

[ICC CONFIDENTIAL, EX PARTE]

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: **ICC-01/22**
Date: **22 June 2023**

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Presiding Judge
Judge Tomoko Akane
Judge Sergio Gerardo Ugalde Godínez

SITUATION IN UKRAINE

CONFIDENTIAL and *EX PARTE*

**Only available to the Prosecution, the Registry and the Republic of South Africa
With CONFIDENTIAL and *EX PARTE* Annex 1**

Only available to the Prosecution, the Registry and the Republic of South Africa

**Prosecution's additional observations on article 97 consultations relating to the
implementation of warrants of arrest by the Republic of South Africa**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor Mr Karim A. A. Khan KC, Prosecutor Ms Brenda J. Hollis		Counsel for the Defence	
Legal Representatives of the Victims		Legal Representatives of the Applicants	
Unrepresented Victims		Unrepresented (Participation/Reparation)	Applicants
The Office of Public Counsel for Victims		The Office of Public Counsel for the Defence	
States Representatives The Republic of South Africa		Amicus Curiae	
REGISTRY			

Registrar Mr Osvaldo Zavala Giler		Counsel Support Section	
Victims and Witnesses Unit		Detention Section	
Victims Participation and Reparations Section		Other	

I. INTRODUCTION AND CLASSIFICATION

1. The Prosecution respectfully submits these written observations following the consultative hearing carried out under article 97 of the Statute on 8 June 2023 (“Hearing”) regarding the implementation of warrants of arrest by the Republic of South Africa (“RSA”) in the present Situation. The Pre-Trial Chamber granted the RSA’s proposal to submit their position in writing and offered the Prosecution the same opportunity.¹ The Prosecution reiterates its appreciation for the steps taken by the RSA to cooperate with the Court, including by seeking consultations under article 97, and notes that the RSA subsequently indicated that its oral submissions at the Hearing would suffice.²

2. The Prosecution files these written observations to further address specific issues raised by the RSA during the Hearing, and to provide the Pre-Trial Chamber with references and, as appropriate, additional details, to some of the legal authorities referred to by the Prosecution. The Prosecution maintains its observations presented during the Hearing that the RSA has an unqualified duty to fully cooperate in the arrest and surrender of Mr Vladimir Vladimirovich PUTIN should he arrive on the RSA territory. As discussed in more detail below, the RSA has not presented any conflicting international legal obligations or agreement which would require or allow it to refuse to arrest Mr PUTIN. To the contrary, the RSA’s obligations under the Rome Statute, its domestic law and customary international law as reflected in article 27 of the Statute, require it to do so.

3. The Prosecution maintains its submission that the Court’s cooperation request to the RSA is complete. Contrary to the RSA’s submission at the Hearing,³ no waiver from the Russian Federation is required under article 98(1) of the Statute since Mr PUTIN does not enjoy immunity from arrest and surrender for the purpose of prosecution before the ICC. Article 27 reflects customary international law, as confirmed by the *Al Bashir/Jordan* Appeal Judgment.⁴ Moreover, this Judgment noted that “[t]he absence of a rule of customary international law recognising Head of State immunity *vis-à-vis* international courts is relevant not only to the question of whether an international court may issue a warrant for the arrest of a Head of State and conduct proceedings against him or her, but also for the horizontal relationship between States when a State is requested by an international court to arrest and surrender the Head of

¹ Transcript of the Hearing (ICC-01/22-T-001-SECRET-ENG ET) (“Transcript”), pp. 29, 31.

² RSA’s Note Verbale, ICC-01/22-36-Conf-Anx, 9 June 2023.

³ Transcript, pp. 11, 13, 14, 16, 19, 28.

⁴ [ICC-02/05-01/09-397 OA2](#), (“*Bashir/Jordan* Appeal Judgment”), paras. 103-112.

State of another State”.⁵ This appellate judgment is directly on point with respect to the status of the law before the Court and should not be departed from in ICC proceedings absent convincing reasons.⁶

4. The RSA asserts that this Judgment dealt with different facts, is controversial and does not conform to the RSA’s approach to customary international law.⁷ Yet, the RSA did not advance valid reasons not to follow the jurisprudence of the ICC Appeals Chamber, and ignored that the *Bashir/Jordan* Appeal Judgment has settled relevant questions regarding the operation of articles 27 and 98. This judgement represents settled law of the Court which should not be departed from in any ICC proceedings absent convincing reasons.

5. In fact, the Judgment did not promulgate a new rule. Rather, it identified and applied an existing principle of customary international law that there is no immunity from prosecutions for international crimes before any international court, even where the suspect is a Head of State or other government official. All state practice cited by the Judgment confirms that this principle applies to any international criminal court and tribunal, such as the ICC, even if not created or supported by a UN Security Council resolution. Since Mr PUTIN enjoys no immunity, article 98(1) is not engaged with respect to the request for the RSA to execute the Court’s arrest warrant against him.

6. Nor is article 98(2) engaged. The RSA did not allege any pre-existing agreement under article 98(2) that it would breach if it arrested Mr PUTIN. Indeed, during the Hearing, the RSA confirmed that it has not made any pledges or assurances for the non-arrest of Mr PUTIN or any other person.⁸ The RSA cannot negate its obligation of cooperation for the purposes of the Statute by subsequent agreements. Moreover, article 98(2) relates only to a limited category of treaties/agreements involving so-called “sending and receiving states”, such as “Status of Forces Agreements” (SOFAs) which are not relevant to this matter.

7. During the Hearing, the RSA also referred to certain factors within its domestic law which it claimed may impede its cooperation in arresting Mr PUTIN.⁹ However, the domestic law of any State Party to the Statute cannot be relied on to displace its duty to fully cooperate

⁵ [Bashir/Jordan Appeal Judgement](#), para. 114 (emphasis added).

⁶ [ICC-02/11-01/15-172](#), para. 14; [ICC-01/14-01/21-318 OA3](#), para. 45. Although this finding was made in the context of the Appeals Chamber following its previous decisions, the Prosecution respectfully submits that the need for predictability and legal certainty call for the application of the same principle to Pre-Trial Chambers and Trial Chambers seised with the same legal matters upon which the Appeals Chamber has already ruled.

⁷ Transcript, pp. 11-15; 19.

⁸ Transcript, pp. 30, 31.

⁹ Transcript, pp. 6-7.

with the Court.¹⁰ In any event, the RSA's legal framework as interpreted by its own Supreme Court of Appeal,¹¹ confirms the absence of immunity to prevent the RSA from fulfilling its duty to fully cooperate with the Court. Furthermore, irrespective of whether article 97(c) of the Statute is construed as non-exhaustive, there is no legal basis for the Court to defer proceedings against Mr PUTIN in a manner similar to that under article 16 of the Statute, as the RSA requested during the Hearing.¹²

8. These submissions are filed as confidential and *ex parte* under regulation 23bis (1) of the Regulations of the Court consistent with the classification of other materials related to this matter.¹³

II. SUBMISSIONS

A. The Court's cooperation request is complete – article 98(1) of the Statute is not engaged because Mr PUTIN enjoys no immunity and no waiver is required

9. During the Hearing, the RSA accepted the ICC's jurisdiction over Mr PUTIN.¹⁴ However, the RSA submitted that, as Head of State of a non-State Party to the Rome Statute, he enjoys immunity *ratione personae* under customary international law that prevents the RSA from arresting and surrendering him to the ICC.¹⁵ As such, the RSA considered that the ICC should have obtained a waiver from the Russian Federation under article 98(1), so that the RSA would not be in violation of its international obligations in executing the Court's request. The RSA acknowledges the holding in the *Bashir/Jordan* Appeal Judgment that there are no immunities for Heads of State before international courts for the crimes covered by the Rome Statute, but considers this decision "controversial"¹⁶ and states that the RSA has not agreed to it.¹⁷ The RSA also asserts that the current situation is "novel" and can be distinguished from that in *Bashir/Jordan*. In that case, the *Situation in Darfur* had been referred to the Court by the UN Security Council, placing Sudan in a similar position to that of a State Party with an obligation to cooperate with the Court.¹⁸

10. In response, the Prosecution maintains its observations in the Hearing that Mr PUTIN

¹⁰ Vienna Convention on the Law of Treaties (1969), article 27.

¹¹ [South Africa Supreme Court of Appeal Judgment 867/15](#), paras. 102-3; article 10(9) of the [RSA Implementation of the Rome Statute of the International Criminal Court Act](#), 12 July 2002.

¹² Transcript, pp. 3, 8, 9, 17, 30.

¹³ See e.g., ICC-01/22-37-Conf-Exp.

¹⁴ Transcript, p. 28.

¹⁵ Transcript, pp. 11-13, 15, 17, 18-19, 28.

¹⁶ Transcript, p. 13.

¹⁷ Transcript, p. 19.

¹⁸ Transcript, pp. 11, 14.

does not enjoy immunity from proceedings before this Court under article 27 of the Statute or under customary international law that is binding on all States.¹⁹ By arresting and surrendering Mr PUTIN for purposes of prosecution before the ICC, the RSA thus would not be acting inconsistently with any obligation under international law. As such, article 98(1) is not engaged. The Prosecution makes the following submissions to address some specific issues raised by the RSA during their oral submissions.

i. States Parties' cooperation obligations are for ICC investigations and prosecution, and extend to any case falling within the Court's jurisdiction

11. As the Prosecution submitted during the Hearing,²⁰ by ratifying the Rome Statute, States Parties—including the RSA—are under a duty pursuant to article 86 of the Statute to fully cooperate with the Court with respect to cases of which the Court is seised. This is regardless of how the Court's jurisdiction was triggered, whether by the United Nations Security Council (UNSC), via State referral or by the Prosecutor *proprio motu*. This general duty entails the specific obligation, among others, to execute article 89 requests for arrest and surrender against suspects for whom the ICC has issued an arrest warrant.

12. By ratifying the Rome Statute, all States Parties have agreed to the terms of article 27 (reflective of customary international law) that there is no personal or functional immunity based on official position (including Head of State) for suspects when the Court exercises its jurisdiction. Since article 12(2)(a) of the Statute grants the ICC jurisdiction over crimes occurring on the territory of States Parties, the Court's exercise of jurisdiction extends to nationals of non-States Parties allegedly responsible for such crimes—including Heads of State as the case may be. Under article 12(3), this same jurisdictional regime may be exercised with respect to the territory of a State not party to the Statute, in this case Ukraine. The RSA has fully agreed to the Court's jurisdictional framework, and nothing in article 12(2)(a) or article 27 permits any exception to the exercise of its jurisdiction based on nationality or official capacity.

13. In order to show that article 98(1) is engaged in this case, the RSA must substantiate its claim that Mr PUTIN enjoys immunity from arrest and surrender to the Court, at its request, as a result of customary international law.²¹ By referring to the existence of immunities *between States* in the exercise of foreign criminal jurisdiction, the RSA has failed to make this

¹⁹ Transcript, pp. 21-27.

²⁰ Transcript, pp. 21-22.

²¹ [Bashir/Jordan Appeal Judgement](#), para. 116 ("the onus is on those who claim that there is such immunity in relation to international courts to establish sufficient State practice and *opinio juris*").

showing.²² As the Prosecution set out during the Hearing,²³ the ICC has requested the RSA's cooperation for the purpose of investigating and prosecuting Mr PUTIN *before the ICC*. Accordingly, the question of investigating and prosecuting Mr PUTIN before RSA's domestic courts or the exercise of foreign criminal jurisdiction is not engaged.

14. This distinction is critical and has been recognised by the ICC Appeals Chamber in the *Bashir/Jordan Appeal Judgment*²⁴ and by the International Court of Justice ("ICJ") in its *Arrest Warrant Judgment*. This is because, as a matter of customary international law, Heads of State may plead immunity from jurisdiction *before foreign national courts*.²⁵ However, such immunity is unavailable before international courts and therefore cannot be pled as a bar to prevent arrest and surrender to international courts, including the ICC.²⁶

15. Indeed, articles 4(2) and 59 of the Statute show that it is the jurisdiction *of the Court* that is being exercised when the Court requests a State to arrest and surrender a suspect. These provisions insulate the criminal jurisdiction of the requested State, which is not requested to exercise the kind of jurisdiction that it is forbidden under customary international law. As noted in the Joint Concurring Opinion ("JCO") in the *Bashir/Jordan Appeal Judgment*, the requested State acts as a "surrogate" for the Court, which relies on States Parties' cooperation to be able to exercise its own jurisdiction.²⁷ This does not imply any diminution of their sovereignty, but instead merely recognises the practical implication of the possibility implied by the ICJ's conclusion in the *Arrest Warrant Judgment*—that international courts will need to work through State cooperation. This does not engage the *par in parem non habet imperium* principle in the same way as if the State sought to exercise its own jurisdiction, in particular since the Court's mandate is derived from the international community.²⁸

16. The terminology in the Statute of "arrest and surrender" of suspects, rather than "extradition" (typically applicable in the interactions between States for the purpose of their own exercise of jurisdiction) further reflects the special role that States were anticipated to play in enabling the Court's effective operation. This is also evident from article 59 of the Statute

²² Transcript, pp. 12-13.

²³ Transcript, p. 23.

²⁴ [Bashir/Jordan Appeal Judgement](#), para. 102.

²⁵ [Case Concerning the Arrest Warrant \(Democratic Republic of the Congo v. Belgium\)](#), 14 February 2002 ("Arrest Warrant Judgement"), para. 58.

²⁶ [Arrest Warrant Judgment](#), para. 61; [Bashir/Jordan Appeal Judgement](#), para. 102.

²⁷ [Bashir/Jordan JCO](#), paras. 441-444.

²⁸ [Bashir/Jordan JCO](#), paras. 181, 189-192; see also Kress in Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th Ed. (C.H. Beck/Hart/Nomos: 2022), p. 2647, nm. 124 (explaining why the ICC constitutes an international criminal court with a credible universal orientation whenever it exercises its jurisdiction and not only where its jurisdiction is based on a UNSC Resolution).

(concerning arrest proceedings in the custodial state) which, while entrusting certain due process checks to the requested State, carefully and expressly demarcates what the courts of the requested State may and may not do. In particular, the provision emphasises that “[i]t *shall not be open* to the competent authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b)”.²⁹ By excluding this competence, the Statute makes it clear that, even where domestic authorities effect the arrest, it remains the Court that is exercising criminal jurisdiction, and not the requested State. Rather, the requested State is merely giving effect to that jurisdiction.

17. Accordingly, since no immunity can be pleaded by Mr PUTIN in relation to ICC proceedings against him, regardless of whether he is a national of a State party or not, and regardless of his official position within the Russian Federation, the RSA is not subject to any conflicting obligation owed to the Russian Federation. The RSA is obliged to arrest and surrender Mr PUTIN to the Court at its request, as is any other requested State Party.

ii. The ICC Bashir/Jordan Appeal Judgment represents the settled law of the ICC and the RSA advances no valid reasons why there should be a departure from this judgment. In any case, it correctly identified an existing and settled customary international principle on absence of immunity before international courts

(a) Article 27’s exclusion of immunity reflects customary international law accepted across all international criminal courts and tribunals

18. The RSA cannot identify any international obligation under either treaty or customary international law that conflicts with the Court’s request for it to arrest and surrender Mr PUTIN, and thus article 98(1) cannot be engaged. As underlined by the Prosecution during the Hearing, article 27 of the Statute — an international treaty with 123 States Parties³⁰ — excludes immunity for any investigation and prosecution before the Court, and reflects customary international law that is binding on all states.³¹ This includes non-States Parties to the Rome Statute,³² who do not enjoy immunity when they commit crimes on the territory of States Parties

²⁹ Emphasis added.

³⁰ See also [Tadic Appeal Judgement](#), para. 223 (“[T]he Statute was adopted by an overwhelming majority of the States attending the Rome Diplomatic Conference and was substantially endorsed by the Sixth Committee of the United Nations General Assembly. This shows that that text is supported by a great number of States and may be taken to express the legal position i.e. *opinio iuris* of those States (...”).

³¹ Transcript, pp. 24-26. See also ICJ’s [Delimitation of the Continental Shelf case – Declaration by Judge Robinson](#) – para. 3 (holding that while rights and obligations under a treaty do not apply to non-states parties as a general rule, they do so of if the obligations form part of customary international law).

³² Although the Russian Federation did not ratify the Statute, it signed it on 13 September 2000, thus showing support for its provisions, including article 27. See Annex 1 for: UKR-OTP-00054139. The Russian Federation subsequently unsigned the Rome Statute in November 2016, but this did not undermine their support for the provisions of the Rome Statute as such, including article 27, because their unsigned appears to have been triggered by a different reason, namely, the ICC Prosecutor’s announcement that Russia’s actions in Crimea constituted an

or States which have accepted the Court's jurisdiction.

19. The *Bashir/Jordan* Appeal Judgement — which held that article 27 reflects customary international law — addressed the legal question arising in these proceedings and represents the settled law of the Court, which, as noted above, cannot be departed from in any ICC proceedings absent convincing reasons. To ensure that the Rome Statute obligations of States Parties are not applied inconsistently, States Parties are expected to respect the Court's interpretation of those obligations. It is thus not sufficient, as the RSA stated during the hearing, that the *Bashir/Jordan* Appeal Judgment does not conform to the RSA's approach to customary international law or that the RSA has not agreed to its holding.³³ The RSA has not advanced any valid reasons why the Chamber should depart from the Court's law as settled in the *Bashir/Jordan* Judgment or why adherence to a judgment of the Court should be dependent on a State Party's consent or concurrence.

20. In any case, contrary to that of the RSA,³⁴ it is the Prosecution's view that the *Bashir/Jordan* Appeal Judgment is correct regarding the absence of immunity under customary international law, whether for Heads of State or other officials before international criminal courts as reflective of customary international law. This Judgment did not create or identify a new principle in customary international law. Rather, as shown below, it merely identified and applied an existing principle embedded in state practice and *opinio juris* as reflected in the provisions of various international courts and judicial precedents the Appeals Chamber cited. Other State practice supports this principle.

21. Indeed, there is a long-standing practice excluding immunity for Heads of State before international criminal courts and tribunals. In support of this, during the Hearing,³⁵ the Prosecution referred not only to the *Bashir/Jordan* Appeal Judgment, but also to provisions of other international courts that are similar to article 27 of the Statute, discussed below. Since the Nuremberg Charter, these provisions have been effectively applied in a manner reflective of a settled custom. Likewise, judicial pronouncements and other relevant practice of international courts — many of which are also cited in the *Bashir/Jordan* Appeal Judgment³⁶ — confirm that the absence of immunity before international criminal courts is reflective of customary

armed conflict. See Annex 1 for: UKR-OTP-00054136; UKR-OTP-00054137; UKR-OTP-00054138. Prior to the unsigning, the Russian Federation participated in the UNSC where there Council referred two situations to the ICC — Darfur and Libya. These referrals embraced the application of the entire Rome Statute, including article 27.

³³ Transcript, pp. 11-13; 17.

³⁴ Transcript, 11-13; 17.

³⁵ Transcript, pp. 24-25.

³⁶ [Bashir/Jordan Appeal Judgement](#), paras.102-109.

international law. In summary, relevant practice thus includes the Charters of the International Military Tribunal and the International Military Tribunal for the Far East; UN General Assembly resolutions, and principle formulated by the ILC; the Statutes of the ICTY and the ICTR, the ICJ's *Arrest Warrant* Judgment, and the SCSL's *Taylor* Judgment. Notably, as one of the Allied Powers in World War II, and a permanent member of the UN Security Council, the Russian Federation and its predecessor has participated in key aspects of this practice.³⁷ Other state practices further support this principle.

22. The following submissions briefly discuss these elements of State practice and other relevant authorities.

Commission on the Responsibility of the Authors of the [First World] War

23. The absence of immunity from prosecution for international crimes before international courts, including for Heads of State, was a principle already recognised by the early 20th century. In its 1919 Report,³⁸ the Commission on the Responsibility of the Authors of the [First World] War and on Enforcement of Penalties³⁹ confirmed that it “desire[d] to state expressly that in the hierarchy of persons in authority, there is no reason why rank, however exalted, should *in any circumstances* protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. *This extends even to the case of heads of states.*” The Commission continued by confirming that “even if, in some countries, a sovereign is exempt from being prosecuted in a national court of his own country *the position from an international point of view is quite different.*”⁴⁰ In conclusion, it found that “[a]ll persons [...] without distinction of rank and including ‘Chiefs of States’ who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal

³⁷ This included not only those bodies such as the ICTY and ICTR which were expressly created by the UN Security Council, but also bodies such as the SCSL which were created pursuant to a mandate given to the UN Secretary General by the UN Security Council: *see e.g.* UNSCR 1315 (calling for the exercise of jurisdiction over persons who bear the greatest responsibility for the commission of the crimes [...] including those leaders who [...] have threatened the establishment of and implementation of the peace process in Sierra Leone”).

³⁸ Report of the Commission on the Responsibility of the Authors of the [First World] War and on Enforcement of Penalties, 29 March 1919 (“1919 Commission Report”).

³⁹ The Commission on the Responsibility of the Authors of the [First World] War and on Enforcement of Penalties (“1919 Commission”) was created by the Preliminary Peace Conference which met at Versailles in 1919 and which ultimately drafted the Treaty of Peace between the Allied and Associated Powers and Germany that legally terminated World War I (1914-1918) (the Treaty of Versailles). The Commission was composed of 15 members, two to be named by each of the Great Powers (United States of America, United Kingdom (then, the British Empire), France, Italy and Japan) and five elected from among the Powers with special interests. The Treaty of Versailles contained a number of provisions for the trial of persons accused of having committed war crimes, including those recommended in this 1919 Commission Report.

⁴⁰ 1919 Commission Report, Chapter III (emphasis added). The Commission also added that, whilst contrary arguments had been raised based on alleged immunity, “this privilege, where it is recognised, is one of practical expedience in municipal law, and is not fundamental.”

prosecution.” As such, the Commission proposed the establishment of a high tribunal composed of judges drawn from multiple nations and included the possibility of trial before that tribunal of a former Head of State, with all states committing to securing the surrender of persons charged.⁴¹

Post-World War II Tribunals

24. Like article 27 of the Rome Statute, article 7 of the Charter of the International Military Tribunal in Nuremberg,⁴² article 4 of Control Council Law No. 10 and article 6 of the Charter of the International Military Tribunal for the Far East all provided that the official position of defendants, whether as Heads of State or responsible officials in government departments, would not free them from responsibility or mitigate any punishment.⁴³

United Nations General Assembly

25. The UN General Assembly — one of the six principal organs of the United Nations⁴⁴ — in its Resolution 95(1) of 11 December 1946⁴⁵ unanimously affirmed “*principles of international law* recognized by the Charter of the Nuremberg Tribunal and the Judgement of the Tribunal”⁴⁶ and directed the International Law Commission (ILC) to urgently formulate principles recognised therein. The Prosecution understand the significance of the words “*principles of international law*” deriving from Nuremberg Charter and Judgement to denote that they must be understood as meaning “international law as it is applied between all nations belonging to the community of States”.⁴⁷

International Law Commission

26. In response to the UNGA’s direction in Resolution 95(1), the ILC formulated seven “Principles of International Law” recognised in the Charter of the IMT — the “Nuremberg Principles.” In particular, Principle III rejected all forms of immunity for crimes under international law for any state official — including Heads of States, as follows: “The fact that a person who committed act which constitutes a crime under international law acted as Head of

⁴¹ 1919 Commission Report, Chapters III, IV(b).

⁴² Charter of the International Military Tribunal (“IMT Charter”), article 7; Charter of the International Military Tribunal for the Far East, article 6. The Prosecution notes that the Union of Soviet Socialist Republics was a party to the London Agreement adopting the IMT Charter. *See also* [Bashir/Jordan Appeal Judgement](#), para. 103.

⁴³ *See also* [Bashir/Jordan Appeal Judgement](#), para. 103.

⁴⁴ UN Charter, article 7(1).

⁴⁵ UN General Assembly, 56 plenary meeting, 11 December 1946, A/RES/95(1) Resolution 95(1) (emphasis added); [Bashir/Jordan Appeal Judgement](#), paras. 103, 104.

⁴⁶ *See also* [Bashir/Jordan Appeal Judgement](#), para. 104.

⁴⁷ *Case of the SS Lotus*, 7 September 1927, Series A No 10, at p. 16.

State or responsible Government official does not relieve him from criminal responsibility under international law.”⁴⁸

27. The ILC’s subsequent draft Codes of Offences against the Peace and Security of Mankind of 1951,⁴⁹ 1954,⁵⁰ 1991⁵¹ and 1996,⁵² likewise consistently reflected the absence of immunity before international criminal courts for Heads of State and other government officials.

28. Following the *Bashir/Jordan Appeal Judgment*, the ILC’s work on the immunity of State officials has not added anything to the state practice relevant to this case, since it has not found it necessary to address the scenario in which a State acts on request of an international criminal court exercising its own jurisdiction.⁵³ It however stressed the need for care when considering the contours of immunities given the “strides made in international criminal law”,⁵⁴ and in light of the mandate of international criminal courts and tribunals, which should function effectively.

International Court of Justice

29. As the United Nation’s principal judicial organ,⁵⁵ the ICJ has confirmed in the *Arrest Warrant Judgment* the absence of immunity before international courts. Although it was unable to find any exception to the customary rule according immunity to incumbent Foreign Ministers

⁴⁸ See also [Bashir/Jordan Appeal Judgement](#), para. 104.

⁴⁹ See also [Bashir/Jordan Appeal Judgement](#), para. 105.

⁵⁰ Article 3 of the ILC’s Draft Code of Offence against the Peace and Security of Mankind (1954).

⁵¹ Article 13 of the ILC’s Draft Code of Offence against the Peace and Security of Mankind (1991).

⁵² Article 7 of the ILC’s Draft Code of Offence against the Peace and Security of Mankind (1996).

⁵³ See ILC, *Eighth Report on Immunity of State officials from foreign criminal jurisdiction*, UN Doc. A/CN.4/739, 28 February 2020, paras. 24-27 (although recognising that this question might “generate greater debate”). Instead, the ILC’s work focused on the immunity of state officials from *foreign* criminal jurisdiction. See UNGA, *Report of the International Law Commission*, UN Doc. A/77/10, 2022, Chapter VI: Immunity of State officials from foreign criminal jurisdiction (“Draft Articles”). The Draft Articles are without prejudice to immunities under special rules of international law (including for persons connected with diplomatic missions): Draft Article 1(2). Likewise, the Draft Articles contain an express saving for the rights and obligations of “States Parties under international agreements establishing international criminal courts [...] as between the parties to those agreements”: Draft Article 1(3). Notwithstanding the qualification “as between the parties to those agreements”, the ILC also stated that the Draft Articles are without prejudice to any additional obligations of States Parties to cooperate with international criminal courts “under international law, in particular by the Security Council or any other international organisation”: Draft Article 1(3), Commentary, para. 26. See also Draft Articles, General Commentary, para. 3 (further emphasising that the Draft Articles are “limited to foreign criminal jurisdiction and do[] not affect the legal regime applicable before international criminal courts”); Draft Article 1(1), Commentary, para. 6 (explaining that this means “the *horizontal relations* between States”, emphasis added). Immunity for certain State officials from foreign criminal jurisdiction flows from the premise that “respect for the principle of the sovereign equality of States [...] is the very foundation of immunity of State officials from foreign criminal jurisdiction”: Draft Articles, General Commentary, para. 5.

⁵⁴ Draft Articles, General Commentary, para. 7.

⁵⁵ UN Charter, article 92.

from criminal jurisdiction in relation to foreign national courts,⁵⁶ it held that “an incumbent or former Minister of Foreign Affairs may be subject to criminal proceedings before certain international courts, where they have jurisdiction.”⁵⁷ In that context, the ICJ referred, *inter alia*, to article 27 of the Statute.⁵⁸

International criminal courts and tribunals

30. Besides the ICC, immunity has been expressly excluded by all modern international criminal tribunals established since Nuremberg, namely, the ICTY⁵⁹ the ICTR,⁶⁰ and the SCSL.⁶¹ The Statutes of these tribunals each provide that “the official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.”

31. These instruments codified an existing rule of customary international law. In the view of the United Nations Secretary-General’s report submitted to the UN Security Council for consideration in establishing the ICTY, the ICTY “should apply rules of international humanitarian law which are beyond any doubt part of customary law (...).”⁶² One of the rules in the ICTY Statute is article 7(2) which excludes immunity.

32. In the *Milošević* case, the Trial Chamber rejected the plea that the ICTY “did not have jurisdiction over the person of President Milošević.”⁶³ It ruled that “there is absolutely no basis for challenging the validity of article 7, paragraph 2, which at this time reflects a rule of customary international law.”⁶⁴ In *Furundžija*, another ICTY Trial Chamber held that “individuals are personally responsible, whatever their official position, even if they are heads

⁵⁶ [Arrest Warrant Judgment](#), para. 58.

⁵⁷ [Arrest Warrant Judgment](#), para. 61.

⁵⁸ [Arrest Warrant Judgment](#), para. 61.

⁵⁹ ICTY Statute, art. 7(2). See also [Bashir/Jordan Appeal Judgement](#), para. 107. The Prosecution notes that the Russian Federation voted in favour of UNSC Resolution 827 adopting the ICTY Statute. See also [Bashir/Jordan Appeal Judgement](#), para. 107.

⁶⁰ ICTR Statute, art. 6(2). See also [Bashir/Jordan Appeal Judgement](#), para. 107. The Prosecution notes that the Russian Federation voted in favour of UNSC Resolution 955 adopting the ICTR Statute.

⁶¹ See SCSL Statute, article 6(2). See also [Bashir/Jordan Appeal Judgement](#), para. 108. The SCSL was pursuant to a mandate given to the UN Secretary General by the UN Security Council: see e.g. UNSC Resolution 1315 (calling for the exercise of jurisdiction over persons who bear the greatest responsibility for the commission of the crimes [...] including those leaders who [...] have threatened the establishment of and implementation of the peace process in Sierra Leone”) in favour of which the Russian Federation also voted.

⁶² Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808(1993), S/25704, 3 May 1993, para. 34. Whilst the Secretary-General’s report refers to “international humanitarian law”, it is clear from ICTY jurisprudence that the tribunal found itself obligated to follow customary international law outside the confines of international humanitarian law, such as to modes of responsibility and, indeed, immunities. See e.g., [Furundžija Trial Judgement](#), para. 140; [Tadić Appeal Judgement](#), paras. 194-226 (exploring elements of joint criminal enterprise liability under customary international law); [Hadzihasanović Appeal Decision](#), para. 44.

⁶³ [Prosecutor v. Slobodan Milošević, Decision on Preliminary Motions](#), 8 November 2001, paras. 26-28.

⁶⁴ [Prosecutor v. Slobodan Milošević, Decision on Preliminary Motions](#), para. 28.

of State or government ministers: Article 7(2) of the Statute and article 6(2) of the Statute of the International Criminal Tribunal for Rwanda (...) are undisputedly declaratory of customary international law.”⁶⁵ In *Karadžić et al*, another Trial Chamber confirmed that “the official capacity of an individual even *de facto* in position of authority – whether as military commander, leader, or as one in government – does not exempt him from criminal responsibility and would tend to aggravate it.”⁶⁶

33. The ICTY Appeals Chamber confirmed the absence of immunity before the Tribunal in the *Blaškić*⁶⁷ and *Krstić*⁶⁸ decisions. It held that while immunity existed for some officials from prosecutions before foreign domestic courts, an exception to this general rule is that immunity is unavailable in relation to international crimes or prosecution before international courts.

34. Similarly, in the SCSL’s *Taylor* Judgment,⁶⁹ the Appeals Chamber rejected Head of State immunity, holding “[t]he principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal court.”⁷⁰

Genocide Convention

35. The Genocide Convention – also cited by the *Bashir/Jordan* Appeal Judgment⁷¹ – expressly excludes immunity. Article IV of the Convention provides that: “persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals. Under Article V, Contracting Parties undertake to enact the necessary legislation to implement the Convention in particular to provide effective penalties for those found guilty. Suspects shall be tried by competent tribunals in the territories of which the crimes were committed, or by such competent international tribunals with relevant jurisdiction.”⁷²

Other relevant State practice

36. Besides the above, additional relevant State practice affirms the same principle. For instance, all statutes of “internationalised” and related courts exclude immunity. These include

⁶⁵ *Furundžija* Trial Judgement, para. 140.

⁶⁶ *Prosecutor v. Karadžić et al*, Decision on Deferral Proposal, 16 May 1995, para. 24.

⁶⁷ *Prosecutor v. Blaškić*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 41.

⁶⁸ *Prosecutor v. Krstić*, Decision on Application for Subpoenas, 1 July 2003, para. 26.

⁶⁹ *Prosecutor v. Taylor*, Decision on Immunity from Jurisdiction, SCSL-2003-01-I, 31 May 2004, para. 52.

⁷⁰ *Prosecutor v. Taylor*, Decision on Immunity from Jurisdiction, para. 52.

⁷¹ *Bashir/Jordan* Appeal Judgement, para. 105. See also para. 161.

⁷² Genocide Convention, article VI.

section 15 of Regulation No 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences (in East Timor);⁷³ article 29 of the Law Establishing the ECCC⁷⁴; article 56 of Organic Law No. 15-003 on the Special Criminal Court of the Central African Republic⁷⁵ and article 16(1)(b) of Law No.05/L-053 on the establishment of Kosovo Specialist Chambers (2015).⁷⁶ Under article 6 of the Statute of the Special Tribunal for Lebanon, “amnesty granted to any person for any crimes falling within the jurisdiction of the Special Tribunal shall not be a bar to prosecution.”

b. Concluding recapitulations

37. All the authorities relied on in the *Bashir/Jordan* Appeal Judgment, consistent with other authorities not expressly cited, affirm that there is no immunity from investigation and prosecution for international crimes before international courts. In fact, the Prosecution is aware of no contrary finding emanating from any international court or tribunal.

38. In sum, the *Bashir/Jordan* Appeal Judgment finding is supported by a long line of State practice. After analysing such practice, the Appeals Chamber concluded that “there is neither State practice nor *opinio juris* that would support the existence of Head of State immunity under customary international law *vis-à-vis* an international court”.⁷⁷ Of direct relevance to these proceedings, it further noted that “[t]he absence of a rule of customary international law recognising Head of State immunity *vis-à-vis* international courts is relevant not only to the question of whether an international court may issue a warrant for the arrest of a Head of State and conduct proceedings against him or her, but also for the horizontal relationship between States when a State is requested by an international court to arrest and surrender the Head of State of another State”.⁷⁸ The application of this holding is not limited to the facts of the *Bashir/Jordan* case and applies with equal logic regardless of the manner in which the Court’s

⁷³ See regulation 15.1 (“The present regulation shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under the present regulation, nor shall it, in and of itself, constitute a ground for reduction of sentence”); and 15.2. (“Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the panels from exercising its jurisdiction over such a person”).

⁷⁴ Article 29 (“The position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment.”)

⁷⁵ Article 56 (“La présente loi s'applique à tous de manière égale, sans aucune distinction fondée sur la qualité officielle”).

⁷⁶ Article 16(1)(b) (“The official position of any accused person, including as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment”).

⁷⁷ [Bashir/Jordan Appeal Judgement](#), para. 113.

⁷⁸ [Bashir/Jordan Appeal Judgement](#), para. 114 (emphasis added).

jurisdiction is triggered.

39. The *Bashir/Jordan* Appeal Judgment is consistent with the ICJ's *Arrest Warrant* Judgment. While the ICJ held that there is no exception in customary international law for international crimes *in regard to national courts*,⁷⁹ it also held that "immunities under international law [...] do not represent a bar to criminal prosecution" if the person is "subject to criminal proceedings *before certain international criminal courts, where they have jurisdiction*".⁸⁰

40. Moreover, like the *Bashir/Jordan* Appeal Judgment, these other international courts have determined the absence of immunity before international courts as an unqualified principle which is not restricted either by the nature of each international court, the manner by which such courts were created or how its jurisdiction is triggered. In this regard, while the *Bashir* case was referred to the Court by the UNSC – which was not the case with the Ukraine Situation – this is irrelevant as far as the reach of the international customary law principle of absence of immunities before international courts is concerned. This principle applies to any international court,⁸¹ including the ICC.⁸²

41. For instance, when the ICJ examined the Rome Statute's article 27 in its *Arrest Warrant* Judgement, it did not qualify or include any caveats to its finding of absence of immunity before international courts.⁸³ Rather, the ICJ states that the principle is applicable or recognised regardless of how these courts derive their jurisdiction.⁸⁴ The ICJ specifically cited the ICC (and its article 27(2)), as one example where immunity cannot be pleaded.⁸⁵

42. Similarly, the fact that the Special Court for Sierra Leone ("SCSL") was not created by the UNSC, but by an agreement between the UN and Sierra Leone was not a relevant factor in the SCSL Appeals Chamber's finding that there was practice/custom regarding absence of immunity before any international court in the *Charles Taylor* case.⁸⁶ The Chamber ruled that

⁷⁹ [Arrest Warrant Judgment](#), para. 58 (emphasis added).

⁸⁰ [Arrest Warrant Judgment](#), para. 61 (emphasis added).

⁸¹ For a definition of an international court, see [Bashir/Jordan JCO](#), paras. 56-60.

⁸² [Bashir/Jordan JCO](#), paras. 56-60.

⁸³ [Arrest Warrant Judgment](#), paras. 58 and 61.

⁸⁴ [Arrest Warrant Judgment](#), para. 61 (although the ICJ was unable to find that "there exists under international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers of Foreign Affairs where they are suspected of having committed war crimes against humanity (para. 58), it held that "an incumbent or former Minister for Foreign Affairs *may be subjected to criminal proceedings before certain international criminal courts, where they have jurisdiction*" (emphasis added)).

⁸⁵ [Arrest Warrant Judgment](#), para. 61.

⁸⁶ In Security Council Resolution 1315 (S/RES/1315), the UNSC calls for the UN Secretary-General to negotiate an agreement with the government of Sierra Leone to establish a court that will have jurisdiction over all persons, including leaders ("3. Recommends further that the special court should have personal jurisdiction over persons

Taylor, who was head of state of Liberia at the time of his indictment and the issuance of an arrest warrant against him,⁸⁷ did not enjoy immunity from prosecution by the Court, finding that “[t]he principle seems now seems established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal court.”⁸⁸

43. The arrest of Mr Milošević, then President of Serbia,⁸⁹ similarly reflects the absence of immunity before international courts within the framework of applicable customary international law. At the time Mr Milošević was indicted, he was the President of a State that was not a member of the United Nations.⁹⁰ Although the ICTY was created by the UNSC, with obligations thereby placed on UN Member States to recognise its jurisdiction and to cooperate with it, this did not prevent the ICTY from issuing an arrest warrant against Mr Milošević, or States from executing that warrant.

iii. Article 98(2) is also not engaged

44. Nor is article 98(2) engaged. The RSA did not allege any pre-existing agreement under article 98(2) that it would violate if it arrested Mr PUTIN. Indeed, during the Hearing, the RSA confirmed that it has not made any pledges or assurances for the non-arrest of Mr PUTIN or any other person.⁹¹

45. The RSA cannot negate its obligation under the Statute to arrest and surrender Mr PUTIN by entering into subsequent agreements. In any event, as the Appeals Chamber has confirmed, article 98(2) relates only to a limited category of treaties/agreements involving so-called “sending and receiving states”, such as “Status of Forces Agreements” (“SOFAs”) which are not relevant to this matter.⁹² This follows from article 98(2)’s express terms, which limit its application to “international agreements pursuant to which the consent of a sending state is

who bear the greatest responsibility for the commission of the crimes referred to in paragraph 2, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone”).

⁸⁷ *The Prosecutor against Charles Ghankay Taylor also known as Charles Ghankay MaCarthur Dapkpana Taylor*, Warrant of arrest and order for transfer and detention, 7 March 2003, SCSL-2003-01-I; see also [Bashir/Jordan Appeal Judgement](#), para. 109.

⁸⁸ [Prosecutor v. Taylor, Decision on Immunity from Jurisdiction](#), para. 52.

⁸⁹ Transcript, pp. 30-31.

⁹⁰ The first Indictment and arrest warrant against Milošević were issued on 22 and 24 May 1999 while he was the President and Head of State of the Federal Republic of Yugoslavia (Serbia and Montenegro). See [Milošević et al Indictment](#), 22 May, 1999; [Prosecutor v. Slobodan Milošević, Decision on Review of Indictment and Application for Consequential Orders](#), 24 May 1999. On 19 September 1992, by way of UNSC Resolution 777 (1992) (S/RES/777), the United Nations had confirmed that the Federal Republic of Yugoslavia did not automatically continue the UN membership of the Soviet Federal Republic of Yugoslavia, which had by then ceased to exist; rather it needed to apply for membership in its own right. Only on 1 November 2000, was the state admitted to the United Nations by UNGA Resolution 55/12 (2000) ([A/RES/55/12](#)).

⁹¹ Transcript, pp. 30-31.

⁹² [Bashir/Jordan Appeal Judgement](#), 159.

required to surrender a person of that State to the Court.” Therefore, article 98(2) does not apply to all kinds of international agreements. This has also been confirmed by Pre-Trial Chamber I, which held that article 98(2) agreements are to be defined with reference to a “sending State” and “a procedure for seeking and providing consent to surrender.”⁹³

46. While some commentators suggest that article 98(2) could have been more clearly articulated to reflect the narrow purpose envisaged at the the time of its drafting,⁹⁴ the drafting history confirms the intent to limit the kind of agreements covered under article 98(2). As Schabas recalls, “[c]ertainly, the terminology that is employed in article 98(2) is rooted in practice concerning status of forces agreements.”⁹⁵ For example, the US delegation’s comments to the Ad Hoc Committee in 1995, state that it is “critical that the rights and responsibilities of states parties to applicable Status of Forces Agreements (SOFAs) be fully preserved”.⁹⁶

iv. The objectives of the Rome Statute and the principle of effectiveness require the RSA’s full cooperation in the arrest and surrender of Mr PUTIN

47. The principle of effectiveness requires that the object and purpose of the Statute—to prosecute without impunity those falling within the ICC’s substantive jurisdiction—not be undermined by other considerations. The RSA’s reading of the interplay between articles 27 and 98—namely that the absence of immunity from arrest and surrender at the request of the Court applies only to Heads of State from States Parties or from situations referred by the UNSC—would fatally undermine the exercise of the Court’s jurisdiction under article 12 of the Statute over nationals of non-State Parties who commit crimes on the territories of States Parties or against their nationals. The Court focuses on those persons most responsible for serious crimes of international concern. If an arrest warrant is issued in the exercise of the Court’s jurisdiction against a Head of State from a non-State Party, then in practice this would mean that any waiver would need to be obtained from the very person who is the subject of the warrant in question, creating an absurd result.⁹⁷ Since the exercise of jurisdiction and its practical

⁹³ [ICC-02/05-01/09-309](#), para. 32.

⁹⁴ See e.g., K. Prost, The Surprises of Part 9 of the Rome Statute on International Cooperation and Judicial Assistance, *Journal of International Criminal Justice* (vol 16, 2018), p. 366.

⁹⁵ W. Schabas, *The International Criminal Court: a Commentary on the Rome Statute*, 2nd Ed. (Oxford: OUP, 2016) (“Schabas”), p. 1349.

⁹⁶ Schabas, pp. 1349-1350 (quoting ‘US Government informal comments on extradition/surrender approach of ILC draft of a statute for an international criminal court,’ 14 July 1995; the US defined “SOFAs as follows: “SOFAs are international agreements, which provide for a number of reciprocal rights and responsibilities of the signatory states in respect to armed forces stationed or temporarily present in the territories of the respective signatory states. Under such agreements, the state dispatching or posting its forces in the territory of another state is identified as the ‘sending state’. [...] Most SOFAs contain provisions governing the exercise of criminal jurisdiction over the armed forces stationed or posted abroad”).

⁹⁷ [Bashir/Jordan JCO](#), para. 5.

enforcement are necessarily entwined, it would create the undesirable outcome that the Court is permitted to exercise its jurisdiction over the Head of State of a non-State Party but no State Party may give effect to that jurisdiction by executing a request for arrest and surrender. This would, in effect, place the Court in precisely the same position as national courts, contrary to the object and purpose of the Statute, and render the Court's jurisdiction illusory.

48. Furthermore, the absence of any relevant immunity in customary international law is consistent with the nature of the crimes in article 5 of the Statute—which very often relate to norms that impose obligations *erga omnes* on States, including the obligation to prevent, investigate and punish crimes within the Court's jurisdiction.⁹⁸ It is also consistent with an interpretation and application of the Rome Statute consistently with internationally recognised human rights without any adverse distinction pursuant to article 21(3). As the Appeals Chamber has explained: “[h]uman rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court.”⁹⁹ Significantly, the allegations leading to the prosecution of this case have not only led to the arrest warrant issued by this Court but also engaged relevant obligations for both the Russian Federation and the RSA under the broader framework of applicable international law.¹⁰⁰

49. Finally, contrary to the concerns of the RSA, the Court's request to arrest and surrender Mr PUTIN does not undermine interstate relations, which is the traditional rationale for immunity *ratione personae*.¹⁰¹ This danger does not manifest with international courts, which are independent from States and subject to strict rules of impartiality.¹⁰² Moreover, physical presence on the territory of the RSA is no longer indispensable to conduct such relations, even where direct personal interaction may be required.

B. The RSA's stated role in peace negotiations and alleged impediments in RSA domestic law cannot displace RSA's unqualified duty to cooperate with the Court

⁹⁸ [Bashir/Jordan Appeal Judgement](#), para. 123. See also [Bashir/Jordan JCO](#), para. 207 (“It has now been authoritatively settled that the proscriptions of genocide, crimes against humanity and war crimes enjoy the status of *jus cogens* norms”).

⁹⁹ [Lubanga Jurisdiction AD](#), para. 37.

¹⁰⁰ For example, the crimes charged in this case include a grave breach of the Fourth Geneva Convention, to which both the Republic of South Africa and the Russian Federation are party. As such, they have accepted obligations to take effective measures to prosecute or extradite persons within their jurisdiction alleged to have committed such acts, irrespective of their nationality. See e.g. Geneva Convention, art. 146. See further, *mutatis mutandis*, 2020 Commentary to Geneva Convention III, art. 129 (mns. 5104-5159).

¹⁰¹ C. Kreß, ‘Article 98: cooperation with respect to waiver of immunity and consent to surrender,’ in K. Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th Ed. (C.H. Beck/Hart/Nomos: 2022), p. 2628 (mn. 89).

¹⁰² Cassesse, *International Criminal Law* (OUP, 2008), p. 321; see also [Prosecutor v. Taylor, Decision on Immunity from Jurisdiction](#), paras. 50-51; [ICC-02/05-01/09-139-Corr](#), para. 34; ICC Statute, e.g., articles 36(3); 42(1) and (3).

50. During its submissions, the RSA referred to some factors that it claims may impede its implementation of the Court's cooperation request, based on its view that article 97 does not exhaustively list factors that may impede State cooperation.¹⁰³ Regardless of whether article 97 may be construed as non-exhaustive, the RSA may not rely on procedures in its domestic law as potential impediments to its cooperation with the Court. As the Prosecution stated at the Hearing,¹⁰⁴ the RSA is duty bound under article 88 to put in place the relevant national procedures to facilitate observance of its Part 9 cooperation obligations. Moreover, whilst article 97 provides a vehicle for a State Party to identify "problems which may impede or prevent the execution of the request", these problems should not be ones of the State's own making,¹⁰⁵ or which are capable of resolution by the State itself.¹⁰⁶

51. In this respect, the RSA seems to misinterpret the significance of article 59 of the Statute. The RSA appears to suggest that under its domestic law, which it claims was adopted in compliance with article 88, an ICC warrant must be approved by the country's judiciary, which *may* make orders for its execution. As such, the RSA suggested that it could not know what its national court might ultimately conclude.¹⁰⁷ Following the Hearing and for the first time, the RSA informed the Chamber that the government is currently litigating before the High Court as part of its article 97 consultations. The RSA did not provide any details on what that litigation entails. *First*, irrespective of the content of the RSA's domestic law, and regardless of the content of the government's present litigation before the High Court of South Africa, the RSA's domestic law and domestic litigation cannot be raised to displace its unqualified duty to cooperate with the the Court. As an ICC State Party, the RSA is bound to put in place procedures which facilitate, rather than hinder, its cooperation with the Court under article 88. This is consistent with the general principle of law reflected in article 27 of the Vienna Convention on the Law of Treaties.

52. *Second*, the RSA misreads article 59. This article does not give States Parties an open-ended power to reject or unreasonably delay an ICC warrant of arrest by invoking its domestic law. To the contrary, article 59 obliges States Parties receiving an ICC warrant of arrest to "immediately take steps to arrest the person." States Parties must do so not only in accordance

¹⁰³ Transcript, pp. 6-7.

¹⁰⁴ Transcript, pp. 22-23.

¹⁰⁵ Such as refusal to admit the non-applicability of personal immunities in the execution of a Court mandated arrest and surrender request.

¹⁰⁶ Such as by not permitting the suspect to enter its territory or engaging in required interactions differently, such as virtually or in another location or with other interlocutors.

¹⁰⁷ Transcript, p. 7.

with its laws, but also their obligations under Part 9 of the Statute, including to fully cooperate with the Court under article 86. Critically, Part 9 does not envisage a situation where a State Party can refuse to enforce an ICC warrant of arrest based solely on its domestic law.

53. Finally, the Prosecution notes that the RSA's legal framework has been interpreted by its own Court of Appeal as requiring the RSA to execute cooperation requests by the Court where an arrest warrant has been issued against a sitting Head of State.¹⁰⁸

C. The Court may not exercise a similar 'deferral' power to that entrusted to the UN Security Council under article 16

54. The RSA further argues that the Court should in some way defer or stay the execution of the arrest warrant, in order to facilitate peace negotiations.¹⁰⁹ In this respect, it expressly drew a parallel with the mechanism envisaged under article 16 of the Statute, but observed that the circumstances of the present conflict in this situation mean that it does not anticipate that the UN Security Council will exercise its powers to grant such a deferral.¹¹⁰ Irrespective of the scope of article 97, however, the Prosecution submits that the Chamber cannot exercise a similar power to that entrusted to the UN Security Council to temporarily 'defer' the Court's exercise of jurisdiction for a renewable period.

55. *First*, the Prosecution submits that the RSA does not demonstrate any legal authority for the Court to exercise a similar power to that entrusted to the UN Security Council under article 16 in determining matters affecting international peace and security. *Second*, article 16 of the Statute was the product of a delicate negotiation, which expressly sought to address "what the link should be between the Court as a judicial body and the Security Council as a *political* organ".¹¹¹ This recognised that the Security Council has a "decisive role in dealing with considerations where the requirements of peace and justice seem to be in conflict",¹¹² and is uniquely equipped for this purpose. It was in light of this exceptional function on behalf of the international community that the Security Council was granted this "unprecedented" power

¹⁰⁸ [South Africa Supreme Court of Appeal Judgment 867/15](#), paras. 102-3; article 10(9) of the [RSA Implementation of the Rome Statute of the International Criminal Court Act](#).

¹⁰⁹ Transcript, pp. 3, 8, 9, 17, 30.

¹¹⁰ Transcript, pp. 3, 8, 9, 17, 30.

¹¹¹ M. Bergsmo and D. Zhu, 'Article 16: deferral of investigation or prosecution,' in K. Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th Ed. (C.H. Beck/Hart/Nomos: 2022) ("Bergsmo and Zhu"), p. 933 (mn. 1, emphasis added). *See also* p. 937 (mn. 8: noting that this was "one of the main political problems that had to be resolved"). *See further* D. Ruiz Verduzco, 'The relationship between the ICC and the United Nations Security Council,' in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (OUP: 2015), p. 63 ("It is a given that decision-making in the Council is 'political' in nature").

¹¹² Bergsmo and Zhu, p. 937 (mn. 7). *See also* p. 938 (mn. 10: "Article 16 will be the vehicle for resolving conflicts between the perceived requirements of peace and justice where the Council assesses that the peace efforts need to be given priority").

over judicial proceedings.¹¹³

56. By contrast, as a judicial body, the Court is limited in its capability to make such political assessments, and has no mandate to do so. This is illustrated for example by comparing articles 53 and 58 of the Statute. While the Prosecutor may exercise a measure of discretion with regard to his *own conduct* within the narrow framework of articles 53(1)(c) and 53(2)(c)¹¹⁴—and this is reviewable by this Chamber under article 53(3)—there is no legal basis for such considerations to be subsequently taken into account once the Prosecutor has decided to initiate a prosecution under article 58.¹¹⁵ To the contrary, absent a deferral by the UN Security Council under article 16, the Court’s legal texts foresee that judicial proceedings will then take their course. In addition, the RSA’s reliance on procedures in its domestic law as potential impediments to its cooperation with the Court are not a relevant consideration. As the Prosecution stated at the Hearing,¹¹⁶ the RSA is duty bound under article 88 to put in place relevant procedure to facilitate observance of its Part 9 cooperation obligations.

D. CONCLUSION

57. For all the above reasons, the Prosecution maintains its position during the Hearing that the RSA has an unqualified duty to arrest Mr PUTIN should he enter its territory and surrender him to the ICC without delay.



Karim A. A. Khan KC, Prosecutor

Dated this 22nd day of June 2023

At The Hague, The Netherlands

¹¹³ Bergsmo and Zhu, pp. 937 (mn. 7), 938 (mn. 10).

¹¹⁴ See also ICC OTP, *Policy Paper on the Interests of Justice*, September 2007, pp. 3 (“only in exceptional circumstances will the Prosecutor [...] conclude that an investigation or a prosecution may not serve the interests of justice”), 8-9 (“The ICC was created on the premise that justice is an essential component of a stable peace. [...] In situations where the ICC is involved, comprehensive solutions addressing humanitarian, security, political, development and justice elements will be necessary. The Office will seek to work constructively with and respect the mandates of those engaged in other areas but will pursue its own judicial mandate independently [...] [T]he broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions”).

¹¹⁵ See e.g. Statute, art. 58(1).

¹¹⁶ Transcript, pp. 22-23.