

THE INDEPENDENT EXPERT REVIEW OF THE ICC: WHAT NEXT FOR COOPERATION?

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ABSTRACT

Professor Sadat's contributions straddle numerous areas of the Law. In the field of international criminal justice, she has been a leading authoritative voice since the early '90s and the beginning of international criminal law as we know it today. Her name has become synonymous with Crimes against Humanity, through her service as the ICC Special Adviser on the subject, and through the Crimes Against Humanity Initiative,¹ where she has channelled her determination to fill the gap left by the absence of a Crimes Against Humanity Convention. The initiative brought together leading experts in the field and culminated in placing the issue on the agenda of the International Law Commission. Professor Sadat's contribution, however, is not limited to Crimes Against Humanity work. From her writings on aggression,² to filing a lawsuit against Donald Trump,³ she has been a critical friend and a fierce supporter of the International Criminal Court as an institution. I have worked alongside Professor Sadat as part of the Crimes Against Humanity Initiative and have been fortunate to join in in several of its meetings. I have cherished our interactions both personally and professionally and look forward to other joint adventures in the future. Our shared passion towards strengthening the work of the ICC and the Rome system of justice will be the focus of my contribution in this volume, which focuses on one aspect of the Independent Expert Review, that of cooperation.

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¹ *Crimes Against Humanity Initiative*, WASH. UNIV. ST. LOUIS, [HTTPS://SITES.WUSTL.EDU/CRIMESAGAINSTHUMANITY/ABOUT/FACT-SHEET-ABOUT-THE-CRIMES-AGAINST-HUMANITY-INITIATIVE/](https://sites.wustl.edu/crimesagainsthumanity/about/fact-sheet-about-the-crimes-against-humanity-initiative/) (last visited Aug. 1, 2021).

² *SEEKING ACCOUNTABILITY FOR THE UNLAWFUL USE OF FORCE* (Leila N. Sadat ed., 2018).

³ *Complaint, Sadat v. Trump*, No. 4:21-cv-00416 (N.D. Cal. Jan. 15, 2021).

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I. INTRODUCTION

In December 2019, an Independent Expert Review (IER) was established by the Assembly of States Parties of the International Criminal Court (ICC).⁴ The review process was mandated to “‘identify ways to strengthen the ICC and the Rome Statute system in order to promote universal recognition of their central role in the global fight against impunity and enhance their overall functioning.’”⁵ Tasked with providing concrete recommendations on “(i) Governance; (ii) Judiciary; and (iii) Preliminary examinations, investigations, and prosecutions,” the final report of the IER process was released in September 2020.⁶ The IER comes at a time of reform for the ICC and is part of a wider review process driven by States Parties.⁷ It also comes at a challenging time for the ICC; in the face of the political attacks on the Court’s existence, the IER welcomed strong support for the ICC from both governmental and non-governmental actors around the globe.⁸

The adoption of the Rome Statute of the International Criminal Court (ICC) in 1998 was an historic moment for the international community.⁹ It marked the establishment of an international criminal justice system with the first permanent international criminal court at its core. The Rome Statute balances preserving State sovereignty with providing the ICC the ability to perform its functions. This balance is essential as without its own police force and with limited enforcement options, the ICC is entirely reliant on the cooperation of States and (where appropriate) intergovernmental organisations in order to conduct its investigations and prosecutions.¹⁰ Recognising the continued importance of the ICC within the current political climate and amid ongoing violations around the globe, the IER called for States Parties to “demonstrate their commitment to the institution they have founded.”¹¹

4 Int’l Crim. Ct. Assembly of State Parties [ICC-ASP], *Review of the ICC and the Rome Statute System*, ICC-ASP/18/Res.7 (2019).

5 ICC-ASP, *Independent Expert Review of the International Criminal Court and the Rome Statute System - Final Report*, at ¶ 1 (Sept. 30, 2020).

6 *Id.* at ¶ 2.

7 *Id.* at ¶ 7.

8 *Id.* at ¶ 21.

9 The Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002) [hereinafter ‘Rome Statute’].

10 Article 87(6) of the Rome Statute provides for cooperation with any intergovernmental organization, as agreed upon and in accordance with their competence or mandate. *See* Rome Statute, *supra* note 9, at art. 87(6).

11 *Independent Expert Review of the International Criminal Court and the Rome Statute System*,

An area where such a commitment is important is that of cooperation, which, despite its significance, was only cursorily examined by the IER. The reality in practice is different to the Rome Statute on paper, and non-cooperation has come to shape and hinder the work of the Court. Prominent examples include indicted persons (notably, Omar al-Bashir) travelling to States Parties without being arrested, and concerns around lack of cooperation influencing the initial decision not to open an investigation into the Situation in Afghanistan.¹² There have been significant developments which impact cooperation issues. Omar al-Bashir is now in the custody of Sudanese authorities, who have met with the ICC Prosecutor to discuss prosecution options.¹³ However, it is not possible to posit future scenarios with Sudan as a State Party to the Rome Statute owing to the military coup, which took place in October 2021, and has created uncertainty around the fulfilment of commitments to the Court.

On appeal, an investigation has also been opened into the Situation in Afghanistan, despite the hostile political climate from the United States of America (U.S.) under the Trump administration.¹⁴ However, the ICC Prosecutor decided to resume investigations in Afghanistan, but limit the focus to alleged crimes carried out by the Taliban and so-called Islamic State - Khorasan Province (IS-K).¹⁵ Whilst this announcement to deprioritise investigations into US actions in Afghanistan may improve USA-ICC relations, the decision was almost immediately met with allegations of selectivity, double standards and bias, even among those who have long supported the Court.¹⁶

The ICC is facing an increasing number of situations where its work is being hindered by non-cooperation from States which are not party to the

supra note 5, at ¶ 22.

¹² International Criminal Court [ICC], Situation in the Islamic Republic of Afghanistan, ICC-02/17-33, Pre-Trial Chamber II, ¶¶ 44, 91, 94 (Apr. 12, 2019); Tom White, *States 'Failing to Seize Sudan's Dictator Despite Genocide Charge'*, THE GUARDIAN (Oct. 21, 2018), <https://www.theguardian.com/global-development/2018/oct/21/omar-bashir-travels-world-despite-war-crime-arrest-warrant>.

¹³ *In Sudan, ICC Prosecutor Aays Al-Bashir Must Be Tried Over Darfur*, AL JAZEERA (Oct. 20, 2020), <https://www.aljazeera.com/news/2020/10/20/icc-prosecutor-talks-on-al-bashir-case-in-historic-sudan-visit>. See also *Statement to the United Nations Security Council on the Situation in Darfur, Pursuant to UNSCR 1593 (2005)*, ICC (June 9, 2021), <https://www.icc-cpi.int/Pages/item.aspx?name=2106-prosecutor-statement-uns-c-darfur>.

¹⁴ See ICC, Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, The Appeals Chamber, (Mar. 5, 2020).

¹⁵ Office of the Prosecutor, *Statement of the Prosecutor of the International Criminal Court, Karim A.A. Khan QC, following the application for an expedited order under article 18(2) seeking authorisation to resume investigations in the Situation in Afghanistan*, ICC (Sept. 27, 2021), <https://www.icc-cpi.int/Pages/item.aspx?name=2021-09-27-otp-statement-afghanistan>.

¹⁶ ACLU, 'Statement on International Criminal Prosecutor's Decision to 'Deprioritize' Investigation of Alleged US War Crimes in Afghanistan', 27 September 2021.

Rome Statute. Issues include open investigations which involve non-State parties who are unwilling to engage with the process, and a lack of support within the UN Security Council to reinforce cooperation with the Court.¹⁷

This piece will therefore consider the challenges which the ICC is facing around cooperation within a changing operational context. It also acknowledges that the Court is in a period of internal reflection and will build on the findings of the Independent Expert Review of the ICC.¹⁸ By taking a holistic approach to non-cooperation which situates the Court within its wider context, this piece will argue that the Rome Statute regime cannot by itself ensure the cooperation of States and requires building on several synergies identified by the IER and fostering their implementation.

II. THE INDEPENDENT EXPERT REVIEW AND COOPERATION

With States as the primary actors expected to execute ICC cooperation requests, the Rome Statute contains a comprehensive cooperation regime. This is the longest part of the Statute and consists of seventeen provisions within Part 9: International cooperation and judicial assistance. These provisions encompass all cooperation matters including the obligation to cooperate, surrender, arrest, and collect evidence, as well as deal with a State refusal to execute cooperation requests.¹⁹ Whilst Article 86 of the Rome Statute provides an obligation on States to ‘cooperate fully’ with the Court, national procedures are also permitted, as well as the ability to postpone requests.²⁰ If an incident of non-compliance occurs and there is a finding that a State Party has breached its obligations under the Rome Statute, then the matter may be referred to the Assembly of States Parties to the Rome Statute for the International Criminal Court (ASP), or the UN Security Council (where applicable) for consideration.²¹ Whilst the cooperation regime primarily concerns States Parties, Article 87(5) also provides for the cooperation and non-compliance by States which are not party to the Rome Statute.²² This approach provides for judicial findings by

17 Beyond US objections to Afghanistan, Myanmar has also rejected the Bangladesh/Myanmar investigation. *Myanmar Rejects ICC Probe Into Alleged Crimes Against Rohingya*, AL JAZEERA (Nov. 5, 2019), <https://www.aljazeera.com/news/2019/11/15/myanmar-rejects-icc-probe-into-alleged-crimes-against-rohingya>.

18 See *Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report*, *supra* note 5.

19 Rome Statute, *supra* note 9, at arts. 86, 89, 91, 92, 93, 94, 98.

20 Rome Statute, *supra* note 9, at arts. 93, 94, 95, 99.

21 Article 87(7), Rome Statute. A State may be referred to the UN Security Council if non-compliance concerns a matter referred to the ICC by the UN Security Council.

22 Article 87(5), Rome Statute stipulates that where a non-State party which has entered into an ad

the ICC combined with a political response from the ASP or UN Security Council, utilising both legal and political tools to tackle non-cooperation.

For States Parties, failure to cooperate with the ICC amounts to breaching an obligation arising from an international treaty which gives rise to State responsibility under international law.²³ In practice, this has not helped to secure cooperation with the Court. The unique mission of the ICC is as a criminal court tasked with ending impunity for core international crimes. Thus, the unique nature of the Rome Statute means that unlike other international treaties, its termination for a non-complying State is not really an option.²⁴ Instead, it is in the interests of the ICC and its States Parties that non-complying States fulfil their obligations under the Rome Statute.

Concerns around cooperation with States include the need to improve inadequate responses to requests for information and to facilitate witness interviews with greater ease rather than the increasing requirements set by some States.²⁵ There is a fundamental need for a broad spectrum of cooperation which was acknowledged by the IER in light of the growing and changing nature of the ICC's work, with more witnesses located abroad and greater use of digital evidence (e.g. online banking, messaging, social media, email platforms).²⁶ In order to effectively conduct investigations and access evidence, the ICC requires cooperation with States Parties and national authorities such as armed forces and national law enforcement agencies as well as international and intergovernmental organisations, civil society, and other entities.²⁷ The legal frameworks and capacities that

hoc arrangement or agreement with the Court then fails to cooperate, the Court may inform the ASP or where applicable the UN Security Council. Article 87 does not provide for non-cooperation by a third State which has accepted the jurisdiction of the ICC by virtue of Article 12(3) (i.e., following a declaration). Such States are equated with States Parties, making Article 87(7) applicable. *See, e.g.*, State of Palestine, *Declaration Accepting the Jurisdiction of the International Criminal Court* (Dec. 31, 2014), www.icc-cpi.int/iccdocs/PIDS/press/PALESTINE_A_12-3.PDF.

²³ International Law Commission, *Articles on State Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission, Fifty-third Session (A/56/10, 10 August 2001)* art. 41(1). For a commentary on these Articles, *see* James Crawford, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, 96 AM. J. INT'L L. 874 (2002).

²⁴ Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations art. 60, May 23, 1969, 1155 U.N.T.S. 331; Claus Krieb & Kimberly Prost, *Article 87: Requests for Cooperation: General Provisions*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (O. Triffterer & K. Ambos eds., 2016).

²⁵ *Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report*, *supra* note 5, at ¶¶ 754–55.

²⁶ Similarly, increasing challenges around cooperation including non-cooperation and the need for optimisation are recognised in the ICC Office of the Prosecutor's 2019-2021 Strategic Plan. Office of the Prosecutor, *Strategic Plan 2019-2021*, INT'L CRIM. CT. (July 17, 2019), ¶¶ 11, 19; *Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report*, *supra* note 5, at ¶ 751.

²⁷ *Id.* at ¶ 752.

domestic agencies, private companies, and intergovernmental or international organisations (such as the UN) may have can facilitate successful investigations.²⁸ For example, the ability to intercept communications and records including bank, phone, and immigration records, and their presence in situation countries with associated forms of evidence such as medical and forensic records.²⁹ Indeed, cooperation with States is one aspect of a complex issue.

The IER's recommendations on cooperation (Recommendations 272-278) focus on domestic jurisdictions and are designed to streamline the aforementioned issues. They include recommending that the Office of the Prosecutor should continue to enter into Memoranda of Understanding with States Parties, international and intergovernmental organisations, and private companies;³⁰ a review of relevant domestic cooperation provisions 'for the purpose of enabling cooperation with States parties for evidence collection';³¹ joint training with ICC staff and investigators from States Parties in order to increase capacity and strengthen networks;³² and, considering strategic secondment of national law enforcement agents.³³ The recommendations are in line with existing suggestions for States to sign and implement cooperation agreements with the ICC in light of the acknowledged need for domestic authority to act in relation to cooperation requests.³⁴

Whilst implementing these recommendations may increase the willingness and ability of States to cooperate with the ICC on an individual basis, the issue of non-cooperation also requires collective action from States. When dealing with non-cooperation the ICC must reduce instances of non-cooperation, address instances when they occur, and avoid repetition in the future.³⁵ As the permanent international criminal court at the centre

28 *Id.* at ¶ 753.

29 The ICC has evidence such as phone records and intercepted radio communications in cases including, *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jaques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, ICC-01/05-01/13-1989-Red, Judgment Pursuant to Article 74 of the Statute, ¶ 214 (Oct. 19, 2016); *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-422-Red, Decision on the Confirmation of Charges, ¶ 55 (March 23, 2016); *Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report*, *supra* note 5, at ¶ 753.

30 *See Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report*, *supra* note 5, at ¶ 754 (Recommendations 272-278).

31 *See id.* (Recommendations 276).

32 *See id.* (Recommendations 277).

33 *See id.* (Recommendations 278).

34 Olympia Bekou, *Dealing With Non-cooperation at the ICC: Towards a More Holistic Approach*, 19(6) INT'L CRIM. L. REV. 911, 932–33 (2019).

35 As the representative Denmark put it in their statement at the 12th Session of the Assembly of

of the international criminal justice system, it is wholly appropriate to engage other actors within the international community in support of the ICC's efforts to combat non-cooperation. Investing in strengthening bilateral cooperation with States Parties such as through maintaining constructive dialogue with relevant national authorities including law enforcement and cooperation networks can enhance the execution of cooperation requests.³⁶

Within the ICC, cooperation is the responsibility of the Jurisdiction, Complementarity and Cooperation Division (JCCD) within the Office of the Prosecutor, ultimately sitting within the International Cooperation Section (ICS).³⁷ The ICS provides International Cooperation Advisors to work on situation-specific cooperation needs as well as seeking cooperation and assistance in order to facilitate investigations and prosecutions.³⁸ Despite the essential role of the ICS given the complex nature of cooperation issues and the need for a bespoke approach to each situation based on the variation between domestic legislation and politics, the IER reports criticism of the JCCD.³⁹ The JCCD was reportedly viewed as a hindrance by some staff, who perceived it as more diplomatic than responsive to requests from prosecutors and investigators.⁴⁰

By strengthening its own processes the ICC can itself improve responses to non-cooperation, including increasing its internal capacity to track fugitives and provide information to States.⁴¹ In that vein, the ICC has improved cooperation in relation to arrest and surrender since the adoption of the 2016 Policy Paper for Case Selection and Prioritisation.⁴² Most recent

States Parties: "Instances of non-cooperation should lead to a clear response from us as States Parties, but we should also together search for ways to avoid repetition of such instances in the future." H.E. Ambassador Ole E. Moseby, Ambassador of Denmark, Statement by Denmark at the 12th Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, 20–28 November 2013. https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/GenDeba/ICC-ASP12-GenDeba-Danmark-ENG.pdf (last visited Aug. 1, 2021).

³⁶ Bekou, *supra* note 32, at 931; Pascal Turlan, *The International Criminal Court Cooperation Regime – A Practical Perspective from the Office of the Prosecutor*, in *Cooperation and the International Criminal Court* 74 (O. Bekou & D. Birkett eds., 2016).

³⁷ *Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report*, *supra* note 5, at ¶ 757.

³⁸ *Id.*

³⁹ *Id.* at ¶ 758.

⁴⁰ Identified issues include delays due to the complex system for drafting and filing Requests for Assistance (RFAs), along with concerns that the RFA system is not appropriate for investigations in its current form given it being time-consuming and bureaucratic. *Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report*, *supra* note 5, at ¶¶ 758–60.

⁴¹ *Id.* at ¶ 769.

⁴² Office of the Prosecutor, *Policy Paper on Case Selection and Prioritisation*, ICC (Sept. 15, 2016); *Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report*, *supra* note 5, at ¶ 677.

arrest warrants have been quickly enforced while the outstanding arrest warrants include warrants dating back to 2005 with at least 14 known fugitives still at large.⁴³

III. NON-COOPERATION AND THE UNITED NATIONS SECURITY COUNCIL

Responding to non-cooperation was envisaged to involve the support of the UN Security Council where a situation has been referred to the Court by the Council. The Rome Statute provides that where a State fails to comply with a request to cooperate by the Court, it may make a finding to that effect, and where the Security Council has referred a matter to the ICC, such a finding may be communicated to the Security Council.⁴⁴ If the Security Council is informed of a finding of non-cooperation, it must then decide upon further action. Enforcement is therefore transferred to the UN. Whilst this had the potential to be a powerful political tool for the ICC, in practice it is stifled by the associated limitations such as the veto power held by the five permanent members and the lack of political will to tackle non-cooperation.⁴⁵ Notably, three of the five permanent members of the UN Security Council are not party to the Rome Statute (Russia, China and the United States) with Russia and the United States are currently involved in ICC situations of concern (Ukraine and Afghanistan, respectively).⁴⁶ The

⁴³ *Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report*, *supra* note 5, at ¶¶ 677, 767. With the exception of Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahoud and Mahmoud Mustafa Busayf Al-Werfalli, the Court’s long-term outstanding warrants were filed prior to the 2016 policy. *See, e.g.*, Prosecutor v. Harun, Case No. ICC-02/05-01/07, Warrant of Arrest (Apr. 27, 2007); *Harun*, Case No. ICC-02/05-01/07, Public Redacted Version of Second Warrant of Arrest (June 11, 2020) (publishing a second arrest warrant for “Ali Kushayb” four days before his initial appearance before the ICC); Prosecutor v. Kony, Case No. ICC-02/04, Warrant of Arrest (July 8, 2005). *See also* Prosecutor v. Al Hassan, Case No. ICC-01/12-01/18, Warrant of Arrest (Mar. 27, 2018); Prosecutor v. Al-Werfalli, Case No. ICC-01/11-01/17, Warrant of Arrest (Aug. 15, 2017); *Al-Werfalli*, Case No. ICC-01/11-01/17, Second Warrant of Arrest (July 4, 2018).

⁴⁴ Rome Statute art. 87(7) (providing for State Parties); Rome Statute art. 87(5)(b) (providing for States which are not party to the Rome Statute). Where a State is not a party, the Court may “inform” the ASP or the UNSC of an instance of non-cooperation as the State in question has not consented to abide by the Rome Statute. *See, e.g.*, *Harun*, Case No. ICC-02/05-01/07, Decision Informing the United Nations Security Council About the Lack of Cooperation by the Republic of Sudan (May 25, 2010). *See also* Annalisa Ciampi, *The Obligation to Cooperate*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 1633 (A. Cassese, P. Gaeta, J.R.D.W. Jones eds., 2002); Claus Kreß & Kimberly Prost, *Article 87: Requests for Cooperation: General Provisions*, in *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* (O. Triffterer & K. Ambos eds., 2016).

⁴⁵ *See* Negotiated Relationship Agreement Between the International Criminal Court and the United Nations art. 17(3), July 22, 2004, ICC-ASP/3/Res.1 (entered into force Oct. 4, 2004).

⁴⁶ *See* Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, Judgement on the Appeal Against the Decision on the Authorisation of an Investigation, ¶ 4 (Mar. 5, 2020). *See also* Office of the

ICC is therefore facing increasing challenges around non-cooperation at a time when the Security Council is both unwilling and unable to fulfil its intended role in support of the Court.

As observed by the Court, communications to the Security Council from the ICC are rendered futile if there is no follow-up.⁴⁷ Such futility is demonstrable in the wealth of jurisprudence which the ICC now has in relation to non-cooperation. The situations in Sudan and Libya highlight the lack of support from the UN Security Council.⁴⁸ Despite both situations having been referred to the Court by the UN Security Council, findings of non-cooperation communicated to the Security Council by the Office of the Prosecutor have received no response.⁴⁹ The majority of the ICC's non-cooperation decisions concern the situation in Sudan.⁵⁰ Sudan has been a focal point for the issue of non-cooperation due largely to its former President, Omar al-Bashir, whose travel around the African continent without arrest caused significant friction between the ICC and the African Union.⁵¹ The ICC's decisions have therefore primarily involved the failure

Prosecutor, *Statement of the Prosecutor, Fatou Bensouda, on the Conclusion of the Preliminary Examination in the Situation in Ukraine*, ICC (Dec. 11, 2020), <https://www.icc-cpi.int/Pages/item.aspx?name=201211-otp-statement-ukraine>.

47 Prosecutor v. Al Bashir, ICC-02/05-01/19, Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding Arrest and Surrender, ¶ 22 (Mar. 26, 2013); *See also Al Bashir*, ICC-02/05-01/19, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, ¶ 33.

48 *See* U.N. Secretary-General, Report of the International Criminal Court, sec. II(a)(4)(6), U.N. Doc. A/74/324 (Aug. 23, 2019). *See also Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report*, *supra* note 5, at ¶ 767.

49 *See* U.N. Secretary-General, Report of the International Criminal Court, ¶ 75, U.N. Doc. A/74/324 (Aug. 23, 2019). *See also Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report*, *supra* note 5, at ¶ 767.

50 *C.f.* Prosecutor v. Gaddafi, ICC-01/11-01/11, Decision on the Non-compliance by Libya With Requests for Cooperation by the Court and Referring the Matter to the United Nations Security Council (Dec. 10, 2014); Prosecutor v. Kenyatta, ICC-01/09-02/11, Second Decision on Prosecution's Application for a Finding of Non-compliance Under Article 87(7) of the Statute (Sept. 19, 2016). *See also* Lorraine Smith-van Lin, *Non-compliance and the Law and Politics of State Cooperation: Lessons From the Al Bashir and Kenyatta Cases*, in COOPERATION AND THE INTERNATIONAL CRIMINAL COURT 114–51 (O. Bekou & D. Birkett eds., 2016).

51 The ICC's related decisions on non-cooperation rejected the notion suggested by States that al-Bashir enjoyed head of state immunity which would have prevented arrest and surrender. *See* Prosecutor v. Al Bashir, ICC-02/05-01/19, Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply With the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Al Bashir (Dec. 13, 2011). *See also* Dapo Akande, *ICC Issues Detailed Decision on Bashir's Immunity (... At long Last...) But Gets the Law Wrong*, EJIL: TALK! (Dec. 15, 2011), <https://www.ejiltalk.org/icc-issues-detailed-decision-on-bashir%E2%80%99s-immunity-at-long-last-but-gets-the-law-wrong/>; Dov Jacobs, *A Sad Hommage to Antonio Cassese: The ICC's Confused Pronouncements on State Compliance and Head of State Immunity*, SPREADING THE JAM (Dec. 15 2011), <https://dovjacobs.com/2011/12/15/a-sad-hommage-to-antonio-cassese-the-iccs-confused-pronouncements-on-state-compliance-and-head-of-state-immunity/>; *Al Bashir*, ICC-02/05-01/19, Decision Pursuant to Article 87(7) of the Rome Statute on the Refusal of the Republic of Chad

of States Parties to arrest and surrender individuals or the non-cooperation of Sudan itself.⁵² Without follow up from the UN Security Council, it is arguable that there was little impact on States' behaviour, despite the numerous findings of non-cooperation.

Referrals by the UN Security Council were included in the Rome Statute in order to discourage the creation of new *ad hoc* Tribunals in light of the now-permanent international criminal court and to provide UN funding in relation to UN referrals.⁵³ However, paralysis within the UN Security Council and lack of support for the ICC, to an extent which has prevented the referral of situations of concern such as Syria and Myanmar to the Court, has led to impatience in the face of ongoing atrocities.⁵⁴ Attention is therefore turning to alternatives to the ICC with proposed initiatives including an *ad hoc* Tribunal focused on Syria and interest in a mechanism to try crimes committed by the so-called Islamic State is growing.⁵⁵ The approach of developing new justice mechanisms does not address the

to Comply With the Co-operation Requests Issued by the Court With Respect to the Arrest and Surrender of Al Bashir; *Al Bashir*, ICC-02/05-01/19, Decision on the Non-compliance by the Republic of Uganda With the Request to Arrest and Surrender Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute (July 11, 2016). *See generally* Dapo Akande, *The Immunity of Heads of States of Non-parties in the Early Years of the ICC*, 112 AM. J. INT'L L. UNBOUND 172 (2018), DOI.ORG/10.1017/aju.2018.56.

⁵² *See, e.g.*, Prosecutor v. Al Bashir, ICC-02/05-01/19, Decision on the Non-compliance of the Republic of Chad With the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Al-Bashir (Mar. 26, 2013); *Al Bashir*, ICC-02/05-01/19, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Al Bashir's Arrest and Surrender to the Court (Apr. 9, 2014); *Al Bashir*, ICC-02/05-01/19, Decision on the Non-Compliance by the Republic of Djibouti With the Request to Arrest and Surrender Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute (July 11, 2016); Prosecutor v. Hussein, ICC-02/05-01/12, Decision on the Prosecutor's Request for a Finding of Non-Compliance Against the Republic of the Sudan (June 26, 2015).

⁵³ S.C. Res. 1593 (2005); S.C. Res. 1970 (2011). In practice, further tribunals were created under the auspices of the UN after the ICC became operational, and the two SC Resolutions that referred the situation in Darfur, Sudan and Libya to the ICC, respectively, explicitly excluded UN funding for these referrals.

⁵⁴ On Syria, *see* Caroline Sweeney, *Accountability for Syria: Is the International Criminal Court Now a Realistic Option?*, 17 J. INT'L CRIM. JUST. 1083 (2019). On Myanmar, *see* Ministry of the Office of the State Counsellor of Myanmar, Press Release on the Application by the International Criminal Court Prosecutor to Claim Jurisdiction Over the Alleged Deportation of the Muslims from Rakhine to Bangladesh, EMBASSY REPUBLIC UNION MYAN., MOSCOW (Apr. 13, 2018), https://memoscow.org/index.php/en/rakhine-news/240-press-release-on-the-application-by-the-international-criminal-court-icc-prosecutor-to-claim-jurisdiction-over-the-alleged-deportation-of-the-muslims-from-rakhine-to-bangladesh?__cf_chl_jschl_tk__=pmd_ea9119880907a41155a32fa84b3e501698988b06-1627926535-0-ggNtZGzNAuKjcnBszQii; Ministry of the Office of the State Counsellor, *Press Release*, GOV'T REPUBLIC UNION MYAN. (Sept. 8, 2018), <https://reliefweb.int/report/myanmar/government-republic-union-myanmar-ministry-office-state-counsellor-press-release>.

⁵⁵ *See* BETH VAN SCHAACK, *IMAGINING JUSTICE FOR SYRIA* (2021) (discussing the concept of "pooled" jurisdiction).

systemic issues around non-cooperation faced by the ICC nor the paralysis which exists within the UN Security Council. Any new justice mechanism may therefore face the same hostility and be hindered by the same non-cooperation issues as the ICC. Additionally, new mechanisms must overcome common challenges such as funding and acknowledge the time which would be taken for proposed mechanisms to become operational in the face of ongoing atrocities. Whilst new international criminal justice mechanisms may be able to make important contributions to justice, it is perhaps pertinent to strengthen the institutions which already exist, including enhancing and increasing cooperation.

IV. LACK OF COOPERATION BY NON-STATE PARTIES

Akin to the lack of support shown by non-States parties within the UN, expecting cooperation from or entering into cooperation agreements with States which are not parties to the Rome Statute may be especially problematic. The issue of non-cooperation by States which are not a party to the Rome Statute has been a consistent challenge for the ICC. However, certain States are now adopting openly hostile policies towards the ICC which negatively impacts cooperation with the Court.⁵⁶ This may be epitomised by the example of Afghanistan. Having opened a Preliminary Examination in 2006, the ICC Prosecutor made a request in November 2017 for authorisation to commence an investigation.⁵⁷ Under the Trump administration, the U.S. became increasingly hostile towards the ICC and its staff due to the prospect of investigation into U.S. citizens for alleged crimes in Afghanistan. On 15 March 2019, U.S. Secretary of State Mike Pompeo announced that the U.S. would impose visa bans on involved ICC officials and that the U.S. was prepared to take further action if the ICC did “not change its course.”⁵⁸ In April 2019, the U.S. revoked the visa of sitting ICC Prosecutor, Fatou Bensouda.⁵⁹ That same month, the pre-Trial Chamber rejected the request to open an investigation, in part due to concerns around non-cooperation, deciding that it would not serve the interests of justice.⁶⁰ However, on 5 March 2020, the Appeals Chamber

⁵⁶ *Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report*, *supra* note 5, at ¶ 399.

⁵⁷ See Situation in the Islamic Republic of Afghanistan, ICC-02/17, Public Redacted Version of ‘Request for Authorisation of an Investigation Pursuant to Article 15’ (Nov. 20, 2017).

⁵⁸ Q&A: *The International Criminal Court and the United States*, HUM. RTS. WATCH (Sept. 2, 2020), <https://www.hrw.org/news/2020/09/02/qa-international-criminal-court-and-united-states#5>.

⁵⁹ *Id.*

⁶⁰ Situation in the Islamic Republic of Afghanistan, ICC-02/17-33, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation Into the Situation in

authorised the ICC Prosecutor to commence an investigation.⁶¹ The investigation concerns the Taliban and affiliated groups for crimes against humanity and war crimes; the Afghan National Security Forces for war crimes; and, the armed forces of the U.S. and its Central Intelligence Agency (CIA) for war crimes.⁶²

The U.S. reacted strongly to the opening of the investigation into Afghanistan. The Trump administration had previously stated that it would not cooperate with the ICC and that for America ‘the ICC has no jurisdiction, no legitimacy, and no authority.’⁶³ After Pompeo publicly threatened ICC staff on 17 March 2020, sitting President Donald Trump issued an Executive Order on 11 June 2020, which authorised asset freezes and family travel bans against selected ICC officials.⁶⁴ On 2 September 2020, the Trump administration designated sanctions against both the ICC Prosecutor and another staff member.⁶⁵ The breadth of the Executive Order means it also provides for sanctions against people who assist ICC investigations.⁶⁶ Following the regime change in January 2021, the Executive Order was revoked by President Biden in April 2021.⁶⁷ However, the Executive Order and aggressive anti-ICC campaign has negatively impacted both the morale within the Court and cooperation where the credibility of the ICC has been called into question.⁶⁸ Such political attacks on the ICC have the potential to fundamentally undermine the Court’s credibility, its impartiality, and its ability to effectively function, especially where they inhibit or prevent cooperation with the Court. Tackling non-cooperation directly is therefore not enough. The Court must also address

the Islamic Republic of Afghanistan, ¶¶ 44, 91, 94 (Apr. 12, 2019).

61 The investigation is regarding “alleged crimes committed on the territory of Afghanistan in the period since 1 May 2003, as well as other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation and were committed on the territory of other States Parties in the period since 1 July 2002.” Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, The Appeals Chamber, Judgment on the Appeal Against the Decision on the Authorisation of an Investigation Into the Situation in the Islamic Republic of Afghanistan, ¶¶ 54, 79 (Mar. 5, 2020).

62 *Id.* at ¶ 4.

63 Q&A: *The International Criminal Court and the United States*, *supra* note 56.

64 Exec. Order No. 13928, 85 Fed. Reg. 36,139 (Jun. 11, 2020); Q&A: *The International Criminal Court and the United States*, *supra* note 56.

65 Exec. Order No. 13928, 85 Fed. Reg. 36,139 (Jun. 11, 2020); Q&A: *The International Criminal Court and the United States*, *supra* note 56.

66 Exec. Order No. 13928, 85 Fed. Reg. 36,139 (Jun. 11, 2020); Q&A: *The International Criminal Court and the United States*, *supra* note 56.

67 Exec. Order No. 14022, 86 FR 17,895 (Apr. 7, 2021). *US Rescinds ICC Sanctions, Biden Should Support Global Court of Last Resort*, HUM. RTS. WATCH (Apr. 2, 2021), <https://www.hrw.org/news/2021/04/02/us-rescinds-icc-sanctions>.

68 *Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report*, *supra* note 5, at ¶ 399.

political attacks on its existence, or it must have a support network which allows it to function within a hostile operational context. The de-prioritization of the Afghanistan situation by the ICC Prosecutor may be perceived by some as succumbing to political pressure or, conversely, as a pragmatic decision given the complexities it would pose for cooperation by others.

V. THE ROLE OF THE ASSEMBLY OF STATES PARTIES

Whilst the ICC has publicly defended itself against political attacks, the IER noted that the Court is constrained by the need to maintain working relations with some of its critics, particularly members of the UN Security Council.⁶⁹ The IER also raised the matter of the ‘dignity of the Court’ and that it might not be appropriate for the ICC to engage in such a political debate.⁷⁰ The ICC’s status as an impartial judicial mechanism and reliance on cooperation with the need to maintain good working relations are salient points. The ICC should be able to rely on political allies to defend it, including the ASP, the Member States governments and its own President and subsidiary bodies.⁷¹ Indeed, on the same day as the aforementioned U.S. Executive Order, the ICC and the President of the ASP both issued statements.⁷² This was followed shortly after by States Parties and civil society including statements from the High Representative of the European Union.⁷³ The IER underlined the need for the ASP to strengthen such activity and act in the face of future attacks on the Court by non-States Parties, recommending that the ASP and States Parties should develop a response strategy.⁷⁴

⁶⁹ See, e.g., *International Criminal Court Condemns US Economic Sanctions*, ICC-CPI-20200902-PR1535, ICC (Sept. 2, 2020), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1535>; *Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report*, supra note 5, at ¶ 400.

⁷⁰ *Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report*, supra note 5, at ¶ R169.

⁷¹ *Id.* at ¶ 401.

⁷² *Statement of the International Criminal Court on Recent Measures Announced by the US*, ICC (June 11, 2020), <https://www.icc-cpi.int/Pages/item.aspx?name=200611-icc-statement>; *ASP President O-Gon Kwon Rejects Measures Taken Against ICC*, ICC (Jun. 11, 2020), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1527>; *Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report*, supra note 5, at ¶ 401.

⁷³ See e.g., *International Criminal Justice: Statement by the High Representative of the European Union Following the US Decision on Possible Sanctions Related to the ICC*, EUR. UNION EXTERNAL ACTION SERV. (June 16, 2020), https://eeas.europa.eu/headquarters/headquarters-homepage/80954/international-criminal-justice-statement-high-representative-following-us-decision-possible_en; *Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report*, supra note 5, at ¶ 401.

⁷⁴ See *id.* ¶ R169. See also *id.* at ¶ 400.

The ASP also has an essential role deploying political and diplomatic efforts as a means of complementing the judicial findings of non-compliance rendered by the Court.⁷⁵ Article 112(2)(F) of the Rome Statute provides the mechanism for dealing with non-cooperation.⁷⁶ It provides the ASP with the ability to request compliance and may condemn failure to cooperate. The ASP may have a matter of non-cooperation referred to it, or, in exceptional situations, there may be reasons to believe that a specific and serious incident of non-cooperation regarding arrest and surrender is either about to occur or is ongoing.⁷⁷ Whilst the ASP could theoretically adopt countermeasures such as economic sanctions, such measures have not been used to date and would be a radical approach.⁷⁸

In light of its role, the IER also made several Recommendations on cooperation (Recommendations 272-278) which concern action from the ASP, including:⁷⁹ the Office of the Prosecutor could request assistance from the ASP to raise awareness of its needs, consider working with the ASP to improve cooperation potentially by developing a cooperation framework;⁸⁰ and the Office of the Prosecutor and the ASP could consider revisiting agreements with agencies such as the UNHCR with which the Office frequently engages.⁸¹ These recommendations raise the issue of to what extent action should be taken collectively through the ASP or individually with State Parties to both improve cooperation and tackle non-cooperation. The Rome Statute does not clarify whether a State may act individually if the ASP does not reach the majority it needs to act in the face of non-cooperation, although Articles 87(7) and 112(2)(f) suggest a preference for collective action.⁸²

75 “The Assembly may certainly support the effectiveness of the Rome Statute by deploying political and diplomatic efforts to promote cooperation and to respond to non-cooperation. These efforts, however, may not replace judicial determinations to be taken by the Court in ongoing proceedings.” Assembly Procedures Relating to Non-cooperation, ICC-ASP/10/Res.5, annex, p. 39 ¶ 6 (Dec. 21, 2011).

76 The Rome Statute states: “The Assembly shall: Consider pursuant to article 87, paragraphs 5 and 7, any question relating to non-cooperation.” Rome Statute art. 112(2)(F), Jul. 17, 1998, 2187 U.N.T.S. 38544.

77 There are informal and formal procedures as well as a non-cooperation toolkit. See Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/10/Res.5, annex, p. 39 ¶ 7 (Dec. 21, 2011); Bekou, *supra* note 32, at 18-20.

78 Bekou, *supra* note 32, at 16; Nigel White & Ademola Abass, *Countermeasures and Sanctions*, in INTERNATIONAL LAW 1, 508 (M. Evans ed., 2014).

79 See *Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report*, *supra* note 5, at ¶ 754 (Recommendations 272–78).

80 See *id.* (Recommendations 273–74).

81 See *id.* (Recommendations 275).

82 Rome Statute arts. 87(7), 112(2)(F); Bekou, *supra* note 32, at 16.

VI. COOPERATION AND OUTREACH

The ICC may itself proactively improve cooperation by strengthening outreach activities. The ICC has still to effectively implement its Strategic Plan for Outreach and the need for outreach activities has been stressed to the IER by States Parties and civil society.⁸³ Outreach should be commenced as soon as possible in relation to each situation in order to stifle anti-ICC rhetoric and propaganda from critics.⁸⁴ Accordingly, the IER's suggestion that regulations governing the Registry limiting outreach to situations and cases should be amended to permit activities during Preliminary Examinations could, if implemented, both strengthen support for the ICC and encourage increased cooperation.⁸⁵

The current, insufficient approach to outreach is also affecting the ICC's relationship with civil society and the media in situation countries, as these entities are often at the forefront of keeping the affected communities informed.⁸⁶ In the absence of an effective ICC outreach programme it also falls on civil society to combat anti-ICC propaganda, misinformation, and to manage expectations.⁸⁷ If left unchecked these issues can all negatively impact cooperation with the Court. The IER rightly suggests capitalising on local civil society organisations and media in order to support outreach activities.⁸⁸ This may be especially pertinent given the role of civil society organisations in promoting and facilitating the work of the ICC within situation countries, including often being crucial to attaining cooperation from affected population groups and conducting fact-finding exercises.⁸⁹ Despite performing these recognised and crucial roles, there is a need for the ICC to improve external relations with civil society and the media in situation countries.⁹⁰ Whilst the Court must balance the nature of its work and the associated needs for independence and confidentiality, the IER noted several issues. These include a lack of engagement with local civil

83 ICC-ASP, Strategic Plan for Outreach of the International Criminal Court, ICC-ASP/5/12, 29 September 2006 https://www.icc-cpi.int/nr/rdonlyres/fb4c75cf-fd15-4b06-b1e3-e22618fb404c/185051/iccasp512_english1.pdf (last visited Aug. 1, 2021); *Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report*, *supra* note 5, at ¶ 394.

84 *Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report*, *supra* note 5, at ¶ 394.

85 *Id.*

86 *Id.* at ¶ 395.

87 *Id.*

88 *Id.*

89 *Id.* at ¶¶ 380, 382.

90 *Id.* at ¶ 381.

society and the media, lack of clarity around communication, and limited effort and resources dedicated to communications.⁹¹

Outreach may be one part of fostering stronger and more productive cooperative relationships with local civil society and media.⁹² In order for civil society organisations to facilitate the work of the Office of the Prosecutor, and themselves work to support the ICC, there needs to be a ‘mutually reinforcing’ relationship.⁹³ The IER highlights that there are no guidelines for civil society organisations in order to ensure that their work is complementary to the Office of the Prosecutor.⁹⁴ This is significant as local civil society organisations and media are often at the scene of international crimes and provide initial assistance to victims.⁹⁵ Conducting outreach around the needs of the Court, standards for the collection and communication of evidence, best practices and standards, and international criminal law is essential in order to make usable submissions to the Office of the Prosecutor and increase protection for victims.⁹⁶

VII. CONCLUDING REMARKS

The cooperation regime envisaged in the Rome Statute requires the support of States, the United Nations, and other intergovernmental and non-governmental organisations to succeed. The Independent Expert Review paved the way for some useful synergies that need to be fostered, not only for the institution to maintain its ‘dignity’ in the face of political attacks, but also to grow the efforts to cooperate already afforded to it. The pragmatism that has succeeded the enthusiasm following the creation of the Court, is likely to guide the new phase of maturity of the institution. This, in turn, may be beneficial for the day-to-day functioning of the ICC and may strengthen its interactions with State and Non-State Parties, the UN, its own Assembly of States Parties as well as the global community. For the ICC to succeed in cooperation, shifting the focus to the practical challenges faced and how best to tackle them is key. Only then will the Court be able to

⁹¹ *Id.*

⁹² Other concerns include a focus by the Office of the Prosecutor on high level officials during visits. This creates a feeling of exclusion for civil society and victims’ groups who are providing information to the Office. Additionally, without a focal point for non-governmental organisations it can also be challenging for them to communicate with the Office of the Prosecutor. *Id.* ¶ 384.

⁹³ *Id.* at ¶ 382.

⁹⁴ Nor is there adequate guidance for such organisations or media working to promote the work of the Court. *Id.*

⁹⁵ *Id.* at ¶ 383.

⁹⁶ *Id.*

perform its functions and discharge its mandate effectively.