A Prosthesis for a Limbless Giant: Proposing an Improved Model for Arrest Warrant Enforcement at the ICC

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Introduction

Many of our greatest hopes for the future of international criminal law (ICL) lie in the permanent and treaty-based institution that is the International Criminal Court (ICC). Notwithstanding that much initial optimism has been snuffed out by the intransigence of international politics,[1] there remains belief that the ICC must forge on against the odds as its death would be nothing less than a message to fellow humans that we care not whether they suffer at the hand of powerful elites instrumentalizing atrocity.

The Rome Statute makes it clear that the ICC aims to address "the most serious crimes of concern to the international community as a whole".[2] However, it aims not to do so alone. The complementarity of the ICC to national criminal systems is fundamental to its role.[3] Therefore, the Rome Statute and the ICC aim to empower States to prosecute international crimes, while having a right of assessment (droit de regard) over such States which permits ICC to step in when States are unable or unwilling to genuinely carry out these activities.[4] With these tools in hand, the ICC aims to put an end to impunity for perpetrators of international crimes and ultimately contribute to the prevention of such crimes.[5]

However, none of these lofty aspirations matter without presence of the accused in court. Article 63 Rome Statute explicitly requires that the accused be present during trial.[6] Even in absence of such a requirement, it is doubtful that a trial in absentia would be able to produce a credible narrative and pronouncement of responsibility.

This paper aims to explore avenues that would better ensure the apprehension of accused following the issuance of an arrest warrant. It is submitted that an expansion of the ICC's agreements with more UN peacekeeping operations and the inclusion of a requirement to assist the ICC itself in carrying out arrests would improve timely execution of warrants and better assist the ICC's mandate of putting an end to the impunity of perpetrators. Part I will provide an overview of the current ICC arrest warrant enforcement models, followed by the impact of failures in enforcement. Part II will overview previous historical models involving international military task forces. In Part III, this article outlines effective measures and favourable circumstances related to the successful use of such forces that can be gleaned from historical experience. Lastly, in Part IV, the legal and practical considerations underpinning the use of an international military organisation in arrest warrant enforcement are addressed.

Part I: Contextualization

Current ICC models for arrest warrant enforcement

There are two main models which the ICC utilizes to approach the delicate task of apprehending those charged before the Court. One model is state cooperation and the other is international organization cooperation.

State Cooperation

As the ICC is fundamentally premised on State cooperation, it comes as no surprise that the Court relies on this in order to apprehend suspects. This system is guided in detail by the Rome Statute itself. Article 59(1) provides that State Parties to the treaty, after having received a request for arrest, must immediately take steps to arrest the suspect, but that this is to be done in accordance with provisions in Part 9.[7] In this regard, Article 86 outlines the requirement that all State Parties have the obligation to cooperate with the Court in its investigation and prosecution of crimes.[8] Subsequent to this, Article 89(1) indicates

[7] *Rome Statute*, *supra* note 2 at art 59(1).
[8] *Ibid* at art 86.

that the Court may request the arrest and surrender of a person by a State where they may be found and that this obligates the State Party to comply with this request in accordance with the other provisions of Part 9 and the procedure under its own national law.[9] A limitation is provided by Articles 98(1) and (2), which prevent the ICC from requesting such an arrest if it either (1) requires the State to act inconsistently with its obligations under international law concerning the State or the diplomatic immunity of a person from a third State; or (2) requires the State to act inconsistently with its obligations under international agreements pursuant to which consent of a third State is required to surrender the person.[10] Following arrest, Article 59(7) requires that the person shall be delivered to the Court as soon as possible.[11]

The State cooperation model is beset by substantial limitations. Most obvious is that the ICC is limited in that it can only compel State Parties or States whose situations were referred to the Court by the United Nations Security Council (UNSC).[12] A

Jordan,[16] and more. Sudan's current transitional government, who is holding al-Bashir under arrest and is under the obligation to surrender him to the ICC pursuant to the UNSC referral, has yet to provide any indication that they will do so.[17] Other times such failures arise because of these efforts being low on a State's list of priorities. Such is the case of Joseph Kony, fugitive and leader of the infamous Lord's Resistance Army, for whom State Party Uganda (with previous assistance of the United States) has recently drastically cut down on its operations to arrest.[18] Claus Kress and Kimberley Prost, now judge at the ICC, have warned that these types of scenarios are a "significant blow to the effectiveness of the cooperation regime [...] and the efficacy of the Court itself".[19] The ramifications of such situations are profound. A State's refusal to acknowledge and protect what others hold to be a universal human right acts as a bulwark to the legitimacy of the particular human rights initiative of the ICC. It sends a message that individual human lives have little value beyond being the playthings of corrupt elites. Frans Viljoen notes that putting tools to support systems upholding international human rights initiatives into the hands of those who seek to violate them, which is the case among certain State Party governments, will likely lead to severe institutional constraints.[20] In the ICC's case, the inherent ability for the cooperation regime to fulfill its mandate of ending impunity is put into question by this inability to truly rely on the very State Parties which maintain the ICC's existence.

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[16] "ICC: Jordan Was Required to Arrest Sudan's Bashir" (6 March 2019), online: *Human Rights Watch* <https://www.hrw.org/news/2019/05/06/icc-jordan-was-required-arrest-sudans-bashir>.

[17] "Sudan: Prioritize Justice, Accountability" (23 August 2019), online: *Human Rights Watch* <https://www.hrw.org/news/2019/08/23/sudan-prioritize-justice-accountability>.

[18] "Opinion: End of Kony search a blow for victims" (17 May 2017), online: *Coalition for the International Criminal Court* <http://www.coalitionfortheicc.org/news/20170517/opinion-end-kony-search-

International organization cooperation

The ICC is not blind to the reality described above, which is precisely why an additional model exists: the international organization cooperation model. The drafters of the Rome Statute were alive to this issue when they opted to include various

Despite these admirable efforts, their practical effects towards the ICC's ability to arrest suspects have been lacking. The only attempted arrest by UN peacekeeping forces pursuant to an ICC warrant on record is that of MONUC (predecessor of MONUSCO) in early 2006, when peacekeepers attempted to "disarm the LRA based in [...] Garamba National Park" in cooperation with "the International Criminal Court to execute the warrants of arrest against the LRA leadership".[25] In particular, Vincent Otti, a commander indicted by the ICC, was apparently present alongside fighters in this area.[26] This apparently ill-conceived mission failed, leaving eight Guatemalan peacekeepers dead.[27]

As for INTERPOL, the most valuable aspect of the cooperation agreement in relation to arrests is the issuance of

As of writing, 15 defendants for which the ICC has issued arrest warrants remain at large.[30] Many of these warrants were issued over a decade ago. There are also four individuals who died

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acknowledges such measures as positively encouraging the arrest of suspects.[63]

Individual financial sanctions and State incentives

The ability to impose financial sanctions on individual

likely encounter less resistance from Security Council members.[68] As for agreements by States within the Assembly of State Parties (and possibly States outside), these could either be done through individual state mechanisms (Office of Foreign Assets Control in the United States) or via international organizations (Organisation for Economic Co-operation and Development or European Union) which have the ability to freeze the assets of individuals. Such initiatives are made even more valuable in that they do not affect the community or State reeling from atrocity like broader State sanctions would, but simply target a unique individual. The caveat, of course, is that these will only be useful when the targeted individual actually has significant funds in international banking institutions. While Omar al-Bashir may be concerned, Joseph Kony would be unbothered.

Measures in the form of State incentives to arrest have also garnered attention as contributing to successful execution of warrants. One such measure is ostracization of a State from the international community. The United States and the European Union had enacted such efforts in order to induce compliance from Serbia in the surrender of accused before the ICTY.[69] In terms of financial incentives, direct financial incentives (i.e. where one promises certain aid in exchange for information or arrests) were found to be useful, yet a bit erratic in their success.[70] As an alternative, scholars point to the fact that a threat to withhold aid that was normally expected is a particularly persuading measure, and has a greater effect in line with how dependent the State is on this aid.[71] Of course, a notable issue here comes in the form of States who are hostile to institutions like the ICC promising aid to States regardless of their abuses. Finally, the overall calculus for regime survival is seen as the overarching consideration in this regard. Regimes in power in areas that experienced mass atrocity

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[68] Michael P Scharf, "The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal" (2000) 49:4 DePaul Law Review 925 at 945.

[69] Nikolas M Rajkovic, *The Politics of International Law and Compliance: Serbia, Croatia and The Hague Tribunal* (London: Routledge, 2011) at 67-68; Scheffer, *supra* note 47 at 323; Roper and Barria, *supra* note 40 at 457-58; Banteka, *supra* note 29 at 527.

[70] Scheffer, *supra* note 47 at 323; Stedman, *supra* note 39 at 12.

[71] Meernik, *supra* note 62 at 178; Mark S Berlin, "Why (not) arrest? Third-party state compliance and noncompliance with international criminal tribunals" (2016) 15:4 Journal of Human Rights 509 at 515, 525.

are typically quite fragile and they tend to operate on a cost-benefit analysis of whether the action they will take is going to benefit or harm their rather immediate survival.[72] Therefore, it remains paramount that regimes in power believe that executing a certain arrest warrant is more beneficial than detrimental for their future survival and success. This goes hand-in-hand with the international community's broad interest in ensuring State stability.

Multiplicity of actors

There is a reality, first pointed out by Judge Antonio Cassese, that the ICC has mostly ignored since its establishment: while judicial enforcement must be the center stage of international criminal law, it must run parallel to political action.[73] In contrast, current Prosecutor Fatou Bensouda made it clear from the outset that the Court would "not play the political game", something which would be left to the UNSC.[74] Our legal instincts tell us it is quite natural to fear this, we are to view Courts as impartial institutions that apply the law independent from any political interference.[75] However, the sui generis relationship between the ICC and realpolitik begs us to reconsider our immediate recoil to the thought of combining the political and judicial. Of course, I must make it emphatically clear that I do not believe political considerations should pervade any decisions rendered by the ICC's Chambers. Rather, I speak to the influence the political rightly should have within many other organs of the Court. Being a major actor within the international landscape in a particularly precarious position (as States may withdraw at any time), any operational decision the ICC makes is inevitably political and will affect its future existence. To isolate ourselves

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[72] *Meernik*, *supra* note 62 at 168-69, 180.

[73] Antonio Cassese, "On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law" (1998) 9 European Journal of International Law 2 at 13.

Chui,[85]

arrest warrant system moving forward. It must be noted, however, that although beyond the scope of the current article, there would also be much value in contemplating a model that engages with regional peacekeeping forces. One such example would be the ECOWAS Mission in the Gambia's forces, who recently played a notable role in ousting former Gambian President Yahya Jammeh from his illegitimately held position.

Part IV: Critical Considerations Underpinning the use of an International Military Organisation in Arrest Warrant Enforcement

seemingly at any moment.[93] Considering that the ICC has previously entered into cooperation agreements with UN peacekeeping missions, it seems undoubtable that such an ability is well within the legal constraints of the Rome Statute.

In further support of this proposition, one can look to the ICTY's history. In relation to the execution of arrest warrants, only the ICTY's Rules of Procedure and Evidence made mention of

the Rome Statute outline the Court's ability request and cooperate with international organizations in obtaining suspects, and make evident that respect of the accused's human rights will be demanded throughout such a process.

The Trial and Appeals Chamber in the Lubanga case identified any concerted action between an organ of the ICC and the authorities performing the arrest as somewhat of an aggravating factor which would give greater weight to the violation.[98] However, as pointed out by Melinda Taylor, the failure of the Appeals Chamber in Lubanga to set out any standards of prosecutorial due diligence indicates that the ICC has taken up a position of lenience towards potential violations and placed an imprimatur on the ability to get an accused before the Court.[99]

If the violation of an "internationally recognized" human right over the course of an arrest is established, there are three types of remedies which the ICC may give: a stay of proceedings, a reduction of sentence, or a financial compensation. The Appeals Chamber in Lubanga recognized the Court's power to stay proceedings on the basis of human rights violations in bringing the accused to justice as emanating from Article 21(3).[100] For such a remedy to be warranted, the Appeals Chamber required that a fair t

remedy".[103] As indicated by Karel de Meester et al, it is quite unlikely that violations of the accused's rights in the context of arrest will affect their ability to receive a fair trial proper.[104]

The ICC's position on the matter is made exceedingly clear by the Lubanga Appeals Chamber reminding that this decision will involve a balancing act where the "interest of the world community to put persons accused of the most heinous crimes against humanity on trial" is weighed against the "need to sustain the efficacy of the judicial process as the potent agent of justice".[105] The particular wording used here, of "heinous crimes" and "efficacy of the judicial process", lends itself to a view that the ICC would be extremely reluctant to ever stay proceedings on the basis of violations, even severe, of the accused's fundamental rights when they are arrested. In further support of this, all the previous ad-hoc tribunals that were faced with these issues make it clear that providing a remedy, in particular a stay of proceedings, to an accused for the violation of their rights during arrest is extremely unlikely.[106] A financial remedy is a possible

compensation.[107] The remedy of sentence reduction arguably exists as well due to the fact that it can be read into Article 85(1) Rome Statute which speaks of a "right to compensation" and does not specify financial compensation.[108] However, with no caselaw addressing either of these the threshold to trigger such remedies remains quite unclear.

Considering both the ICC and ad hoc tribunals' reluctance to grant a stay of proceedings for even severe violations of the rights of the accused, this is almost an inconsequential issue for the manner in which arrests are carried out by UN peacekeeping forces in cooperation with the ICC. However, with ICC involvement being an aggravating factor, it remains that UN peacekeeping force arrest procedures would have to conform to a certain minimum respect of the accused's rights in order to prevent any claim for financial compensation or sentence reduction.

State sovereignty

When cooperating with UN peacekeeping forces, whose reach can extend far beyond the territories of States Parties to the Rome Statute, potential legal issues may arise as to how such activities may undermine state sovereignty. What if, for example, UNAMISS peacekeepers in South Sudan (not a State Party) were to arrest nationals of Sudan (de facto State Party under UNSC resolution) subject to ICC warrants. Could South Sudan claim this

interference in their own affairs. Despite it being a slippery concept, from sovereignty flows a variety of legal principles attributable to States within public international law. Territorial sovereignty is one such principle. This allows a State to operate in its territory with no restrictions other than those existing under international law;[110] the State has the right to -317 (a) 2 I .24(s) -1 ( ) -301 (a)-301-317 (a) 2

unsettled. The ICC Appeals Chamber in Jordan Referral re Al-Bashir held that immunities unequivocally did not apply at the "horizontal level". In the case of a UNSC referral, the Court held that the referral places the same cooperation obligations on the target state as if it were a State Party, and this means that it cannot assert such an immunity in light of the fact that the Rome Statute does not recognize this immunity.[127] Beyond the existence of a referral, the Court found that there is no rule in customary international law "that would support the existence of Head of State immunity under customary international law vis-à-vis an international court".[128] However, there remain arguments against such a rule, not least of which rely on the International Court of Justice (ICJ) holding that the prosecution of former state officials is limited to "acts committed during that period of office in a

for perpetrators of grave human rights violations. Although suffering from the fault of having to necessarily rely on political manoeuvres, any increased ability of the ICC to address mass atrocity will increase the expanse of universal human rights, however limited. The decision as to which perpetrators an ICC-UN peacekeeping collaboration will focus on will also have an impact on the legitimacy of the Court. The articulation of a prosecution plan, showing that operational decisions have a basis in reason and are not purely based on political considerations, is fundamental to an international tribunal's legitimacy. Similar practice would be necessary for the execution of warrants by UN peacekeeping forces in the form of a transparent arrest plan. For arrangements with UN peacekeeping missions, the targets to

momentum which could then strategically be used to target higher level perpetrators.

Local norms and repercussions

A major strength of the UN is the cloak of universality provided to instruments adopted under its auspices.[140] However, this is less so for peacekeeping missions which are established through the quite limited representativity of the UNSC, which only features a small number of States. Notwithstanding, Frans Viljoen outlines that any such "universal" instruments, whether established through a legitimate global consensus or not, will likely clash with regional and local specificities.[141] Thus, one must be alive to the

actors which can provide broad support for arrest initiatives, and most obviously they provide "boots on the ground" to enforce warrants.

Further, there is little legal basis from which to undermine the use of a cooperative ICC-UN peacekeeping operation model to execute arrests. Under the Rome Statute

issues to be considered regarding the differences in troop abilities, training, and equipment based on their nation of origin.[149] Finally, there is the inevitable concern about the financing of such operations. The two previous agreements between the ICC and UN peacekeeping operations both required the ICC to reimburse costs specifically related to their cooperation.[150] This would likely be untenable for any future arrangements considering the severe reluctance by State Parties to increase the budget available to the Court.[151]

With seven situations under investigation and two situations under preliminary investigation located in territories hosting UN peacekeeping missions,[152] it seems a promising endeavour to seek to engage in more extensive cooperation agreements with them. It will not be an easy task, but it may be a necessary one. In more ways than we think, the fight for justice is won by battles in the interstices of law.

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