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AS head of state of the Russian Federation, President Vladimir Putin enjoys personal immunity from the criminal jurisdiction of foreign states. According to the International Criminal Court ('ICC') in its *Mongolia Cooperation Decision*, this immunity should not have stopped Mongolian authorities from arresting the president on a visit to Ulaanbaatar in September 2024.

As a state party to the Rome Statute, Mongolia is obliged to comply with a request for the arrest and surrender of a person under Article 89(1). On 17 March 2023, the court's Pre-Trial Chamber II ('PTC II') issued an arrest warrant against President Putin for the war crimes of the unlawful deportation and unlawful transfer of children from Ukraine into Russia under Articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute. President Putin visited Mongolia on 3 September 2024 and was not detained by the local authorities. In response, the PTC II invited Mongolia to explain the failure to comply with its warrant.

Mongolia explained its failure to arrest President Putin in orthodox terms (at [18]). As Russia is not a state party to the Rome Statute, it is unaffected by the Statute's provisions – including Article 27(2)'s stipulation that immunities enjoyed by an individual due to their official capacity do not bar the court's exercise of jurisdiction over that person. Moreover, the personal immunity which Putin enjoys as head of state applies in relation to the ICC – without a waiver from Moscow, Ulaanbaatar was obliged to respect that immunity and not arrest the president. Lastly, the Rome Statute, a treaty, does not displace or override Mongolia's obligation under customary international law to respect the immunities of a non-state party to the Rome Statute, as codified in Article 98(1).

The PTC II gave Mongolia's submissions short shrift; in its view, the personal immunity of a national of a state not party to the Rome Statute does not affect the obligation of a state party to arrest that individual. The PTC II justified this conclusion in two ways. The first was to look at the object and purpose of the Rome Statute. Under Article 31(1) of the Vienna Convention of the Law of Treaties ('VCLT'), a treaty is to be interpreted in good faith in accordance with the ordinary meaning of its terms in their context, in light of the treaty's object and purpose. Having identified the Statute's object and purpose as ensuring accountability for serious international crimes, the PTC II concluded that an interpretation of Articles 27 and 98 which protected non-state party nationals from the execution of arrest warrants would critically undermine the ICC's functions (at [26]–[28], [34]). The second was to refer to the principle, purportedly endorsed by the International Court of Justice in *Arrest Warrant (DRC v Belgium)*, that immunities do not apply before

international criminal tribunals. The purpose of state immunity – including the personal immunities of heads of state, heads of government and ministers of foreign affairs – is to protect sovereign equality by barring states from impugning the acts of other states' officials through domestic criminal proceedings. As the ICC is an independent, international court, states do not need protection from its proceedings, therefore immunities do not operate before it (at [29], [30]).

The situation in Ukraine is not the first in which the ICC has dealt with a state party's failure to execute an arrest warrant against the head of state of a non-state party. In 2009 and 2010, the court issued arrest warrants against then-president of Sudan, Omar al-Bashir, for crimes allegedly committed in Darfur. The arrest warrants caused considerable foment, with several states parties refusing to arrest al-Bashir upon the president's visits to their countries. In decisions addressing the non-cooperation of Malawi, Chad and Jordan, the court concluded that, in principle, head of state immunity does not exist before the ICC. Superficially, *Mongolia Cooperation Decision* is consistent with this approach. However, there is an important procedural difference between the situations in Darfur and Ukraine. The situation in Darfur was referred to the ICC by the UN Security Council under Resolution 1593 pursuant to Article 13(b) of the Rome Statute. Although Sudan is not a state party to the Rome Statute, it is a member of the United Nations and is accordingly obliged to both "accept and carry out" the Security Council's resolutions and give effect to the obligations of the UN Charter in the event of a conflict of obligations, under Articles 25 and 103 of the UN Charter, respectively. By virtue of Resolution 1593's requirement that Sudan cooperate with the ICC, the Security Council "implicitly waived" the personal immunities of President al-Bashir, according to the PTC II in its *Democratic Republic of the Congo Cooperation Decision*. This *ratio* was affirmed in other al-Bashir-related cooperation decisions addressed to Uganda, Djibouti and South Africa, and is the favoured explanation for the disapplication of a non-state party's immunities for leading scholars (e.g. Akande [2009] 7(2) J.I.C.J. 333). However, this explanation does not apply to the situation in Ukraine, as the matter was referred to the court by other states parties under Article 13(a) of the Rome Statute. Russia's Security Council veto precludes any chance of the UN Charter obligations becoming relevant.

Accordingly, *Mongolia Cooperation Decision* can only be understood in one way: a claim by the PTC II that the Rome Statute itself renders non-state party immunities otiose. This conclusion is difficult – if not impossible – to reconcile with the fundamental principle of *pacta tertiis nocent nec prosunt*; a state's legal rights cannot be affected by a treaty to which it is not party. The PTC II abruptly dealt with this issue by stating that the question of whether Russia was bound by the provisions of the Rome Statute was

"irrelevant to the matter at hand, since the Court is not aiming to impose obligations contained in the Statute to non-States Parties" (at [19]). Although technically true, the PTC II's reasoning necessarily asserts that the Rome Statute affects Russia's legal interests; it is noteworthy that the Chamber appeared unwilling to even acknowledge this fact. Of greater concern is that the pithy dismissal of the *pacta tertiis* problem exemplifies a decidedly narrow reasoning which characterises the entire decision. From an orthodox perspective, the Rome Statute is, despite its laudable aims, just one treaty in a wider system of international law; the Statute does not exist in splendid isolation and, whilst it may function as *lex specialis* between its states parties, the Statute cannot claim a superior status vis-à-vis other sources of international law more generally. Yet *Mongolia Cooperation Decision* does not reason within this orthodoxy. For example, despite its *prima facie* relevance, the court does not once refer to the requirement in Article 31(3)(c) of the VCLT that other relevant rules of international law – such as the customary rules on immunities – are taken into account in the interpretation of a treaty. In addition to this omission, the PTC II makes robust statements to the effect that the Rome Statute's object and purpose places its obligations above those of other treaties and customary international law not merely between states parties to the Statute, but between state parties and non-state parties, such as the striking assertion that Mongolia's obligation to cooperate with the court's arrest warrants, "cannot be altered or superseded by any bilateral commitments that may conflict with the Rome Statute's objectives", including the obligation to respect the personal immunity of a foreign head of state (at [28]). To adopt Koskenniemi's description of the CJEU's approach to the primacy of Union law over other sources of international law, the decision is suggestive of "hermetic absolutism" ([2007] 1(1) E.J.I.L. 8). To secure the effectiveness of the Rome Statute's admirable object and purpose, other rules of international law are to be displaced rather than accommodated in the Statute's interpretation, notwithstanding the essential horizontality of international law.

Since its *Mongolia Cooperation Decision* was handed down, the ICC has issued an arrest warrant against Israeli Prime Minister Benjamin Netanyahu and the Prosecutor has announced that an arrest warrant will be sought against Myanmar's Acting President Min Aung Hlaing. Both Netanyahu and Min Aung Hlaing currently enjoy personal immunity in international law. Neither Israel nor Myanmar are states parties to the Rome Statute. As the situations in Palestine and Bangladesh/Myanmar were not referred to the ICC by the Security Council and considering in Netanyahu's case the likelihood of travel to ICC Member States, we can expect the court to adopt more decisions in line with the *Mongolia Cooperation Decision* in due course. However, affirming the decision has the potential to sour

already strained relations between the court and certain states which have expressed disapproval of the Netanyahu arrest warrant. One state party – France – has already, implicitly, rejected the PTC II's decision in a Foreign Ministry statement on 27 November 2024 intimating that Netanyahu would not be arrested by French authorities due to his personal immunity. A cynical observer may well ask: why should the ICC, already threatened by dissatisfied states, place another target on its back by wedding itself to an unorthodox jurisprudence? An optimistic observer, by contrast, would note that there has always been a thin line in international law between the breaking of old rules and the making of new ones. Indeed, the very existence of the international criminal legal project is premised on what was once a fundamental unorthodoxy – that an individual could be responsible for crimes under international law. Time will tell whether the cynic or optimist is vindicated.

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