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International Law Meeting Summary, with Parliamentarians for Global Action

The UN Security Council and the International Criminal Court

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INTRODUCTION

July 2012 will mark the ten year anniversary of the entry into force of the Rome Statute, bringing into existence the International Criminal Court ('ICC'), the first permanent international court to try the international crimes of genocide, crimes against humanity, and war crimes. Its establishment alone represented a significant milestone in the pursuit of justice and accountability. The work of the ICC since then has brought concrete progress in the fight against impunity, as well as raised new challenges in the establishment of an effective system of international criminal justice.

Whereas the two institutional precursors to the ICC, the *ad hoc* tribunals for the Former Yugoslavia and Rwanda, were established by the United Nations ('UN') Security Council and operate as subsidiary organs of the Security Council, the ICC is an independent treaty-based international organisation. The ICC however is established in relationship with the United Nations, and on the basis of the Rome Statute has specific linkages to the Security Council which are derived from the latter's powers under Chapter VII of the UN Charter. The relationship between the ICC and the Security Council is complex, not least in light of the ability of the Council to refer to the Court situations over which the Court would not otherwise have jurisdiction, and the ability of the Council to suspend investigations and prosecution at the ICC. With its limited enforcement powers, the ICC is reliant upon the cooperation and assistance of states, which can be enhanced through the intervention of the Security Council.

Parliamentarians for Global Action and Chatham House convened a high level conference in order to analyse how the relationship between these two institutions has developed over the last decade, and more importantly to consider the way forward for these two organs of the international community. Addressing questions under the umbrella of the relationship between peace and justice, the discussion focussed on three themes before exploring 'where next' for these two bodies: referrals of situations to the ICC by the Security Council, cooperation of states with the ICC, and the power of the Council to defer ICC proceedings.

Participants included parliamentarians, policy makers, representatives of governments and civil society, as well as academics and officers of the ICC and other international organisations.

The meeting was held under the Chatham House Rule.

1. REFERRALS BY THE SECURITY COUNCIL TO THE ICC

Sitting at the crossroads of international diplomacy and justice, the ICC was described by one participant as being ‘shaped as much by crude politics as by philosopher kings’. This position in which the ICC can be found makes the issue of its legitimacy as a judicial institution based upon the rule of law particularly acute. This is not assisted by the deeply political nature of the Security Council, and the manner it arrives at decisions, which sit uncomfortably with the expectations of certainty, predictability, and impartiality that are associated with the rule of law.

The ICC’s jurisdictional regime is on the one hand derived from the consent of states; in order for the ICC to exercise jurisdiction, the state in whose territory a crime was committed or the state whose national committed the crime must be party to the Rome Statute of the ICC or have accepted its ad hoc jurisdiction. In addition, Article 13(b) of the Rome Statute enables the Court to exercise jurisdiction in circumstances in which the UN Security Council has referred a situation to the Court when using its powers under Chapter VII of the UN Charter.

Article 13(b) was the product of a negotiation that sought to delimit the appropriate relationship between a permanent international criminal court and the UN Security Council, the latter being the primary organ responsible for the maintenance of international peace and security. Article 13(b), in conjunction with Article 16 (discussed in section 3, below), sought to reconcile the concerns of those who wished to establish a permanent and *independent* international criminal court, a tribunal independent from the politics of the Security Council, and those on the other hand who sought to establish the court subject to the control of the Security Council. The formulation ultimately adopted concerning the powers of referral reasserts the judicial independence of the Court and, at the same time, it recognises the responsibilities of the Security Council on matters of international peace and security and the relationship between the core crimes (those under the jurisdiction of the ICC) and threats to international peace.

Already, and despite the initial resistance of some permanent members of the Security Council to the ICC, within the first decade of the Court’s existence, the Security Council has referred two situations to the Court, the first, the referral of the situation in Darfur, Sudan in 2005,¹ and the second, the situation in Libya, in 2011.² As of 16 March 2012, the investigations of the ICC Prosecutor concerning those referrals have led to the publicly known issuance of four warrants of arrest and three summonses to appear in relation to the situation in Darfur, and of three warrants of arrest in relation to the situation in Libya.

Referrals by the Security Council: a risk of double standards?

One of the strongest criticisms of the relationship between the ICC and the Security Council analysed in this meeting concerns the ability of the members of the Security Council, of which three of the five permanent members are not parties to the Rome Statute, to refer situations involving states not parties to the Court. This, it is argued, undermines the legitimacy of the ICC regime, if it is considered that its legitimacy is derived from its basis upon state consent. Furthermore, in principle, it is questioned how those states not parties, especially from among the permanent members of the Council (P5 member states), can justify their exceptionalism, namely of subjecting to the Court another state not party while they do not accept the Court’s jurisdiction over themselves. Thus, many question whether, through Security Council referrals, the ICC becomes a policy tool to advance the political interests of those states represented on the Security Council.

Given that this criticism is, if not widely held, forcefully raised, especially by states not parties to the ICC, it was stated that advocates of the ICC should be more assertive in responding to the allegation of double standards. In this context, it was questioned whether we ‘are to fail to protect anyone because we cannot protect everyone’. Double standards should be deplored and resisted, and to this effect, efforts to increase the number of states parties should continue. Working towards increased ratifications would not only increase the number of states whose nationals and territory

¹ UN Doc S/Res/1593 (31 March 2005), adopted by vote, 11 in favour, none against, and 4 abstentions (Algeria, Brazil, China and the USA).

² UN Doc S/Res/1970 (26 February 2011), adopted by unanimous vote in favour.

are subject to the wider treaty-based jurisdiction of the Court, but it would also put pressure on the sustainability of the exceptionalism professed by certain non-states parties, in particular the three Council's permanent members that are not ICC states parties. However, it was admitted that double standards cannot always be avoided and uneven membership is not unique to the ICC. It was also recalled that the Security Council is acting, as provided by the UN Charter, on behalf of the UN membership.

It was suggested that the creation of a permanent ICC that is substantially independent of the Security Council might itself significantly reduce the risk of selectivity and double standards, since now it is possible to discard the politics of determining which circumstances warrant the creation of an *ad hoc* tribunal for each situation.

Developing consistency

The selectivity with which the Council has made referrals has become a significant challenge facing the legitimacy of the ICC. The merits of the ICC acting in a given situation are less questioned than the instances in which the ICC is not exercising its jurisdiction. Indeed, popular perception has frequently misplaced the charge of selectivity for situations outside the Court's jurisdiction upon the ICC, not the Security Council. This has led some to assert that the ability of the Court to exercise its jurisdiction on the basis of referrals by the Council could question the legitimacy of the ICC since it might be perceived as politicising the Court's mandate. Thus, the discussion centred upon the need to develop a clearer understanding of how the Security Council determines in which circumstances to make a referral to the ICC; what are the factors that distinguish the situations in Libya or Darfur from those in Sri Lanka or Syria, Zimbabwe or elsewhere, situations not considered by the Council in relation to the ICC?

The question was also posed as to whether it would be possible, or even desirable, to develop a set of criteria to assist the process of determining when a referral should be made, thus enhancing consistency, and perhaps even predictability, of practice. The development of such criteria would rely on understanding the inter-relationship between the commission of core crimes under international law and the existence of threats to international peace and security; the availability of information about the commission of core crimes would have an impact on the decision-making of the Council. It was suggested that the elaboration of criteria would provide civil society and like-minded states with a set of principles that they could apply in order to put pressure on the Council to refer situations although, given the dictates of Security Council politics, it would be highly unlikely that the Council would consider any such criteria as part of its internal decision-making process.

Understanding the objectives behind a referral: a policy tool for the Security Council?

The finding by the Security Council that a situation constitutes a threat to international peace and security is not a judicial, but a political decision; namely, while based on factual information and legal basis, it also takes into consideration the political preferences and interests of stakeholders. A decision to refer a situation to the ICC is also a political decision that expresses the view that judicial intervention is an appropriate response to that threat.

During the meeting it was stated that there are at least two possible approaches to identify the rationale underpinning a referral under Chapter VII. On the one hand, the general view may be taken that the commission of core crimes threatens international peace and security, thus international accountability contributes to international peace and security. Thus where core crimes are committed it follows that a referral should be made in order to empower the Court to facilitate international accountability, which in turn, it is assumed, would help to restore or maintain peace and security. The alternative approach is to analyse each situation on a case by case basis in order to determine whether, in that particular case, the referral of the situation would contribute to the maintenance of peace and security. It was suggested that a balance must be achieved between the two approaches; whilst there must be a genuine sense that a referral will positively contribute in the particular case, any measures adopted by the Security Council should take into consideration a general commitment to accountability.

It was stated that the Security Council currently does not apply any particular theory or policy when determining which situations to refer to the ICC. What can be discerned from the initial practice of the Council regarding Darfur is that a referral may be considered by some as a measure of last resort, when other non-forcible measures have been exhausted. Yet, the relatively short time-frame that led to the referral of the Libyan situation would suggest that this measure could be adopted by the Council under Chapter VII without waiting for the exhaustion of procedures and remedies that the Council might take in a crisis.. Overall, what was clear to some participants was that the level of seriousness of a situation is not the sole factor upon which the Council's determination has been made.

Touching upon the distinction between the pursuit of accountability and the pursuit of international peace and security - the so-called 'peace versus justice debate' - one participant suggested that referral to the ICC may appropriately be regarded as a policy tool for the Council - but only if the broader policy framework in question is one of accountability. However there does not appear to be any such broad policy. The referral of the situation in Libya to the ICC could be taken as a dangerous precedent if it is regarded as a tool in the advancement of a policy on the maintenance of international peace and security and a political measure to weaken and place pressure on all sides to the conflict, rather than viewing the broader issue of accountability as conducive to peace and security. Security Council resolution 1970 (2011), through which the Council referred the situation of Libya to the ICC, formed a package of measures adopted by the Council under its power to take measures binding on all member states under Article 25 of the UN Charter. Accordingly, alongside the referral, the Security Council imposed a range of targeted sanctions against Colonel Gaddafi, his family members and members of his regime and imposed an arms embargo on Libya. This notion that the ICC forms part of the Security Council's 'peace and security' arsenal could be seen as coinciding with the position of China and Russia, who appear to understand the ICC in terms of 'last resort approach' or the 'responsibility to protect' paradigm, rather than the international justice and accountability paradigm.

If this is the case, that the Court is being purportedly used as a tool in the advancement of policies other than those of accountability, it was observed that it must be remembered that the referral only bestows the Court with jurisdiction and that neither the Office of the Prosecutor nor the judges are bound by the referral. The Prosecutor must proceed with an investigation, unless there are no reasonable grounds to proceed.³ Accordingly, the Prosecutor, under the oversight of the Pre-Trial Chamber of the Court, is bound by a set of statutory criteria to initiate investigations into a given situation and prosecutions into given cases, even where the Security Council has made a referral.

It was suggested that in situations where international crimes are being committed, a mechanism or procedure should be established in order to encourage the Security Council to take action. One participant highlighted in this regard the current proposal tabled by the 'Small Five' Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland, which recommends the Security Council to refrain from the use of the veto in situations of 'atrocities crimes', namely genocide, war crimes, and crimes against humanity.⁴

One participant suggested taking a cue from the International Court of Justice's advisory jurisdiction, that the ICC could be bestowed with the capacity to provide an advisory opinion on whether there have been any apparent violations of the Rome Statute in a given situation in order to provide a guide to the Security Council's political decision to determine whether to make a referral. Although the likelihood of this occurring is slim, since it would require a review of the entire ICC system as elaborated in the Rome Statute, it was observed that in the daily work of the Council there is already an increasing reference to the preliminary examinations of the Prosecutor when determining how to prevent the further escalation of violence.

³ Article 53(1) of the Rome Statute articulates the three criteria governing the decision of the Prosecutor as to whether to proceed with an investigation.

⁴ See paragraph 20, Annex to UN Doc A/66/L.42 (28 March 2012). The proposed resolution and annex will be discussed at the 66th session of the General Assembly under Item 119, on the Follow-up to the outcome of the Millennium Summit.

The role of the reports of Commissions of Inquiry in informing Security Council action

Discussion focused upon the role of the reports of fact-finding commissions, the High Commissioner for Human Rights, or of other credible bodies, into the human rights situation in particular countries. The referral of the situation in Darfur in 2005 was informed by the findings of the International Commission of Inquiry on Darfur.⁵ In contrast, the Security Council took the decision to refer the situation in Libya to the ICC before the existence of a report to corroborate the presumptions informing the referral; resolution 1970 (2011) was adopted in parallel to the decisions of the Human Rights Council, and only a day after the Human Rights Council established the Commission of Inquiry.⁶

At the same time caution was counselled at any suggestion that the publication of the report of a commission of inquiry be viewed as a precondition to the referral of a situation by the Council. Investigations of commissions of inquiry, when they are established, are a lengthy process, during which violence and criminality does not necessarily cease. Accordingly, to wait for the outcome of a commission of inquiry would unnecessarily and unacceptably delay the action that the Security Council could take.

It was observed that the statements of the Office of the High Commissioner on Human Rights are becoming increasingly influential within the Security Council; the language used by the High Commissioner is becoming a vital indicator for member states, particularly the non-permanent members as to the nature and gravity of a particular situation. For instance, although China and Russia vetoed the draft resolution condemning the ongoing violence in Syria in February 2012, all thirteen other members of the Council voted in favour of the resolution.⁷ It was suggested that the briefings and statements by the High Commissioner expressing the view that crimes against humanity had been and continued to be committed in Syria were important in attaining the level of consensus achieved, aside from the (albeit crucial) vetoes. The implications of credible reports influencing the decisions of the Council, it was suggested, should not be underestimated; it must be borne in mind that all resolutions adopted under Chapter VII, in addition to the support, or at least acquiescence of all five veto wielding members, also require the support or acquiescence of at least nine members.

At the 19th Regular Session of the Human Rights Council in March 2012, thirteen cross-regional states issued a joint statement on the situation in Syria, outlining their reasons for taking the view that the situation in Syria should be referred to the ICC.⁸ They provided three reasons in support of their statement. Firstly, the statement referred to the findings of the Commission of Inquiry which had concluded that 'widespread, systematic, gross human rights violations amounting to crimes against humanity may have been committed' in Syria.⁹ Secondly, the statement recalled the obligation of all states to investigate and prosecute such crimes and noted that to date, the alleged crimes have yet to be investigated and punished. Finally, since Syria was either unwilling or unable to investigate these violations, the statement suggested that the situation would fall within the ICC's competence (implicitly referring to the admissibility criteria set forth in Article 17 of the Rome Statute) and endorsed the opinion of the High Commissioner for Human Rights that the situation in Syria be referred to the ICC.¹⁰ The statement, it was submitted by discussants, may provide an indication of the possible set of criteria that could be drawn upon by the Security Council as

5 UN Security Council, Report of the International Commission of Inquiry on Darfur to the Secretary-General, 1 February 2005, UN Doc S/2005/60.

6 UN Human Rights Council, Situation of Human Rights in the Libyan Arab Jamahiriya, 25 February 2011, UN Doc A/HRC/RES/S-15/1. Adopted without a vote. The Commission's first report was submitted to the Human Rights Council on 15 June 2011 (UN Doc A/HRC/17/44) and after its mandate was extended, it submitted its second report on 8 March 2012 (A/HRC/19/68).

7 UN Security Council, Middle East Situation – Syria, 4 February 2012, UN Doc S/2012/77. Not adopted, 13 votes in favour of the resolution, 2 vetoes by China and Russia.

8 UN Human Rights Council, Debate on the follow up to the 17th Special Session – Report of the International Commission of Inquiry on the Syrian Arab Republic, 12 March 2012, Joint statement by Austria on behalf of 13 states (Belgium, Botswana, Costa Rica, Croatia, France, Ireland, Liechtenstein, Maldives, New Zealand, Norway, Slovenia, Switzerland, Austria) Video recording available at: <http://www.unmultimedia.org/tv/webcast/2012/03/austria-follow-up-to-17th-special-session-31st-meeting.html>.

9 UN Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, 22 February 2012, UN Doc A/HRC/19/69.

10 Article 17 determines the admissibility of cases before the ICC, whereas the statement by Austria relates to the question of whether the situation should be referred.

guidance in the future, taking into account the capacity and attempts of the state in question to undertake investigations itself.

Commissions of inquiry have a much lower evidentiary threshold than criminal investigations. Although they require that information be credible and corroborated, they do not require that findings be proved beyond reasonable doubt. The challenge for both enquiries and prosecutions is to remain within their respective powers, and not to create unintentional problems for the other. In particular, from the perspective of the judicial process, proper care must be taken so as to ensure that reports of commissions of enquiry do not prejudice the rights of the accused and the due process requirements under the Rome Statute.

Conditions for referral

The view was expressed that due to the majority of permanent members of the Council not being parties to the Rome Statute, among other reasons, too high a price was being paid for the conditions for referral which were included in the relevant resolutions. One of these conditions was that no obligation was placed on states not parties to cooperate with the Court (see section 2 below); another condition related to the UN co-financing of the Court's proceedings in referral situations.

Financing

It was stated that 'one of the biggest scandals' is the practice of the Security Council of making a referral to the Court using its Chapter VII powers, but then explicitly placing full financial responsibility for meeting the costs of that referral upon parties to the Rome Statute. In contrast, the *ad hoc* tribunals, which were similarly established under the Security Council's Chapter VII powers, were paid for by the full membership of the United Nations (under both the regular budget and the peacekeeping budget). Accordingly, while both the ICC referrals and the *ad hoc* tribunals were measures adopted by the Security Council when fulfilling its obligations under the Charter for the maintenance of international peace and security on behalf of the entire UN membership, the UN bears no financial responsibility when the action it chooses to take is to make a referral - although United Nations funding is specifically envisaged under Article 115 of the Rome Statute.

It was stated that the current practice enables the Security Council to obtain 'justice on the cheap'. Furthermore, although the cost of referrals is significant within the ICC's budget, in comparison to the expenses of the Special Tribunal for Lebanon and the *ad hoc* tribunals, the ICC is relatively inexpensive. Although it would be politically difficult to encourage those in charge of referrals to bear the costs of referrals, it was argued that the Security Council should not forbid, through the language included so far in the referring resolutions, the possibility of the UN General Assembly, under its budgetary prerogatives, providing support from the regular UN budget to the Court's investigations and prosecutions. Discussions addressing this issue must be encouraged.

If the Court is to fulfil its mandate, it is imperative that it has the appropriate financial cooperation and support of the relevant institutions; whether it be the payment of dues by states parties to the Rome Statute, or whether it be from the United Nations when the Security Council makes a referral.

2. COOPERATION

Cooperation by states with the ICC lies at the heart of all matters relating to ICC proceedings, and thus the fulfilment of the Court's mandate. When in the context of its relationship with the Security Council, the question of cooperation becomes even more acute, both in situations where the Council has made a referral to the Court, and also with regard to the Court's investigations into situations either referred by states parties or initiated *proprio motu* by the Prosecutor.

Referral situations

The issues regarding cooperation in the context of referrals made under Article 13(b) of the Rome Statute and in accordance with the Security Council's Chapter VII powers, can be organised under three headings: 1) the level of cooperation demanded from states by the text of the referral resolutions; 2) what are, or should be, the responsibilities of the Security Council to provide cooperation to the Court and to follow up on the cooperation provided by states once a referral has been made; and related to this, 3) financing – what level of financial cooperation should be provided to the Court in situations of referral, and by whom?

Referral Resolutions by the Security Council and the obligations incumbent upon states

While states parties to the Statute are obliged to cooperate with the Court by virtue of their undertakings as signatories of the Rome Statute regardless of how the Court is seized of jurisdiction, the obligation of non-states parties to cooperate depends on ad hoc agreements or on obligations created by Security Council resolution. Only the Security Council, when acting under Chapter VII of the Charter, has the power to impose binding obligations on all member states of the UN, regardless of their status in respect to the Rome Statute. Yet, in its two referrals to date, the Security Council, whilst obliging the states in which the crimes were committed (and other concerned parties) to cooperate fully with the Court, has expressly recognised that other non-states parties have no obligation under the Statute, and instead only urges them to cooperate.¹¹ As such the Council has significantly diluted the potential effectiveness of the referral as a mandatory enforcement mechanism adopted in order to maintain or restore international peace and security.

This can be contrasted with the obligations to cooperate with the two *ad hoc* tribunals, the ICTY and the ICTR established by the Security Council under Chapter VII of the UN Charter. The statutes of the tribunals were adopted and amended by Security Council resolutions. These resolutions did not differentiate between the obligations of different groups of states, so that *all* member states of the UN are *obliged* to cooperate with the *ad hoc* tribunals. One participant suggested that the effects of this can be seen when one compares the arrest rates before the *ad hoc* tribunals with the arrest rates of those indicted by the ICC in relation to situations referred to it by the Security Council. At the same time, it was argued by others that in practice, in many situations what was more significant in procuring the arrest of individuals indicted by the ICTY was not the authority of the Tribunal, derived from Chapter VII of the UN Charter, but rather the existence of *domestic* legislation and procedures to facilitate cooperation with the Tribunals, such as in the case of the arrest of Duško Tadić in Germany. . Further to this, it was suggested that the key to the success of the *ad hoc* tribunals in effecting arrests was not Chapter VII resolutions, but rather the initiatives adopted by individual states, international organisations (i.e., the European Union) and the Office of the Prosecutor in order to secure those arrests; political, socio-economic and geo-strategic incentives to voluntary cooperation in Croatia and Serbia were important. The Special Court of Sierra Leone (SCSL), as a hybrid tribunal established by negotiation between the Sierra Leonean government and the Secretary General of the UN, did not enjoy the Chapter VII authorised mandate and powers of the *ad hoc* tribunals. As such, it faced similar limitations as the ICC faces. Nevertheless, the Special Court has been remarkably successful in obtaining the arrests of those it has indicted. Consequently, it was suggested that it would be a useful exercise for the ICC and its supporters to examine the reasons behind the success of the SCSL with a view to considering if any lessons could be learned to assist the ICC's endeavours.

¹¹ UN SC Res 1593 (2005), operative paragraph 2; UN SC Res 1970 (2011), operative paragraph 5.

Admitting this, however, and considering the global reach of the ICC and the activism from certain regions against it, some participants stressed that the absence of an obligation to cooperate for states not parties within relevant Security Council resolutions not only provides a wrong signal, but also generates a legal vacuum with practical implications, for instance by reducing the leverage to promote the adoption of implementing legislation in states not parties.

Responsibilities of the Security Council

It was observed that one of the greatest dangers to the effectiveness of the Court is the failure of the Council to provide follow up support to the ICC once it has referred to it a situation. The failure of the Council to take any further measures or pursue in any way the Court's progress, aside from receiving the periodic reports by the Prosecutor concerning each situation, does not convincingly demonstrate an exemplary commitment to the Court and its pursuit of international accountability. At the most basic level of cooperation, it was questioned why the Security Council did not issue any kind of statement in relation to the arrest of Saif Al Islam Gaddafi, against whom the ICC has issued an arrest warrant in relation to the situation in Libya, referred by the Security Council.

It was also noted that the Court has notified the Security Council of instances of non-cooperation by states in their failure to give effect to ICC arrest warrants arising out of the referral of the situation in Darfur, yet the Council has failed to take any action pursuant to those notifications.¹² A statement of support, or an acknowledgement of the information, and an emphasis on the need for cooperation between all parties would have done something to indicate that the Council was interested in the enforcement of its own decisions. These small signals would not be impossible to negotiate. Similarly small measures such as public acknowledgment that discussions have taken place regarding non-cooperation by states would make a considerable difference to raising awareness of how the situation stands, and in preserving the legitimacy and credibility of both organisations.

In addition there is a need for the harmonisation of sanctions imposed by the Council against individuals who are also sought by the Court. For instance, it has come to knowledge that the Court received little cooperation from the Council when it sought to access information on the implementation of the sanctions the Council had imposed against Libyan nationals, of whom some had been indicted by the ICC. . The assets of individuals eventually found guilty before the ICC are crucial to provide reparations to victims. The freezing of assets also contributes to reducing the capacity of these individuals to continue committing crimes and to escape prosecution. The Court ordered that assets of indicted individuals be frozen as a precautionary/interim measure. In this case however the assets had been ordered to be frozen by the Council. The Court then requested the cooperation from the Council on the measures taken by states; yet seemingly it was denied, forcing the Court to submit individual requests of cooperation to each UN member state to locate the assets. In order to avoid duplication of efforts and to improve the efficiency of the measures that seek to achieve common goals, it is important that there is greater coordination between the two and mutually reinforcing approaches and procedures.

¹² ICC, Prosecutor v Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman, Decision informing the United Nations Security Council about the lack of cooperation by the Republic of Sudan, Pre-Trial Chamber I, 26 May 2010, ICC-02/05-01/07-57; ICC, Prosecutor v Omar Hassan Ahmad Al Bashir, Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad, Pre-Trial Chamber I, 27 August 2010, ICC-02/05-01/09-109; ICC, Prosecutor v Omar Hassan Ahmad Al Bashir, Decision Informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's Presence in the Territory of the Republic of Kenya, Pre-Trial Chamber I, 27 August 2010, ICC-02/05-01/09-107; ICC, Prosecutor v Omar Hassan Ahmad Al Bashir, Decision Informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti, Pre-Trial Chamber I, 12 May 2011, ICC-02/05-01/09-129; ICC, Prosecutor v Omar Hassan Ahmad Al Bashir, 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 Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 12 December 2011, ICC-02/05-01/09-139; ICC, Prosecutor v Omar Hassan Ahmad Al Bashir, Décision rendue en application de l'article 87-7 du Statut de Rome concernant le refus de la République du Tchad d'accéder aux demandes de coopération délivrées par la Cour concernant l'arrestation et la remise d'Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 13 December 2011, ICC-02/05-01/09-140.

As appetite for ICC involvement within Libya now wanes, with the National Transitional Council seeking to remain in control over any proceedings against Saif Al Islam Gaddafi and Abdullah Al Senussi, it was observed that evidence and sites significant for the purpose of potential ICC proceedings are yet to be secured. One concrete way in which the Council could capitalise upon the goodwill it enjoys within Libya would be to use its authority in order to put pressure on Libya to secure the necessary evidence and sites. Similarly, it could place more pressure to ensure that the rights of Al Islam Gaddafi, who is currently in the custody of Libyan militia, are being observed. It was the view of some participants that it was the responsibility of the Council to respect and ensure respect for the decisions of the ICC in these concrete situations stemming from referrals.

In this perspective, one suggestion was that the Council could improve its procedures in the context of ICC referrals. Drawing upon the practice of establishing Sanctions Committees to monitor the implementation, enforcement and consequences of the sanctions regimes imposed under Chapter VII, it was suggested that similar subsidiary bodies could be established to focus upon referrals to the ICC. This, it was suggested, might stimulate better follow-up by the Council.

Gaining less support were the suggestions that sanctions against non-cooperating states should automatically follow a referral. Another suggestion was that law-enforcement mechanisms could be authorised by the Council under Chapter VII of the UN Charter to give effect to ICC arrest warrants. (Even without such authorisation territorial states can obtain international assistance and consent to multi-national forces performing arrest operations on their territories) The political feasibility of these suggestions was challenged by a number of participants.

Non-referral situations

It was highlighted that there is an overlap between the situations within the jurisdiction of the Court and the situations regarding which the Council is seized. This is due to the intrinsic relation between the commission of core crimes and threats to international peace and security. There are situations which are being dealt with by the Court (e.g. Côte d'Ivoire, Democratic Republic of Congo, Kenya) which do not necessitate Security Council referral. In such scenarios, the Council could directly or indirectly provide support and cooperation to the Court when it has initiated investigations or issued arrest warrants in situations within its treaty-based jurisdiction as well as promote accountability through domestic jurisdictions.

This cooperation could take on many forms, some of which would not require the invocation of Chapter VII. Whether it be the simple provision of political and diplomatic support, both in public and privately, to the Court, or whether it be the coordination of its sanctions regime to support the Court's activities, or the strengthening of peacekeeping mandates to ensure that peacekeeping operations cooperate effectively with the Court's investigations, the Security Council could do a lot more to provide material support to the Court. While it was agreed amongst some participants that it may not be practically feasible to include the power to give effect to arrest warrants within the mandates of peacekeeping operations established by the Security Council, there was widespread agreement that at a minimum there should be a consistent practice of including general references to accountability within peacekeeping mandates, so as to consolidate the culture of accountability, whether it be through the ICC or other means. At the very least, the UN in general, especially the Secretariat and the personnel of peace operations, and the Security Council in particular, as the primary organ of enforcement, could do more to give effect to the principle of non-essential contacts with indicted persons as it has been urged by ICC authorities, and vocalised by a number of countries and civil society organisations.

Based upon the international engagement with the complex situation in the Democratic Republic of Congo (DRC), there was broad agreement for the need for international actors to coordinate and cooperate more closely in order to structure a more coherent and efficient international response with respect to accountability. The conflicts within the DRC and the wider Great Lakes region of central Africa have been on the Security Council's Chapter VII agenda for over a decade. The international response has included the establishment of the peacekeeping operations MONUSCO and its predecessor MONUC, the imposition and monitoring of sanctions and arms embargoes, and the provision of humanitarian and peacebuilding assistance. At the same time, the situation in

the DRC was one of the first situations on the ICC's agenda, having been a self-referral by the DRC under Article 13(a) of the Rome Statute. Of all the warrants issued by the Court, six publicly known warrants have arisen out of the context of the violence occurring within the territory of the DRC.

The arrest warrant against Bosco Ntaganda is still outstanding, despite his whereabouts being widely known by both the Congolese authorities and MONUSCO, who are in direct contact and negotiations with the ICC indictee. Yet, MONUSCO does not only possess the powers within its mandate to implement the arrest warrant against Ntaganda, but it also has received the necessary letter of authorisation by the Congolese government. Accordingly, it was considered that what is necessary is greater political will by those states with significant influence within the wider international community, and particularly within the Security Council, to drive this arrest forward. At the same time, attention was drawn to the fragile political situation within both the DRC and the region, and the fact that Ntaganda commands considerable support within certain communities, and *when* (rather than *if*) he is arrested, it will be necessary to take into consideration and respond to the reaction that his arrest would incite.

A good example of recent Security Council cooperation with the Court was the assistance it provided to enable the transfer of Laurent Gbagbo into the ICC's custody. Here, although the Court was investigating the situation in Côte d'Ivoire, no ICC arrest warrant had been issued for Gbagbo. However, following a successful apprehension operation that received international support, the Council cooperated fully with the Court by lifting the travel ban imposed against Gbagbo under the Council's Chapter VII sanctions, to facilitate his transfer to the Netherlands.

At the same time, some caution was expressed against placing too much emphasis on the role of the Security Council within the ICC system. Drawing upon the example of the problematic nature of the Security Council's counter-terrorism strategy, it was stated that Security Council measures can often be blunt political tools that may not be appropriate in the context of advancing a rule of law based culture of accountability. Furthermore, the ICC system, as a treaty-based system, must be reluctant to accept too great incursions into its operations by the Security Council, as these may undermine the perceived legitimacy of the Court.

Arrest warrants and immunity

The execution of arrest warrants issued by the Court needs to be placed at the forefront of the Security Council's agenda, since this issue plays heavily on the ICC's credibility. In addition to the political sensitivity surrounding the execution of arrest warrants, particularly those against heads of states, incumbent or otherwise, it was recognised that there still remains a certain degree of *legal* uncertainty as to the relationship between heads of state immunity and ICC arrest warrants. This is both in regard to referred situations and non-referred situations and particularly in the context of the obligations of non-states parties to the Rome Statute. Recent cases of the ICC have not entirely cleared up the ambiguity regarding the correct interpretation of Article 98(1) of the Rome Statute.¹³ It was recalled that recently the African Union expressed its intention to promote within the UN General Assembly an advisory opinion from the International Court of Justice on the question as to whether there is an obligation to arrest a head of state pursuant to an ICC arrest warrant.

Security Council membership

It was highlighted that the level of cooperation that the Security Council provides to the ICC in regard to any situation relies heavily upon the composition of the Council, including how many of its

¹³ ICC, Prosecutor v Omar Hassan Ahmad Al Bashir, 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 Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 12 December 2011, ICC-02/05-01/09-139; ICC, Prosecutor v Omar Hassan Ahmad Al Bashir, Décision rendue en application de l'article 87-7 du Statut de Rome concernant le refus de la République du Tchad d'accéder aux demandes de coopération délivrées par la Cour concernant l'arrestation et la remise d'Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 13 December 2011, ICC-02/05-01/09-140.

members are also parties to the Rome Statute, as well as on the commitment and the activism of these members in favour of accountability for core crimes. In 2011, when the Council referred the situation in Libya to the ICC, there were nine states parties to the Rome Statute on the Council. In contrast, as of March 2012, ICC states parties are in the minority. This could be a significant factor explaining the more passive attitude towards the ICC and international accountability that is currently being displayed by the Council.

It was pointed out that states parties who are on the Council, whether as permanent or non-permanent members, should be as active as possible in consistently raising the issue of the ICC, and the need for cooperation with it, on the Security Council's agenda. To this effect, initiatives such as the recent day-long debate within the Security Council on the 'promotion and strengthening of the rule of law in the maintenance of international peace and security',¹⁴ and the ensuing statement by the President of the Security Council,¹⁵ were commended as platforms that have been used to emphasise the need for effective cooperation both by states and by organs of the United Nations with the work of the international Courts and Tribunals. However, the Security Council is yet to pass operative resolutions with practical implications on this matter.

It is important for states parties within the Security Council to maximise the Presidency of the Council. When filled by a state party to the Rome Statute, this position presents a strong opportunity to advance international justice and accountability on the Security Council agenda. In January 2012, under the South African presidency Ms. Pillay addressed the Council regarding the situation in Libya.¹⁶

Encouraging state cooperation

One participant observed that in general, cooperation with the ICC by states is reasonably good, albeit with notable exceptions and problematic procedural issues. In respect of procedural issues, a significant obstacle to efficient and effective cooperation by states is the lack of internal legislative and bureaucratic capacity to facilitate cooperation with the Court. In particular the failure of a significant number of states parties to the Rome Statute to enact (effective) implementing legislation, although no justification to refuse cooperation, is a significant barrier to practical and effective cooperation. In this context, participants recognised the importance of continued efforts to be devoted by states parties, civil society and parliamentarians to ensure the adoption of effective legislation.

In addition, the ICC Assembly of States Parties (ASP) has only recently adopted procedures to respond to situations of non-cooperation: the effectiveness of these procedures is yet to be tested given their lack of coerciveness.¹⁷ These procedures rely mainly on non-negligible yet soft diplomatic measures and the generation of dialogue. They aim to provide predictability and formality, and enhance the involvement of the entire Assembly regarding measures that have been undertaken in the past by the President of the Assembly when he had been warned of instances of non-cooperation. So far, the Assembly has yet to take measures to emphatically address the recent notifications by the Court on non-cooperation by states parties.

It was suggested, particularly in cases of non-cooperation with the Court in relation to Security Council referral situations, that the Council could initiate dialogue with states in order to understand why cooperation has not occurred. Initiating such a conversation with a view to enhancing understanding by all parties would be enormously helpful when building relationships and cooperation between states and with institutions, such as the Council and the Court. This dialogue would precede calls to cease the non-cooperation and to provide assurances of non repetition of such failure to cooperate.

¹⁴ UN Security Council, The Promotion and Strengthening of the Rule of Law in the Maintenance of International Peace and Security, 6705th Meeting of the Security Council, 19 January 2012, S/PV.6705 and S/PV.6705 (Resumption 1).

¹⁵ UN Security Council, Statement by the President of the Security Council, 19 January 2012, S/PRST/2012/1, reiterating UN Security Council, Statement by the President of the Security Council, 29 June 2010, S/PRST/2010/11.

¹⁶ Statement to the Security Council by Navi Pillay, High Commissioner for Human Rights, 25 January 2012 available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11779&LangID=E>, accessed 16 March 2012.

¹⁷ Assembly of States Parties to the Rome Statute, 10th session, Resolution 2, 20 December 2011, ICC-ASP/10/Res.2, Annex.

Cooperation beyond the Security Council

Taking inspiration from the EU's policy of conditionality when engaging with would-be EU member states, one possible strategy to encourage cooperation with the ICC could be the introduction of bilateral and multilateral incentives for cooperation. It was stated that the conditionality applied to EU membership was 'absolutely critical' to the voluntary surrender or arrest of Croats and Serbs indicted by the ICTY. Similarly, on a bilateral level, the various legislative measures adopted by the United States to limit its capacity to cooperate with states that are not fulfilling their obligations to cooperate with the ad hoc tribunals were highlighted as examples of proactive bilateral measures that have been utilised in the past. In addition the US 'rewards for justice' programme was suggested as an illustration of possible inducements for cooperation with the Court. This programme, established to encourage cooperation with the ICTY and the ICTR, has over the course of its lifespan paid a significant sum of money to those who have provided evidence that has provided material assistance in aiding the arrest of fugitives. It was observed that in recent weeks, in light of the massive surge in publicity surrounding the arrest warrant for the leader of the Lord's Resistance Army, Joseph Kony there has been a remarkable level cross-party support for the idea of extending this reward programme to the ICC, even amongst some of the most staunchest critics of the UN and the ICC on the US political right.¹⁸

Other informal mechanisms that could be developed to facilitate cooperation would be to extend the 'early warning' system in place to monitor President Al Bashir's travel movements, to the travel movements of all those subject to arrest warrants of the ICC. This could help raise the profile of each of the warrants and to act in their defiance.

¹⁸ Since the date of this conference, a draft bill has been tabled before the US Congress that, if passed, would authorise the Secretary of State to pay a reward for the provision of information concerning foreign nationals wanted by international tribunals, formally expanding the existing 'rewards for justice' programme to any other tribunal, including the ICC. The bill currently is reported to enjoy bi-partisan support, and if adopted, the apprehension of Joseph Kony and Bosco Ntaganda would be the foremost priority under this legislation. Draft Bill S.2319, 112th US Congress, introduced by Sen. Kerry (D-MA) and six co-sponsors, 19 April 2012. For further information, see <http://www.foreign.senate.gov/press/chair/release/bi-partisan-kerry-boozman-legislation-would-help-bring-kony-war-criminals-to-justice>.

3. PEACE AND JUSTICE: REQUESTS BY THE SECURITY COUNCIL TO THE ICC TO DEFER PROCEEDINGS

Article 16 of the Rome Statute provides that the UN Security Council may, in a resolution adopted under Chapter VII of the Charter, request the Court to defer (namely not commence or proceed with) an investigation or prosecution for a renewable period of twelve months. As such it recognises the ability of the Security Council to suspend the activities with regards to a specific situation or case, when it is considered that the suspension is necessary for the maintenance of international peace and security.

Article 16 originated from the initial proposals in the draft statute of the ICC to make the Security Council the gatekeeper of the ICC. While advocates of an independent permanent international criminal court prevailed over such a formulation, Article 16 is the outcome of the compromise achieved, which together with Article 13(b) on referrals, delimits the relationship between the Court and the Security Council.

The ability of the Security Council to defer ICC proceedings is one of the most controversial provisions of the Statute. It was stated that Article 16 codifies the right of a political body to interfere in the workings of a judicial institution and thus undercuts the legitimacy of the ICC as an independent judiciary. However, it was also observed that most common law judicial systems incorporate some mechanism by which the executive can intervene in judicial proceedings and this does not necessarily undermine the legitimacy of any of these domestic regimes as a whole. Since the exercise of such powers of intervention is recognised to be controversial, these powers are used rarely. Accordingly, when considering Article 16, one should not consider it to be an entirely novel concept.

It was suggested that the perceived legitimacy of a deferral will depend on the stage in the Court's proceedings at which the deferral is made. For instance it could be seen as being more credible as a measure to ensure the maintenance of international peace and security if it is made at the time of the investigation into the situation, rather than only after arrest warrants for individuals have been issued.

On the point of the politicisation of the Court through intervention by the Security Council by the deferral of an investigation, it was suggested that, in some circumstances, a deferral may protect the ICC's independence. It was observed that a court of law can be overburdened if it operates in a highly politicised environment, whereas the Security Council has, in principle, the power to temporarily suspend the Court's engagement in exceptionally sensitive political situations where it might be considered that it would be in the best interests of peace, security and justice for the ICC process to take a 'step back' from the situation. A participant suggested that an Article 16 deferral could serve the important objectives of getting a peace deal signed by all relevant stakeholders and the demobilisation or decommissioning of armed groups and their integration into civilian life.

Suggestions that the Court should have a say in the manner in which the Security Council exercises its powers as described in Article 16 were rejected on the basis that these questions are supremely political, and for the Court to become involved would play into the hands of those who argue that the Court is merely a political instrument. Although the Court does engage with the Security Council, and likewise the Security Council does take into consideration the views of the Court and its organs, the different institutions and organs must adhere to the relationship as defined within the Rome Statute. Thus even some critics of Article 16 concede that the Rome Statute must not be treated as an 'a la carte menu'; if we are to subscribe to the rule of law, Article 16 must be accepted, since it is a provision of the Statute; it must however be interpreted appropriately. Article 16 does not divest the Court of jurisdiction, nor does it grant an amnesty to those under investigation. Rather, it simply buys time to find a solution to address the threats to international peace, and, it was submitted, as a permanent institution the Court, in which the concept of statutes of limitation is inapplicable, has plenty of that. At the same time, a key objection to the principle of deferring a situation is precisely the notion that 'justice delayed is justice denied'. Furthermore, the deferral of a situation has considerable practical effects over the preservation of evidence, and the life and security of victims and witnesses.

On the 'peace versus justice' question, one participant suggested that the alleged threat posed to peace by the pursuit of justice is 'greatly exaggerated', and in fact, the pursuit of justice can facilitate in the short-term the pursuit of peace by alienating 'bad actors'. The example was provided of the agreement reached in the Dayton Peace Accords, where it was submitted that the ICTY arrest warrants against Radovan Karadzic and Radko Mladic prevented their participation in the peace negotiations and thus diminished their influence over the terms of the agreement. As a point of contrast, the participant drew attention, to the situation in the Former Yugoslavia following the Second World War, where, it was submitted, lack of accountability for the grave crimes committed during the War fuelled the demagogues who subsequently came to power in Serbia and Croatia.

On the other hand, a number of participants expressed the view that not only must Article 16 be accepted as a provision of the Statute, it must also be understood as a necessary and integral part of the ICC system. It could be easy to imagine situations in which, in the short term, the continuation of ICC investigations or prosecutions, may impede the (re)establishment of international peace and security, and it may also be in the interests of justice to ensure that violence and insecurity is halted, even if this means temporarily delaying the judicial process. Although any tension between peace and justice should not be used to inhibit the ICC's work, it was suggested that it is possible to envisage individual and very carefully circumscribed instances where the suspension of justice may be warranted. At the same time it was argued that justice should not be reflexively pushed aside as if it were little more than a bargaining chip. In this sense, another participant observed that in considering the usage of Article 16, each situation must be assessed to determine whether the suspension of ICC proceedings can effectively redress the threat to international peace and security and whether the true impediment to the realisation of peace is the ICC, or whether the real threat is an absence of the necessary political will to secure peace.

Attempts to invoke Article 16

There have been a number of attempts to invoke Article 16 since the Statute's entry into force in 2002. Whether this be to grant immunity from prosecution to UN peacekeepers from troop-contributing states that are not party to the Rome Statute,¹⁹ or whether it was the requests by the African Union that the Security Council defer the ICC investigation into the situation in Darfur,²⁰ or Kenya's request that the Security Council defer the Court's investigations into the 2007-8 post-election violence, this provision has received notable attention. In addition, attempts to invoke Article 16 have been made in the context of the investigations into Uganda,²¹ Côte d'Ivoire and the Central African Republic.²² However, aside from Resolutions 1422 and 1487 regarding peacekeeping, no situation-focussed deferral has yet been made.

One participant remarked upon an apparent hypocrisy amongst some of the critics of the power of the Security Council to refer situations to the ICC on the basis of Article 13(b). Despite opposing the Security Council's competence to refer cases, many of the same actors can be seen to call upon the Security Council to intervene in order to suspend ICC proceedings invoking Article 16. It was also remarked that the calls to defer the ICC investigation in the Darfur region of Sudan only surfaced once the Prosecutor of the ICC announced his intention to indict President Al Bashir. Similarly, it was observed that the Kenyan objections to the ICC's investigations into the post-election violence only came to light once the Prosecutor revealed the individuals under investigation. In the context of Darfur, the arguments in favour of a deferral rest on the basis that any arrest warrant against President Al Bashir would block peace talks in the country. Reflecting

¹⁹ UN SC Res 1422 (12 July 2002), adopted 12 days after the entry into force of the Rome Statute. This deferral was renewed in SC Res 1487 (2003), however following the Abu Ghraib prisoner abuse scandal in 2004, proponents of the deferral within the Security Council were unable to garner sufficient support for its further extension.

²⁰ African Union, Decision of the Meeting of African States Parties to the Rome Statute of the International Criminal Court, 3 July 2009, Assembly/AU/Dec.245 (XIII) Rev.1, operative paragraph 8.

²¹ The 2007 Juba Agreement negotiated between the Ugandan government and the LRA (not into force).

²² Media reported that on 1 August 2008 the president of the Central African Republic wrote to the Secretary-General of the United Nations to request him to intercede with the Security Council to obtain an Article 16 resolution on the situation in the CAR. See, letter available at <http://centrafrique-presse.over-blog.com/article-23115615.html>, accessed 16 March 2012.

upon the situation in Sudan currently, it was argued that this justification is not convincing; there are no serious peace talks taking place that could be blocked, and the arrest warrant did not hamper the negotiation of the peace agreement regarding South Sudan, which although not related to the ICC, nevertheless demonstrated that even if there was a credible peace process taking place in Darfur, the arrest warrant would serve no impediment to the ability of actors to conclude peace negotiations.

In the context of the Kenyan indictments, the justifications to invoke Article 16, for instance the validity of the principle of complementarity, are disconnected from the legal basis for a deferral, namely the existence of a threat to international peace and security. Moreover, despite the allegations of politicisation and bias against the ICC proceedings, following the decisions on the confirmation of charges before the Pre-Trial Chamber, the accused themselves asserted their confidence in the fairness of the proceedings at the Court, thus undermining the credibility of the calls for a suspension of the ICC proceedings.

Risks attendant to the invocation of Article 16

A number of participants warned of the potential consequences that may arise if the Council ever chose to make a deferral pursuant to Article 16. The Security Council may find that if it is successfully lobbied by a state under investigation to make a deferral on the basis that an investigation presents a threat to international peace and security, then it will be faced with permanent blackmail by a recalcitrant regime in order to induce the Council to renew the deferral every twelve months. States could implicitly threaten the Council with recommencing violence should it decide not to renew a deferral. Not only would this enable regimes to continually delay the administration of justice, but it would also run counter to the Security Council's primary responsibility for the maintenance of international peace and security.

Secondly, participants questioned what would happen to the Court's investigation or proceedings in practice should a deferral be made. What would happen to evidence collected, and the status of investigations, particularly with regard to sensitive or perishable evidence, such as mass gravesites? It was questioned what would happen to those detained in the ICC's custody if a deferral was granted by the Security Council; would detainees have to remain in detention during the period of deferral, or would they have to be released, and what would the implications of this be upon resumption of the investigation and proceedings? There is a particularly serious problem with regard to the need to keep under protection numerous witnesses awaiting the opportunity to give testimony during trial.

Because of these risks, to which members of the Security Council are alert, it would be unlikely that the Council would capitulate to requests that it exercises its power to defer ICC proceedings. Furthermore, it was noted that since deferrals must be made by a Chapter VII resolution, attempts at making a deferral could be defeated if just a single permanent member of the Council exercises the veto. Nevertheless, critics of Article 16 cannot entirely discount the risk that Article 16 may at some point be invoked; for example, one of the outcomes of the Juba talks was that Uganda was obliged to request the Security Council to issue a deferral pursuant to Article 16.

Risk mitigation: a high threshold for application

It was suggested that the eventual invocation of Article 16 must be pegged to the highest threshold of imminent danger of the most grave human rights violations on a massive scale. After all, the legal basis of an Article 16 deferral is a finding of the existence of a threat to international peace and security, and such findings should not be made lightly. Adopting such a threshold would minimise any risk that the invocation of Article 16 might establish a precedent for any situations before the Court. Deferral if done at all should be on a case by case basis.

It was also suggested that it was necessary to bear in mind the discretion of the Prosecutor to take into account the interests of justice when deciding whether to proceed with an investigation under Article 53(1)(c) of the Statute; this discretion, and the issues of complementarity and admissibility,

should be considered as an alternative to approaching the Security Council for a deferral pursuant to Article 16.

A number of participants also observed the strong reluctance of states to be seen to wish for the suspension of ICC investigations and proceedings and that discussions involving Article 16 therefore usually occurred in private, off the record meetings. It was suggested that more transparency would be useful in providing explanations to those who had requested deferrals. Such transparency and clarifications would contribute to neutralise the negative discourse against the ICC and to increase acceptance for the operation of an independent judicial institution, in spite of the political inconvenience that its decisions may create.

4. THE SECURITY COUNCIL AND THE ICC - THE WAY FORWARD

In the final session of the conference, the participants sought to identify and elaborate a number of steps towards making the relationship between the ICC and the Security Council more effective in the pursuit of international justice and accountability. While many of these measures will depend on the political will of all members of the Security Council, those members who are states parties to the Rome Statute or who are cooperating with the Court should do all that they can from within the Council to advance the ICC. At the same time, the onus is on actors outside the Council, whether it be civil society, parliamentarians, other states parties to the Rome Statute, or the ASP, to build political pressure on the members of the Security Council.

Developing consistency

When making referrals

Whereas it might not be appropriate, or feasible, to attempt to impose on the Council a set of guidelines to determine when it should make a referral to the ICC, a number of principles emerged that, if promoted and followed, could imbue a greater sense of consistency in the Security Council's response to situations of mass violence where reports of the commission of international crimes have been alleged.²³

Where there are credible reports that core crimes under international law are being committed, and that those crimes appear to meet the thresholds for crimes within the jurisdiction of the ICC, this in itself could indicate to the Security Council that the situation in hand constitutes a threat to international peace and security. Such reports may be reports of Commissions of Inquiry, or reports by the High Commissioner of Human Rights or other bodies within the UN Human Rights system. However, the Council should not be limited to accepting the reports of official enquiries, whether they come from the UN system or from regional or national initiatives, since such processes can be time consuming; to wait for the outcome of a Commission of Inquiry could substantially delay the Security Council's response to potentially situations of mass atrocity.

On the relationship between processes of inquiry and the decision to refer (or to not refer) a situation to the ICC, it was remarked that there needs to be greater consistency about how the Council responds to such reports, highlighting in particular the failure of the Security Council to act upon the mapping report of the serious violations of international humanitarian and human rights law in Sri Lanka during the final phases of the civil war.²⁴ To complement such efforts, there is the need to develop a clearer approach to genuine domestic processes of inquiry and prosecution.

It was submitted that referrals to the ICC should only be made when the Security Council is prepared to provide the necessary follow up and support to the Council's decision. Referrals to the ICC should not be taken as a substitute for any other action. The Security Council has a responsibility of making the referral effective, as willing the ends requires willing the means.

When drafting a referral resolution, the Security Council should include provisions that impose obligations to cooperate with the Court on all member states of the United Nations not simply on the states concerned directly by the situation. The Council should not block the possibility of UN funding to the ICC. Adequate arrangements for UN financing of ICC investigations and prosecutions arising from Security Council referrals should be addressed both at the General Assembly and, as appropriate, within the Security Council.

It would be useful if the Security Council could provide specific steps that a target state should take, rather than simply obliging the state to 'cooperate fully' with the Court. For example, it could

²³ The adoption of general criteria for referrals and deferrals in order to enhance the perception of consistent and predictable decision-making by the Council was one of the suggested actions decided by the senior policy-makers participating in the Retreat on the Future of the International Criminal Court organized by Government of Liechtenstein in Triesenberg, see ICC Doc. ICC-ASP/10/Inf.3 (1 December 2011), para. 42.

²⁴ UNSG, Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka, 31st March 2011, http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf.

request that the state in question adopts implementing legislation that would enable it to cooperate with the Court.

There is a need to develop a clearer and more adequate explanation of the obligation of states to cooperate with the Court with regard to arrest warrants issued against persons who would otherwise have immunity under international law.

Once a referral has been made, the Security Council should be responsible for making that referral effective. One means of encouraging and coordinating Security Council cooperation with the Court might be the establishment of subsidiary bodies, such as committees to monitor and encourage the implementation of ICC referrals. The Security Council could provide assistance to the ICC by strengthening the mandate of peacekeeping operations so as to enable them to cooperate fully with the ICC, where their fields of operation overlap, for example in the DRC. It was submitted that at the very least, peacekeeping operations should not be permitted to assist commanders and other officials who have been implicated by the Court and for whom arrest warrants are pending. More generally, the Security Council should monitor the compliance with UN policy of non-essential contacts with persons against whom arrest warrants have been issued.

Developing consistency in response to non-cooperation

The Security Council should take consistent action in instances of non-cooperation arising in the context of situations that it has referred to the ICC. When discussing the obligations of states to cooperate with the Court, particularly in the context of situations referred to the ICC by the Council, a significant problem is the explicit distinction made in the two existing resolutions between the obligations of the states concerned directly by the referral and the other states not parties to the Rome Statute. Even accepting this as a political reality, it is necessary to continue to promote a consistent approach for the greatest degree of cooperation with the Court.

The EU practice in this regard was described. Prior to a visit by Al Bashir to a state party to the Rome Statute, the EU will seek to raise the issue informally with the state, and to encourage them either to cancel Al Bashir's invitation or to give effect to the arrest warrant. Once a visit takes place, the EU will then routinely issue a statement regretting the failure of the state in question to give effect to the arrest warrant and will call upon all relevant states to fulfil their obligations under the Rome Statute. The adoption of such consistent reactions by the Security Council and other multilateral institutions or states would contribute to a culture of consistency with regard to the ICC and international justice.

In the case of states not parties, the range of options available to respond to non-cooperation is limited but the matter can be raised in bilateral discussions, which help to identify and address some of the reasons, or excuses, relied upon by non-cooperating states, with a view to making it increasingly difficult for states to rely on such excuses. Another strategy the EU has used has been to insert the matter of cooperation with the ICC into EU enlargement talks with, for example, Turkey regarding EU membership.

Consistency of UN engagement with accountability

It was emphasised that the Security Council and other organs of the UN need to strengthen their observance of, and adherence to, the 'UN Secretary-General's human rights due diligence policy for non-UN security forces' (DDP), to ensure that the UN, through its peacekeeping operations, does not support troops on the ground where their commanders are implicated in human rights violations. The OHCHR undertakes a mapping and profiling exercise that indicates the names of persons that should be excluded to ensure that the UN does not lend its support to these operations, or that these persons are not involved in UN operations. Further to this, participants highlighted a current proposed amendment (yet to be officially tabled) to the annual resolution by the UN General Assembly on the ICC that 'requests the Secretary General to ensure...that United Nations field presences and representatives...refrain from any action, including the use of

resources, that could undermine the efforts of the International Criminal Court'.²⁵ This proposal comes after the joint UN-AU representative in Darfur, Ibrahim Gambari, had been pictured socialising with President Al Bashir, and after Ahmad Harun was flown in UN aircraft to participate in peace talks in Abyei. This proposal has been endorsed by all states parties to the Rome Statute but still requires wider support within the General Assembly to be inserted in the final text of the resolution. Lack of support to this crucial element of cooperation highlights the political challenges to improve the cooperation between the UN in general and the Security Council, with the ICC.

Improve dialogue between and among all members of the Security Council and the broader membership of the UN

The membership of the Security Council is diverse. It is imperative that more efforts are made to engage with all members of the Security Council when seeking to understand the perspectives that drive the conduct of member states with regard to the ICC. Particular emphasis was placed on the need to engage more constructively with China and the Russian Federation. Understanding and building upon opportunities for engagement through dialogue is imperative in order to reduce the level of polarization in the Council with regard to international justice in general and the ICC in particular. Reducing the 'gap' between Council members will be an important step in building a more consistent and coherent approach towards the ICC. Similarly, advocates of the ICC within the Security Council should capitalise upon the opportunity to improve the relationship between the ICC and the United States presented by the present US administration's relatively constructive attitude towards the Court and international justice. With much focus on improving understanding and cooperation amongst states in the Middle East and Africa, the need to enhance engagement with states not parties to the ICC in Asia is often overlooked. More should be done to improve understanding of the ICC and international justice across Asia in order to broaden the support that has been provided by key Asian countries, such as Japan, the Philippines, and Singapore.

Rather than conducting discussions on issues of international justice in closed sessions, it was suggested that greater open discussion within the Security Council would enhance ownership of the decisions by the Security Council, and understanding of the international justice and the ICC by the broader membership of the UN, and would build confidence in the institutions of the international justice system, in particular the ICC.

Making full use of opportunities to take leadership within the Council to promote the ICC and International Justice

It was remarked that France will be assuming the Presidency of the Security Council in August 2012. As a strong proponent of the ICC, a number of suggestions were made as to concrete measures that France could take to promote the ICC and cooperation with it within the Security Council. One such suggestion was that the French Presidency could institute the first in a series of meetings similar to those that take place to address the issues surrounding women and children in conflict. Such meetings should be focussed on enhancing cooperation with the ICC, and would help to raise the profile of the ICC and the importance of cooperation for its effectiveness. Such meetings could also address the broader issues surrounding referrals in order to develop a better understanding of how the relationship between the ICC and the Security Council is perceived by all member states of the Council. This could help to develop a more consistent approach towards Security Council practice with regard to the ICC.

More generally, it was suggested that advocates of the ICC with the Security Council should fully utilise all available means through which to promote cooperation with the Court, through the continued work of the Assembly of States Parties' Focal point on the ICC within the Security

²⁵ Non-paper by the Delegation of Switzerland, Draft paragraph 5bis to the Annual Resolution of the UN General Assembly on the International Criminal Court, reported and available in <http://innercitypress.blogspot.com/2012/03/un-draft-tells-ban-gambari-not-to.html>, 27 January 2012 and http://turtlebay.foreignpolicy.com/posts/2012/03/01/don_t_hang_out_with_war_criminals_unless, and 1 March 2012, accessed 16 March 2012.

Council (currently Germany), as well as through Presidential statements, and by ensuring that ICC issues, particularly referrals, remain on the Security Council's agenda. The matter should not be left to the Permanent Members. The Costa Rican-led initiative to secure a Presidential statement was mentioned.²⁶

Strengthen bilateral and multilateral efforts to promote international justice

Throughout the discussions, it was observed that the Security Council is not the only international body that can assist the Court; bilateral and other multilateral action can be crucial, not only in directly assisting international courts and tribunals but also in building pressure on the Security Council itself to take action. In this regard, emphasis was placed upon the effectiveness of the EU policy of conditionality to encourage prospective member states of the EU to cooperate with the ICTY, and the success with which the EU worked to help states parties to the Rome Statute to resist the heavy pressure from the US to enter into bilateral non-surrender agreements. The US itself had various bilateral and unilateral legislative initiatives in place to encourage cooperation with the *ad hoc* tribunals, and in certain circumstances as regards ICC arrest warrants. If states parties and other like-minded states could mobilise their joint efforts, they could provide significant assistance to the Court. Policies should be systematised in order to make their applicability and enforcement more consistent, thus strengthening the culture of cooperation with international tribunals. It was stated that the World Bank, IMF and other major international donors should also be encouraged to promote accountability by applying the principle of conditionality to their granting of financial assistance.

There is a need for greater cooperation between the ICC Assembly of States Parties and the Security Council. Efforts such as those of the current President of the ASP to raise the issue of non-cooperation with every Security Council member, and the briefing of the Security Council on non-cooperation by the previous President of the ASP, should be continued and encouraged. As the ASP will continue its positive engagement with all states parties, including those judicially determined to have failed to cooperate, it requires the support of the Security Council and other international and regional organisations.

One participant suggested that as the UN Peacebuilding Commission begins to consolidate itself, it will become an important actor in the field of justice and accountability. Accordingly, it will be important for the ICC that its states parties develop a strong relationship with the Commission through its overlapping membership in order to promote the ICC within that UN organ.

The potential influence of regional organisations upon the Security Council has been made apparent in the context of the 'Arab Spring'. Many remarked upon how influential the Arab League and African Union's positions on Libya were in securing support within the Security Council for both the ICC referral and the authorisation of military action. Advocates of international justice and the ICC should build upon the opportunities presented by the absence of formerly influential actors such as Colonel Gaddafi, whose presence within such regional organisations ignited the anti-ICC attitudes of the AU. Efforts should be made in this revolutionary transitional phase to dispel misconceptions about the ICC, and to build and consolidate both bilateral and multilateral relations that will advance cooperation with the Court, at both the inter-state, and the inter-organisation levels.

Overall, it was recognised that improvement in the legal structures is necessary, yet the generation of sustained and coherent political will remains central to an effective relationship between the ICC and the Security Council.

²⁶ Presidential Statement 16 June 2008, UN Doc. S/PRST/2008/21 adopted by consensus.

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