THE COUNCIL AND THE COURT:
Improving Security Council Support of the International Criminal Court
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EXECUTIVE SUMMARY

The United Nations Security Council has increasingly offered support, if qualified, for the work and purposes of the International Criminal Court. Twice, Darfur in 2005 and Libya in 2011, it has referred situations to the ICC for investigation and possible prosecution. 2012 saw repeated positive references to the Court, including a first-ever public Council discussion focused on building support for the ICC. In March of 2013, the Council authorized the peacekeeping force in the Democratic Republic of the Congo (DRC), MONUSCO, to cooperate with the government on the arrest of individuals subject to ICC arrest warrants. A promising trend that demonstrates clear overlap between Council and Court interests, the Council’s support has nonetheless been mainly rhetorical. It has not, for instance, adopted concrete measures in areas such as the cooperation of states, the apprehension of those subject to arrest warrant, and resources to expand the Court’s capacity. This report addresses the trend lines in Council support, seeking to answer the following set of questions: How may the Security Council build on and expand the emerging support? What barriers may exist to the adoption of sustainable, concrete measures supporting Court activities, and how may they be overcome?

Two kinds of influences shape the relationship between the Council and the Court. First, the law, norms, rules, and policies of the institutions themselves structure the relationship between the two. Under Chapter VII of the UN Charter, the Security Council bears primary responsibility for the maintenance or restoration of international peace and security. Many Council members, therefore, view the ICC through the lens of this particular authority, asking whether accountability processes can support the Council’s Chapter VII responsibilities. The ICC, by contrast, is concerned with implementation of the Rome Statute, which provides for an independent court pursuing accountability for war crimes, crimes against humanity, and genocide. Court officials and supporters may see a strong connection between peace and security, on the one hand, and justice, on the other, but the Court’s mandate pertains solely to accountability, as Fatou Bensouda, the ICC prosecutor, recently made clear.1 That said, both institutions see that the other can advance its own objectives in certain situations. Events force the two institutions to interact, and their interactions are governed in part by the UN Charter, the Rome Statute, and, to a lesser degree, the Relationship Agreement between the UN and the ICC. Yet no permanent structural mechanism is in place to help manage the relationship between the two.

Second, key actors on the Council and within the UN strongly influence day-to-day policies with respect to the Court. The permanent five members of the Security Council, the P-5, serve as the essential actors in this dynamic, with the United Kingdom and France serving a largely supportive role. The United States also has taken on the role as Court supporter, but its freedom of action is
limited by American law, especially the American Servicemembers Protection Act. China and Russia have adopted nuanced positions toward the ICC, often supportive of international accountability in principle and the ICC in particular. But they also jealously guard the prerogatives of the Council with respect to peace and security. Other actors can play influential roles, as well, such as the non-permanent members of the Council, parties and non-parties to the Rome Statute, other active participants in UN politics in New York, the Court itself, and leading non-governmental organizations (NGOs).

This report reviews these two categories of influences – the structural, legal framework and the Council/UN dynamics – before introducing a series of principles that should guide the Council-Court relationship and specific steps the Council and its members could take to advance that relationship.

The principles argue for sustained attention beyond resolutions and statements; mutual respect for the independence and roles of one another; professional, technical engagement as the foundation of the relationship; transparency within the bounds of diplomatic and case- or investigation-specific requirements; and broadening support in the UN General Assembly as a supplement to Council engagement.

The report draws from these principles to recommend a series of specific structural and substantive policy steps. Two structural elements would benefit a sound Council-Court relationship:

1. A Council working group on international justice that integrates ICC matters, either expanding the existing ad hoc Tribunals working group or establishing a new, broader group dedicated to international justice and accountability issues; and
2. A liaison committee consisting of members of the Court Registry and the relevant Council Sanctions Committees. Such a committee would streamline decision-making where Court processes – such as the transfer of an individual to The Hague or the use of funds for defense or reparations purposes – intersect with Council sanctions programs.

The structural improvements should be supplemented, over time, with specific policy improvements in the Council resolutions themselves:

1. Extension of the obligations of cooperation with the Court to all states, not just the situation countries themselves, especially in referral situations but also possibly in those circumstances where the Council has expressed support for the work of the Court in non-referral situations;
2. Provision of timely substantive responses to Court findings of non-cooperation that are communicated to the Council, as the Court has done on several occasions;
3. Extension of key Rome Statute protections of privileges and immunities in referral and other situations, thereby allowing Court officials to conduct their work safely and without interference from local actors;
4. Regular and streamlined imposition of financial, travel, and diplomatic sanctions on those accused by the ICC, helping to dry up the accused’s resources and highlight the importance of state cooperation in transferring such individuals to ICC custody;
5. Promotion of UN and outside funding in referral situations, eliminating the language from referral resolutions purporting to disallow UN funding;

6. Elimination of jurisdictional restrictions related to non-parties in referral resolutions, enabling the Court to exercise independence in identifying those most responsible for the most serious crimes in situation countries; and

7. Initiation of a transparent conversation about the factors relevant to Council referral of situations to the Court, recognizing that the Council is highly unlikely to identify specific criteria to guide future referrals.

This report also directs three sets of recommendations specifically to the P-5. It recommends that the United Kingdom and France take the lead on both sets of recommendations outlined above, while urging the United States to strengthen its commitment to the Court by expanding presidential waiver authority in ASPA. It concludes with an argument for broadening the support on the Council to include the governments of China and Russia. It thus concludes with a series of recommendations designed to involve the governments of China and Russia in conversations related to the Council-Court relationship. These include conducting diplomacy to encourage support for structural and policy changes on the Council; involving China and Russia in unofficial meetings related to international justice; building and broadening the domestic knowledge base over the long term; helping build the profile of the domestic public international law communities in each country; and identifying areas of collaboration in international justice.