



## IPI MEETING BRIEF

### **The Relationship Between the ICC and the Security Council: Challenges and Opportunities**

Concrete action is needed to improve the UN Security Council's practice of referring situations to the International Criminal Court (ICC), as provided for in the court's Rome Statute. Following up on discussions elsewhere, most notably the Security Council's open debate on October 17<sup>th</sup>, the Mission of Liechtenstein to the UN and the International Peace Institute (IPI) held a roundtable discussion on the relationship between the ICC and the Security Council in IPI's Trygve Lie Center on November 8, 2012.

The event brought together Security Council member states who are party to the Rome Statute and a number of other states parties with a particular interest in the work of the court. The lunch discussion with ICC Prosecutor Fatou Bensouda was open to all other members of the Security Council as well.

A number of key priorities emerged from the discussions:

1. **The UN Security Council should apply consistent standards when referring cases to the ICC, even if this may be difficult to achieve in practice.** The Security Council is a political body, and decisions on situations to be referred to the ICC will continue to be influenced by its political nature. But consistency remains an important goal, because perceptions of the legitimacy and integrity of the ICC depend on it. Security Council referrals should never be used as another "stick" or instead of other action taken by the council. Rather, a set of standards for referrals could help inform referral decisions—input from fact-finding missions, independent commissions of inquiry, and NGOs can also be helpful, but they should not be prerequisites.
2. **The exclusion of certain groups from ICC prosecution is problematic.** The two Security Council resolutions that referred situations (in Darfur and Libya) to the ICC contain provisions shielding persons from prosecution if they are citizens of countries that are not party to the court's statute, other than the situation country. At the time, this was considered necessary to secure political buy-in at the Security Council. However, the legality of exemptions has been challenged on the grounds that a Security Council referral can only activate the Rome Statute as a whole, not select parts thereof. It is therefore questionable whether these exemption clauses would withstand judicial scrutiny in the court itself, and they also expose the court to criticisms of selectivity. The wider negative implications for the ICC's credibility, impartiality, and independence suggest that future use of exemptions should be avoided.
3. **Costs of ICC investigations following Security Council referrals are straining the ICC budget.** When the Security Council refers situations to the ICC, it acts on behalf of the entire UN membership. This implies that the UN General Assembly (the sole authority in this matter) should allocate funding for ICC investigations mandated by the UN Security Council; the relevant provisions of the Rome Statute and the agreement governing the UN-ICC relationship also stipulate as much. Continuing referrals by

the UN Security Council without concurrently allocating funds from the UN's budget could undermine the viability of the court.

4. **Lack of cooperation with the ICC and non-enforcement of its arrest warrants are particularly harmful for the court, but they also harm the Security Council.** To make ICC referrals acceptable to non-states parties on the Security Council, Resolutions 1593 (2005) and 1970 (2011) imposed obligations to cooperate with the ICC only on the situation country. Future referrals would benefit from a provision making cooperation by all states mandatory. The Security Council has not lent sufficient support to the situations it has referred to the ICC. In order to make referrals effective, the council should follow up on referral decisions to enforce cooperation—for example, by imposing targeted sanctions (travel bans or asset freezes that could then serve to pay defendants' legal counsel or reparations to victims). States parties have adopted policies to address non-cooperation among members of the Assembly of States Parties, yet they too can do more to support the court directly and indirectly by pressuring the Security Council to take action.
5. **Strategies need to be put into place to address the enforcement of ICC arrest warrants.** The pervasive difficulties in arresting indictees are not limited to situations referred by the Security Council. Nevertheless, the council's involvement can extend beyond the situations it referred, just as the council has cooperated on non-referral situations when lifting travel bans it had previously imposed (Côte d'Ivoire, Democratic Republic of the Congo). In particular, it should consider mandating UN peacekeeping troops to play a role in arresting ICC indictees. Furthermore, regional organizations could be more closely involved in the hunt for persons indicted by the ICC. Short of making arrests, there are many more things states parties and the international community should do: at a minimum this includes isolating—not accommodating or meeting with—leaders for whom the ICC has issued arrest warrants.
6. **In the near term, the Security Council could take a number of concrete actions to better enable the ICC to carry out its mandate.** For example, it could regularly hold open debates on peace, justice, and the ICC. It should also develop a coherent accountability agenda and refrain from endorsing amnesties and using the veto when Rome Statute crimes appear to have been committed.
7. **Dedicated fora should also address issues concerning situations referred to the ICC.** The Security Council's informal working group on tribunals could be expanded to deal with ICC issues, or a separate mechanism could be created. In addition, a dedicated caucus of interested states parties could begin to jointly push for progressive improvements in the council's practice and relationship with the court, in particular through follow-up action.
8. **The ICC itself can influence ICC–Security Council dynamics.** To this end, the court could invite the Security Council to The Hague, possibly within the framework of a joint invitation from the International Court of Justice and the International Criminal Tribunal for the former Yugoslavia, or upon invitation by the host state. It could also more proactively use visits to New York and the UN Security Council as opportunities for dialogue to advance the ICC agenda, including issues such as enforcement of arrest warrants.