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

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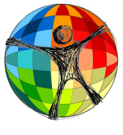

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ABSTRACT

As the International Criminal Court (ICC) matures, a critical appreciation of one of its weaker components, arrest warrant enforcement, becomes imperative. The current state of the ICC's cooperation models with both States and international organisations has been beset by substantial limitations and notable disappointments, most notably the failure to apprehend Omar al-Bashir. Such issues threaten the ability of the Court to effectively fight impunity. Historical experience shows that certain measures and circumstances positively contribute to the successful execution of international arrest warrants. These are the use of secrecy and persistent tracking, individual financial sanctions and State incentives, the involvement of a multiplicity of actors, and the presence of "boots on the ground". Such evidence supports the use of a solid UN peacekeeping cooperation model for the ICC's enforcement of arrest warrants. This model withstands most significant legal concerns. The use of peacekeeping forces to execute arrests is provided for by the Rome Statute, the rights of the accused would not significantly impede such a model, State sovereignty could easily be respected, and concerns about legal immunities would not arise. As for practical concerns, these would play a role in informing the operational aspects of such a model. Risks to the legitimacy of the ICC would demand that initial arrests be focused on lower-level perpetrators and explain decision making through a public arrest plan, the particular norms and needs of local communities would have to be incorporated into such arrest efforts, and attention should be directed to the risk that the actions of these missions fissure instances of fragile peace. Taking these considerations into account, a promising future is laid out for an ICC-UN peacekeeping model as a valuable tool to combat impunity.

CONTENTS

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.

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[1] See generally Payam Akhavan, "The Rise, and Fall, and Rise, of International Criminal Justice" (2013) 11:3 Journal of International Criminal Justice 527.
[2] *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 38544, Preamble, para 4, art 1 (entered into force 1 July 2002) [*Rome Statute*].
[3] See *ibid*, Preamble, para 10, arts 1, 17.
[4] See Carsten Stahn, *A Critical Introduction to International Criminal Law* (Oxford: Oxford University Press, 2018) at 195.
[5] *Rome Statute*, *supra* note 2, Preamble, para 5.
[6] *Ibid* at art 63.

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 further issue is that these States have demonstrated repeated failures to comply with their obligations under the Rome Statute. Sometimes such failures have been voluntary. Omar al-Bashir, former Sudanese president and the subject of an arrest warrant by the Court since 2009, was notably not placed under arrest when visiting State Parties South Africa,[13] Kenya,[14] Uganda,[15]

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[9] *Rome Statute*, *supra* note 2 at art 89(1).
[10] *Ibid* at arts 98(1), 98(2).
[11] *Ibid* at art 59(7).
[12] See *The Prosecutor v Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09, 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 (6 July 2017) at para 88 (International Criminal Court, Pre-Trial Chamber).
[13] Marlise Simons, "South Africa Should Have Arrested Sudan's President, I.C.C. Rules", *New York Times* (6 June 2017), online: <https://www.nytimes.com/2017/07/06/world/africa/icc-south-africa-sudan-bashir.html>.
[14] Associated Press, "Kenya defends failure to arrest Sudan's president Omar al-Bashir in Nairobi", *The Guardian* (29 August 2010), online: <https://www.theguardian.com/world/2010/aug/29/kenya-omar-al-bashir-arrest-failure>.
[15] "Uganda: Stand with victims, arrest ICC fugitive al-Bashir" (14 November 2017), online: *Coalition for the International Criminal Court* <http://www.coalitionfortheicc.org/news/20171114/uganda-stand-victims-arrest-icc-fugitive-albashir>.

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-blow-victims>.

[19] Claus Kress and Kimberly Prost, "Article 87 Requests for cooperation: general provisions" in Otto Triffterer and Kai Ambos, eds, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd ed (London: Bloomsbury Publishing, 2016) at 2042.

[20] Frans Viljoen, "Human rights in Africa: normative, institutional and functional complementarity and distinctiveness" (2011) 18:2 South African Journal of International Affairs 191 at 199-203.

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 provisions explicitly permitting such a model.[21] Empowered by this, the ICC has sought to partner with various international organizations for, inter alia, the specific purpose of enforcing arrest warrants. On one hand, the Court has sought arrangements with United Nations peacekeeping operations. The ICC has concluded memorandums of understanding with UN forces in the Democratic Republic of the Congo (MONUSCO)[22] and Côte d'Ivoire (UNOCI).[23] These agreements both feature quasi-identical acquiescence by peacekeeping forces to provide administrative and logistical support, medical support, access to equipment and transportation, military support to facilitate investigations, access to documents and information, assistance to obtain evidence, and assistance to the local government in effecting arrests. In another vein, the ICC, more specifically the Office of the Prosecutor (OTP), has also sought an arrangement with the International Criminal Police Organization (INTERPOL). The OTP has concluded a memorandum of understanding that requires INTERPOL to share information, to publish INTERPOL red notices for arrest warrants, to provide access to relevant specialized staff.[24]

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[21] *Rome Statute*, *supra* note 2 at arts 15(2), 44, 54(3)(c)-(d), 87(6).
[22] *Memorandum of understanding between the United Nations and the International Criminal Court concerning cooperation between the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) and the International Criminal Court (with annexes and exchange of letters)*, United Nations and the International Criminal Court, 8 November 2005, 2363 UNTS 1292 (entered into force 8 November 2005) [*MoU MONUSCO*].
[23] *Memorandum of Understanding between the United Nations and the International Criminal Court concerning cooperation between the United Nations Operation in Côte d'Ivoire (UNOCI) and the Prosecutor of the International Criminal Court (with annexes)*, United Nations and the International Criminal Court, 23 January 2012, 2803 UNTS 1358 (entered into force 23 January 2012) [*MoU UNOCI*].
[24] *Co-operation Agreement Between the Office of the Prosecutor of the International Criminal Court and the International Criminal Police Organization-INTERPOL*, 22 December 2004 [*MoU INTERPOL*].

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 red notices. While these are INTERPOL's highest level of international notice, they remain nonbinding and how national authorities will deal with them is entirely their prerogative.[28] The current international organization cooperation model for arrests is therefore laying disused and weak, with the risk that it will fall into obsolescence.

Impact of the ICC's failures to arrest fugitives

In many ways, the current arrest system reveals a lethal vulnerability within the ICC's broad mandate.[29] The basic inability to obtain custody of suspects supersedes most other concerns.

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[25] UNSCOR, 61st Year, 5415th Meeting, UN Doc S/PV.5415 (2006) at 3.
[26] *The Prosecutor v Joseph Kony et al.*, ICC-02/04-01/05, Submission of information on the statute of the execution of the warrants of arrest in the situation in Uganda (6 October 2006) at para 8 (International Criminal Court, Pre-Trial Chamber).
[27] *Ibid* at para 14; see also Richard H Cooper and Juliette Voïnov Kohler, "Moving From Military Intervention to Judicial Enforcement - The Case for an International Marshals Service" in Richard H Cooper and Juliette Voïnov Kohler, eds, *The responsibility to protect: the global moral compact for the 21st century* (New York: Palgrave Macmillan, 2009) 243 at 261, n 18.
[28] "Red Notices" (2019), online: *INTERPOL* <https://www.interpol.int/en/How-we-work/Notices/Red-Notices>.
[29] Nadia Banteka, "Mind the Gap: A Systematic Approach to the International Criminal Court's Arrest Warrants Enforcement Problem" (2017) 49:3 Cornell International Law Journal 521 at 523.

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 before their arrest warrants could be executed.[31] To get a broad picture, the ICC has issued arrest warrants against 45 suspects.[32] This means that over a third of arrest warrants have not been executed. Notwithstanding the extensive difficulties associated with obtaining the surrender of international criminals, there is undoubtably room for improvement. Further, certain arrest warrants that have been executed were subject to serious delays between their issuance and obtention of the accused in custody. Bosco Ntaganda only ended up in the ICC's custody almost seven years following the issuance of his initial arrest warrant.[33] Dominic Ongwen's arrest warrant was only executed almost a decade following its issuance.[34]

There are tangible impacts in these failures to arrest fugitives in a timely manner. Without suspects on trial, any chance at criminal justice is lost for victims, their families, and their communities.[35] Although not always necessary, communities lose the possibility of using an independently established record of criminal responsibility as a reference point for societal healing.[36] In addition to victims' rights hanging in the balance, there are also financial consequences as costs spiral upward through frozen witness protection programs and the large amount of resources

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[30] International Criminal Court, "Arresting ICC suspects at large: Why it matters? What the Court does? What States can do?" (January 2019) at 6, online (pdf): *I*CC <https://www.icc-cpi.int/news/seminarBooks/bookletArrestsENG.pdf> [Arresting ICC suspects at large].
[31] *Ibid*.
[32] Office of the Prosecutor, "Strategic Plan 2019-2021" (17 July 2019) at para 28, online (pdf): *I*CC <https://www.icc-cpi.int/itemsDocuments/20190726-strategic-plan-eng.pdf> [Strategic Plan 2019-2021].
[33] International Criminal Court, "Case Information Sheet – Bosco Ntaganda" (November 2019), online (pdf): *I*CC <https://www.icc-cpi.int/CaseInformationSheets/NtagandaEng.pdf>.
[34] International Criminal Court, "Case Information Sheet – Dominic Ongwen" (December 2019), online (pdf): *I*CC <https://www.icc-cpi.int/CaseInformationSheets/ongwenEng.pdf>.
[35] Richard Dicker and Elizabeth Evenson, "ICC Suspects Can Hide – and That Is the Problem" (24 January 2013), online: <https://www.jurist.org/commentary/2013/01/dicker-evenson-icc-suspects/> [ICC Suspects Can Hide]; Strategic Plan 2019-2021, *supra* note 32 at para 10.
[36] ICC Suspects Can Hide, *supra* note 35.

invested into building a case which fails to materialize.[37] Finally, having these suspected criminals at large can do considerable damage to peacebuilding efforts.[38] They create risks of renewed violence, often aiming to spoil peace agreements, believing that the peace emerging from negotiations threatens their power and interests.[39] Such issues threaten not only the ICC's mandate of ending impunity for perpetrators, but also the entire criminal branch of the international human rights regime.[40] Failing to bring the accused of international crimes before court means a failure to address human rights violations so serious that we deem them to harm the entire international community.

Steps forward

The OTP has openly recognized that timely execution of arrest warrants remains a weakness within the Rome Statute[41] and has made clear that to "develop with States enhanced strategies and methodologies to increase the arrest rate" is one of its strategic goals for its 2019-2021 plan.[42] The OTP specifically indicates a willingness to increase efforts in "exploring options to create operational groups of relevant States and organisations to exchange information and coordination on diplomatic and military efforts to secure arrests".[43] This avenue has been garnering increased support among experts as well.[44] However, in both previous cooperation agreements the ICC entered into alongside UN peacekeeping missions, the only requirement they

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[37] *Ibid;* Arresting ICC suspects at large, *supra* note 30 at 7.
[38] Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities" (2001) 95:1 American Journal of International Law 7 at 7; Arresting ICC suspects at large, *supra* note 30 at 7.
[39] Stephen John Stedman, "Spoiler Problems in Peace Processes" (1997) 22:2 International Security 5 at 5.
[40] Steven D Roper and Lilian A Barria, "State Co-operation and International Criminal Court Bargaining Influence in the Arrest and the Surrender of Suspects" (2008) 21:2 Leiden Journal of International Law 457 at 458.
[41] Strategic Plan 2019 - 2021, *supra* note 32 at para 10.
[42] *Ibid* at 5.
[43] *Ibid* at para 32.
[44] See Human Rights Law Centre, "Cooperation and the International Criminal Court Report" (2015) at para 78, online (pdf): *University of Nottingham* <https://www.nottingham.ac.uk/hrlc/documents/specialevents/cooperation-and-the-icc-final-report-2015.pdf> [Cooperation and the ICC]; William A Schabas, *The Cambridge Companion to International Criminal Law* (Cambridge: Cambridge University Press, 2014) at 349.

had was to be prepared to assist local government with carrying out arrests.[45]

With the Prosecutor having recently been authorized to undertake a full investigation into the Situation in Bangladesh/Myanmar,[46] questions over the ICC's ability to execute arrest warrants will only increase. As Myanmar is not a State Party to the Rome Statute, it has no obligation to comply with requests for surrender by the ICC, unless the UNSC were to refer this situation to the Court. With much scrutiny to be placed on any future attempts to secure the surrender of Burmese nationals, it seems valuable for the ICC to tighten up its arrest warrant regime in order to maintain its credibility in the long run.

Part II: Historical Overview of Previously Implemented Models

There are three notable instances, other than in association with the ICC, in which international military taskforces were used to arrest suspects for their alleged violations of ICL.

The first attempted use of a UN peacekeeping taskforce to arrest an individual suspected of violating ICL occurred in Somalia, 1993. By all accounts, this attempt significantly tainted the international community's view on the use of such measures. In June 1993, the UNSC adopted a resolution that authorized the forceful apprehension of those responsible for attacks on Pakistani peacekeepers in Mogadishu, Somalia.[47] The primary target of this mission was Mohamed Farrah Aidid, self-declared President of Somalia, and his lieutenants. In early October 1993, an arrest operation targeting the lieutenants took place under Operation Gothic Serpent. It was a disastrous mission, which collapsed within

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[45] *MoU MONUSCO*, *supra* note 22 at art 16; *MoU UNOCI*, *supra* note 23 at art 15.

[46] *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, ICC-01/19, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar (14 November 2019) (International Criminal Court, Pre-Trial Chamber).

[47] David Scheffer, "Arresting War Criminals: Mission Creep or Mission Impossible?" (2003) 35:2 Case Western Reserve Journal of International Law 319 at 320.

a few hours and led to the deaths of 18 United States soldiers.[48] With that, according to U.S. Ambassador David Scheffer, much momentum that had been built over the use of UN peacekeepers to arrest those responsible for international crimes lost its basis for policy projection.[49]

The use of international military forces to capture international criminals was quickly brought to the forefront again by the International Criminal Tribunal for the former Yugoslavia (ICTY). The ICTY was deftly able to utilize UN peacekeeping operations in the region (UNTAES)[50] and NATO forces (IFOR and later SFOR)[51] to have many arrest warrants executed. The cooperation agreement between UNTAES and the ICTY had been included within the UNSC resolution which created the UN mission.[52] However, it provided nothing more than a vague reminder that "UNTAES shall cooperate with the International Tribunal in the performance of its mandate".[53] As for NATO, it had simply been given the authority to arrest individuals indicted by the Tribunal under the resolution from the North Atlantic Council of 16 December 1995, but had no obligation to execute arrest warrants.[54] These forces were undoubtably essential in the ICTY obtaining a perfect record of arrest warrant execution, with

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[48] *Scheffer*, *supra* note 47 at 320.
[49] *Ibid* at 320-21.
[50] "Apprehension and transfer to The Hague of an Accused under sealed indictment Press Release" (27 June 1997), online: *International Criminal Tribunal for the Former Yugoslavia* <https://www.icty.org/en/press/apprehension-and-transfer-hague-accused-under-sealed-indictment>.
[51] Pierre Hazan, "As Yugoslav Tribunal Closes, A Look Back At Its History" (3 January 2018), online: *Justice Info* <https://www.justiceinfo.net/en/tribunals/36014-as-yugoslav-tribunal-closes-a-look-back-at-its-history.html>; Victor Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (Cambridge: Cambridge University Press, 2008) at 52; Rachel Kerr, *The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law, Politics, and Diplomacy* (Oxford: Oxford University Press, 2004) at 162-63; Annalisa Ciampi, "Current and Future Scenarios for Arrest and Surrender to the ICC" (2006) 66 ZaöRV 719 at 735.
[52] *Resolution 1037*, UNSCOR, 1996, UN Doc S/RES/1037 (1996).
[53] *Ibid* at para 21.
[54] Paolo Gaeta, "Is NATO Authorized or Obliged to Arrest Persons Indicted by the International Criminal Tribunal for the Former Yugoslavia?" (1998) 9 European Journal of International Law 174 at 180-81.

all 162 suspects either surrendering or being captured to face the Tribunal.

A final example pertains to the collaboration between the Special Panels for Serious Crimes (SPSC) and the United Nations Transitional Administration in East Timor (UNTAET) beginning in 2000. When the SPSC was established, UNTAET created a Public Prosecution Service that included a specialized unit to prosecute serious crimes.[55] This unit was a distinct organ outside the SPSC and it brought noted benefits to the tribunal through ensuring closer cooperation with UN peacekeepers in securing evidence and assistance from the UN civilian police in investigation and arrests.[56]

This brief outline of previous historical models permits us to draw a few, albeit limited, conclusions as to the use of international military forces to arrest suspects of international crimes. These tactics are undoubtably useful, as the ICC itself has already recognized by attempting to enter into arrangements with many UN peacekeeping operations. However, history also provides us with a cautionary tale. The risk involved in utilizing such forces to execute arrests is perilously high. Errors will cost lives. The long-term repercussions of failure can be quite serious. The Somali debacle led to the United States shifting to a policy of non-intervention towards mass atrocity crises that is still ongoing today (with the exception of combatting terrorist groups in Muslim-majority regions).[57] There is little room for error when attempting to garner support for such a model, and it will require a stable base to build on in order to grow into a more conventionally accepted method of arrest warrant execution.

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[55] Caitlin Reiger and Marieke Wierda, "The Serious Crimes Process in Timor-Leste: In Retrospect" (March 2006) at 13, online (pdf): *International Center for Transitional Justice* <https://www.ictj.org/sites/default/files/ICTJ-TimorLeste-Criminal-Process-2006-English.pdf>.

[56] *Ibid* at 14.

[57] Philip B Dotson, "The Successes and Failures of the Battle of Mogadishu and Its Effects on U.S. Foreign Policy" (2016) 1:1 Channels 179 at 195-96.

Part III: Effective Measures and Favourable Circumstance as Outlined by Historical Experience

It is important to overview what valuable measures and circumstances have broadly contributed to successful execution of arrest warrants in order to evaluate how useful a revamped cooperation model between the ICC and UN peacekeeping operations would be.

Secrecy and persistent tracking

The ability to maintain secrecy for indictments and arrest warrants has been identified as an important factor supporting arrest warrant execution. The reasons for this are self-evident: it lessens risk of flight by suspects, allows forces executing the warrants time to prepare, and permits forces to encounter suspects on their own terms.[58] In his sweeping overview of the inner workings of the ICTY in Justice in the Balkans: Prosecuting War Crimes in The Hague Tribunal, John Hagan demonstrates that the resort to secret indictments and warrants was crucial to Former Prosecutor Louise Arbour's success at the ICTY.[59] Arbour later publicly agreed with the importance of such a strategy.[60]

Engaging in persistent monitoring and tracking of suspects has also been established as a valuable factor to support warrant execution. Monitoring will increase transparency and expose possible defectors.[61] If done publicly, it will further restrict the confined political space in which fugitive international criminals operate and increase the likelihood that physical and political survival in that space cannot be sustained.[62] The ICC itself

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[58] *Kerr*, *supra* note 51 at 159.
[59] John Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal* (Chicago: University of Chicago Press, 2003) at 129-30.
[60] Louise Arbour, "The Status of the International Criminal Tribunals for the Former Yugoslavia and Rwanda: Goals and Results" (1999) 3 Hofstra Law and Policy Symposium 37 at 39.
[61] Jonas Tallberg, "Paths to Compliance: Enforcement, Management and the European Union" (2002) 56:3 International Organization 609 at 612.
[62] James Meernik, "It's Time to Stop Running: A Model of the Apprehension of Suspected War Criminals" (2008) 9:2 International Studies Perspectives 165 at 173.

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 suspects (and their allies) has been touted as another effective measure to support the execution of international arrest warrants. The specific method of sanctioning focused on here is "asset freezing". This refers to tracing and blocking funds of individuals that are located in international banking institutions.[64] These asset freezes can serve as an effective penalty that can induce compliance for surrender. It makes defiance of an ICC arrest warrant a very costly business. There are two main avenues by which such sanctions could be imposed: through the UNSC Sanctions Committee or by an agreement between State Parties (and also non-State Parties). For the Sanctions Committee, such actions are not unheard of. Bosco Ntaganda, a commander of a Congolese armed group, was named on the UNSC Sanctions Committee list following his indictment before the ICC.[65] Thomas Lubanga Dyilo, President of the same Congolese armed group, was also targeted for personal sanctions by the UNSC Sanctions Committee following his ICC indictment.[66] That same list also featured UNSC targeted sanctions to Germain Katanga, a commander of a Congolese militia, who had also been previously indicted by the ICC.[67] Further, such measures may bypass problems of UNSC multilateralism as these sanctions would be targeted to specific individuals, not governments, and would thus

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[63] Arresting ICC suspects at large, *supra* note 30 at 16.
[64] See David Cortright and George A Lopez, "Targeted Sanctions: Lessons from the 1990s" in Michael Brzoska, ed, *Smart Sanctions: The Next Steps – The Debate on Arms Embargoes and Travel Sanctions within the "Bonn-Berlin Process"* (Baden-Baden: Nomos Publishing, 2001) at 26-27, 35.
[65] See *Resolution 1533*, UNSCOR, 2004, UN Doc S/RES/1533 (2004) [*Resolution 1533*]; "United Nations Security Council Consolidated List" (generated on 4 December 2019) at 122, online (pdf): *UNSC* <https://scsanctions.un.org/fop/fop?xml=htdocs/resources/xml/en/consolidated.xml&xslt=htdocs/resources/xsl/en/consolidated.xsl> [UNSC Consolidated List].
[66] See *Resolution 1596*, UNSCOR, 2005, UN Doc S/RES/1596 (2005) [*Resolution 1596*]; UNSC Consolidated List, *supra* note 65 at 87; see also Cooperation and the ICC, *supra* note 44 at para 62.
[67] See *Resolution 1596*, *supra* note 66; UNSC Consolidated List, *supra* note 65 at 80.

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.
[74] Till Papenfuss, "Interview with Fatou Bensouda, Chief Prosecutor, International Criminal Court" (15 November 2012), online: *IPI Global Observatory* <https://theglobalobservatory.org/2012/11/interview-with-fatou-bensouda-chief-prosecutor-international-criminal-court/>.
[75] See generally Tod Lindberg, "A Way Forward with the International Criminal Court" (2010) Future Challenges in National Security and Law.

from such a reality risks severely weakening the Court,[76] particularly where many world powers are not party to it.

What such political action allows the ICC to do is of interest here. It has been established that the backing of a multiplicity of actors, the ability to raise support for an arrest in a diverse and widespread coalition, is a particularly effective method to secure arrest warrant execution.[77] The ICTY was able to make use of such a method to good effect. Former Prosecutor Louis Arbour mobilized a broad coalition of support from varied actors within the international community to assist the ICTY.[78] Doing so will increase what is termed the tribunal's "soft power", which how its moral authority as a guardian of universal standards of human rights can induce the cooperation of external actors.[79]

"Boots on the ground"

Perhaps the most self-evident circumstance that favours execution of arrest warrants is presence of a cooperating international military or police force in the relevant territory, or "boots on the ground". Of course, this allows a court to effectively bypass any issues of State cooperation. As made clear above, the use of international military organizations such as NATO (IFOR, later SFOR) and UNTAES were particularly crucial for obtaining early arrests for the ICTY and later supporting certain higher profile arrests.[80] This provided a recurrent reminder of the Tribunal's credibility and a sentiment of inevitability that suspects

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[76] Banteka, *supra* note 29 at 531; Nadia Banteka, "An Integrative Model for the ICC's Enforcement of Arrest and Surrender Requests: Toward a More Political Court?" in Richard H Steinberg, ed, *Contemporary Issues Facing the International Criminal Court* (Leiden: Brill Nijhoff, 2016) 453 at 461.
[77] Banteka, *supra* note 29 at 562; Peskin, *supra* note 51 at 236; Han-Ru Zhou, "The Enforcement of Arrest Warrants by International Forces: From the ICTY to the ICC" (2006) 4:2 Journal of International Criminal Justice 202 at 216.
[78] *Third Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, UNGAOR, 51st Sess, UN Doc S/1996/665 (1996) at 85.
[79] Peskin, *supra* note 51 at 7-8.
[80] Robert Cryer, "Means of Gathering Evidence and Arresting Suspects in Situations of States' Failure to Cooperate" in Antonio Cassese, ed, *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009) 202 at 206; Gary J Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000) at 268; Kerr, *supra* note 51 at 162; Zhou, *supra* note 77.

would end up before the ICTY, both towards the international community and the accused themselves.[81]

Support for the peacekeeping model

The effectiveness of the measures and circumstances outlined above provide substantial backing for an increased focus on the use of UN peacekeeping operations for the execution of ICC arrest warrants. The ability to strategically utilize secret indictments would not be jeopardized by cooperation on the matter with a UN peacekeeping force. In addition, a UN peacekeeping operation would likely have extensive means to persistently monitor and track suspects. This even more so as the UN pursues its strategy for technology and innovation for peacekeeping.[82]

Asset freezing via the UNSC Sanctions Committee could also be encouraged by an arrangement with UN peacekeeping forces, whose deployment has to be approved by the UNSC itself. Presumably, support or even mere acquiescence of a UN peacekeeping mission for any asset freeze would evidently increase the likelihood that it be passed by the UNSC Sanctions Committee. As evidence of this, it so happens that every targeted sanction issued by the Sanctions Committee for an individual subject to an ICC arrest warrant featured a situation involving a UN peacekeeping operation. From Laurent and Simone Gbagbo,[83] to Callixte Mbarushimana,[84] to Mathieu Ngudjolo

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[81] *Kerr*, *supra* note 51.

[82] "Performance Peacekeeping: Final Report of the Expert Panel on Technology and Innovation in UN Peacekeeping" (22 December 2014), online (pdf): *United Nations Peacekeeping* <https://peacekeeping.un.org/sites/default/files/performance-peacekeeping_expert-panel-on-technology-and-innovation_report_2015.pdf>; see also Walter Dorn, "Smart Peacekeeping: Toward Tech-Enabled UN Operations" (July 2016), online (pdf): *International Peace Institute* <https://www.ipinst.org/wp-content/uploads/2016/07/IPI-Rpt-Smart-PeacekeepingFinal.pdf>.

[83] *Resolution 1975*, UNSCOR, 2011, UN Doc S/RES/1975 (2011).

[84] *Resolution 1533*, *supra* note 65; UNSC Consolidated List, *supra* note 65 at 92.

Chui,[85] to Alfred Yekatom,[86] to all those mentioned above.[87] All of these sanctions targeted individuals related to a situation where a UN peacekeeping operation was ongoing. It therefore holds that cooperation with peacekeeping forces will better the chances of such measures being taken.

Further, working with UN peacekeeping missions would also address the issue of State incentives. While they do contribute to successful execution of arrest warrants, these incentives are typically extremely costly (in the case of direct financial incentives) or entertain a healthy dose of realpolitik concerns (in the case of withholding aid, often coming from the United States and China). Luckily, cooperating with UN peacekeeping forces allows the ICC to bypass these concerns as there is less of a pressing need to incentivize States when a potential task force is already on the ground.

Working alongside UN peacekeeping operations also permits the ICC to more easily engage with a multiplicity of actors within the international community at very low political cost. Little arguments of "political bias" could be leveled at the ICC for tightening its links to the United Nations. Through their work on building rule of law and security institutions, as well as promoting human rights, UN peacekeeping operations have connections to valuable local and international institutions and actors that can help the ICC's arrest warrant process garner support from a widespread coalition.[88]

Finally, cooperation with UN peacekeeping forces also obviously gives the ICC arrest warrant system clear "boots on the ground" in the form of a cooperative military and/or police force. In sum, working alongside multiple UN peacekeeping forces and requiring their assistance in executing Court warrants through cooperation arrangements is an invaluable model for the ICC's

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[85] *Resolution 1533*, *supra* note 65; UNSC Consolidated List, *supra* note 65 at 102.
[86] *Resolution 2127*, UNSCOR, 2013, UN Doc S/RES/2127 (2013); UNSC Consolidated List, *supra* note 65 at 127.
[87] See "Individual financial sanctions and State incentives", *above*.
[88] "Building Rule of Law and Security Institutions", online: *United Nations Peacekeeping* <https://peacekeeping.un.org/en/building-rule-of-law-and-security-institutions>; "Promoting Human Rights", online: *United Nations Peacekeeping* <https://peacekeeping.un.org/en/promoting-human-rights>.

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

Legality of the use of international forces

The basic framework underlying the legality of the ICC cooperating with international military forces is provided for within the Rome Statute. Article 15(2) permits the Prosecutor to seek information on crimes from organs of the United Nations, intergovernmental or nongovernmental organizations (NGOs).[89] Article 44 permits any organs of the Court to employ the expertise of personnel offered by intergovernmental organizations or NGOs.90 During investigation, Articles 54(3)(c) and (d) allow the Prosecutor to seek the cooperation of or enter into an arrangement with any intergovernmental organization.91 Many scholars have held that the specific use of the word "arrangement" in this provision was to allow the Prosecutor to seek the cooperation of peacekeeping forces.92 More broadly, under Article 87(6) the Court has the right to ask for any form of cooperation and assistance which may be agreed upon with an intergovernmental organization,

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[89] *Rome Statute*, *supra* note 2 at art 15(2).
[90] *Ibid* at art 44.
[91] *Ibid* at art 54(3)(c)-(d).
[92] Claus Kress and Kimberly Prost, "Article 87 Requests for cooperation: general provisions" in Otto Triffterer and Kai Ambos, eds, *The Rome Statute of the International Criminal Court: A Commentary*, 1st ed (Baden-Baden: Nomos, 1999) at 1065; Annalisa Ciampi, "The Obligation to Cooperate", in Antonio Cassese, Paolo Gaeta, and John Jones, eds, *The Rome Statute of the International Criminal Court: A Commentary*, vol 2 (Oxford: Oxford University Press, 2002) 1607 at 1621.

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 international bodies. Rule 39(iii) provided that the Prosecutor could seek assistance from a relevant international body in conducting investigations[94] and Rule 59bis(A) permitted the transmission of arrest warrants to an appropriate international body.[95] On this relatively meager basis, the ICTY found that it had the authority to legitimize arrests of alleged war criminals by multinational military forces, including non-UN forces such as NATO.[96] As the Rome Statute displays a clear elaboration and expansion as to the Court's ability to cooperate with international forces, it seems quite clear that the ICC must also have the authority to cooperate with them. Therefore, there seems to be no inherent issues of legality pertaining to ICC cooperation with UN peacekeeping forces.

Rights of the accused

Use of a UN peacekeeping task force to enforce arrests will likely be challenged by the targeted accused on the basis of a violation of their rights. This occurred repetitively at the ICTY in cases where UNTAES or NATO were involved in an individual's arrest. The requirement to respect the rights of the accused in the process of bringing them to justice flows from Article 21(3) Rome Statute which requires application of the Statute in a manner "consistent with internationally recognized human rights".[97] These articles in

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[93] *Rome Statute*, *supra* note 2 at art 87(6).
[94] ICTY, *Rules of Procedure and Evidence*, IT/32/Rev.50, r 39(iii).
[95] *Ibid*, r *59bis*(A).
[96] Geert-Jan Knoops, *Surrendering to International Criminal Courts: Contemporary Practice and Procedures* (Leiden: Brill Nijhoff, 2002) at 373; see *Prosecutor v Dragan Nikolić*, IT-94-2, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal (9 October 2002) (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).
[97] *Rome Statute*, *supra* note 2 at art 21(3); *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006 (14

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 trial must become impossible due to breaches of fundamental rights of the suspect or accused by their accusers.[101] The Mbarushimana Pre-Trial Chamber added that "only gross violations of those rights [...] justify that the course of justice be halted".[102] The Lubanga Appeals Chamber further reminded that a permanent stay of proceedings is a "drastic" and "exceptional"

December 2006) at para 36 (International Criminal Court, Appeals Chamber) [*Lubanga*].

[98] *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute (3 October 2006) at 9-11 (International Criminal Court, Trial Chamber); *Lubanga*, *supra* note 97 para. 42.

[99] Melinda Taylor and Charles C Jalloh, "Provisional Arrest and Incarceration in the International Criminal Tribunals" (2013) 11:2 Santa Clara Journal of International Law 303 at 321.

[100] *Lubanga*, *supra* note 97 at paras 36-39.

[101] *Ibid* at paras 37, 44.

[102] *The Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/10, Decision on the "Defence request for a permanent stay of proceedings" (1 July 2011) at 4-5 (International Criminal Court, Pre-Trial Chamber).

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 alternative, as Article 85(1) Rome Statute provides that a person who is unlawfully arrested has an enforceable right to

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[103] *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU" (8 October 2010) at para 55 (International Criminal Court, Appeals Chamber).
[104] Karel de Meester et al, "Investigation, Coercive Measures, Arrest, and Surrender" in Göran Sluiter et al, eds, *International Criminal Procedure: Principles and Rules* (Oxford: Oxford University Press, 2013) 170 at 364.
[105] *Lubanga*, *supra* note 97 at para 39.
[106] *The Prosecutor v Jean-Bosco Barayagwiza*, ICTR-97-19, Decision (3 November 1999) (International Criminal Tribunal for Rwanda, Appeals Chamber) (after the Appeals Chamber had initially declared a stay of proceedings for Barayagwiza, subsequent discontent from the broader global community and Rwanda in particular led the ICTR to quickly realise the immense negative backlash it would receive and it recoiled away from its previous decision by deciding to retry it on the basis of somewhat dubious "new evidence"); *Prosecutor v Dragan Nikolić*, IT-94-2, Decision on interlocutory appeal concerning legality of arrest (5 June 2003) at para 30 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber) (consider the reluctance to even clarify the threshold of a serious violations and not bothering to elaborate on which fundamental rights had been violated); *KAING Guek Eav alias Duch*, Case 001, Judgment (26 July 2010) at para 680 (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber) (note the relatively minimal award for the severity of the violation).

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 to be a violation of its sovereignty? In many ways, this issue reflects an inherent tension in the ICC's ability to bring justice caused by its genesis as a product of State sovereignty. The Rome Statute reflects a great solicitude for the prerogative of States and its entire operation is premised on the State as a (hopefully) cooperative sovereign, but a sovereign nonetheless.[109] While sovereignty is, in many ways, an indeterminate notion, it is often invoked by States as a political and legal argument to counter

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[107] *Rome Statute*, *supra* note 2 at art 85(1).
[108] *Ibid*; also note that although Rule 175 of the Rules of Procedure and Evidence does speak of an "amount of compensation", which implies financial compensation, Rule 175 applies only to Article 85(3) *Rome Statute*, which in turn applies to those acquitted and persons otherwise released (obviously, in such cases, sentence reduction could never be a remedy).
[109] Antonio Cassese, *Cassese's International Criminal Law*, 3rd ed (Oxford: Oxford University Press, 2013) at 304.

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 be free from intrusion by other States in its affairs and it is the duty of every other State to refrain from interference.[111] Another principle is that, as the Permanent Court of International Justice rather famously decided, "restrictions upon the independence of States [...] cannot be presumed" and must flow from their own free will.[112] This holding is central to the rule expressed in Article 34 Vienna Convention on the law of treaties (VCLT) that "a treaty does not create either obligations or rights for a third State without its consent"[113] and the broader principle that treaties cannot infringe the rights of third States without their consent.[114] These are the principles and rules that will be relevant to a State's claim of violation to their sovereignty.

However, with UN peacekeeping forces executing arrest warrants pursuant to an arrangement with the ICC, claims of violation to one's sovereignty would likely fall flat. The UNSC determines when and where peacekeeping operations should be deployed as well as their mandate under Chapters VI, VII, and VIII of the Charter of the United Nations.115 The UN General Assembly (UNGA) plays a role in the maintenance of established

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[110] *Island of Palmas Case (Netherlands v United States)* (1928), 2 RIAA 829 at 838-39 (Special Agreement (Arbitrator: Max Huber); James Crawford, *Brownlie's Principles of Public International Law*, 9th ed (Oxford: Oxford University Press, 2019) at 431.
[111] *Ibid*.
[112] *The Case of the S.S. "Lotus" (France v Turkey)* (1927) PCIJ (Ser A) No 10 at 18.
[113] *Vienna Convention on the law of treaties*, 23 May 1969, 1115 UNTS 331 at art 34 (entered into force 27 January 1980).
[114] Crawford, *supra* note 110 at 370; Michael Waibel, "The Principle of Privity" in Michael J Bowman and Dino Kritsiosis, eds, *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Oxford: Oxford University Press, 2018) 201 at 207.
[115] UN Department of Peacekeeping Operations, "United Nations Peacekeeping Operations Principles and Guidelines" (January 2008) at 13-14, online (pdf): *United Nations Peacekeeping* <https://peacekeeping.un.org/sites/default/files/capstone_eng_0.pdf> [UN Peacekeeping Principles and Guidelines].

missions, dealing with issues such as resources and financing.[116] Specifically, it is the UNGA who establishes any arrangement concerning the ICC and a peacekeeping operation.[117] However, the UNGA has only done so pursuant to modifications in the relevant peacekeeping mission's mandate by the UNSC where specific mention is made of "bringing perpetrators to justice".[118] Therefore, it could be argued that these arrangements are under the approval of the relevant UNSC resolution pertaining to the mission and thus are validly binding to the State as a member of the UN. Even in the absence of such a conclusion, it would be difficult for a State to claim that this effectively imposes the obligations of the Rome Statute onto them despite being a non-party. Article 34 VCLT only prevents a treaty from creating obligations or rights for States without their consent. In this case, having peacekeepers executing ICC arrest warrants would neither impose any obligation nor grant any right to the State. The broad principle that treaties cannot infringe on the rights States without their consent would also be difficult to apply, as it seems that UN peacekeepers arresting suspected international criminals would be well within their mandate and thus part of an infringement on rights the State has already "consented to" by virtue of the UNSC resolution establishing the mission.

Immunities

Questions as to whether or not immunities would bar someone from prosecution for international crimes were raised from the very inklings of an international criminal law regime. In the aftermath of World War I, many within the victorious Entente sought to put the former German Kaiser Wilhelm II on trial for what was in effect the crime of aggression, but disguised as a political offence "against international morality and the sanctity of treaties". The possible immunity of the former German leader was much debated, with all parties aligning their view on immunity

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[116] UN Department of Peacekeeping Operations, "Handbook on United Nations Multidimensional Peacekeeping Operations" (December 2003) at 4, online (pdf): *United Nations Peacekeeping* <https://peacekeeping.un.org/sites/default/files/peacekeeping-handbook_un_dec2003_0.pdf>.

[117] As evidenced from the fact that the ICC's memorandum of understanding with both UNOCI and MONUSCO are like this.

[118] As evidenced from the fact that this is what occurred for both ICC memorandums of understanding with UNOCI and MONUSCO.

with whether or not they wanted a trial to occur.[119] Still today, the debate reigns.

There are two types of immunities: functional and personal. Functional immunities protect certain official acts carried out by individuals on behalf of the State.[120] This immunity is conduct-based, thus only relating to acts carried out in an official function while excluding acts made in a private capacity.[121] It continues to apply after the individual has ceased to hold public office as it is tied to State conduct. Personal immunities facilitate the role of certain office holders in international affairs (e.g. heads of states, ministers, diplomats) during their term of office.[122] This immunity relates to the status of the person, thus covering all their acts whether carried out in their personal or official capacity. However, it ceases to apply when individuals lose their role in office.[123] Immunities can apply at two levels with respect to the ICC. They can arise at the "vertical level", i.e. in the relations between the ICC, on the one hand, and the accused and their State, on the other.[124] They can also arise at the "horizontal level", i.e. in the relations between a State that is requested by the ICC to effect an arrest or surrender, on the one hand, and the State of the accused person, on the other.[125] At the "vertical level", things seem quite settled as Article 27(2) Rome Statute provides that any immunities "which may attach to the official capacity of a person [...] shall not bar the Court from exercising its jurisdiction over such a person".[126] It is rather clear from this provision that immunity is removed before the ICC.As for the "horizontal level", the applicable rule remains somewhat

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[119] William Schabas, *The Trial of the Kaiser* (Oxford: Oxford University Press, 2018) at 162-69.
[120] Stahn, *supra* note 4 at 250.
[121] Dapo Akande and Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts" (2011) 21:4 European Journal of International Law 815 at 825.
[122] Stahn, *supra* note 4 at 250.
[123] *Ibid*.
[124] Dapo Akande and Talita de Souza Dias, "Does the ICC Statute Remove Immunities of State Officials in National Proceedings? Some Observations from the Drafting History of Article 27(2) of the Rome Statute" (12 November 2018), online (blog): *EJIL Talk!* <https://www.ejiltalk.org/does-the-icc-statute-remove-immunities-of-state-officials-in-national-proceedings-some-observations-from-the-drafting-history-of-article-272-of-the-rome-statute/>.
[125] *Ibid*.
[126] *Rome Statute*, *supra* note 2 at art 27(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 private capacity",[129] which suggests that functional immunity serves as a bar to the prosecution of official acts committed during terms of office.[130] This is despite the ICJ subsequently indicating that that immunities may not apply in relation "to criminal proceedings before certain international criminal courts, where they have jurisdiction".[131] Further, Article 98(1) Rome Statute itself indicates that "The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the [...] diplomatic immunity of a person". This provision insinuates that immunities do play some role within the "horizontal level" before the ICC. Notwithstanding the Appeals Chamber rendering a decision on the matter, the lack of certainty and clarity on this issue nevertheless raises doubts as to the bar on immunities at the "horizontal level" of the ICC system.

In contexts where UN peacekeeping forces execute an arrest warrant pursuant to an arrangement with the ICC, these immunity concerns would simply vanish. The "horizontal level" would not apply as there would be no immunity application in the relations between a UN peacekeeping force and the State of the

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[127] *The Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Judgement in the Jordan referral re Al-Bashir Appeal (6 May 2019) at paras 135-45, 149 (International Criminal Court, Appeals Chamber).
[128] *Ibid* at para 1.
[129] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, [2002] ICJ Rep 3 at para 61 [*Arrest Warrant*].
[130] Stahn, *supra* note 4 at 252.
[131] *Arrest Warrant*, *supra* note 129.

accused. Therefore, only the "vertical level" would reside between the accused and the ICC itself. As mentioned before, this is of no concern as Article 27(2) clearly excludes immunities in this regard. Thus, the use of UN peacekeeping forces would avoid the somewhat unsettled issues pertaining to the immunity of an accused.

Practical considerations

Legitimacy of the ICC

The credibility of the ICC and its ability to induce State cooperation are fundamental to its long-term success.[132] The legitimacy of the Court, which is essential to these elements, is derived from its perceived legitimacy as a "guardian of justice" throughout the international community.[133]

To work alongside UN peacekeeping missions is to work within the very politicized framework of UNSC resolutions. Targeted States, eager to politicize the ICC by magnifying both the real and perceived inequities of international justice, are likely to criticize the Court for this.[134] This issue is particularly relevant with the rise in African States who seek to delegitimize the ICC as a "neocolonial" institution.[135] Notwithstanding the self-serving nature of such arguments, the risk remains that other States may take up the tune. It would demand, at the least, ensuring that the peacekeeping forces dealing with the execution of arrests be a true coalition of different nationals. Yet the broader, overarching issue still looms and asks whether resting a large part of the ICC's ability to obtain suspects on the political machinations of the UNSC would undermine the legitimacy of the larger international human rights system? I would have to disagree. While the Court is an independent, major actor within the international community, its entire framework is premised on States' political acceptance. Certainly, this very structure is a blow to the premise of universal human rights. However, any time the ICC addresses a situation is a step forward in lessening (although not eliminating) the impunity

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[132] Philippe Kirsch, "The Role of the International Criminal Court in Enforcing International Criminal Law" 22:4 American University International Law Review 539 at 545, 547; Strategic Plan 2019-2021, *supra* note 32 at para 65.
[133] Peskin, *supra* note 51 at 237.
[134] *Ibid*.
[135] Berlin, *supra* note 71 at 526.

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 focus on should first be lower-level perpetrators with a steady progression towards high-level perpetrators as such operations become more feasible. Of course, strategic targeting of high-level perpetrators when they find themselves less powerful would equally be warranted. It should be understood that individuals with greater levels of power are particularly difficult to target,[136] and that these concerns motivated NATO to initially only aim for lower-level ICTY suspects.[137] In addition, it should be noted that even with much of the discontent with the ICC arising from the African Continent, neither the African Union nor individual African States have ever admonished the Court for charging and issuing warrants for rebels (who could typically be considered "lower-level" perpetrators).[138] This is not to say that the ICC-UN peacekeeping arrangements should not target higher level perpetrators associated with the regime in power, as failing to do so in the long run would incontrovertibly damage the worldwide credibility of the institution. Rather, this reflects the fact that lower-level perpetrators are easier to arrest[139] and initially targeting them would allow the ICC-UN peacekeeping model to build up

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[136] Meernik, *supra* note 62 at 173.

[137] Peskin, *supra* note 51; Bass, *supra* note 80.

[138] Franziska Boehme, *Enabling Justice: State Cooperation with the International Criminal Court* (PhD Dissertation, Syracuse University, 2017) at 206, 216.

[139] Emily H Ritter and Scott Wolford, "State Cooperation with International Criminal Tribunals: An Investigation of International Warrant Enforcement" (Paper delivered at the International Relations Workshop, University of Southern California, 5 March 2015) [unpublished] at 43; Kai Ambos, *Treatise on International Criminal Law*, vol 3 (Oxford: Oxford University Press, 2016) at 406.

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 risk that imposing such measures on States risks further alienating them from the "universality" of the grave human rights violations the Rome Statute seeks to address, leading them to rebuke the acceptance of these norms via claims of cultural specificity and exceptionalism, which are so often a disingenuous weaponization of culture by elites seeking to maintain their bloodied grip on power. To avoid such events, ICC-UN peacekeeping arrangements will have to work within the particular cultural understandings and pragmatic needs of locals.

Beyond theoretical issues of tensions between local and international norms, there are also more tangible concerns of the relevant UN peacekeeping mission in maintaining local stability. The core mandate of such missions will always be to preserve the peace where conflict has been halted and to implement agreements achieved by peacemakers.[142] The prospect of arrest in post-conflict zones can sow instability by sparking protests and fissuring governing coalitions.[143] Fervent nationalists and the accused, in chorus, will often fan the flames of these volatile situations.[144] In a context of fragile peace, the possibility of its disruption leads us to question whether the execution of arrests by UN peacekeeping forces may go against their core mandate. Perhaps such concerns are overemphasized, as alarmist warnings of reprisal attacks and the recommencement of war in the former

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[140] Viljoen, *supra* note 20 at 192.
[141] *Ibid* at 193.
[142] UN Peacekeeping Principles and Guidelines, *supra* note 115 at 18.
[143] Peskin, *supra* note 51 at 74-75, 236.
[144] *Ibid* at 236.

Yugoslavia fell silent as more and more ICTY indictees were whisked away by UN peacekeeping forces and NATO.[145] In the backdrop of a volatile transitional stage, Payam Akhavan states that the removal of those with criminal dispositions and a vested interest in conflict delivers a positive contribution to post-conflict peacebuilding.[146] In fact, empirical evidence from the impact of international criminal tribunals suggests that their operation significantly contributes to peacebuilding in postwar societies.[147] While "peacebuilding" (as brought up above) involves laying the foundations for sustainable peace beyond immediate "peacekeeping", the UN recognizes that both are interrelated.[148] It is clear that working towards long-term peacebuilding through these arrests will also be beneficial to the preservation of peace post-conflict. While there are risks in UN peacekeepers engaging in arrests that we must be cautious of in the short-term, it would seem the tremendous beneficial impact in the long run outweighs such dangers.

Part V: Conclusion

The ICC has the daunting mandate of ending impunity for the perpetrators of the most serious crimes of concern to the international community as a whole. Of course, the basic starting point to this endeavour is the initial arrest of a suspect. For the most part, the Court has sought to do so through State cooperation. While the ICC has entered into cooperation with international organizations, including UN peacekeeping missions, it has only done so tepidly. The ICC must further explore cooperation agreements with UN peacekeeping operations, in particular by engaging with more of them and by obtaining their assistance in executing arrest warrants.

Such engagements are favourable to procuring arrests, they maintain secrecy when needed and support persistent tracking of suspects, they may lend support to asset freezing requests and bypass the need to use costly incentives to obtain State cooperation, they draw from a multiplicity of international

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[145] Kerr, *supra* note 51 at 157, 161.
[146] Akhavan, *supra* note 38 at 7.
[147] *Ibid* at 9.
[148] UN Peacekeeping Principles and Guidelines, *supra* note 115 at 18.

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, the legality of using peacekeeping forces to execute arrests is explicitly provided. Additionally, only a minimal protection of the rights of the accused during arrest and subsequent transfer are required by the ICC, and even so it seems that severe violations would at most run the risk of a financial compensation or sentence reduction. Claims of State sovereignty violations by non-party States where these arrests may occur have little legal standing, so long as such activities are within the mandate given by the relevant UNSC resolution. Importantly, any arrests and transfers by such forces would avoid certain political and legal conundrums of the immunities of state officials.

There are many practical considerations that must be kept in mind when deciding how such arrangements to execute arrest warrants will operate on the ground. The legitimacy of the ICC will undoubtably be affected positively or negatively by such an endeavour, and it seems the best manner to address these concerns are to focus initial arrests on lower-level perpetrators and establish a clear, public arrest plan which explains the reasoning behind such steps. Further, a significant effort will have to be made in order to tailor individual arrangements with UN peacekeeping missions to the particular cultural norms and needs of local communities. And while there is reasonable cause for concern that such arrest warrant executions may fissure instances of fragile peace, these are typically overstated, and it seems more likely that such activities will provide better foundations from which to build long-term stability. This paper is by no means an exhaustive attempt to address every single concern related to the use of UN peacekeepers to execute ICC arrest warrants. The willingness of the UNSC to accept such arrangements could be debated at length, although I note in passing that what is proposed (addition of cooperation with ICC specifically, instead of local governments, for arrests) is not a massive leap compared to what was provided for by the arrangements with UNOCI and MONUSCO. Questions of whether accountability for peacekeeper actions in effecting such arrests should fall to the UN or the ICC also need to be addressed. There are also important

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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[149] Felix Haass and Nadine Ansorg, "Better peacekeepers, better protection? Troop quality of United Nations peace operations and violence against civilians" (2018) *55*:6 Journal of Peace Research 742 at 743.

[150] *MoU MONUSCO*, *supra* note 22 at art 4; *MoU UNOCI*, *supra* note 23 art 4.

[151] *Proposed Programme Budget for 2020 of the International Criminal Court*, Assembly of State Parties, 18th Sess, ASP Doc ICC-ASP/18/10 (2019) at para 6.

[152] Dapo Akande and Talita de Souza Dias, "Policy Brief: How the UNSC and ASP can enhance cooperation with the ICC" (26 March 2019) at 5, online (pdf): *Institute for Security Studies* <https://issafrica.s3.amazonaws.com/site/uploads/pb124.pdf>.

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