Chapter 7

Head of State Immunity as a Bar to Arrest

Paola Gaeta

Summary

Under Article vi of the Genocide Convention, contracting parties to the Genocide Convention are obliged to execute the arrest warrants for genocide issued by the ICC, provided that they have accepted its jurisdiction. This requirement is satisfied with respect to contracting states that are parties to the Rome Statute or that have lodged an ad hoc declaration under Article 12, paragraph 3, of the Rome Statute. It is also fulfilled with respect to Sudan by virtue of the UN Security Council’s decision contained in Resolution 1593, which obliges Sudan to cooperate with the ICC. The legal relevance of identifying Article vi of the Genocide Convention as an additional legal basis for the obligation to cooperate with the ICC is that the International Court of Justice acquires compulsory jurisdiction over disputes related to its alleged violation. However, the obligation to cooperate with the ICC under Article vi of the Genocide Convention does not allow a departure from the customary international law rules on personal immunities accruing to some foreign senior state officials, such as incumbent heads of state. Contracting states are therefore obliged to respect the personal immunities accruing to Al Bashir under international law and cannot arrest him unless Sudan waives such immunities. The same holds true for the obligation of States Parties to the Rome Statute to cooperate with the ICC. Indeed, Article 98, paragraph 1, of the Rome Statute prevents the ICC from issuing a request for cooperation if, to comply with it, the requested state would have to act inconsistently with its obligations under international law with respect to the immunities of a person or property of a third state, unless the Court can first obtain a waiver of the immunity from the third state. The request by the ICC to arrest and surrender President Al Bashir is therefore not in conformity with Article 98(1) of the Rome Statute. The ICC has not obtained any waiver of the immunities of President Al Bashir from the Sudanese government, thus it was not empowered by the Statute to proceed with a request for arrest and surrender. The steps taken by the ICC in this respect are ultra vires and at odds with Article 98(1). Therefore, States Parties to the Statute, including African Union States Parties, are not obliged to execute the ICC request for surrender of President Al Bashir as long as he is entitled to personal immunities under international law; they act lawfully if they decide not to comply with the request.
Argument

In the Al Bashir case, it is crucial to establish to what extent states that are not parties to the Rome Statute are nonetheless bound to cooperate with the ICC, in particular to execute the arrest warrant issued against President Al Bashir for charges of genocide on the basis of the obligations arising from the Genocide Convention.

In this respect, I will demonstrate that under the Genocide Convention, the obligation to cooperate with the ICC and to implement the arrest warrant for genocide issued against Al Bashir only concerns the states that are also parties to the Rome Statute (or that have accepted ad hoc the jurisdiction of the ICC) and Sudan, by virtue of the decision of the Security Council that imposes upon Sudan the obligation to cooperate with the ICC. By contrast, states not party to the Rome Statute are not obliged under the Genocide Convention to implement the arrest warrants or other requests for cooperation issued by the ICC for genocide charges. Indeed, although the jurisdiction of the ICC with respect to crimes committed in Darfur (Sudan) has been triggered by the Security Council, a necessary requirement in Article VI of the Genocide Convention is lacking with respect to those states, namely that of the “acceptance of the jurisdiction” of the ICC.

Secondly, I will argue that under the Genocide Convention the obligation to implement the ICC arrest warrants is not unfettered, since contracting states are bound to respect the customary international law rules on personal immunities accruing to foreign heads of state, such as Al Bashir. Indeed, nothing allows for the contention that these customary international law rules are derogated from by the Genocide Convention, even in the case of a request issued by the ICC for genocide charges. On the other hand, with respect to the obligation to cooperate with the ICC stemming from the Rome Statute, Article 98, paragraph 1, clearly provides that the ICC must refrain from requesting the execution of an arrest warrant if such a request implies the violation by States Parties of the international law immunities of states not parties, as in the case at stake.

Admittedly, there is no doubt that justice for the horrendous crimes committed in Darfur must be sought, and that even those in power should be brought to justice. However, the rules enshrined and agreed upon in the ICC Statute must be respected, even if it leads to unpleasant results, such as that of protecting some officials of states not party to the Rome Statute from arrest and surrender in foreign states. To hold otherwise would undermine the credibility of the entire system set up by the Rome Statute, and the ability of the ICC and its member states to generate the perception that this legal system is not susceptible to being manipulated in order to attain specific political goals.