Ramping Up Strategies for ICC Arrests: A Few Lessons Learned

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Summary

Getting suspects into the dock at the International Criminal Court (ICC) has proven to be a formidable challenge for the now ten-year-old permanent Court. Lacking its own police force, the ICC depends on determined action by governments whose commitment, under the influence of competing diplomatic or economic objectives, can be fickle or in some cases outright missing. Improving the delivery of justice faces many hurdles, but the arrest of its suspects is a particular weak spot that affects the Court in a profound way. As an act of compliance with international criminal law, arrest pits execution of a court’s judicial order against the prerogatives of a sovereignty-minded, albeit legally obligated, state.

Significantly, the movement to bring justice for unspeakable crimes through international courts has accumulated rich experience on arrest over two decades of practice, particularly through the International Criminal Tribunal for the former Yugoslavia and the Special Court for Sierra Leone. The Yugoslav tribunal gained custody of 161 of its 161 indictees. The Sierra Leone Court went nine for nine. This experience provides an invaluable source of lessons learned for the ICC and justice-supporting states in the face of daunting obstacles. These lessons need to be mined and applied because, as a permanent court with potentially worldwide jurisdiction, the challenges facing ICC arrests are qualitatively more complex than those which the ad hoc tribunals surmounted. The consensus to arrest and the focus it facilitated are more difficult to sustain across several different country situations simultaneously, each with its own particularities. The ICC justice-supporting states are going to need to up their game.

No two arrest scenarios are likely to be the same and no apprehension for the ICC will be simple. While there is a danger of oversimplification from a limited store of experience, it is possible to group International Criminal Court arrest scenarios into several distinct categories. These include:

1. Arrest where the suspect is already in the custody of the state where the alleged crimes occurred and is then arrested and surrendered for trial to the court (Thomas Lubanga Dyilo, DRC);
2. Apprehension by the national authorities of a suspect for crimes allegedly committed on the territory of another state followed by surrender to the court (Jean-Pierre Bemba Gombo, Belgium);

3. Situations of armed conflict where the territorial government is unable to apprehend a suspect through a law enforcement operation and arrest takes on a military aspect in an operation involving troops acting extra-territorially (Joseph Kony, DRC, Central African Republic); and

4. A recalcitrant government that is implicated in the crimes alleged shields one of its own and refuses to arrest a suspect whose whereabouts are well known (Omar al-Bashir, Sudan).

In these last two scenarios, arrest can take years and there is damaging spill-over for the Court trying to bring a suspect to justice.

**Argument**

Failure to arrest poses serious risk to the mission of the Court. If suspects are not brought to trial, victims do not get the sense of closure they could from a trial. The communities most affected by the crimes have no judicially verified record of individual responsibility as a reference point for societal healing. The incremental strengthening of the rule—and reach—of law to increase its future deterrent effect through prosecution does not occur. Moreover, stalled court proceedings freeze in place witness protection programs, victim participation, robust outreach, and Court field presence as costs spiral upwards. In fact, accountability is weakened and impunity seems strengthened.

The Court, without its own police force, depends on state action for arrest, yet, ironically, it is blamed when governments fail to arrest. The paralysis generates an undercurrent of criticism that the Court is inefficient, expensive, and perhaps useless. In a word, the Court, rather than those states that have skirted their legal obligation to cooperate, takes the hit. The damage can be even more pernicious. A high-profile suspect at liberty who continues to function in a senior position, ostentatiously conducting official visits to different capitals and hosting high level visitors, flouts the Court’s writ in a way that is corrosive to its credibility.

The experience of the last two decades shows that justice-supporting states need to adopt a two-pronged approach underlined by a commitment to the long game. The essential element is using diplomatic, political, and economic clout—the exertion of political will—by States Parties and justice-supporting states. In practice, these states need to ramp up the priority they give to justice