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Bargaining for Arrests at the International Criminal Court: A Response to Roper and Barria

WILLIAM W. BURKE-WHITE*

Abstract

This comment questions some of the key assumptions in the article by Roper and Barria with respect to the ICC's power to bargain with territorial states to attain the apprehension and surrender of indictees. The comment notes that, while factors such as the nature of the referral to the Court, the crimes charged, and whether the conflict is still ongoing are likely relevant to the ICC's bargaining power, the effect of these factors is indeterminate. The comment highlights the regional political dimension of the ICC's bargaining leverage in the Great Lakes region of Africa and suggests that the Court's bargaining power is engaged in a path-dependent three-level bargaining game.

Key words

arrests; bargaining power; International Criminal Court; negotiation; regional politics

In the preceding article Steven Roper and Lilian Barria astutely identify the greatest challenge for the International Criminal Court (ICC) as it seeks to transform itself from the new darling of international lawyers into a meaningful mechanism for the enforcement of international criminal law: the ability to apprehend and arrest indictees. As Roper and Barria observe, 'the inability to apprehend suspects undermines the entire international human rights regime'.

This brief response first challenges a number of assumptions underlying their analysis and suggests that, while most of the factors they identify are likely to have some impact on the ICC's bargaining ability, the nature of that impact is indeterminate. Second, this response raises a key consideration that Roper and Barria ignore, namely the inter-state politics in the Great Lakes region of Africa, which may be critical to the ICC's bargaining ability in the situations currently under investigation. Finally, the response suggests a broader way of framing the ICC's political efforts to apprehend suspects as a path-dependent three-level game.

Roper and Barria argue that nine variables will determine the ICC's bargaining leverage in the apprehension of indictees: (i) the type of conflict; (ii) the status of the conflict; (iii) the state's relationship with the ICC; (iv) the type of indictees; (v) the location of indictees; (vi) domestic support for the ICC; (vii) the type of

* Assistant Professor of Law, University of Pennsylvania Law School, BA (Harvard), JD (Harvard), Ph.D. (Cambridge).

referral; (viii) the nature of the charges; and (ix) third-party support for ICC activity. They then draw conclusions about the directionality of each of these variables, as either enhancing or limiting the ICC's bargaining position. Many of these factors may well be relevant to the ICC's bargaining ability. However, Roper and Barria's analysis of the likely impact of these factors occasionally lacks nuance and should be supported by more evidence. The actual impact of the variables they identify is, therefore, far less determinate than the authors contend.

A few brief examples reveal the problems with Roper and Barria's analysis. Take first the nature of the referral to the ICC, which they claim is 'central to the effectiveness of the Court in bargaining and obtaining the apprehension of suspects'. They assert that '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'. This assumption simply cannot be supported, particularly not for the reasons they suggest. From a legal perspective, a self-referral creates no additional duties for the referring state in co-operating with the Court beyond those any state party would face pursuant to Articles 86 and 89 of the Rome Statute. Likewise, Roper and Barria provide no evidence to suggest that states self-referring to the Court would be driven by some special moral duty for continued co-operation or have, in practice, been more co-operative.[1] Logically, one might think that a state that had self-referred would have a strong interest in the ultimate apprehension of suspects. However, there are two problems with this assumption. First, state interests are not static and change over time. It is conceivable and perhaps even likely that at the time a state self-refers a situation to the ICC it may have an interest in the Court's intervention. However, by the time arrest warrants are issued (perhaps one to two years later), events on the ground may well have shifted the state's interests (e.g. through the signing of a peace deal with indicted rebels) to the point where it no longer favours apprehension. Second, at the time a self-referral is made, the state does not know whom the Court will indict. The government of such a state might assume the ICC will indict rebel warlords, but in reality, government officials might themselves come under the Court's scrutiny. If that were to happen, the state might well resist apprehension, notwithstanding its initial self-referral. Given these potential shifts in state interest over time, Roper and Barria's supposedly decisive variable of the nature of the referral is, at best, indeterminate as to the ICC's bargaining power.

Similar problems of questionable assumptions arise with respect to many of the other variables Roper and Barria identify as significant determinants of the ICC's bargaining power, such as the nature of the charges. They claim 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"'. There is, however, little

1. While the ICC has successfully apprehended two indictees in the self-referred DRC situation, those indictees were outside the government power structure, and DRC co-operation may well have come from the low political costs of apprehending those particular suspects rather than any duty to co-operate because of the self-referral. One could certainly expect the DRC to be far less co-operative if, for example, a member of the sitting government were indicted. For an analysis of the domestic politics of the ICC investigation in the DRC, see W. Burke-White, 'Complementarity in Practice: The International Criminal Court as Part of a System of Multilevel Global Governance in the Democratic Republic of Congo', (2005) 17 LJIL 121.

evidence to suggest that indictees are willing to surrender voluntarily if they face only war crimes charges. Being subjected to international criminal prosecution may be so detrimental to a defendant's future prospects regardless of the nature of the charges that the defendant will have strong incentives to avoid arrest. In deciding whether to surrender to the Court, a rational indictee will compare the detriment of criminal prosecution and the probable sentences he will face if convicted with the costs or utility of remaining at large. Admittedly, war crimes convictions have resulted in median sentences 33 per cent shorter than crimes against humanity convictions, perhaps making surrender in war crimes cases less costly to a defendant than surrender in, say, crimes against humanity cases. However, the International Criminal Tribunal for the former Yugoslavia (ICTY) has taken a broad view of the gravity of the offence in sentencing determinations that goes far beyond the mere nature of the crime charged, and the ICC is likely to do the same. As the ICTY Appeals Chamber found in the *Furundzija* case, 'Rather than subscribing to some form of hierarchy between the offences generally, a Trial Chamber should impose a sentence which reflects the inherent gravity of the accused's criminal conduct', such as the effects on victims and the particular form of responsibility.[2] Hence an especially grave war crimes indictment could well result in a longer sentence than would an indictment for less grave crimes against humanity or genocide. Even if sentencing were based solely on the nature of the crime charged, it is far from clear that a reduction in sentences from a mean of 180 months to a mean of 120 months would significantly shift the indictee's calculation of the utility of surrender to the Court, particularly given the high political costs associated with an international criminal prosecution.[3]

While Roper and Barria suggest that the ICC will have enhanced bargaining power in cases involving less grave crimes, countervailing factors that they overlook may actually enhance the ICC's bargaining power with respect to particularly grave offences, such as genocide. If states and the international community view genocide as more serious than war crimes, a state may be more inclined to apprehend and surrender a genocide suspect so as to distance itself from the perpetrators of such crimes and, perhaps, avoid state liability for genocide.[4] Similarly, if genocide is deemed more serious than other crimes, it may be easier for the Court to galvanize third states and the UN Security Council to assert pressure for apprehension on a territorial state harbouring genocide suspects. Again, then, the effect of the nature of the charges on the ICC's bargaining power appears, at best, an indeterminate variable in the analysis of the Court's bargaining power.

A third and final example again illustrates some of the problematic assumptions of Roper and Barria's analysis. They assert that 'the ICC will be more successful in

2. *Prosecutor v. Furundzija*, Judgment, Case No. IT-95-17/1, A.Ch., 21 July 2001, at para. 227.
3. See J. Meernik and K. King, 'The Sentencing Determinants of the International Criminal Tribunal for the Former Yugoslavia: An Empirical and Doctrinal Analysis', (2003) 16 LJIL 717, at 735. Roper and Barria fail to cite available data in reaching their conclusions about sentencing practices.
4. By handing such an individual over to the ICC, the state could avoid the attribution of the conduct to the state through, e.g., Art. 11 of the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts.

gaining the surrender of suspects after hostilities have ended' as opposed to during a conflict. Their logic is that 'Intervening in an ongoing conflict makes the political ramifications of any investigation more acute.'[5] True enough, but those increased political ramifications during a conflict may actually increase, rather than limit, the ICC's bargaining power. Prior to the end of a conflict, both the government of the territorial state and international actors may have particularly strong interests in apprehending a suspect, precisely because such an apprehension could help to bring about an end to the conflict. Once the conflict is over, in contrast, there may be far less urgency attached to apprehending indictees and the Court's bargaining power may decline. Compare, for example, the limited pressure to secure the apprehension of Radovan Karadžić and Ratko Mladić in Bosnia and Herzegovina, more than ten years after the end of that conflict, with the growing foreign and domestic political support for either a peace deal or the apprehension of Joseph Kony during the conflict in Uganda.[6] The very political urgency created by an ongoing conflict may well increase the ICC's bargaining power. Once again, at the very least, Roper and Barria's assumption that the ICC will have more limited bargaining power in ongoing conflicts is far from conclusive and the variable appears indeterminate based on available evidence.

Roper and Barria overlook other significant determinants of the ICC's influence with national governments. Foremost among these is the interrelationship of the three situations in which the ICC currently has outstanding indictments. This regional political dimension in the Great Lakes region of Africa may in fact generate the ICC's greatest bargaining power, at least with respect to current investigations.[7] More specifically, the ICC indictees in the Ugandan situation – Joseph Kony and the remaining leadership of the Lord's Resistance Army (LRA) – are currently in the Garamba national park in the eastern Democratic Republic of the Congo (DRC). Simultaneously, the ICC has indicted and apprehended two individuals in the DRC situation and is investigating further suspects there. Likewise, the Sudanese government has provided the greatest support to the LRA, while a Sudanese government official, Ahmad Muhammad Harun, is himself under ICC indictment. These deeply interrelated situations may allow the ICC astutely to play one government against another in ways that enhance its bargaining power. For example, the ICC may be able to increase its bargaining power with respect to apprehending LRA indictees in the Ugandan situation by relaxing pressure on the Sudan indictments in a de facto bargain with Sudan not to provide further support to the LRA. Similarly, the ICC may be able to pressure the DRC government to arrest the LRA leadership in DRC territory by quietly indicating to that government that the Court is not likely to indict any currently sitting DRC officials. On the international stage, if the ICC

5. Roper and Barria, citing A. M. Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court', (2003) 97 AJIL 510, at 545.
6. See P. Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?', (2001) 95 AJIL 7, at 8–9; J. Prendergast and A. O'Brien, 'A Diplomatic Surge for Northern Uganda', Enough Strategy Briefing #9 (December 2007), available at www.enoughproject.org.
7. For a discussion of the interconnections in African Great Lakes politics, see J. Clark, *The African Stakes of the Congo War* (2002).

is able to exert sufficient pressure to bring about an end to the conflict in Uganda, that may increase its political clout with the UN Security Council, such that the Council would be more willing to impose sanctions on Sudan for its failure to surrender suspects to the Court. Given the complexity of African Great Lakes politics, the potential interactions among these three interrelated situations are nearly limitless.[8] While the ultimate impact of the regional dimension will depend on the ICC's ability to navigate a highly challenging political landscape, this set of factors cannot be overlooked and may represent the ICC's greatest bargaining leverage in the situations currently under investigation.

Looking more broadly, while the nine variables identified by Roper and Barria may well be important in assessing the ICC's bargaining power, the authors present a model that is far too static and fails to reflect the multiple dimensions of ICC bargaining. A more nuanced analysis must recognize at least two important considerations. First, the ICC's bargaining power is path-dependent. To the degree that the ICC is able successfully to negotiate the apprehension of suspects in its first few situations, that success is likely to increase significantly the Court's bargaining power going forward. On the individual level, to the degree that indictees believe that the ICC has the power to secure their arrests, they are far more likely to take the threat of apprehension seriously. On the domestic level, if the ICC can demonstrate a strong track record of apprehension, states are more likely to work with the Court to secure arrests in subsequent cases. On the international level, if the ICC comes to be seen as successfully fulfilling its mandate to 'put an end to impunity',[9] third states and international organizations are far more likely to view the ICC as a useful mechanism of international justice (and, perhaps, international politics) worthy of co-operation and support. Hence the ICC's future bargaining power will turn, in no small part, on its early successes or failures.

A second consideration for the development of a more robust model of the ICC's bargaining power is the recognition that the Court is engaged in what might be called a three-level game.[10] The first and most obvious level of this game is the one on which Roper and Barria's analysis is focused and involves the ICC's negotiation with a territorial state to secure an arrest. In this game, the ICC must attempt to convince the state to co-operate in the implementation of its indictments. A second level of the game involves the ICC's negotiation with third states and international organizations, which may choose to bring pressure to bear on the territorial state to arrest a suspect or may, in some situations, consider direct military intervention aimed at securing the arrest of an indictee. Thus international support has a direct bearing on the ICC's bargaining power with the territorial state, as the existence of international pressure or even the threat of international intervention may buttress the ICC's requests for co-operation, whereas the lack of such pressure may give

8. The fourth situation currently being investigated but in which no indictments have been publicly issued – the Central African Republic – is also part of this interrelated Great Lakes politics, as that case has involved an investigation of Jean Pierre Bemba, the former DRC vice-president, among others.
9. Preambular paragraph 5 of the Rome Statute.
10. See R. Putnam, 'Diplomacy and Domestic Politics: The Logic of Two-Level Games', (1988) 43 *International Organization* 427.

territorial states the impression that they can effectively ignore the ICC. The third level of this game involves direct negotiation with domestic actors within the territorial state, through, among other things, the ICC's own outreach efforts. To the degree that the ICC has the support of such domestic interests, the government of the territorial state may be unable to ignore ICC requests for apprehension. In contrast, if the ICC has little or no domestic support in the territorial state, that government may actually benefit from thumbing its nose at the Court. All three levels of this game are interrelated, impose constraints on both the Court and territorial states, and influence the ICC's ultimate bargaining power. Understanding the relationships between these three levels of the ICC's diplomatic game is critical to analysing and perhaps enhancing its bargaining power.

In conclusion, Roper and Barria have initiated what ought to become a far broader academic inquiry into the ICC's ability to bargain with and influence national governments.[11] Even if their assumptions are questionable at times, by identifying potentially important variables that may help to determine the ICC's bargaining power, they have set that inquiry in the right direction. What is needed now is a far more robust and nuanced analysis of the ICC's political influence. As the ICC's caseload and track record of apprehension grows, more data will be available to assess and enhance the Court's bargaining power. Critically, at this early stage in the study of the ICC's bargaining power, Roper and Barria have recognized what many international lawyers are unable or unwilling to see: at least with respect to the apprehension of suspects, the Court is and must be a political actor as much as a legal one.

11. For a similar consideration of this ability of the Court to influence national governments see W. Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of Justice', *Harvard Journal of International Law* (forthcoming 2008); W. Burke-White, *Multilevel Global Governance in the Enforcement of International Criminal Law* (2006).