

# Cooperation with the ICC

## What the Security Council and ASP must do

Dapo Akande and Talita de Souza Dias



Non-cooperation by states has been a major factor preventing the International Criminal Court (ICC) from fully delivering on its mandate. The United Nations Security Council and the ICC's Assembly of States Parties (ASP) can deal with this problem. The council should take decisive action when it refers situations to the ICC. During the course of investigations and/or prosecutions, both the council and the ASP can promote cooperation or address states' non-cooperation.

## Key findings and recommendations

### For the UN Security Council

To enhance the effectiveness of UN Security Council (UNSC) referrals to the International Criminal Court (ICC), the council should:

- ▶ Impose cooperation obligations on all states
- ▶ Not restrict or bar UN funding for investigations and prosecutions
- ▶ Not seek to limit the jurisdiction of the ICC over persons relevant to the situation
- ▶ Adopt explicit language lifting any immunities that might hinder ICC prosecution, especially those involving state officials of non-states parties

To promote cooperation at the investigation and prosecution stage, the council should:

- ▶ Establish a process to consider whether to impose targeted sanctions on individuals wanted by the ICC
- ▶ Establish sanctions committees to deal with specific ICC situations and allow the ICC to make recommendations to such committees
- ▶ Give explicit mandates to UN peacekeeping, peace enforcement and peacebuilding missions operating in territories that are also ICC situations to cooperate with the ICC
- ▶ Extend the mandate of its Informal Working Group on International Tribunals to include the ICC in order to provide more structured and better-informed discussions on ICC matters

To respond to non-cooperation at the investigation and prosecution stage, the council should:

- ▶ Put in place more efficient mechanisms to follow up on its referrals and respond to findings by the ICC of non-cooperation by states
- ▶ Ensure that consideration of such matters is routine for situations referred to the ICC by the UNSC, while also taking place in other cases and situations

### For the Assembly of States Parties

- ▶ The ICC's Assembly of States Parties (ASP) should routinely respond to findings of non-cooperation made by the ICC, in particular by asking the UNSC and the UN General Assembly to take appropriate measures.
- ▶ In particular, open letters reminding states not only of their general obligations under the Rome Statute but also of the specific consequences arising from their failure to cooperate could be particularly helpful in deterring and preventing instances of non-cooperation.
- ▶ When states fail to cooperate with the ICC, the ASP should ask the UNSC to take measures, including sanctions, against the relevant states in situations brought to the court by any triggering mechanism.
- ▶ When non-cooperation arises from or is compounded by lack of clarity as to obligations of states under the Rome Statute, the ASP should adopt resolutions putting forward its own interpretation of the issue. If adopted with or followed by the agreement of all states parties, those resolutions must be taken into account by the court as 'subsequent agreements' or 'subsequent practice' when interpreting the relevant provision(s).

## Introduction

It has been said many times that the International Criminal Court (ICC) is like a 'giant without arms or legs'.<sup>1</sup> States provide the 'arms and legs' of the court. Indeed, without enforcement powers of its own, the ICC is entirely dependent on the cooperation of states in order to fulfil its mandate, i.e. the investigation and prosecution of those most responsible for the commission of serious crimes that concern the international community as whole (genocide, crimes against humanity, war crimes and the crime of aggression).

In particular, given that the court cannot generally proceed with a trial in the absence of the accused,<sup>2</sup> it needs the cooperation of states to arrest and surrender, or otherwise secure, the presence of accused persons.<sup>3</sup> Moreover, state cooperation is also essential in allowing the ICC to conduct investigations on the ground, as well as in gathering and presenting evidence to be used in ongoing and future ICC proceedings.<sup>4</sup>

Similarly, in order to enforce its sentences, including detention and fines, and to secure full reparations for victims by, inter alia, the freezing and forfeiture of assets of convicted individuals, the court is entirely reliant on the cooperation of relevant states in the domestic level.<sup>5</sup>

### The ICC is entirely dependent on the cooperation of states in order to fulfill its mandate

In this context, this report will focus on the ways in which the United Nations Security Council (UNSC) can promote states' cooperation with the ICC. In thinking about the council's role with regard to cooperation with the court, it is useful to divide possible UNSC actions into measures that can be taken at different stages in the relations between the two institutions. These are:

- Measures that could be taken by the UNSC at the referral stage, i.e. when the council refers a situation to the ICC
- Measures that could be adopted during the course of investigations and/or prosecutions to promote or incentivise cooperation by states
- Measures that could be taken during investigations and/or prosecutions in order to address instances of non-cooperation by states

The discussion that follows considers those measures that would be both legally possible and desirable, in order to provide maximum support to the ICC in its important work of investigating and prosecuting those who bear the gravest responsibility for crimes under international law.

However, when considering the relationship between the council and the court, it is also essential to consider the political context in which the council operates. In particular, it must be borne in mind that at any one time, some members of the council (perhaps even a majority), including three permanent members, are not parties to the Rome Statute.



---

ICC DEPENDS  
ENTIRELY ON STATES TO  
MAKE ARRESTS

---

This reality means that, from time to time, those states may not consider support for the court as a priority or even as in their national interest. It should also be borne in mind that, even in the short history of the ICC, states, including permanent members, have not maintained a consistent and unbroken approach in their relations with the court. This indicates that even those states that may, at a particular point in time, express a degree of hostility towards the court may at a later date adopt a more cooperative stance towards it.

It is therefore essential, notwithstanding the political realities of the day, to develop a set of tools that can be used in a more conducive political environment.

## Action by the UNSC

### Referral stage

The UNSC's interaction with the ICC begins when the council refers a situation to the court.<sup>6</sup> At that moment, the council should already be taking measures that are likely to enhance cooperation with the court.

In the two resolutions through which the council has thus far referred situations to the court, namely those in Darfur, Sudan<sup>7</sup> and Libya,<sup>8</sup> the council imposed an obligation of cooperation only on those two states, which were most directly concerned with the relevant situation (and, in the case of Darfur, on other non-state entities that are also parties to the conflict). In relation to other states that are not parties to the ICC Statute (the Rome Statute), the council simply urged their cooperation, and explicitly acknowledged the lack of any binding obligations in relation to the court.<sup>9</sup>

Even states that at one point in time express a degree of hostility towards the ICC, may later adopt a more cooperative stance towards the court



UNSC COULD OBLIGATE  
ALL UN STATES TO  
COOPERATE

---

However, there is no reason why the UNSC cannot and should not impose obligations to cooperate with the ICC upon *all* state members of the UN, in accordance with Article 25 of the UN Charter. In this respect, its practice in relation to the ICC departs from its practice with regard to the ad hoc tribunals, i.e. the international criminal tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR). In fact, when establishing those tribunals, the council imposed cooperation obligations on all UN member states.<sup>10</sup>

One must recall two things about UNSC referrals. Firstly, their main purpose was to obviate the council's need to create new ad hoc international tribunals in the future.<sup>11</sup> Thus, the ICC was meant to function analogously to those tribunals in situations referred by the council.

Secondly and relatedly, just like the establishment of the ad hoc tribunals, referrals are made by the council in the exercise of its powers to maintain



international peace and security, that is, in accordance with Chapter VII of the UN Charter.<sup>12</sup> Therefore, although the ICC is a treaty-based court, the practice of the council with regard to ad hoc tribunals should be borne in mind in situations arising from a referral, particularly as regards the need to secure the cooperation of all UN member states.

In this regard, it is important to stress that cooperation by all states, rather than just the territorial state, is not purely symbolic but arises out of a practical necessity. This is especially because accused persons might be found on the territory of non-states parties, or may be nationals of such states.

Accordingly, to ensure that these individuals are effectively arrested and transferred to the court, it is essential that obligations to cooperate with the court have a universal scope of application. In sum, once the UNSC decides that action by the ICC is useful by referring a situation to the court, it must also ensure that action by the court is fully effective.

In addition, one must not forget that a referral is made in the exercise of the council's responsibilities to maintain international peace and security. Thus, this burden should not be left to the parties to the Rome Statute alone. Rather, it should be extended to all UN member states, at the very least in the form of an obligation to cooperate with the court.

Another issue that arises at the referral stage relates to the financing of the ICC. As the court is acting as an 'organ for restoring collective peace and security' in situations referred by the UNSC,<sup>13</sup> it is only natural that the UN and all its members should bear the financial burden arising from ICC investigations and prosecutions into those situations. After all, in those instances, it is the UNSC – and the UN, more broadly – that is taking action, although it is using the court as a vehicle for the exercise of its responsibilities.

UN funding of the costs of referrals by the council to the court is precisely what the Rome Statute had foreseen in Article 115(b), and what the UN has committed itself to doing in Article 13 of its Relationship Agreement with the ICC.<sup>14</sup> Nonetheless, in its two referrals to the court to date, the council has stated that:

none of the expenses incurred in connection with the referral including expenses related to investigations or prosecutions in connection with

that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily.<sup>15</sup>

This council decision not only contravenes the statute and the Relationship Agreement between the UN and the court, but may also be inconsistent with Article 17 of the UN Charter, pursuant to which it is the UN General Assembly, not the council, that is competent to decide on all budgetary matters of the organisation. Thus, the UNSC should refrain from exceeding its powers by interfering in the financial arrangements between the ICC and the UN in its referrals.<sup>16</sup> At the same time, the UN General Assembly should comply with its undertaking to contribute to the ICC's budget, at the very least in situations referred by the council.

The UNSC shouldn't exclude people from ICC jurisdiction who come from non-states parties

Still at the referral stage, the council should not seek to limit the jurisdiction of the court over persons within the situation referred to the ICC.<sup>17</sup> When referring the situations in Sudan and Libya,<sup>18</sup> and on two occasions following the entry into force of the statute,<sup>19</sup> the council excluded from the court's jurisdiction nationals, current or former officials or personnel from states that are not parties to the Rome Statute. It is arguable that this practice is inconsistent with the terms of the statute, particularly articles 13(b) and 16, which do not authorise the UNSC to make such types of carve-out when referring or deferring a situation before the ICC.

The last measure that the UNSC should take upon referring a situation to the ICC has to do with the prosecution of sitting heads of state and other state officials who might benefit from personal or functional immunities.

It is common for the ICC to seek the arrest or appearance of senior state officials, in keeping with its mandate to prosecute those most responsible for the commission of international crimes. This is what happened in Darfur, with arrest warrants being sought for Sudan's President Omar al-Bashir and other members of that state's government and military.<sup>20</sup>

Under international law these individuals have immunities from the criminal jurisdiction of other states, including an inviolability that prevents other states from subjecting them to arrest or detention. As a result, there has been a debate as to whether the obligations of Sudan and states parties to cooperate with the ICC extend to their arrest and surrender to the court.<sup>21</sup>

In order to dispel any such doubts, and thereby ensure that these individuals are effectively transferred to the court, the UNSC should in its referrals use explicit language lifting any immunities that might hinder surrender to the ICC or ICC prosecution. It could, for instance, decide that any individual accused of a crime committed in the context of the situation referred is no longer entitled to any immunities that they might otherwise have before the court itself or in any domestic jurisdiction of a state that is cooperating with the court.

### **Investigation and prosecution stage: promotion of cooperation**

The UNSC should continue to play an active role in ensuring cooperation with the ICC even after the Prosecutor has decided to initiate investigations or prosecutions following its referrals. There is sometimes an overlap between situations where the UNSC is exercising its responsibility for maintaining international peace and security, and situations under examination or investigation by the ICC.

Given the complementary role of both institutions in the pursuance of peace and justice, the council should also seek to promote cooperation with the ICC in cases and situations that have arisen not from its own referrals but from the Prosecutor's own investigations and from state referrals.<sup>22</sup>

Several measures can and should be adopted for that purpose at the investigation and/or prosecution stage.

First, the council, in coordination with the ICC, should establish a process by which it considers whether to impose targeted sanctions on individuals who are subject to an arrest warrant or a summons to appear issued by the court.<sup>23</sup> In fact, the council regularly uses its powers under Article 41 of the UN Charter to impose sanctions and take action against individuals or groups that engage in serious violations of international humanitarian law, human rights abuses or otherwise engage in activities

contrary to international peace and security, including, in particular, the commission of international crimes.

For this purpose, it has established a series of sanctions committees, such as the Counter-Terrorism Committee, the Committee on Non-Proliferation of Nuclear and Chemical Weapons, the Committee on the Taliban, ISIL and associated entities, and various geographically limited committees. The latter address Libya, Sudan and other states that are also the object of ICC preliminary examinations or investigations, including Mali, Afghanistan, Côte d'Ivoire, the Central African Republic (CAR) and the Democratic Republic of Congo (DRC).<sup>24</sup>

The ICC should be entitled to make recommendations to existing sanctions committees

The measures that the council may take include travel bans, asset freezes and arms embargoes, which could be particularly helpful in putting pressure on persons accused or summoned by the ICC to voluntarily surrender to or appear before the court, as well as deterring those same individuals and others from committing crimes within the court's jurisdiction.<sup>25</sup>

Sanctions have both practical and symbolic importance. Not only do they seek to deny a person access to resources to carry out unlawful acts, but they also make a normative statement that such individuals, by not cooperating with the court, should lose the privileges they may otherwise enjoy as state leaders or officials or as non-state actors. They also demonstrate to states that such behaviour entails consequences and penalties, which should in turn encourage them to cooperate with the court. Ultimately, if enforced, such measures may have the effect of limiting an individual's ability to evade ICC processes.

However, when using those measures in connection with ICC proceedings, care should be taken to ensure respect for the fundamental rights of the individuals targeted, especially those that arise in the context of criminal investigations and prosecutions, such as the presumption of innocence and the right to a fair trial.

For this purpose, targeted sanctions should only be adopted once an arrest warrant or summons to appear

has been issued by the competent ICC Pre-Trial Chamber, after its having evaluated all the evidence collected during the investigations. This would allow the targeted sanction to follow the same evidentiary threshold that is required for the issuance of an arrest warrant or summons to appear ('reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court').<sup>26</sup>

Moreover, in order to prevent the relevant sanctions from being used or perceived as a form of punishment, they should not automatically follow an arrest warrant, but must only be imposed if necessary to achieve their aim, and not be disproportionate to the rights limited. This careful evaluation of the necessity and proportionality of each individual sanction should also ensure their effective application, i.e. that they only target those who are *not* cooperating with the ICC or attempting to evade its jurisdiction, rather than those who are cooperating with the court or have demonstrated the willingness to do so.

In order to ensure compliance with fundamental human rights, the council has established (and is committed to improving), within those committees, review mechanisms such as ombudspersons and focal points to allow targeted individuals to challenge the relevant measures.<sup>27</sup>

### The mandates of several sanctions committees overlap with ICC situations in Libya, Sudan, the DRC, the CAR, Mali and Afghanistan

For the purposes of implementing those measures, the ICC should be entitled to make recommendations to existing sanctions committees that have been established to deal with a situation that is under investigation by the court. Furthermore, the council could refer back to the court when assessing the necessity and proportionality of the measures, or when receiving an individual challenge or request for review.

As was mentioned earlier, the mandates of several sanctions committees overlap with situations under ICC preliminary examination or investigation in Libya, Sudan, the DRC, the CAR, Mali and Afghanistan. More importantly, although the UNSC has not yet applied targeted sanctions for the specific purpose of ensuring cooperation with the ICC, there are at least two examples of positive interaction between the two.

Firstly, when referring the situation in Libya to the ICC, the council simultaneously adopted sanctions (*in casu*, a travel ban and an asset freeze) that targeted some of the same individuals who were later indicted by the court (i.e., Saif al-Islam Qadhafi and Abdullah al-Senussi).<sup>28</sup>

Secondly, in the situation of Côte d'Ivoire, the council lifted the travel ban earlier imposed on Laurent Gbagbo in order to allow his transfer to The Hague to stand trial at the ICC.<sup>29</sup> In addition to the existing committees, new



SANCTIONS HAVE  
PRACTICAL AND  
SYMBOLIC IMPORTANCE

---

sanctions committees for specific states or regions, or perhaps a general ICC-themed sanctions committee, could be established by the council to foster cooperation with the court.

Another effective measure that the council could adopt for both referred and non-referred situations during the course of an ICC investigation or prosecution is to include within the mandate of UN peacekeeping, peace enforcement or peacebuilding missions operating in ICC situations an obligation to cooperate directly with the court, and to provide support to other relevant bodies acting in cooperation with the court, including the relevant states themselves and other UN or regional organs.<sup>30</sup>

There are already a few examples of successful cooperation between UN peacekeeping forces and the ICC, some of which have led to the arrest of individuals sought by the court and the exchange of crucial information with the Office of the Prosecutor.

Firstly, as regards the situation in the DRC, the council has explicitly authorised its peacekeeping force on the ground, the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC, now MONUSCO), to cooperate fully with the ICC and the DRC to bring to justice those responsible for the commission of international crimes.<sup>31</sup>

The UNSC should mandate peacekeeping operations located in areas where the ICC is investigating or prosecuting, to cooperate with the court

MONUSCO has also concluded a memorandum of understanding with the ICC in which it specifically undertakes to consider requests from the DRC to arrest persons sought by the ICC.<sup>32</sup> These arrangements have led to the successful arrest, transfer and prosecution of Thomas Lubanga, Germain Katanga and Bosco Ntaganda.<sup>33</sup>

Secondly, when authorising the African Union peacekeeping force in Mali in 2012, the UNSC called upon that force to cooperate with the ICC in matters of accountability.<sup>34</sup>

Thirdly, memorandums of understanding have also been concluded between the ICC and three other peacekeeping missions operating in ICC situations: the United Nations Operation in Côte d'Ivoire (UNOCI), the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) and the Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA).<sup>35</sup>

The experience of the ICTY also demonstrates that the arrests of a significant number of indictees were secured by peacekeeping forces operating in the states involved, in particular, the NATO-led Stabilisation Force in Bosnia and Herzegovina (SFOR).<sup>36</sup> These arrests also had the positive effect of prompting many fugitives to surrender to the tribunal voluntarily.<sup>37</sup>



MONUSCO COOPERATES  
FULLY WITH ICC IN DRC



Similarly, in the context of the Special Court for Sierra Leone, the United Nations Mission in Liberia (UNMIL) was instrumental in transferring Charles Taylor to stand trial in Sierra Leone, in accordance with an explicit and specific authorisation within its mandate.<sup>38</sup>

Based on those experiences, the council should include a mandate to cooperate with the ICC in its resolutions establishing or renewing peacekeeping, peace enforcement and peacebuilding operations that operate in areas or states subject to ICC investigations and prosecutions.

In particular, such cooperation should be as wide as possible and include a mandate to arrest and surrender accused persons to the court, as well as to assist in evidence gathering and information sharing. Indeed, as Table 1<sup>39</sup> indicates, there is great overlap between UN peacekeeping missions and political offices (or peacebuilding missions) and situations that are currently being investigated or subject to preliminary examinations by the ICC.

### Cooperation between peace operations and the ICC should include a mandate to arrest and surrender accused persons to the court

It is important to stress that such action would not be inconsistent with the basic principle of neutrality or impartiality of peacekeeping forces. This is because impartiality has been understood as not precluding enforcement of the relevant rules, in particular, accountability for the commission of serious international crimes.

Moreover, a general obligation to cooperate with the ICC, including in executing its arrest warrants, addresses any concerns that the relevant peacekeeping missions are taking sides in the conflict.<sup>40</sup> In the same vein, cooperation in the arrest and transfer of individuals to the ICC is perfectly consistent with their mandate to protect civilians. In fact, the capture of ICC fugitives may not only enhance the security of civilians but also does not necessarily involve offensive use of force to their detriment.

A more general measure that the UNSC could take at the investigation and/or prosecution stage (with respect to both situations referred to the court by the council and other situations under consideration by the court) is to entertain more structured and better informed discussions of matters relating to the ICC. For that purpose, the UNSC should extend the mandate of its existing Informal Working Group on International Tribunals to include consideration of matters relating to the relationship between the council and the ICC.<sup>41</sup>

A similarly broad measure that could fill any remaining gaps in matters of state cooperation is to include in resolutions referring situations to the ICC or to adopt a separate Chapter VII resolution requesting all UN members to implement the necessary domestic legislation enabling arrest and surrender to the ICC.



**MINUSMA**

MINUSMA COOPERATES  
FULLY WITH ICC IN MALI

---

**Table 1: Overlap between ICC preliminary examinations or investigations and UN peacekeeping and peacebuilding missions**

	ICC situations	UN Peacekeeping Missions or UN authorised peace-enforcement mission	UN Peacebuilding Missions (Political Offices)
Under investigation	DRC	MONUSCO (since 2010)	Office of the Special Envoy to the Great Lakes Region (since 2013), UNOCA (since 2010)
	Mali	MINUSMA (since 2013)	UNOWAS (since 2016)
	Sudan, Darfur	UNAMID (since 2007)	Special Envoy for the Sudan and South Sudan (since 2011)
	CAR	CAR, MINURCA (2003), MINURCAT (2011) MINUSCA (since 2014)	CAR, BONUCA (until 2009), UNOCA (since 2010)
	Côte d'Ivoire	UNOCI (until 2017)	UNOWAS (since 2016)
	Libya	NATO-led operation under SC Res 1973	UNSMIL (since 2011)
	Burundi	ONUB (until 2007)	UNOB, BNUB, BINUB & MENUB (until 2015), UNOCA (since 2010), Office of the Special Envoy to the Great Lakes Region (since 2013)
	Uganda		Office of the Special Envoy to the Great Lakes Region (since 2013)
Under preliminary examination	Palestine	UNTSO (since 1948)	UNSCO (since 1994)
	Afghanistan		UNAMA (since 2002)
	Iraq/UK		UNAMI (since 2003)
	Colombia		UN Verification Mission in Colombia (since 2017) and United Nations Mission in Colombia (since 2016)
	Nigeria		UNOWAS (since 2016)
	Guinea		UNOWAS (since 2016)
	Georgia	UNOMIG (until 2009)	
	Myanmar		UN Secretary General's Special Envoy for Myanmar

### Investigation and prosecution stage: responses to non-cooperation

In order to respond to instances of non-cooperation, the UNSC should also put in place more efficient mechanisms to follow up on the situations that it has referred to the court.<sup>42</sup>

Several years have passed since it has referred the situations in Sudan (2005) and Libya (2011) to the ICC, and numerous calls for more active engagement have been made by the ICC Prosecutor, states and other stakeholders. Yet the UNSC remains idle in the face of violations of cooperation obligations incumbent upon

Sudan, Libya and states parties to the Rome Statute.<sup>43</sup> Examples include the failure of several states parties to the statute, such as Malawi, the DRC, South Africa and Jordan, to arrest al-Bashir during his official visits to those countries.<sup>44</sup>

Rather than remaining unresponsive to those violations, the UNSC should use its powers under the UN Charter to respond to findings of states' non-cooperation with the ICC.<sup>45</sup> Consideration of such matters should be routine in cases arising from situations referred to the court by the council, but should also be considered in other cases and situations.

Consideration of those responses could be made in the context of the Informal Working Group on International Tribunals, with its renewed mandate to include matters related to the ICC, or through the creation of new and more official channels of communication between the court and the council.

Appropriate measures to address lack of state cooperation include, in particular, official statements in UNSC resolutions and political or economic sanctions. As happened in the context of the ICTY in relation to membership at the European Union, the council could also adopt or endorse political and economic rewards for states that successfully cooperate with the ICC.<sup>46</sup>

Lastly, where non-cooperation results from or gives rise to concerns regarding international peace and security, the UNSC should remain open to the possibility of using its powers under Article 16 of the Rome Statute to defer an ICC investigation or prosecution.<sup>47</sup>

### **Action by the Assembly of States Parties**

The ASP is already equipped with a legal and administrative ‘toolkit’ to deal with instances of non-cooperation by states parties and non-parties to the Rome Statute.<sup>48</sup> Thus, enhancing the effectiveness of the measures that the ASP can take is a matter of adopting them promptly and more frequently.

Article 87(7) of the Rome Statute provides that, in instances where states parties to the statute fail to comply with the court’s request to cooperate, the latter may refer the issue to the ASP or the UNSC, when it had been the council that had referred the situation to the court.

Similarly, Article 87(5)(b) provides that in cases where non-states parties that have entered into ad hoc arrangements or agreements with the court fail to cooperate with requests pursuant to any such arrangements or agreements, the court can refer the matter to the ASP or the UNSC, as appropriate.

### UNSC could adopt political and economic rewards for states that successfully cooperate with the ICC

More importantly, in giving effect to those provisions, Article 112(2)(f) not only empowers but also imposes on the ASP the obligation to ‘consider pursuant to article 87, paragraphs 5 and 7, any question relating to non-cooperation’. Article 112(2)(g) also requires the ASP to perform, more generally, ‘any other function consistent with [the] Statute or the Rules of Procedure and Evidence’.

Those general provisions have been further specified and complemented by a series of ASP resolutions indicating what political, diplomatic or administrative measures can be adopted in response to instances of non-cooperation.<sup>49</sup>

In particular, in recognising the negative impact of non-cooperation on the fulfilment of the court’s mandate, the ASP adopted the ‘Assembly procedures on non-cooperation’.<sup>50</sup> This resolution foresees two different scenarios and two sets of appropriate responses.



UNSC HASN'T  
ACTED AGAINST NON-  
COOPERATION WITH ICC

The first scenario is where the court has already referred a matter of non-cooperation to the ASP.<sup>51</sup> This requires formal and public responses from the ASP, alongside more informal measures.<sup>52</sup> Formal and public responses include, in particular, sending an open letter by the ASP president reminding the requested state of its cooperation obligations and inviting it to express its views on the matter, as well as holding a public meeting to establish an open dialogue with that state.<sup>53</sup>

The second scenario is where the court is yet to refer the matter to the ASP, but ‘there are reasons to believe that a specific and serious incident of non-cooperation in respect of a request for arrest and surrender of a person (article 89 of the Rome Statute)’ is about to happen.<sup>54</sup>

In this case, action by the ASP is entirely informal and aims to prevent non-cooperation. It includes, in particular, the use of good offices by the ASP president, assisted by four or five ‘focal points’ appointed by the ASP Bureau on the basis of equitable geographical distribution. These are members of the ASP who represent their region and are engaged, together with the president, at high diplomatic and political levels in New York, The Hague, capitals and, where appropriate, other embassies.<sup>55</sup>

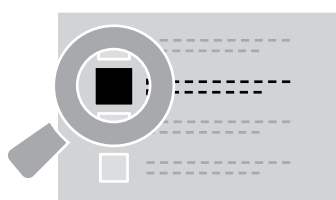
Existing procedures can thus assist the ASP in giving effect to its general duty to follow up on instances of non-cooperation by states parties and non-parties to the statute. However, in order to ensure that they are effective, the ASP must adopt them promptly and routinely in response to any existing or imminent instance of non-cooperation that has been or will likely be the object of a referral by the court.

A review of the UNSC and ASP role in strengthening cooperation with the ICC is needed for the court to deal with the world's most serious crimes

For that purpose, an effective channel of communication should be kept open between the ASP (especially its bureau and its five focal points), the court (particularly its presidency) and the Office of the Prosecutor.

In addition, in cases of existing referrals of non-cooperation, open letters or notifications may be particularly helpful in dissuading states from failing to cooperate with the court. In order to achieve that, they should not simply remind states of their general cooperation obligations contained in the Rome Statute. Crucially, such open letters should also contain a warning about the specific measures that the ASP could adopt in response to the relevant instance of non-cooperation, and the consequences of continued non-compliance.

In order to bolster their deterrent and preventive effect, these open, public letters should be published on the ICC’s website and on social media, as has already been contemplated in relation to warnings about country visits by ICC suspects.<sup>56</sup>



ASP MUST ACT PROMPTLY  
AND ROUTINELY TO  
NON-COOPERATION

Alongside its own procedures, the ASP should also be able to refer instances of non-cooperation to the UNSC. As was mentioned earlier, the power to refer matters of non-cooperation to the UNSC has only been explicitly granted to the court itself, in accordance with Article 87(5) (b) and (7) of the statute. However, there is no reason why the same measure could not be taken by the ASP on the basis of its general power, under Article 112 of the statute, to perform any other function in accordance with the statute or the Rules of Procedure and Evidence.

Such referrals could be made either before, during or after the adoption of the ASP's own formal or informal measures mentioned earlier, as the ASP deems appropriate.

### The ASP should, like the ICC, be able to refer instances of non-cooperation to the UNSC

More importantly, the ASP should be able to refer to the UNSC not only instances of non-cooperation arising in situations that had been referred to the court by the council, in accordance with Article 13(b) of the statute, but also cases and situations arising from other trigger mechanisms, namely *proprio motu* investigations and state party referrals. This is because, as was mentioned earlier, there is a wide range of measures that the UNSC can adopt to address instances of non-cooperation with the court in situations brought by *any* trigger mechanism, including, in particular, targeted sanctions in respect of relevant individuals.

Lastly, in cases where non-cooperation arises from or is compounded by lack of clarity as to the obligations of states under the Rome Statute, as was the case of South Africa in relation to al-Bashir's immunities,<sup>57</sup> the ASP could help clarify the matter by adopting resolutions in the form of 'understandings' or 'interpretative declarations'.

Indeed, as the sole body in which all states parties to the statute are represented, the ASP is competent not only to adopt amendments to the Rome Statute but also to

propose its own interpretations of the statute, as it has done recently in relation to the activation of the crime of aggression.<sup>58</sup> It must be noted that such resolutions are not and cannot be binding on the court. Indeed, as the ASP has itself stressed, any action it takes must be non-judicial and must respect the court's independence.<sup>59</sup>

However, ASP interpretative resolutions can, if adopted with the explicit or implied agreement of *all* parties, qualify as 'subsequent agreement' or 'subsequent practice' within the meaning of Article 31(3)(a) or (b) of the Vienna Convention on the Law of Treaties (VCLT).<sup>60</sup> If that is the case, those resolutions shall be taken into account by the court when interpreting the relevant provisions of the statute, as required by Article 31(3) of the VCLT.<sup>61</sup>

Such interpretative resolutions are especially warranted when, as in the case of South Africa, a state has requested consultations with the court after being asked to cooperate with the latter, in accordance with Article 97 of the statute. In those instances, the existing procedures on consultations, adopted by the ASP in 2017, could benefit from the participation of the ASP, as represented by its president, a member of its bureau, or one of its focal points on non-cooperation.<sup>62</sup>

## Conclusion

The study does not reflect on the numerous cases of effective cooperation between states and the ICC, or the UN and the ICC. Those initiatives must be encouraged to proceed. A review, as emphasised by the recommendations in this report, of the UNSC and ASP's role in strengthening the cooperation regime with the ICC would better assist the ICC to deliver on its mandate. This will take the courageous and decisive action of states and the council. It will also achieve the objective in the preamble to the ICC Statute of enhancing international cooperation to effectively prosecute the most serious crimes of concern to the international community.



## Notes

- 1 G Sluiter, *The surrender of war criminals to the International Criminal Court*, *Loyola of Los Angeles International and Comparative Law Review*, 25, 2003, 605; P Mochochoko, *The experience of the Office of the Prosecutor of the International Criminal Tribunal for Rwanda concerning arrest strategies and lessons learnt for the Office of the Prosecutor of the International Criminal Court*, in C Jalloh, A Marong and H Jallow (eds), *Promoting accountability under international law for gross human rights violations in Africa: essays in honour of Prosecutor Hassan Bubacar Jallow*, Leiden/Boston: Brill Nijhoff, 2015, 72.
- 2 Rome Statute of the International Criminal Court, Article 63(1).
- 3 *Ibid.*, Articles 89–92.
- 4 *Ibid.*, Article 93(1).
- 5 *Ibid.*, Articles 77(2)(b), 93(1)(k) and 109.
- 6 *Ibid.*, Article 13(b).
- 7 United Nations Security Council (UNSC), Resolution 1593 (2005), 31 March 2005, para 2.
- 8 UNSC, Resolution 1970 (2011), 26 February 2011, para 5.
- 9 *Ibid.*
- 10 See, e.g., UNSC, Resolution 827 (1993), 25 May 1993, para 4; UNSC, Resolution 955 (1994), 8 November 1994, para 2. See also UNSC, Records of the 6 849th meeting, 17 October 2012, S/PV.6849, 5, 28; D Kaye et al., *The council and the court: improving Security Council support of the International Criminal Court*, University of California, May 2013, 3, 6, <http://councilandcourt.org/files/2013/05/The-Council-and-the-Court-FINAL.pdf>, accessed 1 November 2018; Chatham House, Meeting summary: the UN Security Council and the International Criminal Court, 8–9, <https://www.chathamhouse.org/publications/papers/view/182963>
- 11 International Law Commission (ILC), Report of the International Law Commission on the work of its forty-sixth session (1994), Topical summary of the discussion held in the Sixth Committee of the General Assembly during its forty-ninth session prepared by the Secretariat, addendum (1995) A/CN.4/464/Add.1, 85; UN General Assembly, Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, (n 35) 27, §120; L Condorelli and S Villalpando, *Referral and deferral by the Security Council*, in A Cassese, P Gaeta and JRWD Jones (eds), *The Rome Statute of the International Criminal Court: a commentary*, Oxford: Oxford University Press, 2002, 628.
- 12 Rome Statute, Article 13(b).
- 13 GP Fletcher and JD Ohlin, *The ICC: two courts in one?*, *Journal of International Criminal Justice*, 4, 2006, 433, 428.
- 14 International Criminal Court (ICC), *Negotiated relationship agreement between the International Criminal Court and the United Nations*, ICC-ASP/3/Res.1, 4 October 2004.
- 15 UNSC, Resolution 1593 (2005), 31 March 2005, para 7; UNSC, Resolution 1970 (2011), 26 February 2011, para 8.
- 16 See ICC Assembly of States Parties (ASP), Resolution ICC-ASP/16/Res.6, *Strengthening the International Criminal Court and the Assembly of States Parties*, 14 December 2017, para 35(b); UNSC, Records of the 6 849th meeting, 17 October 2012, S/PV.6849, 5, 10, 14, 16, 19, 21, 29; D Kaye and K Raustiala, *The council and the court: law and politics in the rise of the International Criminal Court*, *Texas Law Review*, 94, 2016, 713, 735–736; D Kaye et al., *The council and the court: improving Security Council support of the International Criminal Court*, University of California, May 2013, 6–7, <http://councilandcourt.org/files/2013/05/The-Council-and-the-Court-FINAL.pdf>, accessed 1 November 2018; Chatham House, Meeting summary: the UN Security Council and the International Criminal Court', 7, <https://www.chathamhouse.org/publications/papers/view/182963>; *The Council and the Court*, *The Beijing workshop on the United Nations Security Council and the International Criminal Court*, summary of discussions, University of California, 10 March 2014, 11, <http://councilandcourt.org/the-beijing-workshop/>, accessed 1 November 2018.
- 17 D Kaye and K Raustiala, *The council and the court: law and politics in the rise of the International Criminal Court*, *Texas Law Review*, 94, 2016, 736; D Kaye et al., *The council and the court: improving Security Council support of the International Criminal Court*, University of California, May 2013, 6, <http://councilandcourt.org/files/2013/05/The-Council-and-the-Court-FINAL.pdf>, accessed 1 November 2018.
- 18 UNSC, Resolution 1593 (2005), para 6; UNSC, Resolution 1970 (2011), para 6.
- 19 UNSC, Resolution 1422 (2002), 12 July 2002, para 1; UNSC, Resolution 1487 (2003), 12 June 2003, para 1.
- 20 See ICC, *Situation in Darfur, Sudan*, <https://www.icc-cpi.int/darfur>, accessed 1 November 2018.
- 21 See D Akande, *The legal nature of Security Council referrals to the ICC and its impact on al Bashir's immunities*, *Journal of International Criminal Justice*, 7, 2009, 333; Chatham House, Meeting summary: the UN Security Council and the International Criminal Court, 11, <https://www.chathamhouse.org/publications/papers/view/182963>.
- 22 Chatham House, Meeting summary: the UN Security Council and the International Criminal Court, 2, <https://www.chathamhouse.org/publications/papers/view/182963>; UNSC, Records of the 6 849th meeting, 17 October 2012, S/PV.6849
- 23 See ICC ASP, Resolution ICC-ASP/16/Res.6, para. 35(c), 44; ICC ASP, 16 November 2015, Report of the bureau on cooperation, Report on the draft action plan on arrest strategies, submitted by the rapporteur, ICC-ASP/14/26/Add.1, paras 11, 35, 47, 54, 55(a), 60, 71(b), 84, 85(a) (ix); UN General Assembly, Report of the International Criminal Court on its activities in 2014/15, A/70/350, 28 August 2015, paras 95–98; UNSC, Records of the 6 849th meeting, 17 October 2012, S/PV.6849, 23, 28–29; Chatham House, Meeting summary: the UN Security Council and the International Criminal Court', 9–10, <https://www.chathamhouse.org/publications/papers/view/182963>; D Kaye et al., *The council and the court: improving Security Council support of the International Criminal Court*, University of California, May 2013, 5–6, <http://councilandcourt.org/files/2013/05/The-Council-and-the-Court-FINAL.pdf>, accessed 1 November 2018.
- 24 UNSC, *Repertoire of the practice of the Security Council, Sanctions and other committees*, [http://www.un.org/en/sc/repertoire/subsidiary\\_organs/sanctions\\_and\\_other\\_committees.shtml#main2](http://www.un.org/en/sc/repertoire/subsidiary_organs/sanctions_and_other_committees.shtml#main2), accessed 1 November 2018.
- 25 ICC ASP, 16 November 2015, Report of the bureau on cooperation, Report on the draft action plan on arrest strategies, submitted by the rapporteur, ICC-ASP/14/26/Add.1, 16, para 55(a), p. 53, para 31(a); UN General Assembly, Report of the International Criminal Court on its activities in 2014/15, A/70/350, 28 August 2015, para 95.
- 26 Rome Statute, Article 58(1)(a).
- 27 Compendium of the High-level Review of United Nations Sanctions, Letter dated 12 June 2015 from the Permanent Representatives of Australia, Finland, Germany, Greece and Sweden to the United Nations addressed to the Secretary-General, A/69/941–S/2015/432, 12, 30–32.
- 28 See UNSC Resolution 1970 (2011), Annex I, paras 14 and 16.
- 29 UNSC, Records of the 6 849th meeting, 17 October 2012, S/PV.6849, 23; UNSC, Secretary-General hails International Criminal Court as centrepiece of 'new age of accountability', urges enhanced cooperation with Security Council, Press Release, 17 October 2012, <https://www.un.org/press/en/2012/sc10793.doc.htm>, accessed 1 November 2018.
- 30 ICC ASP, Resolution ICC-ASP/16/Res.6, 35(c)–(d); ICC ASP, 16 November 2015, Report of the bureau on cooperation, Report on the draft action plan on arrest strategies, submitted by the rapporteur, ICC-ASP/14/26/Add.1, paras 21–24; ICC-ASP/13/29/Add.1, supra note 23, 2, Recommendation 5, paras 76, 84, 85(a)(ix)(b), 102, 111(b)(iii); UN General Assembly, Report of the International Criminal Court on its activities in 2014/15, A/70/350, 28 August 2015, paras 67–68, 78–90; UNSC, Records of the 6 849th meeting, 17 October 2012, S/PV.6849, 3, 7, 22; Chatham House, Meeting

- summary: the UN Security Council and the International Criminal Court, 10–11, <https://www.chathamhouse.org/publications/papers/view/182963>; D Kaye et al., The council and the court: improving Security Council support of the International Criminal Court, University of California, May 2013, 5, 7–8, <http://councilandcourt.org/files/2013/05/The-Council-and-the-Court-FINAL.pdf>, accessed 1 November 2018.
- 31 UNSC, Resolution 2098 (2013), 28 March 2013, para 12.
- 32 Memorandum of understanding between the United Nations and the International Criminal Court concerning cooperation between the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) and the International Criminal Court (with annexes and exchange of letters), 8 November 2005, <https://treaties.un.org/doc/publication/unts/volume%202363/ii-1292.pdf>, accessed 1 November 2018.
- 33 UNSC, Resolution 2098 (2013), 3; M Mellilo, Cooperation between the UN Peacekeeping Operation and the ICC in the Democratic Republic of the Congo, *Journal of International Criminal Justice*, 11, 2013, 763, 772–773.
- 34 UNSC, Resolution 2085 (2012), 20 December 2012, para. 19
- 35 UN, Best practices manual for United Nations – International Criminal Court cooperation, 12, [http://legal.un.org/ola/media/UN-ICC\\_Cooperation/Best%20Practice%20Guidance%20for%20UN-ICC%20cooperation%20-public.docx.pdf](http://legal.un.org/ola/media/UN-ICC_Cooperation/Best%20Practice%20Guidance%20for%20UN-ICC%20cooperation%20-public.docx.pdf), accessed 1 November 2018.
- 36 H-R Zhou, The enforcement of arrest warrants by international forces: from the ICTY to the ICC, *Journal of International Criminal Justice*, 4, 2006, 202.
- 37 UN International Criminal Tribunal for the former Yugoslavia (ICTY), The fugitives, <http://www.icty.org/en/about/office-of-the-prosecutor/the-fugitives>, accessed 31 October 2018.
- 38 A Ciampi, Legal rules, policy choices and political realities in the functioning of the cooperation regime of the International Criminal Court, in O Bekou and DJ Birett (eds), *Cooperation and the International Criminal Court: perspectives from theory and practice*, Leiden: Brill, 2016, 42.
- 39 Information collected from: UNSC, Repertoire of the practice of the Security Council: Peacekeeping missions, [http://www.un.org/en/sc/repertoire/subsidiary\\_organs/peacekeeping\\_missions.shtml#reg33](http://www.un.org/en/sc/repertoire/subsidiary_organs/peacekeeping_missions.shtml#reg33), accessed 1 November 2018; UNSC, Repertoire of the practice of the Security Council: Political missions and offices, [http://www.un.org/en/sc/repertoire/subsidiary\\_organs/special\\_political\\_complete.shtml#cat5](http://www.un.org/en/sc/repertoire/subsidiary_organs/special_political_complete.shtml#cat5), accessed 1 November 2018; UN Peacekeeping, UNTSO fact sheet, <https://peacekeeping.un.org/en/mission/untso>, accessed 1 November 2018; UN Department of Political Affairs, DPPA around the world, <https://www.un.org/undpa/en/in-the-field/overview>, accessed 1 November 2018.
- 40 ICC-ASP, 16 November 2015, Report of the bureau on cooperation, Report on the draft action plan on arrest strategies, submitted by the rapporteur, /Add.1, para 21.
- 41 UNSC, Records of the 6 849th meeting, 17 October 2012, S/PV.6849, 28; D Kaye and K Raustiala, The council and the court: law and politics in the rise of the International Criminal Court, *Texas Law Review*, 94, 2016, 734.
- 42 ICC-ASP/13/29/Add.1, paras 75, 84; UNSC, Records of the 6 849th meeting, 17 October 2012, S/PV.6849, 7, 23, 28–29; Chatham House, Meeting summary: the UN Security Council and the International Criminal Court, 9, <https://www.chathamhouse.org/publications/papers/view/182963>.
- 43 ICC ASP, Non-cooperation, [https://asp.icc-cpi.int/en\\_menus/asp/non-cooperation/pages/default.aspx](https://asp.icc-cpi.int/en_menus/asp/non-cooperation/pages/default.aspx), accessed 5 January 2019.
- 44 UNSC, Records of the 6 849th meeting, 17 October 2012, S/PV.6849, 16; Chatham House, Meeting summary: the UN Security Council and the International Criminal Court, 9, <https://www.chathamhouse.org/publications/papers/view/182963>.
- 45 UNSC, Records of the 6 849th meeting, 17 October 2012, S/PV.6849, 23.
- 46 Chatham House, Meeting summary: the UN Security Council and the International Criminal Court, 13, <https://www.chathamhouse.org/publications/papers/view/182963>.
- 47 See generally D Akande, M du Plessis and CC Jalloh, Assessing the African Union concerns about Article 16 of the Rome Statute of the International Criminal Court, *African Journal of Legal Studies*, 4, 2011, 5.
- 48 See, generally, ASP, Report of the Bureau on non-cooperation, Addendum, Annex II, Toolkit for the implementation of the informal dimension of the Assembly procedures relating to non-cooperation, ICC-ASP/15/31/Add.1, 9 November 2016, [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP15/ICC-ASP-15-31-Add1-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ICC-ASP-15-31-Add1-ENG.pdf), accessed 5 January 2019.
- 49 See ASP, Non-cooperation, [https://asp.icc-cpi.int/en\\_menus/asp/non-cooperation/pages/default.aspx](https://asp.icc-cpi.int/en_menus/asp/non-cooperation/pages/default.aspx), accessed 5 January 2019.
- 50 ASP, Assembly procedures relating to non-cooperation, ICC-ASP/10/Res.5 as amended by ICC-ASP/11/Res. 8, annex.1.
- 51 *Ibid.*, para 7.
- 52 *Ibid.*, para 10.
- 53 *Ibid.*, para 14.
- 54 *Ibid.*, para 11.
- 55 *Ibid.*, paras 15–16.
- 56 ASP, Report of the Bureau on non-cooperation, Addendum, Annex II, Toolkit for the implementation of the informal dimension of the assembly procedures relating to non-cooperation, ICC-ASP/15/31/Add.1, 9 November 2016, paras 36–40, [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP15/ICC-ASP-15-31-Add1-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ICC-ASP-15-31-Add1-ENG.pdf), accessed 5 January 2019.
- 57 ICC, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the court for the arrest and surrender of Omar Al-Bashir, ICC-02/05-01/09-302, 06 July 2017, paras 30–31.
- 58 ASP, Resolution ICC-ASP/16/Res.5, Activation of the jurisdiction of the Court over the crime of aggression, 14 December 2017.
- 59 ASP, ICC-ASP/10/Res.5 as amended by ICC-ASP/11/Res. 8, annex.1, paras 6, 12, 19.
- 60 D Akande and A Tzanakopoulos, Treaty law and ICC jurisdiction over the crime of aggression, *European Journal of International Law*, 29, 2018, 939, 945–949; ILC, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties (2018), Draft conclusion 11(3); Report of the International Law Commission, seventieth session (ILC report 70th session), UN Doc. A/73/10 (2018), 20.
- 61 *Ibid.*
- 62 See ASP, Understanding with respect to article 97(c) consultations, Resolution ICC-ASP/16/Res.3, Annex, para 3; ASP, Assembly procedures relating to non-cooperation, ICC-ASP/10/Res.5 as amended by ICC-ASP/11/Res. 8, annex.1, para 19.

### About the authors

Prof Dapo Akande is Professor of Public International Law, University of Oxford, where he is also co-director of the Oxford Institute for Ethics, Law and Armed Conflict and Fellow of Exeter College.

Talita de Souza Dias is a DPhil candidate and tutor in Public International Law and International Criminal Law at the University of Oxford.

### About ISS Africa Reports

The Africa Report series analyses human security problems and solutions at the regional and continental level. It also considers the implications and lessons from Africa for global policy. Reports provide insights into African and global policy on conflict trends, conflict prevention, peacebuilding, terrorism, organised crime, peace operations, maritime security, migration, development and governance.

### About the ISS

The Institute for Security Studies (ISS) partners to build knowledge and skills that secure Africa's future. The ISS is an African non-profit with offices in South Africa, Kenya, Ethiopia and Senegal. Using its networks and influence, the ISS provides timely and credible policy research, practical training and technical assistance to governments and civil society.

### Acknowledgements



**Ambasáid na hÉireann**  
**Embassy of Ireland**

This report is funded by the Government of Ireland. The ISS is also grateful for support from the members of the ISS Partnership Forum: the Hanns Seidel Foundation, the European Union and the governments of Canada, Denmark, Finland, Ireland, the Netherlands, Norway, Sweden and the USA.

---

© 2019, Institute for Security Studies

Copyright in the volume as a whole is vested in the Institute for Security Studies and the authors, and no part may be reproduced in whole or in part without the express permission, in writing, of both the author and the publishers.

The opinions expressed do not necessarily reflect those of the ISS, its trustees, members of the Advisory Council or donors. Authors contribute to ISS publications in their personal capacity.

Photo credit: UN Photo/Loey Felipe

---

