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Journal of Theoretical Politics 2012 24: 149 originally published online 3 January 2012
DOI: 10.1177/0951629811429048

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OnlineFirst Version of Record - Jan 3, 2012
What is This?
Bargaining and the effectiveness of international criminal regimes

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Abstract
International institutions lack the independent ability to punish non-compliance, but states sustain cooperation because they can target one another for punishment. In contrast, international criminal courts and tribunals (ICTs) can enforce rulings once suspects are in custody, but they lack the independent power of capture, leaving them unable to punish alleged criminals and therefore deter crime. We analyze a game between an ICT and a suspect to assess the potential of pre-arrest bargaining as a solution to the problem of capture. We show that ICTs that bargain with fugitives will be able to secure their surrender and administer justice, although this comes at the cost of incentivizing some crime. Further, those courts least able to secure their suspects’ capture will, surprisingly, be the most willing to issue warrants. International institutions may thus be able to achieve compliance even when faced with uncooperative member states.

Keywords
bargaining; cooperation; enforcement; institutions; International Criminal Court

1. Introduction
Cooperation with international institutions in the face of short-run incentives to cheat can be supported only by credible threats of punishment. Institutions governing the behavior of states generally lack the independent capacity to punish violations, but members can sustain cooperation because states are largely unable to evade punishments leveled by other states. In contrast, institutions regulating the behavior of individuals, such as international criminal courts and tribunals (ICTs), face an altogether different, but related,
problem: while they have effective powers of enforcement once suspects are in custody, they lack the independent power of capture.\textsuperscript{1} Individuals, such as executives, military officers, rebels, or warlords, can thus avoid punishment at the hands of international courts. States – Libya, for instance – are unable to exit the international system, rendering them ‘captive’ to UN economic sanctions and NATO military action, but Muammar Qaddafi himself may be able to evade capture so as not to be turned over to the International Criminal Court (ICC). Indeed, ‘[t]he ICC is unlikely to punish the Husseins and future Miloševićs of the world because it is unlikely to get a grip on them’ (Goldsmith, 2003: 92). The inability to capture the target of institutional punishment is prior to the problem of enforcement, effectively undermining the credibility of punishment necessary to alter behavior. How, then, can international courts without the ability to execute warrants manage to curb or deter criminal behavior?

Bargaining represents a potential solution to the problem of capture, in that both ICTs and their suspects may have incentives to reach an agreement over surrender rather than let the accused remain at large. A suspect faces a risk of capture by some other party and its associated dire outcomes, such as military defeat, exile, imprisonment, or death; meanwhile, the court is unable to fulfill its mandate and incurs reputational costs while fugitives remain at large. When both sides would be better off with the suspect in custody, there should exist some bargain over the terms of surrender – say, reduced charges or sentencing – that both the court and the suspect prefer to the suspect remaining a fugitive (see, e.g. Muthoo, 1999; Fearon, 1995; Rubinstein, 1982). International criminal courts could, in principle, bring suspects to trial by offering \textit{pre-arrest bargains}, even without the cooperation of member states.

To assess the impact of bargaining on the problem of capture, we analyze a game-theoretic model of the interactions between a court and a potential criminal with the following features. First, the court is unable to secure the arrest of suspects, relying instead on probabilistic third-party capture or the suspect’s voluntary surrender to bring him into custody, although issuing a warrant makes capture weakly more likely than it would be in its absence. Second, the court has two primary goals: deterring and adjudicating crime. While it prefers that no crimes occur under its jurisdiction, it also prefers that it be involved in the prosecution of those suspects that it nonetheless fails to deter. Third, the court can offer a pre-arrest bargain that may encourage the suspect to surrender, although lenience comes at some cost to its policy, punishment, or reputational preferences. Finally, a potential criminal weighs the value of crime against a potential bargain and the risk of third-party capture as a fugitive. This specification allows us to examine: (1) the court’s choice over whether to bargain with suspects given that it cannot guarantee their arrest; (2) its willingness to issue warrants given the effect of its bargaining strategy; and (3) the potential criminal’s decision to commit crimes under different institutional configurations.

We show that international criminal courts can use pre-arrest bargains to bring suspects to trial and administer justice, but this comes at a price of incentivizing criminal behavior. An ICT can promise to reduce charges or sentences and thereby secure a suspect’s surrender, but the potential to reach a lenient bargain can affect a potential criminal’s willingness to commit the crime in the first place. In other words, the court can improve its ability to bring fugitives to justice by sacrificing some deterrent capacity. Nonetheless, pre-arrest bargaining can tragically incentivize crime, especially when the
court is too generous or when the odds of capture are too low. We also derive implications over courts’ willingness to issue warrants, where the costs of appearing lenient may preclude a court from pre-arrest bargaining. Instead, it can rely on the possibility that a state or some other third party will capture the suspect and turn him over without the restrictions of a pre-arranged bargain, yielding the court’s ideal payoff of its preferred punishment for the crime. Paradoxically, those institutions least willing to bargain to bring suspects into custody are also those most likely to issue warrants.

Credible threats of punishment require both capture and enforcement, and by focusing on the former, we show that pre-arrest bargaining may provide ICTs with a mechanism to achieve their goals even without the cooperation of member states. If a court can bargain directly with the individuals whose behavior they are attempting to change, they can circumvent even resistant non-members, such as the ICC’s need to capture fugitives even without the help of powerful countries like the United States. We also highlight an important tradeoff between the deterrence and adjudication of crimes. ICTs may hope to achieve both goals, but our theory suggests it will be extremely difficult for an institution without effective powers of arrest to do so: in choosing mechanisms that attain deterrence, the institution sacrifices the opportunity to adjudicate crimes. Ultimately, while ICTs like the ICC can effectively make a future violator think twice about engaging in crimes against humanity, they can do little to bring suspects to justice and meet institutional goals of protecting civilians from abuse.

2. Capture, punishment, and compliance

How do international institutions motivate compliance? In most cases, states comply with their international obligations when it is in their interests to do so (e.g., Downs et al., 1996; Chayes and Chayes, 1995). Cooperative schemes that tolerate minor deviations and punish significant defections yield high overall rates of compliance and stable institutions (cf. Carrubba, 2005; Rosendorff, 2005; Keohane, 1984; Olson, 1965). In the absence of an independent, centralized enforcement apparatus, the onus of punishment falls on member states themselves (cf. Axelrod, 1984; Carrubba, 2005; Bagwell and Staiger, 2004). This system of decentralized enforcement works because states are, in essence, captive to one another. They may refuse to abide by their obligations and even leave a given institution, but they cannot leave the international system, where they are more or less permanently vulnerable to retaliatory policies. Interdependence in trade, alliances, finance, law, diplomacy, normative relations, etc. gives states a multitude of dimensions along which to punish one another for violating the rules. Issues can be linked to one another explicitly or implicitly (Gibler, 2008; Hafner-Burton, 2005), so that even when punishment in one area is difficult, states can credibly threaten to punish in another area.

International criminal courts and tribunals, however, cannot punish the individuals who violate rules within their jurisdiction until they have them in custody. ICTs such as the International Criminal Court prosecute individuals for past or ongoing war crimes and crimes against humanity, and as such attach guilt to persons rather than states.\(^2\) The International Criminal Tribunal for the Former Yugoslavia (ICTY) tried Slobodan Milošević and Radovan Karadžić as individuals for crimes against humanity, while the International Court of Justice heard the genocide case against the state of Serbia. This attention to the individual rather than the state presents ICTs with a unique problem:
individuals can evade capture (and thus punishment) far more easily than a state, which undermines the credibility of an institution’s threat to bring violators to justice. When suspects are in custody, courts and prosecutors wield significant leverage over them and are able to administer justice, as seen in most domestic courts (see, e.g., Reinganum, 1988), but ICTs lack the support of a dedicated force able to execute warrants. Instead, they must rely on either voluntary surrender or the imperfect cooperation of third parties – some skeptical of the court’s value, others opposed to its goals, and still others simply inefficient executors – to capture suspects and bring them before the bench.

Without the ability to execute warrants, ICTs cannot satisfy their twin goals of deterring and adjudicating crime. By ensuring that criminals are prosecuted, the institution can instill the fear of punishment in those considering committing crimes. In its preamble, the Rome Statute, which establishes the ICC, states that the institution and its member states are ‘determined to put an end to impunity for the perpetrators of [the most serious crimes of concern to the international community] and thus to the prevention of such crimes…’.3 However, should deterrence fail, an ICT prefers to be the institution to administer justice rather than some other body. Decisions and opinions allow the court to establish standards and express preferences (Canon and Johnson, 1998; Cameron, 2002), which is particularly important in common or mixed legal systems that give weight to precedent. Administering the trial also allows the court to select punishments that meet the institutional standard relevant to the crime; for instance, the international community has a preference against death sentencing, and Sharia courts have religious traditions regarding punishment. Further, courts build legitimacy in the eyes of observers when they hear cases and see their decisions enforced (Carrubba, 2009; Vanberg, 2005; Gibson et al., 1998). In other words, ICTs cultivate themselves and their values by playing a direct role in administering justice for crimes under their jurisdiction.

Unfortunately, neither deterrence nor adjudication is possible if an ICT cannot bring suspects into custody. While the permanent or ‘captive’ nature of states in the international system means some actor will be able to punish them for non-compliance via a targeted policy, individuals accused of crimes against humanity are mobile and can often elude capture, as Ratko Mladić did for 16 years in the former Yugoslavia. In many cases, suspects maintain powerful positions in their home state and can avoid arrest even in plain sight, as is the case for President Omar al-Bashir of Sudan. Thus, an ICT’s inability to capture suspects is a problem prior to that of enforcement. While ICTs suffer from a problem of non-compliance like other institutions, it emerges only as a result of the distinct problem of warrant enforcement.

Despite the difficulties of punishing criminals who cannot be captured, ICTs and their suspects face a situation in which bargaining may be possible. Bargaining situations occur when actors stand to gain from a cooperative agreement but differ over the particulars of a possible deal, as when a buyer and seller negotiate the price of a house or states try to revise their borders. Even actors with opposed preferences can reach a mutually beneficial bargain if the disagreement outcome is sufficiently unattractive.4 We argue that despite their opposed preferences both ICTs and alleged criminals incur some loss of utility while suspects remain at large. Unable to try a suspect, the ICT cannot administer justice or deter future crimes. A suspect may remain free and even continue to benefit from criminal activity, but he does so at considerable risk. If he is captured by an actor who will not surrender him to the court, he could be tried in a domestic show trial, exiled
from his home, have his assets expropriated, imprisoned, or even be executed by his rivals (Gilligan, 2006). As the suspect’s risk of third-party capture and the court’s costs for continued crime increase, there should exist some bargain over the terms of surrender and punishment that leaves both sides better off than continued non-compliance. Given the freedom to do so, an ICT could in principle offer a pre-arrest bargain, committing the Court to a particular sentence that would entice a suspect to surrender himself to the Court.

What effect would the ability to offer pre-arrest bargains have on a court’s ability to administer justice and deter crimes? Would lenience undermine an ICT’s efforts to adjudicate crimes? What does the possibility of bargaining mean for a court’s propensity to issue warrants? How are potential or actual criminals likely to respond? To answer these questions, we specify a game-theoretic model based on the features described above.

3. Theory

We specify a game of complete information between a Court, $C$, and an individual, $A$, who chooses whether or not to commit a crime falling under the Court’s jurisdiction. If a crime is committed, the Court can issue a warrant for $A$’s arrest, and since it cannot rely on the perfect execution of warrants, it also chooses a bargaining strategy of variable lenience to facilitate surrender. Figure 1 presents the sequence of play, which begins with an extensive form game in which $A$ chooses whether to commit a crime and the Court chooses whether to issue a warrant for his arrest; should a crime and warrant both occur, the players enter a repeated (potentially infinite) bargaining game in which offers can be exchanged over the terms of surrender in the shadow of a per-period probability of third-party capture. This specification captures the essentials of the strategic dynamic of interest: potential criminals know that capture, even if the court issues a warrant, is probabilistic, and courts can offer pre-arrest bargains to induce surrender at some cost to their own institutional goals.

As shown in Figure 1, payoffs depend on the occurrence of one of the following four strategy profiles: (a) $A$ does not commit a crime; (b) $A$ commits a crime and $C$ does not issue a warrant; (c) $A$ commits a crime, $C$ issues a warrant, and no bargain
is struck over the terms of surrender; and (d) $A$ commits a crime, $C$ issues a warrant, and the players reach an agreement over the terms of surrender in some period $t$. Before discussing the game in greater detail, we present in Equations (1) and (2) each player’s payoff streams given each possible strategy profile, to which we refer throughout the following discussion. First, $A$’s payoffs are

$$U_A = \begin{cases} 
\sum_{m=0}^{\infty} \delta^m g 
& \text{no crime} \\
\frac{1}{1-p_l} \sum_{m=0}^{\infty} \delta^m V_h 
& \text{crime, no warrant} \\
\frac{1}{1-p_h} \sum_{m=0}^{\infty} \delta^m b_{A,C} 
& \text{crime, warrant, no bargain} \\
\frac{1}{1-p_l} \sum_{m=0}^{\infty} \delta^m U_A(c, w) + \sum_{m=0}^{\infty} \delta^m b_{A,C} 
& \text{crime, warrant, bargain at } t 
\end{cases}$$

The first term captures the certainty of receiving some payoff in perpetuity for not committing a crime, contrasted in the second and third lines with the long-term accumulation of the risk of capture when the court either refuses to issue a warrant or issues one without bargaining. The final term represents the case in which $A$ commits a crime at time $m = 0$, then remains at large under a warrant – receiving $U_A(c, w)$ – until striking a bargain with $C$ at time $t$, from which point it receives $b_{A,C}$ forever. Finally, the Court’s payoff stream for the same set of strategy profiles is

$$U_C = \begin{cases} 
\sum_{m=0}^{\infty} \delta^m V_h 
& \text{no crime} \\
-\frac{1}{1-p_l} \left( \frac{1}{1-p_l} \delta (1-p_h) \right) \sum_{m=0}^{\infty} \delta^m U_C(c, w) + \sum_{m=0}^{\infty} \delta^m (V_h - L b_{A,C}) 
& \text{crime, warrant, bargain at } t 
\end{cases}$$

where its own payoff for those periods in which fails to reach a bargain with an at-large suspect after issuing a warrant is defined as $U_C(c, w)$.

The players’ preferences are opposed, in that $A$ would prefer to commit a crime with impunity, while the Court receives its best payoff when it plays a role in either bringing a criminal to justice or deterring crime. $A$ receives $g \in (0, 1)$ in the current and all future periods if he chooses not to commit a crime, which ends the game. Should he commit a crime, he receives 1 in each period in which he remains at large, but if he is captured in a given period, he receives zero for that and all subsequent periods. In this sense, crime is a valuable temptation, holding out the promise of $A$’s best payoff in each period he evades capture, but at the risk of his worst payoff in the event of capture and the loss of freedom that accompanies it.

The Court receives its highest payoff, $V_h > 0$, in perpetuity under two scenarios. If the threat of its involvement deters an individual from engaging in criminal activity, the Court receives $V_h/(1 - \delta)$. It also receives $V_h/(1 - \delta)$ if it is involved in the administration of justice for a crime committed, i.e. when the game ends with the suspect coming before its bench. For this to occur, the Court must issue a warrant so that whoever captures $A$ will surrender him to Court custody. If, instead, the crime occurs and the game ends with some third party capturing $A$ without the ICT’s warrant, the Court receives $V_l/(1 - \delta)$ in perpetuity, where $V_h > V_l > 0$. This represents the Court’s payoff for a criminal facing justice in some form, which it values, although not as highly as if it were to play a role.
in the process. For instance, while the ICC would like for the fugitive al-Bashir to be captured and be held accountable in any domestic judiciary ($V_i$), it would most prefer to oversee the administration of due process itself ($V_h$), since $V_h > V_i$. Regardless of whether it issues a warrant, the Court receives 0 in every period in which $A$ remains a fugitive after committing a crime. Issuing a warrant requires the Court to pay one-time costs $k > 0$ – as shown in the last two terms of Equation (2) – which may be time, effort, or the expenditure of resources that might go to the pursuit of other goals.

Should $A$ commit a crime, he remains a fugitive until he is (a) captured or (b) surrenders himself to the Court after it issues a warrant. In a given period following the commission of a crime, $A$ may be captured by some third party, whether a police force, a rival faction, another judicial system, etc., with probability $p_i$. The probability of capture differs as a function of strength of the Court’s enforcement regime, such that $A$ is captured with probability $p_h$ if the Court has issued a warrant and probability $p_l$ if it has not, where $p_h \geq p_l$. This covers cases in which the court has a perfectly ineffective enforcement regime, i.e. $p_h = p_l$, and more effective ones, or $p_h > p_l$, where indictment may encourage states to turn over fugitives.

Alternatively, the Court and the suspect may reach a pre-arrest bargain that leads the suspect to surrender himself to the institution without being captured. If the Court issues a warrant in response to a crime, the players enter an alternating-offers bargaining subgame (see Rubinstein, 1982) that includes a per-period risk of capture (or breakdown) as defined above. At the beginning of each period, the Court proposes some bargain $b_C \in [0, 1]$ to $A$. This bargain takes the form of some reduction in charges or sentence relative to the maximum sentence the Court could impose for the suspect’s alleged crimes. $A$ can accept the offer, ending the game at the specified terms, or reject it in order to make a counteroffer, $b_A \in [0, 1]$. The Court can accept the counteroffer or reject it, in which case the stage game repeats with the Court making a new proposal, and so on. Players discount each period of bargaining with a common discount factor, $\delta$, and after the rejection of an offer but before a new proposal, there exists the probability, $p_h$, that $A$ is captured by a third party. In the event of capture after a warrant has been issued, the capturing party turns $A$ over to the Court, such that the Court has all of the leverage in the interaction. The Court is then free to impose the maximum punishment relevant to the crime ($b_C = 0$), which leads to its best terminal payoff, $V_h/(1 - \delta)$.

The final terms of Equations (1) and (2) define payoffs for the case in which a bargain is reached in exchange for $A$’s surrender in some period $t$ after entering the bargaining subgame. $A$ receives the value of the agreed-upon bargain, $b_{A,C}$, in every period after a proposal is accepted. The Court receives its value for adjudicating the crime, $V_h$, less the size of the bargain, $b_{A,C}$, multiplied by its sensitivity to lenience, $L > 0$, or $V_h - Lb_{A,C}$, also in perpetuity. We assume that the Court prefers not to be seen as lenient in meting out punishments, as doing so can undermine its reputation with important actors – e.g., member states, world opinion, and potential suspects – who may punish it in the future. Thus, as $L$ increases, the Court becomes more vulnerable to repercussions as a function of its lenience to $A$.

This model pits a potential suspect tempted to commit a crime and remain at large against a court desiring a role in the administration of justice for that crime. The court may rely on third parties to capture the suspect and turn him over to the institution, or it
can engage in pre-arrest bargaining to entice him to surrender. In the following section, we examine how the possibility of bargaining affects not only the court’s willingness to issue warrants, but also an individual’s incentives to commit crime.

4. Analysis

We organize our presentation of the model’s Subgame Perfect Equilibria (SPE) around strategies in the post-warrant bargaining subgame. We focus on three such equilibria in pure strategies that are substantively appealing: (1) a ‘weak court’ equilibrium in which the Court makes very large concessions to A in order to win his cooperation; (2) a ‘bargaining court’ equilibrium in which the Court tailors a bargain that keeps A just indifferent between remaining at large and cooperating; and (3) a ‘tough court’ equilibrium in which the Court and the suspect exchange incompatible offers indefinitely, or until A’s capture by a third party. Thus, we present equilibria that are representative of bargaining strategies in which the Court concedes everything (weak), something (bargaining), or nothing (tough) to the suspect in pre-arrest bargaining. The game models the entire process of the choices to commit a crime, to issue a warrant, and whether and how to bargain. This design allows us to characterize not only the variety of bargaining strategies but also circumstances in which the Court does not involve itself with the crime and/or the individual chooses innocence. In this way, we can compare the effects of institutions that can bargain pre-arrest to institutions that refuse to or are constrained from doing so. Figure 2 illustrates the conditions under which these equilibria exist – and overlap – as a function of the Court’s sensitivity to lenience, $L$. Proofs can be found in the Appendix.

4.1. Weak court

In a weak court equilibrium, the Court proposes the most generous deal possible in each period of the bargaining subgame. In essence, the Court offers the suspect the right to keep whatever spoils of criminal activity have been gained in return for the opportunity to adjudicate the crime, which may even resemble amnesty, and in equilibrium A accepts the bargain immediately and surrenders to the Court.

**Lemma 1** (Weak post-warrant). When $L \leq \hat{L}$, the following strategies constitute a Subgame Perfect Equilibrium of the post-warrant subgame: (1) C proposes $b^*_C = 1$ and accepts if and only if $b^*_A = 1$; (2) A proposes $b^*_A = 1$ and accepts if and only if $b^*_C = 1$. 

![Figure 2. Post-warrant bargaining strategy as a function of the court’s sensitivity to lenience.](image-url)
Lemma 1 states that when
\[ L \leq V_h \frac{(1 - p_h)(1 - \delta)}{1 - \delta (1 - p_h)} \equiv \hat{L}, \] (3)
the Court is willing to make large concessions to win the suspect’s cooperation. The Court will go so far as to offer the suspect the equivalent of his expected utility for remaining at large at no risk of capture, \( b_c^* = 1 \), as long as the Court is not too sensitive to lenience – i.e., as long as \( L \) is sufficiently low. The suspect accepts the proposal immediately, for if he is captured without a bargain he will receive the maximum punishment for his crime and a payoff of 0. Given these strategies, when will the Court issue a warrant just to be maximally generous in the bargaining subgame, and how does this strategy affect A’s decision to commit a crime?

**Proposition 1** (Weak court equilibria). When C and A play the weak court equilibrium of the post-warrant subgame (\( L \leq \hat{L} \)), the following strategy profiles constitute SPE of the full game: (1) C issues a warrant if and only if \( L < L_w \) and \( k \leq k_w \); (2) when C will issue a warrant, A commits a crime; and (3) when C will not issue a warrant, A commits a crime when \( g < g_w \).

In the weak court equilibrium, the Court issues a warrant only when the likelihood of repercussions in response to lenience is low enough for the benefit of adjudication, \( V_h \), to outweigh them. The Court’s proposal is as generous to the suspect as possible, but the Court compares this to doing nothing, which entails a weakly lower probability of capture, \( p_l \), and a lower payoff when another institution deals with the suspect, \( V_l \). As stated in Proposition 1, the Court issues a warrant when \( L < L_w \) and \( k \leq k_w \). We show in the Appendix that \( L_w > \hat{L} \), so the only constraint that binds to determine C’s willingness to issue a warrant is that the costs of issuing it are sufficiently low. Proposition 1 and Equation (3) show that the Court will issue a warrant under the weak court equilibrium when its value for adjudicating the case (\( V_h \)) is much higher than the punishment it will incur for its lenience.

Although this strategy amounts to offering the suspect amnesty for committing a crime, the Court can benefit from such a scenario. Recall that \( V_h \) represents the Court’s value for administering justice. What ‘justice’ means, however, falls to the discretion of the Court. For instance, the Court may have an interest in creating a public record of crimes committed, as the Inter-American Court of Human Rights was wont to do after the Dirty Wars in the Southern Cone. When the interest of the Court goes beyond punishment for the crime to things like establishing a body of law or setting the public record, \( V_h \) can be sufficiently high to balance the reputational or institutional costs of appearing ‘soft’ or lenient. In other words, the Court can still profit from hearing the case, even if it must grant the suspect amnesty to secure his surrender.

Finally, A can take advantage of the Court’s desire to adjudicate and related willingness to offer very generous bargains. When the Court will issue a warrant, A is guaranteed to be offered \( b_c^* = 1 \), whereas if he commits no crime, he receives only \( g \in (0, 1) \). Therefore, A’s best reply is to commit a crime and take the subsequent bargain. In contrast, when the Court will not issue a warrant, A commits a crime if and only if
\[ g < 1 - \frac{p_l}{1 - \delta (1 - p_l)} \equiv g_w, \]
or when the short-term gains of crime are so large as to outweigh the long-term accumulation of risk. Unsurprisingly, as he is more likely to be caught, i.e. as \( p_i \) increases, this constraint becomes harder to meet and innocence is more appealing. In other words, when a weak court will not issue a warrant, \( A \) can be deterred from committing a crime due to the inherent risks of the enterprise, but when the Court will issue one to reap the institutional benefits of adjudication, it reduces the risks of criminal behavior by promising a credible exit from the risk of capture, actually incentivizing criminal behavior with the promise of its involvement.

4.2. Bargaining court

In a bargaining equilibrium, the Court follows the issuance of a warrant by proposing a deal that reflects \( A \)’s expected value for remaining a fugitive in light of the per-period probability of third-party capture.

**Lemma 2** (Bargaining post-warrant). *When \( L < L < V_h \), the following strategies constitute a Subgame Perfect Equilibrium of the post-warrant subgame: (1) \( C \) proposes \( b^*_C = \hat{b}_C \) and accepts if and only if \( b^*_A \leq \hat{b}_A \); (2) \( A \) proposes \( b^*_A = \hat{b}_A \) and accepts if and only if \( b^*_C \geq \hat{b}_C \).

The Court offers \( A \) its certainty equivalent to the otherwise risky action of remaining free, or

\[
\hat{b}_C = \frac{(1 - \delta)(1 - p_h)(L + (1 - p_h)\delta V_h)}{L(1 - \delta^2 + 2\delta^2p_h - \delta^2p_h^2)},
\]

and \( A \) accepts the offer immediately. This bargain is less generous than the full concessions offered in the weak court equilibrium but is more benevolent than a staunch insistence on the maximum punishment for the crime. The Court’s proposal reflects both its own and \( A \)’s bargaining power in that it (1) decreases as the risks associated with lenience increase, because the Court fears appearing overly generous; (2) decreases in \( A \)’s probability of capture, because \( C \) can afford to be less generous as \( A \)’s situation becomes more risky; and (3) increases in \( C \)’s value for adjudication, which allows \( A \) to demand more in return for his cooperation. What does such a bargain imply for decisions over warrant issuance and the commission of crimes?

**Proposition 2** (Bargaining court equilibria). *When \( C \) and \( A \) play the bargaining equilibrium of the post-warrant subgame (\( L < L < V_h \)), the following strategy profiles constitute SPE of the full game: (1) \( C \) issues a warrant if and only if \( L < L_b \) and \( k \leq k_b \); (2) when \( C \) will issue a warrant, \( A \) commits a crime when \( g < g_B \); and (3) when \( C \) will not issue a warrant, \( A \) commits a crime when \( g < g_W \).*

Proposition 2 states that the Court issues a warrant with the expectation of bargaining when its sensitivity to lenience and the costs of issuing a warrant are sufficiently low, or \( L < L_b \) and \( k \leq k_B \), as defined in the Appendix. However, since \( L_b > V_h \), this constraint trivially holds, and the relevant cutpoint is \( k \leq k_B \), which requires that the Court not face insurmountable institutional costs to issue the warrant. When the Court will not issue a warrant, \( A \) commits a crime when the benefits of crime (with its risk of capture) outweigh...
the benefits of innocence, or when \( g < g_W \), just as he does in the weak court equilibrium. Should a warrant be issued, he expects to reach a bargain with the Court, leading to a different threshold over committing crimes, \( g < g_B \). This threshold may fall above or below the threshold that drives \( A \)’s decision in the absence of a warrant, suggesting that the shared desire to avoid alternative punishment can lead the Court to engage in behaviors that may encourage crime or deter it. We explore the conditions under which the bargaining court deters crime more or less effectively than a non-bargaining court in a subsequent section.

As shown in the Appendix, bargaining becomes more attractive as compared to the weak court equilibrium as the strength of the court’s enforcement mechanisms \((p_h - p_l)\) increases. When suspects are more likely to be caught and brought before the court as a result of its warrant, progressively weaker courts can use the greater probability of capture to be less generous to fugitives, opting out of a weak strategy because the suspect will face increasing incentives to accept a bargain when indictment makes capture more likely.

4.3. Tough court

In a tough court equilibrium of the post-warrant subgame, the Court proposes the maximum punishment to \( A \), who rejects it and proposes full concessions, which the Court rejects. A repeated exchange of unacceptable offers, or non-serious bargaining, ends only in the event of \( A \)’s third-party capture. The equilibrium typifies judicial institutions that refuse or are institutionally unable to bargain with the accused, which leaves the difficulty of capture to other parties.

**Lemma 3** (Tough post-warrant). When \( L > \hat{L} \), the following strategies constitute a Subgame Perfect Equilibrium of the post-warrant subgame: (1) \( C \) proposes \( b^*_C = 0 \) and accepts if and only if \( b^*_A = 0 \); (2) \( A \) proposes \( b^*_A = 1 \) and accepts if and only if \( b^*_C = 1 \).

The tough court equilibrium exists when \( L > \hat{L} \), or when concerns over appearing lenient are severe. Rather than bargain with \( A \), the Court prefers to issue a warrant it knows will be futile and simply wait for \( A \)’s capture by a third party. This leaves the Court free to pursue a maximally severe punishment if \( A \) is captured and brought before the bench. \( A \), for his part, has no incentive to turn himself over to the Court, as the worst he expects to do if captured is identical to the outcome guaranteed to him should he surrender, \( 0/(1 - \delta) \), and delaying that outcome yields the per-period benefits of remaining at large. Anticipating that a warrant cannot yield cooperation in the form of a bargain, when will the Court issue one, and how does this affect \( A \)’s incentive to commit a crime?

**Proposition 3** (Tough court equilibria). When \( C \) and \( A \) play the tough bargaining equilibrium of the post-warrant subgame \((L > \hat{L})\), the following strategy profiles constitute SPE of the game: (1) \( C \) issues a warrant if and only if \( k \leq k_i \); (2) when \( C \) will issue a warrant, \( A \) commits a crime if and only if \( g < g_T \); and (3) when \( C \) will not issue a warrant, \( A \) commits a crime if and only if \( g < g_W \).

Once it issues a warrant, the Court awaits \( A \)'s capture, and the presence of the warrant ensures that the suspect is at least as likely to be captured as he is without the warrant,
since \( p_h \geq p_l \). The Court receives zero in each period unless and until \( A \) is captured, in which case the Court receives either \( V_h \) (if it issued a warrant) or \( V_l \) (if not), and suffers no repercussions for being lenient. Should it issue a warrant, it is able to administer justice, although it pays a one-time cost \( k \). Therefore, \( C \) issues a warrant as long as the costs of issuing a warrant are sufficiently low. As the difference between adjudicating the crime and yielding it to another party, \( V_h - V_l \), and the strength of the enforcement, \( p_h - p_l \), increase, the constraint \( k \leq k_0 \) (defined in the Appendix) becomes easier to satisfy. In other words, the more the Court benefits from administering its form of justice to \( A \), and as its enforcement regime grows more effective, it becomes willing to pay higher costs to try the accused.

For its part, \( A \) knows that committing a crime when the Court will issue a warrant leads to the same outcome, \( 0/(1-\delta) \), upon capture as he would receive without a warrant. However, since warrants weakly increase the probability of capture, or \( p_h \geq p_l \), \( A \) is no more willing to commit a crime under the expectation of a warrant. Formally, this means that \( g_T \leq g_W \), or that there are fewer conditions under which \( A \) will commit a crime when facing a tough court than in the other equilibria. In this sense, tough courts are guaranteed not to incentivize crime through expected lenience, but to achieve this measure of deterrence they forfeit the ability to bargain and thus bring a suspect immediately into custody, as evidenced by the fact that tough court equilibria are only sustainable for Courts that are very sensitive to appearing lenient, \( L > \hat{L} \).

### 4.4. Overlapping equilibria

What, then, motivates an international criminal court to offer pre-arrest bargains? Figure 2 plots the existence of weak, bargaining, and tough court equilibria as a function of the court’s sensitivity to lenience, \( L \). In general, courts are less willing to bargain the more sensitive they are to repercussions for appearing lenient, ranging from an extremely generous offer when \( L \) is at its lowest (weak), or \( L \leq \hat{L} \); to a less generous but still attractive bargain as \( L \) increases (bargaining), or \( \hat{L} < L \leq V_h \); to a refusal to bargain when lenience is prohibitively costly (tough), or \( L > V_h \).

Empirically, which courts should we expect to offer generous deals? One possibility is courts with limited temporal jurisdiction; they may feel pressure to offer lenient deals in exchange for the ability to adjudicate the crimes for which the institutions were created. The ICTY, for instance, has experienced increased pressure from the United Nations to hear cases more rapidly and even settle some cases in order to complete its mandate before the deadline at which its mandate expires. This has led it to offer plea bargains to some suspects in custody in order to process their cases more quickly (Combs, 2006). The ICTY has incentives to prosecute as many alleged criminals from the Former Yugoslavia as possible, and so could benefit from offering pre-arrest bargains to bring the accused into custody.

While changes in the parameter values do indicate whether a court will tend toward pre-arrest bargaining, they do not determine which strategy the court will play. As shown in Figure 2, when \( \hat{L} < L \leq V_h \), bargaining equilibria overlap both weak or tough court equilibria under some conditions. However, the court’s post-warrant payoffs are strictly greater in the bargaining equilibrium as opposed to either alternative. Compared to the weak court equilibrium, a bargaining court pays fewer costs post-warrant, since \( Lb^*_C < L \). Further, the court is better off bargaining than being tough because it brings more criminals before its bench and therefore to justice. If the court is strictly better off bargaining,
why do we see weak or tough courts? We may observe courts making rather generous offers due to a lack of practical options, which might be the case if the probability of third-party capture is vanishingly small. On the other hand, the persistence of tough courts may be a function of institutional rules. The ICC, for example, has no provisions in its charter for the construction of pre-arrest bargains, effectively constraining it from doing so even if the short-term gains from bringing a suspect to swift justice are sufficiently attractive to provide a higher payoff than refusing to bargain. In fact, we might view the lack of bargaining provisions as a sort of commitment device designed to help the ICC resist the temptation to bargain at the cost of future deterrence, a tradeoff we identify in the next section.

5. Empirical implications

In this section, we use comparative statics analysis to examine the following questions. First, how do these alternative bargaining strategies differ in their ability to deter potential crimes and/or bring fugitives to an justice by inducing surrender? Second, how does the ability to offer pre-arrest bargains affect the frequency with which courts issue warrants?

5.1. Deterring or encouraging crime

A court’s lack of enforcement power creates a tradeoff. To deter crime, it must credibly promise tough punishments, which prevents it from bringing criminals before its bench faster than its usually weak warrant enforcement regime. It can use pre-arrest bargains to incentivize surrender and bring criminals to justice, but this comes at the cost of encouraging criminal activity.

In the weak court equilibrium, $A$ always commits a crime when he expects a warrant to be issued, because he receives more by committing a crime and going to trial than he would if he were captured or if he committed no crime. We can compare this to the case in which the court will not issue a warrant, where committing a crime entails a per-period risk of capture, $p_c$, that introduces a greater level of risk than would occur if the court were to issue a warrant and offer a generous pre-arrest bargain. A potential criminal who does not expect a court to offer him a bargain is left facing only worse options and is less likely to commit the crime than if he were indicted and offered a generous bargain. The weak court’s desire to adjudicate the crime therefore incentivizes criminal behavior by offering a risk-free alternative against the greater danger of remaining a fugitive. An ICT may benefit from forgoing punishment to offer the suspect a maximally generous bargain, including establishing precedent, creating a public record of crimes committed, or facilitating societal reconciliation, but the promise of its involvement nonetheless perfectly undermines its ability to deter crime.

The effects of bargaining – offering the suspect no more than his value for remaining a fugitive – depend on the strength of the court’s enforcement regime. Bargaining can create incentives to commit crimes if the enforcement regime is relatively weak, or $\hat{p}_l < p_c \leq p_h$ (we define $\hat{p}_l$ in the appendix). Voluntary surrender leaves a suspect better off than risking capture and punishment outside of the ICT, particularly if the increased odds of capture are not too much greater. This means committing a crime and surrendering to the court can also be more advantageous than innocence if he has a reasonable expectation that the court will issue a warrant for his arrest. In contrast, if the court’s enforcement mechanisms are relatively strong, or $p_l \leq \hat{p}_l$, the court can deter more crime and bring
more suspects to justice as compared to a tough court or a court that does not issue a warrant. The increased prospect of capture associated with indictment will motivate $A$ to remain innocent more often than he would without indictment or under a weak court, and the ICT will also be able to try those individuals who do choose crime more often than a court that does not engage in bargaining.

Tough courts that refuse to be lenient to suspects will exercise the most effective deterrence. $A$ commits a crime under more restrictive conditions than he does in the other equilibria, i.e. when $g < g_T$, where $g_T < g_W$ and $g_T < g_B$. Tough courts are only able to deter as well as they can expect third-party execution of warrants, even if their involvement increases the likelihood of capture. Nevertheless, an individual considering the benefits of crime is least likely to commit one if he expects to face the highest punishments relevant to the crime, particularly as the enforcement regime gains strength. While the tough court is always superior at deterring crime, recall that the court is never better off being tough when the bargaining equilibrium is also possible; rather, it receives higher payoffs when it trades some deterrent capacity for the ability to adjudicate crime. By sacrificing deterrent capacity, courts willing and able to bargain for surrender administer justice with certainty. A tough court’s inability to capture the accused, combined with its unwillingness to offer incentives to surrender, leaves alleged criminals at large, which can be socially suboptimal. A person who has committed crimes may continue to do so while free, as those perpetrating crimes against humanity are wont to do. As Scharf (1999: 507) writes, the refusal to bargain in the interest of criminal prosecutions ‘can prolong…conflict, resulting in more deaths, destruction, and human suffering’. In their choice of institutional rules, then, courts must balance the tradeoff between enhanced deterrence and incentivizing crime in the choices of institutional rules, the issuance of warrants, and bargaining with suspects.

5.2. The issuance of warrants

We also derive predictions over the relative frequency with which courts will issue warrants. A court issues a warrant when its costs for doing so are sufficiently low – when $k \leq k_w$ for a weak court, $k \leq k_b$ for a bargaining court, and $k \leq k_t$ for a tough court. As these thresholds increase in value, they are easier to meet and the court is more likely to issue warrants. How might different bargaining strategies lead to variation in a court’s willingness to issue warrants?

First, a bargaining court will issue warrants more frequently than a weak or tough court under all conditions when the bargaining equilibrium exists. The weak court is hesitant to issue a warrant due to the punishment it will certainly incur, because doing so means that it pays $L \times 1 = L$ in accordance with the maximally generous offer. The bargaining court strikes less generous deals and incentivizes fewer crimes, so it incurs much lower costs in issuing warrants. In addition, bargaining courts can ensure that they will adjudicate the case and reap the benefits thereof, making them more willing to issue warrants than a weak court. Tough courts cannot guarantee adjudication without the ability to bargain, particularly when the court has a weak enforcement regime. Thus, they are less willing to incur the costs of issuing warrants than a court that will bargain under the same exogenous circumstances.
However, a tough court will issue warrants \textit{more often} than other types of courts when non-serious bargaining is the only option \((L > V_h)\), even though it is least able to win the cooperation of its targets. This greater frequency occurs not in spite of this inability to win cooperation but \textit{because of it}. Its fear of appearing lenient leads it to pursue only maximal punishments, or \(L \times 0 = 0\). As a result, it places a higher net value on any one suspect brought to justice. Since its warrants do not make crimes more likely if the court does not have enforcement power and can even deter crimes if it does, the costs of issuing a warrant are easier to offset, leading to a greater willingness to issue warrants, refuse to bargain, and simply await their capture by a third party, despite the increased expected time as a fugitive.

This points to a significant exception to the argument that courts in the beginning of their institutional development may take on only those cases for which their rulings are likely to be obeyed (Carrubba, 2009, 2005). If the court can effectively signal that it is acting in observers’ interests, these observers will support the institution against actors who do not comply with its decisions (Vanberg, 2005; Helmke, 2005). Courts can do this by limiting their rulings to those that will be obeyed, helping them to build their perceived legitimacy over time (Carrubba, 2009; Staton and Vanberg, 2008).

However, we posit that those courts most sensitive to appearing lenient – tough courts that engage in non-serious bargaining – will issue warrants for suspects \textit{even when they do not believe them likely to be captured}. These courts receive so much benefit from adjudicating cases and handing down the maximum sentence on the rare occasions when the accused is captured and turned over that the cost of unexecuted warrants is bearable. When it can bring the suspect into custody, the court can then rule appropriately and see the sentence executed. In other words, courts that do not bargain will not limit themselves to the cases that will be enforced, and they can still build institutional legitimacy because their struggle is not in punishing criminals but in enforcing warrants. In fact, this very incentive not to be selective in the cases they pursue is what renders tough courts \textit{less} conservative when issuing warrants, where a simple concern over ruling enforcement might lead them to be more selective.

The most obvious example of this phenomenon is the ICC, which continues to issue warrants despite the relatively low probability the warrants will be executed. Our model suggests that the ICC should be both loath to negotiate and \textit{liberal} in the issuance of warrants. If it adjudicated lesser crimes or was able to secure suspects in custody, it might be able to make strategic use of its rulings to its benefit, but the severe nature of crimes in its jurisdiction and the attendant concern for deterrence imply that it may not be able to build legitimacy in this fashion. Instead, it issues warrants and waits for external parties to capture the suspect and turn them over to the court. The only factor preventing a tough court from issuing warrants all the time is the costs of investigation and issuing warrants, \(k\).

Our theory does not contradict theories of endogenous court development but rather qualifies them. In these theories, the court’s actions are signals as to the value of the institution and a regime of rules it adjudicates for the population at large (see, e.g., Carrubba, 2009; Staton and Vanberg, 2008). The court makes its decisions with the knowledge that its actions inform the public of its value and/or preferences, so that actors will see it as in their interest to enforce its decisions. The courts under study in our model do not face problems of ruling enforcement as constitutional courts do – once a suspect is in custody,
the enforcement of sentences is a matter of resources rather than authority. An ICT’s problem is overcome in a very different manner than an emerging constitutional court’s lack of power to enforce punishments: it need not be selective or tentative in decisions, but must deal with its prior problem of capture.

6. Conclusion and implications

International criminal courts and tribunals do not face difficulties enforcing their decisions, a problem with which many international institutions struggle. However, the inability to bring suspects into custody in the first place creates a problem and potential solutions that are particular to institutions that seek to regulate the behaviors not of states but of individuals. To address the problem of \textit{capture} – which precedes that of carrying out punishments – institutions can turn to bargaining. When both the ICT and the suspect incur costs while the suspect remains a fugitive, there exists a range of compromises both would prefer to his at-large status. In other words, the ICT could offer \textit{pre-arrest bargains} to entice the suspect to surrender himself to the court. In this way, the court may be able to try cases it otherwise would not due to a lack of warrant enforcement, allowing it to build legal precedent and fulfill its mandate for adjudication. We presented a theory of the interaction between an ICT and a potential criminal in which the latter chooses between committing a crime and accepting a court’s proposed terms of surrender, committing a crime and remaining a fugitive with a risk of third-party capture, or remaining innocent, while the court balances the potential price of generosity to a criminal against the benefits of administering justice.

An ICT’s willingness to bargain depends on of the suspect’s likelihood of capture, the court’s sensitivity to appearing lenient, and its benefits from administering justice. First, the more likely a suspect is to be caught, the more willing he will be to accept even a poor bargain. The suspect’s visibility, the power of his opponents, his probability of political survival, or his interactions with international actors may increase his probability of capture. If he is caught outside of a bargain, he faces the maximum punishment for his crime, as compared to a better offer if he should surrender, so he will be more likely to accept an ICT’s proffered deal. Second, the ICT may wish to avoid appearing lenient. The institution may garner a reputation for weakness, even if it is able to adjudicate criminals. This loss of public legitimacy can hurt the ICT in authority and resources if states are less likely to support an institution they perceive to be ‘soft’ on crime. The more sensitive the court is to such repercussions, the less willing it will be to offer lenience in exchange for surrender. Finally, there are a variety of elements that may add to a court’s value for bringing a criminal to justice. Adjudicating allows it to establish precedent and clarify its preferences, and to build its legitimacy in the public eye. Most courts have preferred methods of punishment, which they can only enact if they are the institutions to administer justice. Some courts, like the ICTY, have a stated interest in establishing a public record of crimes committed beyond whatever sentence the court hands down. Further, some persons who commit crimes will continue to do so while they remain at large, and the court may desire a role in bringing ongoing crime to an end even if deterrence has failed. For instance, ICC prosecutor Luis Moreno-Ocampo stated in response to Libya’s targeting of civilians, ‘Our business in Libya is (to) stop the crimes’.\textsuperscript{5} Thus, the more a court profits from trying a suspect, regardless of the punishment handed down, the more willing it will be to bargain in order to secure his surrender.
The model allows us to explore the potential effects of pre-arrest bargaining in the context of international crime, particularly on the incidence of crime and the issuance of international warrants. First, we identify a critical tradeoff between administering justice and deterring future crimes. These are separable goals, although most ICTs value both outcomes. Unfortunately, a court that insists on being tough on criminals may be able to set an example and deter crime, but it can only do so with those few suspects who come to trial after capture by some third party. In contrast, a court that is willing to bargain will be more likely to bring suspects to trial and thus administer some form of justice, at the cost of incentivizing some crime with its lenient bargains. Nonetheless, courts are better off bargaining than refusing to do so. Second, courts that refuse to bargain and expect their warrants to be ignored by suspects will be more likely to issue warrants than courts who can actually entice cooperation with the promise of reduced charges or sentences. Issuing warrants in this case does not unconditionally lower an ICT's deterrent capacity, and it gives the court access to suspects should they be captured by third parties. Even when a tough court is unlikely to bring suspects to justice any more quickly than if it had not issued a warrant, it will issue warrants frequently in order to participate in the administration of justice. In contrast, a court with the preference to offer bargains will be more hesitant to issue warrants, for doing so does mean incurring repercussions for lenience.

Designers can commit institutions to particular warrant issuance and bargaining strategies, as appears to be the case with the ICC. In the interest of ending impunity and deterring future crimes, ICC will not bargain with the accused, even if remaining at large means the continuation of crimes. Indeed, the promise of an ICC trial may encourage President Qaddafi to continue fighting rebels and attacking civilian targets, whereas the promise of a safe exit (i.e., a pre-arrest bargain) might be preferable to the long-term accumulation of the risk of defeat and rebel retribution. On the other hand, by committing itself to this ‘tough court’ strategy, the ICC may be able to put itself in a position to encourage the compliance of third parties in capturing suspects, as it can ensure that the consequences of capture are worse than remaining at large by allowing states to credibly refuse to offer exile (see Gilligan, 2006). It is possible, then, the effective prohibition against pre-arrest bargaining ensures that the long-term desire for deterrence is not sacrificed to the short-term desire to bring any one war criminal to justice. Nevertheless, these institutional constraints prevent the ICC from being able to adjudicate more crimes.

Without the expectation that fugitives will reliably be brought into custody, international criminal courts and ad hoc international tribunals must sacrifice something of value in order to bring alleged criminals to justice and fulfill their stated mandates. Whether a court sacrifices deterrence or the ability to administer justice is a function of the relative value of winning cooperation and appearing tough on criminals, and the institutional design that enables the court to act on these values. Identifying this tradeoff and the utility thereof can facilitate the design of courts toward ensuring either deterrence or swifter justice. Courts should consider bargaining as a possible solution to the problem of warrant execution in the international setting, as it may enable courts to build legitimacy through adjudication and become sovereign, powerful institutions, overcoming the obstacles to enforcement even if states are unwilling or unable to cooperate with the institutions' rules.
7. Appendix

7.1. Equilibria

Proof of Lemma 1. To verify that the posted strategies constitute a SPE, we verify that, in every period of the post-warrant subgame when \( L \leq \hat{L} \), \( C \) proposes \( b^*_C = 1 \) and accepts if and only if \( b^*_A = 1 \) and accepts if and only if \( b^*_C = 1 \). Given \( A \)'s strategy, \( C \) proposes \( b^*_C = 1 \) in every period, as opposed to deviating for one period to an unacceptable proposal, if and only if

\[
\frac{V_h - L}{1 - \delta} \geq p_h \left( \frac{V_h}{1 - \delta} \right) + (1 - p_h) \left( 0 + \delta \left( \frac{V_h - L}{1 - \delta} \right) \right) \Leftrightarrow L \leq V_h \left( 1 - p_h \right) \frac{1 - \delta}{1 - \delta (1 - p_h)} \equiv \hat{L}.
\]

Since its payoffs to accepting \( b^*_A = 1 \) and for a period of rejection before proposing \( b^*_C = 1 \) are identical to those given above, it follows that \( C \) accepts \( A \)'s equilibrium proposal under the same conditions, \( L \leq \hat{L} \). \( A \) proposes \( b^*_A = 1 \) rather than deviate for one period to an unacceptable proposal, if and only if

\[
\frac{1}{1 - \delta} \geq (1 - p_h) \left( 1 + \delta \left( \frac{1}{1 - \delta} \right) \right),
\]

which holds as long as \( p_h \) is a true probability. Since its payoffs to accepting \( b^*_C = 1 \) and for a period of rejection before proposing \( b^*_A = 1 \) are identical to those given above, it follows that \( A \) accepts \( C \)'s equilibrium proposal under the same conditions. Therefore, when \( L \leq \hat{L} \), the proposed strategies are a SPE.

Proof of Proposition 1. Given the weak court SPE of the post-warrant subgame characterized in Lemma 1, we now show that the posited warrant and crime strategies constitute SPE of the full game. Begin with \( C \), who issues a warrant following the commission of a crime when

\[
\frac{V_h - L}{1 - \delta} - k \geq \frac{p_l V_l}{(1 - \delta) (1 - (1 - p_l)\delta)},
\]

where the right-hand side is the present discounted value of \( A \) remaining at large until capture, or

\[
EU_C(\sim \text{warrant}) = p_l \left( \frac{V_l}{1 - \delta} \right) + (1 - p_l)(0 + \delta EU_C(\sim \text{warrant})). \tag{4}
\]

\( C \) issues a warrant when

\[
L < V_h - \frac{p_l V_l}{1 - \delta + \delta p_l} = L_w \quad \text{and} \quad k \leq \frac{1}{1 - \delta} \left( V_h - L - \frac{p_l V_l}{1 - \delta (1 - p_l)} \right) \equiv k_w,
\]

although since \( L_w > \hat{L} \), the first constraint is trivially satisfied. When \( C \) will not indict, \( A \) commits a crime when

\[
\frac{1 - p_l}{1 - \delta + \delta p_l} > \frac{g}{1 - \delta} \Leftrightarrow g < 1 - \frac{p_l}{1 - \delta (1 - p_l)} \equiv g_w, \tag{5}
\]
where the left-hand term of the first inequality is the present discounted value of committing a crime and remaining a fugitive until capture, or

\[ EU_A(\text{crime} | \sim \text{warrant}) = (1 - p_l)(1 + \delta EU_A(\text{crime} | \sim \text{warrant})). \]

When the court will indict, \( A \) commits a crime when \( \frac{1}{1 - \delta} > \frac{g}{1 - \delta} \), which is strictly true since \( g < 1 \). Therefore, when \( L \leq \hat{L} \), the proposed strategies are a SPE. \( \square \)

**Proof of Lemma 2.** To verify that the posted strategies constitute a SPE, we show that, in every period of the post-warrant subgame when \( L < L < V_h \), \( C \) proposes \( b^*_C = \hat{b}_C \) and accepts if and only if \( b^*_C \leq \hat{b}_A \), and that \( A \) proposes \( b^*_A = \hat{b}_A \) and accepts if and only if \( b^*_C \geq \hat{b}_C \). We first identify the equilibrium proposals that solve a system consisting of each player’s acceptance constraints, then verify that each player will make the posited proposal in equilibrium in each period. When a player refuses to accept a bargain, \( A \) remains at large for a period, but in returning to equilibrium strategies it will go on to make an acceptable proposal. Therefore, equilibrium proposals \( \hat{b}_A \) and \( \hat{b}_C \) must solve the following system:

\[
\frac{\hat{b}_C}{1 - \delta} \geq (1 - p_h) \left( 1 + \delta \frac{\hat{b}_A}{1 - \delta} \right) \quad \text{and} \quad \frac{V_h - L\hat{b}_A}{1 - \delta} \geq p_h \left( \frac{V_h}{1 - \delta} \right) + (1 - p_h) \left( \delta \frac{V_h - L\hat{b}_C}{1 - \delta} \right),
\]

consisting of \( A \)’s and \( C \)’s acceptance constraints respectively. A unique pair of proposals satisfies the system:

\[
\hat{b}_A = \frac{(-1 + \delta)(-1 + p_h)(L\delta (-1 + p_h) - V_h)}{L (-1 - \delta + \delta p_h)(1 - \delta + \delta p_h)} \quad \text{and} \quad \hat{b}_C = \frac{(1 - \delta)(-1 + p_h)(L + (\delta - \delta p_h)V_h)}{L (-1 + \delta^2 - 2\delta^2 p_h + \delta^2 p_h^2)}.
\]

\( C \) proposes \( b^*_C = \hat{b}_C \) in every period, rather than deviate to an unacceptable proposal for one period, when

\[
\frac{V_h - L\hat{b}_C}{1 - \delta} \geq p_h \left( \frac{V_h}{1 - \delta} \right) + (1 - p_h) \left( \delta \frac{V_h - L\hat{b}_A}{1 - \delta} \right) \iff L \leq V_h.
\]

\( A \) proposes \( b^*_A = \hat{b}_A \) in every period, rather than deviate to an unacceptable proposal for one period, when

\[
\frac{\hat{b}_A}{1 - \delta} \geq (1 - p_h) \left( 1 + \delta \frac{\hat{b}_C}{1 - \delta} \right) \iff L \leq V_h.
\]

To ensure that there exist interior solutions, i.e. that players propose neither \( b = 0 \) nor \( b = 1 \), we solve \( 0 < \hat{b}_A < 1 \) and \( 0 < \hat{b}_A < 1 \). This results in to minimal values for \( L \),
and since the constraint ensuring that \( \hat{b}_A \) is greater than the other, we establish that both proposals are interior when

\[
L > \frac{(1 - \delta)(1 - p_h)V_h}{1 - \delta + \delta(2 - p_h)p_h} \equiv L.
\]

Therefore, when \( L < L < V_h \), the proposed strategies are a SPE. \( \square \)

Proof of Proposition 2. Given the bargaining court SPE of the post-warrant subgame characterized in Lemma 2, we now show that the posited warrant and crime strategies constitute SPE of the full game. Begin with \( C \), who issues a warrant following the commission of a crime when

\[
V_h - L\hat{c} - k \geq \frac{p_lV_l}{(1 - \delta)(1 - (1 - p_l)\delta)},
\]

where the right-hand side is the present discounted value of \( A \) remaining at large until capture, as defined in (4). \( C \) issues a warrant when

\[
L < \frac{-(-1 + \delta + \delta (-2 + p_h)p_h)(1 - \delta + \delta p_l)V_h + (-1 - \delta + \delta p_h)(1 - \delta + \delta p_h)p_lV_l}{(-1 + \delta)(-1 + p_h)(1 - \delta + \delta p_l)} \equiv L_b
\]

and

\[
k \leq \frac{1}{1 - \delta} \frac{L(-1 + \delta)(-1 + p_h) + (-1 + \delta + \delta(-2 + p_h)p_h)V_h}{(-1 - \delta + \delta p_h)(1 - \delta + \delta p_h)} - \frac{p_lV_l}{1 - \delta + \delta p_l} \equiv k_b.
\]

Note that, since \( L_b > V_h \), the first constraint is trivially satisfied. When \( C \) will not issue a warrant, \( A \) commits a crime when \( g < g_A \) as defined in (5). When \( C \) will issue a warrant, \( A \) commits a crime if and only if

\[
\hat{b}_C > \frac{g}{1 - \delta} \iff g < \frac{(1 - \delta)(-1 + p_h)(L + (\delta - \delta p_h)V_h)}{L(-1 + \delta^2 - 2\delta^2p_h + \delta^2p_h^2)} \equiv g_B.
\]

Therefore, when \( L < L < V_h \), the proposed strategies are a SPE. \( \square \)

Proof of Lemma 3. To verify that the posted strategies constitute a SPE, we show that, in every period of the post-warrant subgame when \( L > \hat{L} \), \( C \) proposes \( b_C^* = 0 \) and accepts if and only if \( b_A^* = 0 \), and that \( A \) proposes \( b_A^* = 1 \) and accepts if and only if \( b_C^* = 1 \). Given \( A \)'s strategy, \( C \) proposes \( b_C^* = 0 \) in every period, as opposed to deviating for one period to \( A \)'s acceptable proposal, if and only if

\[
\frac{p_hV_h}{(1 - \delta)(1 - \delta + \delta p_h)} \geq \frac{V_h - L}{1 - \delta} \iff L \geq \frac{V_h(1 - p_h)(1 - \delta)}{1 - \delta(1 - p_h)} \equiv \hat{L},
\]

where the left-hand side of the first inequality is the present discounted value of exchanging unacceptable proposals until \( A \) is captured, defined by

\[
EU_C(\text{tough}) = p_h \left( \frac{V_h}{1 - \delta} \right) + (1 - p_h)(0 + \delta EU_C(\text{tough})). \tag{6}
\]
C accepts $b^*_A = 0$, rather than reject and await a return to unacceptable proposals, when

$$
\frac{V_h}{1 - \delta} \geq p_h \left( \frac{V_h}{1 - \delta} \right) + (1 - p_h) (0 + \delta EU_C(\text{tough})),
$$

which is strictly true. Given $C$’s strategy, $A$ proposes $b^*_A = 1$ in every period, as opposed to deviating for one period to $C$’s acceptable proposal, if and only if

$$
\frac{1 - p_h}{1 - \delta + \delta p_h} \geq \frac{0}{1 - \delta},
$$

which is strictly true, and where the left-hand side is the present discounted value of exchanging unacceptable proposals until $A$ is captured, defined by

$$
EU_A(\text{tough}) = (1 - p_h)(1 + \delta EU_A(\text{tough})). \quad (7)
$$

$A$ accepts $b^*_C = 1$, rather than reject and await a return to unacceptable proposals, when

$$
\frac{1}{1 - \delta} \geq (1 - p_h)(1 + \delta EU_A(\text{tough})),
$$

which is also strictly true. Therefore, when $L > \hat{L}$, the proposed strategies are a SPE.

**Proof of Proposition 3.** Given the tough court SPE of the post-warrant subgame characterized in Lemma 3, we now show that the posited warrant and crime strategies constitute SPE of the full game. Begin with $C$, who issues a warrant following the commission of a crime when

$$
EU_C(\text{tough}) - k \geq EU_C(\sim \text{warrant}) \iff k \leq \frac{1}{1 - \delta} \left( \frac{p_h V_h}{1 - \delta (1 - p_h)} - \frac{p_l V_l}{1 - \delta (1 - p_l)} \right) \equiv k_T
$$

where $EU_C(\text{tough})$ is as defined in (6) and $EU_C(\sim \text{warrant})$ as in (4). When $C$ will not issue a warrant, $A$ commits a crime when $g < g_A$ as defined in (5). When $C$ will issue a warrant, $A$ commits a crime if and only if

$$
EU_A(\text{tough}) > \frac{g}{1 - \delta} \iff g < \frac{(1 - \delta)(1 - p_h)}{1 - \delta + \delta p_h} \equiv g_T.
$$

Therefore, when $L > \hat{L}$, the proposed strategies are a SPE.

### 7.2. Comparative statics

Several derivatives are presented in the section on which courts bargain, and we present proofs of those comparative statics claims here. First, we verify that $L$ decreases in $p_h$,

$$
\frac{\partial L}{\partial p_h} = \frac{-(1 - \delta)(1 + \delta - \delta (2 - p_h) p_h) V_h}{(1 - \delta + \delta (2 - p_h) p_h)^2} < 0,
$$

which is strictly negative. Next, we verify that $\hat{L}$ also decreases in $p_h$ by noting that

$$
\frac{\partial \hat{L}}{\partial p_h} = \frac{-(1 - \delta)V_h}{(1 - \delta + \delta p_h)^2} < 0.
$$
Finally, to verify that $L$ increases in $V_h$ at a rate less than one, note that

$$\frac{\partial L}{\partial V_h} = \frac{(1 - \delta)(1 - p_h)}{1 - \delta + \delta(2 - p_h)p_h}$$

which is both positive and less than one as long as $0 < p_h < 1$ and $0 < \delta < 1$, both of which are true by construction.

Finally, we prove our claims over the relative frequency of warrants by comparing $k_w$, $k_b$, and $k_t$. First, using these thresholds as defined above, algebra verifies that the tough court’s warrant constraint is easier to meet (i.e. the tough court is more willing to indict) than the weak court’s when $L > \hat{L}$ and easier to meet than the bargaining court’s when $L > V_h$. On the other hand, each of these courts is more willing to issue warrants when the relevant constraints are not satisfied. Finally, the bargaining court is more willing to issue warrants, or $k_b > k_w$, when $L > L_c$ or for the whole of the space in which the two overlap.

Notes

1. Examples of ICTs suffering from such a problem include the permanent International Criminal Court and ad hoc tribunals such as the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Panels for Serious Crimes in East Timor, the Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon, etc. The problem can even be extended to truth commissions established in the wake of civil wars and trials administered as ‘victor’s justice’. The uniting characteristics are that the institutions (a) are international in administration, (b) target individuals for violations of international crimes, and (c) lack a dedicated or reliable force to execute warrants.

2. Articles 22 through 33 of the Rome Statute specify the conditions under which persons can be held criminally responsible for their actions, which includes actions taken as the Head of State or Government (Article 27).


6. A legal advisor at the ICC made this statement in a meeting in The Hague, the Netherlands, 14 July 2009. In fact, the ICC even lacks provisions for plea bargaining with suspects in custody – this statement was made in a meeting with a senior legal advisor at the ICC, 3 July 2007, when specifically asked about the Ugandan case of Joseph Kony.

Acknowledgments

The authors are grateful to Cliff Carrubba, Terry Chapman, Courtenay Conrad, Alex Debs, Joe Jupille, Moonhawk Kim, Will Moore, Toby Rider, Susan Smelcer, Jeff Staton, members of the University of Colorado Political Economy Working Group, and two anonymous reviewers for helpful comments and suggestions. An earlier version was presented at the 2008 Annual Meeting of the Midwest Political Science Association, Chicago, IL. Both authors contributed equally to this work.
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