doi:10.1017/aju.2018.54

SYMPOSIUM ON THE ROME STATUTE AT TWENTY

WHO ARRESTS THOSE ACCUSED BY THE ICC?

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In a world in which war crimes, crimes against humanity, and genocide are not uncommon, the institution that was set up to have jurisdiction over them is in danger of being unable to discharge its mandate. Put starkly, the International Criminal Court (ICC) suffers too frequently from an inability to arrest or otherwise detain alleged perpetrators, whether the prosecutor is acting *proprio motu* or is following a reference to the court by a state party or the Security Council. The situation of Saif al-Islam Gaddafi is a case in point: notwithstanding the Security Council's referral of Libya to the ICC, at least as a member of the public it is difficult to detect any substantial international pressure that has been applied to have Gaddafi transferred to the Court; instead, he has been mooted as a candidate in future presidential elections. In total, the Court has issued thirty-two arrest warrants and nine summonses to appear, yet has held only nine individuals in custody, with fifteen still at large. The fugitives include citizens of the Democratic Republic of Congo, Uganda, Sudan, Kenya, Libya, and the Ivory Coast. Once the present trials before the court have concluded, there is only one case potentially waiting in the wings. A sole outstanding individual, Al-Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud from Mali, has made an initial appearance, and later this year the pre-trial stage of his case should commence; otherwise, there are simply the three trials in progress. However, I urge careful reflection before the Court is blamed for periods in which its docket of cases is lean.

A Departure from the Ad Hoc Tribunals

Shortly after I was appointed as the United Kingdom's judicial candidate for the ICC in 2002, undoubtedly displaying great political (and possibly legal) naivety, I asked for details of the strategy for detaining alleged perpetrators, and whether it was proposed that the Court would be assisted by an international rapid arrest force. By way of a linked question, I sought to explore the position in law if an arrest was planned when the sovereign government of the state where the suspect had been located had not given its consent.

As it appeared to me then, as it still does now, one of the defining differences between the ICC and the ad hoc tribunals is that the creation of the latter was based on an understanding, indeed a real anticipation, that the international community would be able to deliver a particular group of defendants for trial.[1] Moreover, even though the UN Protection Force operating in the Balkans resisted the suggestion that arrests were a part of its mandate, and although the Department of Peacekeeping Operations undoubtedly took some time to agree to assist in this regard, in due course the stabilization force in Bosnia and Herzegovina stepped up to the mark when arrests were made part of its task. As a broad generalization, the ad hoc tribunals have been successful at trying a

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[1] The Special Tribunal for Lebanon is a stark exception to this proposition, in that it was created with the ability to conduct trials *in absentia*, a course that has been followed.

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https://doi.org/10.1017/aju.2018.54 Published online by Cambridge University Press

significant representative cohort of the defendants who were originally suspected of crimes committed during war, although the debates will resound down the decades as to whether the final selection of the accused before each of the institutions was unbalanced, unfair, or politically motivated. It is notable that real political pressure, particularly by the European Union with the Yugoslav Tribunal, was critical in securing the delivery of defendants (e.g., there was a strong threat that monies would be withheld).

The ICC could not be more differently placed. That is not to say that the international community in any sense expected the states parties to the Rome Statute to breach their obligations by not arresting fugitives—quite the contrary—but for the new Court this was wholly uncharted territory. When it was established, there were no specifically anticipated trials. Once the heroic efforts of setting up the Court were concluded and the legendary work of the Rome Conference was over, the institution's start date was essentially accidental, unconnected with some grave national or international event. In a very real sense the ICC, having serendipitously arrived, was left to make its own way in the world.

I am not for a moment contending that the international community has been unhelpful. Indeed, to the contrary, in innumerable ways states have provided invaluable support to enable the Court to investigate crimes, fund its activities, and provide outreach and support for victims and witnesses. The continued strong belief in the institution is a source of real reassurance in a time of increased international instability, when the rise of what could turn out to be a belligerent form of nationalism may undermine the postwar consensus and the various international mechanisms for the resolution of disputes. Yet, notwithstanding the many and varied forms of support the Court has received, from the outset there has been a significant lacuna in its opportunities to act. Once the relevant government decides it does not want to cooperate, the general trend is that the arrest warrant remains unenforced, not least because the international community has essentially failed to exercise the kind of concerted pressure that is necessary to provide the best chance of delivery of the relevant alleged criminal to The Hague. Further, the Assembly of States Parties seems to have little appetite for reprimanding states that fail to abide by their treaty obligations. Regrettably, the kind of political pressure that the European Union used so successfully in delivering defendants to the Yugoslav Tribunal is far less in evidence for the ICC.

The Practical Challenge of Arrests

I departed from the ICC many years ago, and it would be quite wrong for me to attempt to pass judgment on why particular individuals have not been brought before the Court. Indeed, in individual cases, the reasons may be wholly understandable. But the overall picture is that if the relevant state fails to cooperate in the arrest of the suspect, the Court is often simply unable to act. Indeed, even when the relevant state does cooperate, arrests may still prove elusive. Take the case of Joseph Kony, the alleged leader of the Lord's Resistance Army, who has avoided justice notwithstanding the efforts of the Ugandan authorities to effect his arrest. The indications are that although an African Union Regional Task Force was deployed to detain him, in the main the work has been undertaken by a small Ugandan detachment, acting with some international advice. The support for the Ugandan military has been insufficient, and over a decade later Kony remains at large; importantly, the United States has ended its mission to help capture him. It is regrettable that notwithstanding the cooperation of Uganda and surrounding countries, the world is unable to bring to justice the man who is alleged to have been principally responsible for the crimes of the Lord's Resistance Army. I readily accept it would be misleading to suggest that this is an easy issue, for which there is a ready answer. In most instances, the politics and the national sensitivities are considerable and various, but the broad reality is troubling.

The legislative provisions necessary for cooperation in this context are clearly set out in the Rome Statute. Article 86 provides a broad obligation of cooperation for states parties, stipulating that "States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution

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of crimes within the jurisdiction of the Court." This requirement is given greater detail in other articles within Part 9. The critical provision for arrest and surrender is Article 89(1), which states that the Court can transmit a request for arrest and surrender of a person to any state where that individual may be found, and that it shall request the cooperation of that state in the individual's arrest and surrender. States parties, meanwhile, are obliged to comply with these requests. Notwithstanding these clear and, certainly on paper, considerable powers as regards states parties, the figures relating to fugitives from justice to a large extent speak for themselves.

Yet it is the Court that is frequently blamed for periods of inactivity or a paucity of high-level prosecutions. In his masterful *Introduction to the International Criminal Court*, William A. Schabas dealt in some detail with the early years of the institution.[2] Having rehearsed what he described as an expectation that the prosecutor, Luis Moreno-Ocampo, would bring the first cases by using his *proprio motu* powers, he set out the various referrals by states parties that occurred in 2003 (Uganda) and 2004 (Democratic Republic of the Congo and the Central African Republic). Schabas then observed as follows:

> In February 2006, the Prosecutor applied for an arrest warrant directed at Thomas Lubanga Dyilo, a rebel combatant in the Democratic Republic of Congo, who had been in detention in the Centre pénitentiaire et de rééducation de Kinshasa since March of the previous year. Lubanga was immediately flown to The Hague on a French military aircraft. It had taken the Court more than three and a half years to take custody of its first suspect. And Lubanga was no Eichmann. The word "banality" probably exaggerates his place in the global pantheon of atrocity. The insignificance of Lubanga as the first target of the International Criminal Court was confirmed six years later when a Trial Chamber of the International Criminal Court found him guilty as charged and sentenced him to fourteen years of imprisonment after he was convicted of offences related to the recruitment of child soldiers.[3]

As an aside, I hope that Schabas will forgive the highly personal observation that as the presiding judge in the Lubanga trial, it certainly did not feel banal or insignificant to be trying a rebel leader from a notably vast and unstable country for the persistent use of child soldiers, given the prevalence of this tactic in war and its ruinous consequences for the victims, their families, and their communities. But in making these remarks, Schabas is most certainly not out of step with many international and academic commentators: others have echoed his suggestion that the institution was slow to act and that the first trial did not in any sense match the enormity of Nuremberg or the like.

However, I note with interest that the proposals are few and far between as to which accused the Court should have tried in Lubanga's stead. Moreno-Ocampo and others may have hoped, or expected, that the Court's first trials would have resulted from an exercise of his *proprio motu* powers, but scanning the international political horizon as it existed in the early years of this century, it is difficult to identify which defendants could realistically have been brought before the Court without a state referral, or a United Nations referral if backed by strong political pressure. As the fifteen fugitives from justice demonstrate, without concerted assistance from an appropriately sizeable element of the international community—operating dispassionately and in the interests of justice—the Court's opportunity to act is notably restricted.

These observations are not designed to remove responsibility from the Court—and particularly the Office of the Prosecutor—for devising its strategy for identifying and securing the arrest and surrender of alleged perpetrators. The current crop of preliminary examinations and investigations demonstrates the continued hard work of the Office, but the Court carries a heavy burden in this regard, and a properly resourced tracking/fugitive unit would undoubtedly be a significant step forward. As I understand it, this latter idea—perhaps somewhat

[2] William A. Schabas, An Introduction to the International Criminal Court ch. 2 (5th ed., 2017).

[3] *Id.* at 33–34.

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delayed—is currently being developed by the Court.[4] And I do not intend to be critical, generally or specifically, of the many states parties and other third states that have provided considerable assistance to the ICC. Further, the Assembly of States Parties has been consistent in its many attempts to rectify this problem, save perhaps for a reluctance to reprimand defaulting states. It is, instead, to emphasize that the Court does not have its own police force or an international rapid arrest force at its disposal (not least, no doubt, because Entebbe-style operations are likely be controversial, would face multiple legal objections, and would risk disaster, including loss of life).

Conclusion

The Court's decision to conduct a preliminary examination into, or to investigate, a particular situation or particular people will often be highly unpopular in some quarters, especially locally. This phenomenon has taken a dramatic turn in Burundi, which has withdrawn from the ICC, and the Philippines, which has threatened withdrawal, both in the context of the opening of a local preliminary examination. (For Burundi, an investigation was subsequently authorized.) One can easily imagine that certain countries, most particularly the United States but also some of its close allies, feel deeply uncomfortable with the request by the Prosecutor on November 20, 2017, to Pre-Trial Chamber III to initiate an investigation into alleged war crimes and crimes against humanity in relation to the armed conflict in the Islamic Republic of Afghanistan since May 1, 2003. The allegations relate to war crimes said to have been committed by U.S. armed forces in Afghanistan and by members of the CIA in secret detention facilities in that and other countries. The pre-trial chamber is also considering possible crimes by the Taliban, the affiliated Haqqani network, and three Afghan security and police forces. Although the difficulties in securing the appearance of American nationals before the Court will be manifold, the reaction of the states parties, and perhaps particularly close allies of the United States, will be important in terms of determining for the future whether the obligations imposed by the Statute will be met regardless of the country or the individuals under investigation.

I join, therefore, the many voices down the years who have encouraged the international community to use real political and economic pressure, and generally to assist to the greatest possible extent, with requests for cooperation that emanate from the ICC when it seeks to detain suspects, whether they be close to home or far away, whether the relevant country is a mighty or a more modest power, and whether the case involves a friend or merely a more distant fellow member of the United Nations. I believe the present situation is particularly acute and the international community will have conspicuously failed in its treaty obligations and its responsibilities to the victims of the multiple crimes that are committed during war if the Court slowly declines through enforced inactivity.

[4] *See* Report of the Bureau on Cooperation: Report on Arrest Strategies by the Rapporteur, ICC-ASP/13/29/Add.1 (Nov. 21, 2014).

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