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State Co-operation and International Criminal Court Bargaining Influence in the Arrest and the Surrender of Suspects

STEVEN D. ROPER AND LILIAN A. BARRIA*

Abstract

While much has been written about the formation of the International Criminal Court (ICC), less attention has been focused on the enforcement capability of the Court. As demonstrated by the history of the ad hoc international tribunals, one of the most pressing problems for international criminal courts is the arrest and the surrender of suspects, which often requires substantial bargaining between the court and the state in which the suspect resides. We develop a classification of the issues which have the greatest impact on the bargaining influence of the ICC to secure the arrest of indictees, and apply this classification scheme to a study of the four ongoing situations at the ICC in order to explore the bargaining environment in which the ICC operates. While many of the cases have features which should assist the ICC in bargaining with the state, the situation in Sudan represents the greatest challenge for the Court.

Key words

arrest; bargaining influence; International Criminal Court; state co-operation; surrender

Since December 2003, when the Ugandan president, Yoweri Museveni, referred the situation concerning the Lord's Resistance Army to the Prosecutor of the International Criminal Court (ICC), there have been three subsequent referrals all involving African states (the Democratic Republic of the Congo (DRC), the Central African Republic (CAR), and Sudan). While there are important differences between the cases, the difficulty of apprehending suspects is a common problem, given that the ICC has to rely upon the co-operation of states to execute warrants of arrest. To this point, the ICC has issued only eight arrest warrants, and although the case of the CAR was referred in early 2005, no warrants have yet been issued.[1] Human rights groups have criticized the ICC for taking what they consider to be a long time to issue arrest warrants, particularly in the case of Sudan, but the apprehension of suspects has been a major concern of ad hoc tribunals going back to the formative years of the first courts, including the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), through to more recent tribunals such as the Special Court for Sierra Leone.

* Steven D. Roper is Associate Professor of Political Science, Eastern Illinois University; sdroper@eiu.edu. Lilian A. Barria is Assistant Professor of Political Science, Eastern Illinois University; labarria@eiu.edu. A previous version of this research was presented at the 2006 Annual Meeting of the American Political Science Association. We want to thank Eric Leonard for his useful comments.

1. One of the arrest warrants was withdrawn following the death of a Ugandan, Raska Lukwiya.

The difficulty in apprehending suspects in the case of the ICTY and the ICTR is instructive for the ICC. Unlike these tribunals, the ICC is empowered only with authority under Chapter VII of the UN Charter when a case is referred to the Court by the UN Security Council.[2] The problem for the ICC is even more complex because the Court has to balance the complementarity principle (which defers prosecutions to the state) with the need to justify the existence and the expense of the institution.[3] While ICC state parties have an obligation to co-operate with the Court, the lack of domestic enabling legislation in order to implement the Rome Statute and the existence of non-state parties can undermine co-operation and render arresting suspects problematic.[4]

The inability to apprehend suspects not only undermines the credibility of a justice system but, more fundamentally, thwarts the prosecution of cases and ultimately denies the possibility of justice to individuals as well as the establishment of a historical record which can serve as a basis for possible national reconciliation. Therefore we regard the apprehension of suspects as a more fundamental problem than just enforcement – the inability to apprehend suspects undermines the entire international human rights regime.

While much has been written about the formation of the ICC[5] and the Court's relationship with the United States[6] and the Rome Statute,[7] less attention has been focused on issues of enforcement. As Fearon argues, international co-operation involves first a bargaining stage (often described in the literature as a co-ordination game) and then an enforcement stage.[8] He argues that the two phases of international co-operation are linked, and while much attention has been focused on problems of enforcement (akin to a prisoner's dilemma game), much of the hard work which fosters international co-operation occurs at the bargaining stage. Thus understanding the enforcement capability of the ICC requires attention to the bargaining between the institution and the state (or states) which occurs before and after a warrant of arrest has been issued. Even in cases in which the suspect resides in an ICC member state, the Court must secure the apprehension and the surrender of the suspect from state authorities.

Realist theories of international co-operation have focused on the ability of states to determine the costs and the benefits of co-operation in a world in which relative gains figure prominently in calculations, while constructivist theories have noted the importance of norms and multilateral institutions as fora which can co-ordinate

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2. Of course, the history of the ICTY demonstrates that even Chapter VII authority requires the goodwill and co-operation of UN member states, which was not always forthcoming.
3. Interview with Legal Advisor, Registry, ICC, The Hague, 11 July 2006.
4. See V. Oosterveld, M. Perry, and J. McManus, 'How the World Will Relate to the Court: The Cooperation of States with the International Criminal Court', (2002) 25 *Fordham International Law Journal* 767.
5. See H.-P. Kaul, 'Construction Site for More Justice: The International Criminal Court after Two Years', (2005) 99 AJIL 370; and E. Leonard, *The Onset of Global Governance: International Relations Theory and the International Criminal Court* (2005).
6. S. Sewall and C. Kaysen (eds.), *The United States and the International Criminal Court* (2000).
7. See M. Marler, 'The International Criminal Court: Assessing the Jurisdictional Loopholes in the Rome Statute', (1999) 49 *Duke Law Journal* 825; and D. Sarooshi, 'The Statute of the International Criminal Court', (1999) 48 ICLQ 387.
8. J. Fearon, 'Bargaining, Enforcement, and International Cooperation', (1998) 52 *International Organization* 269.

state behaviour and establish conditions for the creation of enforcement authority.[9] While the two theories are often presented in opposition, Moravcsik argues that the 'tendency to jump to this conclusion demonstrates the danger of conducting debates about world politics around the simple dichotomy of realism versus idealism (or realism versus constructivism)'.[10] Indeed, compliance models of state behaviour can be based on both cost–benefit and normative concerns.[11]

While realist, neoliberal institutionalist, and constructivist theories of co-operation differ significantly in their conceptualization of state interests, the importance of international regimes, and mechanisms for enforcement, all these theories recognize that bargaining and enforcement problems are intrinsic to understanding international co-operation.[12] Most of this literature examines state co-operation vis-à-vis other states (bilateral) or within institutions (multilateral) and generally asks why states co-operate and comply with the creation of institutions which have significant sovereignty costs.[13] In this article we take a slightly different approach, and ask under what circumstances the institution is able to elicit co-operation from states.

In order to understand the conditions under which the ICC's bargaining influence is enhanced for purposes of enforcing a warrant of arrest (i.e. securing the surrender of a suspect), we consider the political and the legal environment surrounding apprehension in international criminal cases and draw on the experiences of the ICTY and the ICTR as well as the Rome Statute and the ICC's Rules of Procedure and Evidence. Based on these, we develop a classification of the issues which have the greatest impact on the bargaining influence of the ICC to secure the arrest of suspects. We then apply this classification scheme to a study of the four ongoing cases at the ICC in order to explore the environment in which the ICC operates, and we conclude by comparing the four cases to determine state co-operation with the Court.

1. The role of bargaining in international criminal courts

The literature on international criminal courts, from the Nuremberg Tribunal to the creation of the ICC, has long recognized the importance of bargaining in the creation of these institutions. Rudolph argues that international law institutionalists assume that the bargaining over regime design is an important factor in the success of a

9. D. Snidal, 'Relative Gains and the Pattern of International Cooperation', (1991) 85 *American Political Science Review* 701; and J. Ruggie, 'Multilateralism: The Autonomy of an Institution', (1992) 46 *International Organization* 561.
10. A. Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe', (2000) 54 *International Organization* 217, at 248.
11. See D. Beach, 'Why Governments Comply: An Integrative Compliance Model that Bridges the Gap between Instrumental and Normative Models of Compliance', (2005) 12 *Journal of European Public Policy* 113.
12. K. Oye, *Cooperation under Anarchy* (1986); and J. Checkel, 'The Constructivist Turn in International Relations Theory', (1998) 50 *World Politics* 324.
13. D. Hawkins, 'Explaining Costly International Institutions: Persuasion and Enforceable Human Rights Norms', (2004) 48 *International Studies Quarterly* 779.

court.[14] While some argue that institutions such as the ICC represent the ideal case of 'full legalization' in which rules of commitment are binding, precise, and fully delegated, the reality is that all international criminal courts must engage in significant bargaining to elicit co-operation in order to enforce indictments.[15]

To determine the relative success of the ICC in bargaining with the state (or states) and ultimately achieving the surrender of suspects, we analyse (i) the institutional features of the ICC; (ii) the type of conflict in which the state is involved; (iii) the type and location of indictees; and (iv) the ability of the ICC to secure side-payments and credible threats from other states and organizations. Indeed, these pre- and post-indictment issues were important in the bargaining which took place between the ICTY and the ICTR and respective states over the surrender of suspects. Therefore, in order to understand how these issues might influence ICC bargaining, it is instructive to examine the experiences of the ICTY and the ICTR. The history and the development of the ICC and the ad hoc tribunals are intertwined. The origins of the Rome Statute began with an early draft adopted by the UN International Law Commission in 1994 which was the basis for the discussions by the UN Preparatory Committee (PrepCom) which lasted until 1998. Between 1994 and 1998, the historical lessons and practical issues surrounding the ICTY and the ICTR provided a backdrop for the various discussions. At the diplomatic conference in Rome in 1998, one of the key concerns was the relationship of the ICC to states and the obligations that states would have to the Court vis-à-vis their own citizens and citizens of other states.[16] The experiences of the early ad hoc tribunals showed that the non-compliance of states greatly undermined the effectiveness of courts, and one of the main areas of non-co-operation by states was the failure to surrender indictees.

Indeed, there were two distinct periods involving the ability of the ad hoc tribunals to apprehend suspects. During the first period, from the mid- to late 1990s, both tribunals, but especially the ICTY, were ineffective in apprehending suspects. While Security Council Resolution 827(1993) states that 'all states shall co-operate fully with the International Tribunal', including a requirement to assist in the arrest of indicted individuals and their transfer to the Tribunal, most of those who were tried at the ICTY prior to 2000 were lower-rank indictees who were politically easier for states to surrender.[17]

In the second period, since the early 2000s, both tribunals have been much more successful in securing the apprehension of suspects.[18] In the case of the ICTY, the bargaining influence of the Tribunal was significantly increased because of the threat of force – the use of military assets provided the Tribunal with coercive power to detain suspects. In Bosnia and Herzegovina (BiH), those who did not voluntarily surrender were subject to capture by the NATO-led Stabilization Force or SFOR.

14. C. Rudolph, 'Constructing an Atrocities Regime: The Politics of War Crimes Tribunals', (2001) 55 *International Organization* 655.
15. K. Abbott *et al.*, 'The Concept of Legalization', (2000) 54 *International Organization* 401.
16. D. Scheffer, 'The US Perspective on the ICC', in Sewall and Kaysen, *supra* note 6.
17. T. Meron, 'Answering for War Crimes: Lessons from the Balkans', (1997) 76 *Foreign Affairs* 2.
18. S. Roper and L. Barria, *Designing Criminal Tribunals: Sovereignty and International Concerns in the Protection of Human Rights* (2006).

SFOR's mandate (to create a safe and secure environment) did not specifically include the capture of indictees but was broadly interpreted to include the detainment of indictees, as these arrests were viewed as contributing to the peace process.

The success in arresting suspects in BiH compares favourably with the experience in apprehending suspects in Croatia and Serbia.[19] Over the last few years, both states, however, have co-operated much more with the ICTY, leading to the important arrest of the former Croatian general, Ante Gotovina, in December 2005. The reason for this change in the bargaining influence of the Tribunal can be attributed to the side payments and incentives provided by the European Union (EU), which insisted that accession talks with both states would begin only after fugitives were arrested. When Serbian officials in May 2006 failed to turn over Ratko Mladić to the ICTY, the EU suspended discussions concerning a Stabilization and Association Agreement. By July, Serbian officials announced an 'action plan' designed actively to assist in the arrest of Mladić.[20]

In the case of Rwanda, the initial effectiveness of the Tribunal was also greatly undermined by the lack of co-operation from other states. Article 28 of Resolution 955(1994) specifically requires all UN member states to provide full co-operation to the ICTR, including the surrender of individuals. Several African countries, most notably Kenya and the former Zaire (now the DRC), refused requests to transfer suspects.[21] Both countries accepted a large number of Hutu refugees, including several of the leading planners of the genocide. Part of this reluctance to transfer suspects was due to the balance-of-power struggle which has engulfed central Africa since the mid-1990s. As Magnarella notes, 'they [Kenya and Zaire] supported Rwanda's former rulers because they regarded the successor RPF-led government as a client of Uganda's President Yoweri Museveni, their rival for leadership in East and Central Africa'.[22] Indeed, the location of suspects can hinder the process of surrender because arresting suspects in third-party states requires co-ordination from multiple states which might have very different agendas and even hostility towards each other. However, as with the ICTY, the early 2000s marked a new phase of state co-operation with the ICTR, due to the increasing institutionalization of the ICTR as well as successful conflict resolution efforts within central and eastern Africa. By 2006, over twenty states had transferred indictees to the Tribunal. Significantly, in 2002 the DRC, a haven for Hutu refugees, surrendered its first two suspects and since this increase in state co-operation approximately 90 per cent of those indicted by the Tribunal have been arrested. The conflicts in the former Yugoslavia and in Rwanda highlight one of the difficulties in analysing the nature of the conflict in the cases before the ICC – the blurring of internal (civil) and inter-state conflict which

19. R. Goldstone and G. Bass, 'Lessons from the International Criminal Tribunals', in Sewall and Kaysen, *supra* note 6.
20. Interview with Carla Del Ponte, Chief Prosecutor, and David Tolbert, Deputy Prosecutor, ICTY, The Hague, 12 July 2006.
21. The refusal to transfer suspects is not specific to African countries. France and the United States have refused to surrender individuals to the ICTR. Moreover, there has been at least one case in which a country surrendered a suspect to the Rwandan national court rather than the ICTR. See M. Morris, 'The Trials of Concurrent Jurisdiction: The Case of Rwanda', (1997) 7 *Duke Journal of Comparative & International Law* 349.
22. See P. Magnarella, *Justice in Africa: Rwanda's Genocide, Its Courts, and the UN Criminal Tribunal* (2000), at 51.

makes arrest and prosecution much more problematic.[23] One of the lessons from the experience of the ICTY and the ICTR is that capturing suspects can be a lengthy, time-consuming process.

2. The influence of the Rome Statute on ICC bargaining influence and the arresting of suspects

2.1. The obligation of state parties versus non-state parties

During the early negotiations of the Rome Statute, representatives rejected the concept of ICC universal jurisdiction.[24] Therefore the Rome Statute creates a treaty-based regime binding only on those states which formally join.[25] The Court only has jurisdiction over crimes committed on the territory of a state party, or if the accused is a national of a state party or of a state that has accepted the ICC's jurisdiction pursuant to Article 12(3) of the Rome Statute. The lone exception is when a case is referred to the ICC by the Security Council, which we discuss below. We make this point regarding jurisdiction to emphasize that nationals of an ICC state party have an incentive to flee to non-state parties to avoid surrender.[26]

2.2. The nature of the referral and the role of the prosecutor

There are three procedures by which a case can be referred to the ICC. First, a case can be submitted to the Office of the Prosecutor (OTP) on the request of a state party. This can be a self-referral or a referral from another state party. Second, a UN Security Council resolution under Chapter VII authority can refer a case to the OTP whether the case involves a state party or not. Third, the Prosecutor may initiate investigations *proprio motu* and submit a request to authorize an investigation to the ICC Pre-Trial Chamber, which has to approve the request. In the first case, all state parties have a right to refer a situation to the OTP, which then has the responsibility to evaluate the information in order to determine whether an investigation should be initiated (Art. 53(1) of the Rome Statute). However, the Statute is silent as to whether a state party may request the withdrawal of a case which it had earlier referred, obviously complicating bargaining over the surrender of suspects.[27] The ICC Prosecutor is dependent on state co-operation for investigations and the gathering of evidence.[28]

2.3. The definition of crimes

A final issue which may influence the bargaining ability of the ICC to secure the arrest of suspects and garner state support concerns the nature of the charges against

23. Both forms of conflict have been incorporated into the Rome Statute's definition of war crimes.
24. See *inter alia* W. Schabas, *An Introduction to the International Criminal Court* (2007), 62.
25. At the time of writing the ICC has 105 state parties.
26. Technically, states do not 'extradite' suspects to the ICC but rather surrender them to the Court. This language, which is found in Art. 91 of the Rome Statute, was specifically included because extradition refers to a state-to-state process. The statutes of the ICTY and the ICTR previously incorporated this approach. See Oosterveld *et al.*, *supra* note 4.
27. The Statute allows the state party to challenge a decision of the OTP not to prosecute a referred case.
28. Chief Prosecutor Moreno-Ocampo recognizes his statutory obligation to defer to state judiciaries whenever possible. Interview with Rod Rastan, Legal Advisor, Office of the Prosecutor, ICC, The Hague, 11 July 2006.

TABLE 1. Issues which influence the ICC's bargaining ability to secure the apprehension of suspects

Actors	General issues	Specific characteristics	Assessment
State	Type of conflict	Internal	Enhanced
		Inter-state	Limited
	Status of conflict	Ongoing	Limited
		Ended through amnesty	Limited
		Terminated	Enhanced
	Relationship to ICC	State party	Enhanced
		Non-state party	Limited
	Types of indictee	State actors	Limited
		Non-state actors	Enhanced
	Location of indictees	Permanently outside	Limited
		Within the state	Enhanced
	Domestic support for ICC	Government and civil society	Enhanced
ICC	Type of referral	Self	Enhanced
		UN Security Council	Formal
		Prosecutor investigation *proprio motu*	Limited
	Charges	Genocide	Limited
		Crimes against humanity	Limited
		War crimes	Enhanced
Third party	Support for ICC activity	Military/peacekeeping pressure	Formal
		Economic pressure	Enhanced
		Political pressure	Limited

suspects. The ICC has jurisdiction over the following categories of crimes: genocide, crimes against humanity, war crimes, and the crime of aggression.[29] While all these categories involve crimes that are inhumane and are violations of fundamental human rights, Schabas argues that from a legal perspective there is reason to believe that certain crimes are considered graver than others. For example, the Rome Statute allows for state parties to 'opt out' of the jurisdiction of the ICC concerning war crimes, and allows for the defence of superior orders and the defence of property only in cases concerning war crimes. For these reasons, Schabas concludes that '[i]t might be argued that war crimes are less important than both genocide and crimes against humanity.'[30]

3. ASSESSING THE ABILITY OF THE ICC TO OBTAIN INDICTEES

Based on the lessons of the ad hoc tribunals and the institutional features and jurisdiction of the ICC, we develop a classification of the issues which influence the bargaining power of the ICC to secure the apprehension of suspects. As shown in Table 1, we examine the specific characteristics of the issue and assess whether it 'enhances', 'limits', or constitutes a 'formal' form of bargaining influence by which the ICC can gain the apprehension of suspects. By formal influence, we mean that

29. While the crime of aggression is included in the Court's subject jurisdiction in Art. 5(1) of the Rome Statute, Art. 5(2) provides that the Court may only exercise its jurisdiction in this respect once the crime and the conditions of its prosecution have been defined.
30. See Schabas, *supra* note 24.

the characteristic denotes a formal authority (for example Security Council Chapter VII power) which provides the ICC with legal power but also indicates a reluctance of the state to co-operate (because of either a denial of the situation or a lack of resources). Our assessment of whether an issue contributes to or limits ICC bargaining effectiveness is parsimonious and, therefore, there may be examples which call into question the assessed influence of the ICC. However, based on the experience of the ICTY and the ICTR, we believe that these issues and our assessment highlight some of the important bargaining and co-operation problems that any international institution faces in a conflict and a post-conflict environment.

3.1. The ICC as an actor

We regard two issues as central to the effectiveness of the Court in bargaining and obtaining the apprehension of suspects. First, the type of referral is an important *ex ante* characteristic which provides some basis for anticipating the behaviour of the state. In cases in which a state party has self-referred the situation to the Court, we expect that the ICC will be in a stronger position to bargain with the state on a number of issues, including the surrender of suspects. As Kelly argues in terms of state commitments to the ICC, 'states are constrained by their commitments because, once made, their behavior . . . [is] also about the principle of keeping commitments'.[31] ICC bargaining influence will be greater in those cases involving state party self-referrals because of the need to follow through with their referral commitment. However, the ICC is in a better position to bargain only in the case of self-referral, not necessarily in a case of referral by one state of a situation in another state.

A situation referred by a UN Security Council resolution with Chapter VII authority implies a formal authority of the Court to obtain co-operation (see Table 1). One might argue that having a consensus of the permanent members of the Security Council would provide the ICC with greater leverage with states in securing the surrender of suspects, but the history of the ICTY and the ICTR (both created under Chapter VII authority) demonstrates that this formal power still requires the genuine co-operation of the state, which may not be forthcoming in cases without the referral commitment of the state. Finally, we consider a referral based on the Prosecutor's *proprio motu* power as providing the most limited amount of influence to the Court in obtaining suspects. As Sarooshi argues, '[f]or the OTP to second-guess a state . . . is problematic . . . the point remains that as the Court becomes involved in cases concerning larger states, issues of complementarity are likely to assume greater importance.'[32] If a state, after being confronted with allegations of human rights violations, is unwilling to prosecute or does not seek assistance from the ICC, then it will be difficult for the ICC to convince the state to provide resources for the arrest and the surrender of suspects.

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31. J. Kelly, 'Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Nonsurrender Agreements', (2007) 101 *American Political Science Review* 573, at 573.
32. D. Sarooshi, 'Prosecutorial Policy and the ICC: Prosecutor's *Proprio Motu* Action or Self-Denial?', (2004) 2 *Journal of International Criminal Justice* 940, at 943.

As previously indicated, the Rome Statute seems to imply a hierarchy regarding the gravity of crimes. The creation of an opt-out clause for war crimes, as well as the use of Court-sanctioned defences, makes this important category of crimes seemingly less significant compared with genocide and crimes against humanity. Thus we believe that suspects charged with war crimes will be either easier to arrest or more prone to surrender voluntarily because of the perception that these are 'lesser charges'. Charges based on genocide are viewed as more serious, with a concomitant need for greater punishment. As Prunier discusses in relation to Darfur, 'whether the "big-G word" [genocide] is used or not appears to make a considerable difference in terms of international reaction'.[33]

3.2. The state as an actor

Most of the bargaining leverage that the ICC has will be expended on convincing states to arrest suspects and surrender them to the Court. The nature of the conflict creates a set of preconditions which will influence the Court's effectiveness in bargaining with states. While the Rome Statute covers both internal and inter-state conflicts, international conflict renders the successful apprehension of suspects more problematic. International conflict requires a greater co-ordination effort on the part of the ICC, not only because the number of principal actors increases but also because the number of locations able to host fleeing indictees increases. As Fearon notes, the bargaining stage or co-ordination game becomes more complex with an increase in players.[34] Moreover, much of the empirical research on third-party civil war interventions finds that the 'internationalization' of domestic or civil war lengthens the duration of the conflict and makes resolution and management strategies more difficult to implement, which has an effect on the effectiveness of international courts in obtaining suspects.[35]

Whether the conflict, either civil or international, is ongoing or has recently terminated also has an impact on the ability of the ICC to arrest suspects. Gallarotti and Preis note that apprehending suspects during an ongoing conflict can exacerbate the conflict and severely limit the ability of institutions to obtain state co-operation.[36] Danner argues that

> [o]ngoing disputes render investigation and enforcement difficult, and they make the calculation of the 'interests of justice' very difficult to assess ... Intervening in an ongoing conflict makes the political ramifications of any investigation more acute.[37]

Therefore we believe that the ICC will be more successful in gaining the surrender of suspects after hostilities have ended. The only exception would be in cases in

33. G. Prunier, 'The Politics of Death in Darfur', (2006) 105 *Current History* 195.
34. See Fearon, *supra* note 8.
35. See D. Balch-Lindsay and A. Enterline, 'Killing Time: The World Politics of Civil War Duration, 1820–1992', (2000) 44 *International Studies Quarterly* 615; P. Regan, *Civil Wars and Foreign Powers: Outside Interventions and Intrastate Conflict* (2000); and P. Regan and A. Aydin, 'Diplomacy and Other Forms of Intervention in Civil Wars', (2006) 50 *Journal of Conflict Resolution* 736.
36. G. Gallarotti and A. Preis, 'Politics, International Justice, and the United States: Toward a Permanent International Criminal Court', (1999) 4 *UCLA Journal of International Law and Foreign Affairs* 1.
37. A. Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court', (2003) 97 AJIL 510, at 545.

which the end of the conflict entailed the use of an amnesty.[38] The existence of an amnesty law places additional obstacles in negotiations between the ICC and the state.

The ICC will be most effective in securing the apprehension of suspects in cases involving state parties (see Table 1). Indeed, there are only two situations in which non-state parties co-operate with the ICC (on a voluntary basis and because of a Security Council resolution). Therefore we anticipate that the ICC's bargaining leverage will be much more limited in situations involving non-state parties. As Kelly argues, the commitment to the institution serves to constrain behaviour and also to signal acceptance of the legitimacy and the values of the Court.[39] In addition, we believe that the type of suspect has an impact on the ability of the ICC to secure arrest. While Article 27 of the Rome Statute bars the application of national immunities for state officials, the history of the ICTY demonstrates the difficulty in obtaining the surrender of state actors and particularly of high-ranking officials.[40]

Finally, domestic support for the ICC, from the government as well as civil society, clearly enhances the influence of the Court to apprehend suspects. However, governments and civil society are not monolithic entities but are composed of various individuals and institutions with their own interests.[41] In many situations, we anticipate that *parts* of the government and certain *segments* of civil society will support the ICC, while others may not. While evaluating government and civil society support for the ICC requires sensitivity to competing claims and agendas, support from some sectors of the government and civil society will contribute to the relative bargaining influence of the Court. Indeed, Vinjamuri and Snyder argue that prosecutions for previous human rights violations should 'be contingent on underlying balances of power between the major ethnic groups in society or on the effective containment of potential spoilers'.[42] The pursuit of justice and suspects requires either the active support or at least the acquiescence of various government and civil society representatives.

3.3. Third parties as actors

As previously discussed in the case of the ICTY, third-party side-payments, threats, and intervention have been fundamental to the success of the Tribunal in obtaining the arrest and the surrender of indictees. However, the forms that this pressure takes have a differential impact. Condemnations by the international community and discussions at the Security Council have provided the ICTY with limited influence on the willingness of states to surrender indictees. Diplomacy needs to be accompanied by action in order to secure the arrest of suspects. We regard political pressure by third parties, whether by state or non-state actors, as generally having a limited

38. The decision in 2005 of the Argentine Supreme Court to throw out the amnesty laws following the country's so-called 'Dirty War' between 1976 and 1983 demonstrates that amnesty provisions are not necessarily permanent.
39. See Kelly, *supra* note 31.
40. D. Akande, 'International Law Immunities and the International Criminal Court', (2004) 98 AJIL 407.
41. See Danner, *supra* note 37.
42. L. Vinjamuri and J. Snyder, 'Advocacy and Scholarship in the Study of International War Crime Tribunals and Transitional Justice', (2004) 7 A*nnual Review of Political Science* 345, at 355.

ability to enhance the bargaining effectiveness of the ICC with regard to the capture of indictees.

Instead, military or peacekeeping pressure and especially economic pressure are more successful tools available to third parties to enhance the leverage of the ICC. For domestic judiciaries, the capture of suspects is the role of law-enforcement agencies. Therefore one might assume that military or peacekeeping pressure would be the most effective tool for the surrender of suspects. However, we regard this form of pressure as having a 'formal influence', because, in most cases, sovereign states are extremely reluctant to allow foreign forces on their soil and, if they allow these forces, the formal mandate is often very restrictive. In the case of SFOR in BiH, the mandate was interpreted in a broad fashion to allow for assistance with the capture of suspects. However, in the case of Sudan, the African Union observer mission (AMIS) initially began with a very limited mandate, which has been expanded but has never included provisions which interfere with the primacy of the state.

There is a large literature which examines the efficacy of foreign assistance and economic sanctions (the carrot and stick for third parties). Economic sanctions have long been used to promote state co-operation as regards human rights, and many find that the allocation of foreign assistance has also been used to influence human rights policy.[43] Rather than engage with these specific issues, we argue more generally that significant economic pressure may be one of the most effective tools available to third parties in order to support the activity of the ICC. In the case of the ICTY, the EU was very successful in assisting the Tribunal because of the perceived side-payment economic benefits that states such as Croatia would gain with membership. Especially for states which are highly export-dependent, third-party economic pressure may be one of the most important means by which the international community can assist the ICC in securing the apprehension of suspects. In order to assess success in securing arrests, we apply our classification scheme to four situations currently at the Court to assess the bargaining capability of the ICC in securing the arrest of suspects.

4. International justice in the situations currently before the ICC

4.1. Central African Republic

In 2003, the Central African Republic (CAR) president, Ange-Félix Patassé, was overthrown by forces loyal to his former army chief of staff, François Bozizé. Patassé had become president of the CAR in 1993, after the first democratic election since independence. Most of his supporters lived in the north-western savannah, whereas all the previous presidents had been either from the forest or the Ubangi River regions in the south. Patassé began to replace southern government and military officials with northerners, which antagonized the Yakoma ethnic group (a southern ethnic majority) which had benefited from the patronage of the previous president,

43. The effectiveness of sanctions as well as the importance of human rights policy on the allocation of foreign assistance are highly contested issues. A review of this literature is beyond the scope of this research.

André Kolingba. Soldiers who had been loyal to President Kolingba were opposed to their loss of privilege, and the tense relations between the armed forces and the government led to a series of coup attempts in the mid-1990s, as factions within the armed forces sought to overthrow the government. These coups greatly increased the tension between northerners and southerners in the CAR and thus polarized society to a greater extent than before.

In May 2001, soldiers led by Kolingba attempted to overthrow President Patassé. The government sought the support of the Congolese Liberation Movement (MLC) from the DRC, which had begun a rebellion in the DRC in late 1998 and controlled territory adjacent to the CAR. In the aftermath of the unsuccessful coup, Patassé questioned Bozizé's loyalty, and in October 2001 Bozizé was dismissed from his military post. By 2002 he had led a coup attempt to overthrow the government with the support of troops from Chad. To fight Bozizé, Patassé again requested the assistance of the MLC. During the conflict, hundreds of MLC soldiers looted parts of the CAR capital, Bangui, and as MLC and CAR government forces pursued the insurgents, they committed widespread human rights violations, including rape.[44] Combatants loyal to Bozizé, including their allies from Chad, are also reported to have carried out rapes in the areas which they occupied.

In February 2003 the International Federation of Human Rights (FIDH) asked the ICC to investigate the situation in the CAR. FIDH noted the human rights abuses committed in the CAR, including rape, unlawful killings, and systematic looting.[45] Human rights activists claim that about four hundred people were victims of atrocities committed in the suppression of the coup. Amnesty International claims that war crimes and crimes against humanity, including crimes of sexual violence, were committed during the conflict.[46] In March 2003, Bozizé was able to re-enter Bangui and take control of the military and the government.

In January 2005 ICC Prosecutor Moreno-Ocampo revealed that the CAR government, a state party to the ICC, had referred the situation to the ICC (the referral was received in December 2004). While no indictments have been issued by the ICC, the CAR Appeals Court in February 2006 stated that it was unable successfully to conduct an investigation of former President Patassé or of former MLC leader Bemba, and referred the cases to the ICC on charges of crimes against humanity. Patassé currently resides in Togo while Bemba is in exile in Portugal. Also included in the referral are a French policeman and two aides of Patassé. The CAR Ministry of Justice has stated that the 'only way to prevent total impunity is to call for international help. The International Criminal Court should be the best route to follow.'[47] Table 2 summarizes the characteristics of the CAR case before the ICC. In many instances, the nature of this case enhances the ability of the ICC to secure the apprehension of possible indictees.

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44. Amnesty International, 'Central African Republic: Five Months of War against Women' (2004).
45. US Department of State, 'Central African Republic: Country Reports on Human Rights Practices – 2003' (2004).
46. Amnesty International, 'Central African Republic: Referral to the International Criminal Court Should Be Accompanied by Judicial Reforms to Address Impunity' (2005).
47. BBC News, 'Hague Referral for African Pair', 14 April 2006.

TABLE 2. The ability of the ICC to secure the apprehension of suspects in the Central African Republic

General issues	CAR	
Type of conflict	Inter-state	Limits
Status of conflict	Terminated	Enhances
Relationship to ICC	State party	Enhances
Types of suspect	Non-state actors*	Enhances
Location of suspects	Permanently outside	Limits
Domestic support for ICC	Government and domestic groups	Enhances
Type of referral	Self	Enhances
Charges	War crimes*	Enhances
Third-party support for ICC engagement	Political pressure	Limits

*At the time of writing no warrants of arrest have been issued.

4.2. Democratic Republic of the Congo

War raged in the DRC between 1998 and 2002, with over 50,000 troops from seven different African states fighting alongside the DRC army and numerous rebel factions and tribal militias. During the conflict clashes in the north-east Ituri region between the minority Hema and the majority Lendu tribal militias killed more than 50,000 people and displaced a further 500,000. Since the end of the war in 2002, some 10,000 people have been dislocated by the fighting, many fleeing to neighbouring Uganda. All the groups fighting in the Ituri region are accused of recruiting child soldiers. More than half of the estimated 15,000 Hema fighters were under 18. Thomas Lubanga, the leader of the UPC (a Hema rebel group), emerged as one of the most notorious commanders in the conflict. Soldiers under his command are accused of murder, torture, rape, and the brutal mutilation of their victims. While there were efforts to disarm the militias in 2003, many from the UPC refused to turn in their weapons.

The Security Council in 2003 found that even though the war had ended, Uganda was training local militias in order to maintain control of Ituri's resources. Rwanda was also placing proxies in key positions (such as quasi-governmental firms with bosses from Kigali replacing Congolese). A UN investigation of the role of the foreign forces also revealed the systematic plunder by all parties of Congolese natural resources, particularly diamonds.[48] Beginning in September 2003, the UN Observer Mission for Congo (MONUC) was authorized under Chapter VII authority to locate, disarm, and repatriate thousands of Rwandan Hutus who fled to the DRC after the 1994 genocide in Rwanda and who had been involved in the conflict in the DRC. By 2006 there were 17,000 UN peacekeepers in place in the DRC – the UN's largest peacekeeping operation.

In September 2003 the Prosecutor informed the Assembly of States Parties that he was ready to request authorization from the Pre-Trial Chamber to use his own *proprio motu* powers to start an investigation, but that a referral and active support from the

48. Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, UN Doc S/2003/1027, 23 October 2003.

DRC, a state party to the ICC, would assist his work. In a letter in November 2003 the DRC government welcomed the investigation by the ICC, and by March 2004 the DRC had referred the situation to the Court (pre-empting an official *proprio motu* referral). In June 2004 the Prosecutor announced the commencement of a formal investigation in the Ituri region, following a preliminary examination of the crimes committed in the country since July 2002.

In February 2005, nine Bangladeshi UN peacekeepers were killed, which caused the DRC government to increase its efforts to arrest militia leaders. In March 2005 Floribert Ndjabu of the Lendu Nationalist and Integrationist Front and Lubanga of the UPC were arrested. In February 2006 a sealed arrest warrant for Lubanga was issued at the ICC, which became public in March (the same day that Lubanga was handed over to the ICC by the DRC government). He was charged with three counts of war crimes, including 'enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities'. On 17 October 2007 Germain Katanga, the alleged leader of the Force de Résistance Patriotique en Ituri, was surrendered to the ICC by DRC authorities, marking the Court's second DRC case. The arrest warrant lists three counts of crimes against humanity and six counts of war crimes.

The challenge for the DRC and the ICC is to arrest the other militia and rebel group leaders who continued to commit crimes after the civil war. The United Nations has indicated that there were nine parties to the war which used child soldiers or committed war crimes against children. Amnesty International argues that

> [The] arrest and transfer of Thomas Lubanga Dyilo to the ICC . . . will lose its significance if more warrants of arrest are not promptly issued against other alleged perpetrators of human rights violations, including those on the side of the government and those in armed opposition groups.[49]

While the ICC welcomes the assistance of MONUC in securing the arrest of indictees, up to this point the scope of their mandate has been interpreted narrowly.[50] Table 3 summarizes the characteristics of the DRC case before the ICC. Like the case involving the CAR, most of the features of the DRC case enhance the ability of the ICC to secure the apprehension of indictees (indeed, the only indictees currently at the ICC are from the DRC).

4.3. Sudan

Of all the situations before the ICC, the human rights violations in Darfur (the western region of Sudan) have received the greatest amount of media attention and focus of the international community. Since 2003 an estimated 200,000 individuals have been killed, with millions displaced and approximately 200,000 refugees settled along Chad's border with Sudan.

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49. Amnesty International, 'Democratic Republic of the Congo: International Criminal Court's First Arrest Must be Followed by Others Throughout the Country' (2006).
50. Interview with Legal Advisor, Registry, ICC, 11 July 2006.

TABLE 3. The ability of the ICC to secure the apprehension of suspects in the Democratic Republic of the Congo

General issues	DRC	
Type of conflict	Internal	Enhances
Status of conflict	Terminated	Enhances
Relationship to ICC	State party	Enhances
Types of suspect	Non-state actors	Enhances
Location of suspects	Within the state	Enhances
Domestic support for ICC	Government	Enhances
Type of referral	Self	Enhances
Charges	War crimes	Enhances
Third-party support for ICC engagement	Military/peacekeeping pressure	Formal

The violence in Darfur erupted at a time when the long-enduring conflict between the northern government in Khartoum and the rebel movements in the south headed by the Sudan People's Liberation Movement was finally being resolved. Indeed, it was the peace process in the south which caused Darfuri insurgents in the west to attack government installations. The conflict in Darfur pits black Muslim Darfuri against the ruling elite in Khartoum, who are Arab Muslim. Prunier explains that the Darfuri rebels resented the peace deal between the north and the south because the tribes in Darfur 'would most likely be completely excluded from the new power- and wealth-sharing arrangements. After years of marginalization, resentment, frustration, and increasing social troubles, the Darfuri revolted in their turn.'[51]

When the Darfuri insurgency began in February 2003, the government was unable to send in the military to quell the uprising because many in the armed forces were from Darfur. Therefore the government relied upon a Darfuri Arab militia (known as the *janjaweed*) to carry out military operations on behalf of the government.[52] Udombana argues that the *janjaweed* have been incorporated into the Sudanese military structure[53] and, while the Sudanese government has denounced the militia in Darfur, non-governmental organizations such as Human Rights Watch have argued that '[d]espite continuing denials by the Sudanese leadership of its responsibility for the acts of the militia, the Sudanese government is ultimately responsible for the war crimes and crimes against humanity committed by militias.'[54]

A UN Commission of Inquiry established in 2004 to investigate alleged human rights violations in Darfur issued a report in January 2005 in which it found that government forces had been involved in atrocities which it labelled variously as crimes against humanity and war crimes, but not genocide.[55] The report contained

51. See Prunier, *supra* note 33, at 195.
52. The Sudanese government has been supporting Arab Darfuri against non-Arabs in the region for many years. See A. Abdelmoula, 'The "Fundamentalist" Agenda for Human Rights: The Sudan and Algeria', (1996) 18 *Arab Studies Quarterly* 1.
53. N. Udombana, 'When Neutrality Is a Sin: The Darfur Crisis and the Crisis of Humanitarian Intervention in Sudan', (2005) 27 *Human Rights Quarterly* 1149, at 1183.
54. Human Rights Watch, 'Entrenching Impunity: Government Responsibility for International Crimes in Darfur' (2005).
55. International Commission of Inquiry on Darfur, 'Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General' (2005).

a sealed list of 51 individuals whom it recommended for prosecution. The speculation is that this list includes important policy-making officials in the government, military, intelligence services, and parliament. The UN Security Council referred the situation to the ICC in March 2005 under Resolution 1593 (2005).

The ICC's investigation of the crimes is ongoing, and at the time of writing only two warrants of arrest have been issued, in April 2007, for Ali Muhammad Ali Abd-Al-Rahman (a principal leader of the *janjaweed*) and Ahmad Muhammad Harun (Sudan's secretary of state for humanitarian affairs and a former minister in charge of Darfur). The government in Khartoum was quick to denounce the warrants, and many in the human rights community have expressed their frustration over the perceived inactivity of the ICC. However, because this referral was made through a Security Council resolution rather than being a self-referral of a state party, the situation in Darfur was going to be more difficult than any of the others before the ICC.[56] Chief Prosecutor Moreno-Ocampo in a report to the Security Council indicated that '[g]iven the scale of the alleged crimes in Darfur, and the complexities associated with the identification of those bearing greatest responsibility for the crimes, my Office currently anticipates the investigation and prosecution of a sequence of cases, rather than a single case.'[57]

The government in Sudan has resisted repeated calls to co-operate with the Court, giving the ICC limited access to individuals in Sudan. The ICC had a preliminary meeting with officials in Sudan in February 2006, but has not been able to conduct investigations in Darfur.[58] In addition, the government announced the day after the ICC opened investigations in 2005 that it had established a Special National Criminal Court for Darfur. However, none of the indictees are high-ranking officials, and no one has been indicted or charged with war crimes or crimes against humanity.[59] Indeed, in August 2005 President Omar al-Bashir signed a law which provided a general amnesty to any member of the armed forces for crimes committed. While the African Union has had troops in Darfur since 2004, the mandate of the troops has been severely limited and constantly challenged by the Sudanese government. Table 4 summarizes the characteristics of the Sudan case before the ICC. Not surprisingly, most of the features of this case limit the bargaining influence of the ICC to secure the apprehension of possible indictees. Of the four situations currently before the ICC, Sudan represents the greatest test for the ICC in securing the apprehension of suspects.

4.4. Uganda

The ongoing conflict in Uganda pits the government of President Yoweri Museveni and the military known as the Uganda People's Defence Force (UPDF) against the

56. Sudan has signed but not ratified the Rome Statute.
57. L. Moreno-Ocampo, 'Statement of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo to the UN Security Council Pursuant to UNSCR 1593' (June 2006), 1.
58. Interview with Rastan, *supra* note 28.
59. There is a parallel that can be drawn between the Sudanese Special Court and the Indonesian Human Rights Court (IHRC). Both courts were established to pre-empt an international process, and both have been criticized for failing to indict high-ranking perpetrators and to pursue significant charges. For more information concerning the IHRC, see Roper and Barria, *supra* note 18.

TABLE 4. The ability of the ICC to secure the apprehension of suspects in Sudan

General issues	Sudan	
Type of conflict	Internal	Enhances
Status of conflict	Ongoing	Limits
Relationship to ICC	Non-state party	Limits
Types of suspect	State actors and non-state actors	Limits
Location of suspects	Within the state	Enhances
Domestic support for ICC	None	Limits
Type of referral	UN Security Council	Formal
Charges	Crimes against humanity	Limits
Third-party support for ICC engagement	Military/peacekeeping pressure	Formal

Lord's Resistance Army (LRA). The conflict has been raging for twenty years, and one of the reasons why it has been difficult for the government to negotiate with the LRA is because the insurgents have no clear political, economic, or territorial agenda. The main area where the conflict has occurred is in the north, in an area known as Acholiland (the Acholi are the dominant tribal group in the region). Doom and Vlassenroot argue that the widening economic and political gap between the north and the south and the militarization of politics constitute part of the reason for the conflict in northern Uganda.[60] As part of its colonial policy, Britain introduced industry and cash-crop production in the south, while the north became the source of cheap labour for southern industry. While people from the south held civil service positions, Acholi from the north were recruited into the armed forces.

Museveni's rise to power in 1986 led to a change in the composition of the armed forces, from being dominated by the Acholi to being primarily staffed and controlled by southerners. Many Acholi feared that the newly re-formed UPDF would take revenge for the acts committed by the Acholi-dominated army under the previous government of Milton Obote. Indeed, the UPDF engaged in a policy of violent reprisals, including executions, torture, rape, and looting. When Joseph Kony, the leader of the LRA, began his fight against Museveni in 1986, he targeted both the UPDF and Acholi civilians (the very people they were supposedly fighting for). LRA followers believed that the atrocities committed against the Acholi community would eliminate those loyal to the government and create a new Acholi community based on Kony's vision. Generally, LRA operations were not very successful, and in 1991 the UPDF undertook an anti-insurgency operation designed to eliminate the LRA. At a point where the LRA was almost defeated, the government inexplicably changed its strategy and decided by 1994 to engage in peace negotiations.

However, the talks soon collapsed as Kony accused any Acholi who supported negotiations with the government of disloyalty. He increased his attacks on the Acholi, who became the victims of a number of LRA massacres which began in 1995. In many cases the victims were hacked or clubbed to death. The LRA also cut ears and lips to warn others of the consequences of being suspected as a

60. R. Doom and K. Vlassenroot, 'Kony's Message: A New *Koine*? The Lord's Resistance Army in Northern Uganda', (1999) 98 *African Affairs* 5.

government informant. Rape became commonplace, and the LRA increasingly engaged in the abduction of Acholi children, who were seen as the basis for purifying Acholi society through Kony's indoctrination.[61] Children have been forced to torture and to kill relatives (as well as other abducted children), which ultimately prevented their reintegration into society. Children also faced death through starvation and dehydration. Some of the children were sold into slavery in Sudan in exchange for firearms, and humanitarian organizations estimate that more than 20,000 children have been abducted by the LRA since 1986. To prevent Kony's reprisals, the Acholi have been forced to leave their homes and move into 'protected villages' created by the government. Thousands have died during the conflict, and more than one million have fled their homes, resulting in the economic collapse of the region.

In December 2003 Museveni decided to refer the situation to the ICC. As a state party, Uganda co-operated with the OTP by allowing an ICC investigation in northern Uganda. In July 2004 the OTP announced that it would begin investigations, and by October 2005 Prosecutor Moreno-Ocampo announced the unsealing of arrest warrants for five LRA members. Kony was charged on 33 counts, comprising 12 counts of crimes against humanity and 21 counts of war crimes. The other four indictees were charged on various counts of crimes against humanity and war crimes. Moreno-Ocampo stated at that time that '[t]he next step is arrest . . . Reports indicate that the fugitives are moving between three countries: Uganda, DRC and the Sudan. These countries must work together, with the support of the international community, to carry out the arrests.'[62]

However, the efforts by the ICC to hold the LRA accountable have been hampered recently by the Ugandan government entering into peace negotiations with the LRA. President Museveni has offered the rebels a full and guaranteed amnesty as long as they renounce violence. The talks are being brokered by the government of southern Sudan. Acholi community leaders have supported the negotiations in order to end the violence and bring stability to the region. Moreover, they have questioned the efforts of the ICC to provide justice, preferring local solutions to the conflict. Table 5 summarizes the characteristics of the Ugandan case before the ICC. Like the case involving the CAR and the DRC, most of the features of the Ugandan case enhance the ability of the ICC to secure the apprehension of indictees; however, the continuing possibility of a general amnesty for the LRA leadership calls into question the indictment. The LRA has requested that the ICC indictments be rescinded and that the international community instead support the peace process. Okello Okuti, a lieutenant-commander in the LRA, has asked that 'the entire world should throw its weight behind the LRA and Ugandan government so that together we can achieve peace'.[63]

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61. M. El Zeidy, 'The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State Party Referral to the ICC', (2005) 5 *International Criminal Law Review* 83.
62. L. Moreno-Ocampo, 'The Investigation in Northern Uganda' (2005), accessed at icc-cpi.int/library/organs/otp/Uganda-_PPpresentation.pdf.
63. BBC News, 'Rebels Trek from the Ugandan Bush', 11 September 2006.

TABLE 5. The ability of the ICC to secure the apprehension of suspects in Uganda

General issues	Uganda	
Type of conflict	Internal	Enhances
Status of conflict	Ongoing	Limits
Relationship to ICC	State party	Enhances
Types of suspect	Non-state actors	Enhances
Location of suspects	Within the state	Enhances
Domestic support for ICC	Government	Enhances
Type of referral	Self	Enhances
Charges	Crimes against humanity and war crimes	Enhances
Third-party support for ICC engagement	Political pressure	Limits

5. CONCLUSIONS: ASSESSING THE BARGAINING EFFECTIVENESS OF THE ICC

As the ICC continues to issue warrants of arrest, we have examined the issues that we believe impinge on ICC bargaining to secure the arrest of suspects in these four cases. As all the current cases are located in Africa and many share similarities, there may be an interaction effect which could enhance the Court's cross-country bargaining power. Many of the cases involve larger regional issues, and thus the Court may be able to use negotiations with one state as leverage against another.[64] That said, the ICC faces a number of challenges in gaining the surrender of current and future suspects. In the case of the CAR, ICC bargaining is enhanced by what appears to be strong support within the government once indictments are issued. However, the individuals most likely to be indicted by the Court are not in the CAR, and therefore third-party-state co-operation will be necessary. As previously stated, potential suspects have an incentive to flee to ICC non-state parties to avoid surrender. As an example in the case of the CAR, former President Patassé has sought refuge in Togo, which is not an ICC state party, impeding the ability of the ICC to bargain effectively for his surrender.

The Court has had some success in its dealings with the DRC due to the co-operation of the government as well as third-party pressure in the form of UN peace-keeping operations. However, as further indictments are possibly issued, it remains to be seen whether the DRC will continue to co-operate. In Uganda the government is currently seeking a peace agreement with the LRA, and while the government has not yet requested that the ICC indictments be withdrawn, the chances for apprehension have decreased since the offer of an amnesty to the LRA. The ICC has to rely on the Ugandan government to secure the surrender of these individuals, and Kaul states that if the Ugandan government were not able to surrender these indictees then the 'credibility of the Court would suffer if an arrest warrant issued by the judges of the Pre-Trial Chamber at the request of the prosecutor . . . remained ineffective over a long period because the states parties were slow, or failed, to execute it'.[65]

64. We wish to thank one of the reviewers for making this point.
65. Kaul, *supra* note 5, at 383.

The issues that we have identified based on the experience of the ICTY and the ICTR, as well as the ICC's institutional design, point to Sudan as the most challenging case before the ICC. At the state level, the characteristics of the conflict as well as the types of suspect that could be indicted have led to continual resistance by Khartoum. While the international community has been much more vocal in its condemnation of the human rights abuses in Darfur, more pressure will have to be exerted on the government of Sudan to assist ICC bargaining to secure the arrest of those indicted. The continuation of the human rights abuses and difficulty surrounding the negotiations over the hybrid UN–African Union peacekeeping force call into question the bargaining capabilities of the ICC (as well as of any international institution). The Court will have to rely on sustained international pressure because ultimately '[t]his kind of pressure exerted by outside entities will be critical to the success of the ICC'.[66] Thus Sudan will be a test case not only for the ICC but ultimately for the international community as to whether it is truly committed to ending the cycle of violence and impunity.

66. Danner, *supra* note 37, at 535.