

Putin on Trial: The Reality of Heads of State Immunity before International Criminal Courts

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Abstract:

The prosecution of serving heads of state before international criminal courts is still very challenging even though most of these courts do not recognise immunities for international crimes. While the recognition of head of state immunity before national and foreign domestic courts for international crimes is supported by customary international law, the recognition of immunities before international criminal courts is determined by the statute creating the court.. Consequently, while the Rome Statute creating the International Criminal Court (the ICC) does not recognise any form of immunity, the Malabo Protocol creating the African Criminal Court (the ACC) recognised the immunity of senior serving state officials for international crimes. Currently, the ICC is investigating the situation in Ukraine which may lead to the possible arrest of President Putin of Russia and his senior officials for crimes against humanity and war crimes committed when Russia invaded Ukraine. The article argues that prosecuting a serving president like Putin by the ICC may be similar to the Al Bashir case because it will be difficult to arrest and surrender him to the Court and also the fact that Russia is not state party to the Rome Statute. Consequently, the waiving of immunity before an international court is not enough; cooperation by the home state of the offender and other states is needed in matters arrest and surrender to the prosecuting court.

Keywords:

Putin on trial; head of state immunity; the situation in Ukraine; rome statute; Malabo protocol

I. Introduction

Over the past decades, one of the debatable topics before international criminal courts has been whether heads of state are immune from international crimes committed while in office (Cassese, 2002). This heads of state immunity date back more than 100 years ago where heads of state were granted absolute immunity for any crimes committed while in office (Djibouti v. France, (2008) ICJ Report 177). According to the view of the Privy Council in (Chung Chi Cheung v. The King [1939] AC 160), heads of state are not subject to the legal process (Chung Chi Cheung v. The King [1939] AC 160). In fact, even after they are no longer in office, they were still considered immune from all criminal processes (Aversano, 2006). During this era, most states were governed by kings and queens, and it was practically impossible to prosecute a sovereign hence the saying that “the king can do no wrong” (Dube & Nhlabatsi, 2016). Consequently, most domestic and foreign national courts had no jurisdiction to indict and prosecute heads of state (Tachiona v. Mugabe 169 F Supp 2d 259, 318-7 (SDNY 2001). For example, after the First World War ended, they were no were no courts mandated to prosecute perpetrators of the war (Ferencz 1998). For this reason, Kaiser William II was never prosecuted as one of the culprit of the war because they were no

jurisdiction to prosecute aggression as a crime. They were also no laws governing aggression and head of state immunity was still very absolute (*Kahan v. Pakistan Federation*, 2 KB 1003, 1951). After the Second World War ended, many international tribunals disregarded immunity for international crimes.

Today, the ICC has no regard for head of state immunity before its jurisdiction (Article 27, Rome Statute, 2002). In fact, the ICC was created by treaty and states parties have consented to waive all the immunities of their respective state officials before its jurisdiction. However, the immunities of a non-state party officials cannot be waived before the ICC without its consent (Article 98, Rome Statute 2002).

With regard to the ACC, the personal immunity of senior state officials are recognised despite the international crimes committed (Article 46A bis, Malabo Protocol, 2014). Accordingly, heads of state are protected by two types of immunity namely; immunity *ratione materiae* or functional immunity and immunity *ratione personae* or personal immunity (Gaeta, 2009).

Vladimir Vladimirovich Putin is the current head of state of Russia since 2012. He was also the President of Russia from 2000 until 2008. In sum total, Putin has been the Russian President for 17 years, almost two decades in power (Wikipedia, 2022). On 24 February 2022, he invaded Ukraine.

As the supreme military commander, he ordered the Russian forces to attack Ukraine without any justification. The crisis in Ukraine is under investigation by the ICC and Putin could possibly be indicted for war crimes, the crimes of genocide and crimes against humanity before the ICC.

In this regard, the personal and functional immunities of President Vladimir Putin will be examined before the ICC and the ACC (Grosscup, 2004). Consequently, cooperation by the international communities is required to prosecute crimes such as the crime of genocide, war crimes, the crime of aggression and crimes against humanity (Article 5, Rome Statute 2002). Political leaders must assist the courts in matters of arrest and surrender of suspected individuals and senior officials to the court for actual prosecution. In other words, cooperation with modern international law must follow the indictment of senior state officials (Aghem, 2021).

II. Research Methods

The research methods used in this investigation is mainly empirical. However, theoretical techniques were also explored. The key methodological approach of this investigation will be case law, literature surveys, internet and other electronic sources from the ICC and AU libraries. In addition, the study will also rely on articles in order to further examine the issue of heads of state immunity and impunity with regard to senior state officials before the ICC and the ACC. Empirically, drawing inspirations from the Al Bashir debacle with the ICC allows this investigation to arrive at its conclusion.

III. Discussion

3.1 The Immunities of Vladimir Putin before the ICC

As the current head of state of Russia, Vladimir Putin is entitled to both personal immunity and functional immunity. Personal immunity (also known as status-based immunity) is attached to an office or status (Akande, 2004), this immunity is absolute while the state official is in office and comes to an end when the person is no longer in office or has abdicated his or her office (Murphy, 2014). State officials entitled to this immunity are completely immune from the jurisdiction of other states in both civil and criminal jurisdictions for acts, which they would have performed in an official capacity and equally those carried out in private capacity (*R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No.3)* [1999] UKHL 17, [2000] 1 A.C.147). Immunity *ratione personae* also shields the state officials for actions amounting to international crimes irrespective of whether the actions concerned were executed before the person assumed office or when in office (*Democratic Republic of Congo v. Belgium, I.C.J., Judgment*, 14 February 2002).

Furthermore, immunity *ratione personae* is granted to only high-ranking and top state officials in office (*Khurts Bat v. The Investigating Judge of the German Federal Court*, 2011). It protects the holders concerned against any act of the authority of another state, which will hinder the high-ranking officials from the performance of their duties (Akande, 2004). While functional immunity (also known as conduct based-immunity), usually protects state officials from all official acts performed on behalf of the state (Dugard, 2005). This functional immunity attaches to all official acts executed by the officials representing the state. Most state officials, including the head of state, are accorded functional immunity since the acts they perform are sovereign acts or *acta jure imperii* in their official capacity (Gilmore, 2012). This immunity exclusively covers the acts executed in an official capacity on behalf of the state and not the person (Bates Ed, 2007). This is the reason why the acts performed in this capacity escape foreign scrutiny because they are sovereign acts (Koivu, 2001).

Accordingly, an act qualifies as official based on the fulfilment of two requirements (Akande and Shad, 2011). These requirements are as follows: (i) the act must be executed in accordance with state policy or public policy with the acts expected to benefit the state or the general public and not the individual executing the act or his or her own private interest; and (ii) the act must be achieved using the apparatus of the state. Unfortunately, ICC has no regard for both immunities. Article 27 of the Rome Statute provides as follows:

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.

The possible outcome of the investigation in Ukraine will indict Putin for war crimes, aggression and crimes against humanity. Putin has been publicly accused by United States (US) President Joe Biden as a butcher and many Western leaders are holding him responsible for war crimes (Biden calls Putin butcher, 2022), the crime of aggression and crimes against humanity as

he has invaded Ukraine without any provocation and justification. According to Article 27 of the Rome Statute his personal immunity will not shield him from ICC prosecution. However, Russia is not a state party to the Rome Statute and therefore Article 98 is applicable to Putin as a head of state of a non-party state to the Rome Statute (States Parties to the Roman Statute, 2022). Moreover, just as in the *Al Bashir* case, it will be difficult if not impossible to arrest and surrender President Putin to the ICC without cooperation from Russia and the international community. In fact, Putin is regarded as the king of Russia given the fact that he has been their president for such a long time and he also has held strategic positions in the government before he became president.

3.2 The Situation in Ukraine

The ICC has decided to investigate the situation in Ukraine that escalates when Russian invaded Ukraine on 24 February 2022 (Situation in Ukraine, Investigation 02 March 2022). Ukraine is not a state party to the Rome Statute but has twice accepted the jurisdiction of the Court (Article 12(3), Rome Statute 2002). Initially, the ICC Prosecutor announced that he has decided to open investigations in Ukraine in accordance with Article 15(3) of the Rome Statute. In other words he opens the investigations *proprio motu* (Article 15(1) of the Rome Statute). He mentioned that he has reasonable grounds to believe that war crimes and crimes against humanity are being committed in Ukraine based on the on-going war with Russia (Article 15(3), Rome Statute 2002). However, few days after his announcement, many states parties to the Rome Statute referred the matter to the Prosecutor in accordance with Article 14(1) of the Rome Statute. The referral by states parties in the (*Situation in Ukraine*, N0.ICC-02/02, 2022, Para.8) authorises the ICC Prosecutor to:

[I]nvestigate any acts of war crimes, crimes against humanity and genocide alleged to have occurred on the territory of Ukraine from 21 November 2013 onwards, including any allegations of current and ongoing crimes occurring throughout the territory of Ukraine, thereby requesting the Court to exercise its jurisdiction with respect to the jurisdictional scope accepted by Ukraine.

The outcome of this investigation will either leads to an arrest warrants issue against President Putin and other Russian officials and they might be indicted for wars crimes, the crime of genocide and crimes against humanity committed in Ukraine in accordance with Article 5 of the Rome Statute, or ends the prosecution of Putin if there are no evidence of such crimes. However, it is obvious that war crimes and crimes against humanity are being committed in Ukraine by Russian forces and therefore, Putin will certainly be indicted for these crimes. Again, Russia is not a state party to the Rome Statute and Putin's immunity would likely be another issue to consider even though the Rome Statute does not recognise any form of immunity before the ICC (Article 27, Rome Statute 2002). As in the *Al Bashir* case (Aghem, November 2021); the ICC will have to rely on the government of Russia to cooperate with the Court. However, it will be very difficult for Russia to waive the immunity of Putin and cooperate with the Court. The ICC might also rely on those states parties which referred the situation in Ukraine to the Prosecutor and other European states to arrest and surrender Putin should he visit any of these countries which had ratified the Rome Statute. African states parties to the Rome Statute might hesitate to arrest Putin just like Al Bashir because of his head of state immunity should he visit any state in the African continent as the President of Russia. This is also because the ACC recognises the personal immunity of all serving head of state before its jurisdiction.

3.3 The Immunities of Putin before the ACC

Unlike the ICC that waives all forms of immunity accorded to both the serving and former senior state officials, the ACC recognises the personal immunity of serving state officials. Accordingly, Article 46A *bis* of the Malabo Protocol provides as follows:

No charges shall be commenced or continued before the Court [ACC] against any serving AU Head of State, or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.

Certainly, President Putin as the serving head of state of Russia is protected by immunity *ratione personae* if he is indicted of any crimes committed within the jurisdiction of the ACC. Therefore Putin may travel to Africa without any fear of his arrest and surrender to the ACC. However, Putin maybe arrest in Africa by an African state that has ratified the Rome Statute and consented to its jurisdiction. Moreover, the ACC has a wider jurisdiction with 14 international crimes (Article 28A of the Malabo Protocol), than the ICC whose jurisdiction is limited to only four international crimes (Article 5 of the Rome Statute, 2002). The ICC crimes are also prosecuted before the ACC (Article 28A, Malabo Protocol, 2014). Finally, Putin could be arrest and prosecute in Africa if he no longer the president of Russia for any the crimes committed within the jurisdiction of ACC. This because his immunity *ratione materiae* protects only official acts committed while he was in office as head of state.

3.4 The Reality of Heads of State Immunity: The Case of Putin and Al Bashir

Al Bashir was indicted by the ICC when he was the head of state of Sudan. Just as Russia, Sudan is not a state party to the Rome Statute which does not recognise head of state immunity before it jurisdiction (Article 27, Rome Statute 2002). Currently, Al Bashir is no longer the president of Sudan and has never been tried before the ICC despite the charges against him. Accordingly, the ICC has been unable to apprehend him. Consequently, even though the Rome Statute does not recognise immunity, Al Bashir personal immunity as the head of state of Sudan hindered his arrest and surrender to the Court.

In other words, the fact that head of state immunity is not recognised before the Court is not enough to prosecute a serving head of state. Cooperation by the home state and other states parties with the Court is necessary to successfully prosecute a serving head of state. In the case of Al Bashir, neither Sudan nor African states that are parties to the Rome Statute were willing to cooperate with ICC. Conversely the situation in Darfur, Sudan was referred to the ICC Prosecutor by UN Security Council Resolution 1593 of 2005 in accordance with Article 13(b) of the Rome Statute (UN Resolution 1593 2005, Para.1). Nevertheless, the situation in Ukraine was referred to the ICC Prosecutor by 41 states parties in accordance with Article 14(1) of the Rome Statute (*Situation in Ukraine*, N0.ICC-02/02, 202, Para.5).

The position of Russia and Vladimir Putin will be similar to that of Al Bashir. Should the ICC indict Putin for war crimes and crimes against humanity, Putin might escape ICC trial just like Al Bashir unless Russia cooperates with the Court. In other words, despite the fact that immunity is not recognise before international courts, the prosecution of serving heads of state, without corresponding cooperation regarding matters of arrest and surrender to the respective court, will be almost mission impossible. Some of the reasons for this are: (i) head state immunity is still recognised by domestic jurisdiction; (ii) heads of state immunity is recognised by foreign national criminal courts and customary international law; (iii) heads of state immunity before an international criminal court is determined by the statute creating the court and not

customary international law (Aghem, 2020). These are the reality of head of state immunity and the prosecution of serving heads of state. Consequently, cooperation with modern international criminal courts is a non-negotiable condition for the prosecution of senior state officials such as the head of state.

IV. Conclusion

Despite the creation of modern international criminal courts, the prosecution of senior serving state officials such as heads of state is still a challenge. The personal immunity of these officials hinders the prosecution processes. In other words, head of state immunity is still a fortress. The ongoing investigations in Ukraine will certainly lead to the indictment of Putin and his officials by the ICC for at least war crimes and the crimes against humanity. However, the successful prosecution or trial of Putin by Court will be a giant mountain to climb, and unless Russia cooperates in the prosecution processes, Putin just as Al Bashir may never stand trial before the ICC because of his personal immunity on the one hand and lack of cooperation by Russia and other states parties on the other hand.

It has been established that the decision whether to waive immunity or not, before a modern international criminal court depends on the statute creating the court and not customary international law (Arrest Warrant case of 11 April ICJ, 2002). For example, while the Rome Statute does not recognise heads of state immunity before the ICC jurisdiction, the Malabo Protocol recognised the personal immunity of serving heads of state before the ACC jurisdiction.

In other words, the trial of Putin and the reality of heads of state immunity before international criminal courts is subject to the following challenges: (i) Immunity before international criminal courts is determined by the statute creating the court and not customary international law; (ii) the prosecution of Putin as serving head of state of Russia by the ICC will require cooperation by Russian government, states parties to the Rome Statute and other states despite the fact that the ICC does not recognise immunity before its jurisdiction; (iii) head of state immunity is still recognised by foreign domestic criminal jurisdiction and customary international law; and (iv) finally, the Rome Statute only waives the immunity of states parties and states that have accepted its jurisdiction by consent and Russia is not a state party to the Rome Statute. Consequently, the notion that “the King can do wrong” might still be applicable before certain international criminal jurisdiction.

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