



POLICY BRIEF

How the UNSC and ASP can enhance cooperation with the ICC

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 (UNSC) 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 non cooperation by states.

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 sanctions committees relevant to ICC situations
- ▶ 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 the 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’. States provide the ‘arms and legs’ of the ICC. 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 a whole (genocide, crimes against humanity, war crimes and the crime of aggression).

In particular, given that the ICC cannot generally proceed with a trial in the absence of the accused, it needs the cooperation of states to arrest and surrender, or otherwise secure, the presence of accused persons. 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.

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In this context, this policy brief will mostly 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 council action into measures that can be taken at different stages in the relations between the two institutions. These are:

- Measures that could be taken 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, but in order to address instances of non-cooperation by states

This brief is a summary of a forthcoming report that provides further details of the study on cooperation with the ICC and relevant recommendations.

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 efforts to investigate and prosecute those who bear the gravest responsibility for crimes under international law. However, in reviewing the relationship between the council and the ICC, 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 council members (perhaps even a majority), including three permanent members, are not parties to the ICC’s Rome Statute. This means that, from time to time, those states may not consider support for the court to be a priority or even in their national interests.

Nonetheless, even in the relatively short history of the ICC, states, including permanent UNSC members, have not maintained a consistent approach in their relations with the court. This means that even those states that may, at a particular point in time, express a degree of hostility towards the ICC, may later adopt a more cooperative stance. It is therefore essential – notwithstanding the political realities of the day – to develop a set of tools that can be used in the event of a more conducive political environment.

Action by the UN Security Council

Referrals stage

The UNSC’s interaction with the ICC begins when the council refers a situation to the court. At this stage the council should already be taking measures to ensure cooperation with the ICC.

In the two council resolutions on Darfur and Libya that referred these situations to the court, the council only imposed an obligation of cooperation on Sudan and Libya. In relation to other states that are not parties to the Rome Statute, the council simply urged their cooperation, and explicitly acknowledged the lack of any binding obligations in relation to the ICC.

When deciding on ICC referrals, the UNSC can and should impose obligations to cooperate with the ICC upon all UN member states, in accordance with Article 25 of the UN Charter. This was the procedure when the council established the International Criminal Tribunal for the former Yugoslavia and that for Rwanda (the ad hoc tribunals).

The obligation to cooperate with the tribunals was imposed on all UN member states.

The main purpose of council referrals to the ICC is to obviate the need to create new ad hoc tribunals. Thus, the ICC is meant to function analogously to those tribunals in situations of council referrals. Like the establishment of the ad hoc tribunals, UNSC referrals to the ICC are made by exercising the council's powers under Chapter VII of the UN Charter to maintain international peace and security. Council referrals to the ICC should mirror its practice with regard to ad hoc tribunals, particularly the need to secure cooperation by all UN member states.

A related issue is how the ICC's work stemming from UNSC referrals will be financed. As the ICC is acting as an 'organ for restoring collective peace and security' during council referrals, the UN should bear the financial burden arising from the subsequent ICC investigations and prosecutions.

UN funding for UNSC referrals to the ICC is supported by Article 115(b) of the Rome Statute, and the UN's commitment arising from Article 13 of the Relationship Agreement with the ICC. The relationship agreement provides that the UN and ICC may agree on funding to the ICC arising from the costs and expenses of cooperation. Such conditions and funds must be established by a decision of the UN General Assembly.

While still in the referral stage, the council should not seek to limit the jurisdiction of the ICC over persons within the referred situation. When referring the situations in Darfur and Libya, the UNSC excluded from the ICC's jurisdiction any nationals and current or former officials from states that are not parties to the Rome Statute.

This practice is arguably inconsistent with the terms of the Rome Statute, particularly articles 13(b) and 16, which do not authorise the council to make exceptions when referring or deferring a situation before the ICC.

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

The ICC often seeks the arrest or appearance of senior state officials, as it did with the warrants for Sudan's President Omar al-Bashir and other members of Sudan's government and military. However, these individuals

have immunities under international law 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 ICC states parties to cooperate with the ICC extend to the arrest and surrender of these individuals.

To dispel any such doubts and ensure that these individuals are transferred to the ICC, in its referrals the UNSC should adopt explicit language that lifts any immunities that might hinder their surrender to the ICC or ICC prosecution.

Investigation and prosecution stages: promoting cooperation

After a referral to the ICC, the UNSC should continue to play an active role in ensuring cooperation with the court, even during the investigation and prosecution stages. The council should do the same for cases initiated by the ICC Prosecutor, as well as those arising from state referrals.

Together with the ICC, the council should establish a process to consider, under Article 41 of the UN Charter, whether to impose targeted sanctions on individuals who have been issued with an arrest warrant or summons by the ICC.

The UNSC should use its powers under the UN Charter to respond when states don't cooperate with the ICC

The council could also mandate UN peacekeeping, peace enforcement or peacebuilding missions in ICC situation countries to cooperate with the court and support other relevant bodies such as the UN Human Rights Council and its Mechanisms, e.g. the Special Procedures mandates, working with the court. This measure could be applied to situations referred to the ICC by the council as well as other situations under investigation by the court.

As Table 1 indicates, there is great overlap between UN peacekeeping missions, peacebuilding missions and situations that are either subject to preliminary examinations or investigations by the ICC.

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 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)
Under Preliminary Examinations	Uganda		Office of the Special Envoy to the Great Lakes Region (since 2013)
	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 UN 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

Source: <https://www.icc-cpi.int/pages/situations.aspx>; <https://peacekeeping.un.org/en/where-we-operate>; <https://peacekeeping.un.org/en/past-peacekeeping-operations>; <https://www.unmissions.org/>

A more general measure that the council could take at the investigation and prosecution stages is to hold more structured and better-informed discussions of ICC matters. For that purpose, the council should extend the mandate of its Informal Working Group on International Tribunals to include matters relating to the relationship between the council and the ICC.

Investigation and prosecution stages: responding to non-cooperation

The 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. At the same time, the council should put in place more efficient mechanisms to follow up on the situations it has referred to the ICC.

Several years have passed since the council 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 council remains idle in the face of violations of cooperation obligations incumbent upon Sudan, Libya and states parties to the Rome Statute.

Rather than remaining unresponsive, the UNSC should use its powers under the UN Charter to respond when states do not cooperate with the ICC. Consideration of such matters should be routine in cases arising from all situations referred to the ICC. This could be the task of the Informal Working Group on International Tribunals, with a renewed mandate to include ICC-related matters. Alternatively, a new and more official channel of communication could be created between the court and the council.

Measures that could be used when states fail to cooperate with the ICC include official statements in UNSC resolutions and political or economic sanctions.

Action by the Assembly of State 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.¹ Enhancing the effectiveness of this toolkit is a matter of adopting the relevant measures promptly and more frequently.

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

Similarly, Article 87(5)(b) of the statute 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.

More importantly, in giving effect to those provisions, Article 112(2)(f) of the statute 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 complemented with a series of ASP resolutions indicating what political, diplomatic or administrative measures can be adopted in response to instances of non-cooperation.² 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’.³

Therefore, existing procedures can 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. 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. However, in order to achieve that, they should not simply remind states of the 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.

The ASP should be able to refer instances of non-cooperation to the UNSC

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.⁴

Alongside its own procedures, the ASP should also be able to refer instances of non-cooperation to the UNSC. 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.

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 about by any trigger mechanism, including, in particular, targeted sanctions in respect of relevant states.

Lastly, in cases where non-cooperation arises from or is compounded by uncertainty as regards obligations of states that result from the Rome Statute, as was the case of South Africa in relation to al-Bashir's immunities,⁵ 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.⁶

It must be noted that such resolutions are not and cannot be binding on the court. As the ASP has itself stressed, any action it takes must be non-judicial and must respect the court's independence.⁷

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).⁸ 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.⁹

Such interpretative resolutions are especially warranted when, as in the case of South Africa, a state has asked to consult the court after being requested 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.¹⁰

Conclusion

The study does not reflect on the numerous cases of effective cooperation between states and the ICC, and the UN and ICC. Those initiatives must be encouraged to proceed. A review, as emphasised by the recommendations in this brief, of the council's 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 See, generally, Assembly of States Parties (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, accessed 5 January 2019.
- 2 *Ibid.*, note 44.
- 3 ASP, Assembly procedures relating to non-cooperation, ICC-ASP/10/Res.5 as amended by ICC-ASP/11/Res. 8, annex.1
- 4 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, note 48, paras 36–40, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ICC-ASP-15-31-Add1-ENG.pdf, accessed 5 January 2019.
- 5 International Criminal Court (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.
- 6 ASP, Resolution ICC-ASP/16/Res.5, Activation of the Jurisdiction of the court over the crime of aggression, 14 December 2017.
- 7 ASP, Assembly procedures relating to non-cooperation, ICC ASP/10/Res.5 as amended by ICC-ASP/11/Res. 8, note 50, paras. 6, 12, 19.
- 8 Akande D and A Tzanakopoulos, Treaty law and ICC jurisdiction over the crime of aggression, *European Journal of International Law* 29:3, 2018, 939, 945–949; International Law Commission (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.
- 9 *Ibid.*
- 10 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, 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.

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