

ABSTRACT

Recently, much has been discussed about the Russian invasion on Ukraine. Along the many questions to be answered, is the matter whether Russian president Vladimir Putin and others responsible for this are going to face any consequences for it. One of the possibilities that the mainstream media has stated is the prosecution by the International Criminal Court (ICC). However, there are some problems to this solution, as the Statute of the International Criminal Court only applies to States which are part of it. The main issue that I plan to study in this research is whether State officials – such as presidents, ministers, army generals and so on – are immune to the jurisdiction of the ICC, in the situation that they are citizens of a State that is not a part of this Court.

While the above case is a good illustration of the topic, my research would not focus on one, but on several situations in which a State official would have to appear before the International Criminal Court because of their illegal acts. For example, in 2005, the UN Security Council approved the Resolution 1593, giving the ICC powers to investigate and trial those responsible for the violence in Sudan, and in 2011, the UN Security Council approved the Resolution 1970, conferring the same powers to the Court, but this time in connection to the Libyan situation. In both situations, there were doubts as to what exactly would happen to the State officials, especially if they travelled to another State which is also not a part of the International Criminal Court.

The doubts were based on the following situation: States which are part of the ICC (member States) have accepted the rule of Article 27 (2) of its Statute. This article says that there is no immunity from the jurisdiction of the Court, regardless whether they are a low-ranking or a high-ranking officer. There is also another rule, in Article 98 (1), saying that the Court may not request a non-member State to arrest an indicted and hand them to the Court if that would mean disrespecting the immunity that the States owe to each other (and such immunity indeed exists most of the times). One solution to these doubts would be to consider that Article 27 (2) of the Rome Statute is valid for all States, regardless whether they are members of the ICC or not. In other words, the lack of immunity before an international criminal tribunal would be considered as a rule of customary international law. Based on this, my research would focus on analysing this issue.

So far, this question has been subject to the scrutiny of many courts, domestic and international, and also by many authors. The reason for this is because, following the situations mentioned above, the chambers of the International Criminal Court needed to decide in seven different cases whether some States were right not to arrest and surrender the former Sudanese president, Omar Al-Bashir, to the Court. After judging in different ways, with different explanations, the Appeals Chamber was called upon to decide on the matter. As a result, in 2019, it decided that (in this case) Jordan acted wrongly by not arresting president Al-Bashir when it visited that country. The interesting part is that this decision accepted some of the arguments made in the judgments in those seven cases, and dismissed others. What is more, the decision has been both highly criticised and praised by scholars and practitioners. And in both cases, they use different arguments, have different starting points, give different value to other cases, etc.

How to make a sense out of all of this? It is possible to see many convincing arguments on both sides, but at the end of the day, when a State in the future is faced with the decision whether to arrest and surrender an indicted to an international tribunal, they need to have clear answers on this, and currently there are none.

While the goal of this project cannot be to provide for a solution to this problem, since the decision ultimately depends on States and international tribunals, I plan to perform a more in-depth analysis of what has been done and what has been said in this regard to try to draw some conclusions that could help with the debate on the topic. Among the activities I plan to do are connecting the arguments made in this topic with the goals of international criminal justice (deterrence and retribution), so that I try to find a common ground among them and possibly help the policy-makers and the judges with their task of understanding and applying the law as it currently is. In order to do that, I would need to analyse: a) what scholars wrote about it; b) judgments by national and international courts in this matter; c) the opinion of States about this (including the African States, which are of particular importance due to their strong opposition to the ICC); and d) whether the United Nations or other international organizations have made significant contributions to this debate.