

Case Comment: The Reach of an ICC Arrest Warrant

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An earlier article in this Journal considered the attempt by the executive of the Government of South Africa to cut its ties with the ICC out of concern about the warrants issued by the Court for the arrest and surrender of Omar Hassan Ahmad Al-Bashir and the ruling of the High Court that the attempt was unconstitutional.[1] The High Court and the Supreme Court of Appeals had earlier held that the Government's refusal to act on the warrants was a breach of domestic law.[2] South Africa continuously maintained that its duty to arrest a visiting Head of State interfered with its ability to engage in diplomacy in Africa.

The saga continues with the ICC's own recent decision on South Africa's refusal to execute the warrants in 2015.[3]

Introduction

The Security Council referred the situation in Darfur to the Prosecutor for investigation under Chapter VII of the UN Charter by Resolution 1593 (2005). After investigation, the Prosecutor of the Court secured two warrants of arrest and surrender from the Court in 2009 and 2010 against Omar Al-Bashir for war crimes, crimes against humanity and genocide, allegedly committed between 2003 and 2008. The Court duly requested States Parties to the Rome Statute to execute the warrants, including South

Africa. Eight years after issuance, the warrants have yet to be executed and the Court is unable to proceed.

The Registrar learned of a pending visit by Bashir to South Africa for a meeting of the African Union ("AU") from the 7th to the 15th of June, 2015 and requested South Africa to arrest Bashir for surrender to the Court pursuant to arts. 86, the general requirement to cooperate, and 89, for a specific request to arrest, and to consult with the Court on any problem preventing the arrest without delay.

While the AU meeting was taking place, South Africa requested an urgent consultation with the Registrar of the Court pursuant to art. 97 on June 11th. On the 12th, the Court advised South Africa and the Prosecutor that the issues on which South Africa had sought to consult had been decided by the Court and that the consultations did not suspend the duty to arrest. On the 13th, Bashir arrived in South Africa and South African officials met again with the Prosecutor and Registry. The Court refused to reiterate its decision that the arrest should proceed, which had been clear enough. Bashir left South Africa on the 15th. South Africa did not make the arrest.

The proceedings at hand were commenced because the Court held that proceedings under art. 87(7)[4] were warranted. It requested South Africa to present its views on its failure to arrest Bashir. The Court agreed to South Africa's request to wait for the domestic proceedings to be resolved. In November, 2016, the Registrar recorded that South Africa notified the Assembly of States Parties that domestic proceedings had concluded and that it wished the Court to provide guidance on the procedures for filing its views on art. 87(7).

In December, 2016, the Court duly decided to hold a hearing under art. 87(7) into the issues of whether South Africa failed to comply with its obligations under the Statute request and whether an affirmative finding should result in a referral of the matter to the Assembly of States Parties or the Security Council. The Court decided that South Africa was the only necessary party because the hearing was not about the merits of the case against Bashir. It invited the Prosecutor and the UN to participate because their submissions could be useful. The UN declined, but Belgium's written submissions were accepted as were those of the South Africa Litigation Centre, a party to the domestic cases in that country. There was a public hearing April 7th, 2017.

Whether South Africa failed to comply with the request for arrest

The Court stated two issues on this point. The first was whether South Africa was entitled not to comply because of Bashir's immunity. Second, whether it was so entitled because of its interactions with the Court while Bashir was in South Africa.

(a) Bashir's immunity

The Court first rejected South Africa's argument that Bashir had immunity from arrest based on a Host Agreement between South Africa and the African Union for a Summit in Johannesburg. The Host Agreement provided that South Africa would accord the immunities set out in the General Convention on the Privileges and Immunities of the AU to members of the Commission of the AU and Staff,

delegates and other representatives of Inter-Governmental Organizations. The Court held that the provision did not apply to Bashir because he was not in South Africa as a member of the Commission, Staff, delegate or representative of an Inter-Governmental Organization, but as Head of State of Sudan. There was no other treaty provision conferring immunity on Bashir.

The Court next rejected the argument that Bashir was entitled to immunity as a Head of State as a matter of customary international law ("CIL"). The Court noted CIL prevents the exercise of a State's criminal jurisdiction over Heads of other States such that it would hinder the performance of their duties. The Court could not identify a rule in CIL that excluded immunity for a Head of State when the arrest is sought for international crimes by another State, or even by an international court, such as the ICC.[5] But the Court emphasized that the issue here was not about immunity from its jurisdiction, which was not disputed, but rather whether South Africa had a duty to execute the warrants. This was a legal issue between states – here, South Africa and Sudan.

The central issue then became whether the request to execute the Court's warrants derogated from the CIL of Heads of State immunity as between these two States. This concerned the relationship between art. 27(2) and art 98(1). Art. 27(2) provides that immunities or special procedural rules attaching to a person's official capacity under either national or international law cannot be a bar to the Court's exercising its jurisdiction over that person. Art. 98(1) prevents the Court from proceeding with a request for surrender or assistance that would result in the requested State breaching its obligations under international law to respect the diplomatic immunity of an official or property of another State, without a waiver from that other State.

The Court rejected South Africa's argument that art. 27(2) concerned only the Court and not the issue between States, because this interpretation would prevent the Court from exercising its jurisdiction. Art. 27(2) was worded broadly and excluded all official capacity immunities. States Parties' reliance on such immunities to refuse execution of warrants would be incompatible with the purpose of art. 27(2) because it would frustrate the Court's jurisdiction over officials which depends on States Parties to act on such requests.

The Court explained that a State Party had a vertical duty to the Court to arrest even its own Head of State if requested. By ratifying the Statute, States Parties had rejected any official capacity immunities to the extent required to achieve the Statute's purposes, both because of art. 27(2) and the general duty to cooperate with the Court. A State Party also had a horizontal duty not to refuse to execute a warrant based on official capacity immunity that might be asserted by another State Party. This flowed from the Statute as international treaty between its parties that have all agreed to art. 27(2) and the duty to cooperate. Because there is no official capacity immunity between States Parties in proceedings before the Court, there is no immunity to be waived in matters before the Court and so art. 98(1) does not apply in this respect. The point was that official capacity immunity does not exist between States Parties to the Rome Statute if it would prevent the Court from exercising its jurisdiction.

The Court went on to hold that there is an exception to the rule that States that are not party to the Statute maintain their rights at CIL and that art. 98(1) applies to secure their immunities. The Court followed earlier decisions that held that the referral of the Darfur situation to the Prosecutor of the Court by Security Council Resolution 1593 (2005) triggered art. 13 – which enables the Court to take jurisdiction where certain crimes named in art. 5 appeared to have been committed – and confers jurisdiction over the situation on the Court operating under the legal framework of the Statute. The Security Council resolution that required Sudan to cooperate fully with the Court, made under the power to impose obligations on states in Chapter VII of the UN Charter, imposed on Sudan the rights and duties analogous to States Parties, in respect of Darfur. The Court held that these included the duty to cooperate and art. 27(2) that removed official capacity immunities at CIL. This meant that Sudan could not claim Head of State immunity for Bashir and had the duty to arrest him on the warrants. It could not assert the immunity under art. 98(1) against South Africa or any other State Party in respect of the Darfur situation because art. 27(2) erased his immunity horizontally between them just as between States Parties and so there was nothing to assert. All of this flowed automatically from the Security Council's referral.[6]

South Africa was under a duty to arrest Bashir.

The Court decided that some of the issues raised by South Africa required its analysis of art. 98 to emphasize that it was not a source of rights for States Parties to refuse compliance with the Court's request for cooperation. Art. 98 describes a situation where the Court must decide to use its power to proceed with a request for surrender or assistance. The Court's decision might involve a question of CIL immunities between States Parties. Rule 195[7] supports this interpretation because it requires a State Party concerned about a problem executing a request, to provide the Court with information for its use in making its decision. This interpretation leaves no room for the State Party, here South Africa, to rely on its own interpretation of art. 98 to refuse to execute the warrants. The Court noted that the Statute qualifies or suspends the duty to cooperate in some situations, naming situations that called for the Court to first determine the admissibility of the case. But art. 98 allows only the Court to postpone a request for cooperation while waiting for waiver of immunity in some cases, but does not allow a State Party to decide to delay an arrest by itself.

(b) The effect of South Africa's overtures to the Court on the execution of the warrant

The Court held that South Africa's overtures to the Court relying on art. 97 did not allow it to suspend execution of the warrant. Art. 97 contemplates practical reasons why a State Party might not be able to comply, for example, insufficient information to execute, inability to locate the person or that the person sought is not the one in the warrant or that the execution of the warrant would breach a pre-existing treaty obligation (and does not mention an immunity issue). Each of these situations would allow the Court to alleviate the problem, perhaps through a bilateral exchange of information.[8]

The Court held that it was crucial to distinguish between the art. 97 consultation and the process for art. 98 issues under Rule 195 that requires a party to notify the Court of the issue and to provide any information to assist the Court to decide whether it should request a waiver of immunity. Thus, art. 98

is not a consultation as under art. 97.

In practice though, the provision of information might look like a consultation to clarify matters. In this case, though the Court allowed South Africa to raise its concerns about art. 98, it became clear that the solution was not a remedy to fix the warrants but simply a ruling that South Africa had to arrest Bashir. South Africa presented a legal issue about immunities to the Court, not a political or diplomatic problem. Consultations did not affect the validity of the warrants in any event. South Africa could not unilaterally take the position that the warrants were suspended until it provided more information a few days later, after Bashir departed, and after the Court had made it clear the warrants had to be executed. The Court's warrants remained in force until the Court rescinded them.

South Africa could not rely on its interactions with Bashir while he was in South Africa to refuse to execute the warrants. The Court formally concluded South Africa had failed to comply with the Court's request.

Referral to the Assembly of States Party or the Security Council?

The Court decided that it would not use its discretionary power to refer South Africa to the Assembly of States Parties or the Security Council.

This was a decision for the Court to make in the circumstances of the case. Here the Court said it would particularly consider the manner South Africa approached its duty to execute the warrants, how it interacted with the Court, as well as whether engaging external actors through art. 87(7) would be an efficient way to get its cooperation.

(a) South Africa's manner of approaching its duty to the Court

The Court noted that this was the first time a State had sought a consultation with the Court under art. 97 following a request for execution of a warrant for arrest. The Congo had refused to arrest Bashir and the Court held that it should have consulted the Court according to art. 97 and Rule 195.[9] South Africa had relied on this earlier decision. South Africa had also sought this legal determination of the immunity issue under art. 87(7). This set it apart from other refusals to comply.

The Court also held the domestic proceedings about Bashir, their complexity and the novelty of the art. 97 proceedings before the Court did not show absence of good faith alleged by the Prosecutor who had alleged South Africa had a political problem and found a legal impediment to rely on. The Court observed that a Host Agreement such as the one relied on by South Africa was a common preparation for an international meeting and was broader than just the Bashir immunity issue.

(b) Would a referral of South African non-compliance foster co-operation?

Given that the purpose of art. 87(7) is to foster cooperation and therefore referral was not a mandatory result of finding a failure to cooperate, the Court held that engaging external actors would not be effective in obtaining cooperation from South Africa in these circumstances. It noted that the Supreme

Court of Appeals earlier held that South Africa breached the domestic law implementing the Rome Statute when it failed to arrest Bashir. It appeared to the Court that South Africa had accepted its obligation of cooperation when it withdrew the appeal to the Constitutional Court. The current decision addresses the duty under the Statute itself. Without any lingering ambiguity, there was no point referring the matter.

Further, the last six referrals to the Security Council based on the refusal of States Parties to arrest Bashir did not result in any measures geared to enforcing compliance with the Court's orders.

The referral was not warranted.

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James Hendry is the Editor-in-Chief of the PKI Global Justice Journal. He served as counsel to the Canadian Human Rights Commission before joining the Department of Justice in 1989. He was General Counsel at the DOJ until retirement in 2011, working in civil Charter social policy review, specializing in equality rights, human rights legislation, and human rights act design. He has also published extensively on Canadian and comparative constitutional issues and has lectured in Canada, Spain, South Africa, the United States and Hong Kong.

References

1. James Hendry, "South African Executive Cannot Unilaterally Withdraw from the ICC" (2017) 1 PKI Global Just J.
2. *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development & others*, [2015] 3 All SA 505 (GP); 2015 (9) BCLR 1108 (GP); 2015 (2) SA 1 (GP), appeal dismissed, *Minister of Justice and Constitutional Development & others v The Southern Africa Litigation Centre*, [2016] 2 All SA 365 (SCA); 2016 (4) BCLR 487 (SCA); 2016 (3) SA 317 (SCA) leave to appeal to the Constitutional Court granted, but withdrawn by the government.
3. *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*, ICC-02/05-01/09-302, 06 July 2017, Pre-Trial Chamber II. References to articles are references to the Rome Statute. "Regulations" are those made under that Statute. This article deals with the majority reasons of the Court.

4. Art. 87(7) Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.
5. Para. 68.
6. Para. 95.
7. Rule 195. When a requested State notifies the Court that a request for surrender or assistance raises a problem of execution in respect of article 98, the requested State shall provide any information relevant to assist the Court in the application of article 98. Any concerned third State or sending State may provide additional information to assist the Court.
8. Para. 115.
9. Para. 128, fn. 114.