

Enhancing P3 Cooperation with the International Criminal Court

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The P3² have played a significant though not always constructive role in determining the nature and scope of cooperation between the Security Council and the International Criminal Court (ICC). France and the United Kingdom, as the only two States Parties to the Rome Statute that are permanent members of the Security Council, could play a more proactive role or one that is at the very least more consistently in tune with the integrity of the Rome Statute. The United States, on the other hand, could at times be more cooperative in recognizing that an effective Court is not against its own interests. The divide between the official discourse of the P3 on the advancement of human rights and the fight against impunity and their actual practice in the Council on issues regarding the ICC is still quite wide.

The P3 have common but differentiated responsibilities in this regard. In principle, all share a commitment to root out impunity for the most heinous crimes through judicial accountability. In practice, only France and the United Kingdom are bound by the obligations that arise from the Rome Statute, whereas the United States is not (*pacta tertiis nec nocent nec prosunt*). The Rome Statute acknowledges this by including different provisions for States Parties and for non-Party States.³ However, even the latter can potentially have an indirect obligation to cooperate with the ICC arising either from a Security Council referral pursuant to Article 13(b) of the Rome Statute or from the provisions of Article 1 common to the Geneva Conventions of 1949 and the Additional Protocols of 1977.⁴

The Article 13(b) Referrals: Resolutions 1593 (2005) and 1970 (2011)

Although the Security Council is not bound by the Rome Statute, those States Parties that are either permanent or non-permanent members of the Council have an individual legal responsibility to seek to ensure that the ground rules set out by the Rome Statute are observed and adhered to in Council decisions. Specifically, Articles 13(b) and 16, as well as Article 17 of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations,⁵ provide relevant rules or guidelines for the interaction and cooperation that should exist between the two bodies. Notwithstanding these obligations, the Council has adopted two

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² The P3 includes France, the United Kingdom and the United States. It is a subset of the P5 which includes the five permanent members of the Security Council as per Article 23(1) of the United Nations Charter.

³ Articles 86 and 87(5) of the Rome Statute contain provisions for cooperation by States Parties and non-Party States.

⁴ The four Geneva Conventions of 1949 had 194 States Parties as of 15 October 2012. Additional Protocols I and II of 1977 had 172 and 166 States Parties, respectively, as of 15 October 2012. Article 1 common to the Geneva Conventions of 1949 and the Additional Protocols of 1977 lays down the obligation of all Contracting Parties "to respect and to ensure respect for the present Convention [Protocol] in all circumstances." On this point see Zhu Wenqi, "On Co-operation by States not Party to the International Criminal Court", *International Review of the Red Cross*, Vol.88, Num.861, March 2006, pp.87-110.

⁵ ICC-ASP/3/Res.1 adopted on 4 November 2004.

resolutions referring specific situations to the ICC Prosecutor, resolution 1593 (2005) on the situation in Darfur⁶ and resolution 1970 (2011) on the situation in Libya⁷, both of which contain provisions that are inimical to the integrity of the Rome Statute. All States Parties then members of the Council, including France and the United Kingdom, should have defended the integrity of the Rome Statute instead of agreeing to a “Faustian bargain” in resolution 1593 which entailed acceptance of language that was clearly contrary to the letter of the Rome Statute in exchange for an acknowledgement of the ICC.⁸

What is more surprising is why a similar “bargain” was agreed to in resolution 1970, when the States Parties in the Council had increased leverage and foreknowledge of how the ICC had been short-changed by the absence of meaningful Council cooperation pursuant to resolution 1593.⁹ A second “Faustian bargain” was clearly one too many without major revisions to the language and some type of insurance against Council non-cooperation with the ICC. Although all States Parties then members of the Council should have sought revisions to those provisions that were inimical to the integrity of the Rome Statute, these basically remained unchanged from resolution 1593.¹⁰ As the designated “penholder” on Libya within the Council, the United Kingdom in particular could have sought to avoid the mere repetition of the provisions in resolution 1970 through the inclusion of alternative language more in tune with the integrity of the Rome Statute.

⁶ Resolution 1593 states that the Security Council “1. Decides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court”.

⁷ Resolution 1970 states that the Security Council “4. Decides to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court”.

⁸ Resolution 1593 contains a number of paragraphs that affect the integrity of the Rome Statute, including two preambular paragraphs (“Recalling article 16 of the Rome Statute under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect” and “Taking note of the existence of agreements referred to in Article 98-2 of the Rome Statute”) and two operative paragraphs (“6. Decides that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State” and “7. Recognizes that none of the expenses incurred in connection with the referral including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily”). Compromise with non-Party States on the Security Council came at an even higher cost in the adoption of resolution 1422 (2002), which was expressly adopted to undermine the integrity of the Rome Statute, at the behest of the United States: “1. requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise” and “2. Expresses the intention to renew the request in paragraph 1 under the same conditions each 1 July for further 12-month periods for as long as may be necessary.”

⁹ Apart from a 16 June 2008 presidential statement (S/PRST/2008/21), the Council had systematically failed to substantively cooperate with the ICC despite being regularly briefed by the ICC Prosecutor pursuant to paragraph 8 of resolution 1593.

¹⁰ Resolution 1970 likewise contains a number of paragraphs that affect the integrity of the Rome Statute, including one preambular paragraph (“Recalling article 16 of the Rome Statute under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect”) and two operative paragraphs (“6. Decides that nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State” and “8. Recognizes that none of the expenses incurred in connection with the referral, including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily”).

Recommendation 1: *This raises the necessity of having a “Rome Statute Caucus” operating within the Security Council. States Parties need to concert and act together to defend the integrity of the Rome Statute and the best interest of the ICC, avoiding any Council action that runs counter to the independence of the Court or seems to confuse the political with the judicial. Something of the sort was temporarily possible in the negotiations leading to S/PRST/2008/21, but the effort needs to be sustained. As France and the United Kingdom are the only States Parties that are also permanent members of the Council, they could play a central role in ensuring that such caucusing efforts are carried over despite the annual reconfigurations of the Council. Moreover, they would not be defending a minority cause as States Parties have frequently enjoyed an outright majority within the Council and presumably will continue to do so into the future as more countries ratify the Rome Statute.¹¹*

Recommendation 2: *This also raises the possibility of States Parties acting as “penholders” in the Council, a task traditionally reserved to the permanent members and mostly performed by the P3, making an effort to propose language in initial draft decisions that is not inimical or at the very least neutral to the Rome Statute.*

Resolutions 1593 and 1970 were adopted under Chapter VII with the Council deciding “that the [...parties to the conflict/the authorities...] shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligations under the Statute, urges all States and concerned regional and other international organizations to cooperate fully.”¹² Follow-up by the Council on those parties expressly bound to do so and those simply urged to do so, has been wanting. Regarding Darfur, notwithstanding the 15 briefings to date by the ICC Prosecutor to the Council, among other clear indications of non-cooperation by the government of Sudan with the ICC, the Council has only adopted a presidential statement (S/PRST/2008/21) since the original referral. Similarly, on Libya, notwithstanding 3 briefings to date, and clear indications of non-cooperation by the government of Libya with the ICC, the Council has only issued a press statement (SC/10674) since the original referral. On both situations, the Council has remained silent whenever other States have failed to “cooperate fully” with the ICC, including most notably in not arresting and surrendering visiting or transiting ICC indictees to the Court.

Recommendation 3: *This raises the necessity of having relevant referral resolutions explicitly addressing the rules that apply regarding complementarity. A non-Party State subject to a Council referral will most likely resist ICC complementarity unless it is adequately enforced by the Council. As referral resolutions are necessarily adopted under Chapter VII, and therefore binding on the parties, ICC jurisdiction is not an option to be decided by the affected party but an obligation arising from the enabling resolution and the Rome Statute. France and the United Kingdom, as well as the United States as appropriate, could play a more constructive role in ensuring that the*

¹¹ At no time since the entry into force of the Rome Statute has there been less than 6 States Parties on the Council (blocking minority). In fact, there have repeatedly been 9 or more States Parties potentially enabling procedural control of the Council as per Article 27(2) of the United Nations Charter and Rule 40 of the Provisional Rules of Procedure of the Security Council: 8 votes in 2002; 7 votes in 2003; 7 votes in 2004; 9 votes in 2005; 10 votes in 2006; 10 votes in 2007; 9 votes in 2008; 9 votes in 2009; 10 votes in 2010; 10 votes in 2011; and 7 votes in 2012. In 2002, Colombia ratified the Rome Statute on 5 August, bringing the total to 8. In 2003, Guinea ratified the Rome Statute on 14 July, bringing the total to 7. In 2012, Guatemala ratified the Rome Statute on 2 April, bringing the total to 7.

¹² Operative paragraph 2 of resolution 1593 makes reference to the “Government of Sudan and all other parties to the conflict in Darfur” whereas operative paragraph 5 of resolution 1970 makes reference to the “Libyan authorities”.

language used by the Council pertaining to the nature and scope of the cooperation expected of the non-Party State adheres to Article 19 of the Rome Statute¹³ in clearly spelling out the rules that are to apply regarding complementarity.

Recommendation 4: *This also raises the possibility of States Parties acting as “penholders” in the Council, and more specifically the United Kingdom in regards to Libya, playing a more proactive role in seeking adequate Council follow-up on Article 13(b) referrals. Although not a State Party, the same could eventually apply to the United States as “penholder” on Sudan.*

The Paradoxes of Security Council Cooperation with the ICC

Paradoxically, at least to date, there has been more Council cooperation with the ICC on situations referred by others pursuant to Article 13(a) and 13(c) of the Rome Statute than on situations it has referred under Article 13(b). This does not bode well for any additional Council referrals in the future, as the only cases of substantive cooperation by the Council with the ICC are limited to situations unrelated to Council referrals, including most recently Côte d’Ivoire.

Pursuant to a series of exemption requests¹⁴, on 29 November 2011 the 1572 Sanctions Committee on Côte d’Ivoire lifted the travel ban imposed on former President Laurent K. Gbagbo by resolution 1975 (2011) in order to enable his transfer to The Hague to face ICC proceedings.

¹³ Article 19 of the Rome Statute states that: “1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. [...] 2. [...] challenges to the jurisdiction of the Court may be made by: (a) an accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58; (b) a State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or (c) a State from which acceptance of jurisdiction is required under article 12. 3. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court. 4. The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c). 5. A State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity. 6. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82. 7. If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17. 8. Pending a ruling by the Court, the Prosecutor may seek authority from the Court: (a) to pursue necessary investigative steps of the kind referred to in article 18, paragraph 6; (b) to take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and (c) in cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58. 9. The making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge. 10. If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17. 11. If the Prosecutor, having regard to the matters referred to in article 17, defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. That information shall, at the request of the State concerned, be confidential. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State to which deferral of the proceedings has taken place.”

¹⁴ By the governments of the Côte d’Ivoire and the Netherlands, as well as the ICC.

Tellingly, the Committee did so promptly¹⁵, confidentially and unanimously, despite some members' misgivings regarding the ICC or its alleged stigmatization of African countries. This instance of cooperation, which required the acquiescence of all 15 Council members following a non-objection procedure to the exemption requests, has remained largely unpublicized. However, it clearly demonstrates that the Council, or its relevant subsidiary bodies, can at times be persuaded to cooperate with the ICC.

Just two days before adopting resolution 1593, the Council adopted resolution 1591 establishing a sanctions regime on Sudan to target 4 individuals deemed responsible for the violations in Darfur.¹⁶ Listings are primarily based on evidence although, as seen with the 1267 and 1989 Committees in particular, there have been some lapses or abuses due to the fact that listing decisions are made by a political body (either the Council or one of its sanctions committees) at times using arguably substandard rules of evidence and procedure if compared to a judicial body.

The asymmetry that exists between the consolidated list of the 1591 Committee and the list of ICC indictees, both covering exactly the same situation (Darfur) but referencing completely different individuals, is glaring (see annex 1). Although paragraph 3(c) of resolution 1591 states that individuals designated by the Committee are based "on the information provided by [...] other relevant sources", thereby potentially including the ICC, to date this has not been the case. The P3, as members of the 1591 Sanctions Committee, could -individually, collectively, or as appropriate as part of a "Rome Statute Caucus"- explore avenues and opportunities for the Office of the Prosecutor to become a relevant source pursuant to guidelines 7(a) and 24 of the 1591 Sanctions Committee guidelines.¹⁷ The mismatch between both lists, which in the case of the ICC includes those deemed most responsible for the atrocities committed in Darfur, does a clear disservice to the efforts of the ICC to apprehend those individuals that have pending arrest warrants.

Recommendation 5: This raises the possibility of the United States, as the delegation that took the initiative on resolution 1591 and as the "penholder" on Sudan, to play a more proactive role in updating and matching the consolidated list with the corresponding list of ICC indictees. Other Council members, including France and the United Kingdom, could procedurally also do so notwithstanding inaction by the United States.

Recommendation 6: More generally, this raises the possibility for sanctions committees covering situations referred by the Council to the ICC to automatically list those individuals that are subject to arrest warrants issued by the Pre-Trial Chambers of the ICC. This makes sense from an evidence and procedure standpoint, as the ICC must meet higher standards than any of the other potential sources of information. It also makes no sense to impose targeted sanctions on individuals who are not deemed to be most responsible while those that are remain unperturbed by such sanctions. Language to ensure such automatic listing by the relevant sanctions committee

¹⁵ Just six days after 23 November, when a sealed arrest warrant was issued by ICC Pre-Trial Chamber III, enabling the ICC to arrange for his transfer to The Hague on 30 November.

¹⁶ The targeted listing was unique in that it was decided in a Council resolution and not in a Sanctions Committee-level decision as usual.

¹⁷ Guidelines of the 1591 Sanctions Committee, adopted 27 December 2007. Guideline 7(a) provides that "the Committee will consider information provided by Member States, the Secretary-General, the High Commissioner for Human Rights, the Panel of Experts established under subparagraph 3(b) of resolution 1591 (2005) and other relevant sources." Guideline 24 provides that "the Committee may invite non-members of the Committee, including the Secretariat, other UN Member States, regional and international organizations, NGOs and individual experts to appear before it for the purpose of providing information or explanations relating to any violations or alleged violations of the sanctions measures imposed by resolution 1556 (2004) and 1591 (2005), or to address the Committee and assist it, on an ad hoc basis, if necessary and useful to the progress of its work."

pursuant to an ICC arrest warrant could be incorporated to the two referrals and any future referrals under Article 13(b) of the Rome Statute. This automaticity would only apply to Security Council referrals, not Article 13(a) referrals¹⁸, and would only work in one sense, that is from the ICC to the relevant sanctions committee, and not vice versa.

Symmetry or automaticity does not ensure Council cooperation as clearly exemplified by the absence of meaningful cooperation with the ICC following the referral of the situation in Libya. In this case, the individuals later indicted by the ICC had already been targeted by the 1970 Sanctions Committee, so there was no mismatch. However, since the adoption of resolution 1970, and its follow-up resolution 1973, the Council has not called on Libya to cooperate with the ICC.¹⁹ In fact, the Council failed to call on Mauritania to surrender Abdullah al-Senussi to the ICC before he was extradited to Libya, or the successive governments in Libya to surrender both Saif al-Islam Qaddafi and Senussi to the ICC once both were under custody. On the question of where both ICC indictees are to be tried, the Council has remained silent although it is evident that Libya cannot at present guarantee that the proceedings will meet international standards, nor for that matter, ensure adequate conditions for detention.²⁰ Despite its claims, Libya faces considerable difficulties if complementarity is not to kick in in light of Articles 17(2c) and (3) of the Rome Statute.²¹

Considering the measures taken by the Council in resolutions 731 (1992) and 748 (1992) demanding that Libya surrender its nationals deemed to be complicit in the downing of PanAm flight 103 in 1988 and UTA flight 772 in 1989, the non-cooperation of the Council with the ICC is all the more glaring. Because resolutions 731 and 748, both adopted under Chapter VII with the latter establishing binding obligations *erga omnes* and a sanctions regime against Libya, were a response to requests filed by France, the United Kingdom and the United States, they offer a countervailing example of the determination shown by the P3 in pursuing the extradition of Libyan nationals sought by foreign courts.²² None of the P3 has shown any similar determination regarding the transfer of either Qaddafi or Senussi to The Hague or granting the ICC Prosecutor full access to witnesses, documents and other material evidence.²³

¹⁸ Article 13(a) of the Rome Statute states that: "1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes."

¹⁹ Save as previously indicated for a 15 June 2012 press statement (SC/10674) on the detention of ICC defense counsel staff in Libya by the Zintan militia.

²⁰ At time of writing, Saif al-Islam Qaddafi was under custody of a non-State actor, the so-called Zintan rebels, and had not been surrendered to the government.

²¹ Article 17(2c) of the Rome Statute states that: "In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable: [...] (c) the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice." Article 17(3) states that: "In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings."

²² Whereas resolution 731 was adopted unanimously on 21 January 1992, resolution 748 was adopted by a vote of 10-0-5 on 31 March 1992.

²³ On 27 November 1991, the United Kingdom and the United States issued a joint declaration enjoining the Government of Libya to "surrender for trial all those charged with the crime [...] and allow full access to all witnesses, documents and other material evidence." See International Court of Justice. Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v. United States*) (Provisional Measures). *Order of 14 April 1992*. p.6.

Recommendation 7: *This raises an interesting precedent as to the extremes taken by the P3 within the Council to compel a country, coincidentally Libya, to extradite indicted nationals and guarantee full access to witnesses, documents and other material evidence. Resolutions 731 and 748 are informative in that the P3 could, individually or collectively, pursue comparably less coercive measures within the Council to demand that Libya fully cooperate with the ICC in line with its obligations under resolution 1970 and the Rome Statute, while noticeably improving on the current record of Council silence and acquiescence.*

Although the ICC is independent, unlike the ad hoc international criminal tribunals or other special courts established by the Security Council, the language inimical to the Rome Statute contained in resolutions 1593 and 1970 contrasts with the constructive language recently used by the Council to support the Special Court for Sierra Leone established by resolution 1315 (2000). On the initiative of the United Kingdom, also the “penholder” on Sierra Leone, on 9 October 2012 the Council adopted a presidential statement (S/PRST/2012/12) calling on “Member States to contribute generously to the Special Court” and for “further pledges of voluntary contributions”. Whereas the Council arguably encroached on the attributions of the General Assembly, forestalling any participation by the United Nations towards the funding of the Article 13(b) referrals to the ICC, it has generously “urge[d] the international community to continue to support the Special Court.”

This contrast is not necessarily surprising in that, as mentioned and unlike the ICC, the Special Court was established by the Council. However, it is informative by what it apparently reveals about the P3, and more specifically, France and the United Kingdom. In the Council, in referring the situation in Libya to the ICC, they agreed to language whereby “none of the expenses incurred in connection with the referral[s] [...] shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily”,²⁴ yet just months later were insisting,²⁵ on a zero-nominal growth budget for the ICC at the next Assembly of States Parties.²⁵

Recommendation 8: *This raises an interesting contrast as to the initiative taken by the P3, and in this case most notably by the United Kingdom, in diligently addressing financial needs in a case unrelated to the ICC while arguably preempting (General Assembly) or opposing (Assembly of States Parties) the competent bodies from similarly addressing the financial implications arising from Article 13(b) referrals. At the very least, when referring situations to the ICC, the P3 should adhere to language that is either mute on its financial implications or in line with Article 115 of the Rome Statute.²⁶*

As already indicated, the ICC is independent and therefore different from the ad hoc international criminal tribunals or other special courts established by the Security Council, all of

²⁴ Operative paragraph 8 of resolution 1970 (2011).

²⁵ One other State Party likewise member of the Security Council, albeit not a permanent member so beyond the scope of attention of this paper, adopted a similar stance leading to and during the 10th session of the Assembly of States Parties held in New York from 12-21 December 2011.

²⁶ Article 115 of the Rome Statute provides that: “The expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources: (a) assessed contributions made by States Parties; (b) funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.”

which are given consideration by Council members within one of its subsidiary bodies, the Informal Working Group on International Tribunals. As the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) are nearing the end of their respective mandates, as also is the case with the Special Court for Sierra Leone, the Working Group may soon no longer be necessary.

Recommendation 9: This raises the possibility of maintaining and revising the Informal Working Group beyond the current international tribunals and special courts in order to address questions of cooperation between the Security Council and the ICC. The mandate of the Informal Working Group would need to be confined to issues that, without encroaching on the independence of the ICC, allow for a potentially more effective channel of communication and interaction.

Last but not Least, the Veto

The concurring vote (veto) awarded to the permanent members in the United Nations Charter has at times stood in the way of Council action to confront the heinous crimes typified by the Rome Statute. In the run up to the 2005 Summit Outcome Document,²⁷ the High-Level Panel Report on Threats, Challenges and Change called on “the permanent members, in their individual capacities, to pledge themselves to refrain from the use of the veto in cases of genocide and large-scale human rights abuses.”²⁸ Following up on this recommendation, the Small 5 (S5) have advocated for permanent members to “refrain[...] from using a veto to block Council action aimed at preventing or ending genocide, war crimes and crimes against humanity.”²⁹ Despite their official discourse on human rights and the fight against egregious crimes in particular, none of the P3 has set the example in pledging not to use the veto in such circumstances. Tellingly, United States Secretary of State Hillary R. Clinton characterized the most recent vetoes cast by China and Russia on a draft resolution on Syria³⁰ as “despicable” whereas Foreign Secretary William Hague of the United Kingdom called them “inexcusable and indefensible”. To date, only France has hinted at this possibility with Foreign Minister Laurent Fabius in making informal reference to a possible “code of conduct” to rein in the veto under such dire circumstances.³¹

Recommendation 10: This raises the possibility of the P3 closing the gap between discourse and practice by pledging to refrain from using a veto that is considered “despicable” and “inexcusable and indefensible” when it prevents Council action aimed at preventing or ending genocide, war crimes and crimes against humanity.

This paper has focused on the P3 and therefore basically enumerates options for enhanced P3 initiative within the Security Council to enhance cooperation with the ICC. Far from suggesting that the P3 must spearhead all initiatives, the paper does purposely place the onus on the P3,

²⁷ General Assembly resolution A/RES/60/1 dated 16 September 2005.

²⁸ See UN document A/59/565 issued 2 December 2004, para 256.

²⁹ See UN document A/66/L/42/Rev.1 tabled by Costa Rica, Jordan, Liechtenstein, Singapore, and Switzerland, collectively known as the Small 5 (S5).

³⁰ See UN document S/2012/538 vetoed on 19 July 2012.

³¹ Agence France Presse. “Fabius évoque un ‘code de conduite’ pour débloquer le Conseil de sécurité”, 6 September 2012. At the 17 October 2012 Security Council open debate on the relationship between the Security Council and the ICC, France made reference to the ‘code of conduct’.

individually or collectively, as they are a unique subset of actors within the Council with important prerogatives. Regardless of the role played by the P3, the other members of the Council, first and foremost those that are also States Parties to the Rome Statute, can significantly enhance cooperation and interaction between the Security Council and the ICC. Beyond the Council, other States Parties as well as non-government organizations can also create positive outside pressure for those within.

Annex 1: Asymmetry between Sanctions Committee List and ICC Indictes List

Consolidated List of the 1591 Committee	List of ICC Indictes
Badri, Gabril Abdul Kareem (Gen.) <i>listed 25-04-2006 via resolution 1672 (2006)</i>	
Elhassan, Gaffar Mohammed (Maj.-Gen.) <i>listed 25-04-2006 via resolution 1672 (2006)</i>	
Hilal, Musa (Sheikh) <i>listed 25-04-2006 via resolution 1672 (2006)</i>	
Shant, Adam Yacub (Comm.) <i>listed 25-04-2006 via resolution 1672 (2006)</i>	
	Al-Bashir, Omar Hassan Ahmad (Lt.-Gen.) <i>arrest warrants issued 04-03-2009 and 12-07-2010</i>
	Abd-Al-Rahman, Ali Muhammad (Ali Kushayb) <i>arrest warrant issued 27-04-2007</i>
	Abu Garda, Bahar Idriss <i>summons to appear issued 18-05-2009</i>
	Banda Nourain, Abdallah <i>summons to appear issued 27-08-2009</i>
	Harun, Ahmad Muhammad <i>arrest warrant issued 27-04-2007</i>
	Hussein, Abdel Raheem Muhammad (Gen.) <i>arrest warrant issued 01-03-2012</i>
	Jerbo Jamus, Saleh Mohammed (Comm.) <i>summons to appear issued 27-08-2009</i>