

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/22

Date: 17 July 2023

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PRE-TRIAL CHAMBER II

Before:

Judge Rosario Salvatore Aitala, Presiding Judge

Judge Tomoko Akane

Judge Sergio Gerardo Ugalde Godínez

SITUATION IN UKRAINE

Public

Public redacted version of 'Response to submissions of a State Party under article 97
of the Rome Statute [REDACTED]'

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

The Office of the Prosecutor
[REDACTED]
[REDACTED]

Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

**The Office of Public Counsel
for Victims**

**The Office of Public Counsel
for the Defence**

States Representatives
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

PRE-TRIAL CHAMBER II of the International Criminal Court issues this Response to submissions pursuant to article 97 of the Rome Statute (the ‘Statute’), initiated by the Republic of South Africa (‘South Africa’). This Response provides guidance [REDACTED].¹

I. Procedural history and background

1. On 22 February 2023, the Prosecution seized the Chamber with two applications for warrants of arrest, classified as secret, *ex parte*, Prosecution only.²
2. On 17 March 2023, the Chamber issued two secret warrants of arrest for Mr Vladimir Vladimirovich Putin and Ms Maria Alekseyevna Lvova-Belova (the ‘Warrants of Arrest’).³
3. On 24 April 2023, the Chamber instructed the Registry [REDACTED].⁴
4. On 2 June 2023, the Registry transmitted to the Chamber a note verbale received from South Africa on the same day ‘requesting to engage in consultations with the Court in accordance with article 97(c) of the Rome Statute’ [REDACTED].⁵
5. Pursuant to the Chamber’s order,⁶ on 8 June 2023 a consultative hearing was held with representatives of South Africa, the Prosecution and the Registry (the ‘8 June 2023 Hearing’),⁷ following which the Chamber received written observations from both the Prosecution⁸ and South Africa.⁹ As repeated in its 30 June 2023 observations, South Africa requests the Chamber to find that (i) [REDACTED] is ‘incomplete for lack of a waiver of immunity in accordance with Article 98(1) of the Rome Statute’; and (ii)

¹ [REDACTED].

² [REDACTED]; [REDACTED].

³ [REDACTED].

⁴ See [REDACTED]; [REDACTED].

⁵ Registry transmission of a communication received from the Republic of South Africa in relation to Pre-Trial Chamber II’s Order dated 24 April 2023 (ICC-01/22-23-Conf-Exp), ICC-01/22-34-Conf-Exp, and confidential *ex parte* Annex I.

⁶ Order scheduling a hearing at the request of a State Party, 5 June 2023, ICC-01/22-35-Conf.

⁷ Transcript of hearing, ICC-01/22-T-001-SECRET-ENG.

⁸ Prosecution’s additional observations on article 97 consultations relating to the implementation of warrants of arrest by the Republic of South Africa, 22 June 2023, ICC-01/22-38-Conf-Exp, with confidential *ex parte* Annex 1.

⁹ Registry transmission of a communication received from the Republic of South Africa following the hearing of 8 June 2023, 9 June 2023, ICC-01/22-36-Conf, with one confidential Annex; Registry transmission of a communication received from the Republic of South Africa dated 27 June 2023, 27 June 2023, ICC-01/22-40-Conf, with one confidential Annex; Registry transmission of a communication received from the Republic of South Africa dated 30 June 2023, 30 June 2023, ICC-01/22-41-Conf, with confidential Annexes I and II.

‘problems exist in respect of this request for cooperation that impedes or prevents execution of the request by South Africa’.¹⁰

II. Preliminary matters arising from South Africa’s submissions at the 8 June 2023 Hearing

6. During the 8 June 2023 Hearing, after stating its commitment ‘to the rule of just international law and a global justice framework that ends impunity and does so fairly and in a consistent manner’, as well as to ‘championing the course of the International Criminal Court itself’, South Africa made submissions on the interpretation of articles 97 and 98(1) of the Statute.

7. The Chamber recalls that article 97 of the Statute reads as follows:

Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter. Such problems may include, *inter alia*:

- (a) Insufficient information to execute the request;
- (b) In the case of a request for surrender, the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant; or
- (c) The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State.

8. Based on the understanding that this provision does not contain ‘an exhaustive list of problems that might indeed arise’ and that ‘instances beyond the three listed ones that the Court can decide upon preventing and impeding the execution of requests exist’, South Africa presented specific submissions related to the request [...] to cooperate with the Court with regards to the arrest warrants. South Africa clarified that ‘[t]hese concerns are not related to the merits of the charges against both individuals nor as a means to sidestep [its] obligations in terms of the Rome Statute or [its] domestic legislation pertaining to this’; ‘[t]o the contrary’, South Africa wishes to ensure that ‘any actions expected of [it] are indeed fully aligned to the Rome Statute and that [its]

¹⁰ Annex I to Registry transmission of a communication received from the Republic of South Africa dated 30 June 2023, 30 June 2023, ICC-01/22-41-Conf, para. 20.

actions as a State Party [are] lawful, bearing in mind [its] often competing obligations under the Rome Statute and international customary law’.

9. The Chamber considers the submissions of South Africa as a valid trigger for consultations, as article 97 of the Statute does not limit the scope of the matters that a State may bring before the Court, insofar the consultation process has a nexus to a request for cooperation and the matter genuinely concerns problems which, in the view of the State, may impede or prevent the execution of the request. The wording ‘inter alia’ in article 97 of the Statute clearly indicates that the list contained therein is not exhaustive. The Chamber finds that the present consultation process is legitimate and triggers an assessment and an outcome, and it further notes that, since these consultations are confined to judicial matters, it is for the Chamber to address the matters raised by South Africa.

10. The first issue raised by South Africa consists in ‘whether or not the execution of a request might preclude a State Party from participating in or leading processes that are at the core of the community of nations, [i.e.] peace negotiations’. ‘[A]t a time when the world is engulfed by wars and conflicts and where international law is generally disregarded or selectively applied by the world’s most powerful states’, South Africa wishes to ‘get guidance from the Court in how the Court can assist in enabling peacebuilding processes’. In this regard, South Africa submits that ‘[t]he Statute as a whole acknowledges the interplay between peace and justice’, as evidenced by, for instance, article 16 of the Statute which ‘creates a mechanism [...] to defer prosecutions’ by vesting a power of deferral ‘with the United Nations Security Council [the ‘UNSC’]’, meaning ‘de facto’ that such power is ‘vested with five permanent members of the Council, three of whom are not State[s] Parties’. For South Africa, in the context of its ‘leading role in peacebuilding in the Ukraine war and where there may be a need for a deferral on the action by the Court on the President Putin matter, as part of the peacebuilding processes, Article 16 on its own cannot be relied on to achieve this, given the role played by P5 members’. Accordingly, it is South Africa’s view that ‘the ICC itself would need to use powers which [...] are incorporated in the Statute to facilitate peacebuilding processes currently underway’. South Africa also recalls its leadership role in peace processes in the African continent and the importance to host peace talks.

11. The Chamber notes that it is not within its powers to comment on South Africa's or any other States' political initiatives in 'peacebuilding processes'. The Chamber may only emphasise that the obligations of States Parties under the Statute must be abided by in all circumstances. Article 16 of the Statute confers to the UNSC the prerogative to defer an investigation or prosecution for a period of 12 months and request the Court to that effect, with a resolution adopted under Chapter VII of the UN Charter ('Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression'). The rationale underpinning this exclusive prerogative is rooted in the mandate of the UNSC under Article 39 of the UN Charter to determine the existence of any threat to international peace and security and decide what measures shall be taken accordingly. The Court, which is a judicial body, does not have the same mandate.

12. The second issue raised by South Africa arises from the fact that '[t]he Statute itself under Article 59 subjects [cooperation] requests to the judicial authority of nation states', as also confirmed by article 88 of the Statute. According to South Africa, the Statute thus 'accepts that national jurisdictions have a role to play' with regard to cooperation requests, and that 'states' judicial systems may, in their own decisions, make orders that preclude the execution of a request'.

13. Although South Africa clarified, in its 30 June 2023 note verbale, that it did not 'argue that its domestic law does not allow it to give effect to the warrant of arrest' for Mr Putin, but that '[r]ather it stated that it has indeed enacted legislation to give domestic effect to its international obligations under the Rome Statute', the Chamber nonetheless underlines that article 88 of the Statute provides that 'States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part'. Accordingly, issues concerning national judicial proceedings cannot *per se* relieve a State Party from its obligations under the Statute. [REDACTED]. This provision describes a fundamental obligation of the requested State, not a discretion.

III. Response of the Chamber to South Africa and guidance on the scope of article 98(1) of the Statute

14. Article 98(1) of the Statute reads as follows:

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.

15. South Africa submitted that the present case differs from *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (the ‘*Al Bashir* case’) in the *Darfur* situation, because that situation ‘had been referred to the Court by way of a UN Security Council resolution, which also placed an obligation on Sudan to cooperate with the Court’, thereby ‘essentially plac[ing] Sudan in a similar position to that of a State Party’ and ‘remov[ing] the need for the Court to obtain a waiver from Sudan’. South Africa therefore avers that ‘the Court has never dealt with a situation where an arrest warrant is issued for the Head of State of a non-State Party’. Accordingly, it is South Africa’s view that in the present case, where ‘there is no such referral and no similar obligation’, article 98(1) of the Statute would impose a procedural duty whereby, ‘[i]f a Head of State has immunities under customary international law, the Court will be required to obtain a waiver from the relevant state before it may request States Parties to cooperate in the form of carrying out a provisional arrest’. South Africa adds that, since ‘States that are not party to the Rome Statute are not bound by the provisions of the Statute’ pursuant to article 34 of the Vienna Convention on the Law of Treaties, ‘such states have not agreed to the terms of Article 27’ of the Statute relating to the irrelevance of official capacity in proceedings before the Court: ‘[t]herefore, customary international law relating to immunity for Heads of State continues to apply in relation to third states’.

16. The Chamber does not concur with the view of South Africa, as the issue under consideration is not whether non-States Parties are bound by the provisions of the Statute, but rather whether States Parties, and States that have accepted the jurisdiction of the Court under article 12(3) of the Statute alike, have an obligation to execute an arrest warrant regarding the Head of a non-State Party in compliance with article 27 of the Statute.

17. Article 34 of the Vienna Convention on the Law of Treaties, providing that ‘[a] treaty does not create either obligations or rights for a third State without its consent’, is therefore irrelevant to the matter at hand, since the Court is not seeking to impose obligations contained in the Statute to non-States Parties, but rather to proceed against

individuals who allegedly committed crimes under article 5 of the Statute on the territory of a State where the Court has jurisdiction.

18. South Africa, whilst acknowledging that in the *Al Bashir* case the Appeals Chamber ‘concluded that there are no customary international law immunities for Heads of State before international courts for the crimes covered by the Rome Statute’, states that ‘this is a controversial decision’.¹¹ Indeed, South Africa advances its own interpretation according to which ‘personal immunities of Heads of State do not exist before international courts that have jurisdiction’ but ‘continue to apply amongst states on the horizontal plane, meaning that states may not give effect to the international arrest warrants’. In such a scenario article 98(1) of the Statute would be applicable. In South Africa’s view, its interpretation is ‘in line with that of the International Court of Justice’ in the case of the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (the ‘*Arrest Warrant* case’),¹² where it held that ‘it was unable to deduce that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and that such a finding extends to immunities in national jurisdictions’, as was ‘reaffirmed in 2016 by the International Law Commission Special Rapporteur on immunity of states officials from foreign criminal jurisdiction’ who ‘concluded that national courts almost unanimously acknowledge that no limitations or exceptions are applicable to personal immunity’.

19. South Africa avers that ‘[d]ue to these different interpretations [...] a waiver under Article 98(1) is necessary to give reassurance to States Parties that they will not violate their international law obligations under customary international [law], but very importantly that they also do not render themselves vulnerable to any other consequences’. In particular, South Africa asserts that ‘[w]ithout the waiver, the threat from Russia is real. Statements have been made officially on behalf of representatives of the Russian government that make plain the consequences that will follow of any state that executes the request that has been handed down by this Chamber, a statement that execution of such an arrest would be akin to a declaration of war on Russia’. For South Africa, ‘[s]ince there is no Security Council referral, there is no obligation on a non-State Party to cooperate with the Court by waiving the immunity of their Head of

¹¹ See Appeals Chamber, *The Prosecutor v. Omar Hassan Ahmad al-Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019, ICC-02/05-01/09-397-Corr.

¹² International Court of Justice, Judgment of 14 February 2002 in the *Arrest Warrant* case.

State, which has the resultant effect that the Court must obtain a waiver from such a third state'; '[i]n the absence of a waiver from a non-State Party, States Parties to the Rome Statute are being requested to act in contravention of their customary international law obligations vis-à-vis that non-State Party'.

20. To address the core question underlying South Africa's request for consultations, namely whether article 98 of the Statute is applicable in the present case and, consequently, [REDACTED] could have been issued without first obtaining a waiver of Mr Putin's immunity, the Chamber will hereby address the overarching interpretation of article 27 and article 98 of the Statute.

21. At the outset, the Chamber recalls that, according to article 31 of the Vienna Convention on the Law of Treaties:

1. A treaty shall be interpreted *in good faith* in accordance with the ordinary meaning to be given to the terms of the treaty *in their context and in the light of its object and purpose*. [...] (emphasis added)

22. The object and purpose of the Statute can be derived from its Preamble:

[...] Recognizing that such grave crimes threaten the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole *must not go unpunished and that their effective prosecution must be ensured* by taking measures at the national level and by enhancing international cooperation,

Determined to put an *end to impunity* for the perpetrators of these crimes and thus to contribute to the prevention of such crimes, [...]

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the *most serious crimes of concern to the international community as a whole*,

Resolved to guarantee *lasting respect for and the enforcement of international justice* [...] (emphasis added)

23. The Chamber also notes article 1 of the Statute ('The Court'):

An International Criminal Court ('The Court') is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern [...]

24. The Chamber further notes article 27 of the Statute, pursuant to which:

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

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

25. Article 27 is placed in the third part of the Statute titled 'General principles of criminal law', and is one of the most important principles of the statutory framework, which must be considered together with the Preamble of the Statute when engaging in the interpretation of the Statute in light of its content and purpose. This provision removes any and all international law immunities of officials, including Heads of States, and binds to that effect States Parties, as well as States that have accepted the Court's jurisdiction, not to recognise any kind of immunity to any persons, be them nationals of States Parties or nationals of non-States Parties, as the Statute does not make any distinction. States Parties and States that have accepted the Court's jurisdiction have therefore the duty to arrest and surrender any person for whom the Court has issued a warrant of arrest, irrespective of their official capacity and nationality. In interpreting article 27(2) in the context of the Statute and in light of its object and purpose, it must be taken into account that, in the Court's system, the presence of the suspect is required for a trial to take place and any bar to the execution of an arrest warrant would inevitably convert into the paralysis of the proceedings and therefore into impunity, undermining the ability of the Court to ensure that the most serious crimes of concern to the international community as a whole do not go unpunished.

26. In the *Arrest Warrant* case, the International Court of Justice stated that:

[...] an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, [...] and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly

provides, in Article 27, paragraph 2, that “[i]mmunities 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*.¹³ (emphasis added)

27. While affirming that personal immunities operate in the relations between States, the International Court of Justice has indicated that the same does not apply to international criminal courts. In this respect it needs to be noted that, while there are no precedents of criminal proceedings before international courts having ever been halted because of the personal immunity of Heads of State, there is practice to the contrary.

28. It is the view of the Chamber that the International Criminal Court not only is indisputably international in nature, but since the moment the Rome Statute was signed and came into force, it has progressively evolved to the effect that it acts on behalf of the international community as a whole rather than merely on behalf of the 123 States Parties, amounting to about two-thirds of the international community. The UNSC, which is mandated with the maintenance of international peace and security, has recognised the role of the Court in different instances, particularly in the resolutions referring the situations in Darfur and Libya to the Court. Members of the UNSC, including its permanent members, also implicitly recognise the role of the Court on the occasion of reports of the prosecutor on Darfur and Libya, with none of them objecting to the role of the Court, its mandate, or its international character.

29. When the Court, as part of its mandate to investigate, prosecute, and adjudicate ‘the most serious crimes of concern to the international community as a whole’, including as in the present situation alleged violations of the Geneva Conventions of 1949 which are universally ratified, requests the cooperation for arrest of someone suspected of having committed such crimes, the duties a State Party has vis-à-vis the Court pursuant to the Statute supersede its horizontal relation with the State of the nationality of the sought person, even if that State is not a State Party. It is a variable-geometry system. While at the interstate horizontal level personal immunity operates according to the *par in parem non habet jurisdictionem* principle, it does not operate in the vertical relation between the Court and States Parties.

¹³ International Court of Justice, Judgment of 14 February 2002 in the *Arrest Warrant* case, para. 61.

30. When the Court discharges its judicial functions in order to realise the objectives of the Statute, it must address any actual or apparent incongruities between the different provisions in the statutory framework according to a literal and a contextual interpretation, in light of and consistently with the object and purpose of the Statute. It clearly stems from a systematic interpretation of the Statute that article 98 does not and could not undermine the fundamental principles codified in article 27, on which the entire Court's system stands. Article 98(1) does not supplement, modify or provide for exceptions to article 27(2). Any other interpretation would fatally render the obligations of States Parties senseless and the overall Court's system futile.

31. Unlike article 27(1), article 98(1) does not make reference to Heads of State. It is a purely procedural provision according to which the Court may take into account certain State's pre-existing obligations in the context of requests for cooperation. The wording and the context of article 98(1) suggests that it refers only to governmental activities which are typically conducted abroad and are protected by the safeguards on diplomatic immunity for certain officials and buildings. Moreover, when the provision mentions State immunity, it does not address the immunity of the Head of State, but that of the State *per se*, with reference to diplomatic premises, property, documents or other assets belonging to the State of whom the sought person is a national, which may be linked to the investigation and may not be seized without the consent of that State.

32. The Chamber recalls that the rationale for foreign state officials being entitled to raise personal ('diplomatic') immunity consistent with the 1961 Vienna Convention on Diplomatic Relations is preventing the use of prosecutions by national authorities to unduly interfere and limit the free exercise of the functions of State organs mandated with operating on the territory of another State and, therefore, impede the concerned State's ability to freely engage in international action. However, this danger does not arise with international courts which are totally and inherently independent of States, strictly impartial and act on behalf of the international community. Consequently, the very rationale of article 98(1) must be construed and applied consistently with the object and purpose of the Statute.

33. In the view of the Chamber, personal immunity of officials, including Heads of third States, is not opposable in proceedings before the Court, nor a waiver of immunity

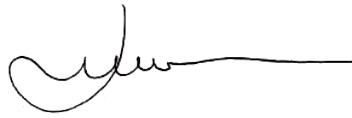
is required under article 98 of the Statute.¹⁴ The principle under article 27 of the Statute means that a State Party would not be acting 'inconsistently with its obligations under international law' by arresting and surrendering State officials, including Heads of State, irrespective of their nationality, where the Court finds to have jurisdiction. To the contrary, in the present circumstances should a State Party grant personal immunity to the President of the Russian Federation for the purposes of [REDACTED], it would be acting inconsistently with its international obligations under the Statute.

34. Conclusively, the Chamber appreciates that South Africa has stated its commitment to the cause of international criminal justice and has sought guidance from the Court in order to fully and transparently comply with requests for cooperation which are vital for the Court to realise its functions and ensure that the most serious crimes of concern to the international community as a whole do not go unpunished. The Chamber recalls that States Parties must operate in all circumstances in accordance with good faith, consistently with the object and the purpose of the Statute and with the expectation that each and all signatories will meaningfully fulfil the obligations agreed in the Statute for the benefit of humanity. Consequently, a State Party which modifies its internal law, or enters into agreements or arrangements of any kind with other States with the view to uphold immunities of certain State officials who are sought by the Court, would act inconsistently with its duties and would remain duty bound to abide by the obligations under the Statute. Cooperation in the arrest and surrender of suspects is particularly crucial for the functioning of the Court and must be lent to it in a timely manner, with due diligence and making use of all reasonable means available, with a view to fulfil the solemn pledge of justice that States have undertaken in the Preamble for 'millions of children, women and men [who] have been victims of unimaginable atrocities that deeply shock the conscience of humanity'.

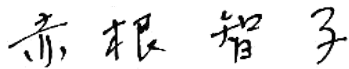
The Chamber hereby orders the Registry to notify this Response to South Africa and all other States Parties as relevant to their duties of cooperation, [REDACTED].

¹⁴ See Appeals Chamber, *The Prosecutor v. Omar Hassan Ahmad al-Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019, ICC-02/05-01/09-397-Corr, para. 5 ('Article 98(1) of the Statute does not itself stipulate, recognise or preserve any immunities. It is a *procedural* rule that determines how the Court is to proceed where any immunity exists such that it could stand in the way of a request for cooperation').

Done in English. A French translation will follow. The English version remains authoritative.



Judge Rosario Salvatore Aitala,
Presiding Judge



Judge Tomoko Akane



Judge Sergio Gerardo Ugalde
Godínez

Dated this Monday, 17 July 2023

At The Hague, The Netherlands