Chapter Four

The Impact of Arrest Warrants Issued by International Criminal Courts on Peace Negotiations

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I. Introduction

In perhaps no other arena is the tension between law and politics, or diplomatic and judicial means of dispute resolution, more fraught and potentially incendiary than in the context of international criminal justice mechanisms in ongoing conflicts. The crimes involved are the most heinous ones; the suspects are often leaders who still retain a great deal of political and military power; the perpetuation of long and bloody conflicts has devastating effects on an already long-suffering civilian population. On the one hand, the current state of international criminal justice requires that these crimes be investigated and the suspects prosecuted: the rule of law must be upheld. On the other hand, peace must be negotiated to ensure the cessation of hostilities. In this context, the issuance of an arrest warrant by an international criminal court against a sitting head of state, or rebel leader with the power to settle on a possible peace agreement, creates a fundamental tension between the interests of justice and the possibility of negotiating a cessation to hostilities.

The complexity of international criminal justice lies in its many diverse, and occasionally contradictory, aims. Indeed, not only is the establishment of international criminal courts intended to punish the worst crimes, but it also has other aims, including preventing further criminal activity, contributing to the protection and reconciliation of the civilian population, bringing justice to the victims, and contributing to international peace and security. The question here is how these objectives can be achieved when the fighting is on-going and there is a pressing need to bring the armed conflict to
an end. What happens when the activity of an international criminal court no longer coincides with ensuring successful peace negotiations in the short term? What happens when an international criminal court issues an arrest warrant against a leader still in power, a leader who can play a crucial role in negotiating a successful peace settlement? Such a situation occurred for the first time in 1995, when the ICTY arrest warrant against Radovan Karadžić\(^1\) meant that he would not attend the peace talks in Dayton, jeopardising the negotiations in the eyes of many.\(^2\) Similar arguments were made in connection with the arrest warrants issued by the ICC against President Al Bashir of Sudan\(^3\) or against Muammar Gaddafi of Libya\(^4\) and other top members of those governments.\(^5\)

This article will consider the various perspectives on the debate. It will then briefly focus on the prosecutorial discretion of the ICC Prosecutor under Article 53 of the Rome Statute,\(^6\) and consider to what extent the “interests of justice” can and do comprise consideration of political contingencies. We will argue that just as international law cannot be viewed in isolation from political realities, neither can political negotiators ignore the fact of international criminal justice mechanisms. We will suggest that international criminal justice has become a “political reality” and blanket amnesties are no longer an option. The only room for manoeuvre – an important one – lies not in whether an arrest warrant will be issued but in when it is released. That being said, international criminal justice requires the action of the international community to be fully effective.

\(^{1}\) The Prosecutor v. Radovan Karadžić and, Ratko Mladić, ICTY Indictment (Case No. IT-95-5-I) 24 July 1995.

\(^{2}\) See Pierre Hazan, Justice in a Time of War: The True Story Behind the International Criminal Tribunal for the former Yugoslavia (College Station: Texas A&M University Press, 2004), at 64–89.

\(^{3}\) The Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC, Pre-Trial Chamber I, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, (Case No. ICC-02/05-01/09), 4 March 2009.

