

Cooperation and the International Criminal Court

Report



**Expert Workshop
18-19 September 2014**

Nottingham, United Kingdom

Expert Workshop on Cooperation and the International Criminal Court

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I. INTRODUCTION TO THE EXPERT WORKSHOP

1. From 18 to 19 September 2014, 26 experts from academia, government, civil society and the Presidency, Registry, Chambers and Office of the Prosecutor of the International Criminal Court (ICC) gathered in Nottingham for a workshop to explore current challenges affecting the Court's international cooperation regime. The workshop, entitled 'Cooperation and the International Criminal Court', was held at the University of Nottingham's University Park Campus, home to the [Human Rights Law Centre](#) (HRLC), which funded the event.
2. The workshop was opened by Professor Sarah O'Hara, Pro-Vice Chancellor responsible for academic planning and oversight of faculties at the University of Nottingham, and Professor David Harris, HRLC Co-Director. Professor Harris co-convened the workshop with fellow HRLC Co-Director, Professor Dominic McGoldrick and Professor Olympia Bekou, Head of HRLC's International Criminal Justice Unit. In their opening remarks, the co-convenors noted the longstanding relationship between HRLC and the ICC Legal Tools Project. HRLC officially became the second outsourcing partner of the Court, having signed a cooperation agreement with the ICC in 2006 to develop a dynamic, fully-searchable database of national legislation implementing the Rome Statute of the ICC as well as legal analysis thereof.¹ It was also observed that HRLC remains the Court's longest serving outsourcing partner.

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¹ ICC, 'National Implementing Legislation Database', available at: www.legal-tools.org/en/go-to-database/national-implementing-legislation-database/ [last accessed 1 December 2014].

3. The two-day event included seven panels, each of which addressed a specific topic pertaining to cooperation with the ICC, as follows: ‘The ICC Cooperation Regime’, ‘Non-Cooperation with the ICC’, ‘Cooperation and Witness-Related Issues’, ‘Cooperation and the Freezing of Assets’, ‘Cooperation and Issues at the National Level’, ‘Strengthening the ICC Cooperation Regime’ and ‘The Cooperation and Judicial Assistance Database (CJAD)’.

II. DISCUSSION OF ISSUES RAISED DURING THE WORKSHOP

(a) The ICC Cooperation Regime

4. The first issue discussed was the ICC cooperation framework. It was observed that the ICC does not possess an enforcement mechanism of its own, which results in a reliance on States and international organisations to cooperate with the Court for the arrest and surrender of accused persons, as well as for other forms of assistance. It was noted that the obligation to cooperate with the ICC under the Rome Statute of the International Criminal Court 1998 (Rome Statute) is a treaty obligation,² which only binds State Parties and does not supersede other obligations to third States under other treaties. This was contrasted with the obligation to cooperate with the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), which were established by the UN Security Council under Chapter VII of the Charter of the United Nations.³
5. It was argued that the general obligation to cooperate under Article 86 of the Rome Statute is not absolute and that exceptions to the general obligation may undermine the regime.⁴ It was also noted that the ICC cooperation framework is a mixed model, which involves both a vertical and a horizontal obligation to cooperate. That non-State Parties to the Rome Statute are also able to cooperate with the Court after accepting its jurisdiction was also raised. One example cited was Côte d’Ivoire, which accepted the jurisdiction of the Court in April 2003

² 17 July 1998, A/CONF.183/9, entered into force on 1 July 2002 [<https://www.legal-tools.org/doc/7b9af9/>]. This Report includes references to Persistent URLs (PURLs) of documents in the ICC Legal Tools Database as often as possible. See ICC, ‘PURL’, available at: www.legal-tools.org/en/purl/ [last accessed 1 December 2014].

³ See SC Res 827, 25 May 1993, S/RES/827 (1993) [<https://www.legal-tools.org/doc/0bff83/>]; and SC Res 955, 8 November 1994, S/RES/955 (1994) [<https://www.legal-tools.org/doc/063bcb/>].

⁴ Article 86 of the Statute provides as follows: “States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court”. [<https://www.legal-tools.org/doc/7b9af9/>].

by lodging a declaration with the ICC Registrar under Article 12(3) of the Rome Statute.⁵ It was also observed that international organisations are not subject to the general obligation to cooperate with the Court, but are able to cooperate on a voluntary basis, as necessary.

6. It was noted that the Court has jurisdiction over the persons responsible for committing the most serious international crimes. It was further observed that 90% of the crimes under ICC jurisdiction are committed by States or have an element of State involvement therein. As a result, it was suggested that the State from which cooperation is most essential to the ICC is the State most connected with the commission of the crime, whether the territorial State, the State of which the accused is a national, or even a third State willing or able to prosecute the crimes. In this regard, it was noted that an unwillingness to prosecute and an unwillingness to cooperate are different, albeit interrelated, concepts.
7. A number of examples of (non-)cooperation between the Court and States in which there are ongoing situations were discussed. The first examples addressed were those relating to States that have referred situations occurring on their own territories to the Court. It was noted in this regard that such self-referrals are of particular import for the ICC cooperation regime. The Situation in Uganda was detailed. It was observed that the national authorities in Uganda are willing to cooperate, having passed national legislation to this end, but have been unable to succeed in executing the remaining arrest warrants, despite a number of attempts. The Situation in the Democratic Republic of the Congo was also discussed. It was noted in this regard that Thomas Lubanga Dyilo was the first accused to be transferred to the Court and that Bosco Ntaganda was the first accused to voluntarily surrender to the ICC.
8. The Situation in the Central African Republic was identified by one workshop participant as the textbook example of how cooperation ought to take place between States and the Court. It was detailed to this end how the accused Jean-Pierre Bemba Gombo was arrested by the

⁵ See Gbagbo ICC-02/11-01/11-129-Anx16, Pre-Trial Chamber I, 25 May 2012, Requête en incompétence de la Cour Pénale Internationale fondée sur les articles 12 (3), 19 (2), 21 (3), 55 et 59 du Statut de Rome présentée par la défense du Président Gbagbo, Annexe 16 : Déclaration de reconnaissance de la compétence de la CPI datée du 18 avril 2003 [<http://www.legal-tools.org/doc/101315/>]. Article 12(3) of the Statute provides: “If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9”.

Belgian authorities following a request for assistance from the Court to Belgium. Finally in this context, it was noted that no case had yet been brought in the Situation in Mali.

9. Situations referred to the ICC by the UN Security Council were also discussed. The Situation in Darfur, Sudan was cited as an example in this context. It was noted that Sudan is obligated to cooperate with the ICC under the terms of UN Security Council Resolution 1583 (2005).⁶ It was observed, however, that the same Resolution does not impose a similar obligation on other non-State Parties to the Rome Statute.⁷ As a result, it was noted that all accused subject to arrest warrants by the Court remain at large mainly because of non-cooperation from both State Parties and non-State Parties to the Statute. One participant further observed that the “Guidance on contacts with persons who are the subject of arrest warrants or summonses issued by the International Criminal Court” issued by the UN Secretary-General in 2013 had thus far proved a less-than-effective tool for improving the ICC cooperation regime. In the same context, the Situation in Libya was compared to that in Darfur, Sudan.
10. The two Situations in which the Pre-Trial Chamber has authorised the Prosecutor to open a *proprio motu* investigation – the Situation in Kenya and the Situation in Côte d’Ivoire – were also discussed. It was noted in the context of the former situation that cooperation may be more limited when the accused is a sitting Head of State. On the other hand, it was observed with regard to the latter situation that when the accused has lost an election, States may be more willing to cooperate with the Court.
11. One participant suggested that a universal obligation to cooperate with the Court would not necessarily result in a more effective cooperation regime. An example cited in support of this position was that of Uganda – a State Party that has demonstrated willingness, but which is unable to cooperate with the Court in practice. It was further suggested in this context that a universal obligation to cooperate would not render situations referred to the ICC by the UN Security Council more operational in terms of cooperation: State Parties to the Rome Statute have demonstrated similar levels of unwillingness to cooperate as non-State Parties.
12. It was questioned whether a referral of a situation to the Court by the UN Security Council inherently implies an obligation for the UN to cooperate. In response, it was noted that there

⁶ SC Res 1583, 28 January 2005, S/RES/1583 (2005) [<https://www.legal-tools.org/doc/4b208f/>], at para 2.

⁷ Ibid.

may be an implied obligation in these circumstances but that this interpretation is difficult to sustain when the UN does not wish to finance investigations or prosecutions in connection with referrals by the Security Council. It was further observed that – even in the absence of a legal obligation – there may be a political obligation for the UN to assist the Court. The lack of arrest powers attributed to UN peacekeepers was also cited as a problem in this regard.

13. Participants expressed varying levels of enthusiasm for the Secretary-General’s “Guidance on contacts with persons who are the subject of arrest warrants or summonses issued by the International Criminal Court”.⁸ On the one hand, it was noted that eliminating non-essential contact does not have any practical impact upon the lives of the accused and that taking such action does not therefore strengthen the ICC cooperation regime in practice. On the other hand, several participants expressed the view that following the guidance may help to affect the behaviour of States and serve to isolate accused persons politically and diplomatically. It was argued that to follow the guidance can thereby strengthen voluntary cooperation.
14. Participants noted that the level of cooperation from States towards the Court is not static. It was suggested to this end that, when conditions are favourable, States should be encouraged to adopt national legislation limiting or reducing their ability to refuse cooperation with the Court in future. In other words, it might be a sensible approach to pre-empt periods where cooperation might be less forthcoming. It was further observed by one participant that – for the purposes of facilitating cooperation – the necessary infrastructure must be in place at the national level, including adequate national legislation and contacts for collecting evidence. It was noted in this regard that organisation and coordination must take place within States, as well as between States. It was therefore suggested that a single entry point in each State could be a useful tool in order to quickly process any incoming requests for cooperation.
15. The importance of consultations was also discussed. It was asked whether consultations with key focal points within States might strengthen the ICC cooperation regime. In response, it was observed that consultations are one of the key features of the Rome Statute cooperation framework. However, it was also noted that in certain situations – for example, the Situation in Darfur, Sudan – cooperation from States would be highly unlikely, regardless of whether consultations were to take place. Conversely, it was observed that, although the drafters of

⁸ Annex to Identical letters dated 3 April 2013 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council, 8 April 2013, A/67/828-S/2013/210.

the Rome Statute did not envisage self-referrals, which have been common in the early years of the Court, the cooperation regime has operated rather successfully in situations referred in this way. In response, one participant noted that self-referrals were envisaged and discussed by the drafters of the Statute at the Rome Diplomatic Conference.

16. Many participants raised concerns about the case of *The Prosecutor v. Uhuru Muigai Kenyatta*, a case brought by the Prosecutor against the sitting President of the Republic of Kenya. In this regard, one participant expressed the view that the case illustrates the problem of prosecuting an individual who is in control of the apparatus of power in the State in question. Another participant suggested that this case suffered from several mistakes in prosecutorial strategy and, in particular, that it had been inadequately prepared. In response, one participant noted that proceedings had been hindered largely because of the unreliability of certain witnesses and an inability to access evidence in light of non-cooperation by the situation-State. It was equally observed, however, that a case cannot be halted merely because of non-cooperation from a State, lest the Court be rendered obsolete when seeking to investigate and prosecute accused persons in positions of power and in direct control of access to evidence.
17. It was observed that the Office of the Prosecutor totally relies on cooperation and goodwill of States to perform its duties because of the lack of an ICC enforcement mechanism. It was noted that there are procedures through which a finding of non-cooperation can be made. For example, non-cooperating State Parties can be referred to the Assembly of States Parties and the UN Security Council can be informed when States do not cooperate with resolutions thereof. This said, it was also observed that, even if a finding of non-cooperation is made by one of these bodies, such a finding does not necessarily lead to the arrest and surrender of accused persons. It was equally emphasised that the Office of the Prosecutor is faced with non-cooperation at all stages of its investigations. This challenge is exacerbated by the fact that the Office is reliant upon the authorisation of States to carry out all of its prosecutorial activities, without which any activities conducted on State territory would be illegal.
18. It was noted that there is no way to *force* States to cooperate with the Court. However, it was equally emphasised that, when forthcoming, State cooperation is multifaceted. Cooperation entails logistical support, access to information and expertise not available within the Office, judicial cooperation, operational support, assistance with security and access to places, sites and evidence. It was further observed that access is often controlled by a number of different

actors with differing levels of willingness and ability to cooperate. In this regard, it was also observed that the Office of the Prosecutor has concluded a number of bilateral agreements and memoranda of understanding to facilitate cooperation, largely with situation-States. One participant noted that those States with which the Office of the Prosecutor cooperates most frequently are States in which financial and communications institutions are located.

19. When responding to requests for cooperation, it was observed that State Parties are obliged to execute requests, but are equally able to impose conditions or proceed in such a manner as to hinder the activities of the Office on their respective territories. The ability to control the way in which the request is processed is therefore critical. The Office must take into account specific domestic administrative and procedural requirements and particularities. Because the Office is unable to wait for prolonged periods of time to receive evidence, the need for swift cooperation is essential. For this reason, State-imposed restraints are particularly challenging to the daily activities of the Office of the Prosecutor on the territory of States.
20. A concern was raised by one participant that ICC officials do not have unlimited access to the territory of States. However, it was noted that Court staff should not expect to receive privileged treatment: States receive requests from other States and international organisations on a regular basis to which they must respond – in addition to those from the Court. It was therefore observed that the Court must encourage States to cooperate without antagonising them. In this context, several decisions of the Trial and Pre-Trial Chambers were welcomed for providing guidance on cooperation requests, particularly as regards the three principles of (i) relevance, (ii) specificity and (iii) necessity and the confirmation that States cannot invoke administrative constraints to deny requests for cooperation from the Court.⁹
21. A further concern raised was that of the relationship between politics and cooperation with the Court. One participant observed that cooperation has been difficult to secure with regard to the Situation in Libya partly because the Prosecutor has not initiated an investigation into

⁹ See, for example, Banda and Jerbo ICC-02/05-03/09-170, Trial Chamber IV, 1 July 2011, Decision on “Defence Application pursuant to Articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the African Union”, at para 14 [<https://www.legal-tools.org/doc/06bc5f/>]; and Banda and Jerbo ICC-02/05-03/09-169, Trial Chamber IV, 1 July 2011, Decision on “Defence Application pursuant to articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan”, at para 17 [<https://www.legal-tools.org/doc/891c96/>].

crimes allegedly committed in Syria. In this context, it was noted that the political goodwill of the State concerned is essential for the Office of the Prosecutor to operate effectively.

22. It was further noted that agreements and memoranda of understanding between the Court and other international institutions and non-governmental institutions are key to the work of the Office of the Prosecutor insofar as they provide access to focal points on the ground. It was also remarked that developing synergies between investigators and cooperation advisers can facilitate better cooperation between the Office and national authorities, which requires trust, transparency, confidence, visibility and predictability. As an alternative, it was suggested that the use of other legal routes might prove more fruitful in securing cooperation. These mechanisms include the EU Genocide Network, using national or regional focal points, the introduction of standardisation procedures or fast-track processes and voluntary exchange of information between the Court and States with a view to achieving reciprocity.
23. Several participants emphasised the importance of personal relationships between officials of the Court and representatives of the national authorities in situation-States. However, it was also observed that an overreliance on these relationships ought to be avoided: when regimes change in these States, government personnel will not necessarily remain constant. It was therefore stressed that institutional relationships ought to be developed alongside personal relationships so that the recognised framework in situation-States is not undermined.
24. Participants discussed examples of the practical application of Article 93(10) of the Statute,¹⁰ pursuant to which the ICC can transfer information to national courts. It was noted by one participant that this procedure has led to mutual exchange of information and cooperation in parallel investigations by the Court and national investigative authorities. It was also stressed,

¹⁰ Article 93(10) of the Statute provides, in relevant part, as follows:

(a) The Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State.

(b) (i) The assistance provided under subparagraph (a) shall include, *inter alia*:

a. The transmission of statements, documents or other types of evidence obtained in the course of an investigation or a trial conducted by the Court [...]

(ii) In the case of assistance under subparagraph (b) (i) a:

a. If the documents or other types of evidence have been obtained with the assistance of a State, such transmission shall require the consent of that State [...].

however, that the consent of the person or institution from which the information originates must be secured before acting under Article 93(10) of the Statute.¹¹ One participant observed that certain information is under the control of – and restricted to use by – certain organs of the Court, which limits the ability of these organs to transfer such information. An additional issue raised in this context was witness protection. It was remarked by one participant to this end that, if the death penalty is applicable in the requesting State, the Court will be reluctant to share information that could be used by national authorities where this penalty applies. It was further observed that the ICC cannot request States to violate internationally recognised human rights standards when acting pursuant to a cooperation request.

25. The issue of cooperation between the Court and non-State Parties to the Rome Statute was also raised. It was noted to this end that although non-State Parties do not have an obligation under the Statute to cooperate with the Court, when they choose to cooperate, they make a commitment to continue cooperating thereafter.

(b) Non-Cooperation with the Court

26. In discussions about the ICC framework with regard to non-cooperation, it was noted that, although the Rome Statute provides for a mechanism to respond to non-cooperation by States Parties under Article 87(7) of the Statute and by non-States Parties under Article 87(5) thereof, Sudan and Libya do not neatly fit into this paradigm.¹² These two States – non-State Parties to the Statute – are under an obligation to cooperate with the Court pursuant to UN Security Council Resolutions 1593 (2005) and 1970 (2011), respectively.¹³ One participant

¹¹ Ibid.

¹² Article 87 of the Statute provides, in relevant part, as follows:

5. (a) The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.

(b) Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council.

[...]

7. Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

¹³ SC Res 1970, 26 February 2011, S/RES/1970 (2011) [<https://www.legal-tools.org/doc/00a45e/>].

expressed concern about this aspect of the Rome Statute cooperation regime. In this context, it was further observed that the Rules of Procedure and Evidence do not contain provisions regarding non-cooperation with the ICC. However, it was remarked that Regulation 109 of the Regulations of the Court requires that, before the relevant Chamber is able to make a finding with regard to non-cooperation, it must hear from the State concerned.¹⁴

27. In this regard, several judicial findings of non-cooperation in the Situation in Darfur, Sudan were discussed. It was observed by one participant that the Pre-Trial Chamber has made a finding of non-cooperation against Sudan in *The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman*, deciding to inform the UN Security Council thereof.¹⁵ In the case of *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, the Pre-Trial Chamber again informed the UN Security Council about non-cooperation by Chad¹⁶ and Kenya,¹⁷ both of which are under to an obligation to cooperate with the Court as State Parties to the Rome Statute. It was further noted that findings of non-cooperation were made against State Parties Chad, Djibouti and Malawi for their failure to arrest the suspect while present on their respective territories in the case of *The Prosecutor v. Omar Hassan Ahmad Al Bashir*.¹⁸ In this case, the Pre-

¹⁴ Regulations of the Court, ICC-BD/01-02-07 [<http://www.legal-tools.org/doc/2988d1/>], Regulation 109 of the Regulations of the Court states, in relevant part, as follows: “3. Before making a finding in accordance with article 87, paragraph 7, the Chamber shall hear from the requested State”.

¹⁵ Ahmad Harun and Ali Kushayb ICC-02/05-01/07-57, Pre-Trial Chamber I, 25 May 2010, Decision informing the United Nations Security Council about the lack of cooperation by the Republic of the Sudan [<https://www.legal-tools.org/doc/565d18/>].

¹⁶ Al-Bashir ICC-02/05-01/09-109, Pre-Trial Chamber I, 27 August 2010, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir’s recent visit to the Republic of Chad [<https://www.legal-tools.org/doc/ec0370/>].

¹⁷ Al-Bashir ICC-02/05-01/09-107, Pre-Trial Chamber I, 27 August 2010, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir’s presence in the territory of the Republic of Kenya [<https://www.legal-tools.org/doc/c2687a/>].

¹⁸ See, e.g., Al-Bashir ICC-02/05-01/09-140-tENG, Pre-Trial Chamber I, 13 December 2011, Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir [<https://www.legal-tools.org/doc/e2c576/>]; Al-Bashir ICC-02/05-01/09-129, Pre-Trial Chamber I, 12 May 2011, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir’s recent visit to Djibouti [<https://www.legal-tools.org/doc/f799cd/>]; Al-Bashir ICC-02/05-01/09-139, Pre-Trial Chamber I, 12 December 2011, 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 [<https://www.legal-tools.org/doc/476812/>].

Trial Chamber informed the Assembly of States Parties and the UN Security Council of the failure to cooperate, having sought observations from the State Parties under Regulation 109 of the Regulations of the Court. The Pre-Trial Chamber also found that there were no legal grounds to justify a failure to cooperate and that the States in question failed to consult the Court with regard to the difficulties encountered when cooperating. Finally to this end, it was observed that further allegations of non-cooperation have been made but that the States in question have provided adequate information to dispel a finding of non-cooperation.

28. The role of the Assembly of States Parties in the ICC cooperation regime was emphasised during the workshop. It was noted to this end that a key function thereof is to consider any findings of non-cooperation made by the Court. It was further observed that the Assembly agreed non-cooperation guidelines in an Annex to Resolution ICC-ASP/10/Res.5,¹⁹ adopted following its 2011 session. The ‘Assembly procedures relating non-cooperation’ provide *inter alia* that any action by the Assembly ought to be political and non-judicial in nature and that, depending on the non-cooperation scenario, its response can be either formal or informal. It was observed that formal responses can include convening an Emergency Bureau meeting or drafting an open letter from the President of the Assembly to the State concerned. Informal responses might include diplomatic action built upon the good offices of the President of the Assembly. It was further noted that these procedures are not mandatory; rather, they provide useful guidance when faced with a State reluctant to cooperate with the Court. Finally to this end, it was observed that five regional focal points may be called upon to assist the President of the Assembly when taking diplomatic action against non-cooperating States.
29. Some participants voiced concern that the UN Security Council has never taken any formal action in response to incidents of non-cooperation; however, it was noted that the Council has held informal consultations with the States concerned to this end. It was also observed that the Bureau of the Assembly of States Parties has taken limited action pursuant to the non-cooperation procedures adopted thereby. One participant expressed the view that this action by the Bureau has not been consistent and that the Assembly as a whole at its annual sessions has not taken any formal action with regard to States that refuse to cooperate.
30. The best way to discourage non-cooperation with the ICC in future was widely discussed. In this regard, it was suggested that there are differing degrees of cooperation by States – with

¹⁹ Adopted by consensus at the plenary meeting on 21 December 2011 [<https://www.legal-tools.org/doc/cc50d0/>].

some requiring more help than others to cooperate effectively. Because of this, it was noted that findings of non-cooperation and responses by the Assembly are not the only methods by which to encourage better cooperation. To this end, it was suggested that incentives may induce States to cooperate in future and that this approach worked well at the ICTY. It was argued that, if their interests are not well served by cooperating with the Court and that the consequences of non-cooperation are of limited impact, States are unlikely to cooperate.

31. Having identified the crucial importance of cooperation to the current operation of the ICC, one participant raised the question of why the Court has not been able to generate a similar level of political support as the ICTY. In this regard, the participant identified the Kony 2012 imitative an example of a situation where such support might have materialised, but did not occur in practice. It was further observed that this initiative originated in the United States of America, a State not subject to an obligation to cooperate with the Court.
32. Support was expressed for a stronger legal basis to provide a springboard for enforcement action on non-cooperation. In discussions to this end, three options were presented. First, it was suggested that findings of non-cooperation ought to be made by a court of law; in other words, a judicial determination must be made in response to any submissions made by the Office of the Prosecutor or the Defence, respectively. Second, it was argued that the quality and authority of any such judicial determination is of fundamental importance. In this regard, it was observed *inter alia* that a fair hearing must be conducted and that the State accused of failing to cooperate with the Court should be given the opportunity to raise a defence. It was suggested that the possibility of appealing against the decision of the Chamber would afford this process further legitimacy and dispel concerns relating to the impartiality of the judiciary. It was also proposed that the judge in this process ought to be distant from the case at hand, and that an external Chamber might be composed to this end. Third, it was suggested that the policy with regard to non-cooperation with the Court must be followed in a direct and consistent manner: procedures and responses must be made clear to States so that they are prevented from evading compliance with their obligation to cooperate, if applicable.
33. Referring to the case of *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, one participant asked why Article 87(7) of the Statute had not been triggered earlier, given that there had been examples of non-cooperation prior to this case. Moreover, it was argued that the Court's approach to Article 87(7) of the Statute has been selective and arbitrary. In this regard, it was

questioned why the Pre-Trial Chamber opted to use its discretionary power not to refer non-cooperation by Nigeria to the Assembly of States Parties or the UN Security Council, but chose to refer the Democratic Republic of the Congo to the latter for not cooperating with the ICC.²⁰ In both situations, the accused attended a conference in the requested State. One participant argued that this inconsistency sends out the wrong signal to States. A related issue discussed was the application of immunities in the same case. It was submitted that the legal analysis by the Pre-Trial Chamber in its case law on non-cooperation, particularly with regard to its finding of non-cooperation against Chad and Malawi,²¹ was less than convincing.

34. It was further observed that, although the Rome Statute does not explicitly provide for the possibility of referral to *both* the UN Security Council and the Assembly of States Parties, in the finding of non-cooperation against the Democratic Republic of the Congo in the case of *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber II referred the offending State to both bodies.²² It was suggested by one participant that this decision is indicative of an increasing frustration with the UN Security Council on the part of the Court.
35. In discussions about the political will of States to cooperate with the ICC compared with the ICTY, three enforcement options were presented in the case of the ICC. First, the Assembly of States Parties is able to take action. Second, the UN Security Council can respond to cases of non-cooperation. Third, it was identified that States are able to respond – individually or collectively – to other States that refuse to cooperate with the Court. However, it was noted that, in the latter case, States may be inclined to think that, if no action has been taken by the former two bodies, it is not their responsibility to seize the initiative in taking enforcement action against non-cooperating States. In response to concerns raised about inaction by the

²⁰ Cf. Al Bashir ICC-02/05-01/09-159, Pre-Trial Chamber II, 5 September 2013, Decision on the Cooperation of the Federal Republic of Nigeria Regarding Omar Al Bashir's Arrest and Surrender to the Court [<https://www.legal-tools.org/doc/1822e7/>]; and Al-Bashir ICC-02/05-01/09-195, Pre-Trial Chamber II, 9 April 2014, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court [<https://www.legal-tools.org/doc/89d30d/>].

²¹ See Al-Bashir ICC-02/05-01/09-109, *supra* n 16; Al-Bashir ICC-02/05-01/09-140-tENG; Al-Bashir ICC-02/05-01/09-139, *supra* n 18. See also Al-Bashir ICC-02/05-01/09-151, Pre-Trial Chamber II, 26 March 2013, Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir [<https://www.legal-tools.org/doc/362dea/>].

²² See Al-Bashir ICC-02/05-01/09-195, *supra* n 20.

Assembly of States Parties, it was suggested by one participant that States might be shamed into complying more frequently with requests for cooperation from the Court.

36. In the context of the Pre-Trial Chamber finding of non-cooperation against the Democratic Republic of the Congo – but not against Nigeria – in the case of *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, one participant observed that, because the former invoked immunity as a justification for its non-cooperation and the latter argued that the visit of the accused to its territory was unexpected, the ICC found differently in the respective situations.²³ It was also noted by another participant in this regard that it is not for the State to meet the burden of proof when invoking immunity as a reason for refusing to cooperate with the Court; rather, it is for the Court itself to decide. Participants disagreed as to whether it is permissible for a State to appeal a finding of non-cooperation without a statutory basis.
37. Several participants observed that the Court’s case law on non-cooperation is not sufficiently robust to deter States from refusing to cooperate. It was also questioned why the majority of this case law has focused on the travel of the accused in the *Al Bashir* case. In response, other participants observed that to maintain positive relationships with States is more conducive to encouraging cooperation and avoiding confrontation than findings of non-cooperation.
38. State responses to findings of non-cooperation were also discussed. It was observed that the purpose of enforcement is to secure cooperation in future. It was, however, noted that there are no situations where a judicial finding of non-cooperation has led to non-repetition by the State in question. The response of Malawi was cited as an example where a State decided to cooperate with the Court following a finding of non-cooperation:²⁴ the Malawian authorities informed Sudan that they would arrest Omar Al Bashir should he attend the African Union summit on its territory. As a result, the African Union relocated the summit to Addis Ababa, Ethiopia. One participant noted, however, that the risk that the United States might withhold aid induced the national authorities in Malawi to cooperate on this occasion and that similar incentives might prove fruitful in encouraging cooperation in future.
39. Participants also discussed findings on State non-cooperation in the context of wider public international law on State responsibility. One participant noted that the UN Security Council

²³ See *Al Bashir* ICC-02/05-01/09-159; *Al-Bashir* ICC-02/05-01/09-195, *supra* n 20.

²⁴ See *Al-Bashir* ICC-02/05-01/09-139, *supra* n 18.

issued a Presidential Statement urging the Sudanese government and all other parties to the conflict in Darfur to cooperate fully with the Court.²⁵ Additionally, in the context of the *Al-Bashir* case, another participant observed that prevention is the best approach. For example, although certain States might be reluctant to arrest the accused, States can avoid hosting him. States can also raise the issue at meetings held at the international level, work with regional partners and issue statements unilaterally. Because States arguably act in their own interests, it was suggested that to apply diplomatic pressure and highlight the positive impact of civil society in the State concerned might lead to more successful requests for cooperation. It was also observed that resolutions adopted by the UN Security Council have increasingly referred to the Court but that a small group of States continues to block consensus therein. Another participant observed in this regard that States are likely to hide behind the Assembly of States Parties or the UN Security Council before reacting to instances of non-cooperation.

40. In discussions about possible further sanctions against non-cooperating States, two options were presented. First, it was suggested that States that refuse to cooperate might be banned from the Assembly of States Parties. Second, it was proposed that the same States might be stripped of their right to vote at the Assembly. One participant noted, however, that should either approach be followed, a tension might emerge at the Assembly and that States might begin to vote in blocs, which would have implications for the adoption of the budget as well as other resolutions. Another participant suggested that a committee could be established by the Assembly of State Parties to specifically consider the matter of further sanctions.

(c) Cooperation and Witness-Related Issues

41. Participants discussed the challenges encountered with securing cooperation in the area of witness protection. It was observed that the ICC seeks to adopt a holistic approach towards the issue of protecting witnesses and that it is the responsibility of the Court to ensure their protection. In this regard, it was noted that the Court must take all appropriate measures to protect the dignity of victims. As a result, it was noted that the Court established a Victims and Witnesses Unit (VWU), which has a further responsibility: facilitating the appearance of witnesses. It was explained there are two ways to protect of victims and witnesses. First, the VWU is able to adopt technical measures to ensure their protection when their presence is required in the courtroom – for example, voice and face distortion. Second, the VWU adopts

²⁵ Statement by the President of the Security Council, 16 June 2008, S/PRST/2008/21 (2008).

additional, procedural measures when necessary, according to a pyramid structure: whereby the more potentially dangerous the testimony, the more protection needed from the VWU.

42. Local protective measures were also discussed by workshop participants. In this regard, locks and fences were cited as an example thereof. Moreover, it was observed that a system can be put in place to extract a vulnerable victim or witness from his or her place of residence, if the risk to safety is deemed sufficiently grave. It was noted that cooperation is particularly crucial for the ICC Protection Programme, given that the Court does not have the same means at its disposal for the protection of victims and witnesses as national authorities. Because the ICC does not have territory of its own, for example, it relies on States to accept persons on their territory. It was further observed that because the duty under Article 93(1)(j) of the Statute requires State Parties to protect witnesses only if they are located on their territory, the ICC is unable to force States to accept witnesses beyond the limited scope of this provision.²⁶
43. The possibility of negotiating agreements with States pursuant to Rule 16(4) of the Rules of Procedure and Evidence to enable States to accept victims, witnesses or other at-risk persons on their territory following a cooperation request was also raised.²⁷ It is the Registry that has the power to conclude such agreements, which may remain confidential and must take into consideration the peculiarities of the national law of the State in question. Pursuant to these tailor-made agreements – as described by one participant – it was noted that at-risk persons may be afforded the possibility to integrate in the society of the States onto whose territory they are relocated and to find work. It was further observed that, if States agree to accept at-risk persons in general, they must nevertheless consent to the relocation of each individual as and when the need for relocation arises. Regardless, it was suggested that such agreements do not constrain States in their ability to host victims and witnesses on their territory. On the other hand, it was noted that the Court’s victim and witness protection apparatus might also

²⁶ Article 93(1)(j) of the Statute provides, in relevant part, as follows: “States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions: [...] The protection of victims and witnesses and the preservation of evidence [...]”.

²⁷ Rules of Procedure and Evidence, ICC-ASP/1/3 [<https://www.legal-tools.org/doc/8bcf6f/>]. Rule 16(4) of the Rules of Procedure and Evidence provides as follows: “Agreements on relocation and provision of support services on the territory of a State of traumatized or threatened victims, witnesses and others who are at risk on account of testimony given by such witnesses may be negotiated with the States by the Registrar on behalf of the Court. Such agreements may remain confidential”.

have negative consequences for the life of at-risk persons. For example, it was suggested that it can be difficult for relocated persons to become self-sustainable in their new country.

44. It was further noted that the ICC must be able to relocate victims and witnesses quickly. In this regard it was observed that the Court's Registry is currently considering how to improve the existing procedures for relocating at-risk persons. One participant suggested that the ICC ought to adopt a dynamic approach in order to convince States to work with the Court and that to offer the incentive of exchange of expertise might induce more frequent cooperation. In this context, it was observed that when the State in question has a system in place which allows the witness to live safely in their new place of residence, the Court is able to help build the capacity of welcoming States to develop their witness protection programmes. It was also noted that, although some States appear eager to agree framework agreements with the ICC, they are concurrently reluctant to execute cooperation requests from the Court on an *ad hoc* basis. Finally to this end, in discussions about how best to incentivise cooperation in the area of the protection of victims and witnesses, it was suggested that the Court might be able to offer financial incentives by, for example, creating a VWU fund for this purpose.
45. The comparative example of cooperation at the Extraordinary Chambers in the Courts of Cambodia (ECCC) and possible lessons to be learned for the ICC was also discussed. It was observed that from the outset cooperation between the Royal Government of Cambodia and the UN was difficult to secure, with the ECCC labelled by certain observers as a kangaroo court established purely to deliver summary justice on behalf of the Cambodian government. It was observed that – in the context of a highly politicised process in which accusations of bribery were made against the Cambodian judges – when the trials were underway, the Royal Government of Cambodia offered limited assistance to the ECCC beyond cooperating with regard to the arrest and surrender of the accused. For example, it was noted that the salaries of Cambodian staff members – which, pursuant to Article 15 of the Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea,²⁸ ought to have been paid by the Cambodian government – frequently went unpaid.
46. It was observed by one participant that most witnesses summonsed to appear by the ECCC were compliant. However, it was noted that five serving members of the Royal Government

²⁸ 6 June 2003, entered into force on 29 April 2005 [<https://www.legal-tools.org/doc/3a33d3/>].

of Cambodia – former members of the Khmer Rouge – refused to comply with summonses to appear. Because its legal framework does not include any mechanism by which witnesses may be forced to comply with its orders, the ECCC was unable to compel their appearance.

47. With regard to the protection of witnesses, it was noted that prosecutorial staff at the ECCC are not permitted to have any contact with witnesses before their appearance in court. It was further observed that, pursuant to Rule 28 of the Internal Rules,²⁹ witnesses are given the assurance of non-prosecution by the ECCC based on evidence provided in response to any questions asked – a process which gave some comfort to some witnesses. Additionally, it was noted that, under Rule 29 of the Internal Rules, protective measures are available to victims and witnesses before the ECCC.³⁰ These procedures include both confidentiality and security measures, including the facilitation of remote participation, voice distortion and provision of secure accommodation, where deemed necessary by the relevant organ of the ECCC.

48. Discussions also addressed the comparative example of cooperation at the *ad hoc* tribunals. Participants generally agreed that the lack of a UN Security Council mandate renders the task of securing cooperation more difficult for the ICC than the ICTY or ICTR. In this regard, it was argued that the ICC needs to establish consistency – particularly in its jurisprudence on non-cooperation – for the benefit of the institution as a whole. It was further remarked that political influence ought not to determine the legal framework, but that it must be the Court – through a thorough exposé of the applicable law within effective and binding decisions – that must delineate the ICC cooperation regime. It was argued to this end that judges must not compromise with the political issues that seek to undermine the work of the Court.

49. In the context of discussing the referrals of the Situation in Darfur, Sudan and the Situation in Libya to the Court by the UN Security Council, one participant observed that the best way for the Court to encourage better cooperation from States is to be as open and transparent as possible. It was argued that to adopt this approach will develop a legitimacy and moral force that renders non-cooperation more difficult. To this end, it was suggested that the findings of non-cooperation made by the Pre-Trial Chamber against Chad and Malawi did not carry

²⁹ As revised on 3 August 2011 [<https://www.legal-tools.org/doc/f356ac/>].

³⁰ Ibid.

sufficient moral authority to facilitate more successful instances of cooperation.³¹ In addition, it was noted that, where a State refuses to cooperate despite an obligation to this effect under the terms of a UN Security Council resolution, the offending State should be reported for its failure to comply. It was observed that in the case of *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah al-Senussi*, despite being under an obligation to cooperate with the Court pursuant to UN Security Council Resolution 1970 (2011),³² Libya refused to cooperate in surrendering the accused Abdullah al-Senussi, but that this non-cooperation was not referred by the Court to the UN Security Council. In light thereof, it was suggested that inconsistency in reporting incidents of non-cooperation serves to undermine the credibility of the cooperation regime. Finally in this regard, it was observed from a defence perspective that the responsibility for securing cooperation from States rests largely with the Office of the Prosecutor, which has at its disposal broad access to sensitive areas and information during preliminary examinations to which the Defence may never have access because of a lack of cooperation.

50. In discussions about witness summonses in the ICC legal framework, one participant noted that the Court had, in practice, exercised subpoena powers in the Situation in the Republic of Kenya. It was questioned whether it is appropriate for the Court to adopt this approach and whether sanctions ought to be introduced against witnesses who refuse to cooperate with the ICC. In response, it was noted that in certain national legal systems, witnesses can be held in custody before giving evidence but that this more robust national model is difficult to apply in the international context. It was further observed in this regard that certain witnesses are willing to appear before the Court, but do not want to be seen to do so voluntarily; in other words, they prefer to be seen as being compelled to testify – often for reasons of safety.

51. One participant questioned whether States have demonstrated reluctance to accept witnesses who appear on behalf of the Defence. In response, it was noted that the VWU is obliged to protect all witnesses and that the same assessment is undertaken by the VWU, whether the witness has been summonsed by the Prosecutor or the Defence. It was further observed that it is not particularly relevant for States – when deciding whether to accept witnesses on their territory – on behalf of whom the witness has been summonsed. The primary considerations

³¹ See Al-Bashir ICC-02/05-01/09-109, supra n 16; Al-Bashir ICC-02/05-01/09-140-tENG; Al-Bashir ICC-02/05-01/09-139, supra n 18. See also Al-Bashir ICC-02/05-01/09-151, Pre-Trial Chamber II, 26 March 2013, Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir [<https://www.legal-tools.org/doc/362dea/>].

³² See SC Res 1970, 26 February 2011, S/RES/1970 (2011) supra n 13.

affecting States' decisions in this regard relate to the profile of the witnesses; as a result, it is easier to secure the relocation of victims on State territory than high-profile witnesses. In the same context, it was observed that certain States with civil law legal systems may be reluctant to accept a direct request for cooperation from the Defence and, as a result, requests made by the Court on behalf of the Defence may be more acceptable. One participant observed in response that a lack of access to witnesses by the Defence could lead to an appeal or other legal filing on the basis that the accused has been denied a fair trial.

(d) Cooperation and the Freezing of Assets

52. The issue of asset freezing, for the purpose of reparations for victims, was also raised during the discussions. In this context, it was observed that Article 93(1) of the Statute obliges State Parties to cooperate with the Court with regard to the identification, tracing and freezing or seizure of proceeds of crime.³³ Requests may originate from the Court or directly from the Prosecutor. It was further noted that Article 109 of the Statute regulates the enforcement of forfeiture measures and that – when requested – State Parties are obligated to give effect to fines or forfeitures ordered by the Court and to thereafter ensure the transfer to the Court of property or proceeds obtained through enforcing an ICC judgment.³⁴

53. One participant observed that requests for the seizure of assets made according to the terms of the Rome Statute are to be implemented according to the relevant provisions of national law. As a result, States must ensure that the necessary procedures are in place at the national level in order to be able to execute a request from the Court to this end. It was also observed

³³ Article 93(1) of the Statute provides, in relevant part, as follows: “1. States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions: [...] (k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties [...]”.

³⁴ Article 109 of the Statute provides:

1. States Parties shall give effect to fines or forfeitures ordered by the Court under Part 7, without prejudice to the rights of bona fide third parties, and in accordance with the procedure of their national law.

2. If a State Party is unable to give effect to an order for forfeiture, it shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties.

3. Property, or the proceeds of the sale of real property or, where appropriate, the sale of other property, which is obtained by a State Party as a result of its enforcement of a judgement of the Court shall be transferred to the Court.

that, even where such measures are available to the relevant national authorities, procedural hurdles may nevertheless be counterproductive to successfully effecting ICC requests. It was remarked, for example, that in certain jurisdictions the requesting party must re-submit their initial request for freezing or seizure on a regular basis, lest it become invalid. In response, it was suggested that such requests ought to remain active until the Court decides otherwise.

54. Other obstacles to identifying, tracing, freezing or seizing the proceeds, property or assets of crime encountered at the national level were discussed by participants. These included use of “shell companies” and “prête-nom” – or straw persons – and new incomes or other means entering the belonging of the accused after freezing or seizure. With regard to the former, it was observed that the request for freezing or seizure must be interpreted as applying to the person in actual possession of the assets in question. As regards the latter issue, it was noted that requests from the Court ought to indicate that freezing and seizure should include any assets which might come into the future possession of the person in question, after delivery of the decision by the relevant national judicial authority.
55. A further problem identified was the situation in which assets or proceeds of crimes – to be identified by investigators – are held in two or more States. In response, it was suggested in such cases that the national authorities within the concerned States must be coordinated to ensure that all property is properly located and frozen. Additionally, it was observed that any such action must be taken promptly so that assets or property are not relocated to a third State, regarded by the subject of the freezing order as “safe” from investigators. It was noted in this context that many suspected or accused of committing international crimes are able to seek financial advice, which enables them to move assets to locations in which they become difficult – if not impossible – to identify, trace, freeze and seize. A further issue raised in this regard was that of the suspect who declares him or herself indigent when, in practice, this is not true. Rule 21(5) of the Rules of Procedure and Evidence regulates such cases.³⁵
56. A number of challenges to the ICC regime for the identification, tracing, freezing and seizure of assets for the purposes of reparations to victims were identified. In discussions about the inaugural decision on reparations made by the Trial Chamber in the case of *The Prosecutor v.*

³⁵ Rule 21(5) of the Rules of Procedure and Evidence provides: “Where a person claims to have insufficient means to pay for legal assistance and this is subsequently found not to be so, the Chamber dealing with the case at that time may make an order of contribution to recover the cost of providing counsel”.

Thomas Lubanga Dyilo,³⁶ it was observed that the proceeds for victims in this case were limited because they were not frozen. It was further remarked that many States – in their respective national implementing legislation – have included reparations in the context of proceeds of crimes. One participant remarked that the vagueness of the Rome Statute with regard to the obligations and rights of the various parties involved in freezing assets leads to inefficiency and works against the victims of crimes under ICC jurisdiction. For example, it was observed that although national authorities are able to identify, seize and freeze assets, what happens between the freezing and transfer thereof is vague under the Rome Statute framework. It was also argued that Article 93(1)(k) of the Statute links the ICC reparations regime to proceeds of crimes, which greatly limits the amount of compensation available to victims.³⁷

57. One participant voiced support for a link between the ICC asset freezing regime and that of the UN Security Council Sanctions Committee. In this regard, it was generally observed that the latter necessarily involves non-State Parties which might not be interested in negotiating or working with the Court. As a result, it was generally accepted that this solution is unlikely to generate sufficient political will in support thereof, unlike its counter-terrorism equivalent, which operates under the auspices of the UN Security Council. Conversely, it was suggested that to link the two regimes could be beneficial for the victims of core international crimes. The assets of the Gaddafi regime were cited as an example. It was proposed to this end that the Court could ask that the assets of the regime remain frozen for the duration of the trial, to be used for the purposes of reparations to victims, should the accused be found guilty in the relevant cases in the context of the Situation in Libya. Alternatively, it was suggested that the assets could be frozen earlier for the benefit of the Libyan people post-Gaddafi.
58. It was generally recognised that, in many cases, there will be competing claims for assets – an issue not regulated by the Rome Statute. Not only might rival claims arise between groups of victims – for example victims under national proceedings in the territorial State and victims of crimes under the jurisdiction of the Court – but they might also occur between forms of cooperation. For example, it was questioned whether remunerating defence counsel ought to be prioritised above ensuring that victims receive reparations from these assets. Additionally, it was asked whether victims – despite their limited procedural rights under the Rome Statute

³⁶ See Lubanga ICC-01/04-01/06-2904, Trial Chamber I, 7 August 2012, Decision establishing the principles and procedures to be applied to reparations [<https://www.legal-tools.org/doc/a05830/>].

³⁷ See Rome Statute, *supra* n 2.

regime – might be able to petition the Court to confirm that they are entitled to receive some benefit from the seizure of the assets of the accused. Finally in this context, one participant noted that assets cannot be disposed of while the accused remains innocent. Because assets are susceptible to decreasing in value over time, the situation might arise in which the cost of safeguarding the assets in question is higher than their value when sold. In response, one participant observed that assets may be sold, with the proceeds held in trust. This approach may serve to avoid some of the administrative costs associated with safeguarding assets.

59. There was much discussion concerning practical challenges to the ICC cooperation regime. It was noted that the Court relies heavily on cooperation with States in locating and taking evidence on State territory. It was observed that one of the primary goals of the Office of the Prosecutor is to investigate and establish financial links in order to prove the commission of crimes under the Statute. It was further noted that ascertaining the existence of such financial links might involve investigating the instrumentalities or proceeds of crime and assets held in safe havens or by shell companies. In this regard, concern was raised that accused are able to cooperate *inter se* in concealing assets within the jurisdiction of other accused.
60. Comparisons were also made between the ICC regime for the identification, tracing, freezing and seizure of assets and those at the national level. It was noted that national frameworks generally require that assets subject to such enforcement action be proceeds of the crime or crimes for which the accused has been indicted. It was also noted that although it might be possible for the Office of the Prosecutor to request the freezing or seizure of assets during an investigation, in certain jurisdictions it is more difficult to secure the transfer thereof.
61. Other challenges to securing cooperation from States with regard to asset freezing were also discussed by participants. It was observed that the nature of financial investigations is slow. A particular example raised was that of requests made by the ICC to banks or other financial institutions concerning deposit accounts, which can take up to two years to be processed. It was further observed in this regard that financial institutions often invoke legal justifications for their non-compliance with requests submitted by the Court, which does not advance the investigation. Moreover, one participant observed that a lack of focal points responsible for responding to cooperation requests within certain jurisdictions results in misunderstandings when these requests are communicated through diplomatic channels. Other obstacles raised by some participants included the limited capacity of the Office of the Prosecutor to include

significant amounts of information in its cooperation requests and the inability of financial investigatory networks to share relevant information *inter se*.

62. Much discussion addressed the relationship between the asset freezing regime of the Court and that of the UN Security Council Sanctions Committee. It was generally agreed that the ICC regime is considerably slower than its UN Security Council counterpart. However, it was equally observed that the UN Security Council Sanctions Committee operates according to an administrative process, rather than a judicial process and that – unlike the ICC – the UN is able to name and shame those States that refuse to act in accordance with its instructions. In this context, it was noted that the accused Thomas Lubanga Dyilo was already named on the UN Security Council Sanctions Committee List at the time of his indictment and arrest by the ICC: pursuant to UN Security Council Resolution 1596 (2005).³⁸ Accordingly, in this case, the obligation of States to freeze the assets of the accused rested on two legal bases: UN Security Council Resolution 1596 (2005) and the Court's cooperation request. Further, these two bodies invoked different grounds for their respective decisions: the UN Security Council Sanctions Committee listed the accused for breaching an arms embargo, the ICC for allegedly committing the war crimes of enlisting and conscripting of children under the age of 15 years and using them to participate actively in hostilities.³⁹ One participant suggested that the decisions of the UN Security Council to this end might be legitimated by those of the ICC and that this might therefore prove an incentive to include accused persons subject to an arrest warrant by the Court on the UN Security Council Sanctions Committee List.

63. Participants noted that – despite the lack of a clear legal basis therefore – the majority of the proceeds gathered under the ICC asset freezing regime is used for the payment of legal aid. A tension emerged as to whether these proceeds ought first to be used for reparations or to meet legal aid expenses. In this context, it was remarked by one participant that, because the Office of the Prosecutor does not own the assets, it has no legal basis on which to negotiate with regard to their transfer and use. It was further observed that the ICC Registry ought to play a larger role with regard to the non-prosecutorial aspect of the asset seizure regime. For example, it was suggested that, as victims of crimes under the jurisdiction of the ICC do not

³⁸ See Lubanga ICC-01/04-01/06-2, Pre-Trial Chamber I, 31 March 2006, Request to States Parties to the Rome Statute for the Identification, Tracing and Freezing or Seizure of the Property and Assets of Mr Thomas Lubanga Dyilo [<https://www.legal-tools.org/doc/0d5f2c/>]; SC Res 1596, 3 May 2005, S/RES/1596 (2005), at para 15.

³⁹ See Lubanga ICC-01/04-01/06-2, Pre-Trial Chamber I, 10 February 2006, Mandat d'Arrêt [<https://www.legal-tools.org/doc/ede08a/>], at 4.

have access to the UN Security Council Sanctions Committee, the Registry could enter into direct negotiations with this body with the aim of securing an agreement on their behalf.

64. The difference between seizure and forfeiture was also raised by participants. It was noted to this end that merely because assets have been seized, they cannot subsequently be transferred to another party without sufficient legal justification. It was further observed that the Rome Statute provided limited guidance on this issue and that Article 93(1)(k) thereof provides for the seizure of assets only insofar as they are related to the proceeds of alleged crimes under investigation by the Court.⁴⁰ As a result, States are limited with regard to that which they are legally able to seize under the ICC framework. One participant remarked that Rule 21 of the Rules of Procedure and Evidence provides the legal basis for the transfer of seized property to the Court,⁴¹ but that this Rule does not have a clear legal basis in the Rome Statute. It was added that, although the Rule does not contradict the Statute, discussion must take place in the Court to better delineate the transfer of assets thereto when frozen by States.

(e) Cooperation and Issues at the National Level

65. Throughout the discussions, several participants raised the need for review of procedures on non-cooperation adopted by the Assembly of States Parties. One participant suggested that these procedures were initially adopted despite the unwillingness of certain States to discuss the issue of cooperation. As a result, it will be difficult to secure meaningful review of these procedures in light of the lack of political will in support thereof. Another participant noted that, at the time of the workshop, the Assembly webpage on non-cooperation had not been updated since 2013 and that it did not contain all findings of non-cooperation made by the Court,⁴² which might demonstrate a lack of support for this matter within the Assembly. In this context, it was suggested that these findings ought to be visible in order to make evident the standpoint adopted by the Court vis-à-vis incidents of non-cooperation. One participant remarked that all future review of non-cooperation procedures must take place in the context of bilateral discussions involving the Bureau as well as representatives from States.

⁴⁰ See Rome Statute, *supra* n 2.

⁴¹ See Rules of Procedure and Evidence, *supra* n 27.

⁴² The webpage was updated on 2 December 2014. See Assembly of States Parties, 'Non-cooperation', available at: http://www.icc-cpi.int/en_menus/asp/non-cooperation/Pages/default.aspx [last accessed 3 December 2014].

66. It was generally agreed that the consequences of non-cooperation ought to be strengthened. One suggestion made was the appointment of an Assembly focal point on non-cooperation to instigate proceedings when an incident of non-cooperation is reported. Other suggestions included suspending the rights of States who refuse to cooperate with the Court.

67. Creative work led by global civil society was raised by a number of participants. A particular example discussed was that of the activities of non-governmental organisations in Africa to bring an end to obstruction of the work of the Court by the African Union (AU): namely in response to a resolution by the AU calling on its Member States to refuse to cooperate with the Court. Other examples raised in praise of the efforts by global civil society to encourage better cooperation with the ICC included action taken in Kenya to discourage the visit to its territory by Sudanese President Omar al-Bashir. In this regard, it was remarked that national courts can serve as a useful vehicle to deter non-cooperation. In the Al-Bashir case, Kenyan civil society petitioned the High Court of Kenya to issue an arrest warrant for the accused, thereby influencing the actions of the government with regard to arrest and surrender. This approach was subsequently adopted in South Africa, Nigeria and the Democratic Republic of the Congo. It was argued that such legal creativity by these non-governmental organisations is able to strengthen the ICC cooperation regime and should therefore be encouraged.

68. The need for careful consideration of the ICC's obligations regarding witnesses and suspects was illustrated by four scenarios. It was noted at the outset of discussions that although the Court does not possess a territory of its own, persons are required to travel thereto in order that it might fulfil its functions. As a result, under Article 93(7) of the Statute, the Court can request the temporary transfer of persons for the purpose of obtaining testimony.⁴³ It was also noted that this transfer is further regulated by the Headquarters Agreement between the International Criminal Court and the Host State,⁴⁴ which states that witnesses can be issued a

⁴³ Article 93(7) of the Statute provides:

(a) The Court may request the temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance. The person may be transferred if the following conditions are fulfilled:

- (i) The person freely gives his or her informed consent to the transfer; and
- (ii) The requested State agrees to the transfer, subject to such conditions as that State and the Court may agree.

(b) The person being transferred shall remain in custody. When the purposes of the transfer have been fulfilled, the Court shall return the person without delay to the requested State.

⁴⁴ 7 June 2007, ICC-BD/04-01-08, entered into force 1 March 2008 [<https://www.legal-tools.org/doc/45e340/>].

visa and transferred to ICC Detention Centre by the Netherlands, the host State. Prior to the discussion of four practical scenarios, it was observed that the Court is obligated to protect victims and witnesses according to Article 68(1) of the Statute and that the Netherlands,⁴⁵ as a Party to international human rights instruments, is subject to similar obligations.

69. The first scenario discussed in this context was that of non-detained witnesses who choose to apply for asylum in the Netherlands. It was remarked by one participant that this situation is not legally problematic for the Court as the issue of asylum is a matter for Dutch law.

70. It was argued that a second scenario – in which an acquitted person applies for asylum – is more difficult to address. Under Rule 185 of the Rules of Procedure and Evidence,⁴⁶ the ICC shall prepare the return of the acquitted person to his or her country of origin, taking his or her views into consideration. Moreover, Article 48 of the Headquarters Agreement between the International Criminal Court and the Host State equally provides that the Court has the obligation to facilitate the return of an acquitted person.⁴⁷ Conversely, Article 81(3)(c) of the Statute provides that an acquitted person ought to be freed immediately.⁴⁸ The Court cannot therefore keep an accused person in detention between his or her acquittal and subsequent transfer to his or her respective country of origin.⁴⁹ The case of Mathieu Ngudjolo Chui was cited as an example, in which regard it was noted that asylum proceedings were ongoing.

⁴⁵ Article 68(1) of the Statute provides, in relevant part, as follows: “The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses [...]”.

⁴⁶ Rule 185(1) of the Rules of Procedure and Evidence provides, in relevant part, as follows: “[...] [W]here a person surrendered to the Court is released from the custody of the Court because [...] the person has been acquitted at trial or on appeal [...] the Court shall, as soon as possible, make such arrangements as it considers appropriate for the transfer of the person, taking into account the views of the person, to a State which is obliged to receive him or her, to another State which agrees to receive him or her, or to a State which has requested his or her extradition with the consent of the original surrendering State [...]”.

⁴⁷ Article 48 of the Headquarters Agreement between the International Criminal Court and the Host State repeats Rule 185(1) of the Rules of Procedure and Evidence near-verbatim. See *ibid*.

⁴⁸ Article 81(3)(c) of the Statute provides: “In case of an acquittal, the accused shall be released immediately [...]”.

⁴⁹ See Ngudjolo ICC-01/04-02/12-22-tENG, Appeals Chamber, 8 February 2013, Second Addendum to “Defence request that the Appeals Chamber order the Victims and Witnesses Unit to execute and the host State to comply with the acquittal judgment of 18 December 2012 issued by Trial Chamber I of the International Criminal Court” [<https://www.legal-tools.org/doc/0a22ac/>]; and Ngudjolo ICC-01/04-02/12-74-Red, Appeals Chamber, 12 June 2013, Decision on Mr Ngudjolo’s request to order the Victims and Witnesses Unit to execute and the Host State to comply with the acquittal judgment of 18 December 2012 issued by Trial Chamber II of the International Criminal Court [<https://www.legal-tools.org/doc/60c1ff/>], at para 13 (“The Appeals Chamber considers that the pending

71. A third scenario discussed by participants was that of detained witnesses, transferred to the ICC for the purpose of giving testimony but who subsequently apply for asylum in the host State. One participant raised the question whether these detained witnesses are able to seek asylum from the ICC Detention Centre rather than from Dutch territory. It was observed by another participant that this issue had been litigated before the ICC by witnesses detained to provide testimony in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*. The European Court of Human Rights, having been seised of the matter, held that the host State is not obligated to review the legality of detention of witnesses at the Court, an issue regulated by the agreement between the Court and the Democratic Republic of the Congo, the witnesses' country of origin.⁵⁰ The ICC Appeals Chamber held that Article 21(3) of the Statute does not supersede the obligation to return witnesses detained to give testimony.⁵¹ At the same time, it was held that the Court must afford to the Netherlands the opportunity to comply with its national law. The national authorities are consequently faced with competing obligations under international human rights instruments and the Headquarters Agreement between the International Criminal Court and the Host State, respectively.⁵² It was noted that the Dutch Supreme Court decided not to grant asylum to the detained witnesses in this case, but that the issue remains controversial both at the Court and within the host State.
72. The fourth and final scenario discussed in this context was that of a convicted person who applies for asylum in the Netherlands. This scenario was compared by one participant to the third scenario, in which detained witnesses apply for asylum in the host State after providing testimony to the Court. One participant observed that Charles Taylor – after his conviction by the Special Court for Sierra Leone – applied for asylum in the Netherlands, the seat of this particular trial, an application rejected by the responsible Dutch judicial authorities.

asylum application does not negate the Registrar's obligation to give effect to Mr Ngudjolo's acquittal pursuant to rule 185 (1) of the Rules of Procedure and Evidence [...]"). [Emphasis added].

⁵⁰ Djokaba Lambi Longa v. the Netherlands Application No 33917/12, Admissibility, 9 October 2012

⁵¹ See Ngudjolo ICC-01/04-02/12-158, Appeals Chamber, 20 January 2014, Order on the implementation of the cooperation agreement between the Court and the Democratic Republic of the Congo concluded pursuant article 93 (7) of the Statute [<https://www.legal-tools.org/doc/d554f7/>], at para 30 ("[...] [T]he second sentence of article 93 (7) (b) of the Statute can be implemented in conformity with article 21 (3) of the Statute, specifically in respect of the Detained Witnesses' right to an effective remedy in respect of their asylum claims [...]").

⁵² See Headquarters Agreement, *supra* n 44.

73. Participants also discussed the impact of parallel trials at the domestic level on cooperation.

It was recalled by one participant that the principle of complementarity establishes that a case is not admissible before the Court if it is concurrently being prosecuted at the national level. Further, in light of the Pre-Trial Chamber interpretation of that which constitutes a case, it was argued that the involvement of the Court promotes proceedings before national courts. Pursuant to this interpretation, there is an increasing emphasis on cooperation between the Court and national authorities with regard to the place in which trials ought to be held for a single set of violations. In particular, it was observed that the ICC more frequently resorts to the consultations process to reach a mutually agreeable solution with domestic courts. One participant observed to this end that such consultations – and indeed cooperation in general – must take into account the different legal cultures within domestic courts, which may not necessarily be driven by the same objectives as international legal proceedings.

74. It was widely recognised that the principle of complementarity renders the ICC subsidiary to national courts. In this context, Article 17 of the Statute regulates the admissibility of a case before the Court.⁵³ It was suggested by one participant that the principle of complementarity can be viewed as a division of labour between the ICC and domestic courts: simultaneously encouraging domestic prosecution of international crimes and supporting State sovereignty.

75. The decision of Pre-Trial Chamber I in the case of *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, in which it was held that both investigations by the national authorities and the ICC must cover the same case,⁵⁴ was also raised in discussions about the principle of

⁵³ Article 17 of the Statute provides, in relevant part, as follows:

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
- (d) The case is not of sufficient gravity to justify further action by the Court.

⁵⁴ See Gaddafi and Al-Senussi ICC-01/11-01/11-466-Red, Pre-Trial Chamber I, 11 October 2013, Decision on the admissibility of the case against Abdullah Al-Senussi [<https://www.legal-tools.org/doc/af6104/>], confirmed in the following: Gaddafi and Al-Senussi ICC-01/11-01/11-565, Appeals Chamber, 24 July 2014, Judgment on the appeal

complementarity. One participant suggested that this interpretation renders the principle less likely to lead to more domestic prosecutions: for the Court to find a case inadmissible, the investigation by the national authorities must cover the same person and the same conduct. On the other hand, it was submitted that the rationale behind the current approach supports the wider objective of the Court to bring an end to impunity for atrocity crimes. In further support of this interpretation, it was argued that if an accused is investigated and prosecuted by domestic authorities for different conduct, or for the same conduct in a different context, national jurisdictions do not compete with the ICC but complement the action by the Court. Furthermore, in such cases, the need arises to share information between international and national prosecutorial services. It was also argued that the conviction for the commission of one crime should not necessarily prevent conviction for another crime.

76. In discussions about the interactions between the ICC and domestic authorities, two stages to the process were identified. First, it was observed that the State in question can enter into consultations with the Court. However, it was recognised that, pursuant to Article 94 of the Statute,⁵⁵ States are able to postpone an ICC request if it interferes with an ongoing national prosecution. Second, general principles regulating the consultation process between national investigative authorities and the Court, found in Article 97 of the Statute,⁵⁶ were discussed. In this context, it was observed that – if the State in question is in the process of examining a different set of facts – an agreement can be made between the ICC and the relevant national authority to this end. However, one participant noted in this regard that guidelines could be useful to assist the parties in demarcating their respective investigations and prosecutions.

77. One participant remarked that, if an emphasis ought to be placed on consultations between national authorities and the ICC, the requirement to take into account different legal cultures becomes imperative. It was further observed that national legal authorities embrace different values on which they base their domestic investigations and prosecutions. The collaboration

Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled “Decision on the admissibility of the case against Abdullah Al-Senussi” [<https://www.legal-tools.org/doc/ef20c7/>].

⁵⁵ Article 94(1) of the Statute provides, in relevant part, as follows: “If the immediate execution of a request would interfere with an ongoing investigation or prosecution of a case different from that to which the request relates, the requested State may postpone the execution of the request for a period of time agreed upon with the Court [...]”.

⁵⁶ Article 97 of the Statute provides, in relevant part, as follows: “Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter [...]”.

between Rwandan authorities and the ICTR was cited as an example. It was submitted that domestic and international judges espoused different views on the objectives of these trials: the international judges at the ICTR were principally concerned with the development of an international case law, the national judges at the same tribunal with capacity-building and the Gacaca court system with developing a better understanding of the conflict among the local population and ensuring accountability for the atrocities committed. In this context, it was observed that the manner in which a court understands its own role affects its relationship with other tribunals and, in particular, cooperation *inter se*. The need consequently arises for continuous interaction between international and domestic courts in order that both might better understand what each aims to achieve through its proceedings.

78. In discussions about incentives to encourage States to cooperate with the Court, it was suggested by one participant that creative solutions such as the Kony 2012 initiative, which could be accompanied by financial rewards from private groups, might provoke disloyalty to accused persons, leading to their arrest. In response, another participant expressed the view that support is needed from the international community to execute a warrant for the arrest and surrender of an accused person in addition to willingness and ability on the part of the State on whose territory the accused is located to enforce the warrant. It was largely agreed that providing support and – particularly military – assistance to one party is not necessarily the most effective approach to securing arrests and surrender. Rather, it was suggested by a number of participants that groups of States ought to work together with the territorial State by offering the necessary expertise so that the latter might conduct enforcement operations on its own territory. It was also generally recognised among participants that the support of influential non-State Parties – particularly the United States of America – is essential to the Court's international cooperation regime. For example, a number of participants expressed support for withholding non-humanitarian aid from States that refuse to cooperate.

(f) Strengthening the ICC Cooperation Regime

79. Throughout the discussions, participants raised suggestions to improve the current operation of the ICC cooperation regime. Several participants emphasised the role of international and regional organisations in promoting better cooperation between States and the Court. The European Union (EU) was cited as an example in this respect. It was observed that the EU has been – and continues to be – a loyal supporter of the work of the Court, including with

regard to its cooperation regime. One participant noted the commitment of the EU to the rules-based international legal order. In light thereof, because refusal to cooperate with the ICC not only undermines its work, but also often involves the violation of a legal obligation, the EU actively responds to three types of non-cooperation by States: foreseeable incidents of non-cooperation, persistent non-cooperation and eliminating non-essential contact. One participant observed that consistency and timeliness is important when responding to non-cooperation because situations in which States refuse to cooperate can quickly escalate.

80. The need for full cooperation as a prerequisite for the effective functioning of the ICC was emphasised by participants throughout discussions. In this context, it was observed by one participant that the Agreement between the International Criminal Court and the European Union on Cooperation and Assistance entered into force in 2006.⁵⁷ It was further noted that the EU has made several statements condemning instances of non-cooperation at meetings of the Assembly of States Parties and continues to work with Member States to ensure that measures are taken at the national level to improve procedures at the international level. It was equally recognised, however, that international and regional organisations need to strike a difficult balance when eliminating non-essential contact with accused persons: they must isolate a person or a government without simultaneously isolating their own organisation or its Member States. It was proposed by one participant to this end that the definition of that which constitutes non-essential contact could be further delineated. For example, essential contacts could be regarded as core diplomatic and consular activities or those mandated by legal obligations. Headquarters agreements were cited as an example thereof in this context. On the other hand, it was suggested that conduct constituting non-essential contact could be defined on a case-by-case basis, depending on the specific circumstances of the situation.

81. The usefulness of establishing a network of practitioners responsible for cooperation issues at the national level was extensively discussed. One participant noted the Assembly of States Parties Bureau on non-cooperation has discussed a pilot meeting of national practitioners, to be held on a voluntary basis to this end. The role of the European Network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes – or EU Genocide Network – was also praised for its efforts in facilitating cooperation with the ICC, particularly for providing a forum for the exchange of knowledge, ideas and difficulties faced when executing requests for cooperation. The EU Genocide Network, which operates

⁵⁷ 10 April 2006, ICC-PRES/01-01-06, entered into force 1 May 2006 [<https://www.legal-tools.org/doc/4e8e0a/>].

under the auspices of Eurojust, an EU agency responsible for judicial cooperation matters, works alongside the ICC and mutually exchanges information about ongoing activities.

82. In discussions about the role of the Registry in the ICC cooperation regime, it was noted by one participant that, as a neutral organ, the Registry cannot advocate on behalf of a defence team; rather, the Registry facilitates requests for cooperation. For example, this organ of the Court can organise a visit to State territory to assist defence teams pursuant to a request for cooperation endorsed by the Chambers. With regard to the freezing of assets, it was noted that the Registry follows a dynamic approach guided by the Court's case law and applicable national implementing legislation. In light thereof, the Registry transmits requests for asset freezing to all State Parties or certain pre-identified States. It was noted by one participant in this context that the consultation process is crucial to successfully executing any cooperation request issued by the Court as it is not possible to individually tailor requests when sent to a number of States, particularly when these States possess different national legal systems.
83. The importance of robust national implementing legislation was also raised by participants when discussing the part played by the Registry in promoting cooperation between the ICC and States. In this regard, situations in which States are willing to assist but their respective domestic legislation does not provide for cooperation with the Court was cited as a problem, which effective national implementing legislation might and ought to remedy if passed.
84. Although it was generally agreed that voluntary agreements were conducive to cooperation between States and the ICC, several problems were discussed concerning the relocation of victims, witnesses and acquitted persons. One participant noted that it is problematic when States refuse to accept such persons on their territory. Another participant remarked that if the standard of the facilities in the receiving State are inadequate, the framework agreements are largely rendered useless. In other words, the Court must maintain a minimum standard pursuant to which at-risk persons can be transferred to the territory of a receiving State. In response to the situation whereby States without adequate detention facilities are unable to accept convicted persons from the ICC, it was proposed that capacity building activities – to include developing national witness protection systems and improving detention facilities – could act as an incentive for States to cooperate better and more frequently with the Court.

85. It was generally agreed by participants that the confidential nature of the Court's case law on cooperation does not serve to strengthen the ICC cooperation regime.
86. The relationship between the UN Security Council and the Court was also discussed during deliberations about current problems facing the cooperation regime. In this context, it was suggested that resolutions issued by the UN Security Council suffer for the lack of a follow-up mechanism, for failing to note that State Parties are legally bound by all provisions of the Rome Statute and for neglecting to sufficiently emphasise the privilege of immunity enjoyed by defence teams and Court personnel. One participant noted that because all States are yet to ratify the Agreement on Privileges and Immunities of the International Criminal Court, it could also prove fruitful to raise this issue in the text of a UN Security Council resolution.
87. Managerial compliance was also discussed as a method by which to strengthen cooperation, but it was recognised that this approach is limited to those States that demonstrate political willingness to cooperate with the Court at the outset. Managerial compliance was described as the 'softer' side of encouraging compliance with international treaties, using methods and tools, including capacity building and developing networks between criminal justice actors at the national and international levels. The managerial compliance approach, which seeks to assist States to overcome the challenges faced when cooperating with the Court, adapts the incentives offered to the circumstances of the particular State. The conditions imposed with regard to accession to the EU were cited as an example in this context. In order to shift the political attitude of governments, more forceful measures – including financial measures – can also be adopted by an individual State or a group of States acting collectively. The need for effective national implementing legislation was again raised by participants in this regard, in which it was observed that the issue of securing cooperation is magnified where State or non-State Parties do not have adequate – or any – legislation at the domestic level.

(g) Next Steps: The Cooperation and Judicial Assistance Database (CJAD)

88. The final panel introduced the Cooperation and Judicial Assistance Database (CJAD) to the workshop participants. Following a request by The Hague Working Group on Cooperation, HRLC is developing CJAD, which will be a specialised database on national implementing legislation concerning cooperation. The importance of national implementing legislation was emphasised by a number of participants during discussions. It was further observed that it is

not easy to find examples of national legislation enabling better cooperation with the Court. As a result, it was noted that CJAD will serve as a central information hub on all aspects of cooperation legislation, offering its users free access to up-to-the-minute data on how States have interpreted the obligation to cooperate with the ICC under the Rome Statute, which is currently lacking. It was also observed that CJAD can be used as a capacity building tool: its users will be able to review, compare and access information online and free of charge. If it is accepted that the future of international criminal justice is reliant upon building capacity at the national level, one participant suggested that CJAD will be of particularly benefit to less well-resourced jurisdictions, as well as the Court, national legislators and global civil society.

89. Finally, the process underpinning the development of CJAD was discussed. It was observed that, having conducted desktop research to find relevant national implementing legislation, these documents are broken down to fine-grain decompositions at paragraph level, based on a long list of purposely-designed keywords. This process increases the accuracy of the search results, enabling detailed searches on cooperation legislation.
90. The workshop concluded with the expectation that a book would be produced based on the fruitful discussions during the event. Participants welcomed the opportunity to contribute to the edited collection.