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ICC Fugitives: The Need for Bespoke Solutions

Beth Van Schaack*

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I. Introduction

It is axiomatic that the International Criminal Court (ICC) [depends on the cooperation of the international community, including state parties and non-party states alike](#), to carry out its mandate to prosecute the “most serious crimes of international concern.” Nowhere is this dependency more apparent than with respect to the imperative of gaining custody of the accused. The Court cannot proceed *in absentia*;¹ if it is to carry out its mandate, the accused must be detained and transferred to The Hague. Given the centrality of this issue to the Court's success, the ICC's Assembly of States Parties in a [consensus resolution on cooperation](#) recently

Express[ed] serious concerns that arrest warrants or surrender requests against 14 persons remain outstanding, and call[ed] on States to cooperate fully in accordance with their obligation to arrest and surrender to the Court...

It is anticipated that the Assembly of States Parties will consider its provisional [Arrest Strategy Roadmap](#) in greater detail over the course of 2013-14 with an eye toward creating a something akin to an [action plan](#) at the next meeting of the ASP in December 2014 in New York.

The custody issue is a vexing one. Those situation countries that willingly submitted themselves to the ICC's jurisdiction are often weakly governed; their authorities may find it difficult (logistically, politically, or both) to gain custody of rebel leaders in areas in which the state exercises little control or authority, notwithstanding Rome Statute obligations to “cooperate fully” with the Court.² Those situation countries whose officials are subject to ICC charges pursuant to Security Council referrals may be hostile (e.g., Sudan) or ambivalent (e.g., Libya) toward ICC jurisdiction. As non-ICC parties, they are subject only to those obligations that have been imposed on them by virtue of the referral resolution, which may employ imprecise language on this point—no doubt by design. Such states may refuse, or find it difficult in light of internal political realities, to cooperate voluntarily with the Court or to appear to be doing so. All told, given this situational variation, strategies aimed at gaining custody of one fugitive will not necessarily be relevant to any other. Instead, the international community in coordination with the Court needs to devise bespoke solutions. That said, there are some common approaches that, if pursued, might bring closure to the pressing problem of at-large defendants.

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¹ Article 63 states: “The accused shall be present during the trial.”

² Article 86 states: “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.”

The international community must make a firm and concerted commitment to the goal of ending this enduring impunity. The current state of affairs [undermines the ICC itself and also the global commitment to ensuring accountability for the worst international crimes](#). As the Court noted in its [2013 Report on Cooperation](#):

Failure to arrest these individuals emboldens them and potential future perpetrators, and fuels the perception that they can remain beyond the reach of the Court and perpetrators can continue to commit crimes with impunity.

Moreover, as noted by the Court in [its Report on Cooperation for the 12th ASP](#),

there are costs related to preserving evidence, maintaining contact with witnesses, monitoring security and mitigating threats [to victims and witnesses]. These costs will continue to run for as long as the relevant cases cannot be presented to the Judges.³

At the same time, attaining this goal is important for reasons that are independent of the legitimacy and efficacy of the ICC or of the system of international justice writ large. Many of the ICC's at-large defendants are today associated with the commission of grave international crimes against civilians in the volatile region that encompasses eastern Democratic Republic of Congo, the Central African Republic, Darfur State, and the contested border regions of Southern Sudan and the Republic of South Sudan. The international community has invested considerable treasure and some blood in establishing stability in these regions; these efforts are being undermined by the ICC fugitives, who are sources of persistent instability. Denying these individuals safe haven and successfully transferring them to the Court thus serves an atrocities prevention imperative in addition to making good on the promise of accountability for horrific crimes already committed.

II. Background

The ICC is not the first international tribunal to experience difficulty in gaining custody of indictees. Devotees to this field will remember the frustration of the International Criminal Tribunal for the Former Yugoslavia (ICTY)'s first prosecutors, whose indictments went unexecuted even after allegations that the NATO-led [Implementation Force](#) (IFOR) and then [Stabilization Force](#) (SFOR) allowed indictees to pass through checkpoints or otherwise go about their business unmolested. Indeed, the conventional wisdom is that ICTY prosecutors initiated the case against Duško Tadić—a relatively small fish who at the time was facing charges in Germany by way of its universal jurisdiction statute—[out of desperation to have something to do](#). It took 18 years to [finally obtain custody over all the ICTY defendants](#), including Ratko Mladić, Radovan Karadžić, and Goran Hadžić, all of whom had long eluded capture with the help of a network of nationalistic supporters. That this feat was finally accomplished is largely attributed to the fact that economic assistance as well as [European Union accession and closer ties to NATO via the Partnership for Peace were made contingent upon cooperation by the states of the former Yugoslavia with the Tribunal](#).

³ Report of the Court on Cooperation, ICC-ASP/12/35 (Oct. 9, 2013), Para. 64.

By contrast, the ICTR was able to start its work almost immediately given that—[not without controversy](#)—all of its indictments targeted members and supporters of the former Hutu Power regime, whom the triumphant Rwandan Patriotic Front (RPF) was generally all too glad to see in the dock. Twenty seven states in the region (including Kenya, Zambia, the Central African Republic, and Cameroon) and beyond (Belgium, [the United States](#), and Switzerland) also facilitated the [arrest of Rwandan suspects on the run and transferred them to the Tribunal](#). Nonetheless, almost twenty years after the formation of that tribunal, [nine fugitives \(of 93 indictees\) still remain at large](#). [Tracking teams formed by the ICTR](#) remain at work [cultivating a network of informants within the Rwandan diaspora and elsewhere](#); [the government of Rwanda has launched a similar team](#). It is anticipated that [three high-value defendants](#) will be prosecuted by the Arusha branch of the [Mechanism for International Criminal Tribunals \(MICT\)](#); the files of the other six have been forwarded to the Rwandan authorities for eventual prosecution in domestic courts. [All nine remain subject to rewards for their capture](#) pursuant to the [U.S. State Department’s War Crime Rewards Program \(WCRP\)](#), which allows for the payment of rewards leading to the arrest, transfer, or conviction of foreign nationals charged with war crimes, crimes against humanity, or genocide. The [Special Court for Sierra Leone \(SCSL\)](#) obtained custody over all indicted individuals except [Johnny Paul Koroma, the leader of the Armed Forces Revolutionary Council \(AFRC\)](#), who is rumored to be dead, although no definitive proof of this has emerged. Likewise, the [Extraordinary Chambers in the Courts of Cambodia \(ECCC\)](#) had no trouble launching proceedings against charged individuals, who were mostly septuagenarians already in government custody (such as Duch) or easily located. If the ECCC decides to pursue [Cases 003 and 004](#), however, gaining custody of the accused may become an issue, [since the Government of Cambodia opposes further cases](#).

The challenges to obtaining custody of each current ICC fugitive are to a certain extent of a different order. There is no regional political organization such as the European Union to exert concerted pressure on actual or potential member states to execute arrest warrants. The ICC is an independent body, rather than a subsidiary organ of the Security Council or an institution created with a host state’s consent. The Court has received very little in the way of concrete support from the Security Council, even in those cases that owe their provenance to a Chapter VII resolution. Even states parties subject to treaty-based obligations to cooperate with the Court have not done enough in this regard. Furthermore, the Court does not at present stand to benefit from any tracking teams, transnational law enforcement efforts, or peacekeepers dedicated to the capture and transfer of these individuals. In short, the ICC is in a much weaker position than the prior *ad hoc* tribunals. As such, the international community needs to think creatively about new solutions to the problem of fugitives and do more to make the capture of these individuals a global priority.

III. Situations-by-Situation Challenges & Opportunities

1. Uganda

The [first arrest warrants](#) issued by the ICC Office of the Prosecutor in 2005 were against Joseph Kony and four of his Lord’s Resistance Army (LRA) henchmen. Of the four, Dominic Ongwen and Okot Odhiambo are still alive and at large. Vincent Otti and Raska Lukwiya are now dead—the former was apparently [executed on Kony’s orders](#) and [the latter died in combat with the Ugandan People’s Defense Forces](#). The remaining LRA defendants have been on the run in one

of the most inaccessible and insecure parts of the world, which sits at the juncture of a set of nations with only the most tenuous control over their hinterlands: the Republic of South Sudan (RSS), the Central African Republic (CAR), Southern Darfur State in Sudan, the disputed Kafia Kingi enclave between Sudan and RSS, and northeastern Democratic Republic of Congo (DRC). Dense foliage confounds [aerial surveillance, and the LRA's areas of activity are generally outside established communications networks](#). The remaining few hundred LRA fighters are reportedly living a nomadic lifestyle, [traveling in small bands](#) with their wretched abductees—including a number of children—in tow. They are [rumored to be a fractured bunch](#), suffering from low morale and [increasingly alienated from their messianic leader](#) with whom they [communicate by courier](#).

These apparent schisms within the LRA offer an opportunity to divide and conquer by weakening Kony's protective network and sources of support. Uganda, its Western partners, [NGOs](#), and the [Security Council](#) have all endorsed a [policy of encouraging defections](#). Regional forces and NGOs have been dropping “come home” [leaflets](#) and broadcasting related messages through the radio and from helicopter-mounted speakers in areas where there have been LRA sightings. Many of the 33 individuals who defected in 2012 [indicated that these efforts influenced their decision to desert the LRA](#). Indeed, this defections strategy has motivated some [high-profile desertions](#) (including [one of Kony's abducted “wives”](#)), which have undoubtedly generated valuable, if dated, information about Kony's whereabouts and *modus operandi*. Moreover, some key LRA leaders have been captured (e.g., [Caesar Achellam](#) in May 2012) or killed (e.g., [Vincent Binany Okumu](#) in January 2013).

Uganda has enacted, [let partially lapse](#), and [re-activated](#) an amnesty law that encourages the defection of individuals engaged in an armed rebellion in exchange for promises of impunity and reintegration. The [Amnesty Act](#) established an Amnesty Commission, which has to date issued over 12,000 certificates of amnesty to LRA fighters. While such amnesty opportunities may be acceptable for breaches of laws penalizing mere membership in the rebel group, or for forms of armed rebellion, they raise acute international law, human rights, and fairness concerns when they purport to extinguish liability for the commission of international crimes. The Ugandan authorities must work to find the right balance between encouraging LRA members and abductees to leave the group, while prosecuting those most responsible for serious human rights violations. The donor community must maintain its support for regional efforts toward the demobilization, disarmament, reintegration, and rehabilitation of current and former child soldiers as well as and LRA abductees so that these individuals have something to “come home” to.

[The United States has made significant contributions to the regional Kony manhunt](#) and related efforts to suppress the LRA and rehabilitate LRA-affected regions. The [Lord's Resistance Army Disarmament and Northern Uganda Recovery Act of 2009](#), signed into law by President Obama in 2010, states that it is the policy of the United States to “work vigorously” to:

eliminat[e] the threat posed by the Lord's Resistance Army to civilians and regional stability through political, economic, military, and intelligence support for a comprehensive multilateral effort to protect civilians in affected areas, to apprehend or otherwise remove Joseph Kony and his top commanders from the battlefield, and to disarm and demobilize Lord's Resistance Army fighters; and ... further support comprehensive reconstruction, transitional justice, and reconciliation efforts.

The Legislation also authorized the President to “provide assistance to respond to the humanitarian needs of populations in northeastern Congo, Southern Sudan, and Central African Republic affected by the activity of the Lord’s Resistance Army.”

In 2011, President Obama with bipartisan support launched [Operation Observant Compass](#) and [sent 100 combat-equipped military advisors drawn from U.S. Special Operations Forces](#) to assist the Ugandan People’s Defense Forces (UPDF) and an [African Union Regional Task Force \(AU-RTF\)](#) in their efforts to track Kony and “remov[e him] from the battlefield.” This is on top of [the provision of substantial matériel](#) (including communications equipment, logistical support, tactical equipment (e.g., night vision goggles), and vehicles) to this initiative. This operation has since been [re-authorized and expanded](#) and is [estimated to cost in the range of \\$4.5 million per month](#). The advisors are meant to be just that—they are not mandated to engage LRA forces unless necessary for self-defense. However, they are now authorized to conduct joint patrols with their regional counterparts. Although Kony’s [trackers have come very close to capturing him](#), their efforts have been hindered by a whole host of challenges, including: the continued need for training and capacity-building among local forces; [variable permission to operate in DRC](#); [the unrest in neighboring CAR following the Seleka alliance coup, which suspended the program for a spell](#); [a lack of coordination between the troops of different sending states](#); the difficult terrain and triple canopy jungle; potential intelligence leaks; the area’s porous borders; and, at times, a lack of resolve among the regional troops. In addition, in the past, there were allegations that [Sudan was providing safe haven to LRA bands](#) in retaliation against Uganda for its support of the Sudan People’s Liberation Movement, although this support appears to have subsided.

A major challenge to effectuating Kony’s capture has been the dearth of real-time information about his whereabouts and movements. By the time word emerges of Kony’s appearance, he has moved on, leaving [a trail of destruction, abduction, displacement, and poaching behind him](#). One solution to this obstacle is the development of better telecommunications capabilities in LRA-affected communities (building cell towers, distributing cell and [Thuraya](#) satellite phones with geo-location capacities, providing high-frequency radios, and creating hotlines and tip lines), so people have a quick, secure, and costless ways to contact Kony’s pursuers in the event that the LRA passes through an area. Such efforts will have the secondary effect of contributing infrastructure to the much needed development of these regions.

The United States has also added Kony, Ongwen, and Odhiambo to its [WCRP](#). This program originally applied only to indictees of three *ad hoc* tribunals: the ICTY, ICTR, and SCSL. The U.S. Congress [amended the law in January 2013](#) to allow rewards to be offered for information leading to the arrest or conviction of foreign nationals charged by *any* international tribunal, including hybrid and mixed tribunals (such as the Bosnian Special Chambers or the proposed mixed chambers for [the DRC](#) and [Syria](#)). In April 2013, [Secretary of State John Kerry designated the ICC’s LRA defendants into the expanded program](#). The program does not authorize the payment of [a “bounty” for delivering a fugitive “dead or alive”](#); rather, designees must be fully prosecuted before any rewards will be issued. Nor does the program apply to government agents (U.S. or foreign) who furnish information “while in the performance of his or her official duties.” Thus, members of the UPDF and U.S. special forces may be ineligible for rewards (although the former’s friends or relatives could conceivably benefit if they provide the actionable information). To further motivate the UPDF, other states or entities could enact

complementary programs that would enable the payment of “bonuses” to UPDF or AU-RTF troops who successfully capture Kony or his co-defendants and facilitate their transfer to The Hague.

In parallel with this effort, the Department of Defense (DoD)’s African Command (AFRICOM) also manages [its own rewards programs](#) in areas in which it operates. The DoD program enables the payment of rewards for the provision of information with the primary goals of force protection and counter-terrorism, including [the arrest of wanted persons and the capture of weapons caches](#). Rewards can be paid in connection with the Kony operation on either ground since the LRA has been on the United States’ [Terrorist Exclusion List since 2001](#), and Kony has been on the list of [Specially Designated Nationals and Blocked Persons](#) created by [Executive Order 13224](#) since 2008. The DoD [rewards, while not subject to the same restrictions as the WCRP, tend to be smaller](#) than those of the WCRP and can also be paid collectively and in kind (with, e.g., food, vehicles, non-lethal equipment, infrastructure improvements, and local amenities). Moreover, they can be paid close to immediately upon the provision of information. An expansion of this program could amplify incentives to provide useful information to U.S. personnel in the region. Both programs have benefited from an aggressive marketing campaign involving posters, fliers, and other “bling.”

U.S. advisers have been in the region for months. Kony’s elusiveness is undoubtedly a source of great frustration to members of the world’s most capable military. Nonetheless, it is the UPDF and the AU-RTF who must ultimately effectuate Kony’s capture. Their endeavors quite simply must be more professional and robust. Uganda must be encouraged to ensure that the U.S. advisors are fully embedded with their host units and able to assist in coordinating the work of AU-RTF units. Other donor states could assist the United States with maintaining coordinated diplomatic support for the Operation, providing additional capacity building and matériel, detailing more advisors and other personnel to the operation, encouraging regional cooperation with the AU-RTF, or even pushing the relevant states to allow joint offensive operations. States in the region must allow these teams free passage, refrain from offering any assistance to the LRA, and provide Uganda, the United States, or the ICC with relevant information in a timely fashion as it emerges.

Since the ICC arrest warrants were issued, Uganda has created a specialized [International Crimes Division \(ICD\)](#), with jurisdiction over war crimes, crimes against humanity, and genocide. The Ugandan Supreme Court, which [has had difficulty constituting itself for lack of a quorum](#), is set to hear an appeal of Thomas Kwoyelo, a mid-level LRA commander [who is being prosecuted in the ICD](#), even though he is ostensibly entitled to amnesty under the Amnesty Act. There is, of course, some chance that Uganda would choose to prosecute the LRA defendants itself in the event that they are captured alive. President Museveni [referred Uganda to the ICC in 2004](#), effectively [outsourcing these prosecutions notwithstanding a relatively effective and fair judicial system](#). Given that the regional and domestic politics have evolved since the time of the referral, he may decide to invoke complementarity and assert Uganda’s prerogative to prosecute Kony et al. domestically. ([Uganda’s Minister of Justice, however, has indicated Kony would be sent to the ICC for trial](#)). Given that the ICC has its hands full with its current caseload, an admissibility challenge coupled with a robust domestic process may not be entirely unwelcome.

In sum, while there are areas where current efforts could be plussed up, the hunt for Joseph Kony obviously does not lack for high level attention or resources. Accordingly, capturing the LRA fugitives may just be a matter of time, persistence, and patience.

2. Darfur, Sudan

The Sudanese fugitives present a different set of challenges. Most importantly, they enjoy the support and protection of the government of Sudan, which strenuously objects to ICC jurisdiction. For the most part, and unlike the LRA defendants, the Darfur indictees' whereabouts are often all too well known.⁴ *Janjiweed* leader [Ali Muhammad Ali Abd al Rahman](#) (a.k.a. Ali Kushayb) [was injured in battle last year](#) and until recently was [receiving treatment in a Khartoum hospital](#). [Abdel Raheem Muhammad Hussein](#) is the Minister of National Defense and former Minister of the Interior and Special Representative in Darfur. [Ahmad Muhammad Harun](#) was Minister of Humanitarian Affairs until he was appointed Governor of South Kordofan state in May 2009. He was appointed in 2007 to lead the investigation into human rights violations in Sudan—no doubt presenting an excruciating irony to Darfuri victims. Harun has endeavored to rehabilitate himself by becoming essential to [negotiations with the SPLM-N rebel group](#) over the disputed South Kordofan area, [one of the “Two Areas” currently wracked by violence in southern Sudan](#). Indeed, in January 2011, the UN was excoriated for [allowing Harun to travel on a UN helicopter](#) in connection with negotiations around ethnic clashes in the Abyei region of South Kordofan. It was also criticized for the fact that Karen Tchalian, later chief of staff of the U.N./African Union Mission in Darfur (UNAMID), [met daily with](#) Harun when the former worked for the U.N. Mission in Sudan (UNMIS) in Southern Kordofan. Harun remains an acting governor in the newly reconstituted Kordofan states.

The fourth and final ICC fugitive, Omar Hassan Ahmad Al Bashir is—of course—Sudan's head of state, which presents its own set of challenges. Bashir appears regularly in the local media and has travelled extensively—including to ICC state parties—effectively flaunting the two outstanding arrest warrants against him. Indeed, since he was indicted in 2009, [he has visited a whole range of countries](#) (including Chad (who also hosted Defense Minister Hussein in 2013), China, Djibouti, Egypt, Eritrea, Ethiopia, Iran, Iraq, Kenya, Libya (pre- and post-Qaddafi), Qatar, and South Sudan), where he often enjoys a dignitary's welcome.

Bashir's radius has diminished considerably, however, in recent years. In 2013, for example, he fled an African Union Special Summit on HIV/AIDs, Tuberculosis, and Malaria in Nigeria [after being in the country less than 24 hours](#) following [an effort by members of the local NGO community to serve a summons on him](#). This happened amidst [expressions of concern about the visit from influential states](#) and [rumors that foreign powers might actually arrest him](#). It also followed upon the issuance of a request to Nigeria by [ICC Pre-Trial Chamber II to immediately](#)

⁴ The Darfur defendants on the rebel side appeared voluntarily before the ICC in 2009 and 2010. [The case against Abdallah Banda Abakaer Nourain is underway](#), with trial set for May 2014. The proceedings against [co-defendant Saleh Mohammed Jerbo Jamus, who was not in custody pending trial, were terminated following his battlefield death](#) on or about April 19, 2013. The charges against [Bahar Idriss Abu Garda](#) were not confirmed for lack of evidence.

[take him into custody](#)⁵ and indications that Nigeria was “[considering the necessary steps to be taken in respect of his visit in line with \[its\] international obligations](#).” Prior to that, and following a visit to Kenya, [a court there issued a ruling](#) indicating that Kenya was under an obligation to arrest Bashir if he returned to the country. Bashir subsequently [did not attend the Kenyatta inauguration](#). [Chad postponed its 2013 Greenbelt Conference of the Community of Sahel-Saharan States](#) upon learning Bashir would attend on Sudan’s behalf. Even in advance of his 2011 trip to China—a non-party state that is ambivalent, at best, toward international justice efforts, [Bashir reportedly felt the need to confirm that he would not be arrested](#).

Other states that once allowed him to visit have since withdrawn their welcome, including Malawi, which [hosted Bashir in October 2011 for a summit of the Common Market for Eastern and Southern Africa \(COMESA\)](#). When confronted with a finding of non-cooperation by the Court, [Malawi replied that it had](#) “accorded him all the immunities and privileges guaranteed to every visiting Head of State and Government; these privileges and immunities include freedom from arrest and prosecution within the territories of Malawi.” The newly installed administration of Joyce Banda, however, [relinquished the opportunity to host an AU summit in June 2012](#)—losing tens of thousands of dollars in income for its hotels and other benefits in the process—when Bashir indicated his intention to represent Sudan. In addition, Bashir has not pursued or has cancelled potential visits to CAR, Zambia, Botswana, Uganda, and South Africa (for the World Cup). Even Saudi Arabia and Turkmenistan, ICC non-parties, refused permission for Bashir’s plane to cross into their air space when Bashir sought to attend the Iranian inauguration and meetings with China, respectively.

Bashir remains welcome in Ethiopia, a non-ICC party and the headquarters of the African Union. [Since Bashir was charged, tension has mounted between the AU and the ICC](#). Although African states were instrumental in the formation of the ICC Statute and its entry into force, the indictment of Bashir, as a sitting head of state, caused a *volte face*, at least among some AU members. The AU has also rallied around President Kenyatta, who was indicted before he became Kenya’s head of state but is now facing trial in The Hague along with his Deputy President William Ruto. On their behalf, the AU has [several times attempted to prompt the Security Council to invoke Article 16](#) of the ICC Statute, which allows the Council to defer ICC proceedings for a year in the exercise of its Chapter VII powers.⁶ Although Article 16 language has been floated in the Council for both the Sudan and Kenya cases, it has been continually blocked by the United Kingdom, France, the United States, and other Council members. When the Council did not act upon one such request other than to [take note of it in Resolution 1828 and pledge to consider matters further](#), the [AU adopted a decision in 2009](#) calling on its members to withhold cooperation with the Court pursuant to Article 98⁷ of the Rome Statute with respect to

⁵ Decision Regarding Omar Al-Bashir's Visit to the Federal Republic of Nigeria, No. ICC-01/05-01/09 (July 15, 2013).

⁶ Article 16 reads: “No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”

⁷ Article 98(1) states: “The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.”

the arrest or surrender of Bashir. Elements within the AU have tried to foment a broader anti-ICC campaign, as reflected in [an Extraordinary Summit devoted to the ICC hosted recently in Addis Ababa](#); however, AU members that remain supportive of the Court have [managed to temper these impulses](#). Although the Extraordinary Summit was poorly attended, [the AU did decide to seek the postponement](#) of the Kenya and Sudan cases until the two heads of state are no longer in office, although there has been no action yet at the Council and [the Court has postponed the start of the Kenyatta case until 2014](#)—the third such delay. Although it is doubtful that the Council would defer the Sudan cases in light of Sudan’s recalcitrance vis-à-vis the Court, [the Kenya case may present a different set of considerations](#). The Council, however, [recently rejected another deferral request for that situation](#).

Bashir even had the temerity to signal an intention to attend the 68th session of the UN General Assembly (UNGA) meetings in September 2013 in New York, [generating speculation as to whether the United States would issue him a visa](#). Granting him permission to travel was arguably mandated by two instruments: the 1947 [Headquarters Agreement between the UN and the United States](#)—which states at Section 11 that “the federal, state or local authorities of the United States shall not impose any impediments to transit to or from the headquarters district of . . . representatives of Members”—and the [1946 Convention on the Privileges and Immunities of the United Nations](#) (the so-called “General Convention”). A breach of the former Agreement might have subjected the United States to binding arbitration with the UN according to Section 21; a breach of the latter treaty, to claims before the International Court of Justice under Section 30. The UN, however, [had the power to waive the United States’ obligations](#) under these instruments (including under Article 20 of the General Convention if the immunity in question “would impede the course of justice”), which it did not do. Per the Headquarters Agreement, the UN can also “expel or exclude persons from the headquarters district for violation of its regulations adopted . . . *or for other cause*” (emphasis added) In addition, there may have had a basis to refuse Bashir entry pursuant to Section 9(b) of the Agreement, which states that the UN shall

prevent the headquarters district from becoming a refuge either for persons who are avoiding arrest under the federal, state, or local law of the United States or are required by the Government of the United States for extradition to another country, or for persons who are endeavouring to avoid service of legal process.

While acknowledging that the U.S. was under no formal obligation to arrest Bashir, [PTC II “invited” the United States to arrest and surrender him to the Court](#), and the ICC Registry sent a *note verbale* to the U.S. embassy in The Hague requesting cooperation in this respect. The President of the Assembly of States Parties, Tiina Intelmann, [reminded potential transit states that are also ICC States Parties](#) “of their obligation to arrest and surrender Mr. Omar Al-Bashir to the ICC.” (Bashir had indicated [his intention to stop in Morocco](#), which has signed but not ratified the Rome Statute, and may have been obliged to fly over European Union air space above the Canary Islands). The UN remained largely silent about his potential visit and [scheduled him to address the Assembly on September 26](#). In the end, he did not attempt the trip, and UNGA proceeded without him.

The international community could be more assertive about preventing Bashir's travel. Obviously, all states—and particularly ICC members—should refrain from inviting him to events or otherwise facilitating his travel through granting fly-over or refueling rights. At the same time, a strategy of containing Bashir presents a paradox. The more he is confined to Sudan, the less likely it is that he might be arrested extraterritorially. He remains relatively safe from capture within Sudan so long as he retains control over the reins of power and there are no insiders or [members of the burgeoning opposition](#) willing to act against him. At the same time, as his ability to travel internationally or visit with UN and other officials is further constrained, the less effective he becomes as a representative of Sudan's interests on the world stage. This will decrease his base of support and signal to his inner circle that he has become a liability. Were the United States to issue a reward for his and his compatriots' arrest or capture under the WCRP, it might further incentivize insiders to offer the ICC defendants up as a way to rehabilitate Sudan's standing in the international community (and advance their own pecuniary interests).

Assuming that he continues to travel, state supporters of the Court should focus their intelligence gathering on tracking his plans; share information on his whereabouts; establish an early warning system when he is on the move; and generally do more than issue nebulous démarches to potential host countries whenever Bashir reveals plans to travel beyond his borders. Hosting or enabling the travel of Bashir should lead to tangible adverse consequences, including potentially the loss of [voting rights in international institutions such as the ASP](#). Likewise, states that respect their international obligations and demonstrate a commitment to international justice, the rule of law, and the promotion of international human rights should be rewarded. For example, [due to "a pattern of actions ... inconsistent with the democratic governance criteria," including allowing the Bashir visit](#), the United States—at the urging of Republican Representative Frank Wolf, a long-time critic of the Sudanese government—[suspended Malawi's \\$350M compact](#) with the Millennium Challenge Corporation (MCC), a foreign aid agency dedicated to alleviating global poverty. [The compact was re-instated](#) following President Banda's courageous decision to forgo hosting the AU summit. Malawi subsequently [received a number of favorable loans from the International Monetary Fund and the World Bank](#) as well as [a visit from Hillary Rodham Clinton](#) and later her husband and daughter. [France, for its part, refused to attend a Presidential ceremony in CAR if Bashir were present](#); the event proceeded without him.

Members of civil society must also remain attuned to Bashir's travel and pressure potential destination countries to either refrain from inviting him to events or to signal that he is an unwelcome distraction at international gatherings. To extent that their legal systems allow for private parties to initiate criminal proceedings pursuant to principle of universal jurisdiction or other forms of jurisdiction over extra-territorial crimes, [NGOs should prepare complaints against Bashir and have them ready to be filed](#) in the event he indicates an intention to visit. Public prosecutors and investigating judges should likewise pursue charges against him if they are empowered to act independently of their executive branch (which would presumably have extended any invitation). When Bashir does travel, these states should send extradition requests to his destination countries. [According to Amnesty International](#), 75 % of states have the ability to exercise some form of universal jurisdiction over the three core international crimes.

Indeed, if Bashir had come for UNGA, the US could conceivably have arrested and prosecuted Bashir under its [genocide](#),⁸ [torture](#),⁹ or [use/recruitment](#) of [child soldiers](#)¹⁰ statutes, all of which allow for the assertion of universal jurisdiction. ([Denmark hinted that it might take this route](#) when it hosted a 2009 UN Conference on Climate Change to which it felt obliged to invite all heads of state). Or, the U.S. could have issued Bashir a visa with exceedingly tight restrictions, an approach contemplated by Section 13(e) of the Headquarters Agreement, and then arrested him on [immigration violations](#) in the event that he breached the terms of his visa.¹¹ Such an approach, however, may have implicated Section 13(a) of the Headquarters Agreement, which states “[l]aws and regulations in force in the United States regarding the entry of aliens shall not be applied in such manner as to interfere with the privileges referred to in Section 11.” But it would be for the UN to assert any breach, unless Bashir were considered [a third party beneficiary](#) to the Headquarters Agreement, which seems doubtful given that the immunities therein accorded are for the benefit of the organization and not the personal benefit of representatives of member states. The US could also have invoked its [“security reservation”](#) to the Headquarters Agreement ([as it did with respect to Yasser Arafat in 1988](#)), providing that:

[n]othing in this agreement shall be construed as in any way diminishing, abridging, or weakening the right of the United States to safeguard its own security and completely to control the entrance of aliens into any territory of the United States other than the [U.N.] headquarters district and its immediate vicinity...¹²

Had the United States taken Bashir into custody, there were potential impediments to the United States transferring Bashir to The Hague directly. Although the [American Servicemembers’ Protection Act \(ASPA\)](#) limits the United States’ ability to provide some forms of assistance to the Court, such a transfer would likely be permitted by the [Dodd Amendment](#) to ASPA, which allows case-by-case assistance to the ICC.¹³ [And, there is no Article 98 agreement between the United States and Sudan](#) that might have prevented the U.S. from transferring a Sudanese national to the Court. However, [a transfer would have required a valid extradition treaty or executive agreement](#) between the U.S. and the Court—such as the 1994 and 1995 congressional-executive [Agreements on Surrender of Persons](#) between the United States and the ICTY and

⁸ 18 U.S.C. § 1091. This statute was amended in 2009 to allow for the exercise of jurisdiction over individuals accused of genocide who are “present within the United States.” Although the law did not allow for “present in” jurisdiction until 2009, [the crime of genocide has been punishable in the United States on other jurisdictional bases since 1988](#), obviating any potential *ex post facto* concerns. *Cook v. United States*, 138 U.S. 157, 183 (1891) (noting that “an *ex post facto* law ... does not involve, in any of its definitions, a change of the place of trial of an alleged offence after its commission”) (internal quotations and citations omitted)

⁹ 18 U.S.C. § 2340. Human rights groups have documented the widespread use of torture, including [of protesters during the recent demonstrations against the government](#) and of [human rights activists working in the Two Areas](#).

¹⁰ 18 U.S.C. § 2442.

¹¹ See, e.g., 18 U.S.C. §1546 (Fraud and Misuse of Visas, Permits, and Other Documents).

¹² Public Law 357, 61 U.S. Statutes at Large 756 (1947).

¹³ The Dodd Amendment, 22 U.S.C. §7433, states:

Nothing in this title shall prohibit the United states from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosovic and other foreign nationals accused of genocide, war crimes or crimes against humanity.

ICTR—or applicable [legislation](#).¹⁴ No such agreement is in place with the ICC. (Because [Bosco Ntaganda voluntarily surrendered himself to the Court](#), the lack of such a legal framework was not an issue to his transfer to The Hague.) However, the U.S. could conceivably have transferred Bashir to an ICC member state, such as the Netherlands, for onward transit to the Court. Finally, the U.S. could have extradited Bashir to another state with a live arrest warrant for him. The existence of such a warrant in South Africa likely prevented Bashir’s travel to [the inauguration of President Zuma in May 2009](#).

At the behest of the ICC, and pursuant to [a 2005 cooperative agreement between the two institutions](#), the International Criminal Police Organization (Interpol) has [circulated red notices against almost all the individuals subject to ICC arrest warrants](#).¹⁵ One notable exception is Bashir, [apparently due to concerns about his entitlement to head-of-state immunity](#). If the OTP were to seek a red notice against Bashir, and if Interpol were willing to issue one, it might make it slightly more difficult for him to travel, particularly to non-ICC member states that have no treaty-based obligation to effectuate the ICC’s arrest warrants. Although a red notice does not *obligate* Interpol members to arrest a suspect, many Interpol members consider a red notice to be a valid request for a provisional arrest. Such a notice would provide a separate basis of authority to effectuate an arrest (particularly among non-ICC state parties) as well as signal international opprobrium and offer states an excuse to withhold an invitation for him to visit when it might otherwise be diplomatically awkward to do so.

Any Bashir arrest scenario requires the resolution of the issue of whether Bashir continues to enjoy any form of head of state immunity under customary international law or any applicable treaty.¹⁶ Arguably, Resolution 1593 removed any such immunity with respect to acts related to ICC charges, either on its own force (by waiving on Sudan’s behalf any immunity in order to effectuate Sudan’s UN Charter-based duty to cooperate with the Court) or by virtue of placing Sudan in the same situation as a state party. All state parties are subject to Article 27, which abrogates all such immunities before the Court.¹⁷ If he were indeed stripped of any immunity, all UN member states could thus arrest him on the strength of the Security Council-backed arrest

¹⁴ See [Ntakirutimana v. Reno](#), 184 F.3d 419 (5th 1999) (so holding even when the request came from a Chapter VII tribunal).

¹⁵ Red Notices exist with respect to Abdullah al-Senussi ([now the subject of domestic prosecution following Libya’s successful challenge to admissibility](#)), Jean Bosco Ntaganda (now at the Court), Vincent Otti (dead), Ali Muhammad Ali Abd al Rahman (at large), Joseph Kony (at large), Dominic Ongwen (at large), Okot Odhiambo (at large), Ahmad Muhammad Harun (at large), and Saif al-Islam Gaddafi (in the custody of the Zintan Brigade in Western Libya and the subject of an admissibility challenge by Libya that is pending in the ICC Appeals Chamber).

¹⁶ There are at least four sources of any potential immunity: Article 105(2) of the [UN Charter](#) (“Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization.”); the UN-US Headquarters Agreement; the General Convention; and customary international law.

¹⁷ Article 27 states:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

warrant. Although, and as discussed below, the resolution makes clear that non-states parties are not *obligated* to cooperate with the Court when it comes to effectuating its arrest warrants, the resolution would *permit* states to do so by lifting Bashir's immunities.

In conclusion, the situation involving the Sudanese defendants is categorically different than that of the LRA defendants. There is no international manhunt for these individuals. Most of them hold positions in government and are confined to Sudan, which gives them safe haven. Bashir is increasingly trapped within his own borders. To date, no state has had the courage, political will, or wherewithal to arrest him when he has traveled, in part because he has enjoyed the support of the AU. The other Sudanese defendants, by contrast, are perhaps more dispensable and vulnerable because they do not benefit from any claims to head-of-state immunity. Effectuating the arrest and surrender of the remaining Darfur defendants may require a change in the domestic political environment or an act of sovereign bravery coupled with an act of bravado by Bashir.

3. Democratic Republic of Congo (DRC)

All but one of the DRC defendants is in custody, in trial, or pursuing an appeal.¹⁸ Sylvestre Mudacumura, a commander in the *Forces Démocratiques pour la Libération du Rwanda* (FDLR) and the lone fugitive, is reportedly billeted somewhere in eastern DRC. The Hutu-dominated FDLR is composed of ex-*génocidaires* who fled Rwanda when the Rwandan Patriotic Front (RPF) assumed control of the country following the 1994 genocide. For many years, it has controlled territory and preyed on the civilian population in the DRC, particularly those of Tutsi ancestry. A rival armed group, the M23 Movement, which is supported by the current Rwandan Government in part as a proxy force against the FDLR, is also alleged to be responsible for abuses against the civilian population in DRC. It has recently been defeated by the Forces Armées de la République Démocratique de Congo (FARDC), with the crucial assistance of the UN Stabilization Mission in the DRC (MONUSCO). It is now expected that the FARDC and MONUSCO will turn their attention toward the FDLR. Additionally, there are rumors that Mudacumura may be injured or ill. So far, other allegations that he might be negotiating his surrender have not come to pass. Whatever his circumstances, it cannot be gainsaid that his presence in the region is a source of continued regional instability. The Security Council has called expressly for his arrest; such arrest would demonstrate that the DRC and MONUSCO are as committed to go after Rwanda's enemies as they are to going after its allies.

The situation in the DRC benefits from a Security Council peacekeeping mandate that is the most robust yet when it comes to the capture of fugitives. When the Security Council renewed the mandate of the MONUSCO in 2013, it created an Intervention Brigade (IB) at the recommendation of the International Conference on the Great Lakes Region (ICGLR) and the

¹⁸ Thomas Lubanga Dyilo, who was already in DRC custody when the ICC turned its attention to him, was found guilty in March 2012 and is now appealing the verdict and sentence. Germain Katanga's trial concluded in May 2012, but the parties continue to litigate a potential change in the charged mode of liability in the case (from indirect co-perpetration to common purpose). Trial Chamber II acquitted his co-accused, Mathieu Ngudjolo Chui, and the Prosecutor has appealed. The charges against Callixte Mbarushimana, an FDLR principal who was arrested by French authorities in France in October 2010, were not confirmed. Bosco Ntaganda voluntarily surrendered to the U.S. embassy in Kigali, Rwanda, in April 2013, and was transported to The Hague in an ICC-chartered plane. The hearing on the confirmation of charges against him will be held in February 2014.

Southern African Development Community ([SADC](#)) to address the continued instability and threat posed by numerous armed groups (including the FDLR, M23, LRA, and various local and loosely connected [Mai Mai groups](#)) in the region. Resolution 2098 of 2013 included language to the effect that MONUSCO may “take all necessary measures” to protect civilians, neutralize armed groups through the IB, and

support and work with the Government of the DRC to arrest and bring to justice those responsible for war crimes and crimes against humanity in the country, including through cooperation with States of the region and the ICC.

It also requests the Government of the DRC to arrest and hold accountable those responsible for international crimes, including Mudacumura, in cooperation with the ICC. [Prior formulations of the mandate \(e.g. UNSCR 2053 of 2012\)](#) had placed the primary responsibility for apprehending fugitives in the hands of the Government of the DRC, in cooperation with the ICC, but called upon MONUSCO to “support” the Congolese authorities in this regard. This new mandate is a far cry from the days when SFOR/IFOR insisted that capturing war criminals from the war in the former Yugoslavia—even though indicted by an international tribunal enjoying a Chapter VII provenance—fell outside of their mandate and institutional competency. Similar language now appears in [the mandate of the peacekeeping force deployed in Mali](#)—the UN Multidimensional Integrated Stabilization Mission in Mali (MINUSMA)—[which since 2012 is also an ICC situation country](#), although no arrest warrants have been issued.¹⁹

In the event that Mudacumura has some freedom of movement, he may undertake [the same calculus as his compatriot](#), Bosco Ntaganda, who turned himself in [when his followers were routed by forces controlled by rival Sultani Makenga and were forced to flee across the border into neighboring Rwanda](#). [Ntaganda thus found himself](#) in a country that had placed him in charge of its proxy forces when they integrated with the FARDC in 2009, supported his M23 mutiny against the FARDC in 2012, but then dropped him in favor of Sultani Makenga in early 2013. Ntaganda obviously decided that [facing charges before the ICC was a safer bet](#) than the fate that might befall him were he to remain on the run, go undercover in Rwanda, or linger embedded within forces of dubious loyalty. The fact that the United States had recently authorized the payment of a reward under the WCRP, a development that had not yet been formally announced but had been [made public](#) in Jason Stearns’ [well-read blog](#), [may have played a role in his decision to turn himself in on his own terms](#), rather than on the terms of a reward-seeker.

Because Mudacumura may have similar incentives to voluntarily surrender, members of MONUSCO should develop a contingency plan in the event that he arrives on their doorstep. This would include the establishment of temporary detention facilities meeting international standards and an advanced agreement with the ICC on how to smoothly effectuate a transfer of custody. MONUSCO should also use its communications channels with warring parties to encourage this outcome. In coordination with the Court, it could also convey assurances

¹⁹ Specifically, UNSCR 2100 (April 25, 2013) empowers MINUSMA to:

To support, as feasible and appropriate, the efforts of the transitional authorities of Mali, without prejudice to their responsibilities, to bring to justice those responsible for war crimes and crimes against humanity in Mali, taking into account the referral by the transitional authorities of Mali of the situation in their country since January 2012 to the International Criminal Court...

regarding travel, the fate of family members, legal aid, and sentence enforcement. For its part, the ICC should ensure it has ready access to a charter plane that can safely extricate Mudacumura from the region and transport him to The Hague to face trial.

4. Côte d'Ivoire (CDI)

The CDI defendants are technically no longer “at large.” Laurent Gbagbo was transferred to The Hague in November 2011 and is [currently in pre-trial detention](#) for crimes against humanity in connection with the 2010 post-election violence. The charges have yet to be confirmed, and the Prosecutor [was invited in June 2013 to submit more evidence in support of her proposed charges](#). Although the other two of the Ivoirian indictees—[Simone Gbagbo](#) and [Blé Goudé](#)—remain outside of ICC custody, it is perhaps too early to consider them true fugitives. Both were subject to sealed arrest warrants that were eventually made public in 2012 and 2013, respectively. Both are now in CDI custody, and the [country indicated that it is both willing and able to prosecute them itself](#), notwithstanding that Mme Gbagbo’s husband will—if the charges are confirmed—be tried by the ICC. CDI has begun a formal admissibility challenge pursuant to Article 19, which is ongoing.

The country has [recently initiated prosecutions against several former Gbagbo associates](#), including his son, [many of whom were extradited from neighboring Ghana](#) after [an initial period of reluctance by Ghana to surrender Gbagbo’s partisans](#). This one-sided focus has [drawn criticism that President Alassane Ouattara is only interested in victor’s justice](#), since none of his supporters has faced charges even though violence was perpetrated by both sides. CDI’s commitment to launching [a genuine transitional justice and national reconciliation process has also been erratic](#).

When it comes to CDI, the international community and global civil society must maintain respectful but firm pressure on the government to either (1) move forward with credible trials of those ICC defendants in custody coupled with its formal admissibility challenge or (2) relinquish jurisdiction to the Court, so the two CDI defendants can join their compatriot Laurent Gbagbo in The Hague.

5. Libya

Likewise, [the Libyan defendants](#) are not fully “at large.” Libya just [recently won an admissibility challenge](#) with respect to Abdullah Al-Senoussi, paving the way for his domestic prosecution (barring a successful appeal by the defense). The situation with respect to Saif Al-Islam Gaddafi remains more complicated. He is [in the custody of the Zintan brigade in Western Libya](#), where he was captured in November 2011 trying to flee the country. Libya appears poised to [prosecute the two along with three dozen other Qaddafi insiders](#). It is widely assumed that once sufficient concessions are extracted from the central government, the Zintanis will consent to Gaddafi’s transfer to Tripoli.

The fact that the central authorities do not currently have custody of Gaddafi *files* was a major factor in the PTC ruling that [his case is admissible](#) before the Court. Specifically, PTC I focused on prong two of the complementarity analysis—which relates to the national court’s ability to stage the prosecution—as opposed to under prong one (willingness), primarily because Libya was not able to secure the transfer of Gaddafi “into state custody.” The inadmissibility ruling is

currently on appeal. At the moment, the PTC has merely “remind[ed] Libya” of its obligation to surrender Gaddafi to the Court, an obligation that had been suspended during the consideration of the admissibility challenge. The Appeals Chamber rejected Libya’s motion for continued suspensive effect of this obligation, even during the appeal of the admissibility challenge. In July 2013, Gaddafi asked the Appeals Chamber to find Libya non-compliant and refer the matter to the Security Council. The Chamber [determined it did not have proper jurisdiction over the request](#). So, the Court and Libya are poised on the verge of a confrontation that may eventually go before the Security Council. It should be noted that Libya and the Court have a [memorandum of understanding in place](#) with regard to the investigation of suspects.

IV. Bilateral & Multilateral Strategies

Although the situation involving each fugitive is different, there is a range of ways that the international community and international institutions can better support the ability of the Court to carry out its mandate. In some cases, finding effective sources of pressure on the territorial/custodial state may be useful to effectuate the capture and transfer of fugitives to the Court. In other cases, it may be a neighboring or influential state(s), or a multilateral organization, that has the real power to bring about this outcome. Ideally, of course, members of the international community and the web of international institutions would be united in their commitment to supporting the work of the Court and ending this unacceptable state of impunity.

1. The Assembly of States Parties

The Assembly of States Parties (ASP) is the natural place for this work to be coordinated, especially given that states parties are obligated under the Statute to ensure that they devise domestic procedures to provide all forms of cooperation with the Court,²⁰ including with respect to the arrest and surrender of charged persons.²¹ Indeed, the [recent arrest by France, the DRC, the Netherlands, and Belgium of four individuals](#) accused of offenses against the administration of justice in the Central African Republic case is an example of the kind of coordination that is possible when political will exists.

The ASP [has consistently called for states parties](#) and non-party states alike to work toward this end through the provision of both operational/technical assistance as well as political support on a bilateral and multilateral level. Indeed, [the ASP’s Bureau](#)—the body’s executive committee, which is made up of a President, two Vice Presidents, and 18 member representatives who serve three-year terms upon election—issued in 2007 a [report dedicated to the issue of cooperation](#) containing a set of 66 recommendations, of which several concern this issue. [The ASP endorsed these recommendations by consensus](#) that year at the ASP plenary.

For example, Recommendation 17 states:

All States Parties should contribute where appropriate to generating political support and momentum for the timely arrest and surrender of wanted persons both

²⁰ Article 88 states: “Availability of procedures under national law. States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.”

²¹ See in particular Articles 89-92 (concerning the arrest and surrender of persons of interest).

in their bilateral contacts and activities in regional and international organisations.²²

Thus, states parties should in their public statements and private consultations/démarches encourage cooperation around fugitives. In addition, states can provide technical support (such as specialized training to police and immigration officials) or second *gratis* personnel directly or through expert rosters such as [Justice Rapid Response](#) to territorial states, as per recommendation 48:

All States Parties should consider whether it would be possible, on request, to provide a State on whose territory suspects are located with technical assistance and support such as information-sharing and specialised training of law enforcement personnel.²³

The ASP [elevated the issue of cooperation during its 11th session in The Hague](#), with an emphasis on [the tracing and freezing of assets and, less so, on effectuating arrests](#), and [asked the Bureau to establish a foundation for cooperation](#) among NGOs, states, relevant organizations, and the Court. With facilitation by Norway, the Bureau followed up with a more fulsome report on cooperation in 2013 containing an [Arrests Strategy Roadmap](#). As a next step, the ASP should create a more permanent body or mechanism (e.g., a standing committee or working group) devoted to this issue to provide inter-sessional opportunities to engage in information sharing, exchange best practices and lessons learned to develop and hone an experience-based analysis, host expert-level discussions, and develop a network of committed states and individuals.

2. The United Nations

Pursuant to Article 2 of the ICC Statute,²⁴ the Court and the United Nations have entered into a [Relationship Agreement](#) that confirms the independence of both institutions and provides a basis for a range of cooperative endeavors. This Agreement implies a role for the entire United Nations when it comes to securing custody of the accused, but the Security Council deserves special consideration. Although the situation in Darfur is before the Court by virtue of [Security Council Chapter VII Resolution 1593](#) issued in March 2005, [the Council has done little to effectuate the Court's Darfur cases](#). When the Council referred the situation to the Court, it echoed the language of Article 86²⁵ and decided that the “Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully and provide any necessary assistance to the Court and the Prosecutor.” With this language, the Council arguably placed Sudan in the position

²² Recommendation 21 urges that “States Parties and the Assembly of States Parties should consider ways in which experiences can be shared on issues relating to arrest and transfer, possibly through a general focal point for cooperation appointed by the Assembly of States Parties.” Recommendation 48, which addresses forms of cooperation in the United Nations context, continues: “States Parties should remind States of their duty to cooperate and request in their statements that States fulfil their obligations to cooperate, in particular when it concerns arrest and surrender.”

²³ See also Recommendation 59, which states: “Workshops on practical issues related to cooperation such as arrest and surrender, freezing of assets and financial investigations could be organized, with the participation of relevant United Nations actors.”

²⁴ Article 2 reads: “The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.”

²⁵ See *supra* note ____.

of a State Party with respect to the situation in Darfur and its obligations toward the Court. Regrettably, however, these same obligations do not extend to other U.N. Member states. Rather, all other states are merely “urged” to render such cooperation.²⁶ Thus, only ICC Member states are under any express obligation to execute the ICC’s Darfur arrest warrants by virtue of their ratification of the Rome Treaty.²⁷ In addition, the Council also noted that states that are not parties to the Rome Statute “have no obligation under the Statute” to cooperate with the Court.

Since the Darfur referral, the Council has received eighteen briefings by the Office of the Prosecutor. The OTP’s interventions have conveyed [mounting frustration](#) at the lack of progress in gaining custody of Sudanese fugitives and the “inaction and paralysis” within the Council. The Council, for its part, has offered only vague rhetorical support for the Prosecutor’s efforts and the imperative of ensuring accountability for abuses in Darfur. For example, when it recently renewed the mandate of the United Nations-African Union Mission in Darfur ([UNAMID](#)) in [Resolution 2113](#), the Council made no mention of the ICC, although it did make more oblique reference to the importance of “ending impunity,” “ensuring justice for crimes committed in Darfur,” “bring[ing] perpetrators . . . to justice,” “ensur[ing] accountability,” and also called on all parties “to comply with their obligations under international human rights and humanitarian law.” Most importantly, the Council has reacted with silence to [findings of non-cooperation](#) by the Court with respect to [Sudan](#),²⁸ [Malawi](#),²⁹ [Kenya](#),³⁰ [Djibouti](#),³¹ [CAR](#),³² and [Chad](#),³³ [although the United States for one has called for more follow up](#) by the Council. By way

²⁶ Resolution 1593, operative paragraph 2, states “while recognizing that States not party to the Rome Statute have no obligation under the Statute, [the Council] urges all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor.” Similar language appears in Resolution 1970, referring the situation in Libya to the Court.

²⁷ Article 89(1) states: “The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.” That said, non-party states may enter into special agreements or arrangements with the Court pursuant to Article 87(5) of the ICC Statute. That Article reads:

- (a) The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.
- (b) Where a State not party to this Statute, which has entered into an *ad hoc* arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council.

²⁸ See Decision informing the United Nations Security Council about the lack of cooperation by the Republic of the Sudan, No. ICC-02/05-01/07 (25 May 2010).

²⁹ Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, No. ICC-02/05-01/09 (12 December 2011).

³⁰ Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir’s presence in the territory of the Republic of Kenya, No. ICC-02/05-01/09 (27 August 2010).

³¹ Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir’s recent visit to Djibouti, No. ICC-02/05-01/09 (12 May 2011).

³² Demande de coopération et d’informations adressée à la République Centrafricaine, No. ICC-02/05-01/09 (1 December 2010).

³³ Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir’s recent visit to the Republic of Chad, No. ICC-02/05-01/09 (27 August 2010);

of comparison, the Council was much more aggressive in addressing the need to capture fugitives from the ICTY. In [Resolution 1207 \(1998\)](#), for example, the Council:

Condemn[ed] the failure to date of the Federal Republic of Yugoslavia to execute the arrest warrants issued by the Tribunal [ICTY] against the three individuals [...] and demand[ed] the immediate and unconditional execution of those arrest warrants, including the transfer to the custody of the Tribunal of those individuals.

The Security Council must work internally to get to the point at which it can consider punitive measures, especially in the face of flagrant non-compliance in Council-referred cases. The Council could also issue an omnibus resolution in support of international justice generally, and its two referrals specifically, enhancing the obligations on all states to cooperate in the arrest and transfer of fugitives. At a minimum, members of the Security Council—either permanent or temporary—should introduce specific language in appropriate resolutions to bolster existing treaty-based or U.N. obligations around arrests.

Security Council Resolutions [1591](#) and [1672](#) (among others) established a UN Sanctions Committee that imposed a range of sanctions on other Sudanese actors (including [travel bans](#) and [assets freezes](#)). Remarkably, none of these applies to any of the ICC defendants. To be sure, the standards employed to impose sanctions are not co-extensive with the standards employed for issuing an arrest warrant. In particular, the former requires a host of bio-identifiers (national identity number, proper name, etc.) in order to be effective. That said, if the Sanctions Committee is able to create a dossier for the likes of [Musa Hilal](#), a notorious *janjiweed* leader, it should be able to pull something together for indicted government officials. [Indeed, the whole Bashir UNGA travel debacle might have been avoided](#) if he had been the subject of a comprehensive Security Council travel ban. The Panel of Experts of the Sudan Sanctions Committee has recommended his inclusion several times, but [members of the Council have blocked his addition to the sanctions list](#). Were the Council to freeze assets of these defendants, these funds could be used to pay reparations to victims and to cover legal fees of defendants who claim indigency, thus alleviating the financial strain on the Court posed by Council referrals.

The Security Council must do more to render its ICC referrals effective, including through the provision of more robust diplomatic support. Following the Prosecutor's most recent report on the Darfur situation in December 2013, the Council could issue a new resolution heightening the duties of cooperation of all UN member states and encouraging them to do more to effectuate the arrest warrants, working alone or collectively. Such a resolution could contain an express ban on member states' hosting ICC defendants, even for diplomatic gatherings. It could also explicitly abrogate any head-of-state immunity Bashir might enjoy, [dispelling any lingering legal ambiguity in this regard](#). Working through the Sanctions Committee, the Council could also institute a travel ban and other sanctions on Bashir and the other ICC indictees, which it has done for other international outlaws.

Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, No. ICC-02/05-01/09 (13 December 2011).

Another option would be for the Council to strengthen UNAMID's mandate to give peacekeepers the power to arrest ICC fugitives. Such an authority could be passive, authorizing an arrest in the event peacekeepers encounter an indictee in the course of their normal duties and if the tactical situation would allow it, which was [the model first adopted in the former Yugoslavia](#). Or, it could be more robust, enabling peacekeepers to hunt indictees down—[the policy eventually adopted in Bosnia](#). Although appealing, such a move would further jeopardize UNAMID's ability to operate in the country. [The Council has already criticized Sudan](#) for placing “increased restrictions and bureaucratic impediments . . . upon UNAMID movement and operations, particularly to areas of recent conflict.” Furthermore, Bashir's [repeated acts of retaliation against humanitarian organizations](#) reveal the depth of his willingness to sacrifice the well-being of his own people to retain power and avoid accountability. It has been argued that empowering UNAMID in this fashion would also threaten its credibility as a neutral steward of operative peace agreements, including the 2011 [Doha Document for Peace in Darfur \(DDPD\)](#).³⁴

No doubt, these concerns prompted the prior Chief Prosecutor of the ICC, Luis Moreno Ocampo, to recommend against any such arrest authority when he delivered his fifteenth, and last, report to the Council. Instead, he boldly suggested that the Council should consider asking UN members and regional organizations to launch targeted arrest operations in furtherance of the warrants. This could be done unilaterally or through an arrest working group composed of states with the capacity and will to participate. Such “snatch and grab” operations are not unprecedented. Indeed, a notable unilateral example is the United States' [recent capture of Abu Anas al-Libi from Libya](#) pursuant to [18 U.S.C. § 3052](#), which [has been interpreted to grant the Federal Bureau of Investigations broad apprehension authority](#) in connection with crimes against the United States, including permission to undertake the extraterritorial capture of an individual without the cooperation or consent of the custodial state. [In the past, the ad hoc tribunals have generally adhered to the principle of male captus, bene detentus](#), which states that a fugitive brought into a court's jurisdiction by means of an illegal arrest or forcible abduction in violation of the defendant's rights or the rights of the territorial state does not automatically divest the court of jurisdiction unless the individual is seriously mistreated by court personnel. The ICC has yet to confront this issue, but it would have ample precedent to accept custody following such an operation if it were so inclined.

Obviously, any of these options will require a significant amplification of political will among members of the Council. Among the current crop of Council members, a record eleven have ratified the Rome Statute (France, UK, Argentina, Australia, Chad, Chile, Jordan, Republic of Korea, Lithuania, Luxembourg, and Nigeria). Significantly, this number is up from seven in light of Jordan's election to the surrendered Saudi seat. The P5 (only two of which are ICC members) would have to consent to any increased engagement on the fugitive issue. Although all five permanent members allowed the referral to go forward back in 2005, Russia and China may be reluctant to authorize more concrete support for the Court's cases in the referred situations. Indeed, in connection with Ocampo's final presentation to the Council, Russia indicated that invoking Chapter VII to carry out arrest warrants [“is unlikely to solve problems arising for the ICC in the Sudan.”](#) [The U.S. for its part stated:](#)

³⁴ SA in connection with the 15th report by ICC Prosecutor.

We agree with the Prosecutor that the lack of progress to date in executing the arrest warrants and bringing those most responsible to justice merits renewed attention by the Council. We think it is a serious cause for concern that the individuals subject to outstanding arrest warrants in the Darfur situation remain at large and continue to travel across borders. This is an area where cooperation is particularly crucial.

To that end, we continue to urge all States to refrain from providing political or financial support to the Sudanese suspects subject to ICC arrest warrants and to bring diplomatic pressure to bear on States that invite or host these individuals. We stand with the many States that refuse to welcome the ICC indictees to their countries, and we commend those that have spoken out against President Al-Bashir's continued travel, including to next month's African Union Summit. For our part, the United States has continued to oppose invitations, facilitation or support for travel by those subject to ICC arrest warrants in Darfur and to urge other States to do the same.

We would welcome additional efforts by, and better coordination with, other members of the international community on these issues. We encourage the Council to consider creative approaches and new tools. As members of the Security Council, we can and should review additional steps that could be taken to carry out the ICC's work in Darfur, execute outstanding arrest warrants and ensure States' compliance with relevant international obligations.

The Council must recognize that the flagrant impunity of the at-large Darfur defendants, and Sudan's recalcitrance in the face of its clear Charter obligations, present a serious challenge to the credibility and authority of the Council (not to mention the ICC) that only it can rectify. The Assembly of States Parties, [working through the Bureau which has taken up this issue](#), should maintain pressure on state parties that might have occasion to host Bashir.

At the same time, the U.N. must limit its own interactions with ICC defendants. The incident discussed above in which ICC defendant Harun traveled on a UN helicopter was not the only controversial contact between a U.N. official and an ICC defendant. There were allegations in 2009 that the U.N. Mission in the DRC ([MONUC](#), since renamed MONUSCO) [had offered medical and transportation assistance to Sylvestre Mudacumura](#). More troubling, was a 2012 incident in which the joint UN-AU special representative to Darfur, Ibrahim Gambari, [was photographed socializing with ICC-indictee President Al Bashir at a wedding](#).

The UN has since issued a [revised contacts policy, restricting UN engagement](#) with individuals subject to ICC arrest warrants to those contacts that "are strictly required for carrying out essential UN mandate activities." There are no restrictions on contacts with those who are the subject of summons to appear (*vice* arrest warrants), as with the Kenyan defendants, and who are cooperating with the Court. While this distinction ostensibly respects the principle of innocent until proven guilty, it should not be forgotten that the confirmation of charges indicates that an ICC Pre-Trial Chamber (PTC) has determined that there were "substantial grounds to believe that the person committed the crime charged" pursuant to Article 61(5), which might merit at least some restrictions on non-essential contacts, such as at honorary, ceremonial, or social

events or courtesy calls. In addition, it is difficult, at times, to ensure that defendants subject to summons are genuinely cooperating with the Court. In this regard, the assessment of the Office of the Prosecutor as well as of states with particular insights gleaned from intelligence and other sources should be given great weight.

This new contacts policy is considerably softer than prior practice as reflected in the policy generated by the UN's Office of the Legal Affairs. That [longstanding policy](#) governed the contacts between UN representatives and persons indicted by all international courts who also held positions of authority in their respective countries. It required that such contacts

should be limited to what is strictly required for carrying out UN mandated activities. The presence of UN representatives in any ceremonial or similar occasion with such individuals should be avoided. When contacts are absolutely necessary, an attempt should be made to interact with non-indicted individuals of the same group or party.³⁵

Respecting the pronouncements of the Court confirming charges against individuals is an essential element of the U.N.-ICC Relationship Agreement, which states at Article 3 that

The United Nations and the Court agree that, with a view to facilitating the effective discharge of their respective responsibilities, they shall cooperate closely, whenever appropriate, with each other and consult each other on matters of mutual interest pursuant to the provisions of the present Agreement and in conformity with the respective provisions of the Charter and the Statute.

To be sure, [it is necessary to leave an opening for principals of the UN to maintain some contact with ICC indictees \(such as UN Under-Secretary-General for Peacekeeping Hervé Ladsous's multiple meetings with Bashir, the most recent being in July 2013\)](#) under exigent circumstances. This is particularly true when there are peace talks underway that require a head of state or state official to participate; however, the elements of "strictly required" and "essential ... activities" should be interpreted narrowly by those concerned to prevent all but the most pressing engagements at which no other individual could represent the state in question. Isolating ICC fugitives is crucial to respecting the authority of the Court and the principles of justice it embodies as well as to signaling that an alleged involvement in international crimes has tangible consequences. It also shows respect to victims and pays tribute to their suffering. If the UN maintains the distinction between individuals subject to arrest warrants versus those voluntarily appearing before the ICC, it should ensure that such individuals, and the government agencies they control, [are genuinely cooperating with the Court, in their public and their private actions](#). Moreover, the UN should continually and critically assess whether its contacts with ICC defendants have actually contributed to the effectuation of the UN mandate and related UN efforts. [As Prosecutor Fatou Bensouda argued to the Council in June 2013,](#)

We must be careful not to embolden fugitives from justice into thinking that they will be rewarded for manipulating their way into positions of indispensability

³⁵ Legal Opinions of the OLA of the UN, *Peace and Justice in Post-Conflict Societies—The UN Position*, 3(2) INT'L ORG. L. REV. 395, 397 (2006).

even as they continue to commit crimes.³⁶

Although this guidance has already been issued, it is not necessarily etched in stone. There should be [no “business as usual”](#) when it comes individuals who are being prosecuted for the worst crimes known to humankind.

This contacts policy governs only U.N. personnel. States parties, who are bound by the Rome Statute’s cooperation regime, will need to devise a more rigorous contacts policy, especially for individuals subject to arrest warrants. No matter how “essential” some contact may appear to be, states parties are under a pre-existing duty to arrest and transfer such individuals. Coming up with consensus language, however, [has so far eluded the ASP](#) some of whose members have raised concerns about the creation of new legal obligations that might impinge on their ability to manage their foreign relations.

3. Regional & Bilateral Pressure

Besides the ASP, there is no regional political body that is likely to be as effective as the European Union and Commission were in pressuring the Balkan states to cooperate with the ICTY. The most obvious candidate—the AU—has soured on the ICC, primarily surrounding the Sudan and Kenya cases, although its membership is not monolithic in this regard. The World Bank, International Monetary Fund, and [African Development Bank](#), with their ability to condition their support on good governance and adherence to the rule of law, could be more effective sources of influence.

Without an obvious multilateral lever, like-minded states will have to be willing to commit to utilizing unilateral and coordinated forms of pressure and incentives (such as appropriations for bilateral assistance, programming including capacity building, or participation in intergovernmental organizations) for states that are either the unwilling host of fugitives or that are providing them safe haven. For example, the United States’ [refusal to attend a donor conference for Serbia in Brussels](#) in 2001 was instrumental in the ICTY’s gaining custody of Slobodan Milošević. The United States also made certain types of aid (excluding humanitarian and democratization aid) to Serbia dependent on a presidential certification that, *inter alia*, the country had met certain conditions, including ICTY cooperation.³⁷ Typically, Serbia [would arrest or facilitate the surrender of indictees to the Tribunal](#) in the vicinity of the certification deadline.³⁸ Some aid was suspended over the years until all the indictees were finally in custody.

Although the World Bank or other IFIs might not take an institutional stand in favor of justice, individual donor countries can always [vote their shares](#) in [multilateral development banks](#) and other such fora in a way that encourages accountability and otherwise make cooperation with the Court a condition for assistance. They could also encourage other members to do the same. For

³⁶ U.N. Doc. S/PV.6974 (June 5, 2013), Records of the 6974th meeting, available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_6974.pdf.

³⁷ See Daniel Braaten, *Human Rights and U.S. Foreign Policy in the Multilateral Development Banks* (2012), available at <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1012&context=poliscitheses>.

³⁸ See generally Congressional Research Service, Steven Woehrel, *Conditions on U.S. Aid to Serbia* (January 7, 2008).

example, in the United States, legislation also gave congressional authorization to vote for the provision of loans and aid from international financial institutions (IFIs) to the states of the former Yugoslavia if the conditions were met. Similar voting guidance has been provided for Sudan by way of the [2002 Sudan Peace Act](#), but it has not been linked to ICC cooperation or the surrender of fugitives. The U.S. Department of Treasury is unlikely to withhold its IFI vote in favor of a harboring state without some form of Congressional direction in this regard. Given the high degree of congressional interest in capturing the LRA defendants and in the human rights situation in the Sudan, this authorization might be obtainable even in today's political climate. More indirectly, donor states must continue to support justice and accountability measures and to strengthen local capacity in areas victimized by the depredations of ICC fugitives.

A state such as Sudan is largely impervious to many forms of pressure that would work on weaker states, and it has the means to [retaliate against states or organizations that might take action](#) against it. Members of the international community must thus actively seek new levers against Sudan, including potential forms of financial pressure, as well as constructively engage with states such as China and Russia that can exercise unique forms of influence.

4. Civil Society

NGOs and other civil society actors need to raise awareness of all fugitives, not just high profile ones. The success of the [Kony2012](#) movement in galvanizing political support for the hunt for Joseph Kony, especially among young people, can be replicated for all fugitives, including those who are less telegenic, such as Mudacumura. Civil society actors should also use all available fora, including the Human Rights Council in Geneva and other treaty bodies, to pressure states to adhere to their ICC obligations.

5. The Court

For its part, there are some steps that the Court, and specifically the Office of the Prosecutor, should consider in order to effectuate its arrest warrants. [The Court as a whole has already begun working on arrest strategies](#) and has pledged to issue focused and specific requests for assistance. [Continuing to issue sealed indictments](#), like those for two of the three CDI defendants, and confidentially sharing information with trusted partners, is one aspect of this strategy. [The Court has also identified the need for:](#)

a systematic results-orientated discussion among States Parties on concrete steps or measures that can be taken to facilitate arrests, in particular with regards to explicit situations and obstacles faced by the Court...

Several meetings of representatives of the Court, States Parties, INTERPOL, the U.N. Office of Legal Affairs, civil society, and experts from the *ad hoc* tribunals have taken place to share experiences in this regard.

The OTP also should move forward with its consideration of a dedicated tracking team like those of the *ad hoc* tribunals to seek out those individuals whose whereabouts are unknown or even to remain aware of the movements of those individuals who are not at large. Such a team could foster cooperation with local law enforcement agencies, develop contacts within the local population, recruit and cultivate sources and informants, manage and contain security risks, and

coordinate with personnel engaged in substantive investigations. Such a team would have to operate with the consent of the territorial state, although it would no doubt benefit from the Security Council giving it a boost in an overarching international justice resolution. ICC members and other concerned states should enter into confidentiality agreements with the OTP to enable information sharing about the whereabouts of fugitives. The OTP should also consider making more concrete requests of the Council for forms of assistance it might render in furtherance of its referrals.

Finally, the OTP also must ensure that its cases are strong and compelling. If the cases prove to be weak, it might discourage members of the international community from taking bold but politically-difficult steps to effectuate the Court's arrest warrants.

Conclusion

The situation of each fugitive is unique, and the entire international community—ICC member states, other “friends of the Court”, Security Council members, and civil society—must work together to harmonize a range of coercive measures, appeals to self-interest, and forms of normative persuasion to maximum effect. The project of international criminal law and the imperative of justice demand such concerted efforts to ensure that fugitives are not allowed to enjoy impunity or safe haven. To be sure, this is a long game, but one that can be accelerated and won if the political will is there. The victims of horrific international crimes deserve nothing less.