

Will the International Criminal Court (ICC) Be Able to Arrest Vladimir Putin When He Travels: Understanding State Cooperation Through Other ICC Non-Arrest Cases Against Malawi, Chad, Nigeria, the Democratic Republic of Congo, South Africa, Djibouti, Uganda, and Jordan.

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Abstract

The arrest warrant issued by the International Criminal Court (ICC) in March 2023 against Russian President Vladimir Putin for crimes committed in Ukraine is one of the most momentous cases taken up by the Court. As Putin will not be arrested in Russia, the only way that he will be detained and handed over to the Court is if he travels to another country, particularly one that is a member of the ICC, which would then have obligations to arrest him. In fact, all states would have a duty to arrest him. A country which will have to deal with this issue is South Africa, to which Putin is meant to travel to. Thus, the case against Putin by the ICC brings into focus, once again, the crucial need for cooperation with the Court by states around the world. This is because the ICC needs states to arrest accused persons if it is to successfully prosecute perpetrators of human rights violations. This article employs the issues concerning the non-arrest of the then President of Sudan Omar Al-Bashir in multiple countries as a lens through which to examine the issues of state cooperation. Thus, the cases of Al-Bashir and Putin have many parallels which are examined. Importantly, between 2009, when the first arrest warrant against him was issued, and 2016, Al-Bashir had already undertaken more than 75 trips to at least 22 states without being arrested. At least seven of those states had ratified the Rome Statute. This article, therefore, examines other cases that were brought by the ICC against Malawi, Chad, Nigeria, the Democratic Republic of Congo, South Africa, Djibouti, Uganda, and Jordan. The study examines what can be learnt overall for issues of state cooperation. The article also reviews a range of ways that the ICC can go about fostering greater state cooperation, and what it can do to ensure greater compliance by states when they do not cooperate.

Keywords

International Criminal Court (ICC) - State Cooperation – Vladimir Putin – Omar Al-Bashir - African Union - Rome Statute – Complementarity

Introduction

The arrest warrant issued by the International Criminal Court (ICC) in March 2023 against Russian President Vladimir Putin¹ for crimes committed in Ukraine is momentous. This is because Putin comes from a Permanent Five (P5) member of the UN Security Council (UNSC), is a head of state, and comes from a state that is not a member of the Court. As Putin will not be arrested in Russia, the only way that he will be detained and handed over to the Court is if he travels to another country, particularly one that is a member of the ICC, which would then have obligations to arrest him. In fact, States that are not party to the Rome Statute, do have obligations to cooperate with the Court in some instances. These include where the UNSC has referred a matter to the ICC as in the Sudan case and made cooperation an essential element for states in a resolution. This occurred in UNSC Resolution 1593 concerning Sudan. There are other times that states which are not parties to the Rome Statute are seemingly obliged to

¹ As well as Maria Alekseyevna Lvova-Belova, Commissioner for Children's Rights in the Office of the President of the Russian Federation. They are charged with war crimes concerning the unlawful transfer and unlawful deportation of a population (children).

cooperate. This would be when there are violations of the Geneva Conventions which provides in Common Article 1 that states must “respect and ensure respect” for international humanitarian law (IHL).² However, non-state parties can be requested to cooperate.³

Thus, the Putin case has again brought into focus the need for cooperation with the Court by states around the world if the ICC is to successfully prosecute perpetrators of human rights violations. While this will probably affect many countries that Putin may travel to in the future, a state that is already being caught up in these issues is South Africa, which Putin is expected to visit in August 2023 for the 15th BRICS Summit, as South Africa chairs BRICS in 2023. South Africa will be expected to arrest him then. However, in a similar situation, South Africa failed to arrest then President Omar Al-Bashir of Sudan in 2015, even though he was being sought by the ICC. As was noted concerning Al-Bashir’s visit to South Africa: “The welcoming of an ICC fugitive by a prominent member state—and formerly key ICC proponent—seems especially damaging to the authority of the ICC and legitimacy of the non-impunity norm.”⁴

South Africa surprised some with its conduct, as it was one of the core members of the ICC’s African bloc (its largest bloc of signatories). It was a shock to many when it decided to breach its treaty obligations by failing to arrest Al-Bashir and then proceeded to initiate its withdrawal from the ICC. At this point the Court reached the nadir of its reputational crisis. Domestically, South Africa’s withdrawal was found to be unconstitutional and was withdrawn. Since then, South Africa has prevaricated on whether or not to leave the ICC. In March 2023 the ruling party decided to withdraw the Bill from its Parliament to leave the ICC which had been pending for years.

However, on 25 April 2023 South African President Cyril Ramaphosa announced that South Africa will take the necessary steps to leave the ICC because the Court was meting out “unfair treatment.” He noted that “we would like this matter of unfair treatment to be properly discussed. But in the meantime, the governing party has decided once again that we should pull out. So, that will be a matter that will be taken forward ... It’s prudent that South Africa should pull out of the ICC largely because of the manner in which the ICC has been dealing with these types of problems.” This was subsequent to an earlier statement by the Secretary-General of the ruling party, the African National Congress (ANC), that South Africa would leave the Court because it is ‘hypocritical to expect South Africa to arrest Russian President Vladimir Putin while big powers’ walk free.’⁵

However, later the same day a ‘correction’ was issued which stated that: ‘The Presidency wishes to clarify that South Africa remains a signatory to the Rome Statute and will continue to campaign for equal and consistent application of international law ... This clarification follows an error in a comment made during a media briefing held by the governing African National Congress (ANC) on South Africa’s status with regard to the ICC. Regrettably, the President erroneously affirmed a similar position during a media session today.’ Ramaphosa also noted that ‘South Africa is considering a legislative amendment ... [concerning] article 98 of the statute that requires a waiver of immunities for persons charged by the ICC from third party countries where there is no referral by the United Nations Security Council [and that the ANC] had also reflected on the potential withdrawal from the ICC as an option that would arise

² Z. Wenqi, ‘On Co-operation by States Not Party to the International Criminal Court.’ (2006) 88(861) *International Review of the Red Cross*, 87-110.

³ C. Soler, *The Global Prosecution of Core Crimes under International Law* (TMC Asser Press: The Hague, 2019) 165.

⁴ A. Bower, ‘Contesting the International Criminal Court: Bashir, Kenyatta, and the Status of the Nonimpunity Norm in World Politics,’ (2019) 4(1) *Journal of Global Security Studies*, 88-104.

⁵ <https://www.news24.com/news24/politics/government/sa-to-exit-icc-as-anc-refuses-to-be-a-scapegoat-for-the-big-powers-20230425>

as a measure of last resort in the absence of legal options that would result in fairness and consistency in the administration of international law.”⁶

What can be seen is that there seems to be discussion within the ANC on what to do with respect to the Putin question. What happened on 25 April 2023, indicates that the matter is far from closed. What may have happened, is that the ruling party did not realise that a withdrawal will take time to occur. Only after South Africa deposits its instrument of withdrawal, does a 12-month period begin, and only after that period has expired, is the country no longer part of the Court. Thus, it would have obligations to the ICC for a year after it formally left the Court, including to arrest Putin should the opportunity present itself.

Thus, whether South Africa will arrest Putin if he goes to the country, remains an open question. However, as with Al-Bashir, it cannot afford to arrest him not only for political reasons, but also because of economic, social, diplomatic, and other factors that tie South Africa to Russia and other networks. South Africa benefits, in a number of ways, from its relationship with Russia, but also because it has various relationships with other states that are dependent on South Africa’s supposed “neutral” position. Its position in the African Union (AU), the institution BRICS (made up of Brazil, Russia, India, China and South Africa), the Non-Aligned Movement, and others, make South Africa’s position invidious in relation to carrying out an arrest of Putin. Thus, if Putin does go to South Africa, South Africa will not want to arrest him. The fact that Putin will probably not be arrested if he travels outside Russia can be seen in the history of state cooperation with the ICC, which has not been positive for the Court.

It can thus be argued that there has been a lack of cooperation with the ICC by various states. This can be noted by seeing that while the Court has issued a total of 35 arrest warrants, only 17 suspects have been taken into ICC custody and at least 13 people remain at large.⁷ The Court relies on state cooperation to realise its arrest warrants and to achieve justice for the most heinous crimes. The unimpressive figures above can thus be directly explained by the ICC’s inability to induce consistent and widespread state cooperation.

Of the 13 individuals still at large, the two outstanding arrest warrants against Omar Al-Bashir remain among the most significant and tumultuous tests of the Court’s legitimacy. Sudan and Al-Bashir have been key concerns of international criminal justice throughout almost all of the twenty-first century, due to the claims of massive crimes committed in Sudan, including genocide and crimes against humanity, allegedly orchestrated by Al-Bashir. His case was perhaps the biggest thorn in the side of the ICC for many years and spurred an enormous number of cases by the ICC against a whole host of countries that did not arrest him when he visited those nations. He was able to snub his nose at the Court by visiting many states while under arrest warrant. In fact, between 2009, when the first arrest warrant against him was issued, and 2016, he took more than 75 trips⁸ to more than 22 states.⁹ At least seven of those states had ratified the Rome Statute.¹⁰ However, none of them arrested him. In failing to arrest Al-Bashir in their respective territories, these member states abrogated their international obligations. Although Al-Bashir did on occasion delay or shorten trips when he saw possible legal consequences eventuating, in general he seemed to believe that he was above arrest. This was obviously extremely problematic for the Court, which relies so heavily on the cooperation

⁶ South African Presidency ‘South Africa remains a participant in the International Criminal Court’ 25 April 2023 <https://www.thepresidency.gov.za/press-statements/south-africa-remains-participant-international-criminal-court>.

⁷ International Criminal Court, 2023 https://www.icc-cpi.int/the_courts accessed 18 April 2023.

⁸ Nuba Reports, ‘75 Trips to 22 Countries in 7 Years: An Indicted War Criminal’s Travels’ (Nuba Reports 07 March 2016) <<https://nubareports.org/bashir-travels/>> accessed 22 March 2023.

⁹ A. Bower, ‘Contesting the International Criminal Court: Bashir, Kenyatta, and the Status of the Nonimpunity Norm in World Politics,’ (2019) 4(1) *Journal of Global Security Studies*, 88–104.

¹⁰ For instance, on 8 May 2016, President Al Bashir travelled to Djibouti, and then to Uganda on 12 May 2016, to attend presidential inaugurations held in both countries.

of its member states to achieve its mandate.¹¹ While the Court routinely provided decisions either informing the Security Council and the Assembly of States Parties about Al-Bashir's visit to member states or requested the relevant state to immediately arrest Al-Bashir or warned and reminded them of their international obligations ahead of Bashir's arrival, this did not achieve any result for the Court. Thus, Al-Bashir's case has important parallels for the Vladimir Putin case, if he decides to travel outside Russia and a similar lack of cooperation from States occurs.

As a result of the Al-Bashir case in particular, a variety of issues, including a barrage of anti-ICC rhetoric, has permeated throughout the international system. This has harmed the ability of the Court to do its work because the rhetoric has turned into action (or perhaps more accurately, inaction) in the form of non-compliance of African states concerning Al-Bashir's arrest.¹² Several African states have, over the past decade, engaged in a campaign of belligerent defiance against the ICC. They have welcomed and chaperoned Al-Bashir into their sovereign territories and have threatened an African exodus from the ICC's foundational treaty, the Rome Statute.

However, the case of Al-Bashir highlights another area of concern relating to the African Union, which utilised the Sudanese president's case to sharpen its point of non-compliance with the structures of international criminal justice. The AU positioned itself as a supporter of Al-Bashir, seeking to protect him from arrest.¹³ During the 17th summit in 2011, held in Malabo, Equatorial Guinea, the African Union concluded its official position regarding the ICC because of the large collegial support for Al-Bashir. At the summit, was African heads of state urged a cessation of cooperation with the ICC in complying with the warrants issued for Al-Bashir's arrest.¹⁴

Arising from this, the AU took a decision to revamp its human rights architecture through the establishment of a novel regional criminal and human rights court – the African Court of Justice and Human and People's Rights.¹⁵ This yet to be established African Court will be formed through the expansion of the mandate of the existing African Court on Human and People's Rights (ACtHPR) to include a criminal law section.¹⁶ A bifurcation of the existing ACtHPR introduces a division of labour between the AU's criminal law arm and its human rights arm and will enter into force upon 15 ratifications. This unprecedented move proposes to usher in a new court armed with a mandate to exercise jurisdiction over an array of crimes which exceeds that of any existing international criminal tribunal.

What can be seen is that all these issues, rather than inducing state compliance, has had the opposite effect. The Court's findings of non-compliance by a whole host of states also thrust

¹¹ A. Jones, 'Non-Cooperation and the Efficiency of the International Criminal Court', in O. Bekou and D. Birkett (eds.), *Cooperation and the International Criminal Court, Perspectives from Theory and Practice* (Brill Nijhoff, Leiden, 2016), 185–209.

¹² C.C. Jalloh and I. Bantekas, (eds.), *The International Criminal Court and Africa* (Oxford University Press, Oxford, 2017).

¹³ M.W. Mutua, 'Closing the "Impunity Gap" and the Role of State Support of the ICC.' In R. H. Steinberg, *Contemporary Issues Facing the International Criminal Court*. (Brill Nijhoff, Leiden, Netherlands 2016). 99-111, 110.

¹⁴ E. Benyera, 'Is the International Criminal Court Unfairly Targeting Africa? Lessons for Latin America and the Caribbean States' (2018) 37(1) *Politeia* 1-30, 6.

¹⁵ M. Ssenyonjo, and S. Nakitto, 'The African Court of Justice and Human and Peoples' Rights 'International Criminal Law Section': Promoting Impunity for African Union Heads of State and Senior State Officials?' (2016) 16(1) *International Criminal Law Review* 71-102, 72.

¹⁶ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights" (Assembly of the Union: Twenty-third Ordinary Session, Malabo, Equatorial Guinea, 26 – 27 June 2014), (The 23rd African Union Summit).

it deeper into a reputational crisis in relation to the African bloc, and the African Union.¹⁷ A large number of the countries that are dealt with in this article, including Malawi, Chad, Nigeria, the Democratic Republic of Congo (DRC), South Africa, Djibouti, Uganda, and Jordan, have all faced reproach for their failure to implement the Court's cooperation arrest requests.¹⁸ Some of these cases eventuated in findings of non-compliance and were subsequently referred to the Assembly of State Parties or the UNSC for further action, but some were not. Naturally, one would assume that the Security Council or ASP would penalise the non-compliant states brought before them by the Chambers of the ICC, thereby deterring non-compliance from the first instance. This has evidently not been the case.

Thus, key questions are what could the ICC have done differently? What can the ICC learn from this? Is there a better way to handle non-compliance? Understanding what has transpired over the past decade regarding the case against Al-Bashir specifically, how should the ICC handle outstanding arrest warrants more generally? However, it must be noted that while the legal issues take centre stage concerning whether to arrest a person wanted by the ICC, the reality is that politics often plays a more important role than the legalities for states that are meant to arrest these high-profile suspects.

Regardless, this article therefore employs the ICC Al-Bashir arrest cases filed by the ICC against a number of states as a lens through which to examine the issues of state cooperation and non-compliance. The paper examines why this case became so contentious in particular for African states and the African Union. It then proceeds to examine the cases that were brought by the ICC against Malawi, Chad, Nigeria, the Democratic Republic of Congo, South Africa, Djibouti, Uganda, and Jordan for not having arrested Al-Bashir when he was on their territory.¹⁹ The article examines what can be learnt from each of these cases, as well as what can be learnt for issues of state cooperation overall. The article finally reviews a range of ways that the ICC can go about trying to foster to state cooperation and what it can do to ensure greater compliance with requests it makes to states. The paper thus draws important legal lessons from the various Al-Bashir cases, taken up by the ICC against a number of states, for that of Vladimir Putin. The article does however argue that the political, economic, and other contexts are critically important in understanding what the pressures are on states like South Africa, who will be in a difficult position in relation to their international obligations. Already steps are being taken in South Africa to try and get around the possibility that Putin will come to the country, and they will be expected to arrest him

The Role of the ICC in Prosecuting Human Rights Violations

The International Criminal Court has functioned as the flagship vehicle for international criminal justice over the past two decades.²⁰ It was created in 1998 with the adoption of its governing treaty, the Rome Statute, which entered into force in 2002.²¹ It was then inaugurated

¹⁷ C.C. Jalloh and I. Bantekas, (eds.), *The International Criminal Court and Africa* (Oxford University Press, Oxford, 2017).

¹⁸ J. Asin 'South Africa Is Not an Accused: State (Non) Co-Operation with the ICC and the Case of the Arrest Warrants for President Omar al-Bashir.' (2017) 3(1) *Strathmore Law Journal* (2017): 157-175.

¹⁹ See also on some of these cases F. Held, 'The ICC's Al Bashir Jurisprudence Over the Last Decade: Enforcer of the Will of States Parties or of a Global Jus Puniendi?' (2021) 10(1) *Cambridge International Law Journal* 54-72.

²⁰ C.K. Hale, 'Does the Evolution of International Criminal Law End with the ICC? The "Roaming ICC: A Model International Criminal Court for a State-Centric World of International Law", (2007) 35 *Denver Journal of International Law and Policy* 429.

²¹ C.D. Totten and N. Tyler, 'Arguing for an Integrated Approach to Resolving the Crisis in Darfur: The Challenges of Complementarity, Enforcement, and Related Issues in the International Criminal Court', (2008) 98 *Journal of Criminal Law and Criminology* 1069, 1074.

the following year.²² The purpose of the Court – the first permanent tribunal of its kind – is to stem the tide of impunity for humanity’s most egregious transgressions: crimes against humanity (Article 7), war crimes (Article 8), genocide (Article 6) and crimes of aggression (Article 8 *bis*).²³ The Court, which enjoys a membership of 123 states, has since become the archetypical institution of contemporary international criminal law with a purpose, *inter alia*, to foster a culture of respect for the rule of law, to develop a robust body of international jurisprudence, to offer expert judicial assistance, and perhaps more importantly, to prevent the reoccurrence of atrocities through the ostensible deterrent effect of its prosecutorial praxis.²⁴

The principle of complementarity is a central ingredient in the functioning of the ICC,²⁵ and governs its jurisdiction.²⁶ As enshrined in Article 17 of the Rome Statute, the principle of complementarity stipulates that the ICC may only exercise its jurisdiction in situations where domestic national legal systems are either unwilling or unable to meaningfully intervene.²⁷ This is a distinctive feature of the institution,²⁸ marking a departure from previous criminal tribunals, the likes of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), in that the Statute recognises the right and responsibility of states to pursue international crimes first and foremost.²⁹ This has led to the adoption of the moniker “the court of last resort.”³⁰ By design the ICC intends not to compete with the national judiciaries of states under its jurisdiction,³¹ but to rather buttress domestic legal systems by assisting them in the incubation of accountability.

In many ways the ICC has come to represent the purveyor of anti-impunity efforts within the international community. It cannot, however, halt impunity single-handedly, nor is it intended to.³² This can only be achieved through its cooperation with (and ensuring compliance from) states, upon which it is heavily dependent for its success.³³ The ICC’s reliance on state cooperation can be explained insofar as, like several other international criminal tribunals both past and present, it wields inadequate enforcement powers.³⁴ In lieu of

²² M.W. Mutua, ‘Closing the “Impunity Gap” and the Role of State Support of the ICC.’ In R. H. Steinberg, *Contemporary Issues Facing the International Criminal Court*. (Brill Nijhoff, Leiden, Netherlands 2016). 99-111, 99.

²³ S. Huikuri, *The Institutionalization of the International Criminal Court* (Palgrave Macmillan, Cham Switzerland, 2019).

²⁴ S. Hibbert, ‘The Bemba Acquittal: A Blow to the ICC’s Legitimacy in a time of crisis’ (2019) 34(1) *Temple International & Comparative Law Journal* 95-127, 96.

²⁵ K. Ambos *Treatise on International Criminal Law: Volume III International Criminal Procedure* (Oxford University Press, Oxford, 2016) 266.

²⁶ See Article 17 of the Rome Statute of the International Criminal Court, 17 July 1998, entry into force 1 July 2002, 2187 UNTS 3.

²⁷ C.R. Rossi, ‘Hauntings, Hegemony, and the Threatened African Exodus from the International Criminal Court’ (2018) 40(2) *Human Rights Quarterly*. 369-405, 395.

²⁸ M. Konforta and V.M. Munivra ‘The Principle of Complementarity in the Jurisprudence of the ICC’ (2014) 3(1) *Zagreb Law Review* 9-27, 11.

²⁹ S. Hibbert, ‘The Bemba Acquittal: A Blow to the ICC’s Legitimacy in a time of crisis’ (2019) 34(1) *Temple International & Comparative Law Journal* 95-127, 121.

³⁰ C. Hillebrecht, & S. Straus, ‘Who Pursues the Perpetrators: State Cooperation with the ICC.’ (2019) 39(1) *Human Rights Quarterly* 162-188, 165.

³¹ M.M. El Zeidy ‘The Principle of Complementarity: A New Machinery to Implement International Criminal Law’ (2002) 23 *Michigan Journal of International Law* 869 – 870.

³² M.W. Mutua, ‘Closing the “Impunity Gap” and the Role of State Support of the ICC.’ In R. H. Steinberg, *Contemporary Issues Facing the International Criminal Court*. (Brill Nijhoff, Leiden, Netherlands, 2016). 99-111.

³³ G. Sluiter, ‘The International Criminal Court and International Criminal Cooperation’, in H. von Hebel, J.G. Lammers and J. Schukking (eds.), *Reflections on the International Criminal Court* (T.M.C Asser Press, The Hague, 1999), 93-96.

³⁴ E. Benyera, ‘Is the International Criminal Court Unfairly Targeting Africa? Lessons for Latin America and the Caribbean States’ (2018) 37(1) *Politeia* 1-30, 10.

a security apparatus, the Court lacks authority to make arrests or collect reliable information on human rights abuses on its own.³⁵ State cooperation is nevertheless a function of three variables: firstly, the ICC's perceived legitimacy; secondly, incumbents' ability to instrumentalise compliance to further their domestic political agendas³⁶; and thirdly, external pressure from donor actors and concerns of international reputation.³⁷

State Cooperation and Non-Compliance Measures

State cooperation at the horizontal level between the ICC's member states is vital to achieve justice for the world's most heinous crimes. Such cooperation can take many forms,³⁸ including assisting the Court in its investigations,³⁹ defending the Court against unfair criticism, providing funding to the Court, or, most publicly, carrying out ICC arrest warrants. In fact, one of the greatest impediments to the International Criminal Court, and to international criminal justice in general, is the inability to execute outstanding arrest warrants. Indicted suspects evade the law by perpetually dodging the Court with impunity. Non-cooperation severely hinders the Court in general, but non-cooperation, specifically in executing arrest warrants, serves as the biggest hindrance to the Court being able to put people on trial. This is because the Court becomes paralysed and can only move forward with a case if the suspect is in its custody.

In the absence of any real enforcement mechanisms,⁴⁰ the Court relies on Article 87(7) of the Rome Statute, which provides for a formal finding of non-compliance against a state party. A judicial finding is the only tool in the Court's remit to directly tackle non-cooperation, leaving it otherwise in the hands of the Assembly of State Parties, the United Nations Security Council, and the international community to pressure belligerent states into cooperation.⁴¹

The ICC was not shy to make use of this provision to combat Al-Bashir's consistent non-arrest. A string of litigation cases were opened over the years against a variety of countries who failed to arrest him. One may assume that the goal of this punitive approach was to goad a significant enough international response against the accused states, and, therefore, act as a deterrent to other potential non-cooperative states. The result was, however, a predictable pattern of failure. In each situation in which a finding of non-compliance was reached, the relevant state was accused of abrogating its treaty obligations (in the case of state parties to the Rome Statute) or its international duty under UNSC Resolution 1593 (in the case of non-state parties). These then resulted in an automatic referral of the case to the ASP or UNSC for further action, which was concluded unceremoniously when nothing further happened. States are aware of this, and thus wilfully avoid cooperation by exploiting the ambiguity of the Rome Statute in relation to head of state immunity.⁴² Thus, the cost of non-compliance with the ICC

³⁵ H.F. Carey, and S.M. Mitchell, *Trials and Tribulations of International Prosecution*, (Lexington Books, Lanham Maryland, 2013).

³⁶ L. García Iommi, 'Nothing Changed after Rome: Continuity in State Support for the International Criminal Court.' (2023) 22(1) *Journal of Human Rights* 16-30, 17.

³⁷ C. Hillebrecht, & S. Straus, 'Who Pursues the Perpetrators: State Cooperation with the ICC.' (2019) 39(1) *Human Rights Quarterly* 162-188, 163.

³⁸ R. Rastan, 'Testing Co-operation: The International Criminal Court and National Authorities' (2008) 21(2) *Leiden Journal of International Law* 431.

³⁹ C.M. De Vos, 'Investigating from Afar: The ICC's Evidence Problem' (2013) 26(4) *Leiden Journal of International Law* 1009-1024.

⁴⁰ G.P. Barnes, 'The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir' (2010) 34 *Fordham International Law Journal* 1584, 1617.

⁴¹ T. Muktasim, and M. Mahfud 'Juridical Analysis of The Implications of Security Council Referral in Regards to The Obligation of Non-State Parties to Cooperate With the International Criminal Court.' (2019) 3(1) *Jurnal Ilmiah Mahasiswa Bidang Hukum Pidana* 99-112.

⁴² G.P. Barnes, 'The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir' (2010) 34 *Fordham International Law Journal* 1584, 1617.

is low, and necessitates a discussion about the scope and authority of the Court.⁴³ Evidently, punishing non-compliance has not led to states being more compliant. The most likely reason for this is that “foreign policy elites have increasingly realized that the targeting of state leaders by the OTP triggers a negative reaction at the national level, often causing domestic authorities to freeze cooperation on all active cases, including those related to nonstate parties.”⁴⁴

However, non-compliance is also about the ineffective means available to enforce compliance. As was noted by a former President of the ICTY, “the need to back up international criminal tribunals with power, power to enforcement, has been demonstrated again.”⁴⁵ The most obvious problem has been the inaction of the UN Security Council, which referred Sudan to the ICC in the first place, which is something that the ICC can do nothing about. The ICC has referred non-compliance to the UNSC and has pled on countless occasions for action to be taken, yet to no avail. It must be understood that the international criminal justice project is mired in politics to a large extent.⁴⁶ The ICC must thus understand that it and the UNSC lie on opposing sides of the battle between law versus politics.⁴⁷ The ASP and UNSC are inherently political bodies whose aim is often not to seek accountability or pursue justice.⁴⁸ China presents a clear example of this. As a member of the UNSC’s P5, China referred the Sudanese situation to the ICC, but it also has vested political interests in Sudanese oil and invited Al-Bashir to China several times without arresting him.⁴⁹ The UNSC is clearly toothless in its ability to hold Al-Bashir accountable. Yet, understanding this, what else could the ICC have done?

State Compliance Concerning the Arrest of Omar Al-Bashir

The case opened against President al-Bashir has its origins nearly two decades ago.⁵⁰ Arrest warrants against him and others were issued in 2009 and 2010 following a United Nations Security Council referral of the situation in Darfur. However, since then Al-Bashir has freely travelled to several ICC member and non-member states in Africa without being arrested.⁵¹ This has resulted in a string of litigation by the Court against the belligerent states who welcomed and chaperoned Al-Bashir into and out of their territories.

However, it must be noted that the ICC cases against him and the other Sudanese suspects is much more than about these individuals. This is because the Al-Bashir case was the

⁴³ Y. Singhi, 'Head of State Immunity: The ICC's Biggest Impediment' (2020) *Indian Journal of International Law* 1-20.

⁴⁴ M. Bocchese, 'Gbagbo's Lost Bet: When Inviting External Judicial Scrutiny Backfires.' (2019) 23(10) *The International Journal of Human Rights* 1648-1672.

⁴⁵ See S. Babaian, *The International Criminal Court—An International Criminal World Court?: Jurisdiction and Cooperation Mechanisms of the Rome Statute and its Practical Implementation*. (Springer, Cham, Switzerland, 2018) 175.

⁴⁶ J. Asin 'South Africa Is Not an Accused: State (Non) Co-Operation with the ICC and the Case of the Arrest Warrants for President Omar al-Bashir.' (2017) 3(1) *Strathmore Law Journal* (2017): 157-175.

⁴⁷ J. Petrovic, D. Stephens, and V. Nasteviski. 'To Arrest or Not to Arrest the Incumbent Head of State: The Bashir Case and the Interplay between Law and Politics.' (2017) *SSRN Electronic Journal*. <https://doi.org/10.2139/ssrn.3060963>.

⁴⁸ See S. Babaian, *The International Criminal Court—An International Criminal World Court?: Jurisdiction and Cooperation Mechanisms of the Rome Statute and its Practical Implementation*. (Springer, Cham, Switzerland, 2018).

⁴⁹ See S. Babaian, *The International Criminal Court—An International Criminal World Court?: Jurisdiction and Cooperation Mechanisms of the Rome Statute and its Practical Implementation*. (Springer, Cham, Switzerland, 2018).

⁵⁰ M. Cacciatori, 'When Kings Are Criminals: Lessons from ICC Prosecutions of African Presidents' 2018) 12(3) *International Journal of Transitional Justice* 386-406, 394.

⁵¹ J. Petrovic, D. Stephens, and V. Nasteviski. 'To Arrest or Not to Arrest the Incumbent Head of State: The Bashir Case and the Interplay between Law and Politics.' (2017) *SSRN Electronic Journal*. <https://doi.org/10.2139/ssrn.3060963>.

genesis of the well-documented “African Problem”⁵² faced by the Court over the past nearly two decades. The movement of the AU and many African states away from supporting the Court finds its origin in Al-Bashir’s indictment. This move occurred because the ICC over time found itself in hot water for the OTP’s purported myopic focus on African heads of state, and for functioning, in this view, as little more than an imperialist project for Western states to persecute African states⁵³ and to engage in “judicial politics.”⁵⁴

The case also proved problematic because it concerned prosecuting a head of state. This caused problems because some argue, especially in Africa, that heads of state have immunity from arrest and prosecution.⁵⁵ This is despite the fact, as will be taken up later, that Article 27 of the Rome Statute provides that immunities shall not block the Court prosecuting heads of states.⁵⁶ However, many argue that international law still provides such immunity.⁵⁷ In this regard, the ICC’s institutional practice of prosecuting heads of state emerged in international jurisprudence following the advent of past ad hoc criminal tribunals (ICTY, ICTR and the Special Court for Sierra Leone).⁵⁸ The idea is that certain crimes are so heinous in nature that the political position of the offender should not be a source of refuge from the ambit of law.⁵⁹ This principle is inscribed in Article 27 of the Rome Statute.

Besides the issue of head of state immunity, the case was also important because Sudan was not a party to the ICC, but the subject of a referral by the Security Council.⁶⁰ This made it even more of a problem because that referral occurred even though most of the permanent members of the Council are not parties to the Court, and in fact opposed to the Court and its role. Any of the five, including Russia and the US, could have vetoed the referral, which on principle they ought to have, but did not. The referral was thus the cause of much unhappiness on the part of the African Union, and many African states, who saw this as powerful states flexing their muscles against weaker ones, and an unfair process.⁶¹ The ICC’s role is seen by these states as aiming at only the weaker countries, mainly in Africa, and that the larger and more powerful states are able to avoid accountability for their actions, including Russia, China, India, and the United States. Regardless, some have been highly critical of the development of international criminal justice in general, and that of the ICC specifically because they see this as a degradation of sovereignty.

⁵² L. Schneider ‘The International Criminal Court (ICC)—A Postcolonial Tool for Western States to Control Africa?’ (2020) 1(1) *Journal of International Criminal Law* (JICL) 90–109.

⁵³ L. Schneider ‘The International Criminal Court (ICC)—A Postcolonial Tool for Western States to Control Africa?’ (2020) 1(1) *Journal of International Criminal Law* (JICL) 90–109.

⁵⁴ Y. Singhi, ‘Head of State Immunity: The ICC’s Biggest Impediment’ (2020) *Indian Journal of International Law* 1–20.

⁵⁵ It is argued by some that even after they are no longer in power it is difficult to get them to stand trial. See E.C. Lubaale, ‘Now Available but Still Not Accessible to the ICC: Bashir and Africa’s Politics.’ In: E.C. Lubaale, and N. Dyani-Mhango, (eds) *National Accountability for International Crimes in Africa*. 247–285 (Palgrave Macmillan, Cham, 2022).

⁵⁶ Article 27(2) of the Rome Statute.

⁵⁷ L. Giannini, and R.V. Yamato, ‘Contesting Immunities in the International Criminal Court: An Analysis of the Rulings of the Pre-Trial Chambers and the Appeals Chamber in Al Bashir Case and Its Outcomes.’ 2021 *Brazilian Journal of International Law* 171–190.

⁵⁸ M. Ssenyonjo, and S. Nakitto, ‘The African Court of Justice and Human and Peoples’ Rights ‘International Criminal Law Section’: Promoting Impunity for African Union Heads of State and Senior State Officials?’ (2016) 16(1) *International Criminal Law Review* 71–102, 92.

⁵⁹ M. Ssenyonjo, and S. Nakitto, ‘The African Court of Justice and Human and Peoples’ Rights ‘International Criminal Law Section’: Promoting Impunity for African Union Heads of State and Senior State Officials?’ (2016) 16(1) *International Criminal Law Review* 71–102, 96.

⁶⁰ A. Bower, ‘Contesting the International Criminal Court: Bashir, Kenyatta, and the Status of the Nonimpunity Norm in World Politics’, (2019) 4(1) *Journal of Global Security Studies*, 88–104.

⁶¹ Franziska Boehme, *State Behavior and the International Criminal Court: Between Cooperation and Resistance*. (Routledge, New York, 2022).

Thus, from the outset, the Al-Bashir case has been overtly political.⁶² Even before the Pre-Trial Chambers (PTCs) issued the first arrest warrant for Al-Bashir, the AU expressed its dismay and tried to get the case postponed. It instructed its member states to disobey the ICC's orders pursuant to Article 98(1), which 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."⁶³

While the Al-Bashir case was the first case that led to tensions between the AU and African states with the ICC, that conflict was exacerbated by the Kenyan cases. In that instance, the AU took great umbrage when the Security Council did not respond to a request by African states for it to defer the ICC cases against the Kenyan head of state and his deputy,^{64 65} even though it had the authority to do so.⁶⁶ Again, this was seen to be imperialism working against African states and further ensured limited state cooperation by them with the Court.

The Kenyan cases also highlighted the issue of whether heads of state have immunity from prosecution. The clash of political-legal norms on this issue has underscored the non-cooperation between the ICC and its African member states.⁶⁷ The Court acknowledged, in the Malawi and Chad decisions, the "inherent tension between articles 27(2) and 98(1) of the Statute and the role immunity plays when the Court seeks cooperation regarding the arrest of a Head of State."⁶⁸ The ICC faced a problem of how to remove the personal immunity, granted under customary international law, of a sitting head of state of a non-party state, like Sudan.⁶⁹

In the case of Kenya, there was more than reluctance to cooperate and assist. In fact, the government went out of its way to undermine, and find ways to impair, the investigations into the conduct of the President and Vice-President during the post-election violence of 2007–2008 in that country.⁷⁰ That case saw President Kenyatta and Vice-President Ruto being charged with crimes against humanity for their roles in the ethnic violence that caused at least 1,300 people to be killed.⁷¹ That case was later withdrawn, because the ICC could not prosecute it. The Court cited Kenya's lack of assistance with those cases as a reason. In this regard, the Court stated: "the Kenyan Government's non-compliance has not only compromised the Prosecution's ability to thoroughly investigate the charges but has ultimately impinged upon the Chamber's ability to fulfil its mandate under Article 64, and in particular, its truth-seeking function in accordance with Article 69 (3) of the Statute." In fact, the ICC brought a case against

⁶² See generally K.A. Rodman, 'Justice as a Dialogue Between Law And Politics: Embedding the International Criminal Court Within Conflict Management and Peacebuilding' (2014) 12(3) *Journal of International Criminal Justice* 437-469.

⁶³ Article 98(1) of the Rome Statute.

⁶⁴ See further LUGANO, Geoffrey. Counter-Shaming the International Criminal Court's Intervention as Neocolonial: Lessons from Kenya. 2017 11(1) *International Journal of Transitional Justice*, 9-29.

⁶⁵ E.O. Asaala, 'Rule of Law or Realpolitik? The Role of the United Nations Security Council in the International Criminal Court Processes in Africa' 2017 17(1) *African Human Rights Law Journal*, 265-293.

⁶⁶ J.D. Van der Vyver, 'Deferrals of Investigations and Prosecutions in the International Criminal Court'. 2018 (51(1) *Comparative and International Law Journal of Southern Africa*, 1-18.

⁶⁷ R.J Elis and Y. Liu 'The Techniques for Appeasing the Tension between the International Criminal Court (ICC) and the African Union (AU)' (2019) 9(4) *Open Journal of Political Science* 703.

⁶⁸ Malawi Decision, para 37

⁶⁹ Y. Tan, "The ICC's South Africa Non-Compliance Decision: Effect of Security Council Resolution 1593 on Referring the Darfur Situation," 2018 10(2) *Amsterdam Law Forum* 72-77

⁷⁰ ICC, Decision on the Withdrawal of Charges against Uhuru Muigai Kenyatta, No. ICC- 01/ 09- 02/ 11 (13 March 2015), [1– 12].

⁷¹ S.D. Mueller, 'Kenya and the International Criminal Court (ICC): Politics, the Election and the Law' 2014 8(1) *Journal of Eastern African Studies*, 25-42.

Kenya for its non-cooperation,⁷² but to no avail. As noted by the Chamber, Kenya's input fell "short of the standard of good faith cooperation under Article 93 of the Statute." As a result, the charges against Kenyan President Kenyatta were dropped.⁷³ ICC Prosecutor Fatou Bensouda described that as a "dark day for international criminal justice."⁷⁴ Bensouda's sentiment was echoed in the commentary of Michael Ignatieff on the decision as a "retreat in the fight against impunity, at least as it relates to Heads of State."⁷⁵ What the episode with Kenya did however cause was the driving of an even greater wedge between the Court and African states.⁷⁶

Evaluating the ICC Cases Against States for the Non-Arrest of Omar Al-Bashir

This section evaluates the multiple non-arrest cases filed by the ICC against a variety of states for not arresting Al-Bashir. This is because the same issues will be pertinent for other countries that Vladimir Putin might visit. As there were so many cases, there are a lot of parallel situations that may arise. The cases taken up are those taken up by the ICC against states that Al-Bashir actually travelled to and those nations did not arrest him. While there are cases where the Court sought to ensure that states where Al-Bashir was to travel would carry out their obligations to arrest him if he arrived in their jurisdiction, these cases are not dealt with.

Malawi⁷⁷

Omar Al-Bashir visited the Republic of Malawi on 14 October 2011 to attend a COMESA summit in Lilongwe. The ICC Registrar sent out a note on 13 October reminding Malawi of its obligations under the Rome Statute (to which it is a state party) to cooperate in the arrest and surrender of Al-Bashir. No reply or consultation with the Court on the part of Malawi followed. On 19 October the Chamber invited the competent authorities of Malawi to submit to it observations on its failure to apprehend Al-Bashir during his time in Malawi. In its observations, the Malawian Ministry of Foreign Affairs declared that it had accorded Al-Bashir "all the immunities and privileges guaranteed to every visiting Head of State". Further, Malawi claimed that this was in line with its domestic law. Malawi then highlighted Sudan's status as a non-state party to the Rome Statute whilst also confirming that Malawi's view expressed that of the official position of the African Union's non-compliance regime pertaining to Al-Bashir's arrest as a sitting head of state. The Chamber decided that Malawi's non-compliance had prevented "the Court from exercising its functions and powers under the Statute" and referred the decision to the UN Security Council and the Assembly of States Parties. Malawi then went on to state that Al-Bashir "is not a party to the Rome Statute and, in the considered opinion of the Malawi authorities, Article 27 of the Statute which, inter - alia, waives the immunity of the Heads of State and Government, is not applicable."⁷⁸ Finally, Malawi made it clear that it "fully

⁷² See ICC, *The Prosecutor v. Uhuru Muigai Kenyatta*, Case no. ICC-01/09-02/11, Trial Chamber Judgement, Decision on Prosecution's application for a finding on non-compliance under Article 87(7) of the Statute, 3 December 2014.

⁷³ ICC, Decision on the Withdrawal of Charges against Uhuru Muigai Kenyatta, No. ICC- 01/ 09- 02/ 11 (13 March 2015), 1– 12.

⁷⁴ Lorraine Smith-van Lin, 'Non-Compliance and the Law and Politics of State Cooperation: Lessons from the Al-Bashir and Kenyatta Cases' in *Cooperation and the International Criminal Court* (Brill Nijhoff, Leiden, 2016), 114-151.

⁷⁵ Ibid.

⁷⁶ M. Cacciatori, 'When Kings Are Criminals: Lessons from ICC Prosecutions of African Presidents' 2018) 12(3) *International Journal of Transitional Justice* 386-406.

⁷⁷ The Prosecutor v. Omar Hassan Ahmad Al Bashir 12 December 2011 – PTC I Decision Pursuant to Article 87(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 Ahmad Al Bashir (including Corrigendum and the Annex to the Corrigendum).

⁷⁸ Ibid.

aligns itself with the position adopted by the African Union with respect to the indictment of the sitting Heads of State and Government of countries that are not parties to the Rome Statute.”⁷⁹

The Malawi decision is by far the most considered interrogation of the controversial immunity problem, in which it propounded the inherent tension between Articles 27 and 98 of the Statute, which lies at the heart of the state cooperation problem.⁸⁰ Article 27 provides that “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.” Thus, it is read by many, as trumping customary international law that provides immunity to heads of state.⁸¹ On the other hand, 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.”⁸² Thus, there are those who argue that Article 98 means that states need to recognise other international obligations such as immunities, or hosting meetings of institutions, which brings about international obligations, and that these need to be complied with by states, despite Article 27.

On this tension, PTC I held that since World War II, and citing the various international tribunals since then, customary international law provides for an exception to the diplomatic immunity held by heads of state whenever such an arrest is requested by an international tribunal. The Court asserted the following: “To interpret article 98(1) in such a way so as to justify not surrendering Omar Al Bashir on immunity grounds would disable the Court and international criminal justice in ways completely contrary to the purpose of the Statute Malawi has ratified.”⁸³

However, the Malawi decision ended up being unsatisfactory and disappointing because it failed to properly address the tension that exists between Articles 27 and 98. The ICC missed an opportunity to set the record straight from the beginning, which may have altered the cooperation landscape to come, for the better. The Court’s failure to substantively iron this out may have emboldened “those who view a value-laden approach to law as a facade for politics, or a tool for the powerful.”⁸⁴

However, Malawi did end up refusing to host Bashir for another summit, which was subsequently moved to Ethiopia (a non-party state to the ICC). However, this was not due to the ICC’s findings of non-compliance, but rather because of unilateral action by the United States, which threatened to withdraw aid.

What can be seen is that the Malawi case represented a distinct shift in the Court’s approach to non-compliance, in that before the Malawi decision the transmission of judicial findings of non-compliance was directed through the Court’s Registrar, whereas after the Malawi decision the President of ICC was tasked with the transmission. Curiously, this remains

⁷⁹ Ibid.

⁸⁰ A.K.A. Greenawalt, “International Criminal Court: Decisions Pursuant to Article 87 (7) of the Rome Statute on the Failure by the Republic of Malawi and the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir & African Union Response,” 2012 51(2) *International Legal Materials* 393-417.

⁸¹ D. Akande, and S. Dias, ‘Cooperation with the ICC-What the Security Council and ASP Must Do’ (2019) 15 *ISS Africa Report*, 1-16.

⁸² Article 98(1) of the Rome Statute.

⁸³ Malawi Decision, para 41.

⁸⁴ D. Tladi, ‘The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98’ 2013 11(1) *Journal of International Criminal Justice* 199-221.

unexplained by the Chamber but has the implicit effect of adding increased political weight to the findings.⁸⁵

Chad⁸⁶

There were in fact two cases concerning Chad. The first occurred in December 2011, when PTC I ruled against Chad for its failure to arrest Bashir, thereby breaching its obligation to cooperate under Article 86. This occurred because of Bashir's visit to Chad on 7–8 August 2011 to attend the inauguration ceremony of Chad's head of state.⁸⁷ The outcome of this case was very similar to the Malawi decision; in fact, they were issued a day apart.

The second case concerning Chad occurred when the Prosecutor's First Notification – issued on 14 February 2013 – notified the Chamber of Al-Bashir's potential visit to Chad and Libya on 16–17 February 2013.⁸⁸ *Notes verbales* were sent to the states in question, reminding them of their obligations to comply with the Court regarding Al-Bashir's arrest. The Registrar's First Report on the matter delineated that Al-Bashir indeed visited Chad on 15–16 February 2013, without any prior consultation with the Court. The Chamber then requested that Chad submit its observations on its failure to comply with the Court's arrest request. A Second Report was issued on 15 March 2013 in the absence of Chad's submission of its observations, for which an extension was not applied. On the same day, the Prosecutor filed its Second Notification of Al-Bashir's return to Chad, which took place on 18 March 2013. The Registry's Third Report was submitted to the Chamber on 21 March 2013, acknowledging the late receipt of Chad's observations, which were disregarded. The Chamber decided that Chad had repeatedly failed in its cooperation obligations under the Rome Statute, to which Chad is a state party, and referred the decision to the Security Council and the Assembly of States Parties. The Court noted that "Chad continues to welcome the visits of Omar Al-Bashir on its territory without any attempt to arrest him, despite several warnings on the part of the Court." It also noted that "Chad is engaging in a consistent pattern of deliberately disregarding not only the Court's decisions and orders related to its obligation to cooperate in the arrest and surrender of Omar Al-Bashir, but also the Security Council Resolution 1593(2005)."⁸⁹

The ICC took a less discursive and more assertive turn in this decision by making explicit reference to Security Council Resolution 1593. PTC II even went on to emphasise that "the ICC relies mainly on the States' cooperation, without which it cannot fulfil its mandate." It also noted that "when the Security Council, acting under Chapter VII of the UN Charter, refers a situation to the Court as constituting a threat to international peace and security, it is expected that the Council would respond by way of taking such measures which are considered appropriate ... Otherwise, if there is no follow up action on the part of the Security Council, any referral by the Council to the ICC under Chapter VII would never achieve its ultimate goal,

⁸⁵ O. Bekou, 'Dealing with Non-cooperation at the ICC: Towards a More Holistic Approach' (2019) 19(6) *International Criminal Law Review* 911-937.

⁸⁶ The Prosecutor v. Omar Hassan Ahmad Al Bashir 26 March 2013 – PTC II Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir.

⁸⁷ Prosecutor v. Al-Bashir, ICC-02/05-01/09-140, Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir (December 13, 2011) [herein *Chad Decision 1*], para 3.

⁸⁸ See S. Babaian, *The International Criminal Court—An International Criminal World Court?: Jurisdiction and Cooperation Mechanisms of the Rome Statute and its Practical Implementation*. (Springer, Cham, Switzerland, 2018).

⁸⁹ Prosecutor v. Al-Bashir, ICC-02/05-01/09-151, Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir (March 26, 2013) [herein *Chad Decision 2*], para 21.

namely, to put an end to impunity. Accordingly, any such referral would become futile.”⁹⁰ It is as if PTC II was directly addressing the Security Council in this decision, making a plea for its assistance with charged language. Perhaps the Court was hopeful that the status quo would change the second time around.

The language used in the 2013 Chad decision was harsher than that of the earlier 2011 decision issued alongside the decision regarding Malawi. By 2013, Chad was denounced for its consistent pattern of recalcitrance towards the Court’s rulings,⁹¹ as evidenced in the Chamber’s heavy reliance on UNSC Resolution 1593 and calling upon the Security Council to “take the necessary measures deemed appropriate.” Despite the Chamber’s plea for help from the Security Council, yet again, nothing was done by either the UNSC or the ASP. Thus, once again, the ICC’s legitimacy was damaged even further. However, the ICC should have known better than to pursue and punish Chad for a second time, over the same issue, when the same result was to be expected. Although the ICC is expressly intended *not* to act as a political body, or to be influenced by political considerations, it could have avoided wasting time with a second case of non-compliance when it knew that Chad was unlikely to change course. The ICC’s course of action was, instead, more likely to make things worse for itself by further aggravating tensions. After all, Sudan and Chad are neighbouring countries, so it was not the most politically expedient idea to arrest the head of state of a neighbouring country.⁹² The peace versus justice dilemma,⁹³ presents itself quite clearly in this regard, as this request was always going to risk peace and security in the space between two neighbours, precisely where the Darfur region is located. What the Court was probably intending to do, was send a message to other countries that their non-compliance would be pursued by the Court; however, as can be seen, that was to no avail.

Nigeria⁹⁴

On 15 July 2013, the Prosecutor notified the Chamber of Al-Bashir’s arrival in the Nigerian capital, Abuja. According to media reports, the reason for Al-Bashir’s visit to Nigeria was to attend the Africa Union’s Special Summit on HIV/AIDS, Tuberculosis and Malaria, which concluded its proceedings on 16 July 2013. Al-Bashir’s presence in the Nigerian capital for the purpose of the summit was corroborated by the spokesperson of the Nigerian President, who added that Nigeria’s position on the matter of Al-Bashir’s arrest was in line with the official position adopted by the African Union in 2009.⁹⁵ This position has been reiterated on a number of occasions thereafter.⁹⁶ This sentiment was echoed in Nigeria’s observations, stating that “Omar Al-Bashir was not invited to undertake a visit to Nigeria”⁹⁷ but rather to attend the AU

⁹⁰ Chad Decision 2, para 22.

⁹¹ Ibid.

⁹² On some of the political complexities of gatekeeper states and the decisions they make concerning cooperation with the ICC, see T.B. Henningsen and L.E. Gissel, L. E. ‘Non-Cooperation With the International Criminal Court in Gatekeeper States: Regime Security in Deby’s Chad.’ (2022) 35(6) *Cambridge Review of International Affairs*, 826-845.

⁹³ Which sees that states in transition specifically need either peace or justice and that they are mutually incompatible. This is however a false choice as both peace and justice are needed.

⁹⁴ The Prosecutor v. Omar Hassan Ahmad Al Bashir 15 July 2013 – PTC II Decision Regarding Omar Al-Bashir’s Visit to the Federal Republic of Nigeria.

⁹⁵ African Union, *Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court* (ICC) of 1-3 July 2009, Doc. Assembly/AU/13 (XIII).

⁹⁶ See for example in 2013 AU, *Decision on Africa’s Relationship with the International Criminal Court* (12 October 2013) Ext/Assembly/AU/Dec. 1 (October 2019).

<http://www.iccnw.org/documents/Ext_Assembly_AU_Dec_Decl_12_Oct_2013.pdf> accessed 17 October 2019.

⁹⁷ Nigeria Decision, para 11.

summit where “Member States of the African Union do not require an invitation of the host Governments to attend, in line with ... the tradition of the AU Assembly.”⁹⁸ In its decision, the Chamber alluded to the possibility of referring the matter to the UNSC and the ASP in the event of non-compliance, before requesting Nigeria to immediately arrest Al-Bashir and surrender him to the Court. Nigeria is a state party to the Rome Statute.

The outcome of the Nigerian case is pretty unusual in that, with the exception of Jordan and South Africa, all other cases pertaining to state non-compliance with Al-Bashir’s arrest have been automatically referred to the Security Council and the ASP.⁹⁹ The reason provided is that Nigeria seemingly provided a more comprehensive explanation of its failure to arrest Bashir, which it claimed it was considering in the face of mounting pressure from civil society.¹⁰⁰ PTC II deemed a UNSC and ASP referral unwarranted. The Court decided “that it is not warranted in the present circumstances to refer the matter to the Assembly of State Parties and/or to the Security Council.”¹⁰¹ The Chamber’s ruling only *reminded* Nigeria of its obligations and *requested* that Nigeria arrest Bashir the next time he visited. The Chamber did not find that Nigeria failed to comply or had breached its international obligations. Notably, the Chamber placed an emphasis on the word “may” when referring to Article 87(7) of the Statute, which was out of the ordinary, so that it read “the Court *may* make a finding to that effect and refer the matter to the Assembly of States Parties or ... [the] Security Council.”¹⁰² This turn to softer and more amiable language differs from the previous cases and could represent a step forward for building more cooperative relationships. The ICC was correct to show restraint in this case, as Nigeria’s response was ostensibly more helpful and cooperative than other states had been. It would have been a step backwards for cooperation if the ICC to referred Nigeria to the UNSC or ASP. Nigeria is perceived as an ally of the Court, and it even tried to get the idea of withdrawing from the ICC off the AU summit’s agenda in 2017.¹⁰³

The Democratic Republic of the Congo (DRC)¹⁰⁴

On 26 February 2014, PTC II received notification from the Prosecutor of Al-Bashir’s possible attendance at a COMESA summit (taking place on 26 and 27 February 2014) in the DRC’s capital, Kinshasa. The Chamber issued a decision during Al-Bashir’s stay in the DRC, reminding the DRC of its obligations and imploring that the relevant authorities immediately arrest Al-Bashir. Not long after the fact, on 3 March 2014, the DRC confirmed that Al-Bashir had left the country on the morning of 2 March. The Chamber then decided to request the DRC’s observations on the issue, which soon followed, and contained several justifications for the alleged non-compliance.

In the DRC’s observations, it was alleged that “the non-enforcement of the Court’s pending requests for the arrest and surrender of Omar Al Bashir was due to time and legal constraints.”¹⁰⁵ The DRC argued that the composition of the delegates attending the summit “was communicated very late to the DRC State Protocol Service”¹⁰⁶ and that “the fact that a

⁹⁸ Ibid.

⁹⁹ A. Mudukuti, “Prosecutor v. Omar Hassan Ahmad Al-Bashir, Judgment in the Jordan Referral Re Al-Bashir Appeal,” 2020 114(1) *American Journal of International Law* 103-109.

¹⁰⁰ Ibid.

¹⁰¹ Nigeria Decision, para 13.

¹⁰² Nigeria Decision, para 10.

¹⁰³ <https://www.ejiltalk.org/african-union-v-international-criminal-court-episode-mlxiii/>

¹⁰⁴ The Prosecutor v. Omar Hassan Ahmad Al Bashir 9 April 2014 – PTC II Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court.

¹⁰⁵ Prosecutor v. Al-Bashir, ICC-02/05-01/09-195, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court (April 9, 2014) [herein *DRC Decision*], para 11.

¹⁰⁶ DRC Decision, para 12.

foreign Head of State was on Congolese territory placed the DRC in a complex, ambiguous and major situation in light of the fact that the DRC is a State Party to the Statute and equally a member to the African Union.”¹⁰⁷ The DRC further contended that Bashir was invited “not by the DRC” but rather “by a regional organisation” and that Bashir’s short stay in the country made it “materially impossible to take a decision with such legal, diplomatic and security implications.”¹⁰⁸ The DRC openly admitted that had it arrested Bashir, it would have faced “heavy consequences.” Lastly, the DRC stated that had there not been such time constraints, it “would have contacted the Court and presented [these] difficulties upon receipt of the decision of [the Chamber].”¹⁰⁹ The DRC also relied on “relevant precedents”, citing Al-Bashir’s visit to other African ICC member states (Nigeria, Djibouti, Kenya and Chad), and indeed confirmed its solidarity with the AU’s position on Al-Bashir’s arrest.

The Chamber proceeded to issue a finding of non-compliance on 9 April 2014 and referred the decision to the Security Council and the ASP. These findings are in line with three prior judicial findings of non-compliance; however, this judgment has been criticised for departing from the findings of the Malawi and Chad decisions.¹¹⁰ The Chamber’s justification on the inapplicability of immunities shifted from a more robust interrogation of customary international law towards a narrow reliance on the ostensible implicit waiver of immunity expressed in the Security Council’s endorsement of the Al-Bashir case under UNSC Resolution 1593.¹¹¹ Indeed, the DRC decision showcased a shift on the part of the ICC from a far more prudent position on belligerent non-cooperation towards a more punitive position.¹¹²

Interestingly, the decision in this case is diametrically opposed to the Nigerian decision, despite similar arguments being raised by both states. It seems that the DRC was much more convincing than Nigeria, yet the Chamber harshly rejected all the arguments it made. The Chamber contended that “the DRC cannot claim that the 26 February 2014 Decision requesting the DRC to immediately arrest and surrender Omar Al Bashir to the Court was novel or came as a surprise, and as such, created an *ambiguous and major situation* to the Congolese authorities.”¹¹³ The Chamber also stated that “the fact that Omar Al Bashir left only one day after the notification of the 26 February 2014 Decision to the Congolese authorities cannot be an excuse.”¹¹⁴ The Chamber admonished the DRC for “[choosing] to remain passive ... instead of complying with its statutory obligations.”¹¹⁵ In the Nigeria decision, the ICC was lenient, but in the DRC decision the ICC was strict and used harsh, cynical language. Perhaps the ICC did not want every state to use similar excuses to those it permitted Nigeria to use.

With regard to the immunity question, the Chamber stated that “the DRC disregarded the fact that the Court is the sole authority to decide whether or not the immunities generally attached to Omar Al Bashir as a sitting Head of State were applicable in this particular case.”¹¹⁶ Interestingly, the Chamber changed its position on the immunity issue in the DRC decision, holding that UNSCR 1593 “implicitly waived the immunities granted to Omar Al-Bashir under

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ N. Boschiero 'The ICC Judicial Finding on Non-Cooperation Against the DRC and no Immunity for Al-Bashir Based on UNSC Resolution 1593' (2015) 13(3) *Journal of International Criminal Justice* 625-653.

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ DRC Decision, para 14.

¹¹⁴ Ibid.

¹¹⁵ DRC Decision, para 15.

¹¹⁶ DRC Decision, para 16.

international law and attached to his position as a Head of State.”¹¹⁷ This “waiver approach”¹¹⁸ retreats from the “custom-oriented approach” in the Malawi and Chad decisions. The consequence of the Chamber’s shifting and inconsistent jurisprudence on such an important issue is the further de-legitimisation of the Court. The DRC decision was, however, unsurprising. Where the Court had taken a step forward vis-à-vis state cooperation in the Nigeria decision, it then reverted to its hard-line approach in the DRC decision, taking two steps back.¹¹⁹

South Africa¹²⁰

South Africa is an important country when considering issues of the ICC non-compliant states because of the furore that was caused when South African authorities failed to arrest Bashir during his visit to attend an AU summit in Johannesburg between 13 and 15 June 2015.

South Africa had set up a meeting prior to his arrival, “to be attended by representatives of South Africa, the Registry and the Office of the Prosecutor,”¹²¹ to seek clarification on South Africa’s obligations. The Presiding Judge determined that “the position that South Africa had an obligation to arrest and surrender Omar Al-Bashir to the Court had already been made sufficiently clear and that no further reminder or clarification was necessary.”¹²² South Africa obtained an extension for its observations “until such time as the currently ongoing relevant judicial proceedings before the courts of South Africa are finalised.”¹²³ However, that allowed time to elapse until Bashir entered the country.

After South Africa failed to arrest Bashir, the Chamber then held a hearing to determine if South Africa had breached its statutory obligations by failing to arrest Bashir and if a finding of non-compliance and referral to the UNSC and ASP were warranted.¹²⁴ South Africa proceeded to directly challenge the Court by charging that “South Africa’s request for consultations had been wrongly dealt with as had the consultations themselves.”¹²⁵ South Africa argued that “the request had been subjected to a quasi-judicial rather than a diplomatic and political process”,¹²⁶ and that the “Chamber had previously decided on a matter in a particular way could not be conclusive, in particular since the Appeals Chamber had yet to rule on the matter.”¹²⁷ However, throughout the course of the case against Bashir the Chambers have suggested that there was “no ambiguity and no uncertainty with respect to [South Africa’s] obligation to arrest and surrender Omar Al-Bashir.”¹²⁸ South Africa disputed this and “asserted that previous decisions of the Court on this matter had been inconsistent.”¹²⁹ South Africa then challenged the Malawi and Chad decisions “on the ground that those decisions improperly conflate the presence of jurisdiction of an international court with the absence of immunity

¹¹⁷ DRC Decision, para 29.

¹¹⁸ Yudan Tan, “The ICC’s South Africa Non-Compliance Decision: Effect of Security Council Resolution 1593 on Referring the Darfur Situation,” 2018 10(2) *Amsterdam Law Forum* 72-77.

¹¹⁹ <https://www.ejiltalk.org/the-african-union-takes-on-the-icc-again/>

¹²⁰ *The Prosecutor v. Omar Hassan Ahmad Al Bashir* Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir - 06/07/2017.

¹²¹ *Prosecutor v. Al-Bashir*, ICC-02/05-01/09-302, Decision Under Article 87(7) of the Rome Statute on the Non-compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir (July 6, 2017) [herein *South Africa Decision*], para 9.

¹²² *South Africa Decision*, para 14.

¹²³ *South Africa Decision*, para 18.

¹²⁴ *South Africa Decision*, para 21.

¹²⁵ *South Africa Decision*, para 27.

¹²⁶ *Ibid.*

¹²⁷ *South Africa Decision*, para 30.

¹²⁸ *South Africa Decision*, para 31.

¹²⁹ *Ibid.*

from national jurisdiction.”¹³⁰ South Africa also challenged the DRC decision “on the ground that it lacked reasoning for its crucial finding, namely that Security Council Resolution 1593 (2005) constitutes a waiver of Omar Al-Bashir’s immunity.”¹³¹ South Africa concluded that “Omar Al-Bashir enjoys immunity from criminal proceedings, including from arrest, under customary international law, and that since that immunity had not been waived by Sudan or otherwise ... South Africa was not obliged to arrest Omar Al-Bashir and surrender him to the Court.”¹³² South Africa even raised the “peace versus justice issue”¹³³ that has been important throughout the Bashir saga by highlighting that “[a]s a leading player in peace efforts, [it] cannot disengage from the African Union or adopt a policy that would suggest [it is] not going to host AU heads of state.”¹³⁴ South Africa then proceeded to explain that the crux of the entire Bashir non-compliance issue had been missing until then: the fact that “were the Chamber to find non-compliance on its part, a referral to the Security Council and/or the Assembly of States Parties would be unwarranted as its only purpose would be to cast South Africa in a bad light and it would not provide an incentive for cooperation.”¹³⁵

The Prosecutor, in their submissions, refuted all of South Africa’s arguments and requested that the Chamber file a formal finding of non-compliance against South Africa. The Chamber deliberated the issues at length, proving a comprehensive decision, but ended up relying on UNSCR 1593 which had the effect of making “Sudan analogous to a state party,”¹³⁶ and also made an argument using the Genocide Convention, thereby concluding that “South Africa failed to comply with the Court’s request for the arrest and surrender of Omar Al-Bashir contrary to the provisions of the Statute, thereby preventing the Court from exercising its functions and powers under the Statute in connection with the criminal proceedings instituted against Omar Al-Bashir.”¹³⁷ This was the fourth different and distinct approach adopted by the Court to tackle the immunity question. This inconsistency has been problematic; however, the South Africa decision was “the most sophisticated and prolonged judicial analysis by the ICC of President Al-Bashir’s immunity.”¹³⁸

What is interesting is that South Africa was the first country to actually seek consultation with the PTCs of the ICC regarding Bashir’s arrest. However, it could be argued that this was done to supposedly consult but actually to avoid appearances of non-compliance. However, the Chamber recognised the attempt to consult, and considered “that the fact that South Africa was the first State Party to seek to consult with the Court ... and sought ... a final legal determination by the Court of the relevant legal issues is a significant factor in that it sets it apart from other situations involving failure to comply with the request for arrest and surrender of Omar Al-Bashir.”¹³⁹ The Chamber then, for the first time, stated that its consistent strategy of automatic referral of non-compliance to the UNSC and ASP “was not intended to be the standard response to each instance of non-compliance, but only one that may be sought when the Chamber concludes that it is the most effective way of obtaining cooperation in the concrete circumstances at hand.”¹⁴⁰

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² South Africa Decision, para 32.

¹³³ South Africa Decision, para 37.

¹³⁴ South Africa Decision, para 40.

¹³⁵ South Africa Decision, para 39.

¹³⁶ South Africa Decision, para 88.

¹³⁷ South Africa Decision, para 123.

¹³⁸ M.J. Ventura, ‘Prosecutor v. Al-Bashir.’ 2017 111(4) *American Journal of International Law* 1007-1013, 1011.

¹³⁹ South Africa Decision, para 130.

¹⁴⁰ South Africa Decision, para 135.

The Chamber did however acknowledge that despite six instances of referrals of non-compliance to the UNSC and ASP, and the fact that no further action has been taken by these bodies, that “a referral of South Africa is not warranted as a way to obtain cooperation.”¹⁴¹ In the end, the Chamber decided not to refer South Africa to the UNSC or the ASP. What emerges is that the ICC decided not to further antagonise South Africa when it was on the cusp of leaving the ICC. The Court might have also lost faith in the UNSC or ASP’s willingness to act.¹⁴² It can be seen in the South African decision that the ICC attempted to make small gains in legal battles against non-compliant states through findings of non-compliance.

However, it is important to note the wider context of these issues for South Africa. It is important to understand the political context especially considering that Putin is meant to visit the country in August 2023. Thus, the stance taken by South Africa over Al-Bashir is because it has wanted to play a significant role in international affairs. It has taken on positions in the Non-Aligned Movement, in BRICS, in the African Union, and with Russia and China, to seemingly improve its international standing in those quarters. South Africa has sought a greater role, and specifically a greater leadership role, in international affairs in general and in Africa in particular. It has played key roles in the establishment of the African Renaissance and the African Peer Review Mechanism. It wants a leadership role in the African Union, and with other African states. For those reasons, at times at least, it takes positions in the Security Council, the General Assembly, the Human Rights Council and elsewhere that are seemingly contrarian to its Constitution, and antithetical its supposedly strong commitment to standing up against human rights violations, which it ought to take because of its apartheid past, where massive human rights violations occurred. Thus, South Africa has walked the tightrope of supposedly supporting international justice, and upholding its international obligations theoretically, but not always in practice, and a more pragmatic position that sees its role in more of a political light. This was seen, for example, at the end of 2021, when on the subject of South Africa and the search for a Rwandan genocide fugitive, the Prosecutor of the International Residual Mechanisms noted: “South Africa is still failing to adhere to its international obligations ... The situation with South Africa is among the most severe instances of non-cooperation my Office has faced since the Mechanism’s establishment.”¹⁴³ He noted that his Office has faced “immense” difficulties in acquiring cooperation from the country for more than three years and that South Africa had failed to arrest the fugitive and to deliver the necessary information needed for the case to make progress. However, there are many more instances of a lack of cooperation.

¹⁴¹ South Africa Decision, para 138.

¹⁴² M.J. Ventura, ‘Prosecutor v. Al-Bashir.’ 2017 111(4) *American Journal of International Law* 1007-1013, 1013.

¹⁴³ UN News, Chief UN prosecutor looks forward to achieving justice for victims of 1994 genocide against the Tutsi in Rwanda, 13 December 2021. https://news.un.org/en/story/2021/12/1107862?utm_source=UN+News+-+Newsletter&utm_campaign=b462f41d3c-EMAIL_CAMPAIGN_2021_12_14_01_20&utm_medium=email&utm_term=0_fdbf1af606-b462f41d3c-107758773

Djibouti¹⁴⁴ and Uganda¹⁴⁵

The Djibouti and Uganda decisions were made as pair of rulings on the same day. Uganda had ignored the Court, which had requested assistance in arresting Bashir should he attend the inauguration ceremony of Uganda's President Yoweri Museveni on 11 May 2016. Similarly, Al-Bashir had gone to Djibouti on 8 May 2016 to attend the inauguration of President Ismail Omer Gaili.¹⁴⁶ In response, Uganda submitted that "the invitation to President Al-Bashir was informed by the standpoint that good relations with all countries in the region is essential to the maintenance of peace and security and that continuous engagement of all the leaders, Al-Bashir included, is both important and unavoidable."¹⁴⁷ It then proceeded to reiterate the AU's stance pertaining to Bashir's immunity pursuant to Article 98. The Chamber acknowledged that "it is not in Uganda's and the region's interest to isolate The Sudan by excluding its leader from any occasion that brings together other regional leaders."¹⁴⁸ It then proceeded to reject this argument on the basis that "it is not in the nature of legal obligations that they can be put aside or qualified for political expediency."¹⁴⁹ For Djibouti's part, in its submissions it raised a capacity issue by saying that "it lacks the national procedures required under Part 9 of the Statute for the arrest and surrender of suspects to the Court, including Omar Al-Bashir."¹⁵⁰ Djibouti then likewise reiterated its fidelity to the AU's position on the matter, and finally mentioned that "within the context of the Intergovernmental Authority on Development (IGAD), Djibouti is part of the peace process in the Republic of the Sudan and the Republic of South Sudan,"¹⁵¹ highlighting the peace versus justice debate. The Chamber rejected this too, by ruling that the "absence of relevant national legislation cannot serve as a justification not to comply with requests for cooperation by the Court."¹⁵² The most salient feature of the Djibouti case is the fact that the Chamber's decision of non-compliance on Djibouti affirmed the Court's position that no legal impediments exist at the horizontal level of obligations between states.¹⁵³ Regarding the immunity issue, the Chamber did not take a different stance to that of the DRC decision, which it referenced in both decisions.

¹⁴⁴ The Prosecutor v. Omar Hassan Ahmad Al Bashir 12 May 2011 – PTC I Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti. The Prosecutor v. Omar Hassan Ahmad Al Bashir Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute & Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute -11/07/2016.

¹⁴⁵ Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute -11/07/2016.

¹⁴⁶ Prosecutor v. Al-Bashir, ICC-02/05-01/09-266, Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute (July 11, 2016) [herein *Djibouti Decision*], para 4.

¹⁴⁷ Prosecutor v. Al-Bashir, ICC-02/05-01/09-267, Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute (July 11, 2016) [herein *Uganda Decision*], para 7.

¹⁴⁸ Uganda Decision, para 14.

¹⁴⁹ Ibid.

¹⁵⁰ Djibouti Decision, para 6.

¹⁵¹ Djibouti Decision, para 6.

¹⁵² Djibouti Decision, para 10.

¹⁵³ Y. Singhi, 'Head of State Immunity: The ICC's Biggest Impediment' (2020) *Indian Journal of International Law* 1-20.

In these decisions, the Chamber continued to make a plea to the Security Council and the Assembly of States Parties, as it had done before.¹⁵⁴ Noting that “in the absence of follow-up actions on the part of the Security Council any referral to the Court ... would become futile and incapable of achieving its ultimate goal of putting an end to impunity. Similar considerations demand that appropriate follow-up actions in response to non-compliance ... be taken by the ASP.”¹⁵⁵ It is somewhat surprising that the Court persisted in the manner that it has to induce compliance through pleading with the Court’s executive organs, especially considering how fruitless this approach has been.

The Court ended up referring both the Djibouti and Uganda decisions of non-compliance to the UNSC and ASP. It is important to note that Uganda (much like the DRC mentioned above) is another state that has referred itself to the Court previously.¹⁵⁶ These two states clearly neither oppose nor reject ICC proceedings in their territories,¹⁵⁷ so it was seemingly unwise for the ICC to make enemies of them. Considering the fraught cooperation landscape faced by the ICC in recent years, it follows that the Court needs more allies than foes.

Jordan¹⁵⁸

On 29 March 2017, Omar Al-Bashir travelled to Jordan to attend the 28th Arab League Summit in Amman. During his visit he was not arrested or surrendered to the Court. Leading up to this, Jordan submitted to the Registry two **notes verbales**: firstly, confirming the invitation sent to Al-Bashir for his participation in the summit, and secondly, confirming his expected attendance. The note went on further to state that Jordan was consulting with the ICC under the Rome Statute’s Article 97 and that Al-Bashir was to enjoy diplomatic immunity as a sitting head of state, making reference to its own interpretations of UNSC Resolution 1593 and Articles 98(1) and 27(2). A further set of submissions ensued between the Prosecutor and Jordan on the matter, in which Jordan further justified its position with reference to the 1953 Convention of the Arab League, which conferred immunity upon Al-Bashir. The Chamber ultimately disagreed with Jordan’s arguments and decided that Jordan’s non-compliance should be referred to the Security Council and the ASP.

The Jordan decision has remained a subject of rigorous debate surrounding state cooperation.¹⁵⁹ One week after the 11 December decision, Jordan applied for leave to appeal, which was granted by the Chamber. This was to be the first instance in which the Appeals Chamber presided over the Al-Bashir matter, providing the Court with an opportunity to resolve the contention in the law surrounding head of state immunity.¹⁶⁰

Although engaging in rigorous legal reasoning, the Chamber failed to demystify the law and reaffirmed the rational of the Malawi decision. Ultimately, the original decision to refer Jordan to the UNSC and the ASP was reversed, owing to the dissent of two judges (Bossa and

¹⁵⁴ See generally D. Kaye et al. ‘The Council And The Court: Improving Security Council Support of the International Criminal Court,’ University of California, May 2013, 6. <<http://councilandcourt.org/files/2013/05/The-Council-and-the-Court-FINAL.pdf>. /> accessed 7 March 2020.

¹⁵⁵ Uganda Decision, para 16.

¹⁵⁶ <https://www.ejiltalk.org/the-african-union-takes-on-the-icc-again/>

¹⁵⁷ <https://www.ejiltalk.org/the-african-union-takes-on-the-icc-again/>

¹⁵⁸ In The Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir 11 December 2017 – PTC II 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.

¹⁵⁹ Y. Singhi, 'Head of State Immunity: The ICC’s Biggest Impediment' *Indian Journal of International Law* (2020), 1-20.

¹⁶⁰ Angela Mudukuti, 'Prosecutor v. Omar Hassan Ahmad Al-Bashir, Judgment in the Jordan Referral Re Al-Bashir Appeal,' 2020 114(1) *American Journal of International Law* 103-109.

Ibanez), who concluded that the PTC had “erroneously exercised its discretion.”¹⁶¹ The Jordan case has invited fierce criticism over how the Chamber treated customary international law.¹⁶² It is yet another of the non-punished cases where states do not comply with their international obligations.

Overall Findings on the ICC Non-Arrest of Al-Bashir Cases

The cases presented herein have served to contribute to a growing jurisprudence surrounding the issues of state cooperation and non-compliance. What can be seen is that the Omar Al-Bashir indictments have proved to be important test cases for the ICC’s cooperation regime, and for it as an institution of international criminal justice.¹⁶³ This case represented the ICC’s first indictment of a sitting head of state and indeed the first time the Prosecutor had initiated investigative proceedings without the territorial support of the state under investigation. In turn, the Kenyatta case, mentioned above, marked the first time that the OTP used its *proprio motu* power. Similarly, Security Council Resolution 1593 represented the first time that the Security Council employed its power of referral to the ICC. Given that the ICC has no enforcement mechanism of its own, it remains utterly dependent on the cooperation of its member states in fulfilling its mandate of advancing the non-impunity norm across the globe. The ICC is indeed a “giant with no arms or legs.”¹⁶⁴

Unfortunately, the ICC has had limited success since its inception, owing at least in part to the emerging regime of non-compliance with its decisions and scant state cooperation in general. The African cases have deepened the cracks of the ICC’s cooperation regime. For this, the ICC is partly to blame. This is because, since the situation in Darfur, the Chambers of the ICC have been inconsistent in their judgments and weak in their ability to *definitely* resolve the inherent contradiction in international law surrounding the issue of head of state immunity in the face of an ICC prosecution.¹⁶⁵ The Court’s cooperation regime is also structured in such a way as to lends itself more to a consensual horizontal model of inter-state cooperation as compared to a vertical model of cooperation found in the likes of other ad hoc tribunals of the past.¹⁶⁶

Problematically, the ICC has shifted its positions and reasoning from the Malawi case onwards.¹⁶⁷ PTC I initially relied on arguments relating to the augmentation of existing customary international law and displayed shrewd discussion and legal prowess. Since then, it has fallen victim to taking the narrower and arguably more pragmatic “Security Council route”¹⁶⁸ and its decisions have been criticised and characterised by confused pronouncements on head of state immunity and state cooperation.¹⁶⁹ The inconsistency in its approach has hampered the ICC’s case completion rate and harmed its perceived legitimacy and

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ O. Bekou, ‘Dealing with Non-cooperation at the ICC: Towards a More Holistic Approach’ (2019) 19(6) *International Criminal Law Review* 911-937.

¹⁶⁴ N. Boschiero ‘The ICC Judicial Finding on Non-Cooperation Against the DRC and no Immunity for Al-Bashir Based on UNSC Resolution 1593’ (2015) 13(3) *Journal of International Criminal Justice* 625-653.

¹⁶⁵ Y. Singhi, ‘Head of State Immunity: The ICC’s Biggest Impediment’ (2020) *Indian Journal of International Law* 1-20.

¹⁶⁶ O. Bekou, ‘Dealing with Non-cooperation at the ICC: Towards a More Holistic Approach’ (2019) 19(6) *International Criminal Law Review* 911-937.

¹⁶⁷ N. Boschiero ‘The ICC Judicial Finding on Non-Cooperation Against the DRC and no Immunity for Al-Bashir Based on UNSC Resolution 1593’ (2015) 13(3) *Journal of International Criminal Justice* 625-653.

¹⁶⁸ Y. Singhi, ‘Head of State Immunity: The ICC’s Biggest Impediment’ (2020) *Indian Journal of International Law* 1-20.

¹⁶⁹ N. Boschiero ‘The ICC Judicial Finding on Non-Cooperation Against the DRC and no Immunity for Al-Bashir Based on UNSC Resolution 1593’ (2015) 13(3) *Journal of International Criminal Justice* 625-653.

effectiveness.¹⁷⁰ The failure of the UNSC to punish belligerent non-cooperators has lowered the reputational cost of non-compliance and has attenuated the Court's compliance pull.¹⁷¹

What seems to emerge from these cases is that African states have made the strategic calculus that the downside of non-compliance with the ICC is almost nil, as no credible sanctioning mechanism exists for non-compliance, even at the level of the UNSC and ASP (the Court's two executive organs).¹⁷² The downside of compliance, in contrast, is greater than zero because it would cause tensions among African regional neighbours unified under the banner of the African Union. The ICC's confrontational approach was always less likely to produce a successful result as dictators will attempt anything to accelerate the obfuscation of legal processes.¹⁷³ African countries have doubled down on non-compliance with arrest warrants and have become extremely defensive. Therefore, it can be argued that the ICC was never going to be successful by just continuing to litigate.

Thus, it can be argued that the Bashir arrest warrants have caused more problems than they have solved for the ICC. This debacle has been damaging to its reputation and has thrust the ICC into the heart of some large and important debates. The Court has been criticised as being untimely and politically insensitive by pursuing Bashir, who openly mocked the Court and expelled NGOs from Sudan who were helping victims. This again exposed the peace versus justice debate. The same issues apply in the Putin case. Already there are those who criticise the case against Putin. This will ramp up later once Putin travels and issues of state compliance come into focus.

Thus, the Court's findings in the Al-Bashir cases concerning non-compliance have also sparked an international legal debate over the provisions of the Rome Statute relating to head of state immunity of non-parties, and states parties' obligations in relation thereto. Adding to this, Bashir's arrest warrant was the incendiary tipping point for African states' rancour with the ICC, which perceive the Court as a legal tool of imperialism against Africa. Owing to these factors, irrespective of their validity, the ICC ought to have navigated the Bashir non-compliance cases with more restraint and foresight. It should have been more dynamic as the situation unfolded and should have abandoned its legal strategy for a better one. It should also have realised its shortcomings and rather promoted dialogue and employed a deeper understanding of the peculiarities of the situation. These are issues which need to be considered when cases concerning Putin arise.

Most critically, it is necessary to ask how feasible is it *really* to ask a host state to arrest a visiting head of state in the context of high-profile diplomatic events? The Court has not assisted in this by changing its stance on the immunity issue several times over the years, issuing inconsistent decisions and unsatisfactory explanations. The ICC's jurisprudence on the matter has neither helped it settle the raging international academic and legal debate on this issue, nor has it helped to smooth over tensions with African states. The Court has only damaged its own reputation in the process. In sum, the ICC must espouse an ethic of good faith, which is lost through ineffective litigation, lest the entire judicial process be stymied indefinitely.¹⁷⁴

¹⁷⁰ A. Jones, 'A Quiet Transformation? Efficiency Building in the "Fall" of International Criminal Justice' (2019) 1 *International Criminal Law Review* 1-30.

¹⁷¹ Ibid.

¹⁷² See S. Babaian, *The International Criminal Court—An International Criminal World Court?: Jurisdiction and Cooperation Mechanisms of the Rome Statute and its Practical Implementation*. (Springer, Cham, Switzerland, 2018).

¹⁷³ A. Duursma, 'Pursuing Justice, Obstructing Peace: The Impact of ICC Arrest Warrants on Resolving Civil Wars' 2020 20(3) *Conflict, Security & Development* 335–54.

¹⁷⁴ Rastan, Rod. "Can the ICC function without state compliance?" In *The Elgar Companion to the International Criminal Court*. (Edward Elgar Publishing, Northampton, Massachusetts, 2020) 3.

It can thus be argued that the ICC probably should not have isolated and alienated African countries in its pursuit of Al-Bashir and should have been shrewder by contextualising the issue within the political reality for long-term success. In fact, the ICC was rather short-sighted in its approach to litigating and the proof lies in the souring of the relationship between Africa and the ICC. The ICC should have quickly realised that it was never going to achieve anything by sanctioning recalcitrant states. The result has either been inaction or very weak diplomacy, neither of which would ever induce compliance or produce deterrence, a key goal of the Court.¹⁷⁵

Looking forward, these issues will be of a critical nature concerning any state that Vladimir Putin travels to. This is the case, considering Russia is a permanent member of the Security Council and is held in high esteem by many states around the world. Russian power is flexed in many ways.

Alternative Ways to Ensure State Cooperation and Ensure Compliance

Procedurally, when it comes to ensuring compliance, the Court seemingly only has one option: it can resort to issuing findings of non-compliance pursuant to Article 87(7) of the Rome Statute, allowing it to “refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.”¹⁷⁶

This strategy has however not worked out as the ICC intended it to, due to the chronic inaction of both the ASP and UNSC. Given the Court’s lack of success in inducing compliance or deterring future non-compliance, what has been the logic behind this strategy? Confusingly, for years the ICC has doubled down on litigation against states for non-compliance despite the predictable inaction of the UNSC thereafter, and despite knowing the position of the African Union member states who refuse to comply with the Court’s requests. Perhaps the ICC sought to add to the international jurisprudence on non-cooperation? The PTCs have presided over eight cases dealing with non-compliance pursuant to Article 87(7), out of which, as noted above, six (Malawi, Chad twice, the DRC, Djibouti, and Uganda) referred the matter to the UNSC and ASP for further action, and two (Nigeria and South Africa) deemed this course of action inappropriate.

In this context, and as the Putin case develops, it is important to review these cases. Were these cases procedurally and substantively the best path that the ICC could have taken? What did the ICC get right, and what did it get wrong? The ICC must ensure that these cases function as a springboard for dialogue and understanding. In attempting to induce cooperation, the ICC instead crystallised uncooperative attitudes. The prevailing situation, however, demands the opposite, that of greater reconciliation and progress in international criminal justice and human rights fora. Perhaps the ICC needs a more de-escalatory approach to cases of non-compliance relating to Al Bashir.

If compliance on the part of states is so vital to the functioning of the ICC, then cooperation must be induced, rather than expected. It serves the ICC’s interests to make inroads with states and build better relationships with them to pre-emptively induce “positive” compliance (because states *want* to comply) rather than pursue reactionary litigation in the hope to induce “negative” compliance (because states *must* comply).

In reality, and what this article aims to show, is that both positive and negative compliance are intertwined. There is a downward spiralling effect between the Court’s supposed

¹⁷⁵ On deterrence see S. Starr, ‘Rethinking “Effective Remedies”: Remedial Deterrence in International Courts’ (2008) 83 *New York University Law Review* 693. See also J.R McAllister, ‘Casting a Shadow Over War Zones? Hard Truths About the ICC’s Efforts to Deter Wartime Atrocities.’ (2023) 22(1) *Journal of Human Rights* 94-108.

¹⁷⁶ Article 87 of the Rome Statute, para 7.

ineffectiveness and its declining reputation where one exacerbates the other and vice versa.¹⁷⁷ The ICC must therefore approach non-cooperation holistically.¹⁷⁸ This all boils down to the importance of perceptions,¹⁷⁹ so the ICC should be concerned with strategies that will increase positive perceptions. Negative perceptions hinder the Court because they actively seek to undermine its work. Challenging the perceptions against the Court, although difficult, is not impossible, however. The ICC has many positives that it can use to leverage favourable public opinion. These positives have not attracted the attention they deserve and should be widely publicised. Good press can only serve to improve global cooperation.

The Court therefore needs to be perceived as a reliable and competent body to gain more support. In other words, the ICC must overcome issues with its image. In today's hyper-connected world, the Court can reach more people than ever before. It can use social media to improve its messaging, boost engagement, educate on how the Court functions, broadcast hearings, and get its message out. It must come up with a better narrative that does not focus on abstract terms such as its mission and independence; rather, it must lay out actionable ways it can make a difference on the ground.

Thus, much can be done to gain trust and thereby ensure cooperation understanding the political environment it operates in. Usefully, to deal better with cooperation, it adopted in 2018 a "Toolkit for the Implementation of the informal dimension of the Assembly procedures relating to non-cooperation."¹⁸⁰ The ASP has also taken up the non-execution of ICC requests by states and called on "all stakeholders, at all levels, to continue assisting the President of the Assembly, including when accomplishing his task with the support of the regional focal points for non-cooperation."¹⁸¹

The Court must additionally find ways of measuring support and determining the extent to which it is attaining it. This has however to be seen in the context of the way the Court is viewed overall. However, measuring the success of the ICC has sparked much debate. Is it a simple measure of the number of successful prosecutions over time? In which case the ICC is largely unsuccessful. Or are there broader parameters against which we can judge the Court's effect? If so, there are some persuasive arguments to be made. Since the ICC's inception, there has been an increase in the codification of laws into domestic laws; the fact that 123 states have signed the Rome Statute indicates a global effort to halt impunity for serious crimes; the ICC's reparations regimes and witness protection programmes do good work for suffering families; where the ICC presides over cases it creates historical narratives satiating victims' right to truth, making the ICC victim-centred; and the OTP has begun taking on cases from different parts of the world to mitigate its perceived anti-African bias. However, what African states will do remains unknown.¹⁸² While there were a number of states that were thinking of leaving the Court in 2016 only Burundi did, but then more for domestic reasons. What happens going forward is unknown but may be affected by the Putin indictment.

The role of the Prosecutor is essential in promoting cooperation. Usefully, the ICC has a new Prosecutor Karim Khan. He paid a visit to Sudan's capital, Khartoum, and met the newly

¹⁷⁷ A. Jones, 'Insights Into an Emerging Relationship: Use of Human Rights Jurisprudence at the International Criminal Court' (2016) 16(4) *Human Rights Law Review* 701–729.

¹⁷⁸ O. Bekou, 'Dealing with Non-cooperation at the ICC: Towards a More Holistic Approach' (2019) 19(6) *International Criminal Law Review* 911–937.

¹⁷⁹ M. Bocchese, 'Justice Denied: Making Sense of State Noncooperation with International Prosecutions.' (2020) 21(1) *Georgetown Journal of International Affairs* 195–200.

¹⁸⁰ ICC-ASP/17/31, Annex III, Toolkit for the Implementation of the Informal Dimension of the Assembly Procedures Relating to Non-Cooperation. (28 November 2018).

¹⁸¹ ICC-ASP/14/Res.4.

¹⁸² See Sylvester Anya, Adrian Osuagwu, Emmanuel Onyeabor, Joycelin Okubuiro, Matthew Nwankwo, Daniel Onyeonagu, and Ifeoma Enemo. 'Credible Commitment or Sham Devotion to the International Criminal Court: Whither Nigeria, Kenya and Uganda?' (2023) 15(2) *African Journal of Legal Studies* 242–269.

formed transitional government there, engaging in dialogue to promote cooperation and finally achieve justice for the atrocities committed by Al-Bashir's regime.¹⁸³ This is precisely the kind of engagement the ICC should prioritise, and then extend to broader and wider channels. The ICC's cooperation strategy must be forward looking, considering the issues beyond the current cases at hand, it must engage with domestic actors (civil society, political parties, academia, judiciary, etc.), and strengthen its position with states.¹⁸⁴ The ICC's biggest strength lies in its symbolic value – its potential to do good, end impunity, and serve the needs of victims. Its biggest weakness is its reliance on (and the absence of) state cooperation.¹⁸⁵

The Court needs to take other steps to promote cooperation and compliance. For example, the ICC could also create incentives for states to adhere to their treaty obligations.¹⁸⁶ Firstly, the ICC must acknowledge that it has alienated African states, ergo it must take care not to punish them too harshly. It should be noted, however, far more member states are guilty of non-compliance besides African states, the most obvious being the US. To induce compliance, the ICC needs to invest in financial and political capital. The ICC review process was a good start too. The report adequately illuminated the issues that need fixing, and the focus should lie on enacting those reforms so that the ICC can do more with what it has. Broader support can also be achieved through capacity building and in “giving something” to member states, such as judicial training and witness protection expertise. It might also occur if agreements were entered into.¹⁸⁷

There are also things the ICC could do legalistically and procedurally. The Chambers have been widely criticised for their incoherent and inconsistent findings of non-compliance, which undermines the Court's credibility.¹⁸⁸ Similarly, the ASP and its procedures for non-compliance have proved at times to be incapable of dealing with the issues.¹⁸⁹ As a result, belligerent states have no real fear of reprisals for their non-cooperation. For this reason, the ASP must improve its non-compliance procedures to be operative and not just mere guidelines for states. As has been proposed, a “straight and strict system [regarding] non-compliance shall assure a ‘de-politicisation’ of the ASP; decisions of the Chambers regarding findings of non-compliance shall not be made contestable or be challenged, instead an automatic enforcement mechanism shall apply.”¹⁹⁰ Beyond this, the ASP must be more focused on non-compliance and apply stronger political pressure on states.¹⁹¹ The ASP could impose other penalties, in a uniform and consistent framework, applicable to all cases of non-compliance, especially cases like Sudan where there are multiple offences by different countries in relation to the same case. These

¹⁸³ L. Chutel, ‘Will Sudan Send Bashir to The Hague?’ 2021 *Foreign Policy*. 18 August 2021. <https://foreignpolicy.com/2021/08/18/sudan-bashir-icc-hague-justice-darfur-hemeti/>.

¹⁸⁴ F. Baetens, ‘Multiple Avenues for State Cooperation with the International Criminal Court – Part Two.’ *EJIL: Talk!* March 12 2020. <https://www.ejiltalk.org/multiple-avenues-for-state-cooperation-with-the-international-criminal-court-part-two/>.

¹⁸⁵ S. Muhammad, B. Holá, and A. Dirkzwager. ‘Reimagining the Icc: Exploring Practitioners’ Perspectives on the Effectiveness of the International Criminal Court.’ (2012) 21(1) *International Criminal Law Review* 126–53.

¹⁸⁶ C. Hillebrecht, & S. Straus, ‘Who Pursues the Perpetrators: State Cooperation with the ICC.’ (2019) 39(1) *Human Rights Quarterly* 162–188.

¹⁸⁷ Yvonne Dutton, ‘The ICC in Action: Using Plea-With-Cooperation Agreements to Bring Government Leaders to Justice.’ (2023) *Stanford Journal of International Law* Forthcoming.

¹⁸⁸ G. Sluiter, ‘Enforcing Cooperation: Did the Drafters Approach It the Wrong Way?’ (2018) 16(2) *Journal of International Criminal Justice* 383–402.

¹⁸⁹ G. Sluiter, ‘Enforcing Cooperation: Did the Drafters Approach It the Wrong Way?’ (2018) 16(2) *Journal of International Criminal Justice* 383–402.

¹⁹⁰ See S. Babaian, *The International Criminal Court—An International Criminal World Court?: Jurisdiction and Cooperation Mechanisms of the Rome Statute and its Practical Implementation*. (Springer, Cham, Switzerland, 2018) 179.

¹⁹¹ D. Akande, and S. Dias, ‘Cooperation with the ICC-what the Security Council and ASP Must Do’ (2019) 15 *ISS Africa Report*, 1–16.

penalties could be administrative sanctions, such as withholding a non-cooperative state's right to vote within the ASP, suspending the right for states to present their own nationals as candidates for elected ICC posts, an administrative fine, or an increase in a state's annual fiscal contribution to the ICC.¹⁹² The ASP is now much more actively engaging with these issues.¹⁹³

An interesting proposal for the ICC to also consider is for it to use the Genocide Convention to strengthen compliance in cases like Sudan that is not a member state of the ICC, but is a party to the Genocide Convention.¹⁹⁴ The Genocide Convention has a far more effective cooperation regime compared to the ICC's and it could increase "both the quality and quantity of the duty to cooperate"¹⁹⁵ by making it more difficult for Sudan to abrogate its obligation to cooperate. The ICC can act beyond its own statute to enforce the Genocide Convention. This approach may open new avenues for cooperation and would circumvent the issue of head of state immunity, which has acted as the primary excuse behind the non-compliance of African states. If the ICC were to use the Genocide Convention, this might allow "the ICC to enter into cooperation relations with many states which have until now basically ignored the Court. Not only does this serve the direct objective of tightening the net around Al-Bashir but may also have a possible spin off effect of improving cooperation – and maybe even ratification – beyond this case."¹⁹⁶ However, whether this overcomes the political issues inherent in these cases remains doubtful.

Beyond this, however, the ICC can perform better diplomatically and politically. Given the political environment in which the ICC finds itself, it could stand to benefit from forming regional and international alliances that it can leverage to establish unity in the international system. Existing legal and political platforms such as the Human Rights Council, the Universal Periodic Review, and international NGOs can "be used in order to promote the ICC and to enhance cooperation together with its Member States."¹⁹⁷ The obvious place for the ICC to start is with the African Union, whose cooperation is vital to bring Al-Bashir to justice. If the ICC focused on mending its fraught relationship with the AU, the Court's cooperation regime would improve and could be more effective. This is because it has been noted that "the failure of states to cooperate with the court that causes many of the problems."¹⁹⁸

This does not mean however that these states would arrest heads of states. Nevertheless, the ICC does need to somehow reverse the current situation so that belligerent states are in the minority and will be pressured by other African states. The ICC must find new ways of engaging with states to incentivise cooperation rather than defaulting to punishing non-cooperation – in other words, it must use more carrot and less stick.

¹⁹² See S. Babaian, *The International Criminal Court—An International Criminal World Court?: Jurisdiction and Cooperation Mechanisms of the Rome Statute and its Practical Implementation*. (Springer, Cham, Switzerland, 2018) 175.

¹⁹³ ICC, Resolution ICC-ASP/17/Res.5 "Strengthening the International Criminal Court and the Assembly of States Parties" Adopted at the 13th plenary meeting, on 12 December 2018, by consensus; Annex II: Assembly procedures relating to non-cooperation.

<https://asp.icc-cpi.int/iccdocs/asp_docs/ASP17/RES-5-ENG.pdf#page=24> accessed 13 March 2020, [D.1].

¹⁹⁴ G. Sluiter, 'Using the Genocide Convention to Strengthen Cooperation with the ICC in the Al Bashir Case' (2010) 8(2) *Journal of International Criminal Justice* 365–382.

¹⁹⁵ G. Sluiter, 'Using the Genocide Convention to Strengthen Cooperation with the ICC in the Al Bashir Case' (2010) 8(2) *Journal of International Criminal Justice* 365–82, 378.

¹⁹⁶ G. Sluiter, 'Using the Genocide Convention to Strengthen Cooperation with the ICC in the Al Bashir Case' (2010) 8(2) *Journal of International Criminal Justice* 365–382, 379.

¹⁹⁷ See S. Babaian, *The International Criminal Court—An International Criminal World Court?: Jurisdiction and Cooperation Mechanisms of the Rome Statute and its Practical Implementation*. (Springer, Cham, Switzerland, 2018) 183.

¹⁹⁸ E. Wilmhurst 'Strengthen the International Criminal Court' (Chatham House 12 June 2019) <https://www.chathamhouse.org/expert/comment/strengthen-international-criminal-court>>

Lastly, perhaps the ICC can learn something from the social psychology literature on compliance. After all, states and as well as the ICC are comprised of human beings who are subject to human psychology. Social psychology identifies key factors that influence compliance.¹⁹⁹ Firstly, compliance is made more likely when in the immediate presence of the person requesting compliance. The ICC can continue to make its presence felt on the ground through more regular country visits. It could do a number of other things outside the courtroom.²⁰⁰ Secondly, compliance is more likely to take place when people believe that they share something in common with the person making the request. In this regard, both the ICC and the victim's families do share something in common: they both want justice for the crimes committed. The ICC could forge inroads with civil society and local actors (NGOs, CSOs, lobbyists, etc.) and create awareness around arrest warrants in order to build up political pressure from within and not only from above (as is the case when taking the Security Council route or approaching regional governing bodies like the AU). Lastly, when group affiliation is an important factor to people (like it is for African states and their solidarity under the AU), they are more likely to comply with social pressure even if this betrays their own personal interests. This explains why unilateral litigation against African states would achieve nothing. The AU had to be the penetration point for the ICC to get closer to Al-Bashir and all grievances and negotiations between the ICC and African states needed to be conducted through the AU. This also shows that should the ICC regain sympathy with some African states, others might follow.

Conclusion

The Al-Bashir case has continued across four different ICC prosecutors and represents the bleakest example of state compliance in ICC history.²⁰¹ His case has been the subject of much litigation by the ICC against a whole raft of states for their failure to comply with the obligation to arrest Al-Bashir while on their territory. What these cases have done, however, is to further exacerbate ill-will towards the Court. These states have again seen this as an indication of how the international governance system is stacked against them and their powerlessness in the system, which has had a further effect on state cooperation, especially by African states.

As a result of the ICC being unable to arrest Al-Bashir, the genocidal violence in Darfur remains unchecked. Worse yet, the path towards al-Bashir's extradition involves the cooperation of the ICC with the current power structures in Sudan, which are in turmoil. This means that the ICC risks running into yet another legitimacy hurdle in that it will need to legitimise a criminal regime.

These are important lessons for the Putin case. The fact that the ICC has been unable to pursue state-sponsored crimes through the prosecution of their presidential architects sends a dangerous message to dictators and others – that there is an incentive to keep a tighter grip on power, through whatever means are necessary, when faced with the threat of an indictment, lest one ends up lower down on the chain of political shielding, thereby opening oneself up to being arrested and tried.²⁰² The impunity gap thus widens.

There is certainly a price to pay for a lack of state cooperation for the Putin and others. However, the world must also be realistic in its expectations of the ICC, and the ICC must be

¹⁹⁹ W. Weiten, D.S. Dunn, and E.Y. Hammer. *Psychology Applied to Modern Life: Adjustment in the 21st Century*. (Cengage Learning, Boston, Massachusetts, 2014).

²⁰⁰ C. Hillebrecht, and H.R. Read, 'The ICC Beyond the Courtroom: Activities, Warnings, and Impact' (2023) 22(1) *Journal of Human Rights* 62-77.

²⁰¹ See S. Babaian, *The International Criminal Court—An International Criminal World Court?: Jurisdiction and Cooperation Mechanisms of the Rome Statute and its Practical Implementation*. (Springer, Cham, Switzerland, 2018) 175.

²⁰² M. Cacciatori, 'When Kings Are Criminals: Lessons from ICC Prosecutions of African Presidents' 2018) 12(3) *International Journal of Transitional Justice* 386-406.

realistic about what it can achieve. Clearly the Court only becomes relevant when states are interested in cooperating with it and are politically willing. The Court operates at the behest of states and often the most it can do is wait until the timing is right. State non-cooperation with the ICC under its system of complementarity is therefore a broad issue, one that is bigger than the issue of non-arrests, and one that affects the entire terrain of international justice above just those African states. The ICC will thus need to seek new ways to bolster its legitimacy and induce better state compliance. Firstly, it needs to work on improving its fraught relationship with the AU bloc. Secondly, it needs to increase the efficiency and speed of its machinery,²⁰³ so that it may be perceived as a competent and reliable body. And thirdly, the ICC should explore other avenues to strengthen cooperation with it.²⁰⁴

As far as Putin travelling to Africa is concerned, the lessons from the Al-Bashir case are instructive. This is because the member states of the African Union represent by far the largest bloc of signatories to the ICC, with many African leaders having been instrumentally involved in the ICC's initial emergence and underwriting. Therefore, the ongoing threat of an African exodus from ICC, whilst reduced from what it was in 2016, still presents a deep challenge to the future and reputation of the ICC as a global institution of criminal justice fighting against impunity. The ICC rather needs the cooperation of these states for arrests, for the collection of evidence, for assistance with witnesses, etc. However, the issue of State non-cooperation with the ICC under its system of complementarity is a broad issue, one that is bigger than the issue of non-arrests, and one that affects the entire terrain of international justice above just those African states. However, arrests have not been occurring at optimum levels and at times there has been an unwillingness to assist the Court. These are critical issues that can be better resolved in the future by the Court especially if Putin travels to an African country. What is clear is that politics will play a more important role than the legal obligations of states to the ICC or international law in general. The political, and other roles, that Russia plays will be a major deterrent for states to cooperate with the Court and hand over Putin if he comes to their nations.

²⁰³ O. Bekou, 'Dealing with Non-cooperation at the ICC: Towards a More Holistic Approach' (2019) 19(6) *International Criminal Law Review* 911-937.

²⁰⁴ N. Boschiero 'The ICC Judicial Finding on Non-Cooperation Against the DRC and no Immunity for Al-Bashir Based on UNSC Resolution 1593' (2015) 13(3) *Journal of International Criminal Justice* 625-653.