

Lost Illusions, or How the International Criminal Court has become a legal nonentity*

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A strive for justice and a desire to bring the powerful to liability for crimes against public good and humanity is the idea that has always united people. Yet not all embodiments of this idea are worth existing, the ICC being the case. Legal deficiencies of its constitutional document, the Rome Statute, in terms of its internal contradictions and incompliance of its provisions with the UN Charter, its political bias, selectiveness of its 'justice', unlawfulness of issuing arrest warrants for heads of sovereign states which are not parties to the Rome Statute, notwithstanding the fact that such warrants are ignored by many countries, as well as the fact that the ICC, in essence, has transformed from an international justice body into a tool of legal struggle, clearly shows its complete failure. In this respect it shall fall into the oblivion, while its judges, prosecutors and other officials who took unlawful decisions may and shall be prosecuted for crimes under the Russian criminal law. In the author's opinion, Russian lawyers should voice their comprehensive and well-based professional criticism of the ICC decisions at all forums, present international legal position of Russia in respect of the Special Military Operation, the Ukrainian conflict and other relevant challenging issues to the global legal community, media and people in different countries. Moreover, taking into consideration deficiencies in the ICC's activities the interested parties could consider a possibility of establishing another international criminal court, which will be spared of them. This Court's constitution shall be based on the established rules of international law, and its jurisdiction may be extended to the crimes of genocide, war crimes, crimes against humanity, and terrorist attacks.

Keywords: the International Criminal Court, international criminal justice, the UN Charter, immunities of the Heads of State, aggression, the UN Security Council, a legal war.

Quod licet Iovi, non licet bovi

The world keeps changing, and not always for the better. We have witnessed the rapid degradation of many supranational legal structures, which have fallen victim to their dependence on the will, funding and values of the so-called collective West. This is true, for instance, for the International Criminal Court (the Hague Criminal Court). The good intentions which guided those who established it two decades ago have evidently paved the road to hell. The further, the more so.

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Deplorable as it may seem, it is more than natural. Suffice it to remember the history of this legal institution, which has gone a short way from alleged demand to full uselessness on the edge of absurdity, bias and cynicism. *It is important to understand what its current actions are conditioned by, how to react to them and what, in the end, shall replace this international body, which has compromised itself so quickly.*

1.

It all started ceremoniously, so to say. A craving for justice has always united millions of people on Earth. History holds examples of falling empires, whose rulers at some point went euphoric due to their own lawlessness, only to be swept away in the blink of an eye by the popular wrath. Yet it is usually difficult to bring the powerful of this world to justice for crimes against the public good and humanity. That is why supranational judicial authorities, not being subject to any national government, are endowed with this task.

Establishment of international criminal tribunals after the Second World War was the first attempt in history to assert the supremacy of law on a global scale, to achieve justice and real equality beyond state, economic and ideological borders. The Nuremberg and Tokyo tribunals committed themselves to the task which the courts of Germany, Japan and their former allies could not have accepted the responsibility for.

When the work of the international tribunals ended, legal scholars from various countries proposed the establishment of a permanent international judicial body, which could bring to justice those to blame for the most violent crimes against humanity. The lingering Cold war impeded these plans. It was only on the cusp of the 1990s that the idea of a permanent international criminal court was revived¹, and in 1998 in Rome the Statute of the International Criminal Court was signed as its charter document.

The ICC was established as an independent international organisation. Its main body is the Assembly of States Parties, which includes all member states (125 at present). The Assembly has a Bureau which shall assist the Assembly in the discharge of its responsibilities (art.112(3) of the Rome statute). The main function, i.e. bringing to justice those who committed the 'most serious crimes of concern to the international community as a whole', is vested in the ICC. The Court consists of 18 judges, elected by the Assembly, the office of the Prosecutor, elected by the same body, and the Secretariat. The judges function as part of the Pre-Trial Chamber, which initiates criminal proceedings and issues arrest warrants; the Judicial divisions, which consider the case on the merits; the Appeals division, which reviews claims in respect of acts and decisions of the lower divisions; and the Presidency, which *inter alia* is responsible for the 'proper administration of the Court, with the exception of the Office of the Prosecutor' (art 38(3) of the Rome Statute). The head of it is the President.

¹ See: *Schabas W. A.* Chapter 1: The dynamics of the Rome Conference in *The Elgar Companion to the International Criminal Court*. Ed. by M. deGuzman and V. Oosterveld. Cheltenham; Northampton: Edward Elgar Publishing Limited, 2020. P. 4–5. See also: Summaries of the Work of the International Law Commission: Draft code of crimes against the peace and security of mankind (Part II) — including the draft Statute for an international criminal court // International Law Commission. Available at: https://legal.un.org/ilc/summaries/7_4.shtml (accessed: 03.02.2025); International criminal responsibility of individuals and entities engaged in illicit trafficking in narcotic drugs across national frontiers and other transnational criminal activities: Establishment of an international criminal court with jurisdiction over such crimes // World Legal Information Institute. Available at: <http://www.worldlii.org/int/other/UNGA/1989/52.pdf> (accessed: 03.02.2025).

Under art.119 of the Statute, the Court may, on its own motion, determine the admissibility of any case. Thus, the Court is the only and supreme instance in disputes it is involved in, i.e. it performs as a judge in its own case (which, in fact, contradicts the *nemo iudex in propria causa*² principle). All judges and other employees of the ICC have international immunity and privileges on the territories of the member states, including the Netherlands, where it is seated.

The ICC has jurisdiction over the most serious crimes, namely genocide, crimes against humanity and war crimes. Yet its jurisdiction is not universal and covers only crimes committed on the territory of its member states or by citizens of its member states.³ Apart from the abovementioned controversial points, the Court's Statute has contained other provisions from the very beginning which in many cases could render impossible the enforcement of its decisions (and they have, as we will see later).

In any case, in 2002 the ICC Statute was ratified by the required number of member states and came into force on July 1 of the same year. Back then, the situation in the world was absolutely different from what we can see now. It was clear that approval of the Rome Statute (like any other international treaty) required representatives of more than a hundred nations to seek mutually acceptable wording, striving for enhancement of the cooperation in this sphere. Consistently advocating full compliance with the UN Charter, the countries assumed that any contradictions could be gradually eliminated with a focus on the key principles of the international law enshrined in the UN documents. Taking this into consideration, the Russian Ministry of International Affairs approved the execution of the Rome Statute in the name and on behalf of the Russian Federation in 2000.

Yet later the Hague Criminal Court displayed its political bias. The ICC itself committed grave violations of the acknowledged principles of international law. Against this political and legal background, in 2016 Russia decided not to be party to the Rome Statute⁴. The U.S. and several other countries acted in the same way. Taking into consideration that China did not sign the Rome Statute, three out of five permanent members of the UN Security Council are not parties to it.

2.

The global community placed serious hopes on the Hague Criminal Court at first. Yet at the very moment of its establishment it was quite clear that the legal structure itself looked quite strange. Its charter documents initially contained a whole row of inconsistencies, the main of them being clear discrepancies with most important

² "No one is judge in his own case" (In Latin).

³ Many publications have been written about the ICC. For the most recent publications see: The Past, Present and Future of the International Criminal Court. Ed. by A. Heinze, V.E. Dittrich. Brussels: Torkel Opsahl Academic EPublisher, 2021. XXI, 783 p.; Commentary on the Law of the International Criminal Court: The Statute. Vol. 1. Eds.: M. Klamberg, J. Nilsson, A. Angotti. 2nd ed. Brussels: Torkel Opsahl Academic EPublisher, 2023. 1104 p.

⁴ See: Order of the President of the Russian Federation No. 361-rp dated 16.11.2016 "On the intention of the Russian Federation not to be party to the Rome Statute of the International Criminal Court" // President of Russia. Available at: <http://www.kremlin.ru/acts/bank/41387> (accessed: 04.02.2025). Also see the communication of the government of the Russian Federation to the UN Secretary General received 30.11.2016: Rome Statute of the International Criminal Court: Rome, 17 July 1998: [status as at: 14.02.2025 10:15:47 EDT] // United Nations Treaty Collection. Available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en#9 (accessed: 14.02.2025).

applicable rules of international law – primarily with its cornerstone, the UN Charter, which contains the fundamentals of the law and order in the post-war world. The UN Charter is to be consulted when developing universal treaties between states, as well as numerous regional and bilateral agreements.

Article 103 of the UN Charter stipulates that its provisions shall prevail over provisions of any other international treaty. According to article 38 of the Statute of the UN International Court of Justice the main source of international law are international treaties (general and special), international conventions, general legal principles.

Yet the Rome Statute provided for its own hierarchy of sources of international law. According to article 21 of the Rome Statute, the Hague Court shall apply, in the first place, ‘this Statute, Elements of Crimes and its Rules of Procedure and Evidence’; and only in the second place (only where appropriate), ‘applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflicts’.

Thus, the internationally established principles of international law under the UN Charter may be applied by the Hague Court under the 1998 Rome Statute only *in the second place*, after the Statute and the documents adopted by the Assembly and the Hague Court itself. This way the established quasi-judicial mechanism was given a leeway in the form of the right to ignore the UN Charter and the legal norms enshrined in it. In fact, this distortion of the balance of the applicable international law in the Rome Statute is inadmissible for any sovereign state, including Russia as a permanent member of the UN Security Council.

Besides, the notion of ‘general principles of the criminal law’ used in the Rome Statute is in its essence improper, as it does not differentiate between the national criminal law (the US, for example) and the international law applicable to combating cross-border crime.

All this ‘salad bowl of principles’ was obviously not in compliance with the national interests of the Russian Federation (or any other sovereign state). Contrary to the identification sometimes applied in the legal science one should differentiate between the Rome Statute, the charter document of the ICC, and the treaties entered into by the USSR and its allies (other superpowers) during the Second World War, starting from the Moscow declarations signed on 30 October 1943. More so that a reference to this Declaration of the four major states can be found in article 106 of the UN Charter. The Agreement entered by and between the governments of the USSR, the USA, Great Britain and France to try the Nazi leaders and organisations accused of war crimes at the London Conference on 8 August 1945 is fundamentally different from the charter of the Hague Criminal Court as well. In terms of their international legal status, by virtue of the UN Charter, the abovementioned documents are *above* any document passed by the Hague Criminal Court.

Yet those who influenced the development of the ICC were not the least concerned. For instance, flouting of this fundamental political and legal distinction (amalgamation of the former and the latter under the umbrella term ‘international criminal justice’) characterised the pro-NATO prosecution of the Serbian leaders in the framework of the so-called International tribunal for prosecuting persons responsible for serious violations of international humanitarian law committed on the territory of the former Yugoslavia after 1991. Russian studies of international law have never admitted this amalgamation⁵. Examples of such inconsistencies are numerous.

⁵ See, for example: International Law and the Fight against Crime / pref. A. V. Zmeevskii, Yu. M. Kolosov. M., 1997. (In Russian)

3.

As a result the ICC judicial practice raised legitimate questions, not only from legal scholars. As time went on the ICC was increasingly demonstrating its dependency on political and ideological factors which in fact shall be excluded from its practice. An obvious inclination was developed towards condemning or pardoning only in the interests of the so-called collective West on the basis of its much favoured double standards. Curious as it may seem, this involved currying favour with a number of states (primarily the USA) which were quite dismissive towards the ICC and its practice. It's understandable, as in the West there is a tough hierarchy of relations which displayed itself recently in the case of Benjamin Netanyahu, Yoav Gallant and others, when the European countries being parties to the ICC Statute at first voiced their intention to prosecute Israeli leaders but after a tough rebuke from Washington started talking about the 'exceptional nature' of the case and refused to prosecute the Israeli officials. Strictly speaking, after that the ICC should have chosen to dissolve itself, as it is impossible to imagine a greater contempt.

In general, according to the ICC site, it has considered 33 cases in more than 20 years; some cases are under consideration, including those in respect of several political and military leaders from Africa (the Democratic Republic of the Congo, Uganda, Sudan, Rwanda, Kenya, Libya, Côte d'Ivoire, Mali, the Central African Republic). They are accused of tortures, rape, robberies, massacre, kidnapping, destruction of peaceful settlements, abuse of prisoners of war and civilians, including women and children.

Several persons involved in the trials were in fact condemned and imprisoned, primarily immediate perpetrators in a limited number of countries, officials who were testified against. However, a number of high-ranking war criminals went unpunished. The Hague Criminal Court demonstrated discriminatory blindness and hearing loss in their respect.

It is also evident that for many years the ICC has thoroughly considered the cases of indisputably violent yet quite ordinary leaders of ethnic gangs, serial killers and rapists. Up to their elbows in blood of their compatriots, they still were not powerful political figures posing danger to the *whole* humankind. A question arises: are these 'warlords', leaders of conflicting African tribes and other criminals real 'international criminals' the *national* justice cannot cope with?⁶ Was it really necessary to establish such high-priced behemoth as the ICC to restrain and bring them to liability?

It is no coincidence that former Chair of the African Union Commission Jean Ping told journalists that the Court is a toy of declining imperial powers⁷. Opinions spread that apparently the ICC was only interested in prosecuting Africans who confronted the Western influence, and used Africa as a laboratory for testing international criminal justice⁸. It should not go unnoticed that back in 2017 the African Union passed a resolution calling on all African countries to cease cooperation with the ICC in terms of enforcing

⁶ W. Schabas writes about the ICC as follows: "Only few concluded cases matter. Many of those accused were insignificant persons in little-known conflicts. With sentences of 12 or 13 years in prison it is hard to believe that the Court deals with 'those who bear greatest responsibility' for 'most serious crimes of concern to the international community as a whole'" (*Schabas W. A. Op. cit. P. 19*).

⁷ *Bosco D. Why is the International Criminal Court picking only on Africa?* (March 29, 2013) // The Washington Post. Available at: https://www.washingtonpost.com/opinions/why-is-the-international-criminal-court-picking-only-on-africa/2013/03/29/cb9bf5da-96f7-11e2-97cd-3d8c1afe4f0f_story.html (accessed: 04.02.2025).

⁸ See: *Bachmann S.-D. D., Sowatey-Adjei N. A. The African Union-ICC Controversy Before the ICJ: A Way Forward to Strengthen International Criminal Justice?* // *Washington International Law Journal*. Vol. 29. 2020. No. 2. P. 249.

arrest warrants for African suspects and to collectively withdraw from the ICC⁹. The fact that the ICC is biased and acts in the interests of a number of Western countries refusing to prosecute persons from the NATO countries was recognised by representatives of various continents. For this reason in particular Burundi and the Philippines declared their withdrawal from the Statute¹⁰.

Another thing has attracted attention as well. For an 'unknown' reason the ICC failed to consider events in the countries where justice, peace and humanism were nothing short of a daydream yet where the US and their NATO allies were advancing their interests. Thus, for almost twenty years (from 2001 to 2021) the NATO forces were engaged in active military operations on the territory of Afghanistan, the state which joined the ICC in 2003. According to media reports during all this period they committed actions which could be regarded as crimes of war¹¹. Yet the ICC never did that.

Another example: in November 2017 the then-Prosecutor of the ICC, Fatou Bensouda, applied to the ICC Pre-Trial Chamber for a permission to initiate investigation of crimes against humanity and war crimes committed by the Afghan opposition group 'Taliban'*, war crimes committed by the Afghan government security forces, and war crimes committed on the territory of Afghanistan starting on 1 May 2003 by US military personnel and CIA officers. After eighteen months of consideration in April 2019 the Pre-Trial Chamber rejected the request, stating that 'an investigation into the situation in Afghanistan at this stage would not serve the interests of justice'¹². The Prosecutor appealed to the Appeals Chamber, which in March 2020 reversed the decision¹³, thus enabling the Prosecutor to initiate preliminary investigation, *inter alia* in respect of war crimes committed in Afghanistan by US military personnel and citizens.

This was followed by a harsh reaction of the US, which is not a member of the ICC, to the very idea of bringing their military personnel and citizens to liability in an international tribunal. In June 2020 US President Donald Trump declared that the ICC's assertion of jurisdiction over U.S. military, intelligence, and other personnel in the course of investigating actions allegedly committed by those personnel in or relating to Afghanistan 'constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States'¹⁴. Invoking authorities provided in US law the President signed Executive Order 13928, under which the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, is tasked with identifying any 'foreign person' that, in particular, has directly engaged in the ICC's efforts to investigate, arrest, detain, or prosecute any United States personnel without the consent of the United States, or has materially assisted, sponsored, or provided

⁹ Ibid. P. 249–250.

¹⁰ The Philippines' membership in the ICC comes to an end // Coalition for the International Criminal Court. Available at: <https://coalitionfortheicc.org/news/20190315/philippines-leaves-icc#:~:text=As%20of%2017%20March%2C%20the,after%20Burundi%20withdrew%20in%202017> (accessed: 04.02.2025).

¹¹ For war crimes in Afghanistan in more detail, see: *Ning Y.* How US evades responsibility for war crimes in Afghanistan // Global Times. Available at: <https://www.globaltimes.cn/page/202109/1235240.shtml> (accessed: 14.02.2025).

¹² Pre-Trial Chamber II: Situation in the Islamic Republic of Afghanistan, No. ICC-02/17 // International Criminal Court. Available at: <https://www.icc-cpi.int/court-record/icc-02/17-33> (accessed: 04.02.2025).

¹³ The Appeals Chamber: Situation in the Islamic Republic of Afghanistan, No. ICC-02/17 OA4 // International Criminal Court. Available at: https://www.icc-cpi.int/CourtRecords/CR2020_00828.PDF (accessed: 04.02.2025).

¹⁴ International Criminal Court: U. S. Sanctions in Response to Investigation of War Crimes in Afghanistan // Congressional Research Service. Available at: <https://crsreports.congress.gov/product/pdf/IN/IN11428> (accessed: 04.02.2025).

* Organization is recognized as an extremist in the Russian Federation.

financial, material, or technological support for, or goods or services to or in support of, any ICC efforts described above. Such persons can be subject to having property blocked if that property is under U.S. jurisdiction; in addition, they can be denied entry into the US¹⁵. On 2 September 2020 the US imposed personal sanctions¹⁶ on the Chief Prosecutor of the ICC, Fatou Bensouda, and Phakiso Mochochoko, the ICC's Director of jurisdiction, complementary and cooperation division¹⁷.

Eventually, despite the newly obtained right to initiate investigation of war crimes and crimes against humanity committed in Afghanistan the new ICC Prosecutor has not yet charged any US military personnel who participated in the hostilities in Afghanistan.

Five years later, having returned to office Donald Trump was quick to reiterate his position towards the ICC. And he didn't limit himself to condemnation. On 6 February 2025 the US President signed an Executive Order which imposed sanctions against the

¹⁵ International Criminal Court: U. S. Sanctions in Response to Investigation of War Crimes in Afghanistan // Congressional Research Service. Available at: <https://crsreports.congress.gov/product/pdf/IN/IN11428> (accessed: 04.02.2025)..

¹⁶ Political and legal scholars have not reached consensus over the term 'sanctions' (see: *Pyatibratov I. S.* Sanctions and unilateral restrictive measures: The problem of delineation of terms and identity of phenomena Gumanitarnye nauki. Vestnik Finansovogo universiteta. 2020. Vol. 10, no. 6. P. 64. (In Russian)). Nevertheless, the use of "sanctions" in respect of restrictive measures taken by states unilaterally without a respective decision of the UN Security Council has been repeatedly criticised by some scholars (see, for instance: *Ryzhova M. V.* Economic sanctions in modern international law PhD in Law thesis abstract Kazan. P. 8. (In Russian); *Kritskiy K. V.* The terms "international sanctions" and "unilateral restrictive measures". Moskovskii zhurnal mezhdunarodnogo prava. 2016. No. 2. P. 2. (In Russian); *Kritskiy K. V.* Sanctions and unilateral restrictive measures in modern international law PhD in Law thesis Moscow. P. 10. (In Russian); *Alekseeva D. G., Alimova Y. O., Barzilova I. S.* Law under sanctions / M. V. Mazhorina, B. A. Shakhnazarov (eds). Moscow, Prospekt Publ. P. 93–94. (In Russian). This criticism is justified: while the term "sanction" is viewed as a coercive measure applied in the case of an offence, i.e. a lawful measure, restrictive measures applied by states unilaterally without a decision of the UN Security Council are not always lawful. In this respect, it is at least inaccurate to call the latter 'sanctions' in the legal sense. It is no coincidence that coercive measures adopted by the UN Security Council are often called 'sanctions' in UN documents, while regimes created by these measures are called 'sanctions regimes' (see: Document A/56/10: Report of the International Law Commission on the work of its fifty-third session (23 April – 1 June and 2 July – 10 August 2001) // Yearbook of the International Law Commission. 2001. Vol. II. P. 2. p. 78; Resolution 2170 (2014), adopted by the Security Council at its 7242nd meeting, on 15 August 2014 (S/RES/2170). Available at: https://digitallibrary.un.org/record/777420/files/S_RES_2170%282014%29-RU.pdf?ln=ru (accessed: 06.03.2025); Subsidiary Organs of the United Nations Security Council // Fact Sheets. Available at: https://main.un.org/securitycouncil/sites/default/files/subsidiary_organ_series_7sep23_.pdf (accessed: 06.03.2025)). On the contrary, in certain UN acts the term 'sanctions' is not used to refer to unilateral coercive measures (see, for instance, Resolution "Human rights and unilateral coercive measures", adopted by the General Assembly on 19 December 2016 (A/RES/71/193). Available at: https://digitallibrary.un.org/record/857550/files/A_RES_71_193-RU.pdf?ln=ru (accessed: 06.03.2025)). Nevertheless, in political and journalistic discourses such measures are sometimes referred to as "sanctions" (see: *Gevorgyan K.* "Unilateral Sanctions" and International Law // The International Affairs. Available at: <https://interaffairs.ru/jauthor/material/720> (accessed: 06.03.2025). (In Russian)). In this article, for the sake of convenience, the term "sanctions" is used inter alia to define unilateral coercive measures applied by states without a decision of the UN Security Council.

¹⁷ Blocking Property of Certain Persons Associated with the International Criminal Court Designations // Office of Foreign Assets Control. Available at: <https://ofac.treasury.gov/recent-actions/20200902> (accessed: 05.02.2025); US imposes sanctions on top international criminal court officials // The Guardian. Available at: <https://www.theguardian.com/law/2020/sep/02/us-sanctions-international-criminal-court-fatou-bensouda> (accessed: 05.02.2025). Later Executive Order N 13928 was repealed (see: Executive Order 14022 of April 1, 2021 «Termination of Emergency With Respect to the International Criminal Court» // Federal Register. Available at: <https://ofac.treasury.gov/media/57411/download?inline> (accessed: 05.02.2025)).

International Criminal Court in response to 'illegitimate and baseless actions targeting America and our close ally Israel'¹⁸. The US President stated that the conduct of the Court 'threatens to infringe upon the sovereignty of the United States'¹⁹. The US threatened to impose 'tangible and significant consequences' on ICC officials, employees, and agents, as well as their immediate family members, including the blocking of property and assets and the suspension of entry into the United States²⁰.

It should be noted that the first person to face sanctions from the newly elected President was Karim Khan, Prosecutor of the ICC, who initiated issuance of an arrest warrant for the Russian President. In his Executive Order Trump, in particular, suspended Karim Khan's entry into the United States, and his property that is in or hereafter comes within the territory of the United States, is blocked²¹.

4.

Yet it was in terms of the arrest warrants issued for heads of sovereign states that the ICC reached the pinnacle of nonsense and disutility, including Russia's President Vladimir Putin in respect of the situation in Ukraine²². Passing such decisions the ICC officials were well aware of the fact that they would never bring any practical result, saving propaganda consequences obviously in the interests of the same Anglo-Saxon world.

Judges and officials of the ICC definitely shall not be considered insane or ignorant. These are experienced lawyers, who are well aware of the content of international treaties and the limit of their authority. Yet they have never refused to perform some 'ideological put-up job', especially when it concerns heads of sovereign states.

Establishing the Hague Criminal Court²³ the parties to the Rome Statute agreed on a compromise. On the one hand, the Statute stipulates that immunities of the Head of State or another senior official of the state provided by the international law 'shall not bar the Court from exercising its jurisdiction over such a person' (article 27). On the other hand, in the same document the Court commits itself to 'obtaining the

¹⁸ Imposing Sanctions on the International Criminal Court: Executive order, February 6, 2025 // The White House. Available at: <https://www.whitehouse.gov/presidential-actions/2025/02/imposing-sanctions-on-the-international-criminal-court/> (accessed: 14.02.2025).

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

²² Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova // International Criminal Court. Available at: <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and-maria-alekseyevna-lvova-belova> (accessed: 05.02.2025). Also see: Problems of Legality of the International Criminal Court: Problems of Legality of the International Criminal Court (Opinion of the International Law Advisory Board under the Ministry of Foreign Affairs of the Russian Federation), // Ministry of Foreign Affairs of the Russian Federation. Available at: https://www.mid.ru/ru/foreign_policy/legal_problems_of-international_cooperation/1949021/ (accessed: 05.02.2025); Opinion of the International Law Advisory Board under the Ministry of Foreign Affairs of the Russian Federation: Problems of Legality of the International Criminal Court [translated by grad. students V.V. Pchelintseva and A. M. Korzhenyak] // Moscow Journal of International Law. 2024. no. 2. P. 92–104.

²³ Being the main subjects of international law, the states may on the basis of treaties between them establish a derivative subject of international law, for instance, an intergovernmental organisation, an international judiciary etc. The competence of this derivative subject is defined by the states which established it. See: *Shaw M. N.* International Law. 6th ed. New York: Cambridge University Press, 2008. P. 1303. In this respect J. Klabbers rightfully said about international organisations: "Organisations are creatures of their member states..." (*Klabbers J.* International Law. 2nd ed. Cambridge: Cambridge University Press, 2017. P. 92).

cooperation' of a respective state for the waiver of the immunity of its senior official (article 98).

In fact the Hague Criminal Court without any waiver provided by respective countries introduced the practice of issuing arrest warrants for certain acting heads of sovereign states (non-Western, as a rule). First warrants of this kind were issued in respect of Sudan's head of state Omar al-Bashir (in 2009) and Libya's acting head of state Muammar Muhammad Abu Minyar al-Gaddafi (in 2011). The case against al-Gaddafi was terminated upon his death; the arrest warrant for Saif al-Islam al-Gaddafi, his son and companion, the de-facto Prime Minister of Libya, has not been enforced yet, the case being on the stage of pre-trial hearing.

As for Omar al-Bashir, Sudan refused to enforce the Court's warrant, stating that it was a 'political' document which contradicted to the national law, and the ICC itself did not have respective jurisdiction. Nor was the warrant enforced in a number of ICC member states (Malawi, Jordan, Uganda, Chad, the RSA and others) which Omar al-Bashir visited. The legal positions of several countries from this list were considered by the ICC Judicial Divisions, which largely formed the Court's position on immunities of senior officials of the states which are not members of the ICC. The ICC's opinion in this regard was mostly expressed in the decision of the Appeals Chamber concerning Jordan's refusal to surrender Omar al-Bashir.

In the opinion of the ICC, 'no immunities under customary international law operate in such a situation to bar an international court in its exercise of its own jurisdiction'²⁴. Thus, in essence, the ICC proceeds from the notion that *there is no rule* of customary international law which would give immunity from arrest and surrender of the head of state which is *not party to the Rome Statute* by the state which is a member of the Statute on the basis of the request for arrest and surrender issued by the Court²⁵.

Being rather disputable, this and other assertions caused fair criticism from experts in international law and, naturally, representatives of national justice in various countries.

I would like to emphasise the following. Whatever the interpretations of articles 27 and 98 of the Rome Statute, *the very issue of arrest warrants by the Hague Criminal Court for heads of sovereign states shall be qualified as a violation of international law, first of all, the UN Charter*. The reasons are as follows.

First, the UN Charter provisions prevail over the Rome Statute, as it was mentioned earlier.

Second, the principle of sovereign equality of all UN members is the basis of the UN (article 2). The heads of state represent the respective sovereign governments and by virtue of such basic source of international law as international conventions they 'enjoy full immunity from jurisdiction in other states, both civil and criminal'²⁶. The violation of this by the Hague Criminal Court is *an offence*.

Third, the Hague tribunal's encroachment on limitation of the sovereignty of a state (in case of Russia, moreover, a permanent member of the UN Security Council) through pushing towards an arrest of the head of state, thus impeding the performance

²⁴ The Appeals Chamber: Situation in Darfur, Sudan: in the Case of the Prosecutor v. Omar Hassan Ahmad Al-Bashir: Judgment in the Jordan Referral re Al-Bashir Appeal, No. ICC-02/05-01/09 OA2, 6 May 2019, para. 114 // International Criminal Court. Available at: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_02856.PDF (accessed: 14.02.2025).

²⁵ See: *ibid*, para. 117.

²⁶ The existence of this convention in international law was conformed by the International Court of Justice. See: Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3, para. 51.

of respective official functions, shall be also qualified as a violation of international law. First of all, by virtue of the main task of the UN Security Council being maintenance of international peace and security (article 24 of the UN Charter).

Fourth, the Hague Criminal court ignores the obvious fact that three out of five permanent members of the UN Security Council are not parties to the Rome Statute. This decision was at different times taken by China, Russia and the USA. Hence by virtue of article 34 of the 1969 Vienna Convention on the Law of Treaties and customary international law²⁷ the Rome Statute shall not create any obligations for the states which are not its members (article 34 of the 1969 Convention), including those announced by the Hague Criminal Court.

Fifth, the ICC officials shall understand that trying to limit the activities of the head of state which is a permanent member of the Security Council they attempt to impede the functioning of the UN's main body, which is exclusively responsible for promoting peace. When the international community is fundamentally divided and our planet is on the brink of a third world war, the ICC's decision in itself has increased the global risk. The responsibility for this increasing threat to humanity lies on specific officials of the Hague Criminal Court as well.

5.

It is well-known that even before the high-profile 'political put-up job' in respect of Russia's President Vladimir Putin the Hague Criminal Court often had to run quite slippery errands of its clandestine puppet masters. After the 2014 coup in Kyiv aided by the USA²⁸, refusal of the people of Crimea and Donbass to recognise legitimacy of the coup, constant shelling of Donbass at the direction of Kyiv leaders and de-facto genocide of its population Russia took measures to protect compatriots. Not bothering itself with legal analysis of the abovementioned facts and the applicable law the Hague Criminal Court obligingly supported the 'legal war' against our country waged by the US and their satellites. A very contentious term, the 'aggression', went into play. By the way, it was included in the ICC jurisdiction only after perennial discussions. By the time the Rome Statute was signed in 1998 the parties had not managed to develop a legally acceptable definition of the term 'aggression'. This issue was submitted to the Assembly, which in 2010 drafted amendments into the Statute. These included definition of a circle of persons liable for this crime and the procedure of bringing them to liability in the Hague Criminal Court. Yet the legal standards introduced were not universal.

Pressurised by the US the Special Military Operation to defend Donbass in the documents of the UN General Assembly was called 'aggression' by the arithmetic majority of states (United Nations General Assembly Resolution ES-11/1 'Aggression against Ukraine' dated 2 March 2022; United Nations General Assembly Resolution ES-11/2 'Humanitarian consequences of the aggression against Ukraine' dated 24 March 2022 and other documents of the UN General Assembly). Contribution was made by other organisations under Western control, namely the International Monetary

²⁷ See: Document A/6309/Rev.1: Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session // Yearbook of the International Law Commission, 1966. Vol. II. New York: United Nations, 1967. P. 226.

²⁸ Preparation for the non-constitutional upheaval in Kyiv, instructions given to the rebels by the US Embassy are comprehensively described in the book by former Ukrainian PM N. Azarov, who earlier worked with the lawfully elected Ukrainian President, V. Yanukovich. See: *Azarov N. Ukraine at a Crossroads. Notes from the Prime Minister Moscow, Veche Publ, 2015. 512 p. (In Russian)*

Fund (the IMF)²⁹, the Institute of International Law³⁰ and others. Finally, in March 2023 the Hague Criminal Court obediently announced the issuance of arrest warrants for the President of the Russian Federation and the Russian Commissioner for children's rights.

From the legal standpoint this move did not withstand any criticism. The Western countries use the term 'aggression' purely formally, in the meaning assigned to it in the resolution of the 1974 UN General Assembly. According to the resolution, aggression is '... the use of armed force by a State against the *sovereignty*, territorial integrity or political *independence* of another State, or in any other manner inconsistent with the Charter of the United Nations...' which '...gives rise to international responsibility'³¹ (emphasis added). Applying this definition to the Special Military Operation, the Western states ignore major issues of the fact and law, first of all, the abovementioned upheaval in Kyiv in 2014 inspired by Washington, which was in obvious violation of article 2 (7) of the UN Charter (on non-interference into a state's internal affairs). After this *coup d'état* Ukraine *de facto* was no longer a sovereign state.

Another circumstance ignored by the West as a whole is that the use of armed forces permissible under the international law (by way of self-defence, including preventive) is not aggression. Yet the main flaw in the international legal position of the Western states is more serious: they ignore the fact that according to the UN Charter establishing the *fact of 'aggression'* and taking respective actions is *only the prerogative of the UN Security Council*, including affirmative vote of its five permanent members, but not another body, be it with the UN or not, or another international organisation.

However, the states which are still parties to the Rome Statute did not implement the ICC's decision as well. Russia's President visited one of these countries, Mongolia, early September 2024³². The visit proceeded in a warm and friendly atmosphere and ended quite successfully. The Hague Criminal Court got almost hysterical. It immediately cracked down on Mongolia, stating that it failed to meet its commitments under the Rome Statute as it had not arrested Russia's President, thus failing to comply with the ICC's cooperation request.

According to the ICC, parties to the Rome Statute shall arrest persons for whom the Court has issued warrants, 'irrespective of their official status or nationality'. In this context the statement made by the ICC that it performs its functions in respect of 'gross violations of the fundamentals of international law'³³ sounds quite cynical. Yet interfering with the official duties of the head of a sovereign state which is a permanent member of the Security Council the officials of the Hague Criminal Court aggravate the risk of failure to pass decisions in terms of the UNSC reacting to threats to world peace.

²⁹ A specialised UN institution Russia is a member of. For the IMF see its site: About the IMF // International Monetary Fund. Available at: <https://www.imf.org/en/About> (accessed: 05.02.2025).

³⁰ A non-governmental organisation. Established in 1873. For more details see its site: About the Institute // Institut de Droit International. Available at: <https://www.idi-iiil.org/en/a-propos/> (accessed: 05.02.2025).

³¹ See its articles 1, 5 (Definition of aggression: [appendix to UN General Assembly Resolution 3314 (XXIX) dated 14.12.1974]. Available at: https://digitallibrary.un.org/record/190983/files/A_RES_3314%28XXIX%29-RU.pdf?ln=ru (accessed: 14.02.2025)).

³² Official visit to Mongolia // President of Russia. Available at: <http://www.kremlin.ru/events/president/trips/75016> (accessed: 05.02.2025).

³³ ICC: Mongolia's refusal to arrest Putin was submitted for consideration of the Assembly // United Nations Organisation. Available at: <https://news.un.org/ru/story/2024/10/1457701> (accessed: 05.02.2025).

In the document of the Hague Criminal Court accusing Mongolia of non-compliance by Mongolia with the request to cooperate under the Rome Statute it is stated that article 98(1) allegedly does not amend article 27(2) or provide for any exceptions, i.e. in the Court's opinion, the Statute does not provide for 'the waiver of the immunity' for heads of sovereign states. According to the Court, any other interpretation would render the obligations of member states 'senseless' and the overall Court's system 'futile', 'contrary to the principle of effectiveness (ut res magis valeat quam pereat)'³⁴, stemming from article 31 of the Vienna Convention on the Law of Treaties, 'according to which treaties should be interpreted so as to ensure their effective implementation'³⁵. 'Futility' is not to be disputed. The Hague Criminal Court has displayed this quality over and over again.

As for the *effectiveness* principle, it should be said that the argument given by the Court is distorted. In the course of interpretation of international treaties an interpreter 'must give meaning and effect to all the terms of the treaty' and 'an interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility'³⁶.

It should be mentioned that earlier the ICC recognised that there is an 'inherent tension' between articles 27(2) and 98(1) of the Statute³⁷, this tension being substantively analysed in the doctrine³⁸. All the abovementioned obviously demonstrates legal and technical flaws in the Statute³⁹, which make this already imperfect instrument absolutely inapplicable.

In its Decision on Mongolia the ICC Pre-Trial Chamber stated that article 34 of the Vienna Convention 'is irrelevant to the matter at hand (whether the non-member parties are bound by the Statute – *remark*), since the Court is not aiming to impose obligations contained in the Statute to non-States Parties, but is rather seeking the cooperation of States Parties in cases against individuals who allegedly committed crimes under article 5 of the Statute on the territory of a State where the Court has jurisdiction'. Yet this position is invalid as well: non-provision of immunity by party to the Statute to the head of state which is not party to the Statute is extension of the Statute to such state, as the latter has the right to claim immunities for their senior officials, while the host country has the obligation to grant such immunities.

³⁴ "So that the matter may flourish rather than perish" (In Latin).

³⁵ Pre-Trial Chamber II: Situation in Ukraine. Finding under article 87(7) of the Rome Statute on the non-compliance by Mongolia with the request by the Court to cooperate in the arrest and surrender of Vladimir Vladimirovich Putin and referral to the Assembly of States Parties, No. ICC-01/22, 24 October 2024, para. 34. // International Criminal Court. Available at: <https://www.icc-cpi.int/sites/default/files/CourtRecords/0902ebd1809d1971.pdf> (accessed: 05.02.2025).

³⁶ Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products: Report of the Appellate Body (adopted on 12 January 2000), AB-1999-8 (WT/DS98/AB/R), para. 80.

³⁷ Pre-Trial Chamber I. Situation in Darfur, Sudan: The Prosecutor v. Omar Hassan Ahmad Al Bashir, No. ICC-02/05-01/09, 13 December 2011, para. 37. // International Criminal Court. Available at: <https://www.legal-tools.org/doc/8c9d80/pdf> (accessed: 05.02.2025).

³⁸ See, for instance: *Ispolinov A. S. Anatomy of a Crisis: Problems of Normative Legitimacy of an International Criminal Court // Zakon. 2024. no. 2. P. 130–131. (In Russian); Kjeldgaard-Pedersen A. Is the Quality of the ICC's Legal Reasoning an Obstacle to Its Ability to Deter International Crimes? // iCourts: iCourts Working Paper Series. 2020. no. 191. P. 15–17. Available at: https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3570447_code2133408.pdf?abstractid=3570447&mirid=1&type=2 (accessed: 05.02.2025); *Tladi D. The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98 // Journal of International Criminal Justice. Vol. 11. 2013. no. 1. P. 199–221; Van Alebeek R. The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law. Oxford; New York: Oxford University Press, 2008. P. 278.**

³⁹ Scholars' opinion that '... the Court's architecture is seriously flawed' looks well-grounded (*Schabas W. A. Op. cit. P. 19*).

If the latter does not do that by virtue of article 27.2 of the Statute, it shall either be considered to be in violation of customary international law or extending the rule of article 27.2 of the Statute to the third state and its senior officials. There is no third way.

The ICC displayed significant self-confidence when confirmed that 'any arguable bilateral obligation that Mongolia may owe to the Russian Federation to respect any applicable immunity that international law may allow to Heads of State is not capable of displacing the obligation that Mongolia owes to the Court, which is tasked with exercising its jurisdiction...'⁴⁰. That is true: any international acts are inferior to the Statute, in the opinion of the biased commentators from the Court.

In its correspondence with the Hague Criminal Court Mongolia referred to the customary legal rule of immunities of the heads of states and the International Court of Justice's ('ICJ') judgment in the Arrest Warrant case as of 11 April 2000, which confirmed its existence. In response the Hague Court reiterated its position: 'while personal immunities operate in relations between States, they do not protect individuals, including Heads of State, from prosecution by international criminal courts', justifying this by stating that the ICC 'is inherently independent of States, strictly impartial and acts in the general interests of the international community'⁴¹.

All these arguments are absolutely politicised and legally null and void. Nevertheless, the Court pathetically stated that Mongolia prevented the Court '...from exercising its functions and powers...' and 'failed to comply with its international obligations under the Statute...'⁴², thus rejecting all Mongolia's objections.

It should be mentioned that under article 98.2 of the Rome Statute 'the Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender'. The 2019 Treaty on Friendly Relations and Comprehensive Strategic Partnership between the Russian Federation and Mongolia (entered into force in September 2020) is applicable in this sense. According to article 4 of this treaty Russia and Mongolia shall 'abstain from participation in any actions or support of such actions directed against the other party'.

All this judicial fuss did not have any significant consequences for Mongolia or Russia. The ICC Assembly decides itself on the measures to be taken against the 'disobedient'. The Statute does not provide for any sanctions against a member state which failed to comprehensively cooperate with the ICC in the course of exercising its functions. In practice such sanctions have never been imposed. The head of Sudan Omar al-Bashir in seven years after the ICC issued its first arrest warrant in 2009 visited more than 20 countries, including the ICC members, yet in none of them was he arrested⁴³. No measures were taken against these states, although the

⁴⁰ Pre-Trial Chamber II: Situation in Ukraine. Finding under article 87(7) of the Rome Statute on the non-compliance by Mongolia with the request by the Court to cooperate in the arrest and surrender of Vladimir Vladimirovich Putin and referral to the Assembly of States Parties, No. ICC-01/22, 24 October 2024, para. 28.

⁴¹ Ibid, paras. 6, 29, 30.

⁴² See: *ibid*, para. 38 and findings.

⁴³ See: ICC arrest warrant? No worries for Sudan's Bashir who visited 22 countries in 7 years // World Tribune: Window on the Real World. Available at: <https://www.worldtribune.com/icc-arrest-warrant-no-worries-for-sudans-bashir-who-visited-22-countries-in-7-years/> (accessed: 14.02.2025); Nuba Reports. Sudan's president has made 74 trips across the world in the seven years he's been wanted for war crimes // Quartz. Available at: <https://qz.com/africa/630571/sudans-president-has-made-74-trips-across-the-world-in-the-seven-years-hes-been-wanted-for-war-crimes> (accessed: 14.02.2025).

arrest warrant for Omar al-Bashir was issued in the framework of the case initiated by the UN Security Council (which, unlike the ICC, has the right to apply international legal sanctions).

This proves to what extent the Court and its decisions are futile. Nevertheless, one should not underestimate the scope and possible consequences of the 'legal war' the Western countries continue to fight against Russia using international justice, along with other hostile actions and unlawful restrictions. In essence, the ICC practice is almost ready to *legally justify* kidnapping officials who enjoy immunities from the territories of the countries which are not parties to the Rome Statute, more so that the ICC has not only become a funnel in which any official of any state may be drawn, in case there is a political order, but also a commonplace tool of political struggle. To say nothing of arrest warrants for Vladimir Putin and Maria Lvova-Belova, the situation with the beginning of the ICC's investigation into the situation in the Republic of the Philippines and the consequent arrest on 11 March 2025 and surrender to the ICC of the ex-President of the Philippines Rodrigo Duterte is quite exemplary.

On 15 September 2021 the Pre-Trial Chamber authorised the ICC Prosecutor's investigation of the situation in the Republic of the Philippines in respect of crimes which fall under the ICC jurisdiction which allegedly were committed in the country between 1 November 2011 and 16 March 2019 in the framework of the so-called 'war on drugs' campaign⁴⁴. This decision and further events are remarkable in the following respect. First, the ICC did not have jurisdiction *ratione temporis* in respect of this situation in general, as the investigation was authorised by the Chamber on 15 September 2021, while the Philippines withdrew from the Statute on 17 March 2019. However, this did not prevent the ICC judges from finding the basis for this jurisdiction with reference to its own practice of interpretation of art.127 of the Rome Statute⁴⁵ basing on the principle of 'if you want it, you can'. Second, the arrest and surrender to the ICC of the ex-President of the Philippines Rodrigo Duterte were not the recognition of the ICC jurisdiction by the Philippines, no longer a party to the Statute, but a surrender by the Marcos clan (Ferdinand Romualdez Marcos Jr. is the current President of the Philippines) of their political opponent from the Duterte clan⁴⁶, i.e. the ICC in fact became a tool of clan rivalry in the territory of the Philippines. Thus, media opinion that the authorization of the investigation in the Philippines is 'casting a dark shadow on the ability of the court to do its job independently'⁴⁷ quite accurately reflects the transformation of the very essence of the Court: from an instrument of justice it has turned into an instrument of dirty politics.

It is unclear what lawlessness we will witness further on. The West, which is quickly losing its positions in the world and is not able to impose its will on the majority of the humankind, goes for broke and will stop at nothing. This danger shall be taken into consideration. I, for one, have already speculated on what may follow the enforcement of an illegal decision of the ICC in respect of the head of state which is not party to the ICC. The very enforcement of such decision may be

⁴⁴ Pre-Trial Chamber I: Situation in the Republic of the Philippines: Decision on the Prosecutor's request for authorisation of an investigation pursuant to Article 15(3) of the Statute, No. ICC-01/21 // International Criminal Court. Available at: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_08044.PDF (accessed: 18.03.2025).

⁴⁵ See: *Ibid.*, para. 111.

⁴⁶ *Filatov S.* Duterte's arrest and its implications for the Philippines, the US and China // The InternationalAffairs. Available at: <https://interaffairs.ru/news/show/50683> (accessed: 18.03.2025); *Smith T.* The ICC caught in clan rivalry in Philippines // Justiceinfo.net. Available at: <https://www.justiceinfo.net/en/140756-icc-caught-clan-rivalry-philippines.html> (accessed: 18.03.2025).

⁴⁷ *Smith T.* Op. cit.

considered as *casus belli* in respect of the countries which participated in it. It is needless to discuss how dangerous such decisions may be in respect of the head of state of a nuclear power and permanent member of the UN Security Council. To say nothing of the fact that persons in charge of such decisions *may and shall* be prosecuted by investigative and judicial bodies of the country the head of which is illegally brought to liability.

6.

It should be remembered that among countries which accuse Russia of 'aggression' are not only the USA⁴⁸. Similar pronouncements were made by the NATO member states⁴⁹, as well as most members of the Council of Europe and the seven most advanced economies, G7⁵⁰. The African union joined the efforts to accuse Russia of violating the international law, encroachment of 'territorial integrity and national sovereignty of Ukraine'⁵¹.

Yet one should not be satisfied that resolutions of the UN General Assembly are not formally legally binding. In practice in economic arbitration and judicial proceedings against Russia and Russian citizens references to such documents are important for the 'inner conviction' of the judge or arbitrator.

Even ungrounded accusations require exhaustive answer. In this respect I consider it necessary to reiterate our position in respect of the so-called 'aggression' of which the West persistently accuses Russia, and the ICC actions as attempts to give legal effect to these accusations.

Let us summarise the above.

First. After the upheaval in 2014 the power in Kyiv was taken by a dependent political regime under full control of the Western countries. Part of former Ukraine, intoxicated and controlled by it, *de facto is no longer a sovereign state*. Therefore, Russia's defence of Donbass, which did not recognise the coup and was attacked by the illegal 2014 Kyiv government, cannot be legally qualified as 'aggression'.

Second. Under the UN Charter establishing the fact of 'aggression' and acting in this respect is the prerogative of the UN Security Council (including affirmative vote of five states which are its permanent members). No other body, be it with the UN or not, or another international organisation have such powers. Their statements are not legally grounded and null.

⁴⁸ US President Joe Biden accused Russia of violation of the UN Charter as it allegedly 'waged a brutal needless war' against Ukraine ('President Biden ... accused Russia of violating the United Nations international charter in its "brutal, needless war" against Ukraine'). See: Biden in UN speech accuses Russia of "extremely significant" violation of international charter // Fox News. Available at: <https://www.foxnews.com/politics/biden-un-speech-accuses-russia-extremely-significant-violation-international-charter> (accessed: 05.02.2025).

⁴⁹ The World Reacts to Russia's Invasion of Ukraine // Lawfare. Available at: <https://www.lawfare-media.org/article/world-reacts-russias-invasion-ukraine> (accessed: 05.02.2025).

⁵⁰ G7 Leaders' Statement on the invasion of Ukraine by armed forces of the Russian Federation // Council of the European Union. Available at: <https://www.consilium.europa.eu/en/press/press-releases/2022/02/24/g7-leaders-statement-on-the-invasion-of-ukraine-by-armed-forces-of-the-russian-federation/> (accessed: 14.02.2025).

⁵¹ Macky Sall, Chair of the African Union and President of Senegal, and Moussa Faki Mahamat, Chairperson of the African Union Commission, in particular, called on the Russian Federation to '... imperatively respect international law, the territorial integrity and national sovereignty of Ukraine' (Statement from Chair of the African Union, H. E President Macky Sall and Chairperson of the AU Commission H.E Moussa Faki Mahamat, on the situation in Ukraine // African Union. Available at: <https://au.int/en/pressreleases/20220224/african-union-statement-situation-ukraine> (accessed: 05.02.2025)).

Third. Encroachment of the Hague Criminal Court on limiting sovereignty of a state which is a permanent member of the UN Security Council (demands of the arrest of the head of this state, thus interfering with the official functions) is to be qualified as an offence against international law. Firstly because the UN Security Council bears primary responsibility for maintenance of international peace and security (article 24 of the UN Charter).

Fourth. Russia is not party to the Rome statute of 1998, on the basis of which the International Criminal Court was established. In 2016 Russia refused to be party to this international treaty. Therefore, the Statute *does not create any obligations* for our country.

Fifth. The actions of the Hague Criminal Court and its position contradict to the principle of *'pacta tertiis nec nocent nec prosunt'* (a treaty does not create obligations or rights for a third state without its consent) enshrined in customary international law and article 34 of the 1969 Vienna Convention on the Law of Treaties.

Sixth. According to the Rome Statute, the idea behind issuing an arrest warrant is that the ICC requires an opportunity to further oblige the Statute member states, in particular, to arrest the person for whom the warrant has been issued and surrender this person to the Court (article 58 of the Rome Statute). Yet in case this person enjoys immunity as an official of the state which is not party to the Statute, and the Hague Criminal Court has not solicited assistance from such state, issuance of such a warrant and the Court's request to a member state to arrest the abovementioned person *contradict to article 98 of the Statute*.

Seventh. The President of the Russian Federation, being the current head of a sovereign state, *is absolutely immune* from foreign criminal justice: both *ratione materiae*⁵² and *ratione personae*⁵³. In case there is no express waiver of this immunity the international judicial bodies have no jurisdiction over the head of the sovereign state.

Eighth. According to the judgment of the international Court of Justice dated 14 February 2002 in the case 'Arrest Warrant of 11 April 2000', 'in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal'⁵⁴. The fact that this rule of international law operates also in cases when there arise a question of possibility of arrest the head of the state which is not party to the Rome Statute by a state which is party to the Rome Statute is recognised in the doctrine as well⁵⁵. Moreover, in one case the ICC recognised the fact there are no exceptions to this rule in respect to the situations when the state operates in its name⁵⁶.

⁵² Under 'ratione materiae' immunity we understand immunity from foreign criminal justice in respect of an official of the state regarding actions this person executes within the framework of the mandate and which can be defined as 'formal actions'.

⁵³ Subjective scope of 'ratione personae' immunity: the head of state, head of government and the minister of foreign affairs are immune from criminal justice of a foreign state. 'Ratione personae' immunity is recognised automatically, in accordance with the rule of international law, in respect of public authorities which represent the state in international relations. This immunity is applied in respect of all actions (whether private or formal) committed by the representatives of the state.

⁵⁴ Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3, para. 51.

⁵⁵ See, for instance: Ispolinov A. S. Trying on the Ring of Omnipotence: The International Criminal Court and the Immunities of Heads of State // Rossiiskii iuridicheskii zhurnal. 2023. No. 2. P. 40, 52–53. (In Russian); Akande D. International Law Immunities and the International Criminal Court // The American Journal of International Law. 2004. Vol. 98. no. 3. P. 410–411, 421.

⁵⁶ In the decision on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir the Pre-Trial Chamber, referring to the same paragraph 51 of the ICJ judgment dated 14 February 2002 in case 'Arrest Warrant of 11 April 2000', stated: "The Chamber is unable to identify a rule in customary international law that would exclude immunity for Heads

Article 27 of the Rome Statute, in the meaning of which immunities of an official shall not impede jurisdiction in respect of this person, *contradicts* to the established customary international law. That this document allows for criminal prosecution of current heads of sovereign states does not comply with fundamental principles of international law enshrined in the UN Charter, firstly, the principle of the sovereign equality of all its members, non-involvement into in the internal politics of another state.

Ninth. As of February 2025 125 states are parties to the Rome Statute⁵⁷ (in the UN there are 193 members)⁵⁸. Despite their number, the ICC *does not represent the international community of states as a whole and does not act in its name*. Three out of five permanent members of the UN Security Council are not parties to it (Russia, China and the USA), along with industrialised and densely populated Asian countries (India, Pakistan, Turkey, Malaysia, Indonesia), many Arab countries⁵⁹.

Tenth. Judges, prosecutors and other officials who took unlawful decisions may and shall be prosecuted for crimes stipulated in *the Russian criminal law*.

7.

In respect of the position stated above a reasonable question arises: what is in store for the international criminal justice in general? Russian lawyers should voice comprehensive and well-based professional criticism of the ICC decisions at all forums. They should present international legal position of Russia in respect of the Special Military Operation, Ukrainian conflict and other relevant challenging issues to the global legal community, media and people in different countries. They should clarify controversies, and do that actively and incessantly. They should reiterate our commitment to the UN Charter and first of all principles of sovereign equality of all states, non-interference with their internal affairs. They should ensure sure that specific officials of the Hague Criminal Court who violate these principles be taken to liability in accordance with international and Russian national law.

It seems entirely possible to develop on the regional level (for instance, in the framework of BRICS) a concept of establishing an international legal body as an alternative to the Hague Criminal Court. This new judicial body in BRICS could reiterate the common commitment of its member states to the UN Charter principles, including the principles of immunity of heads of sovereign states from any foreign jurisdiction and non-interference into internal affairs of the states, including by way of unlawful foreign instructing of opposition leaders.

As for the ICC, unfortunately, at this point we need to recognise its *total inefficiency* in performing its main task – bringing to liability all those guilty of genocide, aggression, war crimes, those who escaped punishment under national law. All of

of State when their arrest is sought for international crimes by another State, even when the arrest is sought on behalf of an international court, including, specifically, this Court (Author's note: the ICC)" (Pre-Trial Chamber II. Situation in Darfur, Sudan: in the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir: Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, No. ICC-02/05-01/09, 6 July 2017, para. 68 // International Criminal Court. Available at: <https://www.legal-tools.org/doc/68ffc1/pdf> (accessed: 15.02.2025)).

⁵⁷ The States Parties to the Rome Statute // International Criminal Court. Available at: <https://asp.icc-cpi.int/states-parties> (accessed: 05.02.2025).

⁵⁸ Charter of the United Nations: Status as at: 14-02-2025 10:15:47 EDT // United Nations Treaty Collection. Available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=1-1&chapter=1&clang=_en (accessed: 14.02.2025).

⁵⁹ From the perspective of the population figures in non-member states this is the majority of the Earth's population.

them, including citizens of Western countries and NATO member states. Of course, it is doubtful that the Hague Criminal Court in its present form and role will make efforts to this end. *That is why it shall sink into oblivion.*

Yet a thirst for justice that unites all people in the world is stronger than any sanctions, pressure, hypocrisy and lies. And the international law developed by the global community is stronger than the rule of force. If the Hague Court is irreversibly flawed at present, the interested states will find an opportunity to establish a *different international criminal court* which will be spared of these flaws. Its charter shall be based upon all universally recognised rules of international law, including the rule of absolute immunity of senior officials. Its jurisdiction may be extended to the crimes of genocide, war crimes, crimes against humanity, and terrorist attacks. Such attacks are often prepared and committed on the territories of two or more states. International cooperation in the framework of this new body will be able to prevent them.

There is a hope that this new court will be able to attain the goals declared in the Rome Statute of the ICC which the ICC itself proved unable to attain.

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