



BOFAXE

Home Alone? (PART 1)

On the Legality of Diplomatic Visits to Suspected International Criminals

— On 20 May 2024 Karim Khan, the Prosecutor of the International Criminal Court (ICC), announced that he was seeking arrest warrants against Hamas leaders Yayha Sinwar, Mohammed Diab Ibrahim al-Masri and Ismail Haniyeh as well as Israeli Prime Minister Benjamin Netanyahu and Yoav Gallant, Israel's Minister of Defense, for possible crimes committed since October 7th. What makes this situation particularly interesting is that it is the first time since the establishment of the ICC in 2002 that an arrest warrant might be issued against a state which is closely allied with and strongly supported by Western leaders. This gives rise to a number of new challenges. In the past, the ICC has enjoyed a lot of support from Western states (with notable exceptions like the US) and particularly the states of the European Union seldomly left doubt as to their willingness to enforce the court's decisions. Despite this, some reactions to the possible warrants against Israeli leaders have been far more critical, with Czech Prime Minister Fiala for instance describing the war crimes allegations against Israel as "appalling and completely unacceptable". And also states like Germany, arguably trying to strike a balance between not alienating their Israeli ally while at the same time supporting the ICC's independence, will be faced with a tough choice in the (likely) case of the issuance of an arrest warrant: How far are those states that on the one hand consider themselves allies of Israel and on the other hand are committed to upholding international law willing to go to enforce the Pre-Trial Chamber's decision? With regard to the Israeli government, Western states would not only have to decide whether they would arrest Netanyahu and Gallant (which Germany has already affirmed), but also if they would isolate the Israeli government in the all but certain case that it would refuse to cooperate with the ICC. Isolation could, for example, include measures such as the cessation of state visits to Israel.

Therefore, in this post we will examine the so far underdiscussed question whether there is an obligation under international law to halt diplomatic visits to government officials against whom arrest warrants have been issued. While there may be good arguments in favor of such an obligation, we will see that it would eventually be difficult to deduce from the text of the Rome Statute and hardly be compatible with existing state practice.

An Obligation to Arrest

What has by now often been discussed (e.g. here, here, and here) is the question whether it is a legal obligation of the 124 states parties to the Rome Statute to arrest individuals against whom arrest warrants exist on their own territory – even if a specific individual is a citizen of a non-party state. In practice, this was prominently addressed by the ICC Appeals Chamber in Al Bashir, which *inter alia* denied the existence of Head of State immunity in front of international courts (cf. paras 1-4). The 'obligation to arrest' stems from a request for arrest and surrender under Art. 89 (1) of the Rome Statute issued by the ICC and would, if issued, indeed restrict Netanyahu's ability to travel abroad without fear of arrest – similar to the case of Vladimir Putin, who was forced to refrain from attending the BRICS summit in Johannesburg in August 2023 since he may have otherwise been apprehended by South African authorities.

An Obligation not to Visit?

Another question, however, that has received only little attention (also due to its hitherto small practical importance) is that of the scope of the state parties' general obligation to cooperate with the Court under Art. 86 of the Rome Statute. With regard to Netanyahu and Gallant, this question is of almost unprecedented relevance, because while other suspected perpetrators of international crimes were often already isolated on the world stage before an arrest warrant was issued, the Netanyahu government most certainly is not. Since October 7th, Israel has frequently been visited by foreign officials who wanted to either express their solidarity or contribute to a solution to the ongoing war. The German foreign minister alone has been welcomed by Israel seven times in the last eight months. This begs the question: Can this practice continue even if an arrest warrant was to be issued – or would it run counter to the states' obligations under the Rome Statute?



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From the general duty to cooperate in Art. 86, the ICC has been deducing a number of state obligations, e.g. the tracking of suspects, the identification of possible leverage and partners, and operational support; a duty to no longer visit the individual in question has, however, not been among those obligations. Yet, when interpreting the regulations of the Rome Statute in line with customary international law as reflected in Art. 31-32 VCLT (see [here](#), para. 37), one has to keep in mind that, due to the lack of its own enforcement mechanism under the Rome Statute, the ICC depends on the states as a “helping hand”. Thus, it is not unproblematic to continue to visit a head of government against whom an arrest warrant has been issued, as such a practice might undermine the arrest warrant by enabling the suspected perpetrator to conduct ‘government business as usual’ despite being wanted for the possible commission of an international crime.

One could therefore argue that such visits are not compatible with a good faith interpretation (cf. Art. 31 (1) VCLT) of Art. 86 since they have the potential to obstruct the proceedings before the ICC and thus impede an effective criminal prosecution. Furthermore, the practice might arguably also be at odds with Art. 70 of the Rome Statute, which prohibits “offences against the administration of justice” – without explicitly mentioning state visits, of course. And while visiting and having consultations with the respective person could have a positive effect and possibly prevent future violations of international criminal law, this does not apply to crimes that are ongoing or have already been committed in the past and for which there is an arrest warrant.

Nonetheless, the arguments against an ‘obligation not to visit’ are far more convincing. Looking at the text of the Rome Statute, one has to stipulate that the wording simply does not prescribe such a duty. Deducing it from Art. 86 would result in a quite significant limitation of state sovereignty that would hardly be consistent with the traditional Lotus approach. After all, one has to keep in mind that the independent formulation of foreign policy – of which state visits would be a part – has been identified as one of the key elements of state sovereignty by the International Court of Justice in Nicaragua (para. 205). In addition to that it is also true that an ‘obligation not to visit’ would be contradictory to states’ duties deriving from other areas of international law (cf. Art. 31 (3) c) VCLT), especially International Humanitarian Law (IHL). For instance, common Art. 1 of the Geneva Conventions has been interpreted in a way that states are obliged to do everything within their power to ensure compliance with IHL (for further discussion see [here](#), [here](#), and [here](#)). As a consequence, state officials should also be allowed to visit the representatives of a party to a conflict in order to be able to act upon this state to comply with international law – an understanding that is shared by the International Committee of the Red Cross, which explicitly names exerting diplomatic pressure as one of the possible means to comply with Art. 1 (cf. [here](#) para. 214). Furthermore, when it comes to the scarce existing state practice of states parties to the Rome Statute (cf. Art. 31 (3) b) VCLT), there is little grounds to support the existence of an ‘obligation not to visit’. Looking again at the prominent example of Vladimir Putin, one could observe that even after the arrest warrant against him was issued in March 2023, his fifth presidential inauguration in May 2024 was attended by envoys from numerous European states such as France, Hungary, Slovakia, Greece, Malta and Cyprus. And while states such as Germany and the UK boycotted the ceremony, they did not argue that they were obliged to do so under the Rome Statute. Additionally, meetings with Putin have not only taken place via envoys: Just this month Hungary’s Prime Minister Viktor Orbán, undeterred by the arrest warrant, met Putin in Moscow to “restore dialogue” with Russia. Diplomatic practice also shows that states regularly maintain diplomatic ties to other states even in times of war; a general ‘obligation not to visit’ would contradict this practice and prevent any kind of diplomatic relation between the concerned states. Ultimately, it would be completely unclear where to draw the line of such an obligation. Would a state need to recall all of its ambassadors? If not, would the ambassadors still be allowed to have consultations with the individual against whom there is an arrest warrant? Hence, also the need for legal certainty in diplomatic practice weighs against the notion of a ‘duty not to visit’.

Conclusion

Finally, we believe that an ‘obligation not to visit’ does not exist under the law as stipulated in the Rome Statute. The difficult decision of whether to continue state visits to Israel after the (likely) issuance of an arrest warrant against Prime Minister Netanyahu therefore remains a solely political one which the states parties to the Rome Statute will have to assess for themselves. In the end, the people in the middle east region are arguably best served by not leaving potential perpetrators of international crimes from either side of the conflict ‘home alone’, but by acting upon them through every means available in order to reach an end of the hostilities.