

20 YEARS AFTER ROME: BACK TO THE MAJOR CHALLENGES OF COOPERATION

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Introduction

The ICCBA was represented at the conference of 7 November 2018 by the ICCBA Vice President for the Defence Dr Caroline Buisman. I was unavoidably absent due to my involvement in an ongoing trial before the court. The report I received from the distinguished organisers, France and Senegal was that the contributions made at the conference were very profound and useful.

According to the concept note distributed with the programme for this plenary event, the proceedings of the conference have been submitted into the records of the ASP. My contribution on cooperation relating to arrests will be informed partially by my personal knowledge of the legal and practical realities of cooperation by states and non-state parties with arrest warrants issued by the ICC. I will briefly talk about real or perceived ICC institutional and policy inadequacies in its cooperation with state and non-state parties towards the execution of arrest warrants issued by the court and proffer suggestions.

Warrants of arrest under the Rome Statute:

The Rome Statute is a complex multilateral treaty. Its complexity arises from its founding history. Like many multilateral treaties, it was bound to represent the major legal, diplomatic and political cultures of the world it hoped to serve. This complexity is evident in several provisions of the statute, among which are those directly or implicitly related to cooperation generally and the arrest warrants particularly. Whereas the Prosecutor may request a pre-trial chamber to order a provisional arrest or a warrant of arrest of a person or persons, pursuant to article 58 of the Rome Statute, the responsibility to arrest and subsequently surrender the person or persons to the ICC lies on state parties to the Rome Statute or non-state parties which have entered into an ad hoc agreement with the court.

Pursuant to Article 86 of the Rome Statute **“state parties shall, in accordance with the provisions of the statute, cooperate fully with the court in its investigation and prosecution of crimes within the jurisdiction of the court”**.

Article 89 of the statute ordains that **“state parties shall, in accordance with the provisions of this part and the procedure under their national law comply with the requests for arrest and surrender”**. By this provision, it is required that the execution of arrest warrants fully respect and comply with the rule of law within national jurisdictions. Under Article 88 of the statute, state parties are expressly mandated to **“ensure that there are procedures available under their national laws for all forms of cooperation.**

Procedures under national law may vary from state party to state party. Some state parties may not yet have in place national procedures that accord with internationally recognized human rights for the enforcement of warrants issued by the court. For this reason, procedural hurdles in the enforcement of the warrants of arrest issued by the ICC may vary from state party to state party.

ICC deference to national procedures in matters of cooperation generally was affirmed by the ICC Appeals Chamber VII in the case of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido in which the Appeals Chamber decided that:
:para 14 **“A State’s collection and transmission of evidence to the Court is presumed to constitute sufficient indication that the domestic authorities complied with the applicable procedures under their national law in the collection of such evidence.”**¹⁵

It further added that **“States may go beyond the explicit duties and conditions contained in Part 9 of the Statute and offer additional cooperation, unilaterally in their implementing laws or through agreements and informal ad hoc arrangements with the Court. The Court may request, and the requested State may provide, forms or modalities of cooperation in addition to those foreseen in Part 9 of the Statute, provided that they are not contrary to the Statute, including internationally recognised human rights, in accordance with article 21 (3) of the Statute.”**¹⁶

The ICC deference of the ICC to national procedures is evidence in this Appeals Chamber judgment to the extent that the national procedures are not contrary to the statute, including internationally recognized human rights, in accordance with article 21(3) of the statute.

Compliance with article 88 of the statute to **“ensure that there are specific procedures available under their national law for all forms of cooperation including those specified in articles 89, 90, 91 and 92”** is a state obligation under the Rome Statute. I do not know if the ASP or the court has a comprehensive record of state parties that have complied with article 88 of the statute by **“ensuring that there are specific procedures available under their national law for all forms of cooperation in particular relating to the enforcement of warrants of arrest and surrender of persons issued by the court to which articles 89, 90, 91 and 92 of the Rome statute relates”**.

Many multilateral treaties have permanent verification and compliance mechanisms to encourage and maintain a permanent dialogue with state parties on the enforcement of the provisions of the treaties. The difficulties encountered by state parties in the domestication of the Rome Statute, particularly the provisions relating to arrests and surrender, and other provisions intended to facilitate the execution of the mandate of the court cannot wait for yearly state party conferences and the decisions arising therefrom.

The court does not have the mandate to order state parties to enact appropriate national procedures to facilitate the enforcement of arrest warrants or any form of cooperation requested by the court. This mandate falls within the customary law treaty responsibility of the ASP.

Institutional hurdles

There are visible institutional hurdles within the court relating to the roles assigned to key institutions of the court in obtaining state cooperation in the enforcement of arrest warrants issued by the court. It is unfortunate that for the past sixteen years, the functioning and duties of different independent organs of the court appear not to have been fully developed, well defined and where defined, not understood by many state parties and the wider public.

The Prosecutor is seen by many as the public face of the court. The duties and responsibilities of the Registrar as an independent organ charged with pursuing state cooperation in the enforcement of warrants and orders of the court is not visible. Yet the elaborate cooperation and reporting procedure contained in articles 89 to 98 of the statute is facilitated by the Registrar, whose independence in proceedings

coming before the court cannot be doubted. Official public statements coming from different independent organs of the court relating to alleged non-cooperation and the its potential consequences when the elaborate procedures in the Rome Statute for cooperation in resolving the matters have not been exhausted, sends mixed signals, are often misrepresented and politicised and renders cooperation difficult.

In addition to the role of the Registrar as the gatekeeper of ICC international cooperation in the enforcement of warrants of arrests, the Outreach programme of the court should be provided adequate resources to maintain a permanent pedagogic presence in State and non-state parties. It is unfortunate to note that after twenty years of the Rome Statute and sixteen years of the court, the court and its institutional mandate is still not yet well understood even in state parties. For example, an ICC warrant of arrest is often conflated with the presumed guilt of the person against whom it is issued and politicised. The Prosecutor who sought and obtained the warrant cannot be deemed or seen as an independent voice of the court to explain the contrary. The Registry through the OPCD is better placed to explain to the person arrested that he/she can seek various forms of redresses before national jurisdictions and before the court for his or her release pending trial.

Warrants of arrest must not be a pretrial conviction or punishment but a process under the authority of the law in which the rights of the arrested person are well respected under the statute. That is why the abuses of pretrial arrests and detentions must be vigorously investigated as soon as they are alleged and punished. In effect, upon surrender to the ICC, the pretrial judge must order an investigation of all investigation, arrests and detention violations and an effective remedy provided.

Article 85(1) of the ICC statute provides that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right of compensation. Allegations of the abuses of the internationally recognized human rights of persons who were arrested and subsequently surrendered by national jurisdiction have not received in the ICC, the attention the Rome Statute intended. The deference to national jurisdiction on the enforcement of arrest warrants by the court has been greatly circumscribed by the ability of the court to verify credible allegation of egregious violations with a view to providing the remedy ordained by article 85(1) of the statute. Non-action may be construed as tacit blessing to impunity.

Persons who are subject of ICC warrants must be assured that in the enforcement of the arrest warrants against them, they will benefit from all the protections afforded in international law by virtue of article 21(3) of the Rome statute. It is regrettable that some persons who were subject of the ICC warrants were killed or lost their lives while the warrants were active and enforceable, under circumstances which have not been verified through credible, independent and transparent investigative processes. It is a critical factor of transparent justice to conduct investigations into the death of each person over whom the court has asserted its jurisdiction and bring persons responsible to account. Doing so enhances the independence and credibility of the court and may encourage persons against whom warrants have been issued to willingly surrender to the court for justice to be done.

The limitations imposed by the Rome Statute.

States as subjects of international law are the primary guarantors of their state sovereignty. The treaty obligations of states notwithstanding, cooperation with states rely on state consent for vibrancy. Effective and efficient cooperation with states require an experience and competent corps of diplomats within the court staff for the successful enforcement of the warrants issued by the court.

The Rome Statute recognized a critical limitation to the enforcement of the warrants of arrest and surrender of persons to the court. Article 98 of the Rome Statute states: (1): 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 state or diplomatic immunity of a person or property of a third state, unless the court can first obtain the cooperation of that third state for the waiver of the immunity. (2) The court may not proceed with a request for surrender which could require the requested state to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending state is required to surrender a person of that state to the court, unless the court can first obtain the cooperation of the sending state for the giving of consent for the surrender.

The first test of article 98 of the Rome Statute came early in 2003, when the US concluded article 98 bilateral agreements with some state parties of the Rome Statute. How these bilateral agreements will impact on actual cases coming before

the court in the which the enforcement of arrest warrants may or not be a factor, cannot be speculated upon now.

Conclusion.

State party cooperation in the enforcement of arrest warrants facilitated the trials at the ICC. The enforcement of warrants is mandatory only to state parties of the Rome Statute, states that made ad hoc agreements with the court or relating to referrals made by the UNSC. Cases of non-cooperation by state parties may be reported to the ASP, by UN member states to the UNSC for UNSC referrals, for states that have ad hoc agreements with the court, to the UNSC. There is nothing more the court can do about non-cooperation. Realistically the UNSC and the ASP are political institutions whose priorities and interests may always not be consistent with those of the court.

Given this reality, it is safe for me to conclude that the successful enforcement of warrants issued by the court can only be attained through the professional experience and diplomatic skills of the women and men to whom the ASP entrusted the administration of the independent institutions of the court for fulfilment of the objectives of the Rome Statute.

Word count: 2115 words.