Emergency Provisional Arrest at the ICC: A Proposal for Amending the Rome Statute in Cases of Imminent Atrocity

July 30, 2020

Emergency Provisional Arrest at the ICC: A Proposal for Amending the Rome Statute in Cases of Imminent Atrocity

By: Gregory S. Gordon

1. Introduction

Imagine the following hypothetical: In one of the Rome Statute member States, a rebel group is planning the massacre of an ethnic minority whose people have refused the rebel group access to their land, which has large reserves of precious metals sought by the rebel group to generate revenue.

By means of an inside source within the rebel group, a nongovernmental organization (NGO) learns that the rebel group is planning to massacre the male population of the ethnic minority group. They have already set up a staging ground for the massacre, stockpiled machetes, and abducted several minority group men and coerced them to provide information about their leadership. The NGO provides this information to the government authorities in the member State, but they dismiss it as rumor and do not take it seriously. In desperation, the NGO sends the tip to the Office of the Prosecutor (OTP) for the ICC. The OTP preliminarily concludes that there is probable cause to believe that an attempted crime against humanity can be established.

Is it possible that the OTP can have an arrest warrant issued in time to apprehend the main suspects and prevent the massacre? Based on the current system, where Sudan Situation suspect Ali Kushayb's June 2020 transfer to The Hague took place thirteen years and four months after the OTP's request for an arrest warrant in his case (see here) the answer is clearly no. Even if requests for arrest warrants could be processed in a fraction of that time, it is doubtful that such expedited processing could accommodate an emergency request of the nature described in the hypothetical. Why? This question must be answered in reference to the ICC's key normative feature in its relation to States – the principle of complementarity, which provides that, in the first instance, the Court defers to member States in terms of conducting investigations and pursuing prosecutions, unless the States prove unwilling or unable to perform those functions. The cumbersome and unwieldy procedural machinery in place to accommodate complementarity currently precludes the ICC's acting in an expedited manner to achieve the arrest contemplated in our hypothetical scenario above.

This article proposes a change in the system that would allow for rapid issuance of an arrest warrant in such exceptional circumstances. For a limited time, the proposal would free the Prosecutor from the constraints of judicial oversight and allow her to dialogue directly with the political authorities of the State where the suspect is to be arrested. Modeled on Rules 40 and 40bis Rules of Procedure and Evidence or RPE of the two ad hoc Tribunals (see for the International Tribunal for the Former Yugoslavia or ICTY here while for the International Tribunal for Rwanda or ICTR here), this would confer on the selected prosecutor a short-term quasi-judicial function and a limited-purpose and temporary suspension of complementarity in favor of the old ad hoc tribunals' paradigm of primacy.

Is the proposal feasible? The balance of this article will consider this question. First, it will examine the mechanics of initiating an investigation and consider how this is affected by the principle of complementarity, which is operationalized at the ICC via Articles 17 to 20 of the Rome Statute (RS). Then it will outline the arrest warrant issuance procedure as currently embodied in Articles 53 and 58 of the ICC Statute as well as the State Cooperation regime set forth in Part 9 of the Statute. It will next lay out the details of the proposal for the creation of a new emergency procedure, which would entail only a very limited carve-out of the complementarity regime, and show how the proposal has antecedents in both common law and civil law domestic criminal procedure schemes. Finally, the article will conclude with some reflections on the prospects for dealing with emergency situations if the proposal is adopted.

2. The Existing Law

A. Initiating a Pre-Trial Investigation

The emergency scenario sketched out in the Introduction implies the Prosecutor undertaking a self-initiated or "proprio motu" investigation – i.e., there is an implied absence of State or Security Council referral (including a self-referral). In such a case, per Articles 13 and 15, as a precondition for the exercise of jurisdiction, the Prosecutor, having commenced a preliminary examination "on the basis of information on crimes within the jurisdiction of the Court," must conclude that there is a reasonable basis to proceed with an investigation and request the Pre-Trial Chamber to authorize one.

Per Article 53, the Pre-Trial Chamber must determine whether, based on the information presented by the OTP in its request, it has jurisdiction over the alleged crimes and should thus authorize an investigation. This means that the crime(s) in question should: (1) fall within either the definition of war crimes, crimes against humanity and/or genocide (jurisdiction ratione materiae); (2) have been committed by a national of a State party (jurisdiction ratione personae) or on the territory of a State party (jurisdiction ratione loci); (3) have been committed after July 1, 2002 or after the date on which the Rome Statute entered into force for the State in question (jurisdiction ratione temporis); (4) be sufficiently grave; (5) be investigated pursuant to the interests of justice and (6) be the object of a proceeding that satisfies the principle of complementarity.

Of these requirements, (1) through (5) should presumably be easy to satisfy in our hypothetical. The biggest hurdle to overcome would likely be (6), satisfying the principle of complementarity, which accords jurisdictional deference to States. Let us now consider that principle in greater depth.

B. Complementarity

Complementarity is operationalized via an admissibility analysis provided for in Articles 17 to 20 of the Rome Statute. Article 17 sets out the substantive principles of complementarity. Its first paragraph declares that a case is admissible before the ICC unless: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it . . . ; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned . . . ; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3 (the trial was not a ruse to keep it from the Court); (d) The case is not of sufficient gravity to justify further action by the Court.

Thus, from a substantive perspective, Article 17 notifies the international community that the Court's default assumption is that the State at issue will handle the matter itself. From a procedural perspective, Article 18 regulates preliminary admissibility rulings and Article 19 governs subsequent admissibility determinations. With regard to the former, pursuant to Article 18, the ICC OTP must notify any State with apparent jurisdiction of a pending investigation and give it an opportunity to supplant the ICC. The State then has one month both to inform the ICC that it is investigating, or has

investigated, certain persons related to the OTP's investigation and to request that the OTP suspend its inquiry. Absent special authorization by the ICC, the OTP must defer to the State's investigation under Article 18.

Article 19, for its part, permits the ICC to consider admissibility at any stage in the case after the initial Article 18 determination is made. Consistent with this, any arrest warrant target or State with jurisdiction may challenge Article 17 admissibility via Article 19. The State must do so at the earliest opportunity. The OTP may also ask the Court to determine admissibility.

Pre-charge confirmation, admissibility or jurisdiction challenges are decided by the Pre-Trial Chamber (PTC). Post charge confirmation, such challenges are entertained by the Trial Chamber (TC). During the pendency of the challenge, the investigation/prosecution would be suspended, although the validity of any arrest warrant would not be affected.

C. Requesting Issuance of an Arrest Warrant

The issuance of arrest warrants is pursuant to Article 58 of the Statute. It stipulates that, "at any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that: (a) there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and (2) the arrest of the person appears necessary."

Pursuant to Article 58(1)(b)(iii), the arrest of the person appears necessary, "to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances." Moreover, according to Article 58(5), on the basis of the warrant of arrest, the Court may request the provisional arrest or the arrest and surrender of the person under Part 9, i.e., "International Cooperation and Judicial Assistance." It is thus to Part 9 that we now turn.

D. State Cooperation

Of course, no warrant of arrest can be executed without cooperation of the State where the suspect is located (and, possibly, committed his crimes). Part 9 begins with Article 86's "general obligation to cooperate," pursuant to which "States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court." Per Article 87(7), "where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council."

States parties agree in Article 88 “to ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.” Article 89 makes it clear that such cooperation applies specifically to the arrest and surrender of the person. Under subsection (2):

“Where the person sought for surrender brings a challenge before a national court on the basis of the principle of ne bis in idem as provided in article 20, the requested State shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the requested State shall proceed with the execution of the request. If an admissibility ruling is pending, the requested State may postpone the execution of the request for surrender of the person until the Court makes a determination on admissibility.”

Thus, ne bis in idem, which has complementarity implications, may also cause delay in the process.

Finally, for our purposes, and quite relevantly, Article 92 deals with provisional arrest. It declares that “In urgent cases, the Court may request the provisional arrest of the person sought, pending presentation of the request for surrender and the documents supporting the request as specified in article 91 (“Contents of Request for Arrest and Surrender”).

3. Hurdles to Effective Provisional Arrest in Cases of Emergency under the Current Legal Regime

The problems under the current system, in reference to our hypothetical, are both logistical and normative – and these are in many ways linked. Logistically, one of the key issues is the sequential and binary nature of the process. In terms of being sequential, a major barrier to expeditious powers of arrest is the division between the preliminary examination and investigation stages. In theory, the prosecutor must first go through the preliminary examination stage before being in a position to ask for investigative authorization. The “binary” nature of the process is owing to the involvement of the PTC – the Prosecutor may not act on her own in the first instance; she must obtain the PTC’s authorization before being able to open an investigation.

This is of great significance given that the request for an arrest warrant is possible only if an investigation has actually been opened. In emergency cases, this represents a cumbersome multi-step procedural regime that is not sufficiently supple or streamlined to accommodate expedited processing.

This is because the State cooperation framework is not structured to facilitate emergency measures. It is true that State cooperation is called for in the Statute but there is little to induce enforcement. The OTP can report non-cooperation to the Assembly of States Parties (ASP) but the ASP is limited in its coercive powers. And, in cases of Security Council referrals, that body, which has greater coercive power, can be notified of instances of non-cooperation. But we have seen over the years that Security Council referrals are exceedingly rare. So far, the Council has referred only two situations to the Court under Article 13(b): the situations in Darfur, in Resolution 1593 (2005, here), and in Libya, in

Resolution 1970 (2011, here). Regardless, in our hypothetical emergency situation, the most likely avenue for case initiation would be via an OTP proprio motu investigation and this necessarily means that non-cooperation could not be reported to the Security Council.

In addition to these logistical obstacles, there is the normative dimension of the problem. And this also helps illuminate some of the logistical issues. The normative or policy problem is linked to the Court's core identity – the principle of complementarity. The deference to State sovereignty and the preference for State-administered justice helps explain, in part, the unwieldy process at the beginning of an investigation – its sequential nature and the binary prosecutor-PTC oversight relationship. In essence, these are measures meant to curb the potential "run-away" prosecutor, who could pose a threat to State prerogatives. The same is true of the limited coercive power at the Court's disposal.

And complementarity puts up another barrier to expeditious and effective arrest warrant procedure even more directly – through the requirements of Article 18 (and possibly, later via Articles 19 and 20). As we have seen, once the Prosecutor requests authorization to investigate, that provision accords the State a one-month grace period both to notify the Court that it is investigating, or has investigated, relevant targets and to request that the OTP suspend its inquiry. This part of the statutory framework alone can stymie any efforts to obtain an arrest warrant on an expedited basis.

4. A Proposal to Effectuate Expedited Arrest Procedures in Emergency Cases

So how can we remedy the problem in cases of imminent atrocity that can be nipped in the bud with the prompt arrest of the identified malefactors? As with the problem, the solution has both normative and logistical dimensions. The logical place to start is in terms of a normative shift. In cases of imminent, preventable atrocity, a complementarity carve-out, in favor of primacy, is recommended. Primacy, the jurisdictional principle pursuant to which the ICTY and the ICTR operated, posits that the international court has primary jurisdiction in respect of the national court. Thus, even if the domestic institutions wish to initiate proceedings, the international institution could trump and assert its jurisdiction instead.

What does this mean in terms of facilitating an emergency arrest? Here we consider the logistical implications. If the ad hoc tribunals operated within a primacy regime, perhaps their rules for provisional arrest in cases of urgency should be consulted. At both the ICTY and ICTR, the relevant provision were RPE Rules 40 and 40bis. In the hypothetical posited in this article, the rules should be considered sequentially (and, for our purposes, we will examine the ICTY versions of Rules 40 and 40bis, which were substantially similar to the comparable ICTR provisions).

First, ICTY RPE Rule 40, styled "Provisional Measures," stipulated that, "In cases of urgency, the Prosecutor may request any State: (i) to arrest a suspect or an accused provisionally; (ii) to seise physical evidence; (iii) to take all necessary measures to prevent the escape of a suspect or an accused, injury to or intimidation of a victim or witness, or the destruction of evidence. The State concerned shall comply forthwith, in accordance with Article 29 of the Statute [providing for State

cooperation].”

ICTY RPE Rule 40bis provided for transfer and provisional detention of suspects at the seat of the ICTY. This required judicial intervention if the following three conditions could be satisfied: (1) the Prosecutor had requested a State to arrest the suspect provisionally, in accordance with Rule 40, or the suspect was otherwise detained by State authorities; (2) after hearing the Prosecutor, the Judge considered that there was a reliable and consistent body of material which tended to show that the suspect may have committed a crime over which the Tribunal had jurisdiction; and (3) the Judge considered provisional detention to be a necessary measure to prevent the escape of the suspect, injury to or intimidation of a victim or witness or the destruction of evidence, or to be otherwise necessary for the conduct of the investigation.

Although Rule 40bis required judicial intervention, this was mitigated by the fact that it presumed that the suspect had already been detained. Moreover, in practice, judicial hearings requested pursuant to Rule 40bis were routinely convened on an expedited basis at the ad hoc Tribunals. This was not a procedure that dragged on for several weeks or, in most cases, even several days.

So what would an incorporation of Rule 40/40 bis look like within the Rome Statute schema? I suggest the inclusion of Article 58bis, “Emergency Issuance of a Warrant of Arrest.” The provision could read as follows:

“1. In urgent cases, when there is a reasonable basis to believe that a crime under this Statute is about to be, or has been, committed, the Prosecutor may request a State member to arrest a suspect or an accused provisionally and take all necessary measures to prevent injury to or intimidation of a victim or witness, even in the absence of an authorized investigation.

2. The State shall comply with the request, if the following conditions are satisfied:

(a) The Prosecutor provides a detailed affidavit providing the grounds for the reasonable basis to believe that a crime under the Statute is about to be, or has been committed;

(b) Information describing the person sought, sufficient to identify the person, and information as to that person’s probable location; and

(c) A statement that the Prosecutor will inform the Court, via the Pre-Trial Chamber, of the request within forty-eight hours of the request being made and that a request for surrender of the person will follow, unless the Pre-Trial Chamber orders rescission as set forth in Paragraph 3, or finds a lack or reasonable grounds pursuant to the hearing called for in Paragraph 5.

3. Upon being notified of the request, the Pre-Trial Chamber may order it be rescinded in the interests of justice or of peace and security or if its execution would otherwise be inimical to the object and purpose of the Statute.

4. In the absence of an order of recission as set forth in Paragraph 3, or reasonable articulated grounds by the State that is the object of the request, a failure of the State to execute the provisional arrest within forty-eight hours will permit the Prosecutor to request enforcement via the Security Council.

5. Within seventy-two hours of the issuance of the request for provisional arrest pursuant to Paragraph 1, a hearing shall take place before the Pre-Trial Chamber wherein the Prosecutor shall present evidence of her reasonable basis for believing that a crime had been, or was about to be, committed under this Statute. The detained suspect may be represented by counsel at the hearing and may present evidence to counter that of the Prosecutor. If the Pre-Trial Chamber concludes that the Prosecutor has satisfied her burden, then it will authorize initiation of an investigation and order that the suspect be surrendered to the Court pursuant to the procedures set forth in Rule 59. If the Pre-Trial Chamber concludes that the Prosecutor has not satisfied her burden, then it will order the release of the suspect without prejudice to the Prosecutor later seeking issuance of an arrest warrant pursuant to Rule 58.

6. In carrying out the emergency provisional arrest pursuant to this section, State authorities and this Court will respect the rights of the accused as set forth in Article 55 of this Statute, including assuring that the accused is not compelled to incriminate himself, not subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment and notify the accused of his right to remain silent and have legal assistance."

5. Evaluation of the Proposal

As we have seen, the notion of "provisional arrest" and "state cooperation" are already embedded in the Rome Statute – so the spirit of the proposal is already infused within the schema. But the devil is in the details and this is where legitimate criticisms of the proposal can be raised. In essence, the proposal accords a quasi-judicial function to the Prosecutor, allowing her a very limited-purpose autonomy and power of injunction for a very limited period of time. Critics may argue that this is completely at odds with the Rome Statute's underlying complementarity regime. And this is a valid point – pursuant to the proposal, the Prosecutor is able to act autonomously without oversight and assert a primary-jurisdiction-oriented power vis-à-vis a member State.

But is this tiny complementarity carve-out so problematic? I believe the answer is no. First, it is only applicable in cases of urgency when there is a reasonable basis to believe, for example, that the possibility of mass murder or serious bodily injury on a large scale are in play. And this would have to be of extreme gravity as the new procedure presumes that a crime under the Rome Statute has been or is about to be committed – this means it only applies to attempted commission of war crimes, crimes against humanity or genocide. (It is possible gravity may not be satisfied but that would be revealed at the hearing within 72-hours of the request being made.) Moreover, the Prosecutor's autonomy and injunctive power is limited to a 48-hour period. At that point, oversight kicks in and further follow-up procedures that are more consistent with the complementarity regime are mandated.

In addition, it is not as if the Prosecutor does not already have a limited degree of autonomy under the current framework – she does, via her ability to conduct a preliminary examination without oversight and for as long as she wishes. The proposal here represents an extension of that autonomy, but it is not entirely inconsistent with her existing powers within the very early phases of a case.

Perhaps the biggest objection, though, would relate to the Prosecutor's ability to call upon the Security Council for enforcement. Apart from any misgivings arising from the complementarity perspective, this aspect of the proposal certainly raises valid international institutional concerns. In the cases of the ICTY and ICTR, the judicial institutions at issue were creations of the Security Council, so it was logical and institutionally sound to permit the Prosecutor for those tribunals to request Security Council enforcement assistance.

But our hypothetical presumes a proprio motu investigation. By definition, this would mean that the Security Council is not implicated in the conferral of jurisdiction. And thus, unlike situations such as Darfur or Libya, the Court's involvement would not be via an Article 13(b) referral pursuant to Chapter VII of the UN Charter. Still, in cases of Article 13(b) referrals, the Prosecutor may call upon the Security Council for enforcement. How much of a stretch is it to extend this to a circumscribed emergency situation where the Security Council's intervention could mean that atrocity is prevented? Is this not consistent with the Security Council's maintenance of peace and security mandate, in any event? We already see a reflection of that mandate elsewhere in the Statute via Article 16, which permits the Council to request suspension of an ICC investigation and/or prosecution pursuant to a Chapter VII resolution issued, implicitly, in the interests of maintaining peace and security.

And it must be pointed out that comparable prosecutorial/police powers can be found in jurisdictions across common and civil law jurisdictions. A representative common law jurisdiction is the United States, where police may arrest suspects without a warrant, when they witness a crime or have probable cause to believe a crime has been committed, as long as a probable cause hearing is held within 48 hours of the arrest (Gerstein v. Pugh, 420 US 103 (1975, see here)). An exemplary civil law jurisdiction is France. There, the Code of Criminal Procedure authorizes the police to arrest any person against whom there exists one or more plausible reasons to suspect she has committed, or is about to commit, a criminal offense. This form of custody is called *garde à vue* and can allow the suspect to be detained for up to 24 hours but this can be extended for another 24 hour period (i.e. 48 hours in total) upon written authorization of the District Prosecutor only.

In light of all this, as well as the ICC's core mission, as set out in its Preamble, of protecting the victims of "atrocities" by "prevention of such crimes," it is submitted that the proposal is viable and should be adopted. Some might argue that, consistent with Rule 40 of the ad hoc Tribunal RPEs, the proposal could be expanded to permit requests for seizure of physical evidence that is at risk of being altered or destroyed. But that exigency does not involve the protection of human life and limb and thus, in light of complementarity concerns, it is not being proposed here.

6. Conclusion

Antonio Cassese, former ICTY President, once famously remarked that the “ICTY remains very much like a giant without arms and legs – it needs artificial limbs to walk and work. And these artificial limbs are State authorities.” Thus, even in the case of an institution functioning within a primacy jurisdictional scheme and capable of calling on the Security Council for enforcement, if the State refuses to cooperate, again in the words of Cassese, the international judicial institution will “turn out to be utterly impotent.” Clearly, primacy and the backing of the Security Council is no guaranteed tonic for the absence of an emergency arrest procedure. But it is certainly better than having no emergency arrest measures at all, which is the ICC’s sad state of affairs at present.

Moreover, it is equally clear that the occasions for using such a procedure will be quite limited. Typically, the State itself will be responsible for the atrocities, or at least complicit, and it will be of no avail to ask for its cooperation in making a provisional arrest. Thus, as posited in our hypothetical at the outset, the most likely relevant situation would be a rebel group about to commit atrocities on the territory of the State party. An obvious example would be an organization like the Lord’s Resistance Army. If the government were too complacent or dysfunctional to take action, the ICC OTP could use the procedure to spur it to act and hopefully save lives.

To date, fourteen persons for whom the ICC has issued arrest warrants remain at large (see here). Some of those arrest warrants were issued over a decade ago. Not only is there currently no procedure in place for arresting suspects on an expedited basis in situations of extreme urgency at the ICC, but under the current system, there is little hope of even effectuating an arrest within the same calendar year. What we may lose in a de minimis weakening of complementarity, we would more than make up for in lives saved. That is an outcome toward which we should all be striving.

This article could be cited as Gregory S. Gordon, “Emergency Provisional Arrest at the ICC: A Proposal for Amending the Rome Statute in Cases of Imminent Atrocity” (2020), 4 PKI Global Justice Journal 28.

About the author

Gregory S. GordonGregory S. Gordon, a member of the Editorial Board for the Global Justice Journal, is Professor of Law at The Chinese University of Hong Kong Faculty of Law, where he has previously served as Associate Dean for Development/External Relations and Director of the Research Post-Graduates Programme. Before entering the legal academy, he was a prosecutor with the International Criminal Tribunal for Rwanda and with the United States Department of Justice, Criminal Division. He would like to thank Giovanni Chiarini, who gave him the idea for pursuing this article and whose innovative thinking makes important contributions to the development of international criminal procedure.