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RESEARCH ARTICLE

NON-COOPERATION WITH THE INTERNATIONAL CRIMINAL COURT: LEGAL CHALLENGES AND GEOPOLITICAL REALITIES

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ABSTRACT

The quest for accountability regarding international crimes, which constitutes the fundamental aim of the Court within the sphere of international criminal law, necessitates the proactive engagement of the States Parties to the Rome Statute. The Court's reliance on these States to execute international arrest warrants is pronounced, particularly due to its absence of enforcement capabilities. Regrettably, this collaboration is often obstructed by geopolitical considerations. The Rome Statute explicitly requires state parties to detain individuals subject to international arrest warrants issued by the Court. Nevertheless, the efficacy of this requirement is undermined by the lack of specific and enforceable penalties for non-compliance. This shortcoming in sanctions seems to stem not only from the Court's legal precedents—most notably the Appeals Chamber, which has persistently declined to refer such violations to the Assembly of State Parties or the United Nations Security Council—but also from the nature of the proposed responses in cases of non-cooperation. Given the unique characteristics of the international legal system, it is unsurprising that these responses fail to exert any substantial punitive impact.

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INTRODUCTION

The obligation of states to cooperate with the International Criminal Court (ICC) is a cornerstone of the Rome Statute, essential for the effective prosecution of international crimes. Article 87 of the Statute mandates state parties to comply with the Court's requests, including the execution of arrest warrants. However, instances of non-cooperation have repeatedly challenged the ICC's ability to enforce its mandates, raising concerns about its authority and effectiveness. The recent case of Mongolia's failure to arrest Russian President Vladimir Putin during his visit on September 2, 2024, highlights the complex intersection of legal obligations and diplomatic realities. While the ICC's Pre-Trial Chamber II recognized this as a breach and referred the matter to the Assembly of States Parties, historical precedents from South Africa, Kenya, and Jordan suggest that meaningful sanctions remain unlikely. This lack of enforcement raises critical questions about the ICC's capacity to uphold international justice in the face of geopolitical pressures. This analysis explores the legal and practical consequences of non-compliance with Article 87, examining the ICC's jurisprudence, the discretionary nature of sanctions, and the broader limitations of international law in punishing state defiance. Mongolia's Non-Cooperation with the ICC: Legal and Geopolitical Implications.

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On September 2, 2024, Vladimir Putin, who is the subject of an international arrest warrant, visited Mongolia, a State Party to the Rome Statute of the International Criminal Court. This diplomatic visit sparked indignation among the political class, the international press, and those involved in international criminal justice, as the Mongolian authorities refused to fulfil their obligation to cooperate with the ICC. In accordance with the Rome Statute, the President of the Russian Federation should have been arrested and surrendered to the Court. On March 17, 2023, at the request of ICC Prosecutor Karim A. A. Khan, the Pre-Trial Chamber of the Court issued an international arrest warrant against Vladimir Putin. Mr. Khan attributes liability for war crimes under Articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Statute, specifically for the illegal deportation and transfer of Ukrainian children from occupied areas in Ukraine to the Russian Federation(1). While this issuance is noteworthy—given that prosecutions against a sitting head of state are relatively rare in international criminal justice—it raises questions about the effectiveness and future of such an arrest warrant. The execution of this warrant relies on the cooperation of States Parties to the Rome Statute, which are obligated to arrest and surrender individuals subject to an ICC arrest warrant. Given these obligations, Mongolia should have arrested Vladimir Putin on September 2, 2024. However, it instead prioritized its economic relations with the Russian Federation and, by extension, with China. This act of non-cooperation has provoked significant geopolitical reactions, both nationally and internationally (2), with widespread

condemnation of Mongolia's failure to uphold its duty of cooperation and the absence of international sanctions. Failure to comply with this obligation of cooperation, however, rarely results in any real sanctions—at least not in the punitive sense of the term. In their study of Article 87 of the Rome Statute, Claus Kress and Kimberly Prost observe that “to date, neither the Assembly of States Parties nor the Security Council have taken any action in response to a situation of non-cooperation reported by the Court”(3). This absence of sanctions effectively reduces international criminal cooperation to a good-faith obligation rather than a binding one. However, it should still be understood as having positive legal and geopolitical effects, if only through the mere existence of an international arrest warrant (I). The lack of sanctions for non-compliance stems not only from specific jurisprudential criteria, strictly overseen by the ICC Appeals Chamber, but also from the inherent nature of the international legal order, which does not allow for the effective punishment of States Parties to the Rome Statute (II).

The Legal Effects of the Arrest Warrant on International Criminal Law Cooperation: In public international law, it is understood that “without cooperation, there can be no peaceful coexistence of sovereign states, no respect for sovereign equality”(4). The International Criminal Court aligns with this principle, as it lacks its own police force. It relies heavily on the cooperation of the 125 States Parties to the Rome Statute, particularly for the arrest of individuals suspected of committing international crimes within its jurisdiction. This cooperation, which may be initiated at the outset of investigations into a situation, becomes fully realized when the ICC's Pre-Trial Chamber issues an international arrest warrant. Such a warrant imposes multiple obligations on States Parties, primarily the duty to arrest any suspect named in the warrant who is found within their territory (A). Beyond its legal implications, this tool also has diplomatic consequences—it can serve to geographically isolate the suspect, yet it may also place States Parties in delicate diplomatic situations (B).

The Creation of International Obligations Following the Issuance of an International Arrest Warrant: An international arrest warrant issued by the Pre-Trial Chamber of the International Criminal Court against a head of state holds particular significance for the effective prosecution of international offenses. The ICC is the only jurisdiction for international crimes that can override criminal immunities. Article 27(2) of the Rome Statute explicitly states that “special immunities or procedural rules relating to the official capacity of a person, under domestic or international law, do not prevent the Court from exercising its jurisdiction over that person.” The Court has two mechanisms to ensure the appearance of individuals under investigation: a summons to appear and an international arrest warrant. A summons is issued when the Pre-Trial Chamber deems it “sufficient to guarantee that [the suspect] will appear before the Court”(5). However, given the international scope of the Rome Statute's jurisdiction *rationemateriae*, this measure is rarely used, especially when dealing with high-ranking political or military officials. In this regard, Sylvain Sana observes that between 2002 and 2019, the ICC issued “more than thirty arrest warrants” compared to only “around ten summonses”(6). When dealing with a sitting head of state, an international arrest warrant is almost always the preferred course of action(7), as it compels States Parties to cooperate with the Court by arresting and surrendering the individual if they are

found within their territory. There are certain exceptions to this obligation, such as the principle of “*non bis in idem*” or cases involving competing arrest requests from other national or international jurisdictions. However, none of these exceptions are relevant in this case. The Mongolian authorities were therefore legally obliged, under Articles 86 to 89 of the Rome Statute, to arrest and surrender the Russian head of state to the Court. Despite a public reminder of this obligation issued by Päivi Kaukoranta, President of the Assembly of States Parties to the Rome Statute(8), Vladimir Putin was received with great ceremony in Ulaanbaatar.

The Geopolitical Implications and Limitations of an Arrest Warrant Issued Against a Sitting Head of State: The arrest warrant issued on March 17, 2023, imposes “extremely high reputational costs on Putin, relegating him to the same club of former state leaders to which Slobodan Milošević, Charles Taylor, Muammar Gaddafi, and Omar al-Bashir belong (or belonged)”(9). This warrant undeniably has geopolitical implications. First, it impacts the suspect's reputation, as it necessarily implies that there are “reasonable grounds to believe that this person has committed a crime within the jurisdiction of the Court”(10). Second, it is expected to have tangible effects on the suspect's mobility, as the arrest warrant theoretically prevents him from traveling to any of the 125 States Parties to the Rome Statute, which are legally obligated to arrest and surrender him to the Court. South Africa found itself caught between its obligation to cooperate with the ICC and the necessity of maintaining diplomatic relations, as it was scheduled to host Vladimir Putin during the BRICS summit in the summer of 2023, despite the issuance of the international arrest warrant. Before the visit was ultimately cancelled, the South African president publicly stated, “Russia has clearly indicated that any arrest of its sitting president would amount to a declaration of war. This would not be consistent with our constitution to risk engaging the country in a war with Russia”(11). This geopolitically sensitive situation echoes the case of Jordan, which “failed to fulfil its obligations by not arresting Mr Omar Al-Bashir (then President of Sudan) and not surrendering him to the ICC while he was on Jordanian territory to attend the League of Arab States Summit on March 29, 2017”(12).

The issuance of an arrest warrant against a sitting head of state inevitably places States Parties in a difficult position, as seen in the Al-Bashir case (13). It forces them to choose between the customary application of international law on immunities and their obligation to enforce an ICC-issued arrest warrant (14). In 2019, the Court reaffirmed that, under Article 27(2) of the Rome Statute, a State Party's ratification of the Statute excludes any form of criminal immunity, both in vertical relations (between States and the ICC) and horizontal relations (between States themselves)(15). However, the practical realities of international relations cannot be ignored. The mechanical application of the Rome Statute does not account for the geopolitical challenges faced by States, which, as seen in South Africa's case in 2023, must balance their obligations to international criminal justice with the imperatives of national sovereignty and diplomatic stability.

Consequences of Non-Compliance with the Obligation of Cooperation under Article 87 of the Rome Statute: Failures to comply with the obligation of cooperation—recognized since the initial negotiations of the Rome Statute as crucial to the ICC's effectiveness (16)—have been consistently identified

as major obstacles to the fight against impunity. The absence of any legal consequences for non-cooperation has significantly weakened the Rome Statute's cooperation regime, thereby undermining the effectiveness of the International Criminal Court (ICC) itself (17). Despite the Court's jurisprudence, judges have demonstrated pragmatism in acknowledging the diplomatic constraints faced by States, making it unlikely that sanctions will be imposed for future breaches (A). Moreover, the broader international legal order lacks robust enforcement mechanisms, as it generally does not provide for sanctions in the traditional sense (B).

The Low Probability of Sanctions for Non-Cooperation:

Following Mongolia's decision to welcome President Putin, it was uncertain whether the International Criminal Court (ICC) would respond with more than a general press release acknowledging the non-cooperation. However, Pre-Trial Chamber II, which reviewed the matter, issued a decision on October 24, 2024, officially referring Mongolia's failure to the Assembly of States Parties (18). This decision aligns with prior ICC case law addressing non-cooperation and directly contradicts Mongolia's argument that Vladimir Putin enjoyed criminal immunity (19). Nonetheless, there remains a possibility that the Appeals Chamber could overturn the decision, particularly in the context of its referral to the Assembly of States Parties. South African, Kenyan, and Jordanian precedents support this interpretation, as failures to comply with the obligation of cooperation in those cases did not ultimately result in any sanctions (20). In the Jordanian case, the ICC Appeals Chamber ruled—drawing from its decision in the Kenyatta case—that: > “Removal is not an automatic consequence of a finding of non-compliance with a request for cooperation, but rather a discretionary decision of the Chamber under Article 87(7)” (21). The Appeals Chamber determined that the Pre-Trial Chamber had abused its discretion by failing to establish a serious lack of cooperation sufficient to justify a referral. Furthermore, it noted inconsistent treatment between Jordan and South Africa, as the Pre-Trial Chamber referred Jordan's case primarily because it had not engaged in prior consultation with the Court to explore alternative solutions for Omar al-Bashir's arrest (22). Since this reasoning was not applied to South Africa, the Appeals Chamber reversed the referral, citing a double standard and an erroneous use of discretion (23). Thus, a mere failure to cooperate does not automatically warrant referral to the Assembly of States Parties or the United Nations Security Council. Instead, ICC jurisprudence has identified two cumulative criteria for such a referral:

- Non-compliance with a cooperation request by the concerned State, and
- A level of non-cooperation severe enough to prevent the Court from exercising its functions and powers (24).

In its October 24, 2024 decision, the judges clearly identified a lack of cooperation, thereby satisfying the first cumulative criterion. However, they did not explicitly assess the seriousness of the breach, which constitutes the second cumulative criterion. Pre-Trial Chamber II correctly observed that Mongolia's failure to act hindered the Court from exercising its functions and powers, yet it did not address the threshold of seriousness. Given that Jordan's mere abstention, criticized primarily for the lack of prior consultation with the Court, was insufficient to convince the Appeals Chamber, it is likely that the decision in the Mongolian case could also be

overturned on appeal. The factual similarities among various cases of non-cooperation, the absence of an explicit finding on the second criterion under Article 87(7), and the speculative nature of the Pre-Trial Chamber are reasoning (25) all contribute to the possibility of annulment. Even if the decision stands, it remains uncertain whether the Assembly of States Parties would impose a strict sanction for Mongolia's failure to comply.

Failure to Comply with the Obligation of Cooperation: A Challenge for International Law:

Vladimir Putin's visit to Mongolia on September 2, 2024, underscores the tension between a State Party's legal obligations under the Rome Statute and diplomatic realities. As a signatory to the Rome Statute, Mongolia was legally bound to execute the arrest warrant issued by the International Criminal Court (ICC). However, political considerations prevailed, leading to non-compliance. Under Article 87(7) of the Rome Statute, if a State Party fails to cooperate, the ICC may refer the matter to either the Assembly of States Parties (ASP) or the United Nations Security Council (UNSC). In this case, referring the matter to the UNSC would be largely symbolic, as Russia, a permanent member with veto power, would undoubtedly block any action. The ASP, on the other hand, retains the discretion to impose a sanction, though past practice suggests that the most likely outcome would be a formal remonstrance rather than concrete punitive measures. The 2016 "Toolbox" for Addressing Non-Cooperation, adopted by the ASP, provides only a limited response mechanism. It allows for a public statement condemning non-cooperation, but only if the ICC has formally ruled on the matter. Beyond this, the ASP's 2011 framework outlines procedural options such as emergency meetings and diplomatic negotiations, but does not specify any binding enforcement measures or sanctions. Ultimately, Mongolia's decision not to arrest Putin illustrates the weakness of the ICC's enforcement mechanisms, highlighting the dominance of political considerations over legal obligations in cases involving high-ranking state officials.

At first glance, the absence of sanctions for Mongolia's failure to arrest Putin may seem shocking, given the missed opportunity to reinforce accountability in the fight against impunity. However, this outcome must be understood within the broader context of international law, which operates on the principle of sovereign equality rather than a hierarchical enforcement system. The term "international sanctions" has been widely used—especially since February 24, 2022—but its legal meaning is often overstated. As Geneviève Bastid-Burdeau explains, the international legal order lacks true punitive sanctions; as such measures are inconceivable against a sovereign state in a system of legal equals.

Instead, what are often labelled as sanctions are merely diplomatic or economic measures, which lack the enforceability of domestic legal penalties?

Given these constraints, what realistic sanction could the International Criminal Court (ICC) impose on Mongolia?

- Expelling Mongolia from the Assembly of States Parties (ASP) would be disproportionate and counterproductive, undermining the ICC's broader mission.
- Financial penalties, such as increasing Mongolia's ICC budget contributions, could provoke unilateral withdrawal, further weakening the Court's legitimacy.

- A harsh punitive response, while demanded by media and advocacy groups, could discourage other hesitant states from ratifying the Rome Statute, ultimately harming the ICC's global influence.

Thus, the realistic course of action remains diplomatic engagement rather than coercion, reaffirming the inherent limitations of international criminal enforcement mechanisms. In reality, the only "sanction" for failing to execute an international arrest warrant is the diplomatic opprobrium directed at the non-compliant State Party. However, criticism of Mongolia must be considered in light of the geopolitical risks associated with arresting Vladimir Putin. Legal scholars Claus Kress and Kimberly Prost caution that while Article 87 of the Rome Statute mandates cooperation, it may be unreasonable to disregard exceptional circumstances. They suggest that, in extraordinary cases, the Court could acknowledge the practical impossibility of compliance under the principles of force majeure (Article 23) or distress (Article 24) of the International Law Commission's Articles on State Responsibility. Mongolia, a small state with a population of 3.5 million, directly borders Russia and faces immense geopolitical pressure. Expecting its authorities to arrest a sitting Russian head of state amid an on-going international conflict may be an unrealistic demand. A similar situation arose in 2023, when South Africa was explicitly warned by the Kremlin that arresting Putin would be considered a declaration of war. Thus, while non-compliance undermines the ICC's authority, it must be weighed against real-world political and security risks, which may leave some states with no practical alternative but to abstain from enforcement.

CONCLUSION AND SUGGESTIONS

The refusal of Mongolia to comply with its obligations under the Rome Statute by failing to arrest Vladimir Putin underscores the persistent challenges in enforcing international criminal justice. Despite the issuance of an ICC arrest warrant, the lack of effective enforcement mechanisms and the geopolitical realities surrounding powerful states severely limit the Court's ability to act. As seen in similar cases involving South Africa and Jordan, the ICC's authority remains constrained by the discretion of states and the absence of concrete sanctions for non-cooperation. While the Court can refer such matters to the Assembly of States Parties or the UN Security Council, historical precedents suggest that these measures often result in little more than diplomatic censure rather than tangible punitive consequences. However, Mongolia's actions must also be examined through a pragmatic lens. As a small state heavily reliant on its regional relationships, particularly with Russia and China, its decision to prioritize diplomatic and economic interests over legal obligations is not surprising. This case highlights the fundamental tension between state sovereignty and the objectives of international criminal justice, raising questions about the feasibility of enforcing arrest warrants against sitting heads of state, especially in politically sensitive contexts.

Suggestions

- The ICC must explore more effective strategies to ensure state compliance, such as creating clearer diplomatic and economic consequences for non-cooperation. The Assembly of States Parties could adopt stronger resolutions

that impose reputational or economic costs on non-compliant states.

- The ICC, along with influential member states and international organizations, should actively engage with non-compliant states to encourage cooperation through diplomatic incentives rather than relying solely on legal obligations.
- Given the potential for veto power to obstruct meaningful action, there should be renewed discussions on reforming the referral and enforcement mechanisms under Chapter VII of the UN Charter to prevent political deadlock in cases of serious non-compliance.
- Strengthening regional judicial mechanisms and cooperation frameworks within groups such as the African Union, ASEAN, or other regional bodies could improve the enforcement of ICC arrest warrants.
- In cases where ICC jurisdiction faces political or practical obstacles, complementary accountability mechanisms, such as hybrid tribunals or universal jurisdiction prosecutions in national courts, should be considered as viable alternatives.

Ultimately, without stronger enforcement mechanisms and greater political will, the ICC risks being perceived as institution that issues symbolic decisions without meaningful impact. Addressing these challenges requires a balanced approach that respects state sovereignty while reinforcing the credibility and effectiveness of international criminal justice.

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