Fighting Impunity:
Assisted Arrests at the ICC

By Matthew Gillett

Introduction

Established under the Rome Statute of 1998, the International Criminal Court (ICC) began functioning on 1 July 2002, sixty days after the sixtieth State Party ratification was received. Now encompassing 105 State Parties and over 139 signatories to its founding treaty, the Court has transformed from concept into reality in a matter of a few short years. In accordance with his primary mandate of bringing to justice those accused of genocide, crimes against humanity, and war crimes, the Court’s first Prosecutor, Luis Moreno-Ocampo, has opened investigations in the Democratic Republic of the Congo, Uganda, the Sudan, and the Central African Republic, and has analyzed the admissibility of the situations in Venezuela and Iraq. At the request of the Prosecutor, the Judicial Chambers of the Court have so far approved the indictments of nine individuals.

However, a fundamental deficiency of the Rome system has already become apparent. Because of its horizontal relationship with its State Parties, the Court lacks any direct power to carry out the arrests of those people indicted for crimes within its jurisdiction. Consequently, it relies on these State Parties to act as its primary enforcement arm. So far, only two suspects have been apprehended and delivered to the Court, despite the Prosecutor sending appeals for assistance to State Parties, to international organizations, and to the

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United Nations. In hindsight, the shortcomings inherent in this bifurcation of powers are clear. Yet during the negotiations leading up to the Court’s formation, a number of States were uncomfortable with granting ICC personnel, particularly the Prosecutor, arrest powers on their territory. Consequently, the drafters of the Rome Statute retained the original proposal, whereby national authorities execute arrest warrants without extensive discussion of the possible ramifications of this approach. The only provision made was that where suspects are unobtainable by those authorities, the matter could be referred to the Assembly of State Parties or to the United Nations Security Council for assistance.

It is no exaggeration to say that the Court has been hamstrung by its inability to obtain custody of those accused of the most serious crimes known to mankind. Under the Rome Statute, the presence of the accused at the ICC is necessary for any prosecution against them to be undertaken. In light of this precondition, the lack of detailed provision for the issue of arrests stands as a major deficiency in the structure of the Rome system. However, it is the thesis of this article that a nascent arrest mechanism, which is demonstrably lawful and effective, rests at the disposal of the international community.

Stalemate in the Hague

In addressing the current plight of the Court, it can be confidently asserted that the primary mode of arrest — that of national authorities — has not been an effective one. In Uganda, warrants of arrest have now been outstanding for over two years. This is despite the fact that the case itself was referred to the Court by Ugandan President Yoweri Museveni. Now the warrants have become bargaining tools in the ongoing peace negotiations between the Government and Joseph Kony’s Lord’s Resistance Army. In the Democratic Republic of the Congo, two arrest warrants have now been executed. However, this initial cooperation with the Court must be kept in perspective. The first ever suspect handed to the Court, Thomas Lubanga Dyilo (hereinafter “Lubanga”) was already in the custody of the national authorities. Given that this was also a self-referral, it would have been a clear affront to the
international community had President Joseph Kabila not complied with the Court’s request for the surrender of the accused. On 17 October 2007, Germain Katanga became the second ever suspect handed to the Court. Like Lubanga, Katanga was in the custody of the authorities of the Democratic Republic of the Congo at the time of his transfer to the Court. Again, in the context of a self-referral, it would have been a direct challenge to the international community if the Democratic Republic of the Congo had not either prosecuted or surrendered Katanga, a fact that the Prosecutor of the ICC no doubt emphasized to the national authorities in negotiations leading up to Katanga’s transfer to the Hague. In the Sudan, the non-execution of the ICC’s arrest warrants arising from the atrocities in Darfur stands as one of the nadirs in the enforcement of international justice in recent years. Despite the backing of a Security Council referral under Chapter VII of the UN Charter, no arrests have thus far been forthcoming. The individuals sought, Ahmad Harun and Ali Kushayb, are clearly within the Government’s grasp, particularly the former, who is somewhat ironically employed as the Minister of Humanitarian Affairs. Canadian Senator Roméo Dallaire, who commanded the UN peace-keeping forces in Rwanda during the genocide of 1994, has recently called the failure of the world community to execute the arrest warrants in Darfur a breach of the “Responsibility to Protect” doctrine, which requires States and the UN to take proactive measures to protect populations from humanitarian atrocities committed or promoted by their own governments.

The pivotal importance of the issue of arrests is increasingly being recognized within the ICC. In August 2007, the Prosecutor was the chief sponsor of the Chautauqua Declaration, which explicitly asserts that the “challenge for States and for the international community is to fulfill the promise of the law they created” to “ensure the arrest and surrender of sought individuals.” The declaration individually names indictees of various international criminal tribunals that are still at large, including Ratko Mladić, Radovan Karadžić, Félician Kabuga, Joseph Kony, and Ahmad Harun. Speaking at a conference in Turin in May this year, Vice-President of the Court, Judge René Blattman, announced that the Court’s dependence on States was particularly acute in the area of assistance in executing arrests. The drafters of the Rome Statute should have been aware of the potential pitfalls of dissecting the power of arrest between international actors. Difficulties in executing arrest warrants have plagued other international criminal tribunals. In 1999, the International Criminal Tribunal for the former Yugoslavia (ICTY), which, owing to its Chapter VII provenance, enjoys a vertical relationship with the States of the world, nonetheless faced extreme
difficulties apprehending its most sought-after indictee, former President of the Federal Republic of Yugoslavia, Slobodan Milošević. All told, it took the conditioning of US $1.28 billion of desperately needed aid on his surrender to persuade the Serbian National Assembly to hand him over. Furthermore, despite outstanding warrants against the Bosnian Serb Generals Ratko Mladić and Radovan Karadžić since the mid-1990s, they are still currently at large. If this remains the case, the legacy of the otherwise extremely successful ICTY will forever have a shadow hanging over it.

The dilemma begs the question of whether under the Rome system, those accused of perpetrating genocide, crimes against humanity, and war crimes can enjoy impunity from prosecution simply because they are located on the territory of an anarchic or unwilling state. Such a bending to political exigencies cannot have been intended by the framers of the Rome Statute; it cannot have been intended by anyone with a belief in pursuing the universal prohibition of the gravest crimes known to man and committed to the subjection to fair trial of those accused of international crimes, a process which was poignantly described during the Nuremberg Trials as “one of the greatest tributes that power has ever paid to reason.” It is the contention of this article that, in contrast to the impression given by the ICC’s bleak first years, alternative means do exist to obtain indictees, even where the State on the territory of which an accused may be found (“the territorial State”) is unable to execute the arrest itself.

Possible Means of Redress

Three primary means of augmenting the ICC’s ability to obtain suspects are possible. First, this could be achieved by explicitly granting the Prosecutor powers of arrest through an amendment to the Rome Statute. However, obtaining the necessary two-thirds majority of State Parties’ support to amend the Statute would be difficult. The amendment would likely be seen as too great an encroachment on state sovereignty and the discretion to choose when and how to deliver an accused to the Court. Furthermore, a muscled-up Court would present a threat to the preeminence of the Security Council in the international legal order, due to the cross-border nature of such arrests.

Failing an amendment to the Statute, indictees could be sought by utilizing the powers of the UN to carry out arrests of ICC suspects. However, in all areas involving forceful actions on the territories of states, the UN is controlled by the permanent five members of the Security Council: the United States, Russia, China, Britain, and France. Their veto powers make reliance on the UN for incursion actions inherently contingent on the good will and
political interest of those States. Consequently, it is not an ideal solution for a justice mechanism seeking to apply the law equally to all peoples.

The third option available to enhance the operation of the Rome system is that of “assisted arrests.” An assisted arrest would see the police or executive arm of a State Party or a UN peace-keeping force assist in the arrest of suspects located in another State Party to the Rome Statute. Through this mechanism, States that were incapable of executing arrest warrants issued by the ICC (and thus at risk of breaching their established international obligations under the Rome Statute) would be assisted in the enforcement of international criminal law within their borders. It is the thesis of this article that the assisted arrest mechanism already rests at the disposal of the international community and that it is at the same time consistent with domestic law, with public international law, with the Rome Statute, and with the international human rights guaranteed therein.

Legality of Assisted Arrests

As with all arrests for crimes under the Rome Statute, the legality of the physical apprehension of an individual would be founded on the issuing of a valid arrest warrant by a pre-trial chamber of the Court. Following the issuance of an arrest warrant, the territorial State would first be requested to execute that warrant. In determining when a territorial State is incapable of carrying out an arrest, the Rome Statute already provides an apposite test. According to Article 17(3), the Court is given jurisdiction where “due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.” Upon determination that a territorial State is incapable of executing an ICC arrest warrant, that warrant could be sent to officials from other State Parties, peacekeepers and other international organizations, as is provided for under the provisions of the Statute. In keeping with the Statute, the assistance of other State Parties and peacekeepers would be a voluntary measure, as has been the practice at the ICTY.

In terms of the arrest itself, this occurs when, by physical restraint or conduct, or by words, an individual is made aware that he is not free to leave. Under the Rome Statute, at this point the accused must be served with a copy of the
arrest warrant in a language which he understands. The authority of law enforcement officials to carry out this procedure and physically detain an individual would find its provenance in the domestic laws of those officials’ State of origin. Within dualist national jurisdictions, where international law is not automatically considered part of domestic law, the authority to arrest would arise from the domestic act on which the powers were founded. In the United States, law enforcement officials are authorized to carry out such acts in so far as internal domestic law is concerned. Most other jurisdictions, including monist systems, where international law is automatically considered part of domestic law, would be bound by the principle of international law, that States may only exercise their jurisdiction outside their territory by virtue of a permissive rule. Consequently, the consent of the territorial State to the assisted arrest, which is discussed below, would be of great significance to the legality of the arrest.

In relation to peacekeeping personnel, the authority to exercise powers of arrest can be located in the terms of their governing mandates. This approach was taken by the Implementation Force and Kosovo Force commanders in relation to arrest warrants issued by the ICTY. In relation to Uganda, the forces of the Mission of the United Nations in the Congo (MONUC) have been authorized to arrest the leaders of the Lord’s Resistance Army, who intermittently find refuge within the Democratic Republic of the Congo’s vast Eastern regions.

Two types of agreements would enhance the ability of peacekeepers to carry out assisted arrests within troubled territories. First would be agreements between specific peace-keeping forces and the ICC, providing for cooperation and information sharing in order to facilitate the smooth execution of arrest warrants by the peacekeeping forces. In this vein, the Court has already concluded a Memorandum of Understanding with MONUC. Of more importance would be the second type of agreement, between peacekeeping forces and the territorial State in which they were located, granting the former the authority to carry out arrests in the host state’s territory. Ideally, such agreements would contain “assisted arrest” clauses allowing peace-keepers to execute arrest warrants and to hand the accused directly to the ICC in cases of substantial or total collapse of the State’s judicial or governmental infrastructure. Such procedures and arrangements would be in keeping with the founding spirit and intent of the ICC, as expressed in the Preamble to the Rome Statute, which explicitly recognizes that the prosecution of genocide, crimes against humanity, and war crimes must be ensured by “taking measures at the national level and enhancing international cooperation.”
In addition to being procedurally compatible with the Rome Statute provisions, the assisted arrest mechanism would be consistent with the fundamental human rights guarantees provided therein. It should be noted first that there is no broad immunity against prosecution for international crimes of offenders in collapsed States; there is no such thing as a “safe refuge” doctrine in international criminal law. However, a guarantee which does exist under the Rome Statute is that “a person...shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.” Article 55(1)(d) reflects Article 9 of the International Covenant on Civil and Political Rights, which has been recognised as a peremptory norm, or pre-eminent principle, of international law by the United Nations Human Rights Committee, and which also reflects the due process rights ensured under Articles 5 and 14 of the Constitution of the U.S., and under the Magna Carta. Despite this high pedigree, the provision carries a certain irony, given that ICC personnel do not have direct powers of arrest and at no point in the Rome Statute or the Rules of Procedure and Evidence is an arrest procedure outlined.

Nonetheless, in seeking to define what will be considered an arbitrary arrest or detention, the existing jurisprudence of the ICC and ICTY provides guidance and a possible point of departure. ICTY indictees Stevan Todorović and Dragan Nikolić both claimed to have been kidnapped by private individuals in the course of their apprehension by the ICTY. The lack of direct participation by court representatives in any such abduction was critical to upholding the legality of the subsequent prosecutions. Such an argument was also upheld in the first case before the ICC, against Lubanga, for conscripting and enlisting child soldiers. However, in contrast to those cases, the assisted arrest mechanism envisages that law enforcement officials of State Parties or peacekeepers would execute the arrest on the basis of the arrest warrant provided to them by the ICC, and in the latter case in accordance with an agreement with the ICC. Consequently, the ICC would be bound by the acts of those actors, even if their authority to exercise police powers extraterritorially comes from sources external to the Rome Statute.

In terms of the modalities of the arrest, the case of Slavko Dokmanović, in which peacekeeping forces were accused of conducting an illegal arrest, is instructive. Representatives of the Office of the Prosecutor of the ICTY
arranged a fake meeting with the mayor of a town in Eastern Slavonia, where Dokmanović owned property, and which was within the UN forces’ geographic mandate. When Dokmanović crossed the border, UN forces immediately arrested him and, within an hour, had him on a plane bound for The Hague. Upon arrival, Dokmanović applied for release on the basis that he was arbitrarily detained. The Trial Chamber held that “luring” the accused into Eastern Slavonia did not constitute a forcible abduction and so did not breach the principles of public international law and the sovereignty of the Federal Republic of Yugoslavia. Whilst there is some merit in taking such a robust approach to the issue of arrests, it is far from certain that a Chamber in the ICC would draw the same fine distinction between luring and forcible abduction. Given the tenuous legal basis for tactics of this nature, they should only be used as a last resort, and at no time should force be used without a legal basis, or future proceedings against that accused would be jeopardized.

The Statute directs that once an accused is arrested they are to be brought before a “competent judicial authority in the custodial State” in order to confirm their identity, that they were arrested through due process, and that their human rights have been respected. In the scenarios of substantial state collapse, where an assisted arrest would generally be envisaged, it is unlikely that the competent authorities in the territorial state would be operational. However, the failure to accord the accused with such an initial appearance would be a significant breach of the provisions of the Statute. Consequently, if, following an assisted arrest, the initial appearance could not be held either in the regular courts or in a specially constituted tribunal in the territorial state, then, as a fallback position, it could be held on the territory of the state making the arrest. This possibility is left open through the Statute’s use of the term “custodial State” in Article 59, rather than the term “the State on the territory of which a person may be found” as is used in relation to transfers of requests for arrest.

A belief in the universality of the prohibition of international crimes logically engenders concomitant support for the consistent application of international human rights norms. Internationally recognized human rights norms are imported into the Rome Statute by virtue of Articles 21(3) and 54(1)(c). Further, in accordance with the principle of complementarity, a pillar of the Rome system that requires the Court to defer to prosecutions within domestic jurisdictions, personnel effecting arrests extraterritorially should seek to adhere to the standards of criminal procedure within the territorial State. If exigencies, such as the collapse of the legal system of the territorial State, prevented the precise ascertainment of domestic laws, then it would
nonetheless be wise for the arresting personnel to adhere to the domestic legal provisions of the territorial State to the greatest extent possible. Irrespective of that adherence, in order to minimize the likelihood of the arrest being found to be illegitimate at a later stage of proceedings and as a matter of good practice, the personnel should ensure the application of the provisions of the International Covenant on Civil and Political Rights, particularly the right not to be subject to cruel, inhuman, or degrading treatment, due process rights during and after arrest, the right to be treated with humanity and respect for the inherent dignity of the human person, and the right to be presumed innocent and treated accordingly.\textsuperscript{44}

A contrasting approach is to decouple the circumstances of arrest from subsequent criminal proceedings, which is a maxim known by the Latin name \textit{mala captus bene detentus}.\textsuperscript{45} That approach was taken by Israeli judicial authorities in relation to the illegal kidnap, trial, and execution of the Nazi war criminal Adolf Eichmann. Eichmann was forcibly abducted from Argentina by Israeli Mossad agents, without approval from the Argentinean government.\textsuperscript{46} His conviction was upheld in the Israeli Supreme Court even after the Security Council issued a resolution condemning Israel’s actions.\textsuperscript{47} The \textit{mala captus bene detenus} approach was also favored by the Supreme Court of the United States, in relation to the abduction within Mexico for trial within America of a Mexican national suspected of aiding the torture and murder of a Drug Enforcement Administration investigator by administering drugs to prolong his suffering.\textsuperscript{48} Finding that the abduction fell outside the terms of the Mexico-U.S. extradition treaty, the Supreme Court held that the propriety of the detention was a political issue, non-justiciable before US Courts.\textsuperscript{49} However, in addition to the questionable legal and political merits of the doctrine, Article 55(1)(d) of the Rome Statute makes it very clear that there is no room for such an approach before the ICC.

The assisted arrest mechanism would be in accordance with the fundamental tenets of public international law. Under international law, challenges that could be expected to arise against the procedure include breaches of the principles of state sovereignty, as enshrined under Article 2(1) of the UN Charter,\textsuperscript{50} of territorial sovereignty, as upheld in the \textit{SS Lotus} case of the Permanent Court of International Justice,\textsuperscript{51} of the right of non-intervention, as recognized in United Nations General Assembly Resolutions 2131 and 2625,\textsuperscript{52} and of the prohibition on the use or threat of force in international relations, as enshrined in Article 2(4) of the UN Charter.

Within the unsettled structures of international law, the responses to these challenges lie on a spectrum. At the extreme end, there are publicists who
argue that when a state’s governmental authorities have substantially collapsed, as is the scenario in which the assisted arrest mechanism is envisaged to apply, no rights of sovereignty pertain to that territory. On that basis, it is argued that an incursion into that territory to carry out a lawful arrest would not constitute any breach of general international law. However, this approach is problematic. Whilst it is true that underlying the doctrine of consent is a presumption of representative autonomy, the principles of the international legal order are strongly oriented towards the continued recognition of a state, existing or nascent, within any given territory. Even the most dysfunctional of the State Parties to the Rome Statute will not readily be considered to lack sovereign rights, and thus fair game for external intervention.

A more solidly grounded and defensible response to challenges against the legality of assisted arrests is to condition such a mechanism on the consent of the territorial state, meaning the agreement or invitation by the territorial state to the assisting state making the arrest. Under public international law, “valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.” The consent of the territorial state must not be coerced, it must be express and it must be free of defects. Furthermore, consent must be provided by the effective government. There is a virtually uniform practice in international law and politics of treating any group of nationals in control of their territory as the legitimate government. If the consenting party is the incumbent government, then the fact it has lost control over the state territory will not prevent its consent being recognized. Such consent could be manifested in advance by the territorial state through, amongst other means, the conclusion of agreements with peace-keeping forces, as described above, or similar agreements with other State Parties to the Rome Statute.

Historic situations which pivoted on the existence of a legally valid consent from the government of a territory to another state’s intervention show that the issue is fraught with risk. In Hungary, after the popular leader Imre Nagy swept back to power in 1956 and promised widespread reforms and withdrawal from the Warsaw pact, the first Secretary of the Soviet-backed communist party, Erno Gero, asked the Soviet Union for help, purportedly on behalf of the State to suppress a rebellion. Soviet forces entered Hungary en masse and violently suppressed the attempted movement. Subsequently, the Soviet Union was involved in similar incursions into Czechoslovakia in 1968, and Afghanistan in 1979. The other Cold War superpower, the United States, invaded the Dominican Republic in 1965 and Grenada in 1983. Each
time, the argument was attempted that consent had been provided by representatives of the territorial state, no matter how nominal the claim.63

However, the assisted arrest mechanism can be distinguished from those precedents in so far as such a mission would be restricted to the specific purpose of executing a valid arrest warrant and delivering an individual to the ICC. The result would be a trial before a Chamber professionally constituted by jurists of the highest qualifications, with the full compliment of internationally recognized fair trial rights and with no possibility of a sentence of death being imposed. Within these narrow parameters, the procedure is inherently less open to abuse than those actions purportedly taken for the rationale of enforcing democracy by propping up embattled governments.

If there is no recognizable or organized authority within a territory that is capable of declaring a legally valid consent, and if there is no pre-existing instrument of consent, ascertaining whether consent had been provided would be difficult. Such situations are not far-fetched. Currently in Somalia, fifteen different factions, with cross-cutting loyalties and histories of conflict, have formed the Transitional Federal Government.64 In determining the legality of an assisted arrest operation on the basis of “constructive consent”, the following considerations would be relevant: first, whether the indictees’ own alleged criminal acts appeared to be a cause of the disorder and lack of discernable authority capable of expressing consent;66 and, fourth, the specific modalities of the arrest operation, particularly the incidental damage that could be caused by its implementation. Clearly, the facts surrounding such an operation would be critical to determining its ultimate legality. However, the above analysis shows that even in cases of silence due to a collapse of state infrastructure, the legality of an assisted arrest mission, conducted by a fellow State Party to the Rome Statute or an appropriately mandated peace-keeping force, would not necessarily be precluded.67

Precedents for extraterritorial assisted arrest operations do exist. For example, in 1977, a German counter-terrorist unit assisted the Somali Government to deal with the hijacking of a Lufthansa airliner, storming the jet and freeing
the hostages within Somalian territory. More recently, in 1999, Turkish agents were allowed to arrest the Kurdistan Worker’s Party (“PKK”) leader, Abdullah Oçalan, at the Nairobi Airport in Kenya.

Implementation of Assisted Arrests: A Multilateral Agreement

The acceptance of ad hoc assisted arrest operations, while a positive development in the struggle to try those accused of the most serious crimes known to mankind, would not be an ideal long-term solution to the problem of impunity. To provide an ongoing, regulated basis for assisted arrests to be conducted in States unable to execute warrants through their own agents, the Assembly of State Parties of the ICC would need to conclude an assisted arrest agreement as a subsidiary instrument to the Rome Statute. Within this agreement, State Parties would provide a prior and continuing consent to assistance in executing ICC arrest warrants in situations where they are unable to do so through their own agents, and also would reciprocally agree to aide in the execution of ICC arrest warrants within other State Parties’ territories, when those States are unable to do so. Such an agreement would enhance the Court’s ability to uphold the expressly stated mission given to the Court by the State Parties, who in signing the Rome Statute affirmed “that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.” Such an agreement would also accord with the obligation imposed by the Assembly of State Parties upon itself to “proactively promote...full implementation [of the Rome Statute], including through bilateral and regional relationships.”

Conclusion

In light of the difficulties experienced by the ICC in its efforts to arrest those people accused of international crimes, creative solutions grounded in the principles underpinning the Rome system must be explored. The assisted arrest mechanism is at the same time realistic and legally defensible. An analogous process has been successfully utilized at the ICTY and ICTR, enhancing the ability of those tribunals to fulfil their mandates. However, assisted arrest is not a panacea to the problem of impunity. It should not eclipse the importance of other measures designed to create a mutually reinforcing system of combating impunity, which include boosting the rule of law within states by encouraging complementary national proceedings within their jurisdictions. However, the acceptance of the assisted arrest procedure, the creation of agreements between peacekeepers and troubled
territorial states, and, eventually, the establishment of a multilateral reciprocal treaty between the State Parties, providing prior and enduring consent to assisted arrest operations within their borders, would be major additions to the arsenal of means at the disposal of the international community. These measures would demonstrate a concrete commitment on the part of the State Parties to the Rome Statute. They would constitute a manifestation of those states’ signalled intent to take on the global leadership of the ongoing struggle against the impunity of those accused of genocide, war crimes, and crime against humanity.

-Carol Gallo served as lead editor for this article.

APPENDIX 1:

SUGGESTED MODEL ASSISTED ARREST PROVISION:

“X. STATE A authorizes PEACEKEEPING MISSION to assist on matters relating to individuals indicted by the International Criminal Court, in particular by exercising within the territory of the STATE A and on behalf of the government of STATE A, the following powers of arrest and surrender: (a) carrying out the arrest of persons whose arrest is sought by the Court; (b) securing the appearance of a person whose appearance is sought by the Court; (c) carrying out the search of premises and seizure of items whose search and seizure are sought by the Court, so long as the exercise of such powers is in accordance with the PEACEKEEPING MISSION mandate under the United Nations Charter.

i. The authority provided to the PEACEKEEPING MISSION to execute warrants issued by the International Criminal Court shall be limited to the parameters of those warrants and shall not transfer permanent powers of criminal law enforcement within the territory of STATE A to the PEACEKEEPING MISSION.

ii. The authority provided to the PEACEKEEPING MISSION to execute warrants issued by the International Criminal Court shall be without prejudice to the right of STATE A to conduct criminal proceedings within its territory relating to the alleged criminal acts contained in the warrants issued by the International Criminal Court, that issue being at all times governed by the Provisions of the Rome Statute.

iii. The authority provided to the PEACEKEEPING MISSION to execute warrants issued by the International Criminal Court shall not absolve the GOVERNMENT nor the International Criminal Court of obligations arising under the RS.”
NOTES

1 The Oxford English Dictionary (Oxford: OUP, 2001) explains the phrase “to bring someone to justice” as “to arrest and try someone in court for a crime.” The Rome Statute also provides for the ICC to have jurisdiction over the crime of aggression, if this is agreed upon by the State Parties at the review conference in 2009, or thereafter, Article 5(2); Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9*. Hereinafter, all references to Articles shall pertain to those of the Rome Statute, unless otherwise stated.


3 Article 87 (7).

4 Article 63 prevents trials being held in absentia of the accused, with the exception of where subsequent to appearing before the Court, the accused continues to disrupt proceedings.


7 Lubanga was taken into custody by national authorities in Kinshasa on March 19, 2005. He was handed over to the custody of ICC officials on March 17, 2006 for trial on three charges of enlisting and conscripting child soldiers; Prosecutor v Thomas Lubanga Dyilo: Decision to Unseal the Warrant of Arrest Against Mr Thomas Lubanga Dyilo and Related Documents, ICC-01/04-01/06, Mar. 17 2006, 3. http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-37_English.pdf.

8 Katanga was the commander of the Force de Résistance Patriotique en Ituri, and a Congolese national. He was charged with war crimes and crimes against humanity occurring within the Democratic Republic of the Congo, in the village of Bogoro. His indictment was sealed up until his arrest; The Prosecutor v Germain Katanga: Sealed Arrest Warrant, ICC-01-04-01/07, July 2, 2007, 2. http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-1_English.pdf.

9 S/RES/1593 (2005). In 2007, the UNSC passed S/RES/1769 (2007), which provides for up to 20,000 peace-keepers to enter Darfur, but makes no reference to UNSC Resolution 1593.


15 In Tanzania, where the headquarters of the ICTY’s twin court, the International Criminal Tribunal for Rwanda is located, 18 indictees charged with crimes, including persecution, murder and genocide, remain at large. One of these is Félician Kabuga, a millionaire businessman with numerous connections, who was allegedly behind the financial planning of the fastest genocide in modern history.


17 Assisted arrests could also occur in states that had accepted the ICC’s jurisdiction on an ad hoc basis under
Article 12(3), or in States referred to the ICC by the UNSC under Article 13(b).


19 Article 89 and 59(1).

20 Article 17(3). During the preparatory negotiations, the phrase “unable to obtain the accused” was perceived as referring to situations of collapsed governmental infrastructures, such as the example par excellence of a failed State, i.e. Somalia; Mahnoush Arsanjani “Reflections on the Jurisdiction and Trigger Mechanism of the International Criminal Court”, H. Von Hebel et al., Reflections on the International Criminal Court: Essays in Honour of Adrian Bos, 70.

21 Neither Art 58 nor Article 89 nor Rule 117 prevents an arrest warrant being transferred to all State Parties. Currently, if a warrant is unsealed then it is sent to all State Parties and Interpol, which issues a red notice for that suspect, facilitating their identification and detention at international borders.

22 Peacekeeping missions receiving warrants from the ICTY have not considered themselves legally bound to implement the warrants; Susan Lamb, “The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia,” Br. Y.B. Int’l L., 165, at 192. Similarly, in the case of State Parties other than the territorial state, Article 89(1) of the Rome Statute makes it clear that the ICC would not be able to send binding requests.


25 A Drug Enforcement Administration agent is authorised by statute to “make arrests without warrant... for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed... a felony” 21 U.S.C. § 878(3). Federal law enforcement agencies have particularly broad arrest authority when enforcing crimes with extraterritorial application; “Authority of the Federal Bureau of Investigation to Overide International Law in Extraterritorial Law Enforcement Activities,” 13 Op. Off. Legal Counsel 163, 1989 WL 595835 (1989).

26 Ian Brownlie, Principles of Public International Law (4th ed., Oxford University Press, 1990), p. 307. See for example the Canadian case of R. v. Hape, 2007 SCC 26, para. 105: “Criminal investigations implicate enforcement jurisdiction, which, pursuant to the principles of international law discussed above, cannot be exercised in another country absent the consent of the foreign state or the application of another rule of international law under which it can so be exercised. While concurrent jurisdiction over prosecutions of crimes linked with more than one country is recognized under international law, the same is not true of investigations, which are governed by and carried out pursuant to territorial jurisdiction as a matter inherent in state sovereignty.”

27 See the discussion of consent under international law discussed below.


29 For example, UNSC Resolution 1031 setting up the Implementation Force authorized contributing states to take “all necessary measures” to achieve the aims of the peace settlement, which included that “(p)arties shall provide a safe and secure environment for all persons in their respective jurisdictions,” (Annex 1-A); Susan Lamb, “The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia,” Br. Y.B. Int’l L., 165, at 167.


31 Article 54(3)(d) and Article 87(6).

32 The instrument is partially described in the Report of the International Criminal Court to the United Nations General Assembly, U.N. Doc. A/61/217, Aug. 3, 2006, para. 47. However, the specific contents of this Memorandum of Understanding are not in the public domain.


34 Article 55(1)(d).


37 Todorović was surrendered to the ICTY pursuant to his abduction by private individuals in September 1998.
Nine persons were convicted in Serbia for this crime in December 2000. See Major C.M. Supernor, “International Bounty Hunters for War Criminals: Privatizing the Enforcement of Justice,” 50 Air Force Law Review 215 (2001), 235. Nikolô was allegedly kidnapped by private individuals in April 2000 and handed over to NATO troops in Bosnia who transferred him to the ICTY. The Trial Chamber rejected the motion for release because neither SFOR nor members of the Office of the Prosecutor were involved in the apprehension of Nikolic; Prosecutor v. Dragan Nikolic, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, Case No. IT-94-2-PT, T.Ch. II, Oct. 9, 2002, para. 21. Those responsible for the kidnapping were subsequently convicted in Serbia. See Supernor at 217.

38 The very first case before the ICC, Lubanga, saw an analogous challenge raised by the defence, and a similar reliance on the clean hands doctrine by the Chamber; “Appeals Chamber’s Judgment on Thomas Lubanga Dyilo’s Appeal against Decision on Interim Release,” ICC-01/04-01/06-824, Feb. 13, 2007, para. 121.


40 Article 59.

41 Article 89.

42 Article 21(3); Art 54(1)(c).

43 The implementing legislation within the State Parties varies on the issue of arrest from the highly prescriptive Australian model, which requires that the person “must” be arrested “in accordance with [the ICC Act]” and has a special procedural regime for arresting suspects of these crimes, to the more broadly worded South African Act which merely provides the general guidance that the person should be arrested “in accordance with the procedures laid down by domestic law”; Mohamed El Zeidy, “Critical Thoughts on Article 59(2) of the ICC Statute”, 4 J. Int’l Crim. Just., 448 at 454.

44 International Covenant on Civil and Political Rights, GA Res. 2200 (XXI), UNGAOR, 21st session, Supp. No. 16, at 52, 16 Dec. 1966, UN Doc. A/6316 (1966) (hereafter ICCPR), Articles 7, 9, 10, and 14, respectively. The ICTY practice when sending arrest warrants to third parties to execute is apposite. There the pre-Trial Chamber issuing the warrant attached arrest guidelines for those enforcement officials, setting out the requirements such as reading the suspect their rights and ensuring their presentation to a judicial tribunal without delay.

45 This phrase literally translates to “bad conduct, good detention”, meaning that the Court will not allow the circumstances of an accused capture to impeach their subsequent trial.


47 The resolution was careful to specify that it should “in no way be interpreted as condoning the odious crimes of which Eichmann is accused.” United Nations Security Council resolution 138, June 23, 1960 (S/4349).


49 A non-justiciable matter is one that is not considered appropriate for legal consideration.


51 States may only exercise their jurisdiction outside their territory by virtue of a permissive rule, “The Case of the SS Lotus,” Permanent Court of International Justice, Judgment Series A, N° 10, 18.


53 This approach builds on the requirement of the 1933 Montevideo Convention that the presence of effective authorities capable of constituting a government is an essential characteristic of Statehood; “Montevideo Convention on Rights and Duties of States,” Dec. 26, 1933, UN Treaty Series 881. These criteria were held to reflect customary international law by the ICTY in The Prosecutor v. Slobodan Milosevic, Case No. IT-02-54-T, wherein it was found that the state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states.


55 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty (UNGA Resolution 2131); Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, (UNGA Res 2635), both cited above.


57 Vienna Convention on the Law of Treaties 1969, United Nations Treaty Series 1155, Article 52. (The Vienna


61 The idea of a multilateral reciprocal assisted arrest agreement is discussed below. Being bound by such agreements and treaties is not an encroachment on sovereignty. Rather, it is an expression of sovereignty, as held by the Permanent Court of International Justice; Case of the S.S. Wimbledon, Aug. 17, 1923, Judgment No.1 (PCIJ, Ser. A., No. 1, 1923).


bm Heed must be paid to the principle indicated in the Preamble – “nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State.” However, the crimes within the jurisdiction of the ICC, particularly those subject to universal jurisdiction, such as genocide and certain crimes against humanity, could well be considered to rise above pure domestic confines and be international affairs of concern to the global community as a whole; the legal universality of these crimes is documented in Susan Lamb, “The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia,” Br. Y.B. Int’l L., 226-227; Antonio Cassese et. al., eds., The Rome Statute of the International Criminal Court: A Commentary, Vol. II, at 1648-1663; Gareth Evans et. al., The Responsibility to Protect, (International Development Research Centre, Canada, 2001), sections 2.14 to 2.15. http://www.iciss.ca/report-en.asp.

bn In accordance with the principle of ex injuria jus non oritur, or “a right cannot be founded in wrongful action.”

65 Article 87(7). If no consent to an assisted arrest operation is forthcoming and a “constructive consent” could not be established, then the non-execution of the outstanding arrest warrant would remain a matter for the ASP or in the case of a referral under Article 13(b), the UNSC. However, the UNSC’s record in relation to referrals from the ICTY about States not cooperating with the tribunal has been limited to condemnatory statements; for example see UNSC Resolution 1019 (1995), Nov. 9, 1995, and UNSC Resolution 1027 (1998), Nov. 17, 1998, and further UNSC statement by the President (S/PRST/1996/34), 8 August 1996. This lack of enforcement of the UN’s own Tribunal’s mandate does not bode well for robust support of the ICC efforts to obtain indictees.


68 Preamble to the Rome Statute.