with a focus on the United States, and when a state decides to withdraw from an international agreement how the subnational actors or private actors may play a role in terms of implementation.

And then we will end our general presentation with Steve Mathias. Just a few words on his wonderful career. Steve is Assistant Secretary-General of the UN for Legal Affairs and head of the Office of the Legal Counsel within the UN Office of Legal Affairs. His speech will be a little bit different, and it will be more institutional and based on the way the United Nations has more and more involved private actors in different institutions and mechanisms.

If you agree, we will hear the different presentations and then, of course, we will have time for Q&A and for discussion with you. I guess that you may have a lot of interesting questions.

Liz, you have the floor for no more than ten minutes, please.

Remarks by Liz Evenson*

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Okay. Thank you very much, Hélène, and thank you to the organizers for putting together this panel and for the invitation to be here.

As Hélène has indicated, my remarks will focus on the role of NGOs in the operationalization of the Rome Statute, which is, of course, the founding treaty of the International Criminal Court, the ICC. And even more specifically, I am going to address a few of the ways in which NGOs promote state cooperation with the ICC. This is, of course, just one of the many, many roles that NGOs play when it comes to the Rome Statute system. Sarah will address some of those other roles, and I hope we can come back to perhaps even additional roles in the discussion.

As I think most of you will know, to carry out its mandate and afford victims access to justice, the ICC depends, to a significant degree, on the cooperation of states. In particular, its states parties, but also other supportive states and intergovernmental organizations at the international and regional levels. And this need for cooperation ranges from what might be thought of as more technical forms of assistance—cooperation in investigations, cooperation in arrests—to diplomatic and political support.

And the latter is particularly important given the Court's mandate. This is a court that was set up to hold those most responsible for the world's worst crimes to account. And that means that the reality is, for as long as the ICC is doing that job it is going to run up against powerful interests that are opposed to accountability and which may seek, in many different ways, to undermine the Court's work and its legitimacy. In the face of those efforts, the ICC needs states parties—not exclusively but in particular its states parties—to work together to defend the integrity of its treaty and its ability to carry out its mandate.

We have this tremendous need for technical cooperation, this need for political support, but it is not obvious that either of those are going to be available to the ICC. You also have this need to have a range of efforts to ensure that that cooperation, that support is there and that it is there, most of all, when it matters most. NGOs have ended up having a very significant role to play in those collective efforts to ensure the Court has the support and cooperation it needs.

I am just going to highlight two examples in the remainder of my remarks, which both fall more on that spectrum of diplomatic or political support, although when it comes to arrests there is a clear link between political and diplomatic support and operational support. And those two examples are the assembly of states parties' procedures on deterring non-cooperation with the ICC, and then the

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role that NGOs have played in the context of what was for some time a persistent threat of mass withdrawal by African states from the treaty.

First, on non-cooperation or deterring non-cooperation. The Rome Statute creates the ICC, of course, but it also gives the ICC an Assembly of States Parties. This is a body composed of representatives of all ICC member countries. It has a number of different responsibilities outlined in the treaty. It meets formally, in a sense, only once a year, but, in fact, it works throughout the year in a number of different configurations. It has a leadership body called the Bureau. It has a New York-based working group. It has a Hague-based working group. It has facilitators on a range of topics, from achieving universal ratification of the treaty to encouraging national efforts through the principle of complementarity to, indeed, cooperation.

One of the responsibilities that is not, I would say, really in the treaty itself but one of the responsibilities that the Assembly has defined for itself and defined at a more progressive moment in the Assembly's history, back in 2011, was to work together to deter non-cooperation, specifically in the arrest of ICC suspects. This is different from the Assembly's treaty responsibility to enforce findings of non-cooperation by the judges. There is a procedure before the ICC judges where states can be found to be in noncompliance and the judges can decide if it is in their discretion whether or not there has been noncompliance. They then ask the Assembly of States parties to address it.

This is something quite different. In a set of procedures adopted in 2011 by the Assembly, they agreed to try to work together to actually head off noncompliance, so as to not need to get to this formal process of non-cooperation, but rather to work together to try to deter non-compliance, specifically in the arrest of suspects. And what these procedures look like, it is really best described as an early warning mechanism. The idea is that where information becomes available that an incident of non-cooperation might take place, the procedures aim at spurring a range of urgent action by states parties to bring about cooperation. The Assembly has also developed a toolkit for states to use, draft statements, draft *note verbales*, *démarches*, press releases, all designed to mobilize a swift response to reports that a state party might consider having a suspect on its territory without arresting that individual, and a response that is sufficient to persuade a state party that the price of noncompliance just is not worth it.

In the implementation of this early warning mechanism NGOs have been prominent actors. The procedures that are written down refer to the importance of sharing information between civil society and states, but, in fact, those procedures really just memorialized what was good practice at that time. There had been an exchange of information between civil society and states about the prospects of a visit by an ICC suspect—most of this concerns President al-Bashir of Sudan—pressure on NGOs on states to take certain actions, publicly and privately, complemented by civil society's own actions, public statements, meetings with government officials, even the use of litigation domestically.

Taken together, the success of these collective efforts has certainly varied, whether it has been possible to deter non-cooperation. It has been, in some cases. The success of it relies, to a certain extent, on the existence of muscle memory. A few years ago, I would say there was a really routine use of these procedures, a very clear coordination and sharing of information. It can be difficult to maintain that, especially as you have turnover in the representatives of states parties. But when it worked, and when it worked, it can work very well. Even where it does not deter non-cooperation, the mobilization of these public and private actions by states parties, reinforced by civil society, has been essential to signal the ICC's authority, the validity of these arrest warrants, and all of that is necessary to what are, inevitably, in some of these cases, going to be very long-term arrest strategies, where there is a need to keep persistent focus and attention on the existence of the arrest warrant.

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The second example I want to give is the role of NGOs in countering threats of mass withdrawal by African states parties from the Rome Statute. Again, I think most of you will know that beginning in about 2009, the ICC began to face opposition from some leaders of African countries. With the first arrest warrant issued by the ICC for Sudanese President Omar al-Bashir, a vocal minority of African leaders worked intensively to undermine support for the Court and weaken its legitimacy. And then with the election in 2013 of the then ICC defendants, Uhuru Kenyatta and William Ruto as the president and deputy president of Kenya, attacks on the ICC, mobilized by Kenyan officials, reached some new and very difficult heights.

A particular tipping point was an October 2013 extraordinary African Union summit on the ICC. There was speculation at the time that the summit would culminate in withdrawals from the treaty. That did not happen, but the summit consolidated an AU position to press for immunity for sitting leaders before the ICC, among other outcomes, and left hanging, for several years, the threat of a mass withdrawal of African states parties.

We fast forward now, almost five years later, and though there have been many ups and downs in this relationship between the ICC and African states parties, in fact no mass withdrawals have taken place. The African Union did endorse a so-called withdrawal strategy at its January 2017 summit, but this withdrawal strategy was really less than its title suggests. It called only for further research on the concept of collective withdrawal and, in fact, more than a dozen reservations were entered by states at the time the decision was issued, which is a very rare step. And in the meantime, we have a number of ICC states parties within African that have been increasingly speaking up about their support and their desire to remain with the ICC. This is, quite frankly, a major turnaround from the very pronounced silence of many states on the ICC, in the face of pressure from Kenya and the African Union, to denounce the Court.

It is important to say, of course, that there was an actual withdrawal, and putting to the side the recent notification of the Philippines withdrawal, because it is not related to these dynamics, there were initially three notifications of withdrawal, from Burundi, from The Gambia, and from South Africa, but only one of these, Burundi, has become effective.

In the interest of time, I am not going to get into the details of these country-specific issues, but to take a more cross-continental perspective, what was the role of civil society in Africa to counter this backlash. And I am just going to highlight—and I only have a short amount of time—I am just going to highlight two goals. A first important goal was to amplify a voice of support on the continent for justice. That was getting lost entirely. In a very short order, Africa went from being a continent that gave birth to the ICC, was among its strongest foundational supporters, to a continent that was under attack by a racist court. Civil society actions across the continent—public statements, op-ed campaigns, classic advocacy tools—helped to counterbalance that narrative and resurface some real facts about the ICC's role in Africa.

And then a second key objective was, of course, to press African states parties themselves to register their support publicly, and civil society did that by taking some of these public statements and then using those directly in their meetings with their good, close contacts and interlocutors in government. And even beyond Africa, we saw that other ICC states parties felt empowered and emboldened in their support to the ICC and their bilateral diplomacy with their African states parties' partners because they could point to a real voice of authentic support on the continent for the ICC.

This has not been smooth sailing. There were a lot of problems along the way. It is a story, I think, that does not have a final end right now. But I would say that as the ICC moves into other situations—Georgia, potentially Afghanistan—there is quite a lot, I think, that can be learned about a partnership

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between civil society and states parties and when there is a need to mobilize support to this institution in the face of politicized opposition.

Thank you.

Hélène Tigroudja

Thank you, and thank you very much for this very precise illustration of the concrete involvement of civil society and NGOs in what you call the collective effort in terms of cooperation.

Now, Sarah, you have got the floor.

Remarks by Sarah Williams*

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Thank you. I would also like to add my thanks to the conference organizers for the invitation. This is my first time attending ASIL and it is a real privilege to be here.

As already indicated, Liz and I have divided our presentation so that we are covering different aspects of civil society engagement with the International Criminal Court. From my own research, this is linked to a project that is funded by the Australian Research Council, which is looking at the broader role of civil society and, in particular, the amicus curiae mechanism within international criminal tribunals. I would also like to acknowledge the support of the Australian Research Council. This made my presence here today possible.

I took as a starting point, in some ways, the possible high-water mark of the Rome Statute negotiations. If you have any textbook that talks about involvement of civil society and non-state actors in the negotiation of treaties it is usually that negotiation that is held up as the classic example. And obviously there is a role for non-state actors, in terms of encouraging ratification, encouraging implementation, and as Liz has just highlighted, increasingly needing to keep states linked to their commitments to the International Criminal Court and to support and reinforce cooperation.

My presentation switches direction a bit. What do they do within the formal mechanisms and processes of the Court itself? We see a huge amount of involvement when the Rome Statute was negotiated, but do we see a similarly high level of involvement in the Court's formal processes?

In the interest of time I am going to look at three formal mechanisms. The first one, as Liz has mentioned, is the ability to provide information to the prosecutor under Article 15 of the Rome Statute. The second is the ability to file, or to seek to file, an amicus curiae submission under Rule 103 of the Rules of Procedure and Evidence. And the third is the making of representations in reparations proceedings under Article 75(3) of the Statute.

Turning first to Article 15 communications, the ability of the ICC prosecutor to receive information on the commission of crimes within the jurisdiction of the Court, from NGOs, states and other organizations, provides an important opportunity for civil society to participate and to attempt to influence the Court's activities. The inclusion of that provision, Article 15, was a very hard-won victory for the negotiators at Rome. It related to the powers of the prosecutor to initiate an investigation independently from either a state referral or by a referral from the UN Security Council.

At that stage, as well, the Office of the Prosecutor does not enjoy its full investigative powers, so it really does provide a valuable opportunity to give that information to the Court and allows the prosecutor the power to consult with other actors, besides states, when working out what evidence is available.

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