

From Spectators to Champions

**How Supportive States Can Promote Cooperation
with the International Criminal Court through Multilateral
Bodies**

February 2022

Contents

Introduction: The ICC’s Daunting, Growing Cooperation Challenges	4
Conclusions and Recommendations.....	5
I. Political Support from the ICC Assembly of States Parties.....	11
II. Political Support from UN Multilateral Bodies	15
III. Other Forms of Support: Peacekeeping Missions and Sanctions	21

Acronyms

CAR	Central African Republic
CDI	Côte d’Ivoire
EU	European Union
DRC	Democratic Republic of Congo
EUFOR	European Union Force
HRC	Human Rights Council
ICC	International Criminal Court
NATO	North Atlantic Treaty Organization
MINUSMA	United Nations Multidimensional Integrated Stabilization Mission in Mali
MINUSCA	United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic
MINURCAT	United Nations Mission in the Central African Republic and Chad
MONUC	United Nations Organization Mission in the Democratic Republic of the Congo
MONUSCO	United Nations Organization Stabilization Mission in the Democratic Republic of the Congo
OTP	Office of the Prosecutor



UN	United Nations
UNAMID	United Nations–African Union Hybrid Operation in Darfur
UNOCI	United Nations Operation in Côte d'Ivoire
UNSC	United Nations Security Council

Introduction: The ICC's Daunting, Growing Cooperation Challenges

The International Criminal Court (ICC) has achieved significant successes in bringing defendants into custody. In the Democratic Republic of the Congo (DRC), the Central African Republic (CAR), and Mali, for example, the court has seen quick results from requested states willing to execute sealed arrest warrants. These facts should not, however, understate the ICC's challenges in obtaining cooperation, as well as its prospects for doing so in the future. Beyond the issue of arrests, prosecution staff have also reported a "serious lack of cooperation and inordinate delays" from states in response to requests for information.¹

Most perilously for the ICC's future, the kind of politically challenging situations in which the court's record of obtaining cooperation has been weakest seems likely to dominate its upcoming docket.² As was the case in Darfur, Libya, and Kenya, many of the governments and other actors most relevant to the ICC's newest investigations are openly or quietly hostile to the court and lack a legal obligation to cooperate with it. These include a range of situation-country governments, key neighbors or allies, and non-state groups, spanning the Georgia, Burundi, Myanmar/Bangladesh, Afghanistan, Palestine, and the Philippines situations, as well as the potential investigations in Ukraine and Nigeria. Sudan's failure to deliver on tentative promises of cooperation prior to the October 2021 coup shows that even a rare transition from a hostile government to a friendlier one may not quickly lead to arrests and transfers.

This briefing paper offers recommendations as to how states that are supportive of the ICC's work, non-governmental advocates, and other actors could leverage support from various multilateral bodies. For each state being asked to arrest the ICC's defendants (requested state), there may not be a partner that has strong political leverage over that state and will insist that it cooperate with the court. Without the advantage of direct bilateral leverage, states supportive of the ICC (third states) must find ways of working together to apply scrutiny and constructive pressure to the requested state, including through multilateral bodies. The roles that third states play in the context of multilateral bodies are changeable. A third state that has been an active champion for the ICC's work in one situation may be passive in another and might even refuse to cooperate if it became a requested state in still another.

This briefing paper focuses on what states and advocates can do to help narrow the gap in political will, by increasing the degree of support offered in the ICC's

pursuit of cooperation. It draws recommendations based on an analysis of patterns in how supportive third states have used or not used multilateral institutions throughout the lifespan of the ICC to help it obtain cooperation from reluctant governments in relation to its investigations.

The paper focuses primarily on cooperation for the purpose of arrest. However, most of the analysis and many recommendations can contribute to increased cooperation on other matters, including facilitating access to witnesses and evidence, cooperation with the defense, and asset tracing. The expressions of political support that this paper encourages can also help maintain a level of sustained backing and interest in the court that, in turn, can help shield the ICC and states parties from political attacks.

Main Findings and Recommendations

With many difficult states to be persuaded, the ICC faces a challenge. States acting through multilateral bodies have offered their support inconsistently from one ICC situation to another. Consistent and active political support from these bodies would be ideal, but in practice, supportive states and advocates are likely to have to rally a supportive coalition each time a new ICC investigation (or other accountability effort) emerges, likely drawing on different supporters in different situations.

Political support from the ICC Assembly of States Parties

Main Findings

More than any other multilateral body, the Assembly of States Parties (Assembly) is responsible for securing state cooperation with the ICC's investigations, though it has made relatively limited use of its admittedly constrained powers. The Assembly has established formal and informal procedures for responding to breakdowns in a state's cooperation, but there is little public reporting about the diplomatic outreach that the Assembly's focal points have carried out under the relevant procedures. In its resolutions, the Assembly nearly always avoids mentioning specific investigations or calling for cooperation from specific states, even those the court has referred to the Assembly for non-cooperation. Long litigation preceding such referrals has blunted their impact, as has the limited

reaction of states and the Assembly to the referrals. This has fed a vicious cycle in which ICC officials have been reluctant to pursue or allow referrals in the first place. Certain changes to the Assembly's and the court's practices—aimed at anticipating failures of cooperation and treating them with urgency when they occur—could improve its effectiveness.

Recommendations

The Assembly should expect noncooperation and prepare for it in each situation. The Assembly should express its support for new investigations when they are opened. The Assembly's Bureau should appoint one or two states as focal points specifically responsible for encouraging cooperation in *each* situation—rather than (or in addition to) having a focal point cover all acts of non-cooperation in its respective region across all investigations.

The Assembly should be responsive to signals of noncooperation and actively participate in the ensuing diplomacy. When noncooperation appears to be occurring, Assembly members should not wait for referral proceedings to be initiated or completed before activating the body's informal noncooperation procedures.

The Assembly should speak clearly about noncooperating states. When judges do refer a state to the Assembly, the latter should consistently call on the state by name to cooperate. To ensure the Assembly can send clear messages about non-cooperation by a state, states parties should be willing to take votes, rather than acting only by consensus. While consensus presents the advantage of rallying all states parties behind a decision, it is difficult to obtain and has often blocked the Assembly from adopting positions.

Individual Assembly members should support cooperation diplomacy. Individual states, too, should show responsiveness to referrals and other signs of noncooperation in their bilateral diplomacy and public statements.

Through voluntary funding or the program budget, the Assembly should fund initiatives that can help overcome requested-state resistance. These include a rewards program for information about the whereabouts of fugitives and a fully functioning Office of the Prosecutor (OTP) tracking team.

ICC judges should expedite the process for noncooperation referrals. The judges should establish in their *Chambers Practice Manual* a reasonably brief time limit for answering an OTP request for a referral.³ They should generally refrain from rejecting such requests based on their own assessment of a referral's

likely political effects. For its part, OTP should submit such requests within a reasonable period of time after the alleged noncooperation becomes apparent.

The ICC prosecutor should find ways of publicly conveying his or her assessment of noncooperation. The OTP should periodically and publicly report on the cooperation of key states in all investigations (see Recommendation 11).

New officials should meet and discuss expectations. Given that it is still relatively early in their respective terms of office, the new prosecutor and the new Assembly President and Bureau members should discuss what kind of diplomatic support from the Assembly would be helpful and realistic.

Political support from United Nations (UN) multilateral bodies

Main Findings

The Security Council and Human Rights Council (HRC) have offered rhetorical and sometimes more tangible support to an assortment of ICC investigations, making dozens of statements noting the ICC's role or work in a country; calling for states to cooperate with the ICC prosecutor or praising them for doing so; and even instructing an investigative mechanism on Myanmar to cooperate with the court. The Security Council's expressions of support have focused mostly on the less-controversial ICC investigations that came at the request of a cooperative host government. The HRC, on the other hand, has expressed support for the ICC in a different set of situations, including several where key governments have been hostile to the court's role (Burundi, Myanmar, Palestine). A handful of ICC investigations have received no acknowledgment or expressions of support whatsoever from any UN bodies (Afghanistan, Georgia, Kenya). The UN General Assembly adopts an annual resolution focused on cross-cutting ICC issues but almost never speaks about the ICC's actual investigations.

Mere statements or calls for cooperation may not by themselves be a powerful tool. But as part of a broader effort to create a political context in which a requested state knows its actions will be scrutinized, and in which third states are prompted to take a position, pursuing expressions of multilateral support might be worthwhile.

Recommendations

When a new ICC investigation emerges, supportive states and advocates should cultivate support from key governments within UN bodies. Working with victims and civil society constituencies, these actors should press key third states to actively support accountability in the situation country early on, or even in the run-up to, a new ICC investigation. This includes making the case in Security Council debates that accountability is vital to lasting peace and security. Key states include neighbors and regional leaders, the Security Council penholder and permanent members, members of the relevant HRC regional bloc, and ICC states parties on these bodies. Because a state's support for the ICC can be perishable, this kind of advocacy may be valuable even in situations where key states already appear to be cooperative.

Supportive states should put UN bodies and their members on record expressing that support. Supportive members on these bodies should propose language including calls for all states, relevant peacekeeping missions, and other investigative mechanisms to cooperate with the court. If the body has not been focusing on the relevant country, supportive members should consider taking steps to change that (e.g., by seeking a briefing on it under the Security Council's "any other business" rubric, or proposing a statement or resolution on the topic).

Across all investigations, the ICC prosecutor should spur scrutiny of state cooperation and discourage unearned praise through public reporting. To provide these bodies with a more objective basis for assessing state cooperation, the ICC prosecutor should periodically report on the cooperation of key states in all investigations, not just the two Security Council referrals. The prosecutor could do so through the ICC's annual report to the UN General Assembly, which typically contains commentary on state cooperation in some situations, or in other public statements. Supportive Security Council members could consider seeking written updates from the prosecutor in particular situations.

Members of these bodies should press them to be responsive to signals of non-cooperation. When noncooperation is occurring, supportive states should not wait for a referral from the court to press these bodies to build on any previous expressions of support for the court by calling for the requested state to cooperate. When facing persistent noncooperation, supportive states should reinforce these bodies' efforts with their own bilateral pressure, especially when the bodies have effectively become paralyzed by disagreements among their members.

Other forms of support: peace-keeping missions and sanctions

Main Findings

Some ICC investigations have emerged from situations of conflict in which the international community has provided peacekeeping forces. Those forces—contributed by third states and often operating under mandates given by the UN Security Council—have sometimes had the authority to help requested states arrest or transfer an ICC fugitive, or to make such an arrest themselves. No such independent arrests have taken place, but in situations where host-country authorities are unable or reluctant to make arrests, supportive states and advocates should work to preserve or build political support for assistance or action by peacekeepers. The Security Council has shown no signs it is likely to use its coercive sanctions powers to promote a requested state’s cooperation.

Recommendations

Where UN missions are already present in ICC situation countries, supportive states should emphasize the importance they attach to apprehending fugitives in their consultations with mission leadership. These officials will make decisions on the ground and decide how to prioritize the issue in practice.

In future ICC situations, supportive states and other advocates should emphasize the linkage between justice and peace and security. These actors should make the case—to local parties, mediators, Security Council members, regional leaders, troop contributors, and UN officials—that cooperation with the ICC and the apprehension of its fugitives are linked to and supportive of the prospects for peace and stability.

Security Council members should support including or retaining arrest mandates in UN peacekeeping mandates for missions in ICC situation countries. The mandate should come early in an ICC investigation, since the presence of supportive peacekeepers and the host government’s support for the ICC may diminish over time. When politically possible, supportive states should propose that the mandate provide the flexibility to conduct arrests without the host government’s specific request and emphasize the contribution of justice to other goals.

Supportive states should also encourage the parties to peace talks in ICC situation countries to include cooperation with relevant justice mechanisms in the final peace agreement. Doing so, and requesting that peacekeepers aid in cooperation, would provide the strongest possible political footing for later assistance from a UN mission with arrests. It could also potentially provide a basis for the Security Council to use its sanctions powers to spur cooperation with the ICC as part of an effort to promote peace agreement implementation.

I. Political Support from the ICC Assembly of States Parties

As the ICC’s legislative and oversight body, the Assembly of States Parties is an essential forum in which third states should work to help secure state cooperation with the court. States parties have accepted a legal obligation to support and cooperate with the ICC. In practice, though, the Assembly has only limited formal powers to persuade requested states to cooperate, and it has made relatively limited use of those powers.

In addition to its member states, the Assembly has an elected president, who can conduct diplomacy on the Assembly’s behalf. The President chairs a Bureau of 18 member states that assists and prepares the Assembly’s decisions and can also carry out diplomacy. The Assembly has also appointed states parties to serve as focal points for noncooperation issues occurring in their respective geographic regions. In addition, the Assembly has had a facilitation on cooperation since 2007. The Assembly annually adopts a resolution focused on cooperation issues, as well as a general “omnibus” resolution that touches on cooperation among other issues facing the ICC.

The Assembly has relied primarily on the often low-profile diplomacy of its appointed presidents to encourage requested states to cooperate, and only recently began to comment in its own name on specific states that are not cooperating. The decade-long political backlash by some of the ICC’s own members against the court’s prosecutions in Sudan and Kenya—and the desire to manage that backlash—have weighed heavily on the Assembly’s and the court’s efforts to promote cooperation. In turn, ICC officials have increasingly concluded that the Assembly will do little in response to the court’s signals about noncooperation, and have thus often refrained from taking or allowing one of the few measures available to them (i.e., formally referring a state to the Assembly).

The Assembly’s scrutiny or disapproval may not by itself change the calculus of a requested state considering whether to cooperate, but certain changes to the body’s practices and those of the court could improve the Assembly’s effectiveness.

The Assembly’s statements and diplomatic outreach can have an effect on requested states. While the Assembly lacks the powers and potential political clout of a body like the UN Security Council, Assembly statements and actions are nonetheless worth encouraging. Those actions may contribute to the overall

political context in which a requested state decides whether to cooperate with the court, and they may help spur or provide a basis for advocacy by third states and other partners. Even if the Assembly's interventions have only a limited effect on a requested state's decisions, its silence or inaction may suggest to that state that there are no consequences for noncooperation. Inaction also signals to ICC officials that going to the Assembly is not an effective means of enlisting the help of third states, effectively taking a tool out of the already limited toolkit.

The Assembly has an infrastructure for promoting cooperation, though its efforts to encourage cooperation with the court have not always been successful. As a general matter, the Assembly's standing recommendations on cooperation have since 2007 cautiously acknowledged the need for states to assist and apply pressure on their peers.⁴ In that vein, the Assembly in 2013 launched an initiative focused on generating strategies to secure the arrest of ICC fugitives and drawing lessons from other tribunals. The Assembly's rapporteur developed an action plan on arrest strategies that recommended aid-conditionality policies and other steps aimed at securing cooperation from requested states.⁵ Difficulties in the relationship between the court and several state parties in that period made it impossible to reach consensus behind those recommendations. Informed by this experience, when the Assembly's noncooperation focal points in 2016 developed a "toolkit" for states to promote cooperation under certain circumstances,⁶ they simply shared it with states for their use, rather than attempting to have the Assembly formally adopt it.

The ICC and the Assembly have often focused on other important forms of cooperation. The court has an extensive program of regionally focused workshops, retreats, and seminars that engage frequently requested situation countries on cooperation issues, in particular in relation to voluntary agreements (e.g., for witness relocation).

The Assembly has also adopted a position generally discouraging members from having contacts with individuals who face ICC arrest warrants.⁷ These efforts are important, but the problems they seek to surmount are different from persuading a recalcitrant government to arrest its own officials or otherwise act against its political interests.

The ICC has formally referred many noncooperating states to the Assembly for its action, but low expectations about impact and concerns about political backlash have increasingly stopped the court from doing so. A formal judicial referral is the court's clearest signal of concern regarding a requested state's refusal to cooperate. The court's judges have referred requested states for non-

cooperation on 15 different occasions,⁸ acting either at the ICC prosecutor's request or on their own initiative.⁹ Nearly all these referrals related to failure to arrest Sudanese officials in the context of the Darfur investigation, though one concerned Libya's failure to arrest a fugitive and another Kenya's failure to cooperate with investigative requests.¹⁰

The OTP has not always responded to noncooperation by seeking a judicial referral.¹¹ For example, it has seldom sought to refer governments that were *unable* to reach an ICC fugitive in remote parts of their territory.¹²

The ICC's judges, too, have refrained from initiating or allowing referrals in some instances. While judges on their own initiative referred several ICC states that failed to arrest President Bashir in the years shortly after his 2009 arrest warrant,¹³ they sometimes held back in later years as the anti-ICC backlash among African states parties mounted.¹⁴ On three occasions since 2014, ICC judges went still further and rejected an OTP request for a referral.¹⁵ One of those rulings cited the inaction of states in response to past referrals as a rationale for the rejection.¹⁶

While exercising discretion is reasonable in certain contexts, the judges' increasingly close and skeptical management of the referral process has arguably had harmful effects, causing delay and creating restrictive precedents for *future* referrals.

To a significant extent, the referral has become unusable save when the prosecutor's and the judges' own *diplomatic* assessments of its likely impact align. As the court accordingly makes less use of the referral process, outside advocates and even states often lack clear indications of whether noncooperation is occurring in a situation and, if so, what strategy is in place to address it.

The Assembly's reactions to noncooperation referrals have been modest, largely delegated to its President and focal points, and difficult to assess. A referral from the ICC may by itself impose some stigma or pressure on a requested state, but the main reason why referrals are worth pursuing is to encourage reactions by other states. Because the Rome Statute provides the Assembly with no formal powers or penalties to help seek a state's cooperation, whether in response to a referral or otherwise, the Assembly's repertoire is primarily diplomatic and rhetorical.

The Assembly has said almost nothing in its own voice—that is, in its resolutions and other statements—to encourage referred states to cooperate.¹⁷ In its annual resolutions, the Assembly only began in 2016 to even acknowledge by name which states had been referred to it in the previous year,¹⁸ and only once (in 2020,

in response to the transition in Sudan) called on such a state to cooperate with the court.¹⁹ The Assembly also generally has not acknowledged or offered expressions of support for newly opened investigations, as other multilateral bodies have sometimes done. The Assembly's 2020 call for Sudan to cooperate suggests that it *could* speak out more in its own voice, though its habit of not naming names is well established. If it were to try, the Assembly's practice of negotiating and adopting resolutions only by consensus—another practice that is discretionary but deeply established—could allow a noncooperating member state or its proxy to easily block critical comments.²⁰

More typically, the Assembly has deferred to its elected President and the member states serving as focal points for their regions.²¹ Under the non-cooperation procedures the Assembly first adopted in 2011, its President has a standing mandate to engage with referred states.²² The President followed up with several governments that had allowed Bashir to freely visit in the years following his arrest warrant, for example, but this kind of outreach subsequently became more opaque or diminished after 2014. As tensions with African states grew and the fear that ICC members would quit the Rome Statute became as great a concern as their noncooperation, a new Assembly President sought to manage these issues quietly.²³ Such efforts may, of course, have continued playing out behind the scenes—but the Assembly stopped publicly reporting on the President's noncooperation outreach in 2015,²⁴ and the minutes of the Assembly's Bureau do not reflect any discussion of the referrals the court made from early 2015 on.²⁵

The Assembly and its President can also respond to noncooperation *in the absence of a referral*.²⁶ They took unprompted action on many occasions in connection with visits by President Bashir to states parties, though seldom if at all in other contexts. In 2013, for example, the Assembly made extraordinary concessions to the Kenyan government just as the prosecutor was asking ICC judges to refer it for noncooperation.²⁷ Similarly, after South Africa refused to arrest Bashir on its territory in 2015, the Assembly created a process to review South Africa's objections to how the court's judges had engaged with it in seeking Bashir's arrest.

Some of the Assembly's budgetary decisions pertaining to fugitive tracking also bear on efforts to seek cooperation from requested states. The specifics of intelligence and tracking efforts to locate an ICC fugitive, whether by states or the court, are beyond the scope of this paper—but having credible information about a fugitive's whereabouts can be essential to pressuring a requested state to act, or

enlisting third states to do the same. Resource constraints have reportedly hindered the effective functioning of the ICC prosecutor's fugitive tracking team.²⁸ The prosecutor also lacks funds to reward informants who provide information on the whereabouts of fugitives. The ICC's expert review encouraged the Assembly to establish and fund a rewards program.²⁹

II. Political Support from UN Multilateral Bodies

Unlike the ICC Assembly of States Parties, multilateral bodies in the United Nations system generally lack an institutional role in most ICC investigations. Many of the third states in those bodies' membership have not accepted the court's jurisdiction, and pursuing criminal accountability for atrocity crimes may feature prominently or not at all in their individual or collective agendas for a given country. Nonetheless, the UN Security Council or the HRC have, to varying degrees, shown interest in the success of nine specific ICC investigations, sometimes pressing requested states for cooperation with the court and offering more tangible forms of assistance as well. This support has not been consistent or motivated by an overarching or principled support for the ICC, but it nonetheless represents a political asset that the court and states parties should cultivate.

Even the legally binding decisions of the Security Council are no panacea for obtaining cooperation from a recalcitrant state, but expressions of multilateral support are worth pursuing as part of a broader effort. Which institutions can practically be brought to bear in a given situation has depended on the support or hostility of a body's members and the situation country's position on the ICC. The Security Council has greater political clout and unique powers it can deploy in support of accountability, while the weaker HRC faces fewer (or at least different) political constraints. With one recent exception, the UN General Assembly has generally not commented on specific ICC investigations.

Supportive states and other advocates should pursue expressions of multilateral support at an early stage in each ICC situation, pressing key states on each of these bodies (including neighbors, regional leaders, and supportive ICC states parties) to support accountability in the situation at hand and put the body itself on record calling for states to cooperate with the court. The practice of regional multilateral bodies is beyond the scope of this paper, but their political support is worth pursuing as well.

Multilateral statements can help apply modest pressure on states facing requests to cooperate, as well as help shape the policy of third states. The Security Council's calls for cooperation with the *ad hoc* tribunals were frequent and extensive, but those statements alone were typically not enough to secure specific breakthroughs in cooperation by resistant governments. For the ICC, too, it is difficult to say with confidence that messages from UN bodies have had a decisive effect in prompting specific states to improve their cooperation with the court. Nonetheless, such statements may help shape the political context in which a requested government decides to what degree it will cooperate with the ICC.

The HRC's calls on Burundi to cooperate with the court's investigation, for example, hardly guarantee that it will do so against its political interests.³⁰ But such messages—or even expressions of support for an ICC investigation—can make a government aware that its posture toward the court may face at least passing scrutiny and critical comment from peers in a major forum. Additionally, for a third state in a multilateral body, having to vote on statements that touch on accountability in a named ICC situation country may be the only action-forcing event that would ever prompt it to consider and take a position on the matter. Having done so, those states would have a stronger, multilaterally rooted basis for urging cooperation when an ICC investigation reaches pivotal moments, such as when the court unseals a warrant that a requested state has refused to execute.

The degree of multilateral support has varied dramatically from one ICC investigation to another. Faced with different ICC investigations, the posture of UN bodies has ranged from silence to merely taking note of the court's jurisdiction in a situation to calling for cooperation to, most concretely, authorizing peacekeepers to help arrest the court's fugitives and facilitating the provision of evidence to the court's investigators.³¹ In particular:

Four ICC investigations (Democratic Republic of the Congo, Mali, Côte d'Ivoire [until 2017], and the second Central African Republic investigation [CAR II]) have received concrete forms of support from the Security Council and varying expressions of political support from the HRC.

In three other situations (Uganda, Darfur, and Libya), the ICC has received much more limited and shorter-lived expressions of Security Council support, with little to no support from the HRC.

Three other investigations (Burundi, Myanmar, and Palestine) have, conversely, received strong expressions of support from the HRC and little or none from the Security Council.

The ICC's remaining five investigations (Kenya, Georgia, Afghanistan, the first Central African Republic investigation [CAR I], and the Philippines) have had no expressions of support from any of these bodies.

The UN General Assembly has almost never discussed specific ICC investigations. As the UN body that receives the ICC's annual report and adopts an annual resolution about the court, the General Assembly is unique in its thematic focus on the ICC. To date, however, the Assembly has done little to encourage specific requested states to cooperate with the ICC.³² The Assembly's annual ICC resolution has only once even referred to any of the specific ICC investigations under way.³³ Moreover, ICC opponents have blocked any substantive updates to the text of that resolution for several years.

In part because it is not constrained by any member's veto, the General Assembly has adopted multiple resolutions focused on Syria and North Korea that hinted in various ways at a future role for the ICC in those countries.³⁴ Few of its country-specific resolutions, however, have pertained to situations in which the ICC was actually investigating.³⁵ The Assembly has not called for any specific government's cooperation with the ICC since 2005, nor had it even taken note of a specific ICC investigation in that time prior to its December 2020 resolution on Myanmar. It is unclear whether the Myanmar resolution, which noted the new ICC investigation, suggests future possibilities for advocacy by the General Assembly.³⁶

The UN Security Council, conversely, has explicitly called for or tried to facilitate state cooperation with several ICC investigations, though almost exclusively in cases where both the situation country and the Security Council's permanent members supported the court's intervention. As of October 2021, the Security Council had adopted 104 resolutions and other statements that made a supportive or factual reference to the ICC in a country-specific context. These covered eight different situations, in all of which the court either was already investigating or would go on to do so.³⁷ Those resolutions ranged from merely taking note of the ICC's jurisdiction in the country to authorizing UN peacekeepers to help arrest the court's fugitives there. In seven of those eight situations, the council has urged the situation country to cooperate with the ICC or welcomed cooperation it deemed to be forthcoming, and on rare occasions it has urged "all states," not just the situation country, to cooperate with the court.³⁸

The Security Council has more often signaled its support for an ICC investigation when the government of the situation country welcomed the investigation. Of the council's 104 statements, about three-quarters concerned situations where the

government, through self-referral or otherwise, had sought out the court's intervention.³⁹ The Security Council has expressed support for these investigations far more often and more persistently than the two it initiated through its own referral (Darfur and Libya), which it still meets to discuss twice a year but for which it has ceased to provide even rhetorical backing. This points to a major limitation in the council's supportive potential—it weighs in primarily on situations where the relevant governments are more likely to already be cooperative.

Other factors appear to have shaped the Security Council's posture toward an ICC investigation. One is the lifespan of the underlying crisis. Nearly all of the ICC's investigations to date emerged from crises that at least briefly attracted the council's engagement.⁴⁰

Another factor is the perceived alignment between accountability and other elements of the Security Council's peace-and-security agenda. Some of the council's expressions of support for the ICC coincided with a change in political circumstances that may have enhanced that perception. The council first took note of the ICC's Uganda investigation in 2008, for example, after the collapse of peace talks with the Lord's Resistance Army made it less diplomatically fraught to highlight the ICC's arrest warrants against the militia's leaders.⁴¹ Similarly, the council began to call explicitly for Bosco Ntaganda's (a Congolese militia leader turned army official) arrest not after the 2008 unsealing of the ICC arrest warrant against him, but once his forces' renewed abuses and his 2012 decision to mutiny against the Congolese government prompted a regional crisis.⁴²

One factor that has had little bearing on the Security Council's posture is the ICC's formal referral of states for noncooperation. The Council did acknowledge the ICC's December 2014 referral of the Libyan government in a broader resolution that called for Libya to cooperate with the arrest warrant against Saif Al-Islam Gaddafi, one of the indictees in the Libya investigation.⁴³ For every other referral, however, it has made no reply and taken no action, other than generically acknowledging receipt of all the court's referrals to date in December 2015.⁴⁴ The ICC prosecutor has not sought to bring instances of noncooperation outside these two situations to the Security Council's attention, despite the council's engagement on other investigations.

The UN HRC has called for cooperation with or otherwise supported a much more eclectic set of ICC investigations, including some that have attracted hostility from key states. As of October 2021, the HRC and its predecessor body had adopted 121 statements making supportive or descriptive reference to the

ICC's actual or potential role in a specific country, spanning seven ICC investigations as well as 10 additional countries, including some on which the court had no jurisdiction at the time.⁴⁵ A large majority of these statements concerned circumstances where the situation government had not, or not yet, sought out the ICC's intervention.⁴⁶ Especially since 2018, the HRC has weighed in on situations where key governments were *opposed* to an active or potentially imminent ICC investigation. These have included statements supporting the relatively new ICC investigations in Burundi and Myanmar/Bangladesh and then preliminary examinations in Palestine and Venezuela,⁴⁷ and directing the HRC's Myanmar-focused investigative mechanism to "cooperate closely" with the ICC.⁴⁸

While the HRC has specifically called on states to cooperate with some ICC investigations that the Security Council has ignored, it has its own blind spots. The HRC often takes a laudatory tone toward governments in situations arising under its agenda item for technical cooperation and assistance ("Item 10"), rather than its more critical agenda item for engagement on crisis situations ("Item 4").⁴⁹ When discussing the ICC in such situations, it has sometimes gone even further than the Security Council in praising states for cooperating with the ICC when they were not doing so.⁵⁰ However, the HRC has also remained silent about some ICC investigations (including those in Darfur, Kenya, Georgia, Afghanistan, and the Philippines) that have lacked the support or attention of *any* multilateral body.

As in the Security Council, the passage of time and the improvement of current conditions have sometimes caused a country to drop off the HRC's agenda long before an ICC investigation that the body once supported had ended.⁵¹ Also, while there is not necessarily a tension between criminal accountability and the HRC's broader human rights mandate, the body has sometimes focused more on supporting the investigative mechanisms that *it* has created than on the work of the independent ICC.⁵²

Summary Description of UN Multilateral Commentary on ICC Investigations

- **DRC:** Extensive UNSC comments, calls for cooperation, and support for arrests from 2009 to present; occasional HRC comment from 2015 to 2018.
- **Uganda:** Initial UNSC references in 2008 followed by repeated calls for cooperation from 2011 to 2015.
- **Darfur:** After the UNSC's referral in 2005, no comment from any of the three bodies, save two UNSC calls for cooperation in 2008.
- **CAR I:** No comment from any of the three bodies.
- **Kenya:** No comment from any of the three bodies.
- **Libya:** After the UNSC's referral in 2011, repeated comments and calls to cooperate until 2015; various HRC comments and praise for cooperation from 2013 to 2019.
- **Côte d'Ivoire:** Extensive UNSC comments, calls for cooperation, and support for arrests from 2011 to 2016; recurring HRC comments and praise for cooperation from 2013 to 2016.
- **Mali:** Extensive UNSC calls for cooperation and support for arrests from 2012 to present; various HRC remarks about the court and calls for cooperation from 2013 to present.
- **CAR II:** Extensive UNSC comments, calls for cooperation, and support for arrests from 2013 to present; recurring HRC comments as well from 2014 to present.
- **Georgia:** No comment from any of the three bodies.
- **Burundi:** Brief UNSC references to the ICC's jurisdiction from 2013 until 2016, all prior to an investigation; various HRC references and calls for cooperation from 2016 to present.
- **Myanmar/Bangladesh:** Repeated HRC comments, including various calls for the HRC's investigative mechanism and for Myanmar itself to cooperate, from 2018 to present; brief UNGA comment in 2020 and 2021.
- **Afghanistan:** No comment from any of the three bodies.
- **Palestine (investigation opened last year):** Extensive HRC comments and calls for cooperation from 2015 to present.
- **Philippines (investigation opened last year):** No comment from any of the three bodies.
- **Venezuela (investigation opened last year):** Brief HRC comments and calls for cooperation in 2019 and 2020.

III. Other Forms of Support: Peacekeeping Missions and Sanctions

Under some circumstances, the UN Security Council's unique powers may provide additional avenues through which third states can help secure cooperation with the ICC. In four ICC situation countries, peacekeeping missions operating under a Security Council mandate have assisted in the arrest of ICC fugitives. In practice, peacekeeping forces have only provided logistical assistance in transferring ICC defendants *after* their arrest or surrender, not arrested ICC fugitives themselves. These forces are only likely to be a significant factor in situations where the host government generally supports the ICC's work but lacks the capacity or desire to apprehend certain fugitives; and even then, only if constraints such as the mission's military strength, competing priorities, and mandate allow.

Supportive states and advocates should continue to pursue an arrest authority for UN and regional peacekeeping missions when circumstances permit. Bringing fugitives to justice is integral to an effective strategy for promoting peace and security in a given situation.

Peacekeepers have only had arrest mandates in a few ICC situation countries, and the support of the host government and key Security Council members has been a necessary condition. UN missions and other field presences can provide many forms of logistical assistance to the ICC under the 2004 relationship agreement between the court and the United Nations,⁵³ but arresting the ICC's fugitives or assisting in doing so is understood to require additional authority.⁵⁴ Only 7 of the ICC's 16 investigations to date have even partly coincided with the presence of a UN or other major international force in the situation country. The Security Council has provided international forces such a mandate in only four of those situations: DRC, Côte d'Ivoire, Mali, and CAR II.

In all four situations, the host governments themselves had recently sought out the ICC's intervention at the time the Security Council first provided the arrest authority, and none of the council's veto-wielding permanent members objected to the court's role. France, which happened to be the Council's "penholder" for all four countries, could channel its support for the ICC into the relevant mandates. Once given to a mission, an arrest authority has generally persisted even when key Security Council members have become hostile toward the ICC. Shifts in

support for the ICC from the host government, on the other hand, may be more damaging. Shortly after the Ivoirian president had announced in early 2016 that he would not send any more Ivoirians to the ICC, the Council ceased to provide an arrest authority to the UN mission in Côte d'Ivoire when renewing that mission's mandate for its final year.

The Security Council does not appear to have considered providing an arrest authority to international forces operating in the other three situations where international forces have been present (Darfur, CAR I,⁵⁵ and Afghanistan), perhaps because key governments would have objected if it had.

The Security Council's arrest mandates have been expansive in whom they cover, but sometimes restrictive in the autonomy of action they allow. While most of the relevant mandates for these four missions mentioned the ICC by name, they allowed the mission the flexibility to help arrest a larger set of individuals than just those facing ICC arrest warrants. For example, the council's 2018 authorization for the DRC mission was to help arrest "all those allegedly responsible for genocide, war crimes and crimes against humanity and violations of international humanitarian law and violations or abuses of human rights in the country."⁵⁶

These missions' arrest mandates have appeared to provide varying degrees of ability to act without the host government's request. In the Mali mission's mandates, for example, the Security Council has specified that the mission can make arrests only in support of national authorities.⁵⁷ Conversely, the council tasked the mission in Côte d'Ivoire with supporting "international efforts" to bring perpetrators to justice,⁵⁸ and directed the mission in CAR not only to "assist the CAR authorities" with tasks that include arresting perpetrators, but also to, "where relevant, implement" those tasks itself.⁵⁹ This greater flexibility could be relevant in situations where a government might find it politically unappealing to arrest a defendant itself but would acquiesce in a peacekeeping mission's doing so.

Even though the mandates given to each of these missions vary, the memorandums that the missions have each concluded with the ICC uniformly commit the missions only to consider *assisting* the government in arresting an ICC defendant, and only if it so requests.⁶⁰

Specific practical and political hurdles have prevented peacekeepers from arresting ICC fugitives, even where other factors have generally been favorable. While UN missions have on three occasions helped transfer to the ICC a fugitive whom national authorities or others had already apprehended,⁶¹ none of these

missions have themselves arrested an ICC fugitive still at large. They have had relatively few opportunities to do so, however, since the ICC has issued public arrest warrants against only 13 individuals across the four ICC situations discussed here.⁶²

Some cooperative governments lack the capacity to arrest suspects, or may only support the ICC's pursuit of certain fugitives. Under such circumstances, the *limited capacity of international forces* in the country has presented an obstacle to arrests. Troop- and police-contributing countries are generally reluctant to allow their personnel to participate in risky operations, and arrest operations that target fugitives at the head of small armies in hostile environments can be dangerous.

The *restrictive terms of a mission's arrest authority* may also present an obstacle to ICC arrests. When the UN mission in the DRC faced calls to arrest Bosco Ntaganda, it repeatedly declined to do so, often saying it could only act at the government's request.⁶³ Congolese authorities made no such request from the time Ntaganda joined the Congolese army in 2009 to his mutiny in 2012. It is not clear, though, that a lack of legal authority was the primary barrier to action against Ntaganda. For example, senior UN mission officials in 2011 and 2012 appeared to acknowledge that the need for a government request was legally debatable and emphasized instead that mandate tasks such as civilian protection were a higher priority.⁶⁴

These factors highlight a third barrier to UN forces arresting ICC fugitives: the *relative priority and tensions* among the UN mission's tasks, as perceived by UN officials, troop contributors, and the Security Council. In some of these countries, while the UN mission's mandate envisions support to the ICC, the peace agreement that provides the primary political foundation for the mission's work makes no reference to the court.⁶⁵ Additionally, some of the same concerns that have made UN peacekeepers reluctant to fulfill a civilian-protection mandate may operate to discourage arrests.

Targeted sanctions measures to spur cooperation with the ICC have never been imposed, or even threatened. Among UN bodies, the Security Council is uniquely able to impose targeted sanctions measures (i.e., an asset freeze and a travel ban) in any context where it finds that a threat to international peace and security exists. In considering whether the council might ever take such a step to assist the ICC, it is useful to recall that it never did so in support of its own *ad hoc* tribunals.

The Security Council is similarly unlikely to make aggressive use of its sanctions tools in support of the ICC's investigations. The council has operated sanctions

programs that correspond with six of the situations where the ICC has opened investigations,⁶⁶ and it has sanctioned some ICC fugitives under those authorities for their human rights abuses or other conduct.⁶⁷ It has never, though, defined noncooperation with the ICC—such as a government official’s impeding or failing to carry out an ICC arrest warrant—as a sanctionable activity in one of these programs.

The best chance of the Security Council doing so indirectly might be through the frequently used kind of sanctions criterion that applies broadly to peace process “spoilers.”⁶⁸ If parties have agreed to cooperate with the court, failing to carry out an arrest warrant might also be an offense against peace agreement implementation. That, in turn, might offer a plausible basis for council members that generally oppose the ICC to tolerate the council taking sanctions measures aimed at pressing others to assist the court.

-
- ¹ [Independent Expert Review of the International Criminal Court and the Rome Statute System: Final Report](#), September 30, 2020 (IER Report), para. 755.
- ² The IER Report appeared to suggest that the ICC Prosecutor's adoption in 2016 of a policy on case prioritization was to be credited in part for the prompt enforcement of nearly all the arrest warrants she had sought since that time. But this is just as likely a result of the fact that the only new warrants in that period emerged from self-referral situations in which the principal government has been actively cooperative, a type of situation that appears likely to be much rarer in the future. IER Report, see *supra* endnote 1, para. 677.
- ³ As of the 2019 edition of the manual, the ICC's judges have established maximum timeframes for issuing a variety of other judicial decisions (e.g., trial judgements, decisions on OTP requests for authorization to investigate), but not for rulings on non-cooperation under Article 87(7) of the Rome Statute. See ICC, [Chambers Practice Manual](#), 2019.
- ⁴ In 2007, early in the ICC's existence and before the backlash prompted by the court's pursuit of President Bashir, the Assembly endorsed a list of 66 substantive recommendations developed by the Bureau regarding cooperation with the court. While the recommendations mostly concerned ways in which states parties and the court itself should develop laws, procedures, and habits of support to facilitate the ICC's work, they also included a handful of recommendations that noted or at least alluded to the possibility of pressing recalcitrant states for their cooperation. See, e.g., ICC Assembly, [ICC-ASP/6/Res.2](#), December 14, 2007, Annex II, recommendations 48 and 66.
- ⁵ ICC Assembly, [ICC-ASP/13/29/Add.1](#), November 21, 2014, Annex III.
- ⁶ ICC Assembly, [ICC-ASP/15/31](#), November 8, 2016, including [Addendum](#).
- ⁷ If respected, such a policy could arguably help prevent a fugitive from shoring up political support to remain at large. The Assembly's position is weaker, though, than the UN secretariat's more-detailed policy on contacts with ICC fugitives. For the Assembly's contacts policy, see ICC Assembly, [ICC-ASP/15/Res.3](#), November 24, 2016, para. 5. For the UN's policy, see UN Secretary-General, [S/2013/210](#), April 8, 2013.
- ⁸ Three of the earliest of these actions, in 2010 and 2011, were framed as notifications of recent or ongoing travel by President Bashir to ICC states parties, and they did not contain a formal referral or finding of noncooperation, or even use that terminology. They are included in this total figure for completeness, since the intent of the notifications was clearly to prompt the Security Council or Assembly to act in response to an act of noncooperation. See ICC Pre-Trial Chamber I, *Prosecutor v. Bashir*, "Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Chad," [ICC-02/05-01/09-109](#), August 27, 2010; "Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of Kenya," [ICC-02/05-01/09-107](#), August 27, 2010; and "Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti," [ICC-02/05-01/09-129](#), May 12, 2011.
- ⁹ The ICC prosecutor cannot make a referral, but rather can only request that the court's judges do so. On one occasion—the December 2014 referral of Libya to the Security Council for failing to arrest Saif Qaddafi—the referral process was backed by the prosecutor but initially triggered by the counsel of the defendant himself, who preferred the prospect of an ICC trial to continued custody in the hands of a Libyan militia.
- ¹⁰ Only the referral concerning Kenya's noncooperation with the Kenya investigation pertained to a situation where the Security Council had no role and was thus addressed solely to the Assembly.

-
- ¹¹ The prosecutor's ability to even *begin* seeking a referral for noncooperation has sometimes been substantially delayed by a government challenging the admissibility of the ICC's case against a defendant it does not wish to hand over. More than two years elapsed as the Libyan government, for example, pursued litigation to have the ICC defer to its own purported efforts to hold Saif Al-Islam Gaddafi accountable, even though it did not actually control the militia holding him captive. Such a challenge can be a reasonable and appropriate way of ensuring the ICC defers to genuine national proceedings, and, in theory, the challenge has no suspensive effect on the challenging state's legal obligation to arrest and transfer the fugitive in the meantime. But in practice, a government can use such a challenge to buy time and diffuse pressure on it to cooperate.
- ¹² Such fugitives include Sylvestre Mudacumura, who operated in portions of eastern DRC that were largely beyond the state's control; and the Lord's Resistance Army leaders who similarly operated in parts of Uganda, the DRC, and CAR far from areas of government control. The prosecutor did choose to pursue a referral against Libyan authorities for their failure to arrest Saif Al-Islam Gaddafi while a militia was holding him captive.
- ¹³ Pretrial chamber judges initiated six of the ICC's first seven referrals or notifications, spanning from 2010 to 2014, as well as three more in subsequent years. All of the nine concerned states parties that had hosted or were hosting President Bashir without arresting him.
- ¹⁴ In particular, a panel of ICC judges in September and November 2013 decided that referrals were not appropriate for three African states (Nigeria, Chad, and CAR) that had recently hosted President Bashir or another indicted Sudanese official. The same panel in March had referred Chad a second time for failing to arrest the visiting Bashir, but held back later in the year after Kenya had begun its diplomatic campaign against the court.
- ¹⁵ These include Trial Chamber V(B)'s December 2014 decision finding Kenya failed to cooperate but deciding not to refer it to the Assembly (later overturned on remand from the Appeals Chamber); Pre-Trial Chamber II's July 2017 decision not to refer South Africa for its non-cooperation; and the Appeals Chamber's May 2019 decision overturning a decision referring Jordan.
- ¹⁶ See ICC Pre-Trial Chamber II, *Prosecutor v. Bashir*, "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](#), July 6, 2017, para. 138. Another panel of judges had also expressed doubt about the impact of a referral in the Libya situation, though they approved such a referral later that year. See ICC Pre-Trial Chamber I, *Prosecutor v. Gaddafi and al-Senussi*, "Decision on the 'Request for Leave to Appeal the Pre-Trial Chamber I's Failure to issue a Decision' filed by the Defence of Saif Al-Islam Gaddafi," [ICC-01/11-01/11-556](#), June 10, 2014, para. 26.
- ¹⁷ The Assembly has frequently made generic calls for *all* ICC states parties to cooperate with the court and carry out its arrest warrants. See, e.g., ICC Assembly [ICC-ASP/18/Res.3](#), December 6, 2019 para. 2 and [ICC-ASP/18/Res.6](#), December 6, 2019, para. 14.
- ¹⁸ ICC Assembly [ICC-ASP/15/Res.5](#), November 24, 2016, para. 20; [ICC-ASP/16/Res.6](#), December 14, 2017, para. 25; and [ICC-ASP/18/Res.6](#), December 6, 2019, para. 22.
- ¹⁹ ICC Assembly, [ICC-ASP/19/Res.6](#), December 16, 2020, para 29.
- ²⁰ The Assembly can make decisions based on a simple or two-thirds majority, but its states have not once in the court's history taken a vote (outside the context of elections for ICC officials), instead following the Rome Statute's dictum that "Every effort shall be made to reach decisions by consensus in the Assembly and in the Bureau" (Rome Statute, Article 112(7)).
- ²¹ The cooperation focal points are appointed by their peers and expected to engage countries in their respective geographic regions on noncooperation issues. See, e.g., ICC Assembly, [ICC-ASP/14/38](#), November 18, 2015, para. 8.
-

-
- ²² The procedures distinguish between the formal dimensions of responding to noncooperation (i.e., in response to referrals) and the informal dimensions (i.e., in the absence of a referral but in response to or in anticipation of serious noncooperation). See ICC Assembly, [ICC-ASP/19/Res.6](#), December 16, 2020, Annex I, paragraph 3(k). For the noncooperation procedures themselves, as amended in 2018, see ICC Assembly, [ICC-ASP/17/31](#), November 28, 2018, Annex II.
- ²³ The Assembly president from December 2014 to December 2017, Sidiki Kaba, issued a statement in June 2015 urging South Africa not to allow President Bashir to visit its territory without arresting him (See ICC Press Release, “The President of the Assembly calls on States Parties to fulfill their obligations to execute the arrest warrants against Omar Al-Bashir,” [ICC-ASP-20150613-PR1117](#), June 13, 2015). After Bashir’s visit ignited a new wave of backlash against the court, however, Kaba did not issue any further public statements concerning the ICC’s subsequent referrals of Sudan, Djibouti, Uganda, or Kenya.
- ²⁴ For an example of this reporting, see ICC Assembly, [ICC-ASP/13/40](#), December 5, 2014, paras. 19-21. Subsequent iterations of this report have not contained this kind of information.
- ²⁵ The Assembly’s noncooperation procedures envision a key role for the body’s Bureau, but its public minutes note only that it was informed of Sudan’s latest referral on March 12, 2015, not that it discussed a response to that or any of the ICC’s subsequent six referrals. See Bureau of the Assembly of States Parties, [Third meeting](#), March 12, 2015. For other minutes in 2016 and other years, see ICC Assembly of States Parties, [Decisions of the Bureau](#). It is similarly unclear to what extent or with what effect the Assembly’s noncooperation focal points have actually engaged referred states.
- ²⁶ The Assembly’s noncooperation procedures make clear that it can act, at least “exceptionally,” even in scenarios where the court has not formally referred a state for noncooperation. See the 2018 revision of the Assembly’s procedures for noncooperation, adopted in ICC Assembly, [ICC-ASP/17/Res.5](#), December 12, 2018, Annex II, para. 7(b). Prior to this revision, the procedures appeared to allow for prereferral intervention *only* in connection with an anticipated failure to carry out an arrest warrant, not other forms of noncooperation. See the 2011 noncooperation procedures, adopted in ICC Assembly, [ICC-ASP/10/Res.5](#), December 21, 2011, Annex, para. 7(b).
- ²⁷ The concessions included a November 2013 change to the court’s rules of procedure that allowed Kenya’s president and deputy president to absent themselves from much of their imminent ICC trials. These concessions helped manage the pressure from critical African states parties, but they also made clear that Kenya faced little pressure to change its posture. In the same session, the Assembly arguably gave the ICC prosecution an offsetting concession in the form of a change to the rules that allowed it to use the previously recorded testimony of witnesses who had subsequently been intimidated out of participating in the Kenya trials.
- ²⁸ The Assembly’s arrest strategies rapporteur in his 2014 report strongly recommended the creation of a tracking unit as a tool for locating elusive fugitives. The OTP suggested in a report that following year that it had not done so in part because the whereabouts of most defendants were already well known, but that such a resource would likely become necessary in the future. The OTP reportedly created a “Suspects at Large Tracking Team” in 2018, but noted in its 2019 strategic plan that “limited resources... rule out some of the more ambitious means employed by the tracking units of other international criminal tribunals...” The Assembly’s Independent Expert Report in 2020 noted that the team has no assigned budget and must draw from the contingency fund, and concluded that it is “under-resourced and cannot fulfil all the tasks required for sufficient tracking, analysis, and coordination of cooperation.” See ICC Assembly, [ICC-ASP/13/29/Add.1](#), November 21, 2014; [ICC-ASP/14/21](#), September 17, 2015, para. 66; ICC Office of the Prosecutor, “[Strategic Plan 2019-2021](#),” July 17, 2019, para. 30; and IER Report, see *supra* endnote 1, paras. 769-770.
- ²⁹ See IER Report, September 30, 2020, para. 773 and recommendation R289.
- ³⁰ HRC, [A/HRC/RES/42/26](#), September 27, 2019, para. 16.
-

-
- ³¹ All three of the UN bodies covered in this section have adopted dozens of thematically-focused resolutions—on topics ranging from extra-judicial killings and civilian protection to cooperation with specific regional groupings—that contain supportive general references to the ICC or take note of the court’s jurisdiction in connection with a particular type of crime or issue. These resolutions generally make no reference, however, to the ICC’s activities or possible role in a specific context.
- ³² The resolution usually does include a general call for the ICC’s states parties “to cooperate with [the court] in the exercise of its functions,” and it provides a list of the kinds of cooperation the Assembly has in mind, including assistance with the arrest and surrender of defendants and the provision of evidence. See, e.g., UN General Assembly, [A/RES/74/6](#), November 4, 2019, paras. 9 and 10.
- ³³ UN General Assembly, [A/RES/60/29](#), November 23, 2005.
- ³⁴ On Syria, see UN General Assembly, [A/RES/75/193](#), December 16, 2020 and [A/RES/71/248](#), December 21, 2016, o.p. 4. On North Korea, see [A/RES/75/190](#), December 17, 2020.
- ³⁵ Since July 2002, the UN General Assembly has adopted 112 resolutions on the “situation in” or the “situation of human rights in” a specific country or a region. Only 22 of these were about countries regarding which the ICC had an investigation or preliminary examination underway in that year. The UN General Assembly has not adopted resolutions at all regarding most ICC situation countries. Of note, it has adopted numerous resolutions on Afghanistan and Palestine, but it has not taken note of a possible ICC role in either situation.
- ³⁶ UN General Assembly, [A/RES/75/238](#), December 31, 2020 and [A/RES/75/287](#), June 18, 2021.
- ³⁷ The eight situations include Uganda, DRC, Darfur, Libya, Côte d’Ivoire, Mali, CAR II, and Burundi.
- ³⁸ The Security Council resolutions that referred Darfur and Libya to the ICC both “urge[d] *all States* and concerned regional and other international organizations to cooperate fully” with the ensuing investigation. See UN Security Council, [S/RES/1593](#), March 31, 2005, and [S/RES/1970](#), February 26, 2011. Between 2011 and 2015, the council repeatedly “encouraged all States to cooperate with the Ugandan authorities and the International Criminal Court” in carrying out the court’s arrest warrants against LRA leaders. See e.g., UN Security Council, Press Statement [SC/10335](#), July 21, 2011.
- ³⁹ That is, 76 of the 104 resolutions and statements concerned situations that the host country had referred to the ICC prosecutor (Uganda, DRC, Mali, and CAR II, and Côte d’Ivoire) at the time.
- ⁴⁰ The Philippines investigation is the one exception.
- ⁴¹ See e.g., UN Security Council, Press Statement [SC/10355](#), July 21, 2011.
- ⁴² UN Security Council, Press Statement, [SC/10634](#), May 3, 2012.
- ⁴³ UN Security Council [S/RES/2238](#), September 10, 2015.
- ⁴⁴ As described in ICC Assembly, [ICC-ASP/15/31](#), November 8, 2016, para. 27.
- ⁴⁵ The seven investigations are Burundi, CAR II, Côte d’Ivoire, DRC, Libya, Mali, and Myanmar, and the ten additional countries are Afghanistan, Colombia, Guinea, North Korea, Palestine, Syria, Timor-Leste, Tunisia, Venezuela, and Yemen. Of note, the HRC has weighed in with particular frequency on an ICC role in Syria and North Korea, where the court has no jurisdiction, adopting 28 resolutions hinting at possible support for an ICC role providing accountability for crimes in Syria and 7 resolutions calling for the UN Security Council to consider referring the situation in North Korea to the ICC. Also, several years before Palestine’s accession to the Rome Statute, the HRC adopted one resolution in 2011 calling for the Security Council to consider referring “the situation in the Occupied Palestinian Territory” to the ICC. See, e.g., Human Rights Council, on
-

Syria, [A/HRC/RES/42/27](#), September 27, 2019; on North Korea, [A/HRC/RES/40/20](#), March 22, 2019; and on Palestine, [A/HRC/RES/16/32](#), March 25, 2011.

⁴⁶ In nearly the opposite pattern of the Security Council, only 36 of the above-referenced 122 HRC resolutions and statements pertained to a situation where the host government had made a self-referral or otherwise requested the ICC's involvement. These include the CAR II investigation, DRC, Côte d'Ivoire, Mali, and Palestine (following its 2018 self-referral). The other 86 statements include 31 on Syria, 13 on Palestine (prior to its 2018 self-referral), 8 on Libya, 8 on both Burundi and North Korea, 6 on Myanmar, and between 1 and 3 on Afghanistan, Colombia, the DRC (prior to its 2004 self-referral), Guinea, Timor-Leste, Tunisia, Venezuela, and Yemen.

⁴⁷ See, e.g., HRC, on Burundi, [A/HRC/RES/42/26](#), September 27, 2019; on Myanmar, HRC [A/HRC/RES/40/29](#), March 22, 2019; and on Palestine, [A/HRC/RES/40/13](#), March 22, 2019.

⁴⁸ HRC, [A/HRC/RES/39/2](#), September 27, 2018.

⁴⁹ In the terminology of the HRC's formal agenda, the body's country-specific resolutions referencing the ICC have been rather evenly divided between countries that are being reviewed under its cooperative agenda item and its more openly critical one. As of October 2021, 38 of these resolutions had been adopted under item 10 ("Technical assistance and capacity-building," including those on CAR, Côte d'Ivoire, DRC, Guinea, Mali, Yemen, and Tunisia, and most of those on Libya) and 49 under item 4 ("Human rights situations that require the Council's attention," including those on Burundi, North Korea, Myanmar, Syria, and Venezuela, and one on Libya), plus an additional 20 under the Palestine-specific item 7 ("Human rights situation in Palestine and other occupied Arab territories"). The resolution establishing the Independent Investigative Mechanism for Myanmar was adopted under the HRC's overarching item 2, as were other recent resolutions on Myanmar and Afghanistan.

⁵⁰ On Côte d'Ivoire, the HRC kept explicitly "not[ing] the continued cooperation" of the Ivorian government with the ICC into 2015 and 2016, even though by then the government had stated that it would not send any more Ivoirians to the court. See HRC, [A/HRC/RES/29/24](#), July 3, 2015, and [A/HRC/RES/32/30](#), July 1, 2016. On Libya, the HRC continued to welcome or note the Libyan government's "continued cooperation" even after the ICC pretrial chamber had referred Libya for noncooperation in the case of Saif Al-Islam Gaddafi. See HRC, [A/HRC/RES/25/37](#), March 28, 2014, and [A/HRC/RES/28/30](#), March 27, 2015.

⁵¹ The HRC's annual statements on Côte d'Ivoire ended in 2017, while the ICC investigation there has at least reportedly continued. See HRC, [A/HRC/RES/32/30](#), July 1, 2016, and President's Statement [PRST/35/1](#), June 23, 2017.

⁵² For example, several of the HRC's resolutions on CAR have specifically called for cooperation with the UN independent expert on human rights appointed for the country but made only descriptive reference to the ICC's activities. See, e.g., HRC, [A/HRC/RES/42/36](#), September 27, 2019. Similarly, in 2017, the HRC called on the government of Burundi to cooperate with the council's commission of inquiry and omitted the reference to the ICC it had made in the previous year's resolution. In the 2018 resolution, however, the HRC called for cooperation with both. See HRC, [A/HRC/RES/33/24](#), September 30, 2016; [A/HRC/RES/36/19](#), October 4, 2017; and [A/RES/HRC/39/14](#), September 28, 2018.

⁵³ These have included transporting ICC personnel within the country or facilitating witness testimony by videoconference. See "[Negotiated Relationship Agreement between the International Criminal Court and the United Nations](#)," June 7, 2004.

⁵⁴ See, e.g., ICC Assembly, [ICC-ASP/12/42](#), October 14, 2013, para. 24.

⁵⁵ It is not apparent from the public record why the Security Council did not offer a rest support to the first ICC investigation in CAR. The CAR government had requested the court's investigation, which in turn had no obvious critics among key council members. Indeed, the council does not appear ever to have made *any* comment about the CAR I investigation. The fact that UN and EU

forces had an unusual two-nation mandate and operated not only in CAR but also in neighboring Chad, where there was no comparable ICC investigation, may have complicated the issue. As a practical matter, those missions' lack of an arrest mandate proved unimportant, since the only defendant the ICC has ever charged with atrocity crimes in this investigation was arrested in Belgium.

⁵⁶ UN Security Council, [S/RES/2409](#), March 27, 2018.

⁵⁷ See, e.g., UN Security Council, [S/RES/2531](#), June 29, 2020, o.p. 28(e)(i).

⁵⁸ See, e.g., UN Security Council [S/RES/2000](#), July 27, 2011.

⁵⁹ See, e.g., UN Security Council [S/RES/2217](#), April 28, 2015.

⁶⁰ For the DRC mission, see the [MONUC-ICCMOU](#), November 8, 2005. The Memorandums of Understanding for [UNOCI](#) (January 23, 2012), [MINUSMA](#) (August 20, 2014), and [MINUSCA](#) (May 19, 2016) contain nearly identical language.

⁶¹ These include Thomas Lubanga in DRC in 2006, Dominic Ongwen in CAR in 2015, and Ali Abd-Al-Rahman in CAR in 2020.

⁶² This group of 13 includes 6 in the DRC situation, 3 in Côte d'Ivoire, and 2 each in Mali and CAR II.

⁶³ See, e.g., Matthew Russell Lee, "[UN and Congolese War Criminal Bosco. No Pictures, Please. As Council Approaches](#)," *Inner City Press*, May 13, 2009; and Alan Doss, letter to the editor, "[The UN mission in Congo has not signed a 'pact with the devil'](#)," *The Guardian*, February 23, 2010.

⁶⁴ Mac McClelland, "[I Can Find an Indicted Warlord. So Why Isn't He in The Hague?](#)," *Mother Jones*, September/October 2011.

⁶⁵ See, e.g., [Agreement for Peace and Reconciliation in Mali](#), June 20, 2015 (the 2015 peace agreement).

⁶⁶ These are DRC, CAR II, Côte d'Ivoire, Darfur, Libya, and Mali.

⁶⁷ See, e.g., the Security Council's summary of reasons for sanctioning [Joseph Kony](#) (undated) and [Bosco Ntaganda](#) (undated).

⁶⁸ For example, the Security Council's Sudan sanctions program applies to "those who impede the peace process" (UN Security Council, [S/RES/1591](#), March 29, 2005, o.p. 3(c)), and the Mali program covers "[a]ctions taken that obstruct, or that obstruct by prolonged delay, or that threaten the implementation of the [2015 peace agreement]" (UN Security Council, [S/RES/2374](#), September 5, 2017, o.p. 8(b)).