International Criminal Court

Manual for the Ratification and Implementation of the Rome Statute

Second Edition

March 2003

A Joint Project of

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Vancouver, March 2003

NOTES ON THE CONTRIBUTORS

The International Centre for Criminal Law Reform and Criminal Justice Policy (ICCLR) is based in Vancouver, Canada and was founded in 1991. ICCLR conducts research and policy analysis, undertakes the development and delivery of technical assistance programs and provides public information and consultation services relating to the fields of international criminal law, criminal justice policy and crime prevention. In its role as an affiliated institute of the United Nations, the Centre participates in the annual meetings of the United Nations Commission on Crime Prevention and Criminal Justice, and the meeting of the institutes comprising the United Nations Crime Prevention and Criminal Justice Programme network. The Centre has also established numerous cooperative working relationships with other international bodies, institutes and associations.

ICCLR has been, and continues to be, committed to supporting the establishment of a permanent, effective and just International Criminal Court. ICCLR began its work on international criminal court issues within a short time of its inception. By 1993, it had assisted the UN Security Council and UN Legal Affairs Office by holding a large meeting of experts in Vancouver and made many recommendations that ended up in the ad hoc Tribunal for the Former Yugoslavia's statute, as noted in the May 1993 Secretary General's Report. Renewed efforts to establish a permanent ICC coincided with the creation of this ad hoc tribunal and the Rwanda Tribunal. In the ensuing years, ICCLR continued to expand its research and program activities dealing with international criminal court issues, and has since written numerous research papers on the topic, participated in many conferences, including the Diplomatic Conference in Rome and subsequent Preparatory Commission Meetings, Assembly of States Parties meetings, hosted prominent guest lecturers who spoke on the topic, and provided public lectures. Among the numerous ICC-related reports and guides developed by ICCLR, which includes this Manual (the first edition is available in Arabic, Chinese, French, Portuguese, Russian, Spanish, and part-translated into Georgian), is a Checklist of Implementation Considerations and Examples under the Rome Statute (also available in Russian); the Rules of Procedure and Evidence – Implementation Considerations; the Agreement on Privileges and Immunities of the International Criminal Court – Implementation Considerations; and the Guide for National Criminal Justice Personnel to Cooperating with Investigations and Prosecutions Involving the International Criminal Court. Since August 2000, ICCLR has been involved in organising workshops to promote the expeditious establishment of the ICC and to assist countries in the development of legislation and administrative procedures to support the ICC. ICCLR provided five regional workshops with support from the Canadian International Development Agency (CIDA), the Department of Justice, and the Department of Foreign Affairs and International Trade and most recently provided country-specific ICC technical assistance to numerous countries with funding from the Department of Foreign Affairs and International Trade.

Rights & Democracy (International Centre for Human Rights and Democratic Development) is a non-partisan organization with an international mandate. It was created by Canada's Parliament in 1988 to encourage and support the universal values of human rights and the promotion of democratic institutions and practices around the world. Rights & Democracy works with individuals, organizations and governments in Canada and abroad to promote the human and democratic rights defined in the *United Nations' International Bill of Human Rights*. It enjoys partnerships with human rights, indigenous peoples' and women's rights groups, as well as democratic movements and governments around the world and is therefore uniquely placed to facilitate dialogue between government officials and non-governmental organizations in Canada and abroad. It initiates and supports projects that advocate the protection of human rights and the strengthening of democratic development, principally in developing countries, and facilitates the capacity of its partners to do the same.

Rights & Democracy has been at the forefront of the international movement for the creation of a strong and effective International Criminal Court. The creation of an effective ICC is an integral part of Rights & Democracy's strategy to combat impunity. This effort is part of a continuum which began in the early 1990's with the Vienna World Conference on Human Rights (1993), the organization of an International Popular Tribunal on Haïti (September 1993) and an international conference in Ouagadougou, Burkina Faso (March 1996). Rights & Democracy's campaign against impunity emphasized the importance of knowing the truth about the past, the necessity of fair trials and effective prosecution and redress for victims of atrocious crimes, and the prerequisite of strengthening the Rule of Law for the sake of punishment and deterrence of serious large-scale violations of human rights. Having encouraged resolutions in favour of the ICC at the Francophonie's Hanoï (1997) and Moncton (1999) summits and the Commonwealth Heads of Government meeting in Edinburgh (1997), Rights & Democracy also sought to encourage an active partnership between human rights NGOs and those "like-minded" governments that were favourable to a strong, independent and effective ICC. It hosted, in March 1998, a meeting of experts to devise pertinent lobbying strategies in support of the creation of the ICC.

Moreover, Rights & Democracy contributed to the debate on the structure and mandate of the ICC, participating in all six Preparatory Committees since 1996 and in the 1998 Rome Diplomatic Conference as well as facilitating the participation of some Southern partners including, women's rights activists in the Preparatory Committees. It has also been engaged in Canadian non-governmental public awareness initiatives through its participation in the Canadian NGO Coalition for an ICC and the NGO Coalition for an International Criminal Court (CICC). It is an active member of the Steering Committee of the CICC. Rights & Democracy was active during all 10 ICC Preparatory Commission sessions and during the first meeting of the ICC Assembly of States Parties. Rights & Democracy has also closely followed the work of the International Criminal Tribunals for Rwanda and the former-Yugoslavia, with a focus on the witness protection programme and preparation of *amicus curiae* briefs. Lastly, it worked with the ICCLR in the organisation of five regional workshops on ratification and implementation of the Rome Statute.

ACKNOWLEDGEMENTS

This second edition of the Manual builds on the original Manual of May 2000. The following team of researchers worked on the updated second edition:

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The first edition of the Manual was written by a team of researchers and writers at the International Centre for Criminal Law Reform and Criminal Justice Policy (ICCLR) in Vancouver, and Rights and Democracy (new short version of the International Centre for Human Rights and Democratic Development (ICHRDD)) in Montreal. The contributors to the original manual, in particular, were Daniel Préfontaine, then Executive Director of ICCLR, Warren Allmand, then President of Rights & Democracy, Joanne Lee, Associate at ICCLR, Alexandre Morin, Researcher at Rights & Democracy, and Monique Trépanier, Program Co-ordinator at ICCLR. Valuable contributions were also made by Valerie Oosterveld of the Department of Foreign Affairs and International Trade Canada (DFAIT), Christian Champigny, Research Assistant at Rights & Democracy and Bill Hartzog, independent consultant. The International Criminal Defence Attorneys Association (ICDAA) provided input on the assistance of defence counsel.

ICCLR wishes to express its appreciation to the Department of Foreign Affairs and International Trade, Government of Canada for its financial support of the work in updating the second edition of the Manual. Original funding for the first edition was generously provided by the Canadian government through the Department of Foreign Affairs and International Trade and Department of Justice Canada.

In developing the first edition of this Manual, the contributors took into account the views expressed and the information provided by the following experts who participated in teleconference meetings, provided feedback and/or attended the ICC Manual Review Meeting held in New York during the recent March 2000 Preparatory Committee Meetings for an International Criminal Court:

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The analysis and recommendations in this Manual do not necessarily reflect the views of any of these individuals or their organisations.

FOREWORD TO THE SECOND EDITION

Since the publication of the first edition of this Manual in May 2000, a momentous event took place with the coming into force of the Rome Statute of the International Criminal Court on 1 July 2002. With 139 States signing the Rome Statute and more than 80 States ratifying to date, the international community has affirmed its intolerance of those who commit with impunity the most serious crimes of concern to the international community as a whole. The enthusiasm and momentum for the effective functioning of the International Criminal Court must continue to grow.

The first edition of the Manual has been a huge success, widely disseminated and strongly in demand by government and nongovernmental actors. We are pleased to report that it has been translated into every UN language as well as Portuguese and Georgian.

The development of strong national implementing legislation is fundamental for the Court to realise its full potential. Since the first edition of the manual, a number of States have drafted and/or enacted implementation legislation dealing with complementarity and cooperation issues. This second edition to the Manual seeks to provide fuller details on how States have implemented their obligations under the Rome Statute in their domestic systems.

I would like to acknowledge the valuable contribution of Rights and Democracy (Montreal) to the preparation of the first edition of the Manual and also their assistance with the revision to this second edition.

We trust that publication of the second edition of this Manual continues to contribute to the momentum of ratifications as well as to promote the development of effective ICC implementing legislation in States that have ratified and signed the Rome Statute.

Frances Gordon
The International Centre for Criminal
Law Reform and
Criminal Justice Policy

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GUIDE TO ABBREVIATIONS

AR - *Proyecto de Ley Sobre Crímenes de la Corte Penal Internacional* (Two drafts have been made available to date), 2002, Argentina

AU – *International Criminal Court Act 2002,* Act No. 41, 2002, 27 June 2002, Australia (addresses co-operation issues)

AU(C) - *International Criminal Court (Consequential Amendments) Act 2001*, Act No. 42, 2002, 27 June 2002, Australia (addresses complementarity issues)

AZ - *Criminal Code of the Republic of Azerbaijan,* adopted 30 December 1999, entered into force 1 September 2000 (unofficial translation)

AZ(E) - *Law of the Republic of Azerbaijan on Extradition of Criminals,* adopted 15 May 2001, entered into force 19 June 2001 (unofficial translation)

AZ(L) - *Law of the Republic of Azerbaijan on Legal Assistance in Criminal Matters,* adopted June 2001 (unofficial translation)

BE - *Belgian Provisional Draft Law on Co-operation with the ICC and the International Criminal Tribunals* (French only)

BR - *Draft Bill on the International Criminal Court*, available in English and Portuguese (at http://mj.gov.br/sal/tpi/), Brazil

CA - *Crimes Against Humanity and War Crimes Act,* S.C. 2000, c. C-24, assented to 29 June 2000, entered into force 23 October 2000, Canada

CA(E) - *Extradition Act,* S.C. 1999, c. C-18, assented to 17 June 1999, amendments concerning the International Criminal Court entered into force 23 October 2000, Canada

CA(L) - *Mutual Legal Assistance in Criminal Matters Act,* R.S. 1985, c. 30 (4th Supp.), 1988, c. 37 assented to 28 July 1988, amendments concerning the International Criminal Court entered into force 23 October 2000, Canada

DC - *Implementation of the Statute of the International Criminal Court (Draft),* Democratic Republic of the Congo (available in French and English)

ES - *Rome Statute of the International Criminal Court Ratification Act (Draft),* Estonia (unofficial translation)

ES(P) - *Amendment Act to the Code of Criminal Procedure (Draft),* Estonia (unofficial translation)

ES(C) - Special Part, *Penal Code,* Estonia (unofficial translation)

FI - *Act on the implementation of the provisions of a legislative nature of the Rome Statute of the International Criminal Court and on the application of the Statute,* No. 1284/2000, issued in Helsinki 28 December 2000, Finland (unofficial translation)

FI(C) - *The Penal Code of Finland,* No. 39/1889 (unofficial translation)

FI(A) - *Act on the amendment of the Penal Code,* No. 1285/2000, issued in Helsinki 28 December 2000, Finland (unofficial translation)

FI(D) - *Decree on the application of Chapter 1, section 7 of the Penal Code* (No. 627/1996 as amended by Decrees 353/1997, 118/1999, 537/2000 and 370/2001), 11 September 2001, Finland (unofficial translation)

FI(L) - *International Legal Assistance in Criminal Matters Act,* No. 4/1994, 5 January 1994, Finland (unofficial translation)

GE - *Act on the Rome Statute of the International Criminal Court of 17 July 1998 (ICC Statute Act),* entered into force 4 December 2000, Germany (unofficial translation)

GE(C) *Act to Introduce the Code of Crimes against International Criminal Law,* adopted 26 June 2002, Germany

GE(E) - *An Act to Amend the Basic Law (Article 16),* entered into force 29 November 2000, Germany (unofficial translation)

NZ - *International Crimes and International Criminal Court Act 2000,* No. 26/2000, assented to 6 September 2000, most sections entered into force 1 October 2000, New Zealand

NO - *Act No. 65 of 15 June 2001 relating to the implementation of the Statute of the International Criminal Court of 17 July 1998 (the Rome Statute) in Norwegian Law* (unofficial translation)

PO - *Penal Code of 6 June 1997,* Poland (nb. further amendments are being considered) (unofficial translation)

SA - *Implementation of the Rome Statute of the International Criminal Court Act, 2002,* No. 27 of 2002, adopted 18 July 2002, South Africa

SW - *Federal Law on Cooperation with the International Criminal Court (CICCL) of 22 June 2001,* Switzerland (unofficial translation)

UK - *International Criminal Court Act 2001,* Chapter 17, enacted 11 May 2001, United Kingdom (note also the availability of Explanatory Notes for this Act)

UK(S) - *International Criminal Court (Scotland) Bill,* introduced April 2001, United Kingdom, Scottish Parliament

UK(F) - *The International Criminal Court Act 2001 (Enforcement of Fines, Forfeiture and Reparation Orders) Regulations 2001,* No. 2379/2001, entered into force 1 August 2001, United Kingdom

UK(M) - *The Magistrates' Courts (International Criminal Court) (Forms) Rules 2001,* No. 2600/2001 (L. 27), entered into force 1 September 2001, United Kingdom

UK(R) - *The International Criminal Court Act 2001 (Elements of Crimes) Regulations 2001,* No. 2505/2001, entered into force 1 September 2001, United Kingdom

EXECUTIVE SUMMARY

1. INTRODUCTION

1.1 Overview of the International Criminal Court

This section of the Manual provides an introduction to the main features of the International Criminal Court (ICC). It describes how the Statute for this Court was finalised in Rome in July 1998 (Rome Statute), representing the culmination of 50 years of work to create a permanent institution for trying those accused of the most serious crimes of concern to the international community as a whole. The Statute came into force on July 1, 2002.

The Overview explains that the ICC will be complementary to national jurisdictions and that it has the potential to deter and punish genocide, crimes against humanity, war crimes, and aggression. However, the ICC will only exercise it jurisdiction over genocide, crimes against humanity and war crimes committed subsequent to July 1, 2002, and the Court will only have jurisdiction over the crime of aggression when an acceptable definition has been finalised by States Parties.

The Court is managed by an Assembly of States Parties, representing all States Parties that have signed the Rome Statute. States that have signed the Final Act of the Rome Conference will have observer status in the Assembly.

The Assembly of States Parties has elected the judges, will nominate the Prosecutor, and the Deputy Prosecutors, and will be responsible for their removal if serious misconduct or breach of duty is established. The selection process for judges and other ICC personnel will ensure that the principal legal systems of the world, as well as all the major geographical regions of the world, are equitably represented. The Court has a fair representation of male and female judges, and reflects the need for persons with relevant expertise.

The Overview then describes how an investigation by the Prosecutor is initiated, and how a matter proceeds to trial. It highlights some of the special features of the Court, such as the potential for prosecution of sexual and gender-based violence, and the special provisions for protection of victims. The Court will also safeguard the rights of accused persons, in accordance with international standards of due process. It will hold fair and public trials, honouring widely-accepted procedural guarantees such as the right to an appeal and the right not to be tried twice for the same crime.

1.2 Purpose of the Manual

The Manual has been developed to assist interested States with the ratification and implementation of the Rome Statute. The ICC will rely on the cooperation and assistance of States Parties, in order to realise its potential, so States Parties need to ensure that

they are able to provide this assistance. The various sections of the Manual highlight the obligations of States Parties to the Statute, and the features of the Statute that may affect the approach taken by States to ratification and implementation. It is recognized that the views and the statements in the Manual are not intended to be the last word on all requirements of the Rome Statute for implementation by States.

2. GENERAL ISSUES OF IMPLEMENTATION

This section discusses the following points:

- why it may be necessary to adopt national legislative and procedural measures;
- if it is possible to ratify before changing national laws;
- the difference between monist and dualist States and their approaches to ratification and implementation of the Statute;
- whether it is more appropriate to create only one implementing law or to create several;
- federal issues;
- compatibility with different legal systems; and
- how to deal with a potential constitutional problem

3. SPECIFIC ISSUES OF IMPLEMENTATION

This section presents in detail the obligations of States Parties under the Rome Statute with respect to ICC criminal investigations and prosecutions. It also suggests practical measures for implementing these obligations and for assisting the Court in other ways.

The main obligations to be implemented are described in:

3.1 Protecting the privileges and immunities of the personnel of the Court;

3.2 Creating offences against the administration of justice of the ICC;

3.6 & 3.7 Executing requests for arrest and surrender of persons to the ICC;

3.9 Collecting and preserving evidence for the ICC;

3.12 Enforcing fines, forfeiture and reparations orders;

Section 3.10 describes how States may protect their national security information when assisting the Court, in accordance with article 72 of the Statute.

The following issues are also discussed in this section of the Manual:

3.3 Procedures where the ICC wishes to investigate the same matter as a State Party;

3.4 Important provisions in the Statute relating to State co-operation, such as:

- the obligation to "co-operate fully";
- postponement of execution of requests;
- costs of executing requests;
- designation of an "appropriate channel" for receiving requests; and
- ensuring the confidentiality of requests.

3.5 Possible constitutional issues relating to surrender of a person to the ICC, such as:

- the absence of immunity for Heads of State,
- the non-applicability of a statute of limitations to the crimes listed under the Statute,
- surrendering nationals to the ICC,
- life imprisonment, and
- the right to trial by jury;

3.8 Allowing suspects to be transported across State territory en route to the ICC;

3.11 Protection of third party information; and

3.13 The option for States to enforce sentences of imprisonment, including review by the Court for reduction of sentences and other issues pertaining to the acceptance of sentenced persons.

4. COMPLEMENTARITY OF THE JURISDICTION OF THE ICC

This section addresses the practical implications of the complementarity principle provided for in the Statute, which gives States priority over the ICC to prosecute crimes that are within the jurisdiction of the Court. It describes the Statute's carefully crafted provisions on *ne bis in idem*, which ensure that a person will not be prosecuted by the ICC for any conduct which formed the basis of crimes for which the person has already been convicted or acquitted by the Court, or by another court. The only exception to this is provided in article 20, where the proceedings in another court "were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court", or "otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law, and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice".

This section then discusses how States may need to review the following, to ensure that they can effectively prosecute crimes within the jurisdiction of the Court should they wish to: definitions of crimes, grounds of defence, individual criminal responsibility and inchoate offences, command responsibility, and the rules of procedure and evidence in national criminal justice proceedings.

5. RELATIONSHIP BETWEEN THE COURT AND STATES

5.1 Broader State Obligations and Rights of States Parties

This section provides guidance on:

- treaty requirements of the Rome Statute;
- financing of the Court;
- allowing the ICC to sit in a State's territory;
- nomination of personnel such as judges for the Court; and
- some of the other rights of States Parties, such as referring situations to the Court for investigations;

5.2 Developments since Rome

The last section of the Manual deals with:

- the Assembly of States Parties;
- the Rules of Procedure and Evidence, the Elements of Crimes and other documents;
- the possibility of amendments to the Statute;
- the crime of aggression (which is not yet defined by the Statute); and
- assistance of defence counsel.

1. INTRODUCTION

1.1 Overview of the International Criminal Court

The attainment, in July 1998, of a Statute for a permanent International Criminal Court (ICC) with the power to investigate and prosecute those who commit genocide, crimes against humanity and war crimes, represents a significant achievement for the world community. Of the 160 or so States that assembled in Rome for the United Nations conference that finalised and adopted the Statute for the ICC (Rome Statute), 120 voted in support of the Statute's final text. Subsequently, 139 States signed the Statute, and more than 80 States have become Parties to the Statute, from every region and legal system of the world. The creation of the Court therefore represents the realisation of a strong consensus among States – a remarkable feat, considering the various interests and legal systems that contributed to the process, as well as the fact that the General Assembly had first addressed this question some 50 years ago. The ICC will not only be a principal means of combating impunity, but will also contribute to the preservation, restoration and maintenance of international peace and security.

On 1 July 2002, the Rome Statute of the ICC entered into force, having achieved the 60 ratifications or accessions required under the Statute (article 126). This allowed for the immediate establishment of the Court's facilities at The Hague in The Netherlands, the appointment of a team of experts to start setting up the administrative functions of the Court, and the commencement of the Court's criminal jurisdiction. On 11 March 2003, the first 18 judges of the Court were sworn in, and the remaining key personnel are expected to be appointed soon thereafter, to enable the ICC to commence its first investigations in the latter half of 2003. The number of States Parties to the Rome Statute continues to grow steadily, which means that war criminals and the like will soon have nowhere to hide from international justice.

The Assembly of States Parties for the ICC met for the first time from 3-10 September 2002 and adopted a range of legal documents that were prepared by the Preparatory Commission for the Establishment of an ICC, established in Rome in 1998. These documents are intended to supplement the provisions of the Rome Statute, and include:

- Rules of Procedure and Evidence;
- Elements of Crimes;
- Financial Regulations and Rules;
- The Rules of Procedure of the Assembly of States Parties; and
- An Agreement on the Privileges and Immunities of the International Criminal Court.

More information on the ICC and the work of the Assembly of States Parties can be obtained from the website of the ICC: http://www.icc-cpi.int/index.php and also at the website of the Rome statute at http://un.org/lawicc/index.html.

The place of the ICC in the international legal system

The ICC will fill a significant void in the current international legal system. It will have jurisdiction over individuals, unlike the International Court of Justice which is concerned with issues of State Responsibility. Furthermore, unlike tribunals that have been established by the Security Council on an *ad hoc* basis, such as the International Criminal Tribunals for the former Yugoslavia and for Rwanda (ICTY/R), the ICC will be a permanent body, with a much broader mandate. Its jurisdiction will not be restricted to dealing with crimes committed only in one specific conflict or by one specific regime during one specific time period, and the Court should be able to act more quickly after an atrocity has been committed anywhere in the world. However, the ICC will only have jurisdiction over crimes committed after the Rome Statute entered into force (article 11).

As a treaty-based institution, the ICC will have a unique relationship with the United Nations system. Unlike the ICTY/R, the ICC is not a creation of the Security Council, nor will it be managed by the UN General Assembly. Yet it will be based in the Hague and will receive some financial support from the UN, particularly when the Security Council refers matters to it for investigation (article 3, article 13, paragraph (b), and article 115, paragraph (b)). The proposed relationship between the ICC and the UN has been detailed in a draft agreement that has been approved by the ICC Assembly of States Parties, and is currently awaiting approval by the UN General Assembly (see Draft Relationship Agreement between the Court and the United Nations).

The ICC Assembly of States Parties, comprising representatives from each State Party, will be responsible for making decisions on such matters as the administration and budget of the Court, as well as on future amendments to the Statute (article 112). The expenses of the Court and of the Assembly of States Parties will be paid from the funds of the Court, which will be provided by States Parties on an agreed scale of assessment, as well as by the UN and any voluntary contributors (articles 114-117; see also ICC-ASP/1/Res. 14: Scales of assessments for the apportionment of the expenses of the International Criminal Court and ICC-ASP/1/Res.1 1: Relevant criteria for voluntary contributions to the International Criminal Court). Thus, States Parties to the Rome Statute will have a significant role to play in the management of the ICC. If the Court is to realise its potential, it must be aided by States to enforce the existing rules, laws and norms that prohibit serious crimes of concern to the international community as a whole.

However, the ICC is intended to complement, not be a substitute for national criminal justice systems. This "principle of complementarity" ensures that the Court will only intervene in cases where national courts are unable or unwilling to initiate or conduct their own proceedings (these circumstances are carefully defined in the Statute, article

17, paragraph (1)). The Court will not therefore encroach on an individual State's jurisdiction over crimes covered by the Statute.

How the ICC will function

Article 5 lists the crimes that will be within the jurisdiction of the Court: genocide, crimes against humanity, war crimes, and the crime of aggression. Article 6 provides that the crime of genocide will be defined in the same way for the purposes of ICC prosecutions as it is currently under article 2 of the Genocide Convention 1948. Both crimes against humanity (article 7) and war crimes (article 8) have been carefully defined in the Statute to incorporate crimes from different treaty and customary sources, which 120 States at the Rome Conference agreed were "the most serious crimes of concern to the international community as a whole" (article 5). The Court has jurisdiction over all the crimes except aggression, now that the Statute has entered into force. With respect to the crime of aggression, article 5, paragraph (2), article 121, and article 123 together provide that the Court will have jurisdiction over the crime of aggression when a suitable definition is accepted by a two-thirds majority of all ICC States Parties, at a Review Conference to be held seven years after the entry into force of the Statute. The provision on the crime of aggression must also set out the conditions under which the Court may exercise jurisdiction over this crime, which must be consistent with the Charter of the United Nations.

The procedural provisions of the Rome Statute have been drafted to create an optimal balance between the following priorities: (i) the need for an independent, apolitical, representative international Court, which can function efficiently and effectively to bring to justice those responsible for the most serious crimes of concern to the international community as a whole; (ii) the right of States to take primary responsibility for prosecuting such crimes if they are genuinely willing and able; (iii) the need to give victims of such crimes adequate redress and compensation; (iv) the need to protect the rights of accused persons; and (v) the role of the Security Council in maintaining international peace and security, in accordance with its powers under Chapter VII of the Charter of the United Nations. These considerations are all reflected in the functions and powers of the Court, and its relationship with other entities, as set out under the Statute.

The personnel of the Court

The ICC will be comprised of the following organs: the Presidency, the Pre-Trial Division, the Trial Division, the Appeals Division, the Office of the Prosecutor, and the Registry (article 34). The Assembly of States Parties elects all judges, by a two-thirds majority of the States Parties present and voting, based upon nominations made by States Parties (article 36, paragraph (6)). Every judge must be a national of a State Party, and no two judges may be nationals of the same State (article 36, paragraph (4), subparagraph (b) and article 36, paragraph (7)). The criteria for nominating judges is: (i) high moral character, impartiality and integrity; (ii) possession of the qualifications required in their respective States for appointment to the highest judicial offices; (iii) established competence in criminal law and procedure, and the necessary relevant

experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings, or established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional capacity which is of relevance to the judicial work of the Court; and (iv) excellent knowledge of and fluency in at least one of the working languages of the Court, which are English and French (article 36, paragraph (3), and article 50, paragraph (2)). The selection process outlined in the Statute requires the Assembly to take into account the need for judges who (i) represent the principal legal systems of the world; (ii) represent an equitable geographical representation; (iii) comprise a fair representation of female and male judges; and (iv) have legal expertise on specific issues, such as violence against women and children (article 36, paragraph (8)). Therefore the highest standards of competence and representativeness will be ensured in the selection of the judges.

At the first resumed session of the first Assembly of States Parties meeting, held from 3-7 February 2003, the Assembly elected eighteen judges, based upon nominations made by 43 States Parties. This first bench includes seven women, eleven men, and a balanced number of elected candidates by region and legal system. After the election, ballots were drawn to determine which of the elected judges will serve on the Court for 3 years, 6 years, or a maximum of nine years (article 36, paragraph (9)). The President and First and Second Vice-Presidents of the Court were elected on 11 March 2003 by an absolute majority of the judges and will have limited terms of appointment to these positions (article 38).

The Assembly of States Parties will also elect the Prosecutor and Deputy Prosecutors, based on similar criteria to that for judges (article 42). The judges will elect the Registrar (article 43, paragraph (4)), who will be responsible for establishing a special Victims and Witnesses Unit within the Registry, which will employ staff with expertise in trauma (article 43, paragraph (6)). The Registrar will also have responsibilities relating to the rights of the defence (article 43, paragraph (1), rules 20 and 21, Rules of Procedure and Evidence.)

The ICC judges, Prosecutor, Deputy Prosecutors and the Registrar will be independent in the performance of their functions and the Statute provides that they should be accorded the same privileges and immunities as heads of diplomatic missions when they are engaged on or with respect to the business of the Court (article 48). However, they may be removed from office for serious misconduct or a serious breach of any of their duties under the Statute (article 46). The same sanctions apply to the Deputy Registrar, although the Assembly of States Parties is responsible for the removal of judges and prosecutorial staff, while an absolute majority of the judges will decide whether the Registrar or Deputy Registrar should be removed (article 46, paragraph (2) and paragraph (3)).

Triggering an investigation

There are three ways by which an ICC investigation may be initiated:

(i) a State Party may refer a "situation" to the Prosecutor, where it appears that one or more crimes within the jurisdiction of the Court have been committed (article 13, paragraph (a), and article 14);

(ii) the Security Council may refer a "situation" to the Prosecutor, when acting under Chapter VII of the Charter of the United Nations, where it appears that one or more crimes within the jurisdiction of the Court have been committed (article 13, paragraph (b)); or

(iii) the Prosecutor may initiate investigations *proprio motu*, on the basis of information received from any reliable source as to the commission of crimes within the jurisdiction of the Court (article 13, paragraph (c) and article 15).

The Prosecutor will be responsible for determining which individuals should be investigated and for which particular crimes, when a "situation" is referred by either a State Party or the Security Council. However, there are rigourous procedures set out in the Statute to ensure that the Prosecutor's decision to proceed with an investigation is reviewed by the Pre-Trial Chamber, that all States Parties are informed of any ICC investigations that have been initiated on the basis of State Party referrals or *proprio motu* by the Prosecutor, and that States have a chance to challenge certain decisions of the Pre-Trial Chamber in this regard (articles 15-19). The Security Council may also request the Court to defer any investigation or prosecution for 12 months, by means of a resolution to that effect adopted under Chapter VII of the UN Charter (article 16).

The Court can only assume jurisdiction where the alleged crime was committed after the entry into force of the Rome Statute (article 11, paragraph (a)); and, in most cases, where:

(i) the alleged crime was committed on the territory of a State Party; or

(ii) the crime was allegedly committed by a national of a State Party (article 12).

However, non-States Parties may accept the jurisdiction of the Court over particular crimes committed on their territory or by their nationals, by means of a declaration lodged with the Registrar (article 12, paragraph (3)). If a State becomes a Party after entry into force of the Statute, the Court may only exercise its jurisdiction with respect to crimes committed after entry into force of the Statute for that State, unless the State has already made a declaration under article 12, paragraph (3) as a non-State Party with respect to the crime in question (article 11, paragraph (b); see also article 126, paragraph (2)). In addition, when the Security Council refers a situation to the Court, the Prosecutor may investigate and prosecute crimes that were committed on the territory, or by the nationals, of non-States Parties, and the Court will have jurisdiction over such matters (articles 12 & 13).

General principles of criminal law

The Statute incorporates existing international standards and principles for the prosecution of crimes. For example, no person will be prosecuted or punished by the ICC for any conduct that did not constitute a crime, or did not carry such a punishment, at the time the conduct was performed (articles 22 & 23). In addition, no person will be prosecuted by the ICC for any conduct which formed the basis of crimes for which the person has already been convicted or acquitted by the Court, or by another court, unless the proceedings in another court were for the purpose of shielding that person from criminal responsibility, or were not conducted independently or impartially in accordance with the norms of due process recognized by international law, and were conducted in a manner that was inconsistent with an intent to bring the person to justice (article 20). Article 26 also provides that no person will be prosecuted who was under the age of 18 at the time of the alleged crime.

The Statute provides for individual criminal responsibility, including responsibility as an accessory or accomplice to a crime, or other similar involvement in the commission or attempted commission of a crime (article 25). However, under article 25, paragraph (1), the Court only has jurisdiction over natural persons. The Court therefore does not have jurisdiction over corporations *per se* (as might be the case in national law, when such law lists corporations as legal persons). The result of this is that corporations cannot be indicted nor tried by the ICC. However, this is not to be confused with corporate officers and employees, who can be held individually criminally responsible for genocide, crimes against humanity and war crimes, or responsible as "commanders" or "superiors" under article 28. That article specifically provides for the responsibility of commanders and other superiors for the actions of their subordinates, in certain circumstances.

At the same time, the Statute recognises certain grounds for excluding criminal responsibility, such as self-defence, mental incapacity, and mistake of fact (articles 31 & 32). Note however that a person cannot claim as a defence that they were acting pursuant to the order of a Government or a superior, unless (i) the person was under a legal obligation to obey orders of the Government or the superior in question; (ii) the person did not know that the order was unlawful; and (iii) the order was not manifestly unlawful. The Statute further provides that an order requiring a person to commit genocide or crimes against humanity is a manifestly unlawful order (article 33). Note also Article 30, which stipulates that an intent to commit the crime and knowledge of the crime be proven, in accordance with the relevant definitions in the Statute.

How a case is brought to trial

Upon the application of the Prosecutor, the Pre-Trial Chamber decides whether or not to issue a warrant for the arrest and surrender of a person suspected of committing an ICC crime. The Statute sets out a number of factors that the Chamber must take into account, before issuing such a warrant, including reasonable grounds to believe that the person committed the crime that is under investigation (article 58). States Parties are required to assist the Court in executing requests to arrest and surrender persons to

the ICC (articles 59 & 89). Once the person is brought before the Court, either voluntarily or by means of a warrant, the Pre-Trial Chamber must hold a confirmation hearing, to ensure that the Prosecutor has sufficient evidence to support each charge (article 61, paragraph (5)). The person is entitled to apply for interim release at several stages in the pre-trial phase (article 59, paragraph (3), article 60, paragraph (2)). There are also several opportunities for the accused, the Prosecutor and States to ask the Pre-Trial Chamber to review various decisions of the Prosecutor and to appeal certain decisions of the Pre-Trial Chamber prior to the commencement of a trial (for example, see articles 19 & 53).

The right to a fair trial

The right to a fair trial is guaranteed in the Statute. For example, the accused must be present during the trial (article 63); the accused is entitled to be presumed innocent until proven guilty before the Court in accordance with the applicable law (article 66, paragraph (1)); the Prosecutor has the onus to prove the guilt of the accused, and must persuade the Court of the guilt of the accused beyond a reasonable doubt (article 66, paragraphs (2) and (3)). Article 67 sets out the rights of the accused to a fair and public hearing, which will be conducted in accordance with standards that are derived from the International Covenant on Civil and Political Rights and other widely accepted international instruments. Vulnerable witnesses and victims will also be protected during any proceedings, and the Court will decide which evidence is admissible or not (articles 68 & 69). In addition, victims may make representations to the Court at various stages of the proceedings, either in person or represented by counsel (article 15, paragraph (3), and article 68, paragraph (3)). The Court will be able to prosecute persons who attempt to interfere with the administration of justice, for example by giving false testimony or by bribing or threatening judges or witnesses (article 70).

Article 74 provides that all the judges of the Trial Chamber must be present at each stage of the trial and throughout their deliberations, and must attempt to reach a unanimous verdict. Their decisions must be handed down in writing and contain reasons (article 74, paragraph (5)). Article 76, paragraph (4) provides that any sentence imposed must be pronounced in public and, wherever possible, in the presence of the accused. The Statute also allows for appeals against various decisions of the Trial Chamber, such as a decision to convict or to impose a particular sentence on a person (articles 81-84). All such appeals will be heard by the Appeals Chamber, which will be composed of the President and four other judges, in every instance (article 39). The Court may impose the following penalties on a convicted person: (i) imprisonment for a maximum of 30 years; or (ii) a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person; and/or (iii) a fine; and/or (iv) forfeiture of the proceeds of that crime (article 77). In addition, the Court may order the convicted person to pay reparations to victims, in the form of restitution, compensation or rehabilitation (article 75, paragraph (2)).

The Statute provides that the Court will have its own Rules of Procedure and Evidence, which have been adopted by the Assembly of States Parties (article 51). These provide greater detail on the provisions in the Statute pertaining to the conduct of all ICC pro-

ceedings. For example, the Rules stipulate such practical matters as the factors that the Court must take into account when imposing a fine, the procedure for determining what reparations may be appropriate, and the time period for lodging an appeal.

The Court will rely on States to provide co-operation and assistance throughout the investigation, prosecution, and punishment process, as necessary (articles 86-103). States Parties are required to respond to requests for assistance from the Court, unless genuine national security interests would be threatened (article 72), and in certain other very limited circumstances. States Parties may also be required to help enforce fines and forfeiture orders or reparations orders (articles 75, paragraph (5) & 109). In addition, any State may volunteer to accept and supervise sentenced persons (articles 103-107). However, such States may not modify the sentence of the person, nor release the person before expiry of the sentence pronounced by the Court (articles 105 & 110).

Other important features of the Court

The Statute embodies a traditional concept of justice that provides for the prosecution and punishment of the guilty and obliges the Court to establish principles relating to reparation to, or in respect of, victims, including restitution, compensation and rehabilitation (article 75). Furthermore, article 79 provides that a Trust Fund will be established by decision of the Assembly of States Parties. The Fund will be managed according to criteria to be determined by the Assembly (article 79, paragraph (3); see also ICC-ASP/1/Res. 6: Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims and ICC-ASP/1/Res. 7: Procedure for the nomination and election of members of the Board of Directors of the Trust Fund for the benefit of victims). The Court can decide whether to compensate victims through this Fund and it may order that money or other property collected through fines and forfeiture be transferred to the Fund (article 75, paragraph (2) and article 79, paragraph (2)).

The Statute goes beyond this and gives victims a voice – to testify, to participate at all stages of the Court proceedings and to protect their safety, interests, identity and privacy. Such inclusive participation reflects the principles of the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, to be implemented by national judicial systems. The provisions of the Statute require the Court to provide these protections and rights in its proceedings (eg. article 68). The inclusion of these provisions in the Statute demonstrates the importance of victims in the whole process and it is hoped that the Court will provide an effective forum for addressing grave injustices to victims the world over.

The participants in the Rome Conference were particularly sensitive to the need to address gender issues in all aspects of the Court's functions, and the Rome Statute provides that no adverse distinction may be made by the Court if founded on grounds such as gender (article 21, paragraph (3)). The Statute also includes important provisions with respect to the prosecution of crimes of sexual and gender-based violence. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence are defined as crimes against humanity and war

crimes. The Court will be staffed with people knowledgeable in issues relating to violence against women, and there will be a fair representation of both female and male judges on the Court.

1.2 Purpose and Use of Manual

The *Manual for the Ratification and Implementation of the Rome Statute* (hereafter referred to as the Manual) has been developed to assist all interested States with the ratification and implementation of the Statute. Many States are currently preparing to ratify and implement the Statute, but may face legal and constitutional obstacles that prevent them from doing so quickly. Where States already have in place legislation relating to international legal assistance, the process of implementing the Rome Statute will probably be relatively simple. For other States, it may be more involved, and so this Manual attempts to address a range of different contexts for implementation.

The sections outlined herein highlight the obligations of States Parties to the Statute, and the features of the Statute that may affect approaches taken by States to ratify and implement the treaty. It has also been designed to provide guidance as to how States with different legal systems might implement their obligations into their national legal systems. Policymakers, government administrators and various criminal justice professionals may find this document particularly useful in assessing the Statute's overall and specific impacts on their respective jurisdictions. People working in the military context should also find this document helpful.

The Manual focuses on the following key areas: General Issues of Implementation; Specific Issues of Implementation; Complementarity; Broader State Obligations and Rights of States Parties; and Developments Since the Rome Conference. This second edition of the Manual has updated the general information about the ICC and its current status, as well as updated the implementation sections. These now take into account the numerous implementation laws, be they in draft form or enacted, as well as previously unforeseen obstacles to implementation, that have emerged across the globe since the first edition of this Manual was produced. It is recognised that the views and the statements in the Manual are not intended to be the last word on all requirements of the Rome Statute for implementation by States.

Recent history has shown that genocide, crimes against humanity, and war crimes continue to occur in all regions of the world. It is hoped that this Manual will contribute to the work already being undertaken by numerous organisations and individuals to contribute to the establishment of an effective ICC that will bring to justice and hold accountable those responsible for the most serious crimes known to the international community as a whole.

2. GENERAL ISSUES OF IMPLEMENTATION

The purpose of this section of the Manual is to highlight the particular features of the Rome Statute that may affect the overall approach taken by States to ratify and implement the Statute, and to provide some examples of approaches taken by States Parties over the past few years. However, this section does not attempt a thorough analysis of the many approaches that are possible under the various legal systems of the world. It merely outlines the main considerations for all States.

Some States generally ratify treaties first, and then the self-executing provisions of the treaty automatically become a part of national law upon ratification and publication in an official journal (monist system). Thus, the constitutions of most continental European States, and many of their former colonies, include a provision for the international obligations of the State and customary international laws to form part of the domestic law without explicit domestic legislation being implemented. Other States, especially those in the Commonwealth, are obliged by their constitutional systems to prepare comprehensive implementing legislation before ratifying or acceding to any international treaties (dualist system). There are also numerous variations within each of these overarching systems.

As with any international treaty, all States need to consider whether becoming a Party to the Rome Statute will require changes to be made to their national laws or administrative procedures, to enable them to meet all of their obligations under the treaty. The experience of almost all States Parties to the Rome Statute, no matter what system they come from, is that the Statute will require some form of domestic implementing legislation, even if this is not the normal practice for the State. Not all of the key provisions in the Rome Statute are considered self-executing in all jurisdictions, and the detail required for the effective fulfillment of some of the self-executing provisions is simply not provided for under the Statute itself.

In general, when drafting legislation to implement the Rome Statute, it is necessary to bear in mind that the ICC is no ordinary international regulatory or institutional body. It has the unique potential to deter and punish "the most serious crimes of concern to the international community as a whole" (article 5, paragraph (1)) and thereby to contribute significantly to international peace and security. However, this potential will only be realised through the full co-operation of States Parties, since there is no international "police force" to do the work of assisting the Court with its investigations and enforcing its orders. Therefore, special attention will need to be given to support the Court, and in particular to ensure that States Parties are able, in actuality, to meet their obligations under the Rome Statute. This will most likely require specific legislation that empowers all relevant authorities to do what is required under the Statute. At the same time, the incidence of such crimes is much less than for "ordinary" crimes that are prosecuted regularly in States. So, as a general rule, many of the forms of co-operation listed in the Statute will be part of the usual work of national criminal justice systems and foreign affairs ministries, and so will not generally require additional resources.

Possible approaches to implementation

The process of implementing international treaty obligations varies significantly from State to State, according to the political and constitutional requirements of each State. Every State Party to the Rome Statute is free to choose how it will implement its treaty obligations, as long as it proceeds in good faith and the result is an ability to meet all of the obligations under the Statute.

Each particular system, monist or dualist, has its own advantages and disadvantages in terms of ratification and implementation processes. For example, in some States the Executive branch of government may need the consent of the Legislature to ratify, or to consult with Constitutional Courts before ratifying. Such processes inevitably slow down the ratification and implementation process, but also provide an opportunity for more widespread consideration of the impact of certain treaties on that State.

Several States have revised their approach to ratification of international treaties in recent years, in order to increase the amount of consultation involving government members or with civil society, in light of an increased awareness of the significant impact that many of today's treaties have in the domestic sphere (see for example, Zimbabwe's revised Cabinet procedures between 1993-1997 and Australia's treatymaking reforms in 1996). This consultation process may lengthen the process of ratification and implementation, yet it ensures that more people are better informed about the particular treaty once it is ratified, and therefore better able to assist the Court with its important work. In addition to the Ministries of Justice, Constitutional Affairs, Foreign Affairs, and/or Defence, it may be useful to involve a range of other actors in the consultation and legislative drafting process. The involvement and cooperation of the executive, legislative, and judicial branch, the creation of inter-ministerial committees involving a wide range of ministries potentially affected by the ICC's work, and the involvement of a range of civil society actors, such as bar associations, law professors, victims' support groups, and non-governmental organisations working on human rights issues, provide opportunities for broad national dialogue on the ICC in a State's territory.

2.1 Ratification First Versus Implementation First

The Rome Statute entered into force on 1 July 2002 for those sixty-six States who ratified or acceded to the Statute prior to 1 May 2002. For States who ratified or acceded after 1 May 2002, the Rome Statute will enter into force for them on the first day of the month after the sixtieth day following the deposit by such State of its instrument of ratification or accession (article 126, paragraph (2)). Most States Parties chose to leave their implementing legislation until after they ratified, since it initially seemed unlikely that the Court would be fully operational in the near future. Also, since the Rome Statute required 60 ratifications to enter into force, domestic processes for ratification were often expedited, in order to bring the ICC into being more quickly, and implementing laws were not made a prerequisite where they normally would be.

Now that the Rome Statute has entered into force, and the Court is already being set up in The Hague, there are new time-frames within which States need to prepare their implementing legislation, and most States Parties are in the process of, or have now adopted implementing legislation. There is a new urgency for all States Parties to enact comprehensive implementing laws that take effect from the date of entry into force of the Rome Statute for them, either 1 July 2002, or at a later date for those who ratified after 1 May 2002. Because these laws involve criminal matters, it is important that they be adopted and disseminated widely as soon as possible, in order to ensure that everyone has a fair opportunity to become aware of the new laws. Even if the ICC is not in a position currently to investigate the crimes within its jurisdiction, because it is still being set up, in future it may decide to investigate and prosecute any crimes committed from the date of entry into force of the Statute (within the jurisdictional limits set out under articles 12-13). In the same way, a State that has already ratified the Statute has already accepted the criminal prohibition on the acts that constitute the crimes within the Statute. Therefore, these laws can be introduced retroactively, since the acts were considered crimes at the date of entry into force of the Statute.

For non-States Parties intending to ratify in the future, the complementary jurisdiction of the ICC will come into force approximately two months after deposit of the instrument of ratification or accession. Therefore, criminal and procedural laws need to be enacted and enter into force within two months of ratification or accession. This suggests that work on implementation needs to begin well before ratification, for those States yet to become Parties to the Rome Statute.

Numerous examples of ICC implementation bills and the like have already been drafted by many States and can be used as a guide for others. These include examples from States that have already ratified, as well as States that are still in the process of preparing for ratification. Members of the Southern African Development Community have also prepared an ICC Ratification Kit, which includes a Model Enabling Act. A complete list of implementing legislation available online in English at the time of printing is included in Chapter 6 "Select Resources" of this Manual.

2.2 Approaches to Implementation

The bases of implementing the Rome Statute at the national level are the principles of co-operation and complementarity. The primary obligation of States Parties to the Rome Statute is to render cooperation and judicial assistance to the ICC when requested (discussed in detail in Chapter 3 of this Manual). With respect to complementarity, this principle encourages States Parties to implement ICC crimes into their national laws, and recognises the primary responsibility of all States to investigate and prosecute international crimes (Preamble and article 1). States may also choose to bring their criminal procedures for prosecution of the crimes in line with the Rome Statute, perhaps amending applicable defences and penalties to correspond with the Rome Statute. The "principle of complementarity" is discussed in detail in Chapter 4 of this Manual.

As with implementation of any treaty, States may create a single piece of legislation that covers every aspect of implementation, or amend all relevant pieces of their existing legislation separately, or combine these approaches, in order to comply with the Statute. However, there are some special considerations worth taking into account when approaching the implementation of the Rome Statute.

States Parties will have a special relationship with the ICC, particularly in terms of providing judicial assistance. As such, there are some particular features of the ICC that may not lend themselves to being incorporated as amendments to existing arrangements for State-to-State co-operation. Many States do not currently have laws allowing them to co-operate with international institutions such as the ICC, and so will need new laws for this kind of judicial co-operation. Also, there are some unique co-operation requirements under the Rome Statute that need unique laws. For example, there will be no grounds for refusal when a State is asked to surrender a person to the Court (article 89). This is clearly different from the usual extradition arrangements between States. Therefore, States may wish to draft new ICC-specific "surrender" legislation, instead of trying to adapt existing laws on extradition.

Most jurisdictions will be familiar with the process of preparing the appropriate legislation, regulations, decrees, executive orders, or declarations, in order to implement international treaties. The exact form of the implementing law can be decided by each State, in accordance with its own hierarchy of laws. The most important thing is to ensure that all relevant authorities are able to do whatever is required of them in accordance with the State's obligations under the Rome Statute, and to take advantage of the complementary jurisdiction of the ICC. In monist jurisdictions, the most important requirement is that the legislation implements all the elements of the Statute that are not self-executing, and ensures that obligations under self-executing provisions can be fulfilled completely, if necessary with some further elaboration in the implementing laws.

While generally in monist systems implementing legislation is not necessary due to the State's particular constitutional system, in some monist States it has been held that the special nature of criminal law reflected in a treaty may not be self-executing (for example, see the case against Hissène Habré, which was dismissed by the highest courts of Senegal in 2001). Comprehensive implementation of the Rome Statute into national law by monist States will ensure that the ICC crimes can be prosecuted in national courts. In order to ensure that the relevant authorities in monist systems are also able to co-operate fully with the Court, it is likely that the implementation of the Statute will involve some modifications to existing national laws. For example, every State must create technical mechanisms with which to co-operate with the Court and determine which State institutions or agencies will be competent to ensure co-operation with the Court. On the other hand, much of the substance of the Statute is a reflection of existing international law standards. If States have already implemented such standards, this may help to minimise the amount of implementing legislation required.

A single piece of legislation

Where a State chooses to introduce a single piece of legislation, or to annex the entire Rome Statute to a single piece of implementing legislation, it may be necessary to specify that such pieces of legislation take precedence over existing legislation, should there be a conflict between the ICC legislation and any existing legislation. This will help to avoid potential breaches of a State Party's obligations. At the same time, although the adoption of a unique law covering every aspect of the Statute is possible, some modifications or incorporations by reference will probably need to be made to some national laws, such as the Code of Criminal Law and Procedure, mutual legal assistance legislation, extradition laws, and human rights legislation, in order to recognise the special status of the Court. If there is only one ICC law, which is intended to take precedence over any existing laws with which it may conflict, but those laws are not specifically referred to in the ICC law, this may cause confusion for those relying on the old laws and not aware of potential conflicts with the new ICC law.

Many States have now implemented comprehensive implementing legislation, which includes provisions regarding incorporating the ICC crimes as well as cooperation obligations. Some have taken the approach of separating implementing legislation into two parts – one for the introduction of the crimes and one for the cooperation requirements, reflecting the usual separation between the Code of Criminal Procedure and the Code of Crimes, in relation to domestic crimes. This is the case in many civil law countries.

States also need to consider whether they will take this opportunity to go beyond the requirements of the Rome Statute, which are considered the absolute minimum standards in international law. For example, Germany has taken the opportunity to revise all international crimes within its jurisdiction, to bring them up to date in a comprehensive new Code.

For smaller jurisdictions, with fewer resources, there are some good examples available of a "simple" approach taken to implementation by two small jurisdictions. New Zealand chose to follow the structure and content of the Rome Statute closely, when drafting its implementing laws, thereby saving considerable time reorganising all the relevant provisions at the legislative drafting stage. South Africa, on the other hand, chose to draft its law in a style that was already familiar to national criminal justice personnel, and to assign existing mechanisms in its criminal justice system for the purposes of ICC co-operation, with very little modification, in order to reduce the need for training large numbers of people in new procedures.

There are some advantages and disadvantages to both approaches. In New Zealand, national authorities who would probably be unfamiliar with the Rome Statute will most likely need considerable training at some stage, in order to understand their exact duties under the legislation, if a co-operation request from the Court is received. However, New Zealand is a small island a long way from most conflicts, therefore it is unlikely to receive a significant number of such requests, at least in the foreseeable future. In South Africa, the preparation of the implementing law took several years, in

order to harmonise the Rome Statute effectively with national procedures and thereby reduce the need for training. An Inter-Ministerial Committee was involved in preparing the ICC legislation, and a Bill was circulated in draft form for consultation purposes, in order to familiarise all relevant levels of government and civil society with the requirements of the Rome Statute, and to harmonise these with national laws and procedures. Despite taking such a long time, all South African authorities who are required to assist the ICC with a request for cooperation are now familiar with the ICC, and in a better position to provide that cooperation, and the general public is also aware of the existence of the ICC.

Amending all relevant pieces of legislation separately

If a State chooses to amend all the relevant pieces of its legislation one at a time, it needs to recognise and highlight the distinct nature of the Court in some way, in order to give everyone in the State an accurate overview of the Court's role and purpose. For example, in many common law jurisdictions, most of the proposed legislation introduced into legislative assemblies may be viewed and commented upon by citizens either in writing or at special hearings. These special hearings could be organised in such a way that all the amendments related to the ICC are discussed at one time, if they are not all contained in the same amending bill.

At this time, there do not seem to be any examples of States taking this approach to implementation.

Hybrid approach

Some States may be able to create a single piece of legislation that also effectively amends most of the relevant pieces of legislation already in force, and then make other amendments to existing legislation if required. This is the approach taken by many governments, including the Canadian Government in its Crimes Against Humanity and War Crimes Act. This Act implements most of Canada's obligations under the Rome Statute, as well as taking advantage of the ICC's "complementarity principle". The Act is a mixture of completely new provisions and amendments to existing provisions in a wide range of Acts. Before preparing the Crimes Against Humanity Act, Canada also amended its Extradition Law, in such a way that it made it easier to harmonise it with the Rome Statute at a later stage, since the Extradition Law needed updating and revising before work on the ICC legislation was completed.

Note, however, that the Crimes Against Humanity Act goes well beyond the minimum requirements under the Statute. It has been drafted to address a number of concerns of a constitutional nature that will likely not arise in most other States. At the same time, the list of Canadian Acts that will be amended by the Crimes Against Humanity Act provides a useful checklist for other States, of the types of national legislation that may need to be reviewed in order to implement the Rome Statute (this list is under the heading "Consequential Amendments" in the Bill): Citizenship Act, Corrections and Conditional Release Act, Criminal Code, Extradition Act, Foreign Missions and Interna-

tional Organizations Act, Immigration Act, Mutual Legal Assistance in Criminal Matters Act, State Immunity Act, and Witness Protection Program Act.

A lawyer assisting the Namibian Government in drafting its ICC laws, Ms. Wema Isa, recommended that Namibia have one bill implementing the Rome Statute instead of amending all laws individually. This one bill would implement the obligations of the Rome Statute into domestic law and also amend or modify all the laws to be affected. She recommended this approach as it would be both cost effective and less time consuming for all concerned, since there would be no need to have a number of bills tabled before and passed by Parliament in order for the Rome Statute to be given full force and effect. She identified the following Namibian laws as potentially requiring amendment: Criminal Procedure Act, Prescriptions Act, Extradition Act, Expropriation Ordinance 13 of 1978, Police Act, Prisons Act, and Constitution of Namibia.

A number of States already have some legislation to allow national authorities to cooperate with other States and international tribunals, and such laws contain many of the same principles and values as those required under the Rome Statute. However, several provisions in the Rome Statute require States Parties to introduce laws and procedures that take into account the "distinct nature" of the ICC, in order to avoid similarly cumbersome arrangements as State-to-State cooperation often involves, given the seriousness of crimes being prosecuted by the ICC.

Dissemination of the requirements of the Statute

From a practical point of view, whether States introduce ICC-specific legislation, amend existing pieces of legislation separately, or use a hybrid approach, the changes to the law of the State will need to be disseminated widely once they come into force. This will ensure that all relevant personnel are aware of the changes that the new legislation may introduce into the law in their particular area of work. For example, the ICC may have different standards from those of national organisations for the collection of its evidence. If persons who normally assist with the collection of evidence for national prosecutions are asked to assist the ICC with one of its investigations, they will need to know about the different standards, in order to ensure that the evidence they collect is admissible and the way it has been collected does not reduce the chances of a successful prosecution (article 69, paragraph (7)). Nationals cannot be expected to know about the ICC requirements unless there is an effective publicity and information campaign connected with the new ICC legislation. In order to avoid a possible breach of a State's obligations, citizens need to be sufficiently well informed by State agencies.

2.3 Introduction of New Procedures

Many States may also need to introduce new administrative procedures in certain areas, in order to ensure that they can meet all their obligations under the Statute and to assist the Court as much as possible (article 88). Article 99, paragraph (1) provides that requests for assistance from the ICC can be executed in accordance with the relevant procedure under the law of the requested State. However, article 99, paragraph (1) also specifies that requests must be executed in the manner specified in the request, unless

this is prohibited by the laws of the State. Given the important nature of the ICC's work, it would greatly assist the Court and thereby the international community, if States ensure that their laws and procedures are generally compatible with the Rome Statute, so that all requests for assistance can be executed in the manner specified in the request.

The Statute covers a broad range of areas of administration, such as criminal procedure, proceeds of crime, witness and victim protection, mutual legal assistance, national security, dissemination of the rules of engagement in military law, and financial assistance to the Court. It will be necessary that a State do more than merely append the Rome Statute to a piece of legislation that makes it the law in the State. Every State needs some kind of new procedure for dealing with ICC requests, and perhaps training of a small group of national criminal justice personnel in the requirements of the Rome Statute, so that a request from the Court can be responded to in a timely fashion. This will involve co-ordination between government departments and between the various branches of government as well as the military forces and bar associations.

2.4 Federal Issues

The process of implementing ICC obligations may be more complicated for federations, as regional, state, and/or provincial laws may need to be changed by the appropriate authorities as well. It would be helpful to undertake consultations with all relevant authorities at an early stage, to ensure the widest possible support for effective implementation of ICC obligations. For example, many States could take advantage of existing inter-governmental and inter-departmental meeting schedules to discuss ICC issues.

In Australia, which has a federal system where each Australian state has its own criminal laws and procedures, the Federal Government used its external affairs power under the Constitution to introduce ICC implementation legislation. The legislation addresses nearly every conceivable principle that could be applied in any State court, to make sure that all such principles were over-ruled specifically by the ICC implementing legislation. Therefore in Australia, the two pieces of ICC legislation are more like a Code than most pieces of crime-related legislation in a common law system. In this way, Australia ensured that State authorities could not inadvertently cause Australia to breach its obligations under the Rome Statute.

2.5 Compatibility With Different Legal Systems

The ICC will conduct its proceedings according to a new international legal system, which draws upon a variety of well-established national criminal procedures. As such, it is a truly international criminal court, representing the traditions and values of a wide spectrum of participants. Even so, it is unlikely that any State will have to radically change its own criminal justice system in order to be able to assist the Court. Many of the standards for investigations and trial fairness required under the Rome Statute are adopted wholesale from international human rights instruments that have

already been implemented in most countries, such as the International Covenant on Civil and Political Rights.

The most important thing is that whatever procedures are established under national laws to assist the ICC with its investigations and prosecutions, those procedures must respect the judicial guarantees of independence, impartiality and equality.

3. SPECIFIC ISSUES OF IMPLEMENTATION

This section of the Manual is intended to highlight the various forms of State co-operation that are detailed in the Rome Statute, and to suggest ways that a State Party can ensure its ability to provide such assistance, as required. Each of the various types of co-operation outlined here may require a different approach to implementation, depending on the particular State's criminal procedures and existing mechanisms for international judicial assistance. Each section identifies various options for implementation that States may be able to use, according to their particular needs and requirements. It assumes that readers will be able to discern which issues are particularly relevant to their situation. For example, those States with mutual legal assistance legislation already in place will probably only need to make minor modifications to this legislation in order to be able to co-operate with the ICC in many respects.

Readers should not be daunted by the large amount of material in this section of the Manual. It does not mean that implementation of the Rome Statute will necessarily be a large undertaking. The Manual provides guidance on the precise obligations of States under the Statute, but it also makes suggestions as to how States may wish to go beyond the requirements under the Statute, in order to make the ICC even more effective. This distinction is made clear throughout the Manual, as every requirement is listed under the heading "Obligations" in every section. Therefore States that wish not to expend unnecessary resources when implementing the Rome Statute can clearly see what the exact standard is in each area of implementation. They will find that it will be very easy for them to comply with the requirements under the Statute, in most instances.

Parts 9 and 10 of the Rome Statute set out the general types of co-operation that may be requested by the Court and the obligations of States Parties in this respect. Further details on some of the requirements for co-operation and how requests are made are also found in other parts of the Statute. For example, the various chambers of the ICC and the ICC Prosecutor may make certain requests of States at different stages of a criminal proceeding, and the functions and requirements of these entities are set out in Part 5 – Investigation and Prosecution; Part 6 – The Trial; and Part 8 – Appeal and Revision. Therefore, the rest of this section of the Manual draws together, in different sub-sections, the various forms of assistance that are detailed throughout the Statute, in roughly the order that a criminal investigation occurs.

From the date of the first edition of the Manual, a large number of States Parties have since prepared and adopted domestic implementing legislation. In this second edition, examples of how certain States have implemented their obligations under the ICC Statute are provided to highlight the different approaches that may be available to States Parties who are in the process of drafting or adopting their implementing legislation. These examples are drawn only from legislation that is available in English and accessible on the world wide web, and are in no way meant to provide a comprehensive review of all the examples and methodologies available. A complete list of ICC implementing legislation currently available online is included in Chapter 6 "Select Resources", together with the abbreviations used for each example throughout the following section. In addition, a list of other

resources on implementation is included in Chapter 6. These resources are updated regularly, and should be reviewed for any new legislative models that become available after this document was prepared.

3.1 Privileges and Immunities of ICC Personnel

Description

The ICC is a treaty based international organisation, and not an organ of the United Nations. Therefore, States cannot assume that ICC personnel will automatically be covered by existing State laws on the protection of UN personnel.

Article 48 of the Rome Statute governs privileges and immunities for the Court. This is very similar to article 105 of the UN Charter regarding judges of the International Court of Justice. The judges, Prosecutor, Deputy Prosecutors and Registrar of the ICC will enjoy the same immunities as are accorded to heads of diplomatic missions and will, after the expiry of their terms of office, continue to be accorded immunity from legal process of every kind "in respect of words spoken or written and acts performed by them in their official capacity". This will help to prevent any politically motivated allegations against such personnel or any reprisals after they retire from the Court.

Under article 48(3), the Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry, will be accorded "privileges and immunities and facilities necessary for the performance of their functions". Article 48, paragraph (4) provides that counsel, experts, witnesses and "any other person required to be present at the seat of the Court" are to enjoy such privileges and immunities as are necessary "for the proper functioning of the Court". These provisions also contemplate a separate agreement, to elaborate the details of such privileges and immunities of the Court, its personnel and officials and those participating in proceedings of the ICC.

The ICC Preparatory Commission was mandated to prepare this stand-alone treaty on privileges and immunities, which was adopted by the Assembly of States Parties in September 2002, and is entitled an "Agreement on the Privileges and Immunities of the International Criminal Court" (APIC). The APIC contains some additional definitions and places some additional obligations on States, above those that are set out in article 48, Rome Statute. Therefore, the APIC must be ratified and implemented in addition to the Rome Statute, and may also be ratified by States that have not ratified the Rome Statute. The APIC was opened for signature by all States as from 10 September 2002 at United Nations Headquarters in New York and will remain open for signature until 30 June 2004. It will enter into force 30 days after the date of deposit of the tenth instrument of ratification or accession (article 34, APIC). At the date of writing, APIC is not yet in force.

Article 48, paragraph (5), Rome Statute, sets out who can waive the privileges and immunities of judges, the Prosecutor, the Registrar, the Deputy Prosecutors, staff of the Office of the Prosecutor, the Deputy Registrar and the staff of the Registry. For example, the privileges and immunities of judges and the Prosecutor can only be waived by an absolute

majority of the judges. APIC elaborates further on who can waive the privileges and immunities for counsel, experts, witnesses and any other person required to be present at the seat of the Court.

Obligations

a) States must recognise the privileges and immunities of the judges, Prosecutor, Deputy Prosecutors and Registrar, and accord them the same immunities as are accorded heads of diplomatic missions, including immunity, after the expiry of their terms of office, from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity (article 48, paragraph (2)).

b) States must also provide the privileges and immunities and facilities necessary for the Deputy Registrar, the staff of the Office of the Prosecutor, and the staff of the Registry to perform their functions, in accordance with the APIC (article 48, paragraph (3)).

c) States must accord appropriate treatment to counsel, experts, witnesses and "any other person required to be present at the seat of the Court", as is necessary for the proper functioning of the Court, in accordance with the APIC (article 48, paragraph (4)).

Implementation

States should recognise the privileges and immunities of officials, personnel and others participating in the proceedings of the ICC in their implementing legislation. Most of this should not be difficult, considering that most States will already have in place general privileges and immunities legislation or regulations dealing with diplomatic relations, foreign missions or international organisations.

An example of amending existing legislation is that of the Canadian ICC legislation which amends the Canadian *Foreign Missions and International Organisations Act*, by adding a reference to the privileges and immunities of ICC personnel (CA s 54). South Africa's ICC Act refers to the procedure established in their *Diplomatic Immunities and Privileges Act* to elaborate details of the privileges and immunities for certain ICC officials and personnel by proclamation (SA s. 6). Other States, particularly of the monist approach, may not have to implement article 48 into domestic legislation as these provisions may be considered to be self-executing and thus applicable without the authorisation of domestic law.

To enable the ICC and all its personnel to operate effectively, States Parties will need to ratify and implement not only the Rome Statute but also APIC. For assistance in the implementation of APIC, please refer to the guide prepared by ICCLR, "Agreement on Privileges and Immunities of the International Criminal Court: Implementation Considerations".

For those States yet to finalise their legislation to implement the Rome Statute, it would be most efficient to implement their APIC obligations at the same time, since they both deal with privileges and immunities of persons involved in the work of the ICC. The relevant pieces of existing legislation could be reviewed for appropriate amendments, or States may

enact a single piece of legislation that covers every aspect of article 48 of the Rome Statute and the APIC.

A number of States Parties to the Rome Statute drafted implementing legislation prior to the adoption of APIC. Certain implementing legislation had this in mind when providing for executive regulations, such as Orders in Council, to be made to give effect in domestic law to APIC (such as UK Sch.1 s. 1(2) and CA s. 54). The South African ICC legislation provides for the Cabinet member responsible for foreign affairs, after consultation with the Cabinet member responsible for the administration of justice, to confer immunities and privileges on any other persons performing functions for the purposes of this Act (SA s.6).

3.2 Offences Against the Administration of Justice of the ICC

Description

Article 70, paragraph (1) of the Rome Statute creates certain offences against the administration of justice of the ICC. These are as follows:

"Intentionally:

(a) Giving false testimony when under an obligation pursuant to article 69, paragraph (1), to tell the truth;

(b) Presenting evidence that the party knows is false or forged;

(c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;

(d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;

(e) Retaliating against an official of the Court on account of duties performed by that or another official;

(f) Soliciting or accepting a bribe as an official of the Court in connection with his or her official duties."

Under article 70, paragraph (3), the maximum penalty for committing one of these offences is five years imprisonment, and/or a fine.

Article 70, paragraph (4), subparagraph (a) requires all States Parties to extend their criminal laws penalizing such offences, to include article 70, paragraph (1) offences where these are committed by their nationals or on their territory. Article 70, paragraph (4), subparagraph (b) further provides that the Court may request a State Party to submit a particular case to the relevant national authority for the purpose of prosecution. States Parties are re-

quired to respond to such requests and to "treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively". Thus, States Parties are expected to assist the Court in the prosecution of these offences, when requested.

Article 70, paragraph (2) provides that the principles and procedures governing the Court's exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence (RPE). These were adopted by consensus by the Assembly of States Parties in September 2002, and provide further details on all the procedural issues relating to article 70 (rules 162-172). For example, they provide details for the considerations relevant to imposition of sanctions, including the possibility that the Court may request a State Party to enforce a fine in accordance with article 109 (rules 163 and 166). Unlike the Statute's detailed provisions on the admissibility of cases involving "crimes" within the jurisdiction of the Court (articles 1 & 17-20), article 70 does not attempt to establish how and when the ICC will exercise jurisdiction over these "offences" where a State Party may also wish to exercise jurisdiction over the same matter and has the authority to do so. The RPE elaborates the procedures and considerations for the ICC to take into account when deciding whether to prosecute a case or request a State Party to prosecute. Unlike the complementarity jurisdiction of the Court over ICC crimes, rule 162 clarifies that the Court will ultimately determine the appropriate forum in each particular case relating to offences against the administration of justice of the ICC. This allows the ICC to ensure that it will not get over-burdened with minor prosecutions that States could manage.

Article 70, paragraph (2) also provides that the ICC may request international cooperation and judicial assistance from States in relation to offences under this article. States need only provide such cooperation in accordance with their existing law. Rule 167 clarifies that the ICC may request a State to provide any form of international cooperation or judicial assistance corresponding to those forms set out in Part 9 of the Rome Statute, and requires the Court to indicate that an offence under article 70 is the basis for the request. In addition, rule 166 sets out the role of States Parties in enforcing any orders of forfeiture or other penalties imposed on a person convicted of one of these offences. For further details and analysis of these rules and their potential impact upon national authorities when cooperating with the ICC, please see the ICCLR guide "International Criminal Court Rules of Procedure and Evidence: Implementation Considerations".

Obligations

a) Article 70, paragraph (4), subparagraph (a) requires every State Party to "extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this article, committed on its territory, or by one of its nationals".

b) States Parties must empower the appropriate authorities in their territory to prosecute these offences, whenever requested to do so by the ICC. Under article 70, paragraph (4), subparagraph (b), those authorities are required to "treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively."

c) States Parties should also provide full co-operation to the Court in the investigation and prosecution of these offences, in accordance with article 70, paragraph (2) and article 86, and the domestic laws of the requested State.

Implementation

a) Options for penalising offences

(i) Extend existing national legislation to include offences against the administration of ICC justice

Most, if not all, States Parties will already have legislation in place that creates offences against the administration of justice within their own legal systems. For example, such activities may be proscribed under the Criminal Code. Article 70, paragraph (4), subparagraph (a) suggests that such legislation should merely be extended to include persons involved in ICC proceedings, in order to comply with the Rome Statute. Such persons would be (as both the subject and object of these crimes): accused persons appearing before the ICC, witnesses appearing before the ICC, and officials of the ICC. In addition, national offences involving interference with evidence should be extended to include evidence that is required for an ICC matter.

States Parties should ensure that their national legislation includes all of the offences listed under article 70, paragraph (1). The easiest way to do this is to reproduce the offences as they are expressed in the Rome Statute. The legislation must have both territorial and extra-territorial application, so that States Parties can prosecute such offences when they are committed by both nationals and non-nationals on the State's territory, and so that nationals can be prosecuted in the State for acts they commit while at the Court, or elsewhere outside the State. Under article 70, paragraph (4), States Parties must criminalise these offences on their territory and where they are committed by a national, no matter where that national has committed the offence.

The Statute is silent as to the maximum or minimum penalty that a State can impose when it is prosecuting such offences. However, these offences strike at the very heart of any justice system, by potentially undermining its legitimacy and credibility. Therefore, a maximum penalty of no less than 5 years for all of those offences is a good guide, as per article 70, paragraph (3). States may also wish to provide for different penalties for different types of offences, depending upon their seriousness. Various States Parties have assigned different penalties for different article 70 offences in their implementing legislation. The minimum and maximum penalties range from 1-15 years imprisonment.

States may also wish to go beyond the requirements of article 70, by providing for further variations of the offences listed in that article, and by assigning different penalties to different offences, sometimes greater than 5 years imprisonment. This has the benefit of deterring a greater variety of potential attacks on the integrity of the ICC justice system.

Norway follows the approach where the implementing legislation essentially provides that certain sections of the domestic penal code correspond to the offences listed under article

70 (NO s.12). Germany also has a bill before Parliament, at the time of writing, that would extend the scope of application of certain sections of the German Criminal Code to cover false testimony before the ICC (Progress Report by Germany). In Australia, Finland and Switzerland, their implementing legislation shows examples of where an Act amending and clarifying certain provisions of the national penal code was enacted. For example, in Finland, the Act on the Amendment of the Penal Code clarified the term "court of law" as meaning the ICC and the term "criminal investigation" as meaning an investigation referred to in the Rome Statute (FI(A) s. 12(a)). In Australia, the ICC (Consequential Amendments) Act amends the existing Criminal Code Act by adding a section on crimes against the administration of justice of the ICC (AU(C) Subdiv J). At the time of writing, Argentina and the Netherlands have pending draft legislation that will amend their national penal codes in order to extend existing offences against the administration of justice to the ICC context.

(ii) Extend existing legislation relating to offences against the administration of justice of the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY/R), to include the ICC

Some States Parties may have already created offences against the administration of justice for these two Tribunals, in accordance with their respective Rules of Procedure and Evidence. For example, Rules 77 & 91 of the Rules of Procedure and Evidence for the ICTY are "Contempt of the Tribunal" and "False Testimony under Solemn Declaration", respectively. Note that there are several differences between those Rules and Article 70 of the Rome Statute, most notably the maximum penalty for offences. For example, the ICTY Rules differentiate between various types of offences, and provide that some offences only have a maximum penalty of 12 months imprisonment (Rule 77, paragraph (h), subparagraph (i)), while other offences have a maximum penalty of 7 years imprisonment (Rule 77, paragraph (h), subparagraph (ii)). In implementing article 70 offences, States can set higher maximum penalties if they wish.

If States wish to amend existing laws relating to offences against the administration of justice of the ICTY/R, they should ensure that they have provided for all of the offences listed under article 70, paragraph (1), not just those in the ICTY/R Rules, because those Rules do not provide for certain article 70 offences, such as retaliating against officials of the tribunal (article 70, paragraph (1), subparagraph (e)).

At the time of writing, there are no examples of this approach being taken by States.

(iii) Create a new piece of legislation

Alternatively, States could create article 70 offences either by a specific piece of legislation on offences against the administration of justice, or by including such offences within a broader ICC-specific piece of legislation, or by simply reproducing article 70 offences in the implementing legislation. In Canada, the ICC legislation creates new offences in Canada and for Canadian citizens in accordance with the obligations under article 70 (CA ss.16-26). Basically, Canada has taken certain provisions from its criminal code and updated, reworded and applied these provisions to the ICC context, thereby complementing

substantive domestic criminal law in order to harmonise it with the Rome Statute. Canada went beyond its obligations under article 70 by stating that other existing Canadian legislation governing the offences against the administration of justice would also govern any proceedings under the ICC legislation, since these proceedings would be conducted pursuant to the Canadian rules of evidence and procedure governing criminal trials. For example, the Canadian government criminalised additional offences against the administration of justice, relating to proceeds of crime provisions, including possession of property obtained by certain offences, laundering proceeds of certain offences and enterprise crime offences. These sections were taken from the Canadian criminal code and reworded for the special circumstances of the ICC. In New Zealand, South Africa and the United Kingdom, the implementing legislation essentially reproduces the obligations listed under article 70 (NZ ss.14-23, SA s.36 and UK s 54).

b) Giving national courts jurisdiction over article 70 offences

States Parties must also enable their own courts to prosecute these offences (article 70, paragraph (4), subparagraph (b)). This can be done by adding "offences against the administration of ICC justice", or similar terminology, to the list of offences over which the relevant courts are to have jurisdiction. All personnel involved in criminal investigations need to be granted the jurisdiction to investigate and prosecute such crimes as well. Note that the ICC will have to grant a waiver of immunity if State courts wish to prosecute ICC personnel.

Some States Parties have included in their implementing legislation a provision giving the national court jurisdiction over an article 70 offence in two situations: (1) when the offence against the administration of justice is committed in the domestic territory or (2) when the offence is committed abroad by a citizen of the domestic country. For example, the New Zealand legislation states that New Zealand courts are given jurisdiction to try offences under article 70 if the relevant act or omission occurred in New Zealand or if the person charged is a New Zealand citizen (NZ s.14). Other examples include legislation from Argentina, Norway, South Africa and United Kingdom (AG s. 23, NO s.12, SA s. 37(1), UK s. 54(4)).

c) Providing sufficient resources to enable national prosecutions to be treated diligently and conducted effectively

Article 70, paragraph (4), subparagraph (b) specifically provides that a State Party "shall submit" any cases under this article to its competent authorities, once requested by the Court to do so. It also provides that "those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively." Clearly the drafters of the Statute envisaged that these types of offences should be taken seriously by States Parties. After all, any kind of impropriety on the part of those participating in ICC proceedings could bring the whole Court into disrepute, and reduce its potential deterrent effect.

States Parties should therefore ensure that sufficient financial and human resources would be available to the various sectors of their criminal justice system that would be involved in

investigating and prosecuting such crimes, and supervising those convicted of such offences. However, it is unlikely that prosecution of these crimes will require many resources, as such crimes will rarely be committed in most States. States may wish to undertake an information campaign, to ensure that all relevant persons know of the new offences and the maximum penalty, and give them due consideration. This would help to reduce the incidence of such crimes.

d) Enforcement of sentences

States Parties should also consider making provisions for enforcing the sentences of persons convicted of these offences by the ICC. This is not mentioned in the Statute, however, rule 163 now provides that States may volunteer to enforce sentences of imprisonment in relation to offences under article 70. The Court will have limited detention facilities and will rely on States to accept and supervise all sentenced persons. Note that most of the provisions under Part 10 of the Rome Statute do not apply to offences under article 70, such as the Court's primary role in supervising and reviewing the sentence of the person. Nevertheless, a State may choose to enforce a sentence of imprisonment under this provision in accordance with the principles set out in Part 10 of the Statute.

Under Rule 166, the ICC can impose an order of forfeiture in addition to imprisonment or a fine or both. The ICC may therefore request a State Party to enforce a fine in accordance with that State Party's domestic laws (see article 109). States should also note the ten year limitation period for enforcement of all sanctions imposed by the ICC under article 70 (rule 164).

e) Co-operation measures

States should have legislation and procedures in place to enable them to provide co-operation to the ICC for article 70 offences. Such co-operation may include surrendering nationals to the Court, and providing evidence to support and/or rebut the claim that the alleged crime has taken place. The conditions for providing such co-operation can be governed by the national laws of the requested State (article 70, paragraph (2)), while still enabling the State to "co-operate fully", in accordance with article 86. The legislation and procedures could be much the same as for other criminal investigations and prosecutions by the ICC.

Some States Parties have comprehensively implemented the obligation to cooperate with the ICC without specific mention to article 70 offences. This may be sufficient in many jurisdictions. Other States, like New Zealand, have incorporated a specific provision clarifying that if the ICC makes a request for assistance in an investigation or proceeding involving an article 70 offence, the request must be dealt with in the same manner provided for under Part 9 of the Rome Statute (NZ s. 23). The United Kingdom has incorporated a provision ensuring the national courts take into account any relevant judgements or decisions of the ICC and also permits the national courts to take account of any other relevant international jurisprudence (UK s. 54(2)).

3.3 Procedures Where the ICC Wishes to Investigate the Same Matter as a State Party

Description

Because the ICC is intended to be complementary to national criminal jurisdictions, the general rule is that the ICC cannot assume jurisdiction and thus will not investigate or prosecute if a State Party is already investigating or prosecuting the same case. However, not all States may be able to carry out a full investigation, particularly if they are involved in an armed conflict at the time, which has caused their judicial system to collapse. The drafters of the Statute were also concerned about the possibility that some States may hold "sham" trials, which would not satisfy the interests of international justice. Therefore, the Statute sets out some procedures that allow the Court to seek information from States on some of their investigations and prosecutions, to ensure that the Court is not duplicating the genuine efforts of States to prosecute crimes within the jurisdiction of the Court, and to allow the Court to monitor any investigations or prosecutions about which it has concerns. The conditions under which the Court will assume jurisdiction are set out in article 17, which is discussed in detail in Chapter 4 on "Complementarity".

Relevant procedures under the Statute

Once a situation requiring the ICC's attention has been referred to the Court, or the ICC Prosecutor has identified the apparent commission of an ICC crime, the ICC Prosecutor needs to determine that there would be a reasonable basis to commence an investigation (articles 13-15). The Prosecutor must request the ICC Pre-Trial Chamber to authorise any investigation that is initiated by the Prosecutor *proprio motu* (article 15, paragraph (3)). At that stage, or once the Prosecutor has initiated an investigation based on a referral by a State Party, all States Parties must be notified (article 18, paragraph (1)). The Prosecutor must also notify any other States that would normally exercise jurisdiction over the crimes concerned. Note that the Prosecutor can provide this notification on a confidential basis, and limit the scope of the information provided to States, if it is necessary to protect certain persons, prevent the destruction of evidence, or prevent certain persons from absconding.

Keeping the ICC informed

Under article 18(2), States have only one month from such notification in which to inform the Court that they are investigating or have investigated the same matter, and to request the Prosecutor to defer to the State's investigation. This short time period is to ensure that the Court is not subject to unnecessary delays in carrying out its functions. Article 18(2) provides that "a State may inform the Court of its own investigations" (not "shall"). Although States are not actually obliged to notify the Court of their own investigations, it would be sensible for a State to advise the ICC of its own proceedings, to help avoid an unnecessary duplication of efforts and to ensure that the ICC defers to the State's investigation.

Once a State has requested the deferral of an ICC investigation, the Prosecutor is obliged to cease investigating the matter. However, the Prosecutor can then ask those States to provide periodic reports on the progress of their investigations and any subsequent prosecutions (article 18, paragraph (5)). States Parties are required to "respond to such requests without undue delay."

Even if a State does not request the Prosecutor to defer to the State investigation, the Prosecutor can decide to postpone the ICC investigation. The Prosecutor can then request the relevant State to make available information on any proceedings in the same matter (article 19, paragraph (11)). Note that States can request the Prosecutor to keep this information confidential.

Responsibilities of the ICC

If the ICC Prosecutor or Pre-Trial Chamber have concerns over the conduct of the State investigation or prosecution, the Pre-Trial Chamber can authorise the Prosecutor to proceed with the investigation, either at first instance, or after a certain period of time has elapsed, or where there has been a significant change of circumstances in the State (article 18, paragraphs (2) and (3)). Note that States are able to appeal such preliminary rulings on admissibility to the ICC Appeals Chamber, under article 18, paragraph (4). Where the Prosecutor made the decision to defer investigation in the absence of notification from the State, the relevant State must be notified if the Prosecutor resumes the investigation (article 19, paragraph (11)). In certain circumstances, States can then challenge the admissibility of the case under article 19 and then appeal any decision made under that provision, if necessary. In other words, States will be given every opportunity to ensure that the Court has all the information it requires to reassure itself that the State authorities are acting in good faith. A majority of judges of the Pre-Trial Chamber must concur in the decision to authorise the Prosecutor to proceed, and a majority of the five judges of the Appeals Chamber must concur in any decision made on appeal (articles 39, 57 and 83).

Protection of evidence

While all of these procedures are being followed, there may be periods of time where it is unclear as to which authority – State or ICC – will eventually take charge of the investigation or prosecution. In order to protect the interests of all those involved, States should ensure that all relevant evidence within their possession is preserved in the meantime, in accordance with article 93, paragraph (1), subparagraph (j). States should also note that the Court might authorise the ICC Prosecutor to collect and preserve evidence during these periods, under article 18, paragraph (6) and article 19, paragraph (8). Even if a State is challenging the admissibility of a case in the ICC, all orders or warrants issued by the Court prior to the making of the challenge remain in effect (article 19, paragraph (9)). Therefore, States may need to co-operate with the ICC Prosecutor until it is clear that the State will be taking responsibility for the investigation and prosecution of the matter (see also article 19, paragraph (8)). While this arrangement may be difficult for both practical and political reasons, it remains a treaty obligation of the State to cooperate with the Court in all of its investigations and prosecutions.

Obligations

a) Under article 18, paragraph (5), where the ICC Prosecutor has deferred an investigation at the request of a State Party, that State Party must respond in a timely fashion to any requests from the Prosecutor for information concerning the progress of its investigations and any subsequent prosecutions, in accordance with article 86.

b) While any conflicts over which authority will take responsibility for an investigation are being resolved, States must continue to meet all of their obligations under article 93, including the preservation of evidence within their possession and co-operation with the ICC Prosecutor.

Implementation

Most of the matters and obligations outlined above will not require implementing legislation. They are procedural matters, designed to ensure efficient communications between the ICC and national authorities. Nevertheless, it would be highly desirable for the relevant authority to establish efficient administrative procedures for dealing with all of these matters, in the event that such a sequence of events unfolds. This authority could be the Ministry of Foreign Affairs, as the procedures will largely entail communication between national authorities and the Court.

a) Notification and co-ordination

Most importantly, administrative procedures are needed to enable States that are already investigating a matter to notify the ICC within one month of receiving notice from the ICC that it wishes to investigate the same matter. This will require several things:

(i) a procedure whereby national investigators and prosecutors must notify the relevant authority whenever they commence an investigation or prosecution of a crime that is also within the jurisdiction of the ICC; and/or

(ii) designation of a person within the relevant authority to keep track of all national investigations and/or prosecutions for crimes that are also within the jurisdiction of the ICC, or who is able to obtain information about particular cases of that kind promptly; and

(iii) an expedited procedure for bringing to the attention of the appropriate person the notification from the ICC and for responding to the ICC's notification within one month.

The Swiss Government has created a Central Office for Cooperation with the ICC of the Federal Bureau of Justice. This Office would likely coordinate all of the procedures and communications required, should Switzerland find itself in the situation of wishing to investigate and prosecute the same matter as the ICC.

b) Periodic updates

If the ICC decides not to investigate the same matter, administrative procedures are needed to enable the State to respond to any requests for periodic updates made by the ICC Prosecutor under article 18, paragraph (5). This will probably require effective and timely communication between investigators, prosecutors, and the relevant government department, in order for the State to be able to furnish the Court with the information it requires.

c) Information on proceedings

Where the State Party has not requested the ICC Prosecutor to defer the investigation, but the Prosecutor defers anyway, States should also be prepared to provide any information on their proceedings that the Prosecutor requests, in accordance with article 19, paragraph (11). This provision is not couched in obligatory terms. But it should also be interpreted in light of article 86, which requires all States Parties to "co-operate fully with the Court in its investigation and prosecution of crimes". In addition, article 93, paragraph (1), subparagraph (i) stipulates that States must provide to the Court any records and documents that the Court requests. Responding to requests by the Prosecutor for information on proceedings under article 19, paragraph (11) will require the same kinds of procedures as for providing periodic updates to the ICC Prosecutor in accordance with article 18, paragraph (5). Note that information provided in accordance with article 19, paragraph (11) may be provided to the ICC on a confidential basis.

d) Protection of evidence

Procedural and evidentiary laws and procedures are needed to ensure that the appropriate people are empowered and enabled to preserve evidence and to co-operate with the Prosecutor's investigations, in accordance with article 93, even when there is a possibility that the State may take final responsibility for the matter. See Section 3.9 "Collecting and Preserving Evidence" for more details on implementation requirements and examples for these obligations.

3.4 Important Provisions in the Statute Relating to State Co-operation

Description

Part 9 of the Statute focuses on International Co-operation and Judicial Assistance. There are two main types of co-operation envisaged between States Parties and the ICC under this Part:

(i) arrest and surrender of persons at the request of the Court; and

(ii) other practical assistance with the Court's investigations and prosecutions, e.g. collecting evidence.

In addition, Part 10 on Enforcement outlines where the Court may need the assistance of States Parties in enforcing its orders.

"Co-operate fully with the Court"

Article 86 in Part 9 requires that all States Parties "co-operate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court". The words "co-operate fully" were chosen carefully by the drafters of the Statute, to emphasise the important role that States must play in the effective and efficient functioning of the Court. Article 86 also provides that States Parties must co-operate fully "in accordance with the provisions of this Statute." Thus, every provision of the Statute requiring State participation should be interpreted as requiring full co-operation, unless otherwise specified.

Article 88 stipulates that States Parties must "ensure that there are procedures available under their national law for all of the forms of co-operation which are specified under this Part." In other words, it is envisaged that States will use their national laws to establish all the procedures necessary to be able to assist the Court. All such procedures should allow the State organs to respond as rapidly as possible to requests from the Court.

States Parties should also note that if they fail to comply with a request to co-operate by the Court, contrary to the provisions of the Statute, thereby preventing the Court from exercising its functions and powers under the 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 (article 87, paragraph (7)). The Statute does not provide specifically for any sanctions. However, a State Party that does not comply with requests from the Court will effectively be in breach of its treaty obligations in most instances, and this may have undesirable political consequences for that State.

Jurisdiction of the ICC

Under article 12, paragraph (1), a State, once it becomes a Party to the Statute, thereby accepts the jurisdiction of the Court with respect to the crimes set out in article 5 (genocide, crimes against humanity and war crimes, and aggression once a suitable definition has been found). What this means is that once a State becomes a State Party, that State automatically accepts the Court's jurisdiction over genocide, crimes against humanity and war crimes, from the date of entry into force of the Statute (article 11).

Note that non-States Parties may also accept the exercise of jurisdiction by the Court with respect to a particular crime, by way of a declaration lodged in accordance with article 12, paragraph (3). Non-States Parties are expected to co-operate fully once they agree to assist the Court with a particular investigation (article 87, paragraph (5), subparagraph (a)). If they breach the agreement or arrangement that they have made with the Court, it may inform the Assembly of States Parties or the Security Council, as appropriate (article 87, paragraph (5), subparagraph (b)).

Obligations

a) Under article 86, States Parties must be able to "co-operate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court", in accordance with the provisions of the Statute.

b) Under article 88, States Parties must ensure that they have procedures available under their national laws "for all of the forms of co-operation" specified in Part 9 of the Statute.

c) Under article 87, paragraph (5), subparagraph (a), non-States Parties must comply with any agreements or arrangements for providing co-operation that they enter into with the ICC.

Implementation

A State that becomes a Party to the Statute is thereby accepting that the Court has jurisdiction over the crimes listed in article 5, from the date of entry into force of the Statute, and that the Court may take jurisdiction over its nationals or other persons on its territory, in certain well-defined circumstances. Therefore States Parties should ensure that there are no obstacles to co-operation with the Court. A non-State Party that accepts the jurisdiction of the Court over a particular crime should also ensure that there are no obstacles to co-operation in accordance with whatever agreement or arrangement it enters into with the Court. For example, States should ensure that all of the relevant State authorities are empowered to assume jurisdiction as necessary, in relation to ICC investigations and prosecutions.

States will most likely have to enact implementing legislation, and implement appropriate procedures, to enable them to meet all of their obligations under the Rome Statute. However, those States that already have arrangements for State-to-State co-operation may only need to modify these arrangements slightly, to enable them to co-operate with the ICC as well.

There are at least four approaches that States Parties have used in order to incorporate the general obligation to cooperate under article 86: (1) including a general provision in the implementing legislation to cover overall procedures of cooperation or (2) adding a provision in existing domestic legislation to apply the general procedures of existing regimes for cooperation or (3) a hybrid approach adding a provision in the implementing legislation that extends an already existing obligation to give judicial assistance and cooperation under domestic legislation or (4) implement by practice without specific legislative provisions.

Australia and Switzerland follow the first approach (AU s.3, SW art 3). Estonia has followed the second approach by adding an article incorporating the obligation to cooperate fully with the Court to its Code of Criminal Procedure (ES(P) art 415). Canada also follows the second approach by providing that its domestic legislation on mutual assistance and extradition legislation applies to ICC (CA ss.47-53 and 56-69). New Zealand and Finland

have followed the third approach (NZ s.3, FI s. 4). For example, New Zealand bases its provisions on cooperation on comparable provisions in the International War Crimes Tribunal Act 1995; Finland bases its cooperation provisions with comparable provisions in the Act of International Legal Assistance with Criminal Matters, 1994. The United Kingdom takes the fourth approach of implementing by practice.

Requests for co-operation and assistance

Description

Article 87 enables the Court to make requests to States Parties for co-operation. Requests from the Court will generally be in writing (article 91, paragraph (1), and article 96, paragraph (1)) and transmitted through the diplomatic channel, unless the State specifies otherwise (article 87, paragraph (1)). In some urgent cases, requests may be made by any medium capable of delivering a written record, such as facsimiles or email, as long as the request is subsequently confirmed through the appropriate channel (article 91, paragraph (1), and article 96, paragraph (1)). Requests from the ICC and any supporting documentation will either be in, or accompanied by a translation into, an official language of the requested State or one of the working languages of the Court (article 87, paragraph (2)). The working languages of the Court are English and French (article 50, paragraph (2)).

Article 96 outlines the required contents of most requests for co-operation. The Court must provide the following: a statement of the purpose and legal basis of the request and the assistance sought; a statement of the factual situation underlying the request; information concerning the possible location of persons or items that are the subject of the request; details of any special procedures or requirements that must be observed and the reason for them; and any additional information that the State needs in order to execute the request (article 96, paragraph (2)). States must advise the Court of any special requirements for executing requests under their national laws (article 96, paragraph (3)).

Article 99, paragraph (1) provides that requests for assistance must be executed in accordance with the relevant procedure under the law of the requested State. However, as long as it is not prohibited under State law, the Court can specify the manner of execution of the request, certain procedures that are to be followed, and certain persons who are to be present or who are to assist with the execution process. Where the Court makes an urgent request for documents or evidence, States must send such items urgently (article 99, paragraph (2)).

Exceptions to the duty to comply with requests

Article 93 lists some of the main forms of assistance with ICC investigations that States are required to provide, such as witness protection, search and seizure, and collection of evidence. Note that this article requires States to "comply" with any requests by the Court for the kinds of assistance listed in this article. There are only two narrow grounds for denying such a request. The first is where the request concerns the production of documents or disclosure of evidence which relates to the requested State's national security (article 93(4)).

Article 72 provides further detail on the procedures to be followed when a State has national security concerns.

The second ground for denying requests is provided for in the combined language of article 93, paragraph (1), subparagraph (l) and article 93, paragraph (5). Article 93, paragraph (1), subparagraph (l) provides that any type of assistance which is not listed in paragraphs (a)-(k) of article 93, paragraph (1) is only compulsory where it is not prohibited by the law of the requested State. Article 93, paragraph (5) states: "Before denying a request for assistance under paragraph 1(l), the requested State shall consider whether the assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later date or in an alternative manner, provided that if the Court or the Prosecutor accepts the assistance subject to conditions, the Court or the Prosecutor shall abide by them." Thus, if the type of assistance being requested is *not* listed in article 93, paragraph (1) *and* it is prohibited by the law of the requested State *and* the State has considered whether the assistance can be provided subject to conditions and so forth as per article 93, paragraph (5), it would seem that under these articles a State may then deny that request for assistance.

Duty to consult

By contrast, where execution of a particular measure is prohibited in the requested State "on the basis of an existing fundamental legal principle of general application", article 93, paragraph (3) does not explicitly state that the requested State can refuse to comply with the request. Instead, this provision requires a State to consult with the Court and further suggests that during the consultations, consideration be given as to whether the assistance can be rendered in another manner or subject to conditions. However, the provision requires the Court to "modify the request as necessary", if the matter cannot be resolved by consultation. Therefore it would seem to imply that a requested State may refuse to comply with such a request until the Court has modified the request so that it would not be prohibited in the State on the basis of an existing fundamental legal principle of general application. Thereafter the State must comply with the modified request.

Article 97 gives some examples of the type of problems that may impede or prevent execution of requests: insufficient information to execute the request, inability to locate the requested person or item after every attempt has been made to do so, and requests transmitted in a form that appears to require the State to breach a pre-existing treaty obligation to another State. In every case, the State must consult with the Court without delay in order to find a solution to the problem. The State cannot refuse to execute the request, or it will be in breach of its obligations under the Statute.

Obligations

a) States Parties must comply with all requests made by the Court in accordance with article 93, except where they have national security concerns (article 72 and article 93, paragraph (4)), or if the type of assistance being requested is *not* listed in article 93, paragraph (1) *and* it is prohibited by the law of the requested State (article 93, para-

graph (1), subparagraph (l)) *and* the State has considered whether the assistance can be provided subject to conditions and so forth as per article 93, paragraph (5).

b) Under article 93, paragraph (3), where execution of a particular measure of assistance is prohibited in the requested State "on the basis of an existing fundamental legal principle of general application", the State must consult with the Court promptly to resolve the matter, and should consider whether the assistance can be rendered in another manner or subject to conditions, before denying the request.

c) Under article 96, paragraph (3), States Parties must consult with the Court when requested, regarding any requirements under their national law for executing requests from the Court. During such consultations, they must advise the Court of the specific requirements under their law.

d) Article 97, which relates to other perceived problems with executing requests, requires the State to consult with the Court "without delay in order to resolve the matter".

e) States Parties must comply with any specifications that the Court makes under article 99, paragraph (1) in relation to the execution of a request for assistance, unless the specified manner of execution is prohibited by the law of the requested State.

f) Under article 99, paragraph (2), where the Court makes an urgent request for documents or evidence, the requested State Party must send the requested items urgently, if the Court requests this.

Implementation

In general terms, States Parties need to have laws and procedures in place to enable them to comply with all requests for assistance from the ICC. These laws and procedures need to be flexible enough to allow States Parties to comply with any specifications that accompany the request, such as the manner of executing a particular request, or the procedure to be followed. This may include requirements as to confidentiality or other forms of protection of information, as well as the urgency of the request.

All States should establish an effective method of communicating with the Court to resolve any problems that may arise in relation to requests from the Court for assistance. For example, someone working in the State's Embassy at The Hague should be designated to keep in regular contact with the ICC Registry, so that any potential difficulties in meeting requests can be identified at an early stage. At the very least, a contact person should be designated to keep up-to-date records on all communications with the Court and its various organs.

Where States Parties have particular requirements concerning the execution of requests from the ICC, they should make these known to the Court as soon as possible after ratification. If they do not, then they must be prepared to do so whenever the Court requests such information.

States Parties may also need to have laws that allow persons specified by the Court to be present at and assist in the execution process, after the State Party has been consulted (article 99, paragraph (4), subparagraph (b)). These persons are likely to include ICC personnel, such as the Prosecutor or Deputy Prosecutors. They may also include Defence counsel for a person being investigated by the ICC, where they have obtained an order or a request for co-operation from the Pre-Trial Chamber in accordance with article 57, paragraph (3), subparagraph (b).

Some States Parties have comprehensively implemented the general provisions relating to requests for assistance under Part 9 of the Rome Statute. In the Australian and New Zealand legislation, the person responsible for consulting with the ICC in the event that execution of a request raises difficulties is the Attorney General (AU Part 2 and NZ Part 3). These laws provide that the request must be made in accordance with the relevant procedure under the respective domestic law. They also outline the restrictions on the provision of assistance and the circumstances when the Attorney General is obligated or has the discretion to refuse a request for co-operation and/or to postpone the execution of a request for cooperation. These provisions follow the wording of the Rome Statute closely, in order to respect the obligations of States Parties under the Rome Statute.

In the Swiss legislation, the Federal Office of Justice administers a Central Authority for cooperation with the ICC (SW art 3). The Central Authority can then appoint official counsel, federal authorities or the canton responsible for the execution of a request. Under this legislation, the Central Authority must consult with the ICC when (1) the execution of a request would conflict with existing fundamental legal principle of the Rome Statute (2) would prejudice national security interests (3) would interfere with ongoing investigation or prosecution of a difference case and (4) could violate States or diplomatic immunity.

Postponement of execution of requests

Description

Articles 94 and 95 allow States to postpone the execution of requests, in certain situations. Article 94 addresses the instance where execution of the request in the State would interfere with an ongoing investigation or prosecution of a different matter. In such a situation, the requested State is able to consult with the Court and to agree upon a period of time for postponement of execution. This period must not be longer than is necessary to complete the relevant investigation or prosecution in the requested State. The requested State may also provide the assistance subject to certain conditions, if the State decides to provide the assistance immediately.

Article 95 addresses the case of a request for assistance that is made when an admissibility ruling is still pending. The ICC has the competence to decide all jurisdictional matters pertaining to itself. However, the requested State may postpone the execution of a request pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may collect evidence before the Court has ruled on the admissibility issue. In other words, it may be unclear at that stage as to whether a State authority or the ICC will

eventually prosecute the matter. So States are entitled to wait and see if the ICC will definitely be assuming jurisdiction before being required to execute requests made under Part 9, unless the Court orders otherwise.

Obligations

a) If a State postpones the execution of a request for a period of time agreed upon with the Court, in the case of potential interference with an ongoing investigation or prosecution by the State of a different matter, the postponement must be no longer than is necessary to complete the relevant investigation or prosecution in the requested State (article 94, paragraph (1)).

b) Where the Court has specifically ordered that the ICC Prosecutor may pursue the collection of evidence pursuant to article 18 or 19 on challenges to the admissibility of a case before the ICC, and pending a determination of such a challenge, the requested State must not postpone the execution of any requests from the Court. However, States may postpone the execution of requests pending the determination of the matter, if there is no such order from the Court (article 95).

Implementation

When a State receives a request for assistance from the ICC, it needs a mechanism whereby it can check whether execution of the request would interfere with any ongoing investigations or prosecutions it is undertaking. This would probably involve a procedure for consultations between all the relevant State authorities, to be undertaken within a reasonably short period of time or on a regular basis. Such authorities need to be identified first and would likely include law enforcement officers, prosecutors, defence counsel, court registry staff, and possibly military tribunal staff as well.

Once the relevant State authorities have been consulted, and it has been determined that execution of the request would interfere with the State proceedings, the State must consult with the Court to agree upon the appropriate time period for postponement of execution of the request. The body that consults with the Court should know at what stage the State proceedings are, in order to negotiate with the Court a suitable time period for the postponement. In the alternative, the State should consider whether the assistance requested could be provided immediately, subject to certain conditions. Any conditions should be negotiated with the Court.

Where a State has postponed execution of a request in accordance with article 94, those involved in the State's investigation or prosecution will need to keep in contact with the relevant authorities, so that the State can notify the ICC when it has completed its investigations or prosecutions.

States should ensure that they keep themselves informed as to preliminary proceedings in the ICC, such as admissibility challenges. If they decide to postpone execution of a request pending the resolution of an admissibility issue, they should notify the Court of this deci-

sion. However, where the Prosecutor has permission from the Court to collect evidence on the requested State's territory, the State must have laws and procedures in place to be able to provide any assistance to the Prosecutor that the Court has requested.

The New Zealand legislation provides a provision, which sets out circumstances where the Attorney General may postpone execution of assistance, one of which is the postponement where there is an ongoing investigation or prosecution (NZ s.56).

Costs of executing requests

Description

Under article 100, paragraph (1), States must be prepared to bear the "ordinary costs for execution of requests in their territory", with quite a few exceptions. These exceptions are:

(a) Costs associated with the travel and security of witnesses and experts or the transfer under article 93 of persons in custody;

(b) Costs of translation, interpretation and transcription;

(c) Travel and subsistence costs of the judges, the Prosecutor, the Deputy Prosecutors, the Registrar, the Deputy Registrar and staff of any organ of the Court;

(d) Costs of any expert opinion or report requested by the Court;

(e) Costs associated with the transport of a person being surrendered to the Court by a custodial State; and

(f) Following consultations, any extraordinary costs that may result from the execution of the request.

Obligations

States must cover the costs of the execution of all requests for assistance in their territory (article 100), except those listed in article 100, paragraph (1).

Implementation

States Parties need to ensure that they have sufficient funds to cover the cost of certain requests from the Court. However, minimal additional costs are likely to be incurred, since many of the forms of State co-operation required under the Statute will simply entail an extension to the usual work of various personnel already within the national criminal justice system and Ministry of Foreign Affairs.

The Australian legislation specifically addresses the issue of costs in executing requests (AU s. 174). It states that Australia is liable to pay any costs incurred in connection with dealing with a request for cooperation other than the costs borne by the ICC.

Designation of an appropriate channel for receiving requests

Description

Under article 87, requests from the Court "shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession." In addition, a State must indicate its preferred language of correspondence at the time of ratification, acceptance, approval or accession. Subsequent changes to the designation of the appropriate channel, and the language of correspondence may be made, in accordance with the Rules of Procedure and Evidence (rule 176).

Under article 87, paragraph (1), subparagraph (b), requests from the Court may also be transmitted through the International Criminal Police Organisation or any appropriate regional organisation.

Obligations

Article 87 requires each State, upon ratification, acceptance, approval or accession, to designate:

(a) its preferred channel for communication, whether it be diplomatic or otherwise; and

(b) its preferred language of correspondence, either an official language of the State or a working language of the Court (English or French).

Implementation

With respect to the diplomatic or other appropriate channel, a State may prefer to follow the practice already established by that State for the ICTY. For example, many States receive communications from the ICTY through their embassies based in The Hague. In cases where a State has no established ICTY practice, the State might want to designate that communication be directed through a particular section/department of its Ministry of Foreign Affairs or Ministry of Justice. Numerous States Parties made specific declarations as to the designated channel when they deposited their instrument of ratification or accession with the UN Secretary General. These declarations can all be accessed via the UN Treaty database (http://untreaty.un.org), or the UN website on the ICC (http://www.un.org/law/icc). They range from the more general declarations of "through diplomatic channels" to more specifically identifying the authority competent to receive requests. Competent authorities have included Ministry of Justice, Public Prosecutor's Office or Procurator's Office and Attorney General. Declarations could also specify a new government office set up to deal with ICC requests, such as in Switzerland's declaration which refers to the Central Office for Cooperation with the ICC of the Federal Bureau of Justice. In addition to identifying the diplomatic route, some declarations, such as Finland's declaration, have expressly stated that the Court can enter into direct contact with other competent authorities in the State.

With respect to choosing a language of communication with the ICC, the State can designate either an official language of the State or a working language of the Court. Again, States may wish to follow their practice established for communicating with the ICTY. Of course, a State must take into account any legislation it has on its official languages. A number of States, such as Norway, made the declaration choosing English as the working language as regards to requests for cooperation from the Court, taking into consideration the Court's translation charges and the resources available in the future, as well as the wish to contribute to the quickest possible processing of the said request.

Note that requests may be transmitted from the Court to the International Criminal Police Organisation (Interpol) or any appropriate regional organisation. With respect to States, it is likely that the Court will only transmit requests to regional organisations when it is requesting assistance from every State in that organisation or is requesting assistance from the regional organisation's structure itself. The regional organisation must have a structure in place to transmit such requests to its member States. States should ensure that they are able to receive and execute requests made through regional organisations and Interpol.

Ensuring the confidentiality of requests

Description

The Rome Statute contains many references to the protection of confidential information. The Court has a general duty to ensure the confidentiality of documents and information within its possession except as required for the purpose of requests for State co-operation (article 93, paragraph (8), subparagraph (a)). Article 87, paragraph (3) provides that the "requested State shall keep confidential a request for co-operation and any documents supporting the request, except to the extent that the disclosure is necessary for the execution of the request." Thus, States must keep all requests from the ICC for co-operation confidential, and only reveal to the appropriate authorities (for example, police in order to execute a warrant of arrest) the amount of information they need in order to carry out the request. The reason for these clauses is that the Prosecutor or the Court will need, as much as possible, to keep confidential ICC investigations, indictments and requests for assistance in order to prevent accused persons from fleeing, witnesses from being threatened or killed, and evidence from disappearing or being destroyed. Therefore, a State's role in keeping such requests confidential will directly influence the effectiveness of the Court.

Under article 87, paragraph (4), a State Party may also be required to protect certain information in its possession or control, where measures are necessary to ensure the safety or physical or psychological well-being of victims, potential witnesses, and their families. These measures will apply to the way that the State provides and handles the information, and may also involve keeping certain information confidential. Under article 68, paragraph (6), a State may make an application to the Court for it to take measures for the protection of confidential or sensitive information, and the protection of State servants or agents.

Under article 93, paragraph (8), subparagraph (b), a State receiving a request for co-operation may transmit documents and information to the Prosecutor on a confidential ba-

sis, and the Prosecutor may use that information solely for the purpose of generating new evidence. Subparagraph (c) provides that the State may subsequently consent to the disclosure of the documents.

Obligations

(a) States are obliged to keep confidential requests for co-operation, and any documents supporting these requests.

(b) If the Court makes a request pursuant to article 87, paragraph (4) for certain handling of information, a State must comply, in order to protect victims, witnesses, and their families.

Implementation

States must adopt procedures for keeping requests for co-operation, and all supporting documents, confidential. This obligation of confidentiality might be designated in legislation, or might be left to be delineated by the executive. Whether this obligation is implemented by legislation or by a decision of the executive, the State must ensure that the channel chosen for receiving requests allows for confidentiality.

In addition, States need to implement procedures and possibly laws to enable them to provide and handle information in a manner that protects the safety and well-being of victims, witnesses, and their families. These procedures are most likely to be regulated through the executive and not through legislation. They could be implemented so as to apply to both requests from the Court to protect information, and requests to the Court by the State to protect information and certain individuals. However, a State must take into account its national privacy legislation when establishing these procedures, and will need to determine if amendments are required.

Australia and New Zealand have similar provisions ensuring confidentiality and the protection of victims, witnesses and their families when executing a request for co-operation (AU s. 13 and NZ s. 29). The requests must be kept confidential except to the extent disclosure is necessary for the purpose of executing the request.

3.5 Possible Constitutional Issues Relating to Co-operation with the ICC

Since the first edition of this Manual was produced, many more States have encountered difficulties with a range of issues, mostly relating to co-operation with the ICC, that appear to conflict with their national constitutions. Most monist jurisdictions provide that no international treaty may be entered into if it conflicts with the Constitution, since the Constitution is the supreme law of the land. Therefore, implementation issues relating to constitutional provisions were at the forefront of many government's minds once the decision had been made at the national level to ratify the Statute. In many monist jurisdictions, a special Constitutional Court or other similar body has reviewed the Rome Statute for any inconsistencies with the national Constitution prior to ratification. In some States the deci-

sions of such a review body are binding while in other States this body provides recommendations that are not binding. In any case, the decisions of constitutional bodies from across the globe now provide a wealth of interpretive experience for other States to draw upon, should they find apparent inconsistencies between the Rome Statute and their Constitution.

Numerous other organisations and authors have now produced comprehensive materials addressing ICC constitutional issues, and some of these materials are listed in Chapter 6 "Select Resources". This section of the Manual will not attempt a comprehensive discussion of all the issues and approaches taken to such concerns. It will simply highlight the main issues faced by most States to date, and provide examples of some of the approaches taken to reconcile the State's Constitution with the Rome Statute.

The following are the main provisions under the Rome Statute that have raised constitutional questions for various States Parties when they are preparing to ratify and implement the Rome Statute, and which will be discussed below:

- the absence of immunity for Heads of State (article 27);
- crimes listed under the Statute are not subject to a statute of limitations (article 29);
- the obligation of a State to surrender its nationals at the ICC's request (articles 59 & 89);
- the ICC's power to impose a sentence of life imprisonment (article 77, paragraph (1), subparagraph (b));
- persons appearing before the ICC will be judged by a three-judge chamber rather than by a jury (article 39, paragraph (2), subparagraph (b), sub-subparagraph (ii));
- the powers of investigation of the Prosecutor on the territory of a State Party (article 99, paragraph (4);
- complementary jurisdiction of the ICC (Preamble, articles 1, 17 and 19); and
- "ne bis in idem" not absolute (article 20).

When assessing the potential impact of the Rome Statute on a State's Constitution, it is important to keep in mind the values that the ICC seeks to uphold, namely, justice, the rule of law, protection of human rights, and an end to impunity for those who wield their power destructively and wantonly. It would be hard to find a Constitution in the world that does not also aspire to these values. When States consider the interests that are intended to be protected in each case, they are sure to find ample common ground. This should point the way for reconciling any apparent inconsistencies between constitutional provisions and Statute requirements.

The process of amending a Constitution is often a difficult and time-consuming procedure in many countries. If possible, it would be more desirable to find another way to meet the particular ICC obligation, in order to ensure that the State does not spend years preparing for ratification and implementation, and thereby missing the opportunity to assist the

Court in its early days of operation. Nevertheless, each State must decide what will work best in its jurisdiction, given its unique culture and constitutional arrangements.

In general terms, States have tended to follow one of the following approaches to resolving constitutional issues:

1) Amending the constitution.

2) The interpretative approach.

3) Leave the issue for the future, where it is considered highly unlikely to have any real application due to the particular constitutional arrangement of that State.

1) Amendment

Only a small number of countries felt it was necessary to amend their Constitution, in order to ensure full compliance with their obligations under the Rome Statute. If a State needs to amend its Constitution, it may be possible to accomplish this with a simple amendment that addresses a number of different issues at the same time. For example, the Constitutional Council of France identified three potential areas of conflict between the Rome Statute and the French Constitution. The French Government decided to adopt the following constitutional provision, which addressed all three areas of conflict: "The Republic may recognise the jurisdiction of the International Criminal Court as provided by the treaty signed on 18 July 1998" (article 53-2, Constitutional Law No. 99-568). The advantage of this type of constitutional reform is that it implicitly amended the constitutional provisions in question, without opening an extensive public debate on the merits of the provisions themselves.

2) Interpretive approach

Most States have preferred the interpretative approach, which involves a decision or a recommendation by the relevant national authority that a particular interpretation of the Constitution would avoid the necessity of amending the Constitution, despite what the wording of the Constitution would seem to mean at face value. Sometimes the decision or recommendation has been made by a Constitutional Court, sometimes by a parliamentary body, where the legislature is involved in making the decision whether or not to ratify.

In general terms, the fundamental principles underlying the Rome Statute are consistent with those of most Constitutions of the world. This is partly why so many States have become Parties to the Statute in such a short period. For example, the Ecuadorian Constitutional Tribunal's Opinion on the Compatibility of the Rome Statute with its National Constitution concluded: "The object and purpose of the Rome Statute is the protection of human rights, as the codification of the serious crimes under its jurisdiction and the Court's mandate to bring those responsible to justice seeks to safeguard the rights of all people; That the ICC has been created to uphold peace and security in the international community at large and that the crimes under its jurisdiction are regarded as the most egregious under international law and also under the national law of the State; That

the rights of the alleged perpetrators are fully guaranteed by the procedural norms of the Court, whose Statute includes universal principles of criminal procedure; These objectives – conveyed in principles, values, and norms – are also found in the Constitution and in the judicial order of Ecuador." (unofficial translation prepared by Human Rights Watch, February 2001).

The interpretive approach to resolving constitutional issues suggests that if someone takes action contrary to these shared, fundamental principles, thereby breaching the State's Rome Statute obligations, the national Constitution should not protect or apply to that person. For example, several European States have found it unnecessary to amend constitutional provisions on the immunity of their Head of State. One of the reasons cited was that any Head of State who commits one of the crimes within the ICC's jurisdiction would place themselves outside of the Constitution (Norway was the first State to take this approach).

4) Leave the constitutional issue for the future

This is the least desirable option, as it does not guarantee that the State will be in a position to assist the Court when requested. Nevertheless, a small number of States have decided that this is their only option, in order to become a Party to the Rome Statute. In some States, due to their particular constitutional arrangements, an amendment to the Constitution would be an extraordinarily lengthy and complex process, with no guarantee of success. In Australia, for example, constitutional amendment requires a national referendum to be held, and a positive vote by a majority of voters in a majority of States – even with broad political support for the amendment, and a positive campaign over several years by all political parties, it is highly unusual for such referenda in Australia to be successful. Most of the States in this category also have no mechanism that would allow them to take the interpretive approach to resolving the constitutional issue in question.

In general terms, the decision of these States not to amend their Constitution was also based upon the following considerations: (i) the constitutional issue in question was highly theoretical, requiring a number of highly unlikely events to take place, before it could possibly become a real issue in practice; (ii) if the State were to find itself in that highly unlikely situation, there would have been already a complete collapse of the constitutional order, such that the Constitution would no longer applies, anyway.

Absence of immunity for Heads of State

Description

Under many Constitutions, Heads of State enjoy immunity from criminal prosecution, in order to avoid politically motivated attempts to destabilise the State. At the same time, some modern Heads of State, especially constitutional monarchs, do not have any effective authority, especially over the armed forces, but serve a symbolic function only. Sometimes Head of State immunity comes with exceptions, such as only protecting the Heads of State while holding office. Some constitutions also protect members of government and government officials. Under article 27, Rome Statute, a Head of State or other official who

commits a crime within the jurisdiction of the ICC will lose his or her immunity and can be prosecuted by the ICC. The provisions of the Statute are applicable to everyone regardless of any distinction based on official capacity. The International Court of Justice explicitly recognised the legitimacy of article 27, in the Yerodia case (Democratic Republic of Congo vs. Belgium), when distinguishing the ICC from national courts asserting universal jurisdiction.

The idea of an absence of immunity for Heads of State accused of international crimes is not new. The existence of this rule was recognised following the First World War in the Treaty of Versailles, after the Second World War in the Charter of the Nuremberg Tribunal, in the Genocide Convention, by the International Law Commission, and in the Statutes of ICTY/R.

Article 27 confirms the rule that individuals cannot absolve themselves of criminal responsibility by alleging that an international crime was committed by a State or in the name of a State, because in conferring this mandate upon themselves, they are exceeding the powers recognised by international law. With respect to immunity for former Heads of State for crimes committed while they were in power, the United Kingdom's House of Lords ruled that Senator Augusto Pinochet was not entitled to immunity in any form for the acts of torture committed under his orders when he was Chile's Head of State. The House indicated that because the alleged acts of torture could not be considered as constituting part of the functions of a Head of State, these acts were not protected by any immunity (*R.* v. *Ex p Pinochet Ugarte (No 3)* [1999] 2 All.E.R. 97).

States Parties to the Rome Statute need not eliminate all existing forms of immunity for their representatives. The Statute simply obliges them to provide an exception to the general rule, if they have not already done so.

Obligations

When the ICC requests that a State Party surrender its Head of State or other official because he or she is accused of one of the crimes listed under the Statute, the State in question will not be able to invoke any immunities under national law as a reason for refusal to deliver that person. The State must surrender the person to the ICC, in accordance with articles 59 & 89.

Implementation

Some States have introduced an amendment in their general ICC implementing law that disallows any immunity as grounds for refusing to surrender someone to the ICC (for example, see the Canadian and New Zealand ICC legislation (CA(E) s 6.1, NZ s.31)). However, where there is concern about inconsistencies between the Rome Statute and national constitutions, States have taken a number of approaches. In general terms, they have followed one of the three main approaches listed above:

1) Amending the constitution (for example, see Frances, Ireland, Portugal, and a number of Latin American countries).

2) The interpretative approach (for example, see a number of European States, Cambodia).

3) Leave the issue for the future, where it is considered highly unlikely to have any real application (for example, see the United Kingdom, Greece, and Australia).

a) Amendments to the constitution

Where Constitutions provide for absolute immunity for any State official, article 27 may necessitate constitutional or legislative amendments for States Parties. They may need to establish an exception to this absolute immunity, for their Heads of State and any other officials that would otherwise be immune from criminal prosecution. This amendment could be minor, and may simply consist of the addition of a provision making an exception to the principle of immunity for the Head of State or other officials, should they commit one of the crimes listed under the Statute.

Approaches taken in amending the constitution can range from the straightforward to a more limited amendment. To ensure that States could prosecute domestically as well as cooperate with the Court, an effective amendment would specify that immunity does not apply to the crimes enumerated in the Rome Statute. A more limited constitutional amendment covers cooperation with the ICC. The French approach is an example of the limited amendment version. Following the French Constitutional Council's conclusion that ratification of the Rome Statute required a revision of the Constitution, the Constitution was subsequently amended by inserting a new article which provides that "the Republic may recognise the jurisdiction of the ICC as provided in the treaty signed on 18 July 1998". This would appear to allow France to cooperate with the Court but does not indicate that immunity is revoked with respect to domestic prosecutions of ICC crimes.

In Belgium, the Opinion of the Council of State concluded that the Constitution was inconsistent with the Rome Statute and suggested adding a new provision stating "the State adheres to the Statute of the International Criminal Court, done in Rome on the 17 July 1998". In Luxembourg, a new provision was added to the Constitution providing that "the provisions of the Constitution do not hinder the approval of the Statute and the performance of the obligations arising from the Statute according to the conditions provided therein". These amendments were sufficient to address any inconsistencies between article 27 and the Constitution.

b) The interpretative approach

Several European States, amongst others, have decided that they do not need to amend their constitutions, in order to provide for an exception to immunities under national law. They believe it is already implicit in their constitutions. If the unlikely situation arises where the ICC requests the surrender of an official, such as their Head of State, a purposive interpretation of the relevant constitutional provision would allow for that official to be surrendered, given that the purpose of the ICC is to combat impunity for "the most serious

crimes of concern to the international community as a whole". If a State official commits such a crime, this would probably violate the underlying principles of any Constitution. Therefore, other States may be able to surrender State officials to the ICC, notwithstanding the protection that their Constitutions may appear to offer to the official under normal circumstances.

Immunities that are subject to waiver or impeachment proceedings in the Constitutions can be interpreted to comply with the Rome Statute. The reason for this is that the Constitution provides a mechanism necessary to cooperate fully with the Court, provided the Constitutional device of waiver or impeachment is used when the ICC requests cooperation. Immunities for Heads of State not subject to waiver or impeachment but restricted to acts committed in the exercise of their duties, allows for easy interpretation, since committing an ICC crime is clearly not the "duty" of anyone. The more difficult scenario is when Heads of State have absolute immunity. Below are some examples of interpretations that address this kind of immunity.

In Cambodia, the Constitution provides the King absolute immunity from prosecution, even though he has some real powers should Cambodia be invaded and have to defend itself militarily. The "interpretative approach" of the parliamentary Commissions on Legislation effectively concluded that if the King commits one of the ICC crimes, he would be acting against international law, not national laws. Since the Constitution is a national law, operating in a separate sphere from international law, then the King can only be prosecuted by the ICC, therefore there was no need to remove his immunity under the Constitution. Now that Cambodia is in the process of implementing the ICC crimes into national law, this interpretation may need to be adjusted.

The Spanish Council of State's opinion on the King's inviolability was that if the King was relieved of responsibility, then all public acts done by him had to be countersigned. It would be the countersigning official who would bear individual penal responsibility. In Ukraine, the Opinion of the Constitutional Court concluded that the Rome Statute was not contrary to the immunities granted by the Constitution since the crimes subject to the jurisdiction of the ICC were crimes under international law recognised by customary international law or by other international treaties binding on Ukraine. The immunities granted by the Constitution were only applicable before national jurisdictions and did not constitute obstacles to the jurisdiction of the ICC. Regarding the Norwegian King's immunity, the government of Norway determined that the Rome Statute does not create an obligation to prosecute the King before domestic courts. However, where the King may be subject to the jurisdiction of the ICC, the opinion of the government is that it is highly unlikely that the King would be accused of such crimes as he has very limited constitutional powers. It further concludes that the Constitution must be interpreted in the light of the ideas and opinions prevalent in society, which includes the developments of international humanitarian law since the origin of the Constitution in 1814.

As one can see from the examples above, there are various bases for using the interpretative approach. One view is to see a Constitution as a living document that reflects the evolving times and interprets the language in a broad and liberal manner. Another view is

to interpret the Constitution looking at the object and purpose of the document, which are often based on human rights principles. This view recognises the consistency between the values and objectives of the Rome Statute with those in national Constitutions. Another view is to see that interpretations of Constitutions are consistent with international law obligations, which would now include the Rome Statute. A State could also make provisions to ensure that its own courts can prosecute the Head of State for the commission of crimes within the jurisdiction of the ICC. The advantage of this approach is that, as a result of the principle of complementarity running through the Statute, the State would likely exercise jurisdiction in this matter.

c) Leave the issue for the future

In States where the possibility of a conflict between the Rome Statute and the national Constitution is considered quite remote, the State may be of the opinion to put the issue aside and live with the potential incompatibility for the purposes of ratification and implementation. And if such an issue would materialise in the future, to deal with it then. Several of the Constitutions in question contain symbolic references to previous power-sharing arrangements that remain an important part of the nation's history and culture, even after enactment of the Constitution, such as the constitutional monarch as the Head of State. In actuality, constitutional monarchs generally have no real, effective authority, unlike other Heads of State, despite the wording of the Constitution.

Whatever solution is adopted, immunity should no longer be absolute and should not prevent the ICC from prosecuting the perpetrators of the international crimes listed under the Statute.

No statute of limitations

Description

The ICC may not investigate and try crimes that are committed before the Statute enters into force. However, with respect to conduct occurring after the Statute enters into force, perpetrators of crimes covered by the Statute can still be prosecuted and punished by the ICC regardless of the number of years that have elapsed between the crime's commission and the indictment (article 29). In other words, the crimes within the jurisdiction of the ICC will not be subject to any statute of limitations.

The non-applicability of statutory limitations to ICC crimes should not normally pose constitutional problems, because constitutions usually do not contain such provisions. However, even in the absence of such a provision, there is a possibility of constitutional issues arising. For example, the French Constitutional Council found that the Rome Statute conflicted with the French Constitution by encroaching on the exercise of national sovereignty, by depriving France of its power to decide against prosecuting individuals under its authority who had committed an international crime thirty years earlier. Thus, France had to amend its Constitution, to ensure that it could meet its obligation to surrender in every case.

Obligations

States must ensure that persons may be surrendered to the ICC, even when statutory limitations would normally apply under national legislation to the crime for which they are being charged.

Implementation

States may wish to follow the example of France, by making a general amendment to their constitution that allows them to co-operate with the ICC in all situations. Or they may wish to introduce a more specific amendment, providing that their statute of limitations or other similar restrictions, do not apply to prevent the surrender of persons to the ICC.

Alternatively, these States can decide to amend their laws, specifying that no international crimes should be subject to a statute of limitations. This is the best solution if the State Party itself intends to prosecute all cases of international crimes involving perpetrators under their authority. It is also in conformity with the spirit of the *International Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, which was adopted by the General Assembly in 1968.

In all situations, legislation to implement the Statute must include the possibility of surrendering an accused person to the ICC, even if the crime of which they are accused is subject to a statute of limitations under national law.

The surrender by a State of its own nationals

Description

The ICC will sometimes request that a State Party surrender one of its nationals, where that person is suspected of having committed a crime within the jurisdiction of the Court. However, this may pose difficulties for States where their constitution expressly prohibits them from extraditing their nationals, and it may require creative solutions. Such States should take into account the "distinct nature of the Court" (article 91, paragraph (2), subparagraph (c)) when deciding how best to ensure that the nationality of the requested person does not affect surrender to the ICC.

The Rome Statute is careful to distinguish "surrender" from "extradition". Article 102 defines surrender to mean the delivering up of a person by a State to the Court, while extradition means the delivering up of a person by one State to another as provided by treaty, convention or national legislation. While constitutional provisions against extradition of a State's own national vary, a common underlying assumption for such a provision is that a fairer trial will be found in domestic rather than foreign courts. Also, domestic courts are considered a more appropriate forum due to the accused's cultural background, local deterrence objectives and State's responsibility to prosecute its own criminals. However, the ICC is not a "foreign" court, in the usual sense. Its jurisdiction and procedures have been negotiated by representatives from almost every nation, and most States Parties to the Rome Statute were actively involved in negotiating the Statute. Therefore, it repre-

sents their national concerns, as well as the concerns of the international community as a whole, and should not be viewed as a "foreign" tribunal.

Obligations

A State Party to the Statute cannot invoke any grounds for refusal to surrender based on the nationality of the accused, or a constitutional provision that prohibits them from extraditing nationals. When, in conformity with the Statute's provisions, and observing the principle of complementarity, the ICC requests that a State surrenders one of its nationals, every State Party is obliged to comply with this request.

Implementation

For many States, the possibility of surrendering nationals to the ICC does not necessitate adoption of any particular legislative measure other than one that would provide for the surrender of any person to the ICC. However, some States have a Constitution that expressly prohibits extradition of nationals. These States have a choice between two options:

a) Amend the constitution

The amendment could be minor, aimed only at including an exception to the principle, to ensure that the Constitution would not be breached by the surrender of a national to the ICC. The advantage of a constitutional amendment with a specific reference to the ICC is that it erases any possibility of normative conflict at the national level. It constitutes an assurance that national courts will render judgments in conformity with legal obligations issuing from the Rome Statute, despite possible hesitation in surrendering a citizen to another judicial system.

In Germany, a proposed amendment to its Constitution relating to extradition of nationals is " a regulation in derogation of this may be made by statute for extradition to a member State of the EU or an international criminal court". This sort of approach is generally taken where States have relatively straightforward procedures for amending their Constitutions.

b) Interpretative approach

One view of interpreting the constitutional prohibition against extradition of a State's own national is that such provisions should be read in conformity with international law. International law includes the Rome Statute that distinguishes surrender from extradition. Some States have already followed this approach in their cooperation legislation with the ICTY and ICTR. The Rome Statute also enshrines international human rights standards, such as the right to a fair trial to the accused. Also the Court, being negotiating and financially supported by the States Parties, is not the same as another State. Another view is to see the ICC not as a foreign court or foreign jurisdiction but as an extension of domestic jurisdiction.

Some examples of the interpretative approach include Costa Rica. Their Constitutional Court was of the opinion that the guarantee under its Constitution that no Costa Rican may be compelled to abandon the national territory was not absolute. In the spirit of the

Constitution, the recognition of this guarantee should be compatible with the development of international humanitarian law, which includes the Rome Statute. In Ecuador, the Constitutional Court was of the opinion that the Constitution's prohibition of extradition of nationals is not inconsistent with the Rome Statute. The Court reasoned that the main objective of that provision was the protection of the accused and since the ICC is an international tribunal that represents the international community and is established with the consent of Ecuador, protection of the accused is ensured. The Ukraine Constitutional Court's opinion that there is no inconsistency between its Constitution and the Rome Statute bases this on the distinction between "surrender" and "extradition".

This interpretative approach can be reconfirmed in establishing clearly, in the act implementing the Statute, the distinction between extraditing a person to another State and surrendering a person to the ICC, which would allow them to surrender nationals to the ICC even though there is a restriction on "extraditing" nationals to tribunals outside the State. This would allow them to maintain the prohibition on extraditing a person to a foreign tribunal, while not interfering with their ability to co-operate fully with the ICC. The advantage of this approach is that it avoids the need for constitutional reform and, in conformity with the Statute, it establishes simplified procedures with respect to the surrender of an accused person to the ICC. It also recognises the distinct nature of the ICC's jurisdiction, which cannot be considered as a foreign jurisdiction, and provides more efficient procedures for co-operation.

The sentence of life imprisonment

Description

Article 77, paragraph (1), subparagraph (b) empowers the ICC to impose a sentence of life imprisonment, but only when justified by the extreme gravity of the crime and the individual circumstances of the convicted person. Otherwise the maximum penalty for offences under the Rome Statute is 30 years imprisonment. Some constitutions may prohibit life imprisonment, or 30 year terms of imprisonment, on the grounds that they do not provide any opportunity for rehabilitation, or that they are disproportionate to the nature of the crime. It would be hard to argue that lengthy periods of imprisonment are disproportionate to most of the crimes within the jurisdiction of the ICC, particularly when a life sentence must be justified by "the extreme gravity of the crime". Such a sentence will only be imposed upon those holding the highest degree of responsibility in the commission of the most serious crimes, such as genocide.

Provision for rehabilitation under the Rome Statute

Furthermore, the Rome Statute does in fact provide for the possibility of rehabilitation. Under article 110, paragraph (3), the Court must review all sentences of imprisonment after the person has served two thirds of the sentence, or 25 years in the case of a life sentence, to determine whether the person's sentence should be reduced. At that stage, the Court will consider such matters as whether the person has assisted the Court in locating any assets that are subject to fine, forfeiture or reparation orders, which can be used for the benefit of

victims (article 110, paragraph (4), subparagraph (b)). The Court may also consider any "other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence" (article 110, paragraph (4), subparagraph (c)). Therefore, a life sentence may be reduced to 25 years in some cases. If the Court decides not to reduce the person's sentence after the first review, the Statute requires the Court to continue to review the question of reduction of sentence in accordance with provisions in the Rules of Procedure and Evidence which incorporates the principle of rehabilitation in the criteria the Court shall apply in reviewing a sentence (article 110, paragraph (5) and Rules 223 and 224).

During negotiations on the penalties for the ICC, many States were in favour of applying the death penalty in the most extreme cases. The number of States with the death penalty is only slightly fewer than those that do not have a death penalty. There is no opportunity for rehabilitation whatsoever where the death penalty is imposed. Thus a life sentence with a possibility of reduction to 25 years is a reasonable compromise between the death penalty and a maximum prison sentence of 30 years. States should also remember that article 80 specifically states that the Statute does not affect the application by States of penalties prescribed by their national law, nor does it affect the law of States which do not provide for penalties prescribed in the Statute. States Parties do not have to adopt the same penalties for similar offences in their jurisdiction, nor will they be required to enforce any sentences of imprisonment unless they volunteer to do so. At that stage, they may also specify conditions on the acceptance of sentenced persons, including a condition that they do not have to enforce a sentence of life imprisonment (article 106, paragraph (2)). Therefore, States Parties with constitutional provisions prohibiting the imposition of a life sentence may only need to make an exception allowing them to surrender persons to the ICC, despite the fact that such persons may be sentenced to life imprisonment.

Obligations

States Parties to the Statute are required to surrender an accused to the ICC when requested, even if this person may be sentenced to life imprisonment.

In keeping with article 80 and the principle of complementarity, however, when States Parties are themselves prosecuting the perpetrator of a crime listed under the Statute, they are not obliged to impose a life sentence.

Implementation

For many States, the power of the ICC to impose a life sentence will not necessitate the adoption of any particular legislative measures. However, some States have a Constitution that explicitly prohibits the extradition of a person to a State where this sentence is imposed, or that declares that a life sentence constitutes cruel punishment. These States have the choice between two options:

a) Amend the constitution

The amendment could be minor, aiming only to include an exception to the constitutional principle. It could specify that a life sentence imposed by the ICC in conformity with the Rome Statute for one of the crimes listed under the Statute is not in violation of the Constitution. It should also mention that the State can surrender an accused person to the ICC despite the possibility of the life sentence being imposed. The constitutional amendment could also make mention of the fact that the ICC may reduce the sentence after 25 years, so there is a possibility for rehabilitation.

The advantage of a constitutional amendment that refers specifically to the ICC is that it erases any possibility of normative conflict. It ensures that national courts will make rulings in conformity with the legal obligations issuing from the Rome Statute.

b) Interpretive approach: Establish clearly, in the Act implementing the Statute, the distinction between extraditing a person to another State and surrendering a person to the ICC.

Some States may be able to make a distinction in their laws between extraditing a person to another State and surrendering a person to the ICC, which would allow them to surrender persons to the ICC even though there is a restriction on "extraditing" persons to tribunals that impose sentences of life imprisonment. This would allow them to maintain the prohibition on extraditing a person to some foreign tribunals, while not interfering with their ability to co-operate fully with the ICC.

A number of opinions by Constitutional Courts in various States, including Spain, Costa Rica, Ecuador and Ukraine, have interpreted the provision which prohibits life sentences or state that the main objective of the penal system are education and training to be consistent with the Rome Statute. The mean reason is that this would not preclude the application of the penalties prescribed by national law to domestic prosecutions of ICC crimes. Also, since the Statute allows for an automatic review of sentences, the sentence imposed would not be, in practice, life or indefinite sentences. The Rome Statute is also to consider treaties, principles and norms of applicable international law and interpret the Statute accordingly. The International Covenant on Civil and Political Rights establishes the principle that the main objective of a penitentiary system is the rehabilitation of convicted persons.

The right to trial by jury

Description

Some constitutions provide for the right to trial by jury. Under article 39, paragraph (2), subparagraph (b), persons appearing before the ICC will be tried by a three-judge Trial Chamber. The ICTY/R function in the same way. Constitutional problems should not result, however, because generally speaking this right does not apply with respect to extradition to a foreign jurisdiction. For example, in *Reid v. Covert* (354 U.S. 1, 6 1957), the United States Supreme Court found that the right to trial by jury should not be interpreted in such a way as to prevent the extradition of an American citizen to face trial in another jurisdiction. An individual may have the right to be judged by a jury before judicial au-

thorities of their own State, but may not necessarily enjoy this right in other jurisdictions. This rule should be applied in the case of the ICC, because it does not constitute a foreign jurisdiction, but is rather an international jurisdiction that the States Parties have decided to vest with specific powers. Moreover, the guarantees of judicial independence and competency provided by the Rome Statute are sufficient to guarantee an accused person a fair trial despite the absence of a jury.

Obligations

States Parties to the Statute must be able to surrender a person to the ICC when requested, in conformity with the provisions of the Statute, even though the person may have a constitutional right to a trial by jury.

Implementation

States Parties may need to review their constitutions and existing jurisprudence on the right to trial by jury, to ensure that this would not create a barrier to surrender to the ICC. For example, they may find that the right only applies when nationals are being tried by State courts. If an amendment to the constitution is required, this could simply provide that surrender to the ICC is an exception to the usual principle that every citizen of that State must be tried by a jury.

Powers of investigation of the Prosecutor on the territory of a State Party

Description

Article 54, paragraph (2) opens the possibility that the Prosecutor might conduct investigations in the territory of any State Party. This provision and others in the Rome Statute mean that certain powers are ceded to international actors and to international procedures. Certain of these powers of investigation of the Prosecutor on the territory of States Parties may raise some issues of concern for States in relation to their Constitutions. Article 57, paragraph (3) allows the Prosecutor to take investigative steps within the territory of a State Party when, in the opinion of the Pre-trial Chamber, the State is clearly unable to execute a request for cooperation. Article 99, paragraph (4) allows the ICC Prosecutor to go on State's Parties territories in order to conduct site investigations and gather depositions from witnesses, after consulting with the State in question and subject to any conditions the State may impose, in most cases. It also allows the Prosecutor to carry out an investigation without the presence of the authorities of the requested State Party, in certain limited circumstances. Note that the provisions regarding restrictions on disclosure of confidential information connected with national security apply to the execution of requests for assistance under article 99 of the Rome Statute.

Article 99 has caused constitutional difficulties for some States Parties. For example, in France, the Constitutional Council expressed concern that article 99 allows the ICC Prosecutor to affect the conditions for the exercise of national sovereignty. This power contradicted the rule giving French judicial authorities sole responsibility to perform ac-

tions requested in the name of legal cooperation by a foreign authority. In order to surmount this obstacle, the French government added a provision to its Constitution addressing the issue of unconstitutionality and thereby allowing implicit constitutional reform on the concern raised in the context of article 99.

Obligations

States Parties to the Statute must allow the Prosecutor the power of investigation on their territories, in accordance with the procedures under the Rome Statute (article 54, paragraph (2), article 57, paragraph (3) and article 99, paragraph (4)).

Implementation

A number of States have reviewed their Constitutions to determine inconsistencies with the Rome Statute. For example, the French Constitutional Council is of the opinion that when the ICC Prosecutor is on a State's territory following a determination by the Pre-trial Chamber that the State is unable to execute a request for cooperation, this does not infringe the exercise of national sovereignty. In the same opinion, the Council concluded that the powers of investigation for Prosecutors under article 99, paragraph (4) were incompatible with the exercise of national sovereignty to the extent that the investigations may be carried out without the presence of French judicial authorities, even in the absence of circumstances justifying such steps. In this matter, the French Constitution was amended. However, the Luxembourg Council of States had a different opinion. They found that given the Prosecutor's power to investigate was based on consultations with the State concerned and concerned particular interviews of persons on a voluntary basis, there was no incompatibility between Luxembourg's Constitution and the Rome Statute. In Spain, the interpretative approach considered that the powers of the Prosecutor were of the competence of national judicial authorities and therefore the transfer of those powers to an international court is permitted under it's Constitution. The opinion of the Ecuadorian Court is that while the powers of investigation of the Prosecutor may be seen to encroach on the powers of the Public Minister, they considered the Prosecutor's investigation powers as a form of international judicial cooperation.

Complementary jurisdiction of the ICC

Description

The "complementary" jurisdiction of the ICC is established by article 1, Rome Statute, and is also referred to specifically in Preambular paragraph 10, as one of the guiding principles of the Statute. Under the "principle of complementarity", the ICC will generally defer to national criminal jurisdictions that may wish to investigate and prosecute cases also within the jurisdiction of the ICC. This principle recognises the primary responsibility and duty of every State "to exercise its jurisdiction over those responsible for international crimes" (Preambular paragraph 6). At the same time, the ICC may also admit cases where the State is "unwilling or unable genuinely to carry out the investigation or prosecution" (articles 17 and 19). The circumstances where this situation may arise include the collapse of the State,

or where a State is deliberately shielding a person from criminal responsibility for ICC crimes. They may also arise where there is an agreement to "share" prosecutions between the ICC and national courts, to make the workload on the ICC less, as happened in Rwanda. All of these issues are discussed in further detail in Chapter 4 "The Complementary Jurisdiction of the ICC".

Implementation

Some States, such as France and Spain, examined the complementarity provisions of the Rome Statute and whether such provisions are consistent with its Constitution. France considered that the restriction on the principle of complementarity, in the case where a State deliberately evaded its obligation, was derived from the rule pacta sunt servanda (a treaty is binding on the parties and must be executed in good faith) and was clear and well defined. Therefore such limitations did not infringe on national sovereignty. The Spanish Council of States was of the opinion that the Constitution implicitly recognises the existence of a jurisdiction superior to that of Spanish jurisdictional organs. Other States, such as the Ukraine considered that the provision in its Constitution regarding the exclusive competence of the courts and judges could not be delegated to a jurisdiction supplementary to the national system and would therefore have to be amended.

Ne bis in idem

Description

Article 20, paragraph (3) of the Rome Statute permits in certain circumstances that a person tried before a national court be re-tried before the ICC. These circumstances include when the previous proceeding was for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court or otherwise were not conducted independently or impartially in accordance with the norms of due process recognised by international law and were conducted in a manner which, in circumstances, were inconsistent with an intent to bring the person concerned to justice. This provides a very limited exception to the principle of "ne bis in idem", which is protected, either expressly or implicitly, under a number of States' Constitutions.

Article 108, paragraph (1) also provides that a person sentenced by the ICC, who is in the custody of the State of enforcement, shall not be subject to prosecution or punishment or to extradition to a third State for any conduct engaged in prior to that person's delivery to the State of enforcement, unless such prosecution, punishment or extradition has been approved by the Court at the request of the State of enforcement. Some States have interpreted this provision to mean that the Court is effectively removing the right of the State to investigate and prosecute that person, even though the State may be trying to violate the principle of "ne bis in idem" in some ways.

Obligations

States Parties to the Statute must be able to surrender a person to the ICC when requested, in conformity with the provisions of the Statute, even though the person may have been tried before a national court (articles 59 and 89).

Implementation

Ecuador considered that the Rome Statute respects the principle of "ne bis in idem" along with the goal of avoiding impunity. Since an accused who has been tried according to the rules of due process will only be tried a second time by the ICC in exceptional cases, as provided for in article 20, the Ecuadorian Constitutional Court concluded that this did not contradict the constitutional principle of "ne bis in idem". The situations in which the Court could retry a case will be rare because the exceptions would not arise in any democratic State that upholds the rule of law with an independent and impartial judicial system that applies the basic guarantees of due process.

Belgian's opinion is that article 108 was to be construed as subjecting the prosecution and conviction of persons already convicted by the ICC for offences committed before their trial to the approval of the ICC. That provision would be contrary to the principle of independence of justice under article 14 of the International Covenant of Civil and Political Rights and with the Belgian Constitution. In the Spanish Constitution, the right to effective judicial protection for the exercise of their rights and legitimate interests is considered not only limited to the protection given by Spanish courts but also extends to international ones that are recognised by Spain. However, the Spanish Council's opinion is that the transfer of judicial competence to the ICC enables the ICC to modify the decisions of Spanish courts without infringing the constitutional right to judicial protection.

3.6 Responding to a Request From the ICC to Arrest a Person

Overview of arrest procedures

There are three means by which the ICC can seek to have a person suspected of committing a crime brought before the Court:

1. Issuing an arrest warrant in accordance with articles 58, 89, & 91;

2. Issuing a provisional arrest warrant in accordance with article 58, paragraph (5) and article 92, in urgent cases where the required supporting documentation is not yet available; and

3. Issuing a summons in accordance with article 58, paragraph (7), where the Pre-Trial Chamber is satisfied that a summons is sufficient to ensure the person's appearance.

States are required to respond promptly to all requests to execute such warrants and to serve such summons in their territory (article 59, paragraph (1), and article 89).

The contents of requests for arrest and surrender are outlined in article 91. These include information describing the person sought and their probable whereabouts, plus a copy of the warrant of arrest. In addition, States can specify other documents and information that they require for their national laws, as long as these requirements are not more burdensome than the State's requirements for meeting a request for extradition from another State (article 91, paragraph (2)).

Once a person has been arrested by the State, they must be brought before a competent judicial authority and provided the opportunity to apply for interim release pending surrender (article 59, paragraphs (2)-(6)). The judicial authority will then order the person to be surrendered to the ICC, in most cases (article 59, paragraph (7)). See the section "Surrendering a person to the ICC" for details and exceptions.

Persons who are the subject of an ICC warrant have various rights, which must be respected by the relevant State authorities (article 55). In some circumstances, once a warrant has been issued by the ICC, States may be required to take protective measures for the purpose of forfeiture (article 57, paragraph (3), subparagraph (e)). This may include identifying, tracing, freezing, or seizing proceeds, property, assets, and instrumentalities of crime.

If the Pre-Trial Chamber decides to issue a summons instead of a warrant, it may attach certain conditions to that summons, if provided for by national law (article 58, paragraph (7)).

Issue and execution of warrants of arrest

Description

The Pre-Trial Chamber of the ICC can issue warrants for arrest, at the request of the ICC Prosecutor (articles 57, paragraph (3), subparagraph (a) and article 58). The details of the preconditions and content of such warrants are set out in article 58, paragraphs (1)-(3). All such warrants of arrest remain in effect until otherwise ordered by the Court (article 58, paragraph (4)).

Once the warrant has been issued by the Pre-Trial Chamber, the Court may then request the State to execute the warrant in accordance with the relevant provisions of Part 9 (article 58, paragraph (5)). In most cases, all requests for arrest and surrender must be in writing and supported by certain information, documents, and statements, as set out in article 91. Such information will include the probable location of the person (article 91, paragraph (2), subparagraph (a)). In urgent cases, the Court can make requests via any medium capable of delivering a written record, such as by facsimile, as long as the request is also confirmed via the usual channel for requests (article 91, paragraph (2), subparagraph (a)).

The Court can also request States to provide it with information as to the requirements under national law for supporting documentation and States are required to consult with the Court if such a request is made (article 91, paragraph (4)). Note that the requirements under national law should, if possible, be less burdensome than those applicable to requests

for extradition, given the distinct nature and purpose of the ICC (article 91, paragraph (2), subparagraph (c)). This latter point is discussed in more detail in the section "Surrendering a person to the ICC".

The requested State must "immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9" (article 59, paragraph (1)). Note that article 66 requires that the person be presumed innocent until proved guilty before the Court in accordance with the applicable law.

Provisional arrest

When the Court has already issued a warrant of arrest in accordance with article 58 but does not have the required documentation available to support a request to a State for arrest and surrender, article 58, paragraph (5) and article 92 allow the Court to request a State to provisionally arrest the person who is the subject of the warrant. Such a request for provisional arrest is only to be used in urgent cases (article 92, paragraph (1)). This request need not be in writing, but can be communicated by any medium capable of delivering a written record, such as email (article 92, paragraph (2)). The requirements of the request are outlined in article 91, paragraph (2), subparagraphs (a)-(d). States are then required to execute the request immediately (article 59, paragraph (1)).

If the required documentation to support the request for arrest and surrender does not reach the State within 60 days from the date of the provisional arrest, then the person may be released from custody (article 92, paragraph (3) and rule 188). However, once the documents do arrive, States must immediately re-arrest the person (article 92, paragraph (4)). Note that the person can voluntarily consent to being surrendered to the Court even if the State has not received the required supporting documentation, if this is permitted by the law of the requested State. In that case, the requested State must surrender the person to the Court as soon as possible (article 92, paragraph (3)).

Note also that a State Party may be requested to help the Prosecutor to prevent certain persons from absconding, pending a decision on the admissibility of a case under article 19, where a warrant of arrest has already been issued (article 19, paragraph (8), subparagraph (c)).

Obligations

(a) States Parties must take immediate steps to respond to requests from the ICC for the execution of arrest warrants, including provisional arrest warrants (article 59). This obligation also applies to warrants that are issued subsequently for a person who was released from custody under article 92, paragraph (3) because the required documentation was not received within sufficient time of a provisional arrest (article 92, paragraph (4)).

(b) If the Court requests it, States Parties must inform the Court of any special requirements under their national laws for the contents of a request for arrest and surrender (article 91, paragraph (4)).

(c) All State officials and other authorities who come into contact with the person to be arrested, must presume that the person is innocent until proved guilty before the Court in accordance with the applicable law (article 66).

(d) If: (i) a person has been provisionally arrested and the time limit for receipt of the supporting documents has not yet expired; and (ii) the person who is the subject of the provisional arrest warrant voluntarily consents to be surrendered to the Court; and (iii) this is permitted by the law of the requested State; then (iv) the State must proceed to surrender the person to the Court as soon as possible (article 92, paragraph (3)).

(e) When requested, States must assist the ICC Prosecutor in preventing certain persons from absconding, pending a decision on the admissibility of a case under article 19, where a warrant of arrest has already been issued (article 19, paragraph (8), subparagraph (c)).

(f) States must take protective measures for the purpose of forfeiture when requested, after a warrant of arrest or a summons has been issued (articles 57, paragraph (3), subparagraph (e) and article 93, paragraph (1), subparagraph (k)).

Implementation

(a) Verification of requests

States Parties need a procedure for verifying the contents of requests for arrest and surrender from the ICC (in accordance with the requirements in article 91), and then passing the request on in obligatory form to the relevant authority. For example, States may wish to have a judicial officer verify the ICC request, and then issue their own warrant under State laws. This could help to minimise the number of amendments to national legislation on the execution of arrest warrants. However, States should ensure that any procedures do not unnecessarily delay the execution of the request from the ICC.

(b) National requirements

Any special requirements for requests under national law should be communicated to the Court as soon as possible after ratification of the Statute, to avoid any unnecessary delays at a later stage. These requirements are discussed in detail in the section "Surrendering a person to the ICC".

(c) Apprehension of suspects

Criminal laws and procedures are needed that allow the relevant people to apprehend, detain, arrest, and/or provisionally arrest both nationals and non-nationals for all crimes within the jurisdiction of the ICC. The Statute also refers to the need for observance of na-

tional laws, if these exist. In other words, States could grant this jurisdiction to their regular law enforcement officers, who would already be familiar with national laws.

Any such laws and procedures should allow for persons who are provisionally arrested (in accordance with article 92) to be released from custody, if the appropriate documents are not received from the ICC within a certain time limit (article 92, paragraph (3)), and then to arrest that person subsequently, once the documents arrive (article 92, paragraph (4)).

These laws and procedures should also state that the person who is to be arrested must be presumed innocent until proved guilty by the ICC, if the relevant legislation in the State does not already provide for this. The person should therefore be treated with consideration and respect, and not treated like a person who has already been convicted.

It is left to individual States Parties to determine which mechanisms will be used under domestic law to fulfil the obligations for arrest and provisional arrest of persons pursuant to articles 89 and 92. There are a variety of options for States as illustrated by approaches already taken by some States. One is to amend existing extradition legislation to allow for arrest, provisionally and otherwise, on the basis of ICC requests. For example, the Canadian ICC legislation provides that the procedure for arrest under the Canadian Extradition Act applies to ICC requests (CA ss. 47-53).

A number of States have created a separate scheme for surrender to the ICC which includes specific powers and procedures for arrest, provisionally and otherwise. Under the New Zealand scheme, for a straight arrest, the Minister approves and sends request and documents to a judge who then can issue a warrant (sets out two criteria) (NZ Part 4). For provisional arrests, the request goes directly to the judge and a notice goes to the Minister. In the United Kingdom, the ICC request is received by the Secretary of State who then transmits the request and accompanying documents to the appropriate judicial officer (UK Part 2). The judicial officers, when satisfied of the authenticity of the ICC request, are to endorse ICC warrants for execution in the United Kingdom. In cases of provisional warrants, the Secretary of State transmits the request to a constable or other official and directs them to apply to court for a warrant for the arrest of the person.

The Swiss law reflects a centralised model, which creates a Central Authority, administered through the Federal Office of Justice, to which all ICC requests for cooperation go through, including requests for arrests The content and documentation required by Swiss authorities for the execution of requests for arrest, provisional or otherwise, from the ICC are set out in detail in the implementing legislation (SW Chap 3).

(d) Voluntary surrender

If a State wishes to, and adequate national laws do not already exist, the State may need to draft new laws to allow for persons who are provisionally arrested to be voluntarily surrendered to the Court as soon as possible. Article 92, paragraph (3) allows for this to occur if the time period has not expired for delivery to the State of supporting documentation for a regular arrest warrant. However, the State need not impose such a restriction. In South Africa, the implementing legislation provides that where an inquiry is taking place to de-

termine whether the warrant applies to the person in question, whether his or her rights have been respected or whether the person has been arrested in accordance with the procedures laid down by domestic law, such inquiry could be dispensed with if the person concerned agrees in writing to his or her surrender to the Court (SA s. 10).

(e) Time in custody

States should also keep a record of any time that the person spends in custody, in order to be able to assist the Court with any future sentencing decisions if the person is convicted subsequently (article 78, paragraph (2) and article 86).

(f) Preventing persons from absconding

States need laws and procedures to prevent persons who are the subject of a warrant from absconding. For example, the legislation could provide that where the Prosecutor makes such a request, the appropriate national authorities have the right to take the person's passport away, or something similar. The laws and procedures should also allow the relevant law enforcement personnel to apprehend and detain the person, if necessary.

(g) Forfeiture

States that already have Proceeds of Crime legislation or its equivalent may only need to make minor amendments to this legislation, to allow the relevant authorities to identify, trace and freeze or seize the proceeds, property and assets and instrumentalities of crimes within the ICC's jurisdiction that are alleged to have been committed. This type of forfeiture must be without prejudice to the rights of bona fide third parties and it is ultimately for the benefit of victims of crimes within the jurisdiction of the ICC. Those States that do not have Proceeds of Crime legislation may need to make substantial revisions to their laws on criminal procedure, to allow the relevant authorities to have access to an accused person's property before conviction, on the basis of a warrant of arrest or a summons issued under article 58. There are other provisions in the Statute concerning forfeiture at later stages in the proceedings. So, States without the relevant legislation at present will also need to ensure that they have comprehensive laws and procedures that allow them to meet this obligation at all stages of an ICC proceeding. Note that the ICC will only seek the co-operation of States in this respect prior to conviction, "having due regard to the strength of the evidence and the rights of the parties concerned" (article 57, paragraph (3), subparagraphs (e)).

Rights of the person

Description

As mentioned previously, article 66 provides that everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law. Article 67 further provides that the accused is entitled to a fair hearing conducted impartially, in accordance with the guarantees set out in that article. In order that these procedural guarantees to the accused are respected and to ensure that the proceedings are not compromised, States

should respect the following rights of the person they are arresting, in accordance with article 55, paragraph (2):

(a) To be informed, prior to being questioned on any matter including as to the person's identity, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;

(b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;

(c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it;

(d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

These are the minimum rights under the Statute and States may of course provide more extensive rights to such persons. In addition, States Parties should take note of the following rights that are set out in article 55, paragraph (1) and apply to everyone involved in an ICC investigation:

"In respect of an investigation under the Statute:

(a) A person shall not be compelled to incriminate himself or herself or to confess guilt;

(b) A person shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;

(c) A person shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and

(d) A person shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in the Rome Statute.

In accordance with article 10 of the International Covenant on Civil and Political Rights (ICCPR), it would also be advisable to ensure that, if the person is to be detained prior to being brought before the competent judicial authority, the person be segregated from convicted persons and subject to separate treatment appropriate to their status as unconvicted persons, save in exceptional circumstances and where the person was already subject to detention as a convicted person. This is a right that is guaranteed to all persons under the ICCPR, which has received broad international support. Note also article 85, paragraph (1), which provides: "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." This refers to a right to compensation by the

ICC, but States may wish to make provision for such compensation at the national level as well.

Obligations

a) The rights in Article 55, paragraph (2) must be observed by States where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9. These rights must be communicated to the person prior to being questioned and they include: being informed that there are grounds to believe the person has committed an ICC crime; remaining silent without any inferences being drawn as to guilt or innocence; having legal assistance which must be free if the person cannot afford to pay for it; and having counsel present when being questioned.

b) At present there are differing views within the international community as to whether or not the rights set out in article 55, paragraph (1) create obligations for States. These rights are couched in obligatory terms, because the word "shall" is included. However, it is not clear from the Statute as to who has the obligation to protect the rights. The article provides, "In respect of an investigation under this Statute, a person shall not be compelled to incriminate himself or herself or to confess guilt", and so forth. It does not provide that "a State shall ensure that a person is not compelled to incriminate himself..."

Implementation

a) Recognition of rights

Practically speaking, it would be extremely prudent for States Parties to ensure that all of the rights under article 55, paragraphs (1) and (2) are accorded to persons who are to be arrested on behalf of the ICC, as well as any other rights that are usually accorded to persons who are arrested by national authorities. A "fair hearing conducted impartially" begins when the person is arrested. If they are compelled to incriminate themselves, either by force or otherwise, or they are asked questions in a language they do not understand, then any evidence that is gathered in such a manner and subsequently relied upon to convict the accused, would bring into question the fairness of any such trial.

These rights are all contained in the ICCPR as well, and many States believe that they represent the minimum required standards under international law for a fair trial. In addition, the ICC is intended to bring about justice, and the ill treatment of persons who may be innocent is not just.

States should also review existing legislation to ensure that it prevents anyone from inflicting torture or cruel, inhuman or degrading treatment or punishment on a person under investigation, in accordance with the ICCPR and the Convention Against Torture, which has also received broad support in the international community.

States may implement the obligation to ensure the rights of the accused person in a number of ways. Implementation can take place through using existing procedures, if the State is satisfied that practice is consistent with the rights enumerated in the Rome Statute. Another approach can be specific incorporation into the ICC legislative scheme. For example, the New Zealand ICC legislation provides that the issue of rights determined and dealt with as part of the test before the judge (NZ s. 43). In the United Kingdom, there is a mechanism to allow the violation of rights to be reported to the ICC (UK s. 5). In South Africa, the implementing legislation provides for the judicial authority power to hold an inquiry in order to establish whether the rights of the person, as contemplated in the South African Constitution, have been respected (SA s. 10).

b) Training and provision of relevant personnel

States Parties should train their law enforcement officials to observe these basic minimum standards, if they have not already. States also need to provide resources to pay for legal counsel, in case the person being questioned does not have sufficient means to pay for it. Note however that article 100, paragraph (1), subparagraph (b) provides that States may not have to pay for interpreting and translation services when executing a request from the Court.

c) Segregated prison accommodation and compensation

Optimally speaking, it would also be useful if States Parties could provide segregated prison accommodation for accused persons, unless the person is already in custody for another matter. Also optimally speaking, a scheme for compensating persons who are wrongfully detained or arrested by State authorities should be established by States Parties.

Hearing before a competent judicial authority

Description

Under article 59, paragraph (2), once a person is arrested, they must be brought promptly before the competent judicial authority in the custodial State. That authority will then determine the following, in accordance with the law of that State:

(a) The warrant applies to that person;

(b) The person has been arrested in accordance with the proper process; and

(c) The person's rights have been respected.

If the judicial authority believes that the warrant does not apply to that person, that the proper process was not followed, or that the person's rights were not respected, then it should consult with the ICC without delay (article 97).

If the person who is the subject of the arrest is already being investigated for the same offence by the State, then the State should notify the Court, in accordance with the procedures outlined above in the section "Procedures where the ICC wishes to investigate the same matter as a State". If the person who is the subject of the arrest is already being investigated, or serving a term of imprisonment, for a different offence, then the requested State is still obliged to grant the request for surrender, but must consult with the Court after making its decision to grant the request, in order to determine the most appropriate course of action (article 89, paragraph (4)).

Where the person has already been prosecuted for the same offence, or conduct that relates to that offence, then the procedures outlined in the section "Surrendering a person to the ICC" should be followed, in particular the component on *ne bis in idem* claims (article 20).

Obligations

a) Once a person is arrested, they must be brought promptly before the competent judicial authority in the custodial State to determine that the arrest was carried out in accordance with certain requirements and that the warrant applies to the person (article 59, paragraph (2)). However, the State authority cannot consider whether the ICC warrant was properly issued (article 59, paragraph (4)). The person can only make such a challenge before the ICC.

b) If the competent judicial authority perceives any difficulties or conflicts in meeting the request for surrender, it must consult with the Court (article 97).

c) If the arrested person is already being investigated by the requested State for the same offence, then the State should bring an admissibility challenge under articles 18 & 19, and seek to postpone execution of the request in accordance with article 95.

d) If the arrested person is already being investigated, or serving a term of imprisonment, for a different offence, then the requested State must consult with the Court, after granting the request for surrender (article 89, paragraph (4)).

Implementation

a) Time in custody

Many jurisdictions already require that a person may only be kept in custody for twenty four hours, and certainly no more than a few days, before they must be brought before a judicial authority to determine whether detention is still warranted. States Parties should ensure that persons are not kept in custody for lengthy periods awaiting a judicial hearing on the validity of the arrest.

b) Competent judicial authority

States Parties need to designate the appropriate level of judicial authority for assuming jurisdiction over such matters and grant that authority the relevant jurisdiction to order the

surrender of the person. The authority must then be required to make the determinations under article 59, paragraph (2), in accordance with article 59, paragraph (4).

In implementing this obligation to bring the accused person before the appropriate level of judicial authority, States have either chosen to implement through existing procedures and practice or by specifically incorporated into legislative scheme. Both the New Zealand and Australian legislation designate the appropriate judicial officer to deal with requests relating to arrest and surrender as the District Court or a magistrate in the State or Territory in which the arrest took place (NZ s. 43 and UK s. 5). The United Kingdom implementing legislation defines "competent court" as a court consisting of an appropriate judicial officer.

c) Duty to consult

Laws or procedures may be needed to enable or require the relevant authority to consult with the ICC wherever there are any concerns, problems, or conflicts in meeting the request for surrender. If the person is already a suspect or a prisoner, laws or procedures are needed to require the relevant authority to consult with the ICC. Any procedure must enable such consultations to take place on an expedited basis.

Interim release

Description

At the initial hearing before the State judicial authority, the arrested person is entitled to apply for interim release pending surrender (article 59, paragraph (3)). The ICC Pre-Trial Chamber must be notified of any requests for interim release and must make recommendations to the State authority, to which that authority must give "full consideration" before rendering its decision (article 59, paragraph (5)). Article 59, paragraph (4) sets out the other factors that the State authority must take into account when considering whether to grant interim release. It must consider the gravity of the alleged crimes, and whether "there are urgent and exceptional circumstances to justify interim release" and "necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the Court".

If the person is granted interim release, the Pre-Trial Chamber should be notified. It can then request periodic reports on the status of the interim release, which the custodial State must provide (article 59, paragraph (6) and article 86).

A record of the time spent in custody in the State should be created and maintained for the person at least until they are acquitted or convicted by the ICC. This will ensure that the ICC is able to take such a period of time into account for sentencing purposes, if the person is subsequently convicted by the ICC (article 78, paragraph (2)).

Obligations

a) Persons arrested subject to a warrant from the ICC must have the opportunity to exercise their right to request interim release pending surrender (article 59(3)). In some jurisdictions, this application would not be necessary, where the relevant authority is already obliged to determine whether the person should be detained or not, even if no application for release is made.

b) The competent authority in the requested State must consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the Court. However, it is not open to the competent authority of the requested State to consider whether the warrant of arrest was properly issued in accordance with the Rome Statute (article 59, paragraph (4)).

c) States must notify the ICC Pre-Trial Chamber of any requests for interim release and provide that the competent State authority gives full consideration to any recommendations of the Pre-Trial Chamber before rendering its decision (article 59, paragraph (5)).

d) If the person is granted interim release, States must respond to any requests made by the Pre-Trial Chamber for periodic reports on the status of the interim release (article 59, paragraph (6)).

Implementation

a) Interim release

Laws and procedures are needed to provide for the interim release of suspects, such as laws allowing for "bail" or sureties, or other measures restricting liberty. Laws are also needed to make sure that the State authority making the decision on whether to detain the person or not is required to take into account the matters outlined in article 59, paragraph (4) and any recommendations that the Pre-Trial Chamber makes on the issue, in accordance with article 59, paragraph (5).

The Rome Statute provides that the ICC can make recommendations for interim release, which must be considered by the national authorities. The effect of this is that there is an onus on the accused person to demonstrate why interim release should be allowed, which for many States may constitute a reversal of the normal position they have for interim release hearings. States have taken a number of approaches to ensure that they meet this obligation. Canada's approach is an example of amending the State's existing scheme for interim release to incorporate the reverse onus as well as providing a procedure for domestic courts to receive the ICC recommendations for their consideration (CA s. 50). In Canada, applications for judicial interim release must be adjourned at the request of the Attorney General of Canada in the event that recommendations from the ICC are pending. If recommendations are not received within 6 days of the adjournment, judges may proceed with the application.

Other States, such as New Zealand and United Kingdom, have incorporated provisions as part of a separate scheme (NZ s. 39-40 and UK s. 18). When establishing separate interim release regime, States need to address such issues as whether to set out a procedure or incorporate by reference to the Rome Statute, the powers of the court and conditions for interim release. In the United Kingdom, the Secretary of State must consult with the ICC on interim release applications and the domestic courts cannot grant interim release without the full consideration of any recommendations by the Court.

Swiss Law is an example of the centralised model, where the Central Authority makes determinations as to whether arrested persons remain in detention pending surrender or if interim release is justified (SW Chap 3). The decisions of the Central Authority for warrants for detention pending surrender may be appealed to the Federal Supreme Court within 10 days of the date the ruling is issued in writing.

b) Periodic reports on interim release

A procedure is needed to keep the Pre-Trial Chamber informed periodically on the status of the interim release, in accordance with article 59, paragraph (6). In other words, whoever grants interim release must communicate this to the relevant authority to pass on to the Pre-Trial Chamber, and then should set up a mechanism for periodic review of the interim release, or of the status of interim release, in order then to communicate this periodically to the Pre-Trial Chamber.

c) Records of time spent in custody

Persons in charge of detention facilities should be required to keep a special record of any persons who are detained in accordance with a warrant from the ICC, and to forward a copy of that record to the ICC when the person is surrendered to the ICC. This will assist the ICC in determining an appropriate sentence, should the person be convicted subsequently.

Issuing of a summons

Description

Article 58, paragraph (7) allows the Pre-Trial Chamber to issue a summons as an alternative to a warrant of arrest. Such a summons may be issued with or without conditions restricting liberty, other than detention, as long as these conditions are provided for by the law of the custodial State. For example, State laws may allow for the confiscation of the person's passport in such circumstances.

Subparagraphs (a)-(d) of article 58, paragraph (7) set out the required contents of the summons:

(a) The name of the person and any other relevant identifying information;

(b) The specified date on which the person is to appear;

(c) A specific reference to the crimes within the jurisdiction of the ICC which the person is alleged to have committed; and

(d) A concise statement of the facts which are alleged to constitute the crime.

States are required to serve such summons on the person.

Obligations

States must take responsibility for the service of a summons on the relevant person, when requested by the Court to do so (article 58, paragraph (7)).

Implementation

a) The ICC needs to know what "conditions restricting liberty (other than detention)" are allowable under a State's national law, when a person on the State's territory is summonsed to appear before the Court in a criminal matter.

b) Legislation and procedures may be needed to ensure service and execution of process within States Parties' jurisdictions, with respect to such summons.

c) Legislation and procedures may be needed to enable the relevant people to enforce the conditions that the ICC determines shall apply after it has consulted with the State, such as confiscation of the person's passport.

In the United Kingdom, when the Secretary of State receives from the ICC a summons to be served on a person in the State, he or she directs the chief officer of police for the area to have the document personally served (UK s. 31). The chief of police must keep record and inform when and how service was done or if not done and why. In Australia, the provisions relating to service of summons also includes other documents requested by the ICC to be served (AU Pt 4 Div 7). The documents must be served in accordance with any procedure specified in the request or if that procedure would be unlawful or inappropriate in Australia, or no procedure is specified, then it should be served in accordance with Australian law. In South African, the implementing legislation differentiates between the service of process or documents with a summons issued for attendance of any person in any proceeding before the Court (SA ss. 19-21). A summons is to be endorsed by a magistrate and therefore is then served as if it were a summons issued by the domestic courts. In Finland, the legislation provides that the Finnish authorities must take the necessary measures in order to facilitate the possibility of a witness, on whom a summons has been served, to comply with the summons (FI s. 5). In South Africa, the legislation expressly provides that non-compliance with a summons is an offence.

3.7 Surrendering a Person to the ICC

"Distinct nature" of the ICC

Description

Article 91, paragraph (2), subparagraph (c) requests States Parties to take into account "the distinct nature of the Court", when determining their requirements for the surrender process in their State. It further provides that "those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome". This wording was chosen to encourage States, if possible, to introduce a more streamlined process for surrendering persons to the ICC than their current process for State-to-State extradition.

The idea behind this is that there are often lengthy delays involved in current procedures for extradition of nationals from one State to another. This is understandable where there are differences in the criminal procedures and jurisprudence and standards of trial fairness between different jurisdictions, and States may need to protect their nationals from potential injustices. However, the ICC regime has been established by States Parties themselves. During the surrender of persons to the ICC, considerations relative to the impact of national values on the exercise of criminal law in different States need not be taken into account. These concerns do not arise in the same way with the ICC because it is not a foreign jurisdiction, as is the court of another State, and because most States participated in drafting the surrender provisions of the Rome Statute and the Rules of Procedure and Evidence. Thus every national will be treated according to the standards agreed to multilaterally in the drafting of these two documents.

The Statute defines "surrender" in article 102, paragraph (a) as "the delivering up of a person by a State to the Court, pursuant to this Statute" and contrasts it with the definition of "extradition" in article 102, paragraph (b), described as "the delivering up of a person by one State to another as provided by treaty, convention or national legislation".

Preconditions to an order for surrender

The Statute also creates a considerable number of procedural hurdles for the ICC Prosecutor to overcome, before a request for surrender can be issued by the Court (articles 53, 54 & 58). Therefore, by the time a State receives a request for surrender from the ICC, it can expect that the ICC has been satisfied that: a crime within the jurisdiction of the Court has been or is being committed (article 53, paragraph (1), subparagraph (a)); there is a sufficient legal or factual basis to seek a warrant (article 53, paragraph (2), subparagraph (a)); the prosecution is in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime (article 53, paragraph (2), subparagraph (c)); in order to establish the truth, the Prosecutor has or will extend the investigation to cover all facts and evidence relevant to an assessment of whether there is

criminal responsibility under the Statute, including incriminating and exonerating circumstances equally (article 54, paragraph (1), subparagraph (a)); the arrest of the person appears necessary to the Pre-Trial Chamber in order to ensure the person's appearance at trial, to ensure that the person does not obstruct or endanger the investigation or the court proceedings, or to prevent the person from continuing with the commission of the crime (article 58, paragraph (1)); and the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crimes stated in the warrant (article 58, paragraph (1), subparagraph (a)).

No grounds for refusal

All States have a vested interest in eliminating the crimes over which the ICC has jurisdiction, as these are the most serious crimes of concern to the international community as a whole. The Statute provides many assurances that these crimes will be tried according to the highest standards of international law, and contains procedural safeguards that ensure the utmost protection, submitted to an extremely rigourous regime of eligibility which gives States the initial responsibility to prosecute and punish these crimes.

Therefore the Statute provides no grounds for refusal to surrender a person to the ICC and requires States Parties to comply with all requests for arrest and surrender (article 89, paragraph (1)). Once the State has ordered the surrender of the person, in accordance with its procedures under the ICC regime, the person must be delivered to the Court as soon as possible (article 59, paragraph (7)). In this way, States will assist the Court with dispensing justice in a timely fashion. Note that States are not required to pay for the cost of transporting the person to the Court, under article 100, paragraph (1), subparagraph (e).

Obligations

a) States Parties must implement a procedure for surrendering a person to the ICC when requested (article 59, paragraph (7), and article 89, paragraph (1)). This procedure must not allow for any grounds for refusal to surrender.

b) The procedure should not have any more burdensome requirements than the State's normal extradition procedures, and should, if possible be less burdensome, taking into account the distinct nature of the Court (article 91, paragraph (2), subparagraph (c)).

c) States must ensure that the person is delivered to the Court as soon as possible after making an order for the surrender of the person (article 59, paragraph (7)).

Implementation

a) Streamlined approaches

States may wish to take a streamlined approach to executing requests for surrender from the ICC, in order to ensure that the Court is not delayed unnecessarily in carrying out its valuable work for the international community. If possible, they should establish a special procedure for surrender to the ICC, which eliminates some of the usual hurdles involved

in extradition proceedings. For example, they may wish to reduce the number of appeals that a person can make, or dispense with the right of appeal altogether, in order to speed up the process of bringing the person before the ICC. Under article 14, paragraph (5) of the International Covenant on Civil and Political Rights, which sets out the basic minimum standards under international law, a person only has a right of appeal against a conviction or a sentence, not an order for extradition or surrender. The Rome Statute is silent on the issue of appeals against orders for surrender at the national level.

Most States Parties have chosen to establish a separate procedure for surrendering persons to the ICC, in order to avoid making a wide range of legislative amendments to existing legislation on extradition.

b) At the very least, States Parties should ensure that they have an expedited procedure for transporting persons to the ICC, once an order for surrender has been made by the State. Under article 100, paragraph (1), subparagraph (e), the Court will cover the ordinary costs associated with the transport of a surrendered person.

c) Nationals and non-nationals

States must ensure that they have laws and procedures in place that allow them to surrender both nationals and non-nationals who are on their territory.

d) Prosecutors' discretions.

States should note that the Rome Statute does not allow for national Prosecutors to exercise any discretion with respect to granting immunity from surrender to persons in return for their assistance with other investigations or prosecutions. This is understandable because of the serious nature of the crimes within the ICC's jurisdiction. Article 65(5) provides that the ICC Prosecutor is unable to enter into enforceable "plea bargains" with defence counsel. Only the Court itself can decide whether a person's willingness to co-operate should be taken into account in any way. For example, it may be considered as a mitigating factor during the sentencing process, under article 78, paragraph (1) ("the individual circumstances of the convicted person" must be taken into account by the Court when determining the sentence).

e) Sufficiency of evidence

Article 91, paragraph (2), subparagraph (c) allows States to determine their own requirements for the surrender process in their State. One requirement to consider is the sufficiency of evidence that will be required in order to allow the State to order the surrender. This requirement should be as minimal as possible, bearing in mind the need for States to avoid creating burdensome requirements for the Court. Article 58, paragraph (3) provides that all warrants for arrest from the ICC will contain the following: "(a) the name of the person and any other relevant identifying information; (b) a specific reference to the crimes within the jurisdiction of the Court for which the person's arrest is sought; and (c) a concise statement of the facts which are alleged to constitute these crimes." These components should provide sufficient evidence upon which to make an order for surrender,

given the procedural safeguards in the Statute. Therefore the most straightforward method of ensuring the sufficiency of evidence for meeting ICC requests is to make the required contents of an ICC arrest warrant plus proof that the person named is the person before the court the minimum requirement.

f) Use of normal extradition procedures

If the State decides to use its normal extradition procedures in order to surrender persons to the ICC, the State will need to amend certain of its existing laws and procedures.

The obligation to surrender contains no exception for lack of dual/double criminality. Therefore, a State has two options: it can remove the double criminality requirement from its existing extradition procedures when implementing new procedures for surrender to the ICC, or it can keep the requirements for double criminality, but must also incorporate the ICC's crimes into domestic law. The State could also make these crimes into extraditable offences at the same time. Both of these approaches would have the further advantage of enabling the State to cooperate more easily with other States in prosecuting the crimes within the jurisdiction of the ICC, because there would be no issue as to double criminality or extraditable offences in State-to-State extraditions. States may not use a failure to establish double criminality as grounds for refusing to surrender a person to the ICC.

Postponement of requests for surrender and ne bis in idem

Description

The competent judicial authority in the custodial State must make several determinations when the arrested person is first brought before it, namely that the warrant applies to the person, the person has been arrested in accordance with the proper process, and the person's rights have been respected (article 59, paragraph (2), subparagraphs (a)-(c)). However, none of these provide grounds for refusal to surrender. Article 97, paragraph (b) requires States to consult with the Court "without delay in order to resolve the matter" if, for example, the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant. States Parties can decide what they wish to do at the national level where the proper process was not followed, or the person's rights were not respected. But States Parties cannot refuse to surrender the person because of such matters, nor does the Statute make any provision for them to postpone execution of the request for surrender in these circumstances. Where the person cannot be located at all, despite the best efforts of the requested State, the State must also "consult with the Court without delay in order to resolve the matter" (article 97, paragraph (b)).

Ne bis in idem

There is, however, one instance where States may be able to postpone the execution of the request for surrender. In accordance with article 20, paragraph (3) and article 89, paragraph (2), the person sought for surrender may bring a challenge before a national court on the basis of the principle of *ne bis in idem*. Under article 20, paragraph (3), this principle means: if the person has already been tried before for conduct that would constitute geno-

cide, a crime against humanity, or a war crime, as defined by the Statute, the ICC will not try the person with respect to the same conduct. The only exception to this principle is discussed below in the section "Complementarity".

If the person makes such a challenge, the requested State is required to "consult immediately with the Court to determine if there has been a relevant ruling on admissibility" (article 89, paragraph (2)). Such a ruling may come about in the following manner. Under article 19, paragraph (1), the ICC must satisfy itself that it has jurisdiction in any case brought before it, and one of the considerations is the admissibility of the case. Under article 17, paragraph (1), subparagraph (c), the Court is required to determine that a case is inadmissible where the person concerned has already been tried for conduct that is the subject of the complaint. The Prosecutor may still request the Pre-Trial Chamber to authorise an investigation where there is some uncertainty over the State's unwillingness or inability to pursue the prosecution genuinely itself (article 18, paragraph (2)). The State concerned or the Prosecutor can appeal to the Appeals Chamber on this issue (article 18, paragraph (4)). Thus there are several opportunities for rulings on admissibility.

If the Court has already determined that the case is admissible, then the requested State must proceed with the surrender (article 89, paragraph (2)). If, however, an admissibility ruling is pending, then the requested State may postpone execution of the request until the Court makes its determination on admissibility (article 89, paragraph (2)).

Obligations

a) States Parties must consult with the Court without delay in order to resolve any matters that arise in relation to problems with the execution of a request for surrender, including the fact that the person in the requested State is clearly not the person named in the warrant of arrest (article 97, paragraph (b)). They may not simply refuse to execute the request for surrender.

b) States Parties should allow a person sought for surrender to bring a challenge before a national court or other competent authority, if the ICC is seeking the person in connection with conduct that has already formed the basis of a prosecution for genocide, crimes against humanity, or war crimes (article 20, paragraph (3), and article 89, paragraph (2)). However, the national court or authority may not determine the issue of whether the case is admissible before the ICC. Only the ICC can make that determination.

c) If a person sought for surrender brings a challenge before a national court or other authority on the basis of the principle of *ne bis in idem*, the requested State must consult immediately with the Court to determine if there has been a relevant ruling on admissibility (article 89, paragraph (2)).

d) The requested State must proceed to execute the request for surrender, if the Court has ruled already that the case is admissible (article 89, paragraph (2)).

e) If an admissibility ruling is pending, the requested State may postpone the execution of the request until the Court makes a determination on admissibility (article 89, paragraph (2)).

Implementation

a) States Parties should ensure that they have procedures in place to allow rapid and efficient communication with the Court, in the event that there is a problem in executing a request for surrender, including inability to locate the requested person (article 97, paragraph (b)).

b) Under article 59, paragraph (2), subparagraphs (b) and (c), States Parties should also establish procedures and introduce legislation to ensure that the national judicial authority will determine if the person has been arrested in accordance with the proper process or if the person's rights have been violated. Note, however, that remedies for a violation of rights or the use of improper process are to be left to the ICC. One way to present this issue in domestic law is to emphasize that any determination that rights have been violated will be referred to the ICC to take into account.

c) A procedure should be established for situations where a person sought for surrender makes a challenge before a national court or other competent authority on the basis of "ne bis in idem" (article 89, paragraph (2)). The introduction of such a procedure will necessitate diligent keeping of records of previous trials, and possibly access to the records of other States, so that the national court may check whether there is any basis for the person's claim, before referring the matter to the ICC.

d) A procedure should also be established for bringing all such claims to the attention of the ICC and for consulting with the ICC as to any rulings it has made on the issue (article 89, paragraph (2)).

e) Once it is apparent that the ICC has already ruled the case admissible, the State must organise to surrender the person as quickly as possible (article 59, paragraph (7)).

f) If there is an admissibility ruling pending, States need to consider whether they wish to continue with the surrender or not. They may if they wish, in which case, once the decision is made to surrender, the person should be brought before the Court as soon as possible (article 59, paragraph (7)). If States decide to postpone the surrender, it would be extremely prudent for them to have legislation and procedures that allow the relevant authorities to keep the person in temporary custody, or to restrict their liberty in some other way, until the Court rules on the admissibility issue. Otherwise the person may take flight.

Competing requests

Description

Article 90 outlines the procedure to be followed where a State Party receives requests from both the ICC and another State for the surrender of the same person for the same conduct. In general terms, States Parties are required to notify the various parties and give priority to requests from the ICC, where the Court has made a determination that the case is admissible and the requesting State is a State Party (article 90, paragraph (2)). If the Court is still considering the issue of admissibility, then it must expedite its determination (article 90, paragraph (3)). If the State has existing international obligations to non-States Parties, then it can usually decide whether it wants to surrender the person to the Court or extradite the person to the requesting non-State Party. However, article 90, paragraph (6), and article (7) , paragraph (a) require the requested State to take into account such matters as the respective dates of the requests, the nationality of the perpetrator and the victims, and the possibility of subsequent surrender between the Court and the requesting State.

Obligations

a) If a State Party receives requests from both the ICC and another State for the surrender of a person under article 89, where the same person is being requested in relation to the same conduct, then the State Party must notify the Court and the requesting State of that fact (article 90, paragraph (1)).

b) Where (i) the requesting State is also a State Party; and (ii) the Court has already made a determination as to admissibility, taking into account the investigation or prosecution being conducted by the requesting State; then (iii) the requested State must give priority to the request from the Court. If the Court is still considering the admissibility issue, the State must not extradite the person to the State until the Court has determined whether the case is admissible before it. However, the requested State may proceed to deal with the request for extradition in all other respects (article 90, paragraph (2)).

c) Where (i) the requesting State is not a State Party; and (ii) the requested State is not under an international obligation to extradite the person to the requesting State; and (iii) the Court has determined that the case is admissible; then (iv) the requested State must give priority to the request from the Court (article 90, paragraph (4)). If the Court has not determined that the case is admissible, the requested State may proceed to deal with the request for extradition from the requesting State, at its discretion, but shall not extradite the person in question to the requesting State (article 90, paragraphs (3) and (5)).

d) Where (i) the requesting State is not a State Party; and (ii) the requested State is under an international obligation to extradite the person to the requesting State; and (iii) the Court has determined already that the case is admissible; then (iv) the requested State must determine whether to surrender the person to the Court or extradite the person to the requesting State. In making its decision, the requested State must take into account

at least the following factors: (a) The respective dates of the request; (b) The interests of the requesting State, such as whether the crime was committed in its territory or against one of its nationals; and (c) The possibility of subsequent surrender between the Court and the requesting State (article 90, paragraph (6)).

e) Where (i) the requesting State is either a Party or a non-Party; and (ii) the Court has determined the case to be inadmissible, upon notification of the receipt of competing requests and subsequent expedited consideration of the issue of admissibility; and (iii) the requested State subsequently refuses to extradite the person to the requesting State; then (iv) the requested State must notify the Court of this decision, in case the Court's determination on admissibility was based on the requesting State's ability to prosecute the case (article 90, paragraph (8)).

f) Where (i) the conduct constituting the alleged crime of the same person is different in the ICC request and the State's request; and (ii) the requesting State is either a Party or a non-Party; and (iii) the requested State is not under an existing international obligation to extradite the person to the requesting State; then (iv) the requested State must give priority to the request from the Court (article 90, paragraph (7), subparagraph (a)). Where all of these factors are the same, except that the requested State is under an existing international obligation to extradite the person to the requesting State, then the requested State must determine which request to fulfil. When making this decision, the State must take into account all the factors listed in article 90, paragraph (6), as well as giving special consideration to the relative nature and gravity of the conduct in question (article 90, paragraph (7), subparagraph (b)).

Implementation

National authorities must follow article 90 when faced with competing requests. If a State decides to adopt a specific law or written procedure on competing requests, incorporation by reference is the safest approach, given that article 90 sets out a detailed code. The Australian legislation provides an example of a comprehensive approach to the implementation of article 90 (AU(C) ss. 37-40, 56-62).

States Parties also need to ensure that they maintain communications with the Court throughout the whole process, in order to allow the Court to make an informed decision about admissibility issues, and to keep up-to-date with the progress of the Court's rulings on admissibility.

Conflicts with other international obligations

Description

International law bestows Heads of State and diplomatic officials with immunity from criminal prosecution by foreign States *(Vienna Convention on Diplomatic Relations*, article 31, paragraph (1)). However, international law is rapidly evolving with respect to immunities for the most serious international crimes.

The ICC will determine whether any immunities exist when a matter is referred to it.At the same time, article 98 places certain restrictions on the Court, when it is making requests for surrender or other types of assistance from States. Article 98, paragraph (1) deals with the situation where surrendering a person would conflict with a State's obligations under international law with respect to the State or diplomatic immunity of a non-national or their property. The wording of this provision places the onus on the ICC to ensure that it does not request a State to act inconsistently with its international obligations. The "obligations under international law" applicable to States Parties would include their obligations under the Rome Statute. By agreeing to articles 27 and 86 of the Statute, States Parties arguably have waived any immunities they may have had against the ICC. Therefore, where a national of a State Party is the subject of a request from the Court, that national may not be able to claim the normal immunities that may exist with respect to criminal prosecution by foreign States and the requested State may not be in breach of its international obligations if it surrendered that person to the ICC.

However, where the ICC has determined that an immunity does exist, it can proceed with a request to surrender only if it first obtains the co-operation of the accused's State of nationality. Then the requested State can proceed with the surrender, without breaching its international obligation with respect to the Vienna Convention on Diplomatic Relations.

Article 98, paragraph (2) provides that the Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements which require the consent of a sending State to surrender a person of that State to the Court. "Sending State" refers to a sending State under a Status of Forces Agreement (SOFA). This situation may therefore arise where, under a SOFA, members of the armed forces of a third State are present on the territory of a requested State. Where the sending State is a Party to the Rome Statute, it should not place any restrictions on the ability of other States to surrender its nationals to the ICC, since every State Party accepts the jurisdiction of the Court over its nationals and there are no grounds for refusing to surrender a person to the Court. However, where a person being sought for surrender makes a *ne bis in idem* claim and the relevant admissibility ruling by the ICC is still pending, the requested State should consult with both the sending State and the Court, in accordance with article 89, paragraph (2), to see if execution of the request should be postponed. Otherwise, the requested State should never need to obtain the consent of a sending State Party, in order to surrender the State Party's national to the ICC. The other exception is where the Court is able to obtain the consent of the sending State. The Court must obtain the co-operation of the sending State, if it is not a State Party, before the Court can make the request for surrender.

Article 98 is relevant only where the requested State can demonstrate that the action sought by the Court would place it in violation of an obligation under international law. A State cannot invoke a provision under its national laws which grants a person immunity from surrender.

Obligations

a) A State Party has the obligation to surrender a person enjoying diplomatic immunity, when the Court requests this surrender after it obtained the co-operation of the third State for the waiver of the immunity (article 98, paragraph (1)). The requested State Party may also be required to surrender the person where the third State is a State Party.

b) When the Court requests the surrender of a person, but the requested State Party usually could not surrender that person without breaching an international agreement with a third State, the requested State Party has the obligation to surrender if the Court has obtained the consent of the third State for the surrender of the person (article 98, paragraph (2)). The requested State Party may also be required to surrender the person where the third State is a State Party.

Implementation

States Parties should provide in their national legislation for the possibility of surrendering a person to the ICC who would normally enjoy State or diplomatic immunity, when the State that this person is from agrees to the waiver of his or her immunity. Because the ICC has the authority to determine whether or not immunities exist, States would be wise to specify simply that immunities will not bar co-operation with the ICC. This ensures that the State Party will be able to meet its obligation to surrender. For example, Canada amended its *State Immunity Act,* to ensure that it would not apply where it conflicted with the Canadian *Extradition Act* (which provides for surrender to the ICC), the *Visiting Forces Act,* or the *Foreign Missions and International Organizations Act,* to the extent of the conflict (CA s.70).

States Parties should also ensure that their nationals can be surrendered to the ICC by other States, where appropriate, and that there are no bilateral or multilateral agreements hindering this process. States Parties should be prepared to disclose to the Court any relevant international obligations and agreements that may conflict with a request for surrender that the Court is preparing, if the Court needs this information.

Some States have interpreted article 98, paragraph (2) as authorising them to enter into new bilateral agreements with other States, in order to create a new "international obligation" between the two States not to surrender their nationals to the ICC. These agreements would appear to be directly contrary to the Rome Statute, as they would provide impunity for a certain group or groups of nationals from the jurisdiction of the ICC, even when members of those groups have committed the most serious crimes of concern to the international community as a whole. They would also appear to prevent States Parties who enter these agreements, from fulfilling their primary obligation under the Rome Statute, namely to "co-operate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court."

The European Commission's legal service was asked to analyse a draft agreement being proposed by the United States of America to all the European Union Member States on a

bilateral basis, which would prevent a State from surrendering any US citizens to the ICC if the agreement was adopted. In August 2002, the EC legal service concluded that any State Party to the Rome Statute who entered such an agreement would be acting against the object and purpose of the Rome Statute, and thereby would be violating its general obligation to perform its obligations in good faith. In addition, the legal experts said that a State Party's obligation to the other States Parties and to the Court, to surrender a person to the Court upon request, cannot be modified by concluding an agreement of the kind proposed by the US. In addition, the legal advice pointed out that any State agreeing to protect Americans from the jurisdiction of the ICC would become safe havens for suspects in ICC crimes.

The European Union General Affairs Council took a slightly different stance, given the political considerations it was required to take into account as well. The General Affairs Council prepared the following "Guiding Principles concerning Arrangements between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conditions to Surrender of Persons to the Court", which are annexed to the EU General Affairs Council Conclusions on the International Criminal Court of 30 September 2002: "(1) Existing agreements: Existing international agreements, in particular between an ICC State Party and the United States, should be taken into account, such as Status of Forces Agreements and agreements on legal co-operation on criminal matters, including extradition; (2) The US proposed agreements: Entering into US agreements – as presently drafted – would be inconsistent with ICC States Parties' obligations with regard to the ICC Statute and may be inconsistent with other international agreements to which ICC States Parties are Parties (3) No impunity: any solution should include appropriate operative provisions ensuring that persons who have committed crimes falling within the jurisdiction of the Court do not enjoy impunity. Such provisions should ensure appropriate investigation and – where there is sufficient evidence - prosecution by national jurisdictions concerning persons requested by the ICC; (4) Nationality of persons not to be surrendered: any solution should only cover persons who are not nationals of an ICC State Party; (5) Scope of persons: (i) Any solution should take into account that some persons enjoy State or diplomatic immunity under international law, cf. Article 98, paragraph 1 of the Rome Statute. (ii) Any solution should cover only persons present on the territory of a requested State because they have been sent by a sending State, cf. Article 98, paragraph 2 of the Rome Statute. (iii) Surrender as referred to in Article 98 of the Rome Statute cannot be deemed to include transit as referred to in Article 89, paragraph 3 of the Rome Statute. (6) Sunset clause: The arrangement could contain a termination or revision clause limiting the period in which the arrangement is in force. (7) Ratification: The approval of any new agreement or of an amendment of any existing agreement would have to be given in accordance with the constitutional procedures of each individual state."

3.8 Allowing Suspects to be Transported Across State Territory En Route to the ICC

Description

Under article 89, paragraph (3), subparagraph (a), a State Party must authorise, in accordance with its national procedural law, transportation through its territory of a person being surrendered to the Court by another State, except where transit through that State

would impede or delay the surrender. Article 89, paragraph (3), subparagraph (b) sets out the required contents of a request by the Court for transit.

Article 89, paragraph (3), subparagraph (c) states that the person being transported must be detained in custody during the period of transit. Article 89, paragraph (3), subparagraph (d) stipulates that no authorisation is required if the person is transported by air and no landing is scheduled on the territory of the transit State. However, under article 89, paragraph (3), subparagraph (e), if an unscheduled landing occurs on the territory of the transit State, that State may require a request for transit from the Court. The transit State must detain the person being transported until the request for transit is received and the transit is effected, provided that detention is not more than 96 hours from the unscheduled landing unless the request is received during that time. Although this is not mentioned in the Statute. States Parties should also allow for convicted persons to be transported through their territory, en route to the State where they will be serving their sentence.

Obligations

a) A State must ensure that its laws provides for transportation through its territory of a person being surrendered to the Court by another State.

b) These laws must not require authorisation if the person is transported by air and no landing is scheduled on the territory of the transit State.

c) If an unscheduled landing does occur, the transit State must detain the person being transported, for up to 96 hours unless a request for transit is received during that time.

d) If a request for transit is received, the detention may be for longer.

Implementation

Where States already have legislation on mutual legal assistance, they may only need to make minor amendments to such legislation, to allow them to meet their obligations under these provisions. Other States should adopt laws and procedures to provide for transportation through their territory of a person being surrendered by another State. States Parties laws and procedures must provide that no authorisation is required if the person is transported by air and no landing is scheduled on the territory of the transit State. However, the law should provide for cases where an unscheduled landing does occur. Ideally, the transit State would allow the continuation of the transit very quickly after the reason for the unscheduled landing is dealt with. The transit State should ensure that the laws provide for keeping the surrendered person in transit in custody for up to 96 hours while in the country for the unscheduled landing. Note that under article 100, paragraph (1), subparagraph (e), States may not have to pay the costs "associated with the transport of a person being surrendered to the Court by a custodial State". States should also consider applying the same provisions to the transit of convicted persons through their territory.

Since many States will not have legislation permitting the detention of a person being transported through their territory to the ICC, they will need to ensure that there is a basis

in law for such detention. There are at least two approaches seen in existing implementation legislation. First approach is to amend existing domestic legislation. A second method of implementation is to include a separate regime in implementing legislation. An example of the first approach is the Canadian legislation that amends the domestic legislation on citizenship to ensure compliance with article 89 (CA(E) s. 76).

The second approach could include mirroring the obligations provided for in article 89. This approach has been effectively the approach taken by New Zealand, Australia, the United Kingdom and Switzerland (NZ ss. 136-138, AU Pt 9, UK ss. 21-22, SW art 13). In New Zealand, Part 7 of its implementing legislation deals with persons in transit to ICC or serving sentences imposed by the ICC. These provisions mirror the obligations set out in article 89 and include self-contained procedures in dealing with ICC requests regarding persons in transit. The legislation expressly covers three situations: (1) persons being surrendered to the ICC by another State under article 89; (2) persons who are being temporarily transferred to the ICC by another State pursuant to article 93; and (3) persons sentenced to imprisonment by the ICC and who are being transferred to or from the ICC, or between States, in connection with that sentence. The Australian legislation also covers persons in transit for reasons of surrender as well as sentencing. The UK implementing legislation mirrors the obligations set out in article 89, identifying the Secretary of State as the national authority to receive and agree to requests for transit. The requests are to be treated as if it were an ordinary ICC request for arrest and surrender but, in view of the different circumstances, there will be an expedited process for transferring the person in question to the ICC. It equates the process to the domestic regime of arrest under an endorsed warrant. The Swiss legislation identifies the Central Authority as the focal point for request and communications with the ICC on these matters. The South African legislation provides for a reference to entry and passage of persons in custody through their territory; any warrant or order lawfully issued by the ICC will be deemed to be lawful in their territory.

3.9 Collecting and Preserving Evidence

Admissibility of evidence before the ICC

Description

The Court has the power to decide whether certain evidence should be admitted or not, taking into account the need for a fair trial (article 64, paragraph (9), and article 69, paragraph (4)). Article 69, paragraph (7) provides that evidence shall not be admissible where it has been obtained by means of a violation of the Rome Statute or internationally recognised human rights, if (a) the violation casts substantial doubt on the reliability of the evidence; or (b) the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings. This means that the Court will not be allowed to take into account any such evidence, when making its decisions. Therefore, States need to be familiar with the relevant provisions of the Rome Statute and internationally recognised human rights standards, to ensure that any evidence collected by the State on behalf of the

Court is going to be acceptable to the Court and that the State's efforts have not been wasted.

The relevant provisions of the Statute includes article 66, which states that accused persons will be presumed innocent until proven guilty before the Court, with the onus on the Prosecutor to prove to the Court the guilt of the accused beyond a reasonable doubt, if the Court is to convict the person. At the same time, the Court must ensure that every trial is a fair trial, conducted impartially (article 67, paragraph (1)).

With this in mind, the Prosecution must disclose any evidence in its possession to the defence, where such evidence shows the accused may be innocent, or suggests that the Prosecution evidence may be less than credible (article 67, paragraph (2)). The defence is entitled to challenge the evidence that the Prosecutor presents, and the manner in which it was collected, in the interests of due process. The defence must also have the opportunity to present as much evidence as it believes is necessary to ensure that the Court has all the relevant facts before it, prior to passing judgement on the accused (articles 67, paragraph (1), subparagraph (e) and article 69, paragraph (3)). In addition, the Court itself has the authority to request the submission or production of any evidence that it considers necessary for the determination of the truth (article 64, paragraph (6), subparagraph (d) and article 69, paragraph (3)).

In all cases, the quality and quantity of the evidence that both the Prosecutor and the defence are able to present to the Court will have a major impact on the number of successful and just convictions. For this reason, States Parties must be prepared to assist the Court in every way with the collection and preservation of evidence, in accordance with their duties under the various parts of the Statute, in order to facilitate the work of the Court. Under article 69, paragraph (8), the Court is allowed to consider national laws that may apply to the relevance or admissibility of evidence collected by a State. However, the Court may not rule on the application of the State's law. Therefore, representatives of the State who are collecting evidence for ICC proceedings need to be familiar with the requirements of the ICC as well as their national requirements. Whether they have complied with national laws or not is irrelevant for ICC purposes, unless these laws reflect international standards.

Internationally recognised human rights

The procedural provisions of the Rome Statute are based to a large extent on existing international human rights standards in the area of criminal procedure. In assessing "internationally recognised human rights" for the purposes of determining the admissibility of evidence, it is likely that the Court will also rely on the following standards adopted or approved by the UN General Assembly: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the UN Standard Minimum Rules for the Treatment of Prisoners, the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the UN Declaration on the Independence of the Judiciary, the UN Guidelines on the Role of Prosecutors, and the UN Basic Principles on the Role of Lawyers. In addition, the Court may look to the humanitarian law stan-

dards set out in the Four Geneva Conventions and their Additional Protocols, since they have also received widespread support within the international community.

As their name suggests, the Rules of Procedure and Evidence elaborate further on the Court's requirements in this regard, but these Rules are consistent with the relevant provisions of the Statute discussed below. For more information, refer to ICCLR's Guide on the Rules of Procedure and Evidence.

Privileges on confidentiality

Article 69, paragraph (5) recognises that certain conversations and written communications should be kept confidential and not exposed to scrutiny of any kind, even by the Court. For example, whatever a lawyer says to their client is generally considered a "privileged" communication in many countries, to which courts cannot demand access. Similarly, health professionals and humanitarian workers need to be able to keep confidential certain information that has been provided by people they have treated or assisted, so that potential patients are not afraid to reveal important information required for diagnosis and treatment. Journalists working in war zones and reporting on issues relating to the conflict may also be accorded privilege. A December 2002 ruling by the International Criminal Tribunal for the former Yugoslavia held that war correspondents could only be subpoenaed to give evidence where the latter is of "direct and important value in determining a core issue in the case" and "cannot reasonably be obtained elsewhere". This ruling may set an important legal precedent for the ICC. Rule 73 of the Rules of Procedure and Evidence elaborates the principles for the Court to follow when determining the status of a particular communication in a given case. States should bear these privileges in mind whenever they are collecting evidence for the ICC, so as not to prejudice the trial before the ICC.

Obligations

Whenever States are requested to assist the Court with the collection and preservation of evidence, they should ensure that they observe all relevant standards under the Statute, in addition to their requirements under national laws, as well as the relevant international human rights standards, in order to ensure that the evidence will be admissible before the Court.

Implementation

When States are implementing legislation and procedures to allow the relevant personnel to collect and preserve evidence for the ICC, as detailed below, that legislation and those procedures should respect the relevant standards for evidence, as described above. For example, Australia and New Zealand have included provisions within their respective legislation detailing the procedures to be followed in relation to the application for, and execution of search warrants. These procedures reflect the fact that both countries have already implemented relevant international standards such as the right to a fair trial, the presumption of innocence until proven guilty, etc. If States have not previously implemented the relevant international human rights standards, then persons collecting and

preserving evidence for the ICC will probably need to be trained in any new procedures that are introduced. In particular, the rights of all persons being questioned must be respected, in order to ensure a fair trial for all.

In order to assist the Court, States should attempt to ensure that privileged communications are not required to be disclosed by anyone. The best way to ensure this is to make sure that none of their laws require the disclosure of such communications, particularly as part of an ICC investigation. New Zealand implemented this obligation by specifying under Part 5 s. 85(4) of its ICC legislation, that "a person who is required to give evidence, or to produce documents or other articles, is not required to give any evidence, or to produce any document or article, that the person could not be compelled to give or produce in the investigation being conducted by the Prosecutor or the proceeding before the ICC". States should also ensure that the relevant persons are entitled to bring a claim before a judicial authority, if someone is about to disclose one of these communications, or refuses to return a copy of it that they have obtained without the person's permission. In the same way, the ICC will not accept secretly recorded evidence of such communications, unless the relevant person waives their privilege.

To ensure the admissibility of evidence and the respect of international standards in gathering evidence, States may thus take a number of approaches: 1) using established practices, 2) applying existing legislation or 3) incorporating the obligation specifically into legislation, such as that done by New Zealand in the example above (NZ Part 5).

Requests for assistance with evidence

Description

States may be requested to assist with the provision of information and the collection and preservation of evidence at several stages of ICC proceedings.

Investigations

Prior to the commencement of an investigation, the Prosecutor can request more information from a State when analysing the seriousness of information already received concerning an alleged crime (article 15, paragraph (2)). Once the investigation has commenced, the Prosecutor can seek the co-operation of any State and enter into arrangements with States in order to facilitate co-operation throughout the investigation (article 54, paragraph (3), subparagraphs (c) and (d)). The Prosecutor can request the Pre-Trial Chamber to issue any orders or warrants required to carry out the investigation (article 57, paragraph (3), subparagraph (a)). Note that the Pre-Trial Chamber also has the power to issue orders and seek State co-operation with respect to the preparation of the defence case, at the request of the accused person (article 57, paragraph (3), subparagraph (b)).

The Prosecutor may also execute requests on State territory in certain limited circumstances. Under article 57, paragraph (3), subparagraph (d), the Pre-Trial Chamber may authorise the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the co-operation of the State Party, if the Chamber has de-

termined that the State's judicial system and other forms of authority are clearly unable to meet any request for co-operation due to the unavailability of such systems of authority, such as during situations of armed conflict. The Pre-Trial Chamber is encouraged to consult with the State Party if possible, before authorising the Prosecutor. Under Article 99, paragraph (4), the Prosecutor may execute requests that do not require compulsory measures, such as taking evidence on a voluntary basis. Where the ICC has not yet determined whether the case is admissible, the Prosecutor needs to consult with the State Party first and observe any reasonable conditions or concerns raised by that State Party.

Hearings

The Pre-Trial Chamber can order the disclosure of information to the defence prior to the confirmation hearing, which may include some of the evidence on which the Prosecutor intends to rely at the hearing (article 61, paragraph (3)). So the Prosecutor may need to ask States to assist with such disclosure, if the relevant evidence is still in their custody. Similarly, once a case has been assigned to the Trial Chamber, that Chamber may provide for disclosure of documents or information not previously disclosed, "sufficiently in advance of the commencement of the trial to enable adequate preparation for trial" (article 64, paragraph (3), subparagraph (c)).

Finally, States may also be requested to assist the Trial Chamber with the "attendance and testimony of witnesses and production of documents and other evidence" prior to and during the trial (article 64, paragraph (6), and article 69, paragraph (3)).

Requests made at all of these stages of the process require a prompt response from States, if the Court is going to function efficiently and effectively. Note that the Court can also make an urgent request for the production of documents or evidence and these must be sent urgently (article 99, paragraph (2)). In addition, under article 99, paragraph (1), the Court may request that certain persons be present when a request for evidence is being executed.

Obligations

a) States Parties must comply with all requests for assistance in providing evidence and information, whether these requests are made by the Prosecutor, the Pre-Trial Chamber, or other chambers of the Court (article 93). However, States may not have to comply where national security concerns are involved (article 72, article 93, paragraph (4), and article 99, paragraph (5), or where execution of the request is prohibited in the requested State on the basis of an existing fundamental legal principle of general application (article 93, paragraph (3)).

b) If the Court makes an urgent request and requires an urgent response, States Parties must respond with urgency (article 99, paragraph (2)).

c) Requests for assistance must be executed in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner

specified in the request. This may include following any procedure outlined in the request, or permitting persons specified in the request to be present at and to assist in the execution process (article 99, paragraph (1)).

Implementation

a) State laws need to recognise the right of the Prosecutor, the Pre-Trial Chamber, and the Trial Chamber to make requests for assistance with various types of evidence and the provision of information, including evidence for the defence.

b) States need to have a procedure in place to ensure that all requests for such assistance are directed to the appropriate authority as soon as possible after they are received, so that the assistance can be provided expeditiously at all stages of investigations and Court proceedings.

Canada chose to implement this obligation by adding the ICC to the list of entities from which it can entertain requests for assistance. Provisions in its new ICC legislation amend its existing Mutual Legal Assistance in Criminal Matters Act and allow Canada to respond expeditiously to such requests from the Court. In Canada, the Minister of Justice has the authority to approve requests for assistance from the ICC and to authorise state authorities to apply for and execute search warrants according to existing legal procedures (s. 11 (1),(2) MLA Act.). The United Kingdom and Switzerland similarly enacted legislation in this regard, specifically allowing them to entertain requests for assistance from the ICC and specifying to whom such a request should be addressed. As in the Canadian example, the designated official in receipt of the request in both States, is empowered to then authorise national officials to facilitate the investigation process. The UK legislation, like the Canadian legislation, applies existing procedural laws to the collection of evidence. The Swiss legislation provides for cooperation in such matters that includes "any procedural acts not prohibited by Swiss law…" (art 30 SW). The Swiss legislation also specifies, as per art. 99 (4) of the Rome Statute, that in some circumstances, requests from the ICC may be executed directly and in the absence of national authorities once approval is given by the Swiss Central Authority. New Zealand has dealt with this issue by adding to its implementing legislation an express provision relating to the execution of requests for assistance under article 99 (NZ s. 123). This allows the Attorney General of New Zealand to consult with the ICC in the event of difficulties arising with the execution of a request under article 99.

Testimonial evidence and other evidence concerning specific persons

Description

Most witnesses who agree to give evidence during ICC proceedings are required to give it in person, unless the Court orders otherwise. However, the Court may allow the presentation of the recorded testimony of a witness, either by video or audio technology (article 69, paragraph (2)). Before testifying, each witness must give an undertaking as to the truthfulness of the evidence they are about to give (article 69, paragraph (1)).

The ICC does not have the power to order witnesses to testify. This was one of the compromises made in Rome when the Statute was finalised. But the Rome Statute tries to compensate for this by providing for extensive protections for witnesses who do agree to testify, particularly victims. For example, the Court will have a special Victims & Witnesses Unit, to deal with the concerns of all witnesses (article 43, paragraph (6)). Article 93, paragraph (2) also provides that witnesses and experts appearing before the Court will not be prosecuted, detained, or subjected to any restriction of personal freedom by the Court for anything they may have done prior to their departure from the requested State. In addition, the Court can request States to "facilitate the voluntary appearance of persons as witnesses or experts before the Court", so that witnesses are actively encouraged to attend the Court (article 93, paragraph (1), subparagraph (e)). However, article 100, paragraph (1), subparagraph (a) provides that the Court will bear the costs associated with the travel and security of witnesses and experts.

At the same time, both the Pre-Trial Chamber and the Trial Chamber can provide for the protection of accused persons (article 57, paragraph (3), subparagraph (c), and article 64, paragraph (6), subparagraph (e)). The Court may request States to assist with this protection, in order to ensure that the person is brought to trial unharmed.

Article 93, paragraph (1), subparagraphs (a)-(f), (h) & (j) set out the main types of assistance that States Parties are most likely to be requested to provide in relation to testimonial evidence. Where a State consents, the Court can also request the State to transfer a person who is already in custody for another offence, for the purpose of testifying, or for identifying someone present at the Court (article 93, paragraph (1), subparagraphs (f) & (7)). The person must also give their informed consent to the transfer and will remain in custody while being transferred (article 93, paragraph (7), subparagraph (a), sub-subparagraphs (i) & (b)).

Obligations

In general terms, States will need to assist with the following, where requested by the Court:

a) Identifying and locating persons (article 93, paragraph (1), subparagraph (a)).

b) Obtaining expert opinions and reports (article 93, paragraph (1), subparagraph (b)).

c) Questioning victims and witnesses, including taking sworn statements from them (article 93, paragraph (1), subparagraph (b)).

d) Questioning accused persons (article 93, paragraph (1), subparagraph (c)).

e) Serving documents, such as requests to testify before the Court (article 93, paragraph (1), subparagraph (d)).

f) Assisting witnesses and experts to attend the relevant proceedings (article 93, paragraph (1), subparagraph (e)).

g) Conducting searches of persons (article 93, paragraph (1), subparagraph (h)).

h) Preserving evidence such as audio, video, or written copies of interviews, statements and reports (article 93, paragraph (1), subparagraph (j)).

i) Protecting victims and witnesses (article 93, paragraph (1), subparagraph (j)).

j) [optional] Transferring persons in custody to the Court (article 93, paragraph (7)).

k) Ensuring the protection of the rights of all persons taking part in investigations in any capacity, in accordance with Article 55.

l) Providing adequate physical protection for accused persons (article 57, paragraph (3), subparagraph (c) and article 64, paragraph (6), subparagraph (e)).

m) Providing any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court (article 93, paragraph (1), subparagraph (l)).

Implementation

a) Identification and location of persons within a State's territory

Administrative procedures may be needed to enable States to identify and locate nationals of their own State if the ICC requests this. For example, States could make use of their access to government records such as electoral rolls and motor vehicle registrations.

Different procedures may be needed to enable States to identify and locate nationals of other States whom the ICC wishes them to find. In either case, States must have procedures in place to locate those who are present upon as well as those who are about to enter, or leave, their territory. For example, States may wish to consider amending existing procedures or laws in relation to immigration and customs, to make it easier for them to know with certainty who is transiting their borders.

States may already have such procedures in place, and could thus opt to implement this obligation by including a provision that simply refers to or recognises generally those procedures not prohibited by domestic law (see Switzerland and South Africa (SW, art. 30 a. and SA, s.14 a)). Another approach would be that taken by Australia and New Zealand whereby the obligation is incorporated into the legislation and specifies the procedures to be undertaken. In Australia, such procedures involve the Attorney General executing the request by authorising in writing, the making of inquiries to locate and/or identify a person or thing (AU, Part 4, Div. 4, s. 63). In New Zealand, the Attorney General is authorised to forward the request to the appropriate domestic agency which is asked to "use its best endeavours to locate or, as the case may be, identify and locate the person or thing to which the request relates" (NZ Part 5 s. 81 (4)).

b) Obtaining expert opinions and reports

It would also be desirable for States to create and keep a register of different types of experts who reside in the State, who may be asked to prepare reports, such as medical experts, weapons experts, military strategy experts, and experts on gender issues. Article 100, paragraph (1), subparagraph (d) provides that the Court will pay the costs of any expert opinion or report requested by the Court. States may similarly implement this obligation by adopting either of the two approaches noted in the above obligation to assist in the identification and location of people or things.

c) Questioning victims and witnesses, including taking sworn statements from them

A record of some kind will need to be made of all statements made by persons questioned in connection with an ICC investigation. At the very least, this will need to be a written record. However, it would be desirable to have as complete a record as possible, such as a video recording, in case the person is not able to attend the Court for some reason. Then their statement will be much more helpful to the Court, if the Court agrees to admit it into evidence. Australia's legislation, for example, specifically allows for evidence to be taken by means of video or audio technology providing that such evidence is accompanied by a written transcript or in any other form that the magistrate considers appropriate (AU s.65).

Note that the Court will pay the costs of translation, interpretation and transcription, under article 100, paragraph (1), subparagraph (b) (Note also Article 55, paragraph (1) which applies to all persons involved in investigations under the Rome Statute). All persons being questioned, including victims and potential witnesses, should be granted the rights in this paragraph. They shall not be compelled to incriminate themselves, or to confess guilt, nor shall they be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment, nor shall they be subjected to arbitrary arrest or detention. States that have implemented the International Covenant on Civil and Political Rights or the Convention Against Torture will already be in compliance with these provisions, as long as the laws in their present state can also apply to people involved in ICC investigations. Other States may need to revise their laws and procedures on the treatment of persons being questioned. Canada's approach in this regard, was to utilise its existing legislation on mutual legal assistance. S. 18 (7) of its MLA, requires that persons named in an order for examination be subjected to the rules of procedure and evidence of the State or entity that made the request. Such individuals, however, may refuse to answer questions or to produce records if the information is protected under Canadian laws of non-disclosure or privilege.

States should also provide competent interpreters and translations for persons being questioned who do not fully understand or speak the language of the person asking the questions, or the language of documents they are being questioned about. Switzerland, for example, specifically provides that a competent interpreter shall be provided as well as "such translations as are necessary to meet the requirements of fairness" in such a situation (SW Sec. 2, Art. 34. 1). Article 55, paragraph (1), subparagraph (c) of the Rome Statute stipulates that the person should not have to pay for this. Therefore, States may need to create and retain a list of interpreters and translators who are available at short notice, to

assist in such matters, and organise for the Court to pay for these, in accordance with article 100, paragraph (1), subparagraph (b).

States should also review existing international standards for investigations, to ensure that their laws do not contradict these.

The Rules of Procedure and Evidence elaborate in considerable detail the rights and protections to be provided to victims and witnesses who are questioned in relation to a proceeding before the ICC. For more information, refer to the Guide on the Rules of Procedure and Evidence and Rules 74 and 75 in particular.

d) Questioning any person being investigated or prosecuted

Even before the ICC has issued an arrest warrant, the Court may request a State to question a person who is believed to have committed a crime within the jurisdiction of the Court. States will need laws and procedures to allow them to question the person, including the possibility of detention if appropriate, while ensuring that the person's rights under Article 55, paragraph (2) are respected and observed. These rights include the right to be informed of the charge that the person is likely to face, the right to legal counsel of their choosing, the right to remain silent, and the right to be questioned in the presence of counsel. Subject to constitutional safeguards, States may wish to have laws in place to allow them to detain the person until the ICC has been advised of the information that the person has provided, as long as this is not an unreasonably lengthy period of time, such as more than a day.

States may implement this obligation by extending their existing legal practices (such as Canada's approach) or by incorporating the obligation into legislation, such as that done by New Zealand (NZ ss. 89, 90) and the United Kingdom (UK s. 28).

States need to make sure that at the very least, a written record of the questioning must be produced in every case.

State laws should also provide for the Prosecutor and defence counsel to interview accused nationals or other persons within their territory, after the Court has consulted with the State, in accordance with article 99, paragraph (4), subparagraph (b). Note that article 100, paragraph (1), subparagraph (c) stipulates that the Court will pay the travel and subsistence costs of relevant ICC personnel.

e) Serving documents, such as requests to testify before the Court

Because the ICC cannot demand that victims and witnesses provide information or testimony, States are not required to subpoena such persons to provide statements or to attend the Court. However, it would assist the Court considerably if States decided to make use of subpoenas or summons', to ensure that vital evidence is collected in a timely but fair fashion. Persons within the requested State and nationals of that State could be subpoenaed by the State authorities to provide statements for the Court, as long as the appropriate protections are also provided. This may require some revision to the State's laws on ser-

vice of documents, to include such subpoenas. On the other hand, States may choose merely to deliver requests to give evidence before the ICC, without any provision for enforcement of a response to such a request. Delivering requests may also need laws that require a person to ensure that the right person receives the request, and that the delivery of the request is kept confidential.

Some States, such as New Zealand and the United Kingdom, have incorporated this obligation into their legislation (see NZ s. 91, and UK s. 31). Others have chosen to include a general cooperation provision in their legislation that allows for procedures such as those involving the service of documents, as long as they are not prohibited by domestic law (see Switzerland, SW, art. 30 d).

f) Assisting witnesses and experts to attend the relevant proceedings

Article 100, paragraph (1), subparagraph (a) provides that the Court will pay the costs associated with the travel and security of witnesses and experts. However, States are required to "facilitate the voluntary appearance of persons as witnesses or experts before the Court" (article 93, paragraph (1), subparagraph (l). In other words, they should do everything possible to make it easy for witnesses and experts from their State to travel to the Court, of their own volition. This may include making the travel arrangements, arranging extra counselling, or anything else that the State thinks will assist such persons. In Finland, for example, authorities are required to take the necessary measures to facilitate a witness's compliance with a summons. The obligation is thus incorporated in its statute (see FI s. 5). Finland's legislation also provides that such witnesses are to be compensated in advance of appearing before the ICC in accordance with Finland's State Compensation for Witnesses Act (see FI s. 6). New Zealand similarly incorporated this obligation into its legislation, requiring that the Attorney General facilitate a witness's appearance if a number of conditions are met (see NZ ss. 92-94).

g) Conducting searches of persons

State laws will need to provide for the issuing of warrants to allow the relevant personnel to search persons, if the ICC requires this. They may also need to allow representatives of the Prosecutor and the defence counsel to be present during such searches, if requested by the Court to do so, after consultations with the State concerned. Some States have incorporated this obligation into their legislation while also referring to domestic powers. New Zealand's legislation, for example, authorizes police to search individuals once a warrant has been properly obtained, but also provides that nothing in the relevant provision limits or affects the rights of a constable to search a person or exercise any power under its Police Act (see NZ s. 77). Other States such as Canada, have amended their mutual assistance scheme to include the ICC. According to Canada's MLA Act, searches are conducted in accordance with Canada's Criminal Code (see CA(L), s. 10, 12 (4)). State authorities should note that there are different types of searches, from "frisking" a person's body outside of their clothes, to a full body cavity search. The invasiveness of the search is usually determined by the amount of probability that the person is carrying something particularly harmful or something that carries a high penalty if found in one's possession, such as certain banned drugs. States need to ensure that they do not carry out searches that are any

more invasive than they need to be, given all the circumstances. Otherwise the person can claim that their rights have been violated, such as their right not to be subjected to cruel, inhuman, or degrading treatment (article 55, paragraph (1), subparagraph (b)). Then whatever evidence is found on them may not be admissible, in accordance with Article 69, paragraph (7).

h) Preserving evidence such as audio, video, or written copies of interviews, statements and reports

States need to designate a secure storage facility for such materials, until they are required at trial, and limit the number of persons who can have access to them. This will help to reduce any possible tampering with such evidence.

i) Protecting victims and witnesses

States may need to have protection programs, or similar measures in place for all persons who may be involved in ICC investigations and proceedings. The needs of victims will be different from the needs of witnesses for the defence, so there should be separate measures for each. However, the basic idea of each will be the same: these persons may need protection from physical harm, or any kind of intimidation, prior to, during, and sometimes after ICC proceedings. The actual protective measures requested by the Court will vary. They may involve providing a safe temporary residence for victims, witnesses, and their families, moving them to a different location within the State or to another State if necessary, perhaps even changing their identity for them. States Parties may also be required to receive foreign victims and witnesses, if their safety is compromised within their own State. Therefore, immigration authorities should grant preferential treatment to these people.

Examples of different legislative approaches to this obligation include amending existing legislation (see Canada's amendment to its Witness Protection Act, and the United Kingdom's extension of its Criminal Evidence Order's provisions for the protection of witnesses, to its ICC legislation), or incorporating the obligation into the State's ICC legislation (see New Zealand, NZ s. 110).

The appropriate type of protection for each situation should be taken into account. For example, witness protection programs in North America are successful largely because of the size of the continent and the varied ethnic and racial background of the population. Both of these factors make it easier for strangers to blend into a new community, than if they all came from a relatively small, homogeneous country. Sometimes the use of restraining orders will be sufficient.

Police forces or other relevant authorities within the State should be organised to assist with the execution of requests to protect victims. In many States, a special unit with a mandate to protect victims and witnesses already exists at the national level. This could simply be expanded to include the victims of ICC crimes and witnesses who will be appearing before the ICC.

Some States Parties are relying on the general obligation to cooperate with requests of the ICC included in their implementing legislation in order to meet their obligations under article 93, paragraph (1), subparagraph (j) of the Rome Statute. For example, the Netherlands relies on the general obligation to cooperate with requests of the ICC in order to cover trust fund interests. Other States have implemented in detail the procedure to be adopted if the ICC requests assistance in protecting victims and witness or preserving evidence under article 93, paragraph (1), subparagraph (j). For example, in the Australian and New Zealand legislation, the Attorney General is the person responsible for authorising the request to proceed if he or she is satisfied that the request relates to an investigation or proceeding before the ICC and if the assistance sought is not prohibited by domestic law (AU s.80 and NZ s.110). The Attorney General then forwards the request to the designated agency who, in turn, produces a report for the Attorney General on its efforts to give effect to the request.

Some States Parties have either created new legislation or extended separate existing legislation in order to provide for the protection and compensation of witnesses and victims. For example, in Canada, the legislation provides for the establishment of the Crimes Against Humanity Fund and a Witness Protection Program Act (CA ss. 30-32). Certain States, such as Estonia, Finland and Norway already have existing legislation schemes that provide for protection and compensation of victims of crime and this could include victims of ICC crime (Estonia Code of Criminal Procedure s. 791, Finland State Compensation for Witnesses Act, Norway Penal Code and the Police Code). The Swiss legislation on the cooperation with the ICC includes specific provisions on the protection of victims and witnesses and the preservation of evidence (SW s. 30-32). Under the legislation, the Swiss courts may take preventative measures to maintain existing conditions, protect threatened legal interests or preserve endangered evidence. Other preventative measures may be taken to ensure the safety or physical or psychological well being of victims, witnesses or their families. The United Kingdom legislation extends the protection afforded to victims and witnesses of sexual offence under pre-existing domestic legislation to victims and witnesses in proceedings brought in the context of the ICC (UK s. 57).

j) Transferring persons in custody to the Court

If a State is likely to allow a person in its custody to be transferred to the Court, the State should have laws that allow it to perform such transfers. It should also have a procedure for obtaining the free and informed consent of the person in custody beforehand. Note that States can agree with the Court on conditions for the transfer, such as placing the person in a cell away from other persons in custody at the seat of the Court.

Many States may already have mutual legal assistance legislation, which allows them to transfer prisoners from one State to another, for the purpose of giving evidence or something similar. This legislation should only require minor modification to allow those States to transfer prisoners to the Court. Canada, for example, amended its existing mutual assistance scheme to comply with this obligation. New Zealand, on the other hand, fulfilled its obligation by creating specific provisions in its ICC legislation on the temporary transfer of prisoners to the Court (see NZ s. 95-99).

Article 100, paragraph (1), subparagraph (a) provides that the Court will pay for the costs associated with transferring a person in custody to the Court.

k) Respecting the rights of all persons being questioned

The rights set out in Article 55, paragraph (2) apply specifically to a person who is about to be questioned, and where there are grounds to believe that the person has committed an ICC crime. It is important that States enact laws or adopt procedures that require the relevant authorities to observe these fundamental rights. Otherwise, if the person's rights are violated significantly, that person may be acquitted on the grounds that the investigation was unfair.

l) Protecting accused persons

Accused persons may also need to be shielded from harm, so that they can have a fair trial and not be executed summarily by a person seeking instant revenge, for example. If they are being held in detention, States may need to give them a cell in a private area, so that other inmates cannot approach them.

m) Other types of assistance

The Court may also request a State to provide "any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court" (article 93, paragraph (1), subparagraph (l)). Such assistance will need to be negotiated with States, in accordance with article 93, paragraph (5).

Items of evidence

Description

There are an infinite number of different types of items that may be required as evidence in a criminal proceeding. Article 93, paragraph (1) refers to some of them, including the contents of exhumed grave sites (paragraph (g)), official records and documents (paragraph (i)), and possible proceeds of crimes (paragraph (k)). Other paragraphs in Article 93 suggest that States will have to co-operate with respect to: the location of items for the Court (paragraph (a)), the production of all kinds of evidence (paragraph (b)), the examination of places or sites, including the exhumation and examination of grave sites (paragraph (g)), the execution of searches and seizure (paragraph (h)), and the preservation of all kinds of evidence (paragraph (j)).

States need to ensure that they have no limits on the kinds of materials and objects that they can obtain control over, for provision to the Court. They also need to have laws that, in accordance with the Statute, allow the Prosecutor and the defence counsel to obtain items on their territory, or in the possession of their nationals. However, these laws should all protect the rights of bona fide third parties, if their property is required as evidence before the Court (article 93, paragraph (1), subparagraph (k)). Confidentiality and national

security concerns may also be relevant to items of evidence – see the sections on third-party confidentiality and protection of national security information, below.

Obligations

In general terms, States will need to assist with the following, where requested by the Court:

a) Identification and whereabouts of items (article 93, paragraph (1), subparagraph (a)).

b) Service of documents (article 93, paragraph (1), subparagraph (d)).

c) Examination of places or sites, including grave sites (article 93, paragraph (1), subparagraph (g)).

d) Search and seizure of items (article 93, paragraph (1), subparagraph (h)).

e) Provision of records and documents, including official documents (article 93, paragraph (1), subparagraph (i)).

f) Preservation of evidence (article 93, paragraph (1), subparagraph (j)).

g) Identifying, tracing and freezing evidence of proceeds of crime (article 93, paragraph (1), subparagraph (k)).

Implementation

a) Identification and whereabouts of items

This will probably be more of an issue of allocating resources than of legislation. In short, people will be needed to locate items of evidence for the ICC, such as weapons. In addition, States may need laws to allow the Prosecutor and defence counsel to look for items of evidence on State territory, after consulting with the State in accordance with article 99, paragraph (4), subparagraph (b). The defence will usually need an order from the Court to collect evidence, unless the State consents to their presence on its territory (article 57, paragraph (3), subparagraph (b)).

b) Service of documents, including judicial documents

States need to ensure that their laws on service of documents will apply to ICC documents, so that these can be served within the State's territory, as required.

c) Examination of sites

States may need to review any laws which prohibit persons from visiting or examining or disturbing particular locations in the State's territory. The Statute makes specific mention of the examination of grave sites, which may raise cultural or religious concerns in some States. However, recent experience with the two International Criminal Tribunals has

shown that issues such as these can be negotiated, where the gravity of the crime is such that the need for adequate prosecution overrides the need to meticulously observe particular practices.

By adding the ICC to the list of entities in its mutual assistance legislation from which it can entertain requests for assistance, Canada was able to apply existing procedures for obtaining approvals of requests to examine places or sites in Canada regarding an offence (s. 23 (1) MLA Act).

d) Search and seizure

State laws will need to provide for the issuing of search warrants to allow the relevant authorities to search for property and seize items of evidence, on behalf of the ICC. In addition, these laws and procedures could allow representatives of the Prosecution and the defence counsel to conduct such searches and seize such items after the State has been consulted on the issue. As with body searches, there are different types of searches of property, ranging from a superficial inspection to complete deconstruction of objects into their various components. States need to ensure that they do not carry out searches that are any more invasive or destructive than is necessary, given all the circumstances. Otherwise the evidence that is found may not be admissible, in accordance with article 69, paragraph (7).

e) Provision of official documents

States may need laws to allow them to provide official documents to the ICC and defence counsel. For example, data from police files is mentioned specifically in the Security Council Guidelines for National Implementing Legislation prepared for the International Tribunal for Yugoslavia. It is likely that the ICC will also request access to such information, where it concerns crimes within its jurisdiction.

f) Preservation of evidence

States may need laws to restrict the types of people who have access to evidence that is required for the ICC, in order to reduce the risk of anyone tampering with it. States may also need to allocate some extra resources to allow for the preservation of certain types of physical evidence. For example, security officers may be required to protect the scene of a crime until ICC Prosecutor can inspect it. Extra storage facilities may need to be provided to refrigerate bodily samples.

g) Proceeds of crime

States may need special laws to enable the relevant authorities to identify, trace, and freeze the proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties. The difference between such laws and some other search and seizure laws is in the fact that the property will not be returned to the person afterwards, if it is connected to the crimes that the person is found to have committed. In other words, court orders that effectively require the

potentially permanent confiscation of property need to be issued before it is proved that the person has actually committed the offence under investigation. Of course, these orders should provide that the property be returned where appropriate. They also need to protect the rights of bona fide third parties.

Where the proceeds of crime are in monetary form, States may need to introduce procedures that allow them to track the movement of large sums of money within the private banking sector. For example, in some jurisdictions, banks are required to notify the appropriate authority of all transactions of $10,000 or more.

Canada chose to implement this obligation through a series of amendments. First, its ICC legislation amended its pre-existing MLA Act to adopt and include the definition of the ICC, then new provisions were added to the MLA Act allowing Canada to provide specific assistance to enforce ICC orders and judgements for forfeiture and collection of ICC fines (see Canada's ICC legislation s. 57, and Canada's MLA Act ss. 9.1 and 9.2). Under the Swiss ICC legislation, the Central Authority executes such a request by the Court by authorising officials to enforce orders for freezing proceeds of crime. This is done in a similar way to its execution of other requests for cooperation from the Court (SW art. 30(j)).

3.10 Protection of National Security Information

Description

Article 93, paragraph (4) provides that a State Party may deny a request for assistance, in whole or in part, if the request concerns the production of any documents or disclosure of any evidence which relates to its national security. Article 72 sets out the procedure for dealing with issues of protection of national security information requested by the Court or a party. It provides that "in any case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests", all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor, the defence or the Pre-Trial Chamber or Trial Chamber as the case may be, to seek to resolve the matter by co-operative means. These steps may include modifying or clarifying the request, having the Court determine the relevance of the information or evidence sought, obtaining the information from another source, or agreeing on the use of summaries or redactions. Once all reasonable steps have been taken to resolve this matter co-operatively, then the Court may take steps set out in article 72, paragraph (7), such as requesting further consultations with the State or ordering disclosure.

Article 72 also applies to persons who have been requested to give information or evidence, when that person has claimed that disclosure of the information or evidence would prejudice the national security interests of a State and that State agreed with the claim.

Obligations

States have an obligation to co-operate with the Court. Article 72 provides specific guidance in cases where the disclosure of certain information requested by the Court or a party

is deemed by a State to be prejudicial to that State's national security interests. States must work co-operatively to resolve the matter. Article 72, paragraph (5) gives some examples of how the issue might be resolved co-operatively – for example, agreement could be reached on providing summaries or redactions or other protective measures. If, however, the State and the Prosecutor or Court cannot come to an agreement co-operatively, under article 72, paragraph (6) the State has an obligation to notify the Prosecutor or Court of the specific reasons for the decision – unless providing specific reasons would prejudice the State's national security interests.

Article 72 cannot be used to protect information that is not prejudicial to a State's national security interests. States must act in good faith when invoking protection on the basis of national security.

Implementation

The obligations under article 72 do not necessarily need to be reflected in legislation. The determination of "national security interests" will likely be a decision of the executive. In addition, the designation of appropriate procedures for communication on national security claims will likely be a matter for the executive. However, each State should review its process for designating specific procedures to determine if legislation is required to specify the communications procedures.

When a State is deciding whether to withhold certain information from the ICC, because of national security concerns, it may be helpful to consider these comments made by the Appeals Chamber of the ICTY, with reference to documents being withheld by a State asserting national security claims: "those documents might prove crucial for deciding whether the accused is innocent or guilty. The very *raison d'être* of the International Tribunal would then be undermined" (*Prosecutor v. Tihomir Blaskic,* Judgment on Request of Republic of Croatia for Review of Decision of Trial Chamber II, October 29, 1997, para. 65). However note that the ICTY Statute does oblige States to disclose national security information, unlike the Rome Statute.

3.11 Protection of Third-Party Information

Description

Article 73 provides for protection of third-party information or documents. According to this article, if a State Party is requested by the Court to provide a document or information in its custody, possession or control that was disclosed to it in confidence by a third party (State, intergovernmental organisation or international organisation), the State must seek the consent of the originator before disclosing the document or information. If the originator is a State Party, then it shall either consent or undertake to resolve the issues subject to article 73. If the originator refuses and is not a State Party, then the State shall inform the Court that it is unable to provide the document or information because of a pre-existing obligation of confidentiality to the originator.

Obligations

States must follow the procedure described in article 73 prior to the disclosure of third-party information.

Implementation

The procedures to deal with third-party information, and provision of information to the Court, are likely to be regulated by the executive and not through legislation. However, a State must take into account its national privacy legislation when establishing these procedures, and will need to determine if amendments are required. Some States Parties have implemented in detail the procedures set out in article 73 in their implementing legislation, such as New Zealand (NZ ss. 164-165) and Australia (AU Pt 7). In both these examples, the Attorney General is the authority identified who must seek the consent of the originator of the information or document and follow the procedures required. Both of these pieces of legislation also provide for the situation where their State is in the position of the originator of information or documents and another State is seeking consent from them to disclose information to the ICC.

3.12 Enforcement of Fines, Forfeiture Orders, and Reparations Orders

Description

Once a person has been convicted by the ICC, the Court may make a request to a State Party for identification, tracing and freezing or seizing of the relevant proceeds, property and assets and instrumentalities of the crime, for the purpose of eventual forfeiture, if this appears necessary (article 75, paragraph (4) and article 93, paragraph (1), subparagraph (k)). State Parties must comply with such requests, in accordance with their obligations under Part 9 of the Statute.

Article 77 allows the Court to impose fines and forfeiture orders on convicted persons, by way of a penalty. In addition, under article 75, paragraph (2), the Court may order a convicted person to provide reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Article 109 provides that States Parties must participate in the application and execution of all penalties that are in addition to incarceration. This includes fines and orders for the forfeiture of proceeds of crime, which must be enforced in accordance with the procedures of the national law. Note that this general obligation on States Parties is to be carried out without prejudicing the rights of "bona fide third parties". Article 75, paragraph (5) provides that States Parties must also give effect to reparations orders in accordance with the provisions of article 109. Note that orders for reparations may be appealed, by the legal representative of the victims, the convicted person, or a bona fide owner of property adversely affected by such an order (article 82, paragraph (4)). A convicted person or the ICC Prosecutor can also appeal decisions on penalties (article 81, paragraph (2), subparagraph (a)). Therefore, States may have to respond to a subsequent request *not* to enforce the particular fine or forfeiture order, if an appeal is lodged.

Article 79 provides for a Trust Fund to be established by the Assembly of States Parties, for the benefit of victims of crimes within the jurisdiction of the Court, and their families. The Court can order fines and other property collected through forfeiture orders to be transferred to the Trust Fund (article 79, paragraph (2)). Where appropriate, the Court can order that payment of reparations be made through the Trust Fund (article 75, paragraph (2)).

Obligations

a) Under article 75, paragraph (4) and article 93, paragraph (1), subparagraph (k), once a person has been convicted, States Parties must respond to requests from the Court to identify, trace and freeze or seize certain proceeds, property and assets and instrumentalities of crimes, for the purpose of eventual forfeiture.

b) Under article 109, paragraph (1), States Parties must give effect to penalties that are imposed on a convicted person in the form of fines or forfeiture orders by the Court, without prejudice to the rights of bona fide third parties, and in accordance with the procedure of their national law.

c) Under article 109, paragraph (2), if States Parties are unable to give effect to an order for forfeiture, they must 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.

d) Under article 109, paragraph (3), States Parties must transfer to the Court any property, or the proceeds of the sale of real property or, where appropriate, the sale of other property, which is obtained by the State Party as a result of its enforcement of a judgment of the Court.

e) Under article 75(5), States Parties must give effect to orders by the Court for reparations, in accordance with the provisions in article 109.

Implementation

a) Proceeds of crime

Article 75, paragraph (4) is one of several provisions in the Statute that allows the Court to request or order the tracing, seizure or freezing of proceeds and instrumentalities of crimes. Article 57, paragraph (3), subparagraph (e) allows the Pre-Trial Chamber to seek the co-operation of States in taking protective measures for the purpose of forfeiture, after an arrest warrant or summons has been issued under article 58. Article 93, paragraph (1), subparagraph (k) requires States to comply with orders for tracing, seizing or freezing proceeds and instrumentalities of crimes at any stage of an ICC investigation or prosecution. Thus, States Parties should ensure that they have laws and procedures in place that enables them to undertake all of these activities, such as Proceeds of Crime legislation and procedures.

With respect to implementing obligations regarding tracing, freezing, seizing (restraining) and forfeiture of the proceeds of crime, States Parties have taken a number of approaches, of which four will be highlighted here. One approach combines extending existing domestic restraint and forfeiture provisions to the proceeds of ICC crimes as well as providing for direct enforcement of such ICC orders. Another approach is to create a separate regime for restraint and forfeiture and the enforcement of forfeiture orders. A third approach is a hybrid of the first two, which implements only a domestic power for restraint and freezing and provides for direct enforcement to cover obligations regarding forfeiture. A fourth approach identifies a central national authority to address all ICC requests for cooperation.

An example of the first approach is the Canadian legislation which amends pre-existing mutual legal assistance legislation to adopt and include the definition of the ICC and add it to the other organisations covered by the Act, including the International Criminal Tribunals for Rwanda and the Former Yugoslavia (CA ss. 56-69). The Canadian legislation further provides that ICC orders for restraint and seizure of proceeds of crime are enforced as if they were special search warrants or restraining orders. The implementing legislation establishes a streamlined process, wherein the Minister of Justice may authorises the Attorney General to make arrangements for enforcement, who can then file the ICC order giving it status of its domestic equivalent. An example of the second approach is the New Zealand implementing legislation (NZ Pt 6). This Act establishes a scheme that applies domestic law for restraint, using existing proceeds of crime legislation and establishes a separate domestic forfeiture regime. An example of the hybrid and third approach is that of the United Kingdom legislation (UK ss.37-38 and 49). This Act separately deals with ICC requests to freeze property liable to forfeiture from the national legislation process for the enforcement of ICC sentences. The UK legislation essentially converts ICC requests regarding property into orders issued by national courts. However, rather than amending existing legislation, the UK Act includes self-contained procedural regime for executing requests. The Secretary of State designates a person to act on behalf of the ICC and directs that person to apply for an order. Providing an example for the forth approach, in the Swiss legislation, all decisions on whether to proceed or not to execute requests for the ICC lies with a Central Authority (SW arts. 3 and 41). The South African legislation also establishes a Central Authority that receives and authorises all requests from the ICC, including requests for entry, search and seizure as well as restraint orders and confiscation orders (SA ss. 25-29). The legislation sets out in detail the procedural regime that the Central Authority is to follow for each request.

b) Enforcement of fines, forfeiture orders and reparations orders

Article 109, paragraph (1) provides that States Parties must give effect to these types of orders "in accordance with the procedure of their national law." Thus States Parties need to ensure that they have laws and procedures in place that allow them to enforce all of these orders. They can determine for themselves what the appropriate laws and procedures should be, as long as these are consistent with the other provisions in article 109 and with the Statute. Those States with mutual legal assistance legislation will probably only need to make minor modifications to this legislation and to the relevant administrative procedures, to enable them to enforce these types of orders from the ICC. However, States

should ensure that the rights of bona fide third parties are protected in all cases. They should also ensure that the relevant authorities can respond in a timely fashion to any orders for a stay of execution of such orders, for example where an appeal is lodged subsequent to the order being made.

Legislative examples of implementing obligations relating to the enforcement of fines and reparation orders show at least three approaches: (1) providing for a general power to enforce all orders directly or (2) separate powers for both fines and reparation orders or (3) general power for enforcement but leaves out procedural details. Canada, Australia and the United Kingdom follow the first approach where the implementing legislation essentially converts these ICC orders into orders issued by its national courts (CA ss. 56-69, AU Pt 10 and 11, UK s. 49). However, the Canadian legislation amends existing domestic legislation to allow Canada to provide specific assistance to enforce ICC reparation orders and collection of ICC fines, while the UK and Australian legislations includes self-contained procedural regime for executing such orders. The second approach is followed by New Zealand, which has separate provisions dealing with enforcement of fines and reparation orders (NZ Pt 6). Examples of the third approach are found in the Norwegian and Finnish implementing legislations (FI s. 9, NO s. 11). In Norway, the implementing legislation provides general authority for the enforcement of fines and reparation orders and refers to the use of existing legislation, such as criminal procedure act applying where appropriate. In Finland, the legislation provides for the enforcement of fines and reparations as requested by the Court.

c) Transferring property or the proceeds of the sale of property to the Court

States Parties must transfer to the Court the tangible results of their enforcement of judgments of the Court. The Court may order that money and other property be transferred to the Trust Fund. States Parties therefore need legislation and administrative procedures to allow them to transfer money and property to the Court or to the Trust Fund, in accordance with the relevant order of the Court. Their mutual legal assistance legislation should contain similar provisions, which will probably only require minor amendment.

Some implementing legislation simply ensures that money or property recovered as a result of the enforcement of such orders must be transferred to the ICC, without specifying the procedure to do so. For an example, see New Zealand legislation. While other implementing legislation have created national funds, for example the Canadian Crimes Against Humanity Fund in which to deposit moneys collected through enforcement of ICC orders and identifies the national authority, such as the Attorney General, who has discretion to make payments to the ICC Trust Fund or to victims themselves.

3.13 Enforcement of Sentences of Imprisonment

The Statute provides that States Parties are not required to accept sentenced persons, in order to enforce sentences imposed by the Court. This is a voluntary commitment (article 103). When States are considering whether to volunteer for such a role, they should however take into account the positive effect that this would have on the efficient functioning of the Court. The Court will have only very limited detention facilities at The Hague, so it

will be relying almost entirely on States to enforce its sentences of imprisonment in national detention facilities. If there is a shortage of suitable facilities, this may create administrative difficulties for the Court and may lead to challenges by convicted persons to the conditions of their detention, if the facility at The Hague becomes overcrowded. Such challenges would take up the time of the Court and thus may interfere with the carrying out of its investigations and prosecutions. States may wish to ensure that their nationals, at least, are imprisoned in facilities that the State has jurisdiction over, to ensure that their conditions of imprisonment are in accordance with the person's rights under national laws. Thus, there are a number of good reasons for States Parties to volunteer to accept sentences persons from the Court.

Accepting sentenced persons

Description

States Parties will need to determine if they are prepared to be a willing party to accept sentenced persons. In the process of doing so, they will need to determine what conditions they may wish to attach to acceptance, which are to be agreed upon by the Court (article 103, paragraph (1), subparagraph (b)). Such conditions may include further prosecution, punishment or extradition to a third State at the conclusion of the person's sentence (articles 103, paragraph (1), subparagraphs (b) and 108). A number of States have made formal declarations when signing the Rome Statute indicating their willingness to accept sentenced persons. Some of the conditions made in these declarations include: only accepting its own nationals as prisoners; only prepared to receive persons sentenced not to more than 30 years imprisonment; or only when the sentenced imposed by the Court was enforced in accordance with national legislation on the maximum duration of sentence. Consideration to agreements between the Court and States Parties may be appropriate to govern the relationship under this part.

Obligations

States are not obliged to accept sentenced persons by the ICC. However, if they indicate a willingness to do so, States can attach conditions on this willingness, which are subject to agreement by the Court and to compatibility with Part 10 of the Rome Statute.

States Parties must assist the Court, as far as possible, in transferring the person to another State, where necessary (articles 104 and 107).

Implementation

One of the first policy questions for States to consider is whether it will agree to accept ICC prisoners. Factors for States to consider include: the capacity and resources of the State; constitutional issues with respect to pardons; and the ability to revise domestic law to reflect the enforcement scheme of the Rome Statute. ICC cases have the potential to be high profile and politically contentious at the national and international level and therefore could impose much greater demands upon the correctional services than other cases. Such

cases may require special detention arrangements, such as increased security to protect them from politically-motivated assaults, greater access to them by diplomatic officials from their country of origin, and arrangements to transfer them out of the State for appeal and sentence review hearings before the ICC, as well as at the end of their sentence. A revision of national legislation may be needed, with particular attention being paid to such matters as privacy of communication by sentenced persons with the Court and transfer of sentenced persons.

Once a State agrees to act as State of enforcement, it should review on what conditions it would be willing to accept such prisoners. Domestic legislation may provide for consultations with the appropriate national authorities to takes place before setting out such conditions. For example, the New Zealand legislation provides that the Minister of Justice must consult with the Police; the Department of Corrections and the Department of Labour (NZ ss. 139-156). Legislation may also allow that these conditions can be altered from time to time. Certain legislation, such as New Zealand's, provides that the State is not obliged to accept every prisoner. Each case would be considered as it arises. A number of States have provided details in their legislation as to what those conditions may be whereas other States' legislation provides for a general ability by the national authority to make of conditions. Conditions may include requiring the written consent of the prisoner to serving the sentence in the State; requiring ministerial consent; requiring at least 6 months of the sentence remains to be served (AU Pt 12); requiring the convicted person to be a citizen or permanent resident of the enforcing State (SW Chp 5). States may legislate that it can withdraw its agreement to act as a State of enforcement. For examples of this see the New Zealand and Australian ICC implementing legislation (NZ ss. 139-156, AU Pt 12).

Sentences of Imprisonment

Description

Article 103 provides for a sentence of imprisonment imposed by the Court to be served in a designated State which the Court has selected from a list of States willing to accept the sentenced person. When a State is designated by the Court in a particular case, article 103, paragraph (1), subparagraph (c) requires the State to inform the Court promptly whether it accepts the Court's designation. A State that has indicated its willingness to accept sentences to be served in their system may attach conditions agreed upon by the Court. However, a State of enforcement must notify the Court if these conditions or any other circumstances could materially affect the terms or extent of the imprisonment (article 103(2)).

Article 103(3) recognizes that the process of selection and designation by the Court is based on several governing principles. This includes "the principle that States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with the principle of equitable distribution, as provided in the Rules of Procedure and Evidence". Other principles include the application of widely accepted international treaty standards, the views and nationality of the sentenced person and such other factors appropriate to the enforcement of the sentence by the receiving State that will administer the sentence.

The sentence of imprisonment is binding

After acceptance by the State designated to enforce the Court's sentence, article 105 provides that the sentence of imprisonment is binding. Subject to certain conditions previously specified in article 103, a State cannot modify the sentence on its own initiative. However, in the event of new circumstances arising which did not exist at the time of acceptance and which substantially affect the terms or length of imprisonment, the State must notify the Court to review the situation and if necessary, transfer the sentenced person to another State (article 103, paragraph (2)). Article 104 also makes it possible for the Court to transfer the sentenced person to another State at any time it considers it necessary to do so. The Court may also make a new designation in response to a request from the prisoner (article 104, paragraph (2)).

In summary, it can be stated that the imprisonment part of the sentence is binding on the State Party that accepts the sentenced person and is subject to modification only by the Court, or in consultation with the Court in accordance with article 103, paragraph (2), subparagraph (a).

The supervision of enforcement of sentences and the conditions of imprisonment

With respect to the supervision of enforcement of sentences and the conditions of imprisonment, article 106 makes it clear that the Court has primacy and is the body with the authority to make any significant decisions that have to be made in the execution of the sentence. Article 106, paragraph (2) also provides that the conditions of imprisonment shall be governed by the law of the State of enforcement and "shall be consistent with widely accepted international treaty standards governing treatment of prisoners". Furthermore, the conditions may be neither more nor less favourable than national prisoners.

Article 106, paragraph (3) reconfirms that the Court is in charge of supervising the terms of imprisonment by declaring unequivocally that "communications between a sentenced person and the Court shall be unimpeded and confidential". The State must facilitate communication between the prisoner and the Court to ensure implementation of this obligation.

After completion of the sentence

Article 107 provides what is to be done after completion of the sentence and must be read with article 108 on the limitations involved on the prosecution or punishment of other offences. Article 107 provides for the transfer of the person who is not a national of the State of enforcement, extradition or surrender to a requesting State.

Article 108 can be viewed as a kind of specific description of the rule of specialty. It provides for an individual right to protect a person who is under sentence or who has served their sentence, from prosecution or extradition unless the Court approves the request from the State of enforcement. However, article 108, paragraph (2) states that the Court can only rule on the request of the State of enforcement "after having heard the views of the sentenced person".

Review by the Court for reduction of sentences

Article 110 makes it clear that the Court alone has the right to reduce the sentence after having heard from the sentenced person. A review of the sentence by the Court shall take place when the person has served two thirds of the sentence, or 25 years in the case of life imprisonment. The Court may reduce the sentence based on the factors enumerated in Article 110, paragraph (4).

Obligations

If a State chooses to accept sentenced persons, appropriate procedures will need to be put in place to respect the letter and spirit of this requirement. In particular, States of enforcement must comply with articles 103, paragraph (1), subparagraph (c) and paragraph 2, subparagraph (a), articles 105, 106 & 108 as follows:

- inform the Court promptly whether it accepts a particular designation in a particular case;
- once the State has accepted the sentenced person, notify the Court at least 45 days in advance of any known foreseeable circumstances which could materially affect the terms or extent of the imprisonment and ensure that the national authorities do not take any prejudicial action during that 45 day period;
- assist the Court as far as possible in transferring the person to another custodial State, either during or after the term of imprisonment;
- ensure that any sentence imposed by the Court cannot be modified or reduced by national authorities, including releasing the person before the expiry of the sentence imposed by the Court;
- ensure that the sentenced person is not subject to prosecution or punishment or extradition to a third State for any conduct engaged in prior to that person's delivery to the designated State, unless such prosecution, punishment or extradition has not been approved by the ICC at the request of the designated State;
- ensure that all communications between the prisoner and the ICC are unimpeded and confidential and in particular that the person is not impeded from making applications to the ICC for appeal and revision;
- ensure that the conditions of imprisonment for the sentenced person are consistent with widely accepted international treaty standards governing treatment of prisoners and that they are not more or less favourable than those available to prisoners convicted of similar offences in the designated State;
- be prepared to assist the Court with obtaining certain information from the prisoner, for example information regarding the proceeds of the crime; and
- be prepared to cover the ordinary costs for the enforcement of the sentence person, travel and subsistence costs of ICC personnel, or costs of any expert opinion requested by the Court.

Implementation

This may necessitate both legislative and administrative changes on the part of the accepting State. Various States have taken a number of approaches in implementing the obligations to enforce ICC sentences upon accepting the Court's designation. A simple approach is stating that enforcement will be in accordance with Part 10 of the Rome Statute (NO s. 10). Another relatively simple approach is extending the pre-existing domestic enforcement scheme to ICC sentences (FI s. 7). A variation of the last approach is in addition to using the domestic enforcement scheme, providing provisions dealing with the uniqueness of the ICC sentences, such as communication of requests by the ICC as well as from the prisoner to the ICC through the State's central authority (see Switzerland and South Africa). A more comprehensive approach is providing in the legislation a detailed self-contained enforcement scheme that covers transportation, enforcement through warrants or orders, sentences/detention, review, communication, etc (see AU Pt 12, NZ ss. 139-156, UK Pt 4). In the UK and New Zealand, once a warrant is issued, the prisoner is treated for all purposes as if he or she was subject to a sentence of imprisonment imposed by the domestic courts. In Australia, the ICC legislation specifies the form of the warrant as well as consequences. A number of States have legislation that specifically deals with the issue of costs. For example, in the Swiss law it sets out which costs will be covered by the ICC and which costs will be covered by the State. In the New Zealand legislation the State can ask the ICC to give assurances regarding transportation costs or to have the ICC arrange for transportation before and after sentences.

4. THE COMPLEMENTARY JURISDICTION OF THE ICC

4.1 The "Principle of Complementarity" of the ICC

The Rome Statute encourages States to exercise their jurisdiction over the ICC crimes. Its Preamble states that the effective prosecution of the ICC crimes must be ensured by taking measures at the national level and by enhancing international cooperation. In addition, it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes. Nevertheless, there is nothing explicit in the Statute imposing an obligation to prosecute the ICC crimes. This obligation can be found in other treaties, for some of the crimes listed in the Statute, but not for all of them. Under the four Geneva Conventions of 1949, States Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing grave breaches of the Conventions. Under article 5 of the Genocide Convention, States Parties undertake to enact the necessary legislation to give effect to the provisions of the Convention and to provide effective penalties for persons guilty of genocide. The history of the second half of the 20th century shows us that this obligation was only minimally respected.

Nevertheless, the Statute does not deprive States of the power to prosecute the perpetrators of international crimes. Further, the ICC's jurisdiction defers to that of States Parties. While the Statute does not relieve States of the power to prosecute perpetrators of crimes within its jurisdiction, it institutes a Court that will do so in the event that States Parties neglect to prosecute these criminals or do not possess the means to do so.

Under the principle of complementarity, the ICC only exercises its jurisdiction when States Parties fail to investigate or undertake judicial procedures in good faith, after a crime covered under the Statute has been committed. The ICC cannot hear a case when a State has decided to act in good faith.

Exceptions to the principle

However, it is essential that procedures initiated by the State in question be undertaken in good faith, that is, respecting international law. There are therefore several exceptions under which the ICC can hear a case that has already been referred to a State. These are provided in article 17:

- when the State in question is unwilling genuinely to investigate or prosecute;
- when the State in question is unable genuinely to investigate or prosecute;
- when, after investigation, the decision of a State not to prosecute a person is motivated by the desire to shield the person from being brought to justice;
- when, after investigation, the decision of a State not to prosecute a person is motivated by its inability to conduct judicial proceedings.

The ICC becomes involved when there is a lack of either willingness or ability on the part of a State. Under article 17, paragraph (2), "Unwilling" means:

- the proceedings were undertaken with the aim of shielding the person in question from criminal responsibility for the crime;
- the decision not to pursue the matter was made by the State in order to shield the person in question from criminal responsibility;
- the proceedings were subjected to unjustified delay which in the circumstances, is inconsistent with an intent to bring the person concerned to justice;
- the proceedings are not or were not conducted independently and impartially, and they were or are being conducted in a manner inconsistent with an intention to bring the person concerned to justice

Under article 17, paragraph (3), "Unable" means:

1. the State's national judicial system has substantially or totally collapsed;

2. the State's national judicial system is unable to obtain the accused or the necessary evidence or otherwise unable to carry out its proceedings

Although it was imperative that priority be given to States to prosecute and punish perpetrators of international crimes, it was equally necessary to have a mechanism ready in the event that a State would conduct sham proceedings or would not possess the technical means required for a proper investigation and trial. Without this mechanism, it would be too easy to defeat justice. A State who was unwilling to prosecute the perpetrator of a crime could manipulate the procedures to ensure a not-guilty verdict by engineering a stay of proceedings, buying off the jury, deliberately violating the fundamental rights of the defendant, or by creating unreasonable delays. More simply still, a State could deliberately omit to present critical evidence to the hearing. These crimes are not to be subject to any statute of limitations, either (article 29). Therefore, if the national jurisdiction continues to have statutes of limitations for these crimes, the ICC may find them unable to prosecute them and the complementarity principle applies. This could create an unnecessary burden for the Court.

At the same time, the Statute and the Rules of Procedure and Evidence together provide that a State Party will have numerous opportunities to present information to the Court, so that the Court will make a fair assessment of the genuineness of a State's proceedings. States can challenge the admissibility of cases at a number of stages of the proceedings, and decisions on admissibility may be appealed to the Appeals Chamber. With the 18 ICC judges representing every region and principal legal system of the world, the ICC will be able to take into account legitimate cultural differences and approaches to investigations and prosecutions.

Ne bis in idem

The jurisdiction of the ICC to try an individual who has been the object of sham proceedings in a national court is technically an exception to the principle of criminal law in which a person may not be prosecuted twice for the same crime (*ne bis in idem*). Arti-

cle 20 allows the ICC to prosecute a person for a crime referred to in the Statute, even after being tried for the same act in a national court if:

a) the proceedings were aimed at shielding the person from criminal responsibility; or

b) the procedure was not independent or impartial in accordance with the norms of due process recognized by international law, and was conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Criminal justice has been rendered then, only when it has been rendered in accordance with due process and other international standards. The first example concerns a situation such as a State charging a perpetrator of genocide with assault. Such a trial, although respecting all the safeguards concerning impartiality, would be aimed at shielding the person from responsibility for an extremely serious crime. The second example covers a larger spectrum of situations. It does not mean, however, that the ICC will have the power to intervene in every case where it judges that a procedural safeguard was violated in a trial conducted by a national authority. In order for the ICC to begin a new trial, the violation of procedural safeguards must have been committed with the aim of preventing the person concerned from being brought to justice.

The principle of *ne bis in idem* can be found in most national criminal codes, in some constitutions and in article 14 of the International Covenant on Civil and Political Rights. It would be preferable if the national law implementing the ICC Statute made mention of the exception to this principle provided by the Statute. The ICC Statute and the general scheme for complementarity require that issues of *ne bis in idem* are to be decided by the ICC. In ensuring this principle, States may need to review and amend existing regimes if domestic courts have such a power or States may choose to specify this in legislation, such as the case of New Zealand (NZ ss. 8-13).

Ordinary offences versus ICC crimes

Article 22 states that a State may not prosecute someone for a crime listed under the Statute for which he or she has already been sentenced or acquitted by the ICC.

Under article 20, paragraph (1), if the judicial authorities of a State have properly prosecuted a person for an act under the ICC's jurisdiction, the ICC may not try that person again. Whether the person was genuinely prosecuted for a sufficiently serious crime under national law (for example, for the commission of multiple murder rather than genocide) or for an international crime, will determine whether the ICC can exercise its jurisdiction.

Sentences

When a national court prosecutes and sentences the perpetrator of an offence referred to in the Statute, it has the power to impose the sentence it considers appropriate. Article 80 does not affect application of sentences provided by the domestic law of States

Parties. Nor may subsequent rulings concerning pardon, parole or suspension of sentence result in the case being referred to the ICC.

Amnesties and pardons

Many constitutions allow the Head of State a discretion to make amnesties or grant pardons.

i) A Head of State may grant pardons or amnesties in relation to any national prosecution or sentence. If the person was granted a pardon after being convicted at the national level, the ICC would not try that person again unless the proceedings were aimed at shielding the person from criminal responsibility.

ii) However, the Head of a State Party cannot use this power where a person has been convicted by the ICC. Article 110, paragraph (2) provides that the Court alone has the right to reduce a sentence it has imposed.

The issue of amnesties and truth commissions and the like is not specifically mentioned within the Statute, even in the provisions on complementarity. This reflects mixed views within the international community as to the effectiveness of such measures in bringing about lasting peace and reconciliation. There are also varying approaches to the granting of amnesties across different jurisdictions, some of which are more expedient than others. When the Court is considering issues of admissibility, it will consider how genuine the efforts of States have been and will no doubt take into account how closely any "truth commission" resembles a genuine investigation process. It will also consider the basis upon which a decision not to prosecute was made, to determine whether the Court should interfere with a genuine process of reconciliation.

4.2 The Jurisdiction of the ICC

Description

Under article 1, the Court shall have the power to exercise its jurisdiction over persons "for the most serious crimes of international concern". Article 1 also states: "The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute". Note that the ICC only has jurisdiction over persons who were 18 or over at the time of the alleged offence (article 26).

Non retroactive jurisdiction

Article 11 states that the Court has jurisdiction only with respect to crimes committed after entry into force of the Statute. The Statute entered into force July 1, 2002. No one shall be criminally responsible under the Statute for conduct prior to July 1, 2002. For States Parties that ratified prior to May 1, 2002, the Court may exercise jurisdiction over ICC crimes committed after July 1, 2002. If a State becomes a Party after May 1, 2002, then the Court may exercise its jurisdiction only with respect to crimes committed after

the entry into force of this Statute for that State, except where it has made a declaration under article 12, paragraph (3) accepting the jurisdiction of the Court as a non-State Party. Note also, if the Statute is amended prior to final judgement in a particular case, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

Complementarity Requirements

If a State Party wishes to prosecute ICC crimes, at a minimum, it should enact legislation allowing it to exercise territorial jurisdiction over such crimes and extra-territorial jurisdiction over its nationals who commit crimes abroad. States should also consider the following:

- ensure that there are laws and procedures in place to carry out such investigations and prosecutions in accordance with the relevant provisions of the ICC Statute to ensure that the ICC will defer to the State's jurisdiction;

- grant "universal" or other appropriate jurisdiction to all relevant national authorities, in order to facilitate prosecution of ICC crimes at the national level, wherever and whenever they have been committed; and

- implement procedures to enable relevant authorities to take full advantage of the Court's "complementary" jurisdiction, in accordance with articles 17-19.

Implementation

States that wish to prosecute ICC crimes should ensure that they have national legislation in place that allows them to exercise jurisdiction over people committing crimes in their territory, and nationals who commit crimes abroad. This may simply require an amendment to the criminal code. When a State is implementing the ICC crimes into national law, the State is not obliged to follow these time constraints that are placed on the ICC. The State need only observe the relevant domestic principles that may apply to its introduction of new crimes. States may consider whether to exert jurisdiction on a prospective or retrospective basis. The New Zealand and Canadian legislation provide examples of applying retrospective jurisdiction (NZ s. 8, CA s. 8).

States have various implementing options relating to jurisdiction. A State could parallel the jurisdiction of the ICC, as seen by the UK example wherein jurisdiction covers crimes committed on its territory or on its registered vessels and aircraft or by an accused who is a national (UK ss. 54 and 67). Alternatively, States may choose to provide for a broader jurisdiction, including universal jurisdiction, as set out in the 1949 Geneva Conventions and their 1977 Additional Protocols in relation to "grave breaches". Note that different concepts of "universal jurisdiction" exist: some interpret this term to mean that a State can exercise jurisdiction over anyone found in its territory, while others interpret it to mean that a State can arrest anyone, wherever that person may be in the world and regardless of any linkage to the State in question. The International Court of Justice recently expressed concern over the issuance of international arrest

warrants by national courts for foreign government officials, where there was no jurisdictional link between the State issuing the warrant and the State of nationality of the accused (Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo* v. *Belgium*), International Court of Justice, General List, No. 121, 14 February 2002 (Yerodia case)). Most States have incorporated a traditional definition that provides for the exercise of universal jurisdiction where the person is present in the jurisdiction (for example, see Canada and France). In some States, such as Argentina, universal jurisdiction is asserted on the basis on binding international agreements, which would include the Statute. Other States have opted for a broader definition which provides for jurisdiction over all offences whether or not the person is or was ever present in the jurisdiction (for example see New Zealand and Belgium). Other grounds States may wish to consider include jurisdiction based on the victim's status (see Canada's legislation). Other implementing options relating to jurisdiction include incorporating traditional bases of jurisdiction applicable to armed conflict (see Canadian legislation).

As an example, the Canadian *Crimes Against Humanity and War Crimes Act* states that persons alleged to have committed, outside of Canada, offences of genocide, crimes against humanity, war crimes or breach of a commander's responsibility may be prosecuted for these offences if: (a) at the time the offence is alleged to be committed, (i) the person was a Canadian citizen or was employed by Canada in a civilian or military capacity, (ii) the person was a citizen of a State that was engaged in an armed conflict against Canada, or was employed in a civilian or military capacity by such a State, (iii) the victim of the alleged offence was a Canadian citizen, or (iv) the victim of the alleged offence was a citizen of a State that was allied with Canada in an armed conflict; or (b) at the time the offence is alleged to have been committed, Canada could, in conformity with international law, exercise jurisdiction over the person with respect to the offence on the basis of the person's presence in Canada and, after that time, the person is present in Canada."

4.3 Crimes listed under the Statute

It is prudent for a State Party to ensure that its national law incorporates definitions of the crimes that reflect the Statute's provisions in their entirety because the Statute has refined international criminal law with respect to the definitions of the offences in some instances. These definitions were adopted by 120 States participating in the Rome Conference. Therefore, they represent the views of the majority of States, in terms of the current state of international criminal law. They are based on existing treaty and customary law proscriptions, and take into account the jurisprudence of the ICTY/R. Therefore, all States that incorporate these definitions into their national laws are indicating their strong support for international norms and standards.

Pursuant to article 9 of the Rome Statute, the ICC Preparatory Commission prepared the draft "Elements of Crimes" which has been adopted by the Assembly of States Parties at its first meeting 3-10 September 2002. The Elements of Crimes are to assist, rather than bind, the ICC in the interpretation and application of the crimes under the Court's jurisdiction. The Elements are meant to be used by the Court's judges as simple

guidelines in reaching determinations as to individual criminal responsibility, and in the event of a conflict between the State and the elements, the Statute should always prevail. The Elements of Crimes provide a description of the various material (conduct, consequences and circumstances) and mental elements constituting each ICC offence. The Elements of Crimes will have an impact on domestic courts as they will be a reference point in dealing with the ICC crimes at the national level. Therefore, States may wish to implement these elements into their national laws as well.

Genocide, Crimes Against Humanity and War Crimes

Description

The definitions of crimes over which the ICC has jurisdiction reflect widely-accepted international norms, based on existing treaties on international humanitarian law and customary international law. Many legal experts believe that all the ICC crimes reflect customary international law as it currently stands. The Canadian *Crimes Against Humanity and War Crimes Act* provides: "For greater certainty, crimes described in Articles 6 and 7 and paragraph 2 of Article 8 of the Rome Statute are, as of 1 July 1998, crimes according to customary international law. This does not limit or prejudice in any way the application of existing or developing rules of international law" (CA s.4(4)).

For States who have decided to implement the ICC crimes into domestic law, it must be recalled that fifty years have passed since the adoption of the four Geneva Conventions. International humanitarian law has evolved and the definition of war crimes and crimes against humanity has developed. It should be noted that in some cases, the definitions of crimes in the Rome Statute reflect a conservative interpretation of the law established by treaty and customary international law. In other cases, the definitions reflect a more expansive interpretation of customary international law. Therefore for those States who have implemented the Geneva Conventions and other treaties domestically, there is likely to be some changes. In order to ensure that States Parties are clear of their obligations under the ICC Statute, each of the ICC crimes will be reviewed along with an analysis of the definition source as well as comparisons made.

Genocide

The Rome Statute has adopted word for word the definition of genocide established by the 1948 Convention for the Prevention and Repression of the Crime of Genocide. The definition of this crime is based on three components:

1) commission of one or more of the five following acts:

- murder;
- causing serious physical or mental harm;
- deliberately inflicting conditions of life calculated to bring about physical destruction in whole or in part;
- imposing measures intended to prevent births;

- forcibly transferring children of the group to another group.

2) targeting a national, ethnic, racial or religious group, as such.

3) intent to destroy the group, in whole or in part. The requirement of guilty intent is very high. The person must be shown to have acted with the intent to destroy a group. Where this specific intent is not present, the acts may still, in appropriate circumstances, amount to crimes against humanity or war crimes. Genocide cannot be committed by negligence. The term "in whole or in part" signifies that an isolated act of racist violence does not constitute genocide. There must be an intent to eliminate large numbers of the group, although not necessarily to completely destroy the group.

Crimes Against Humanity

Under article 7, the expression "crimes against humanity" is employed to designate multiple acts of inhumanity committed as part of a widespread or systematic attack directed against a civilian population, in peacetime or wartime. The Rome Statute definition of crimes against humanity contains six components, some of which may differ from previous definitions of this crime. It should be noted that the second paragraph of article 7 of the Statute contains definitions for all of the important terms contained in the first paragraph:

a) Widespread or systematic attack. "Widespread" signifies a high number of victims and "systematic" refers to a high degree of organization, pursuant to a plan or policy. The presence of the word "or" means that those are not cumulative conditions. The murder of a single civilian can constitute a crime against humanity if it were committed in the course of a systematic attack.

b) Directed against a civilian population. National or other ties between the perpetrator and victim are of no import.

c) Commission of inhumane acts. The Statute lists eleven acts that could constitute crimes against humanity in the context of such an attack (1. murder; 2. extermination; 3. enslavement; 4. deportation or forcible transfer of a population; 5. imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; 6. torture; 7. rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; 8. persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other universally recognized grounds; 9. enforced disappearance of persons; 10. apartheid; and 11. other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health).

d) Knowledge of the attack against a civilian population.

e) For acts of persecution only, political, racial, national, ethnic, cultural, religious, gender, or other universally recognized grounds must be shown.

f) Context. A crime against humanity may be committed in peacetime or in wartime. It is not necessarily committed in connection with another crime. An exception is the persecution of any identifiable group or collectivity; persecution must be linked to another act enumerated in article 7, paragraph (1), or any crime within the ICC's jurisdiction.

The reason for the inclusion of a context element in crimes against humanity is to distinguish ordinary crimes under national law from international crimes which are of international concern. Crimes against humanity comprise only the most severe violations of human rights.

The definition of crimes against humanity in the Rome Statute borrowed from many sources of international law, including the Nuremberg Charter, Statutes of the ICTY/R, and various human rights treaties, such as the Convention Against Torture. There are some differences between the Rome Statute definition and these sources, as most States participating in the Rome Conference felt that international law had developed since those documents were drafted. These minor differences are discussed below:

- Rome Statute definition does not require that the perpetrators have a discriminatory intent when committing a crime against humanity. This means that the attack against civilians need not be committed against a particular group sharing certain characteristics such as nationality.
- The definition of torture in the Rome Statute, whether as a crime against humanity or war crime, differs from the definition under the Convention of Torture in that it does not require that the act of torture be committed for a purpose such as obtaining a confession or as a punishment nor does it require that the torture be committed by or at the instigation of or with the consent or acquiescence of a public official or a person acting in an official capacity.
- The definition of enslavement in the Rome Statute adds an explicit reference to trafficking in women and children which is not present in the Slavery Convention definition.
- The Rome Statute expands the list of grounds for persecution from that listed in the Nuremberg Charter to include national, ethnic, cultural, gender or any other grounds universally recognised as impermissible under international law. It also expands the connection element to include not only connection with any ICC crime but also connection with any act referred to in article 7, paragraph (1).
- In the Rome Statute, the definition of enforced disappearance provides that in addition to States, political organisations may also be responsible for such a crime. It also adds the concept of detention for a prolonged period of time to distinguish enforced disappearance from other unlawful deprivations of liberty.

War crimes

War crimes have traditionally been defined as a violation of the most fundamental laws and customs of war. Article 8 of the Rome Statute defines four categories of war crimes:

1. Grave breaches under the 1949 Geneva Conventions which apply to international armed conflict.

2. Other serious violations of the laws and customs applicable to international armed conflict.

3. Serious violations of article 3 common to the Geneva Conventions, which applies to non-international armed conflict.

4. Other serious violations of the laws and customs applicable in non-international armed conflict.

The negotiating process that culminated in the Rome Statute was characterized by both compromise and the development of international law. Below, each category will discuss the source of law and reflect on the differences to the traditional definitions. The Statute definition of war crimes is narrower in some respects than the traditional definitions of war crimes. At the same time, it is broader than the traditional definition in other respects, because it covers acts that had never before been codified. The major innovation of the Statute is that it enshrines the recent evolution of international jurisprudence criminalizing war crimes committed during non-international armed conflict. The differences discussed below highlight the fact that if States have not fully implemented international humanitarian law treaties, they may not be in a position to benefit from the complementarity principle under the Rome Statute. The reason for this is that there are certain war crimes within the ICC's jurisdiction which are not covered by the Geneva Conventions or the Additional Protocols. Also note that if States adopt legislation to criminalise war crimes as defined by the Rome Statute, this would not be enough to satisfy their obligations under international humanitarian law.

Grave breaches of the Geneva Conventions of 1949 that apply to international armed conflict (article 8, paragraph (2), subparagraph (a))

Under this category, the Rome Statute essentially repeats all of the acts defined as "grave breaches" in the four Geneva Conventions. In other words the Statute criminalises the following acts committed against wounded, sick or shipwrecked members of armed forces, prisoners of war or civilians:

- Willful killing;
- Torture or inhuman treatment, including biological experiments;
- Willfully causing great suffering, or serious injury to body or health;

- Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- Compelling a prisoner of war or other protected person to serve in the forces of a hostile power;
- Willfully depriving a prisoner of war or other protected person of the right to a fair and regular trial;
- Unlawful deportation or transfer or unlawful confinement;
- Taking of hostages.

The Rome Statute establishes a threshold for jurisdiction in respect of war crimes, which is not existing in international humanitarian law. The acts listed in article 8 must be committed as part of a plan or policy or as part of a large-scale commission of such crimes.

Other serious violations of the laws and customs applicable to international armed conflict (article 8, paragraph (2), subparagraph (b))

These crimes are derived from various sources and reproduce to a large extent rules from the 1907 Hague Regulations concerning the Laws and Customs of War on Land, the 1977 Additional Protocol I to the Geneva Conventions, the 1899 Hague Declaration IV concerning Expanding Bullets and the 1925 Geneva Gas Protocol as well as various conventions banning certain weapons. The criminal acts include:

- Intentionally directing attacks against the civilian population not taking direct part in hostilities;
- Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
- Intentionally launching an attack against personnel or installations involved in humanitarian assistance or a peacekeeping mission in accordance with the Charter of the United Nations;
- The transfer by an occupying power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence constituting a serous breach of the Geneva Conventions;
- Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

- Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

In most respects, the definitions of war crimes committed in international armed conflict in the Rome Statute are consistent with the existing international law. The differences between the Rome Statute to traditional international humanitarian law include advancement in the Rome Statute such as recognition of specific sexual and gender based offences, recognition as a war crime conscription or enlistment of children under fifteen years; and criminalisation of attacks against humanitarian personnel. However, not all serious violations of international humanitarian law have been included in the Rome Statute. For example the provisions relating to the use of certain weapons are not as extensive as other treaties. There are no provisions on the unjustifiable delay in the repatriation of prisoners of war or of civilians.

The reference to the widespread, long-term and severe damage to the natural environment is not found in the Geneva Conventions not the Additional Protocols. The threshold in the Rome Statute is that such damage must be "clearly excessive" in relation to the overall military advantage anticipated. The Rome Statute's definition of transferring civilian populations by an occupying power refers to both direct and indirect transfer and includes the transfer of its own civilian population into territory it occupies as well as the deportation or transfer of all or parts of the civilian population of the occupied territory. The Rome Statute expands the definition of this crime found in the fourth Geneva Convention to cover transfers of the occupying power's own civilian population into the territory it occupies. In the Rome Statute, there are three crimes regarding intentionally directing attacks against civilian objects, intentionally launching an attack, and attacking and or bombarding which are found in Additional Protocol I. The difference between the Rome Statute and Additional Protocol I is that the Rome Statute does not explicitly require "death, serious injury to body or health" in connection with these three crimes.

Serious violations of article 3 common to the Geneva Conventions that apply to non-international armed conflict (article 8, paragraph (2), subparagraph (c))

This definition borrows directly from Common article 3 of the Geneva Convention. The following list of war crimes would apply in non-international armed conflicts when committed against individuals not directly participating in the hostilities, including members of armed forces who have laid down their arms or been placed hors de combat due to illness, injury, detention, or any other cause:

- Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- Taking of hostages;

- The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees that are generally recognized as indispensable.

It should be notes that article 8, paragraph (2), subparagraphs (d) and (f) limit the scope of the ICC's jurisdiction over acts committed in non-international armed conflicts. They exclude internal disturbances and tensions, riots, isolated and sporadic acts of violence and other acts of a similar nature.

Other serious violations of the laws and customs applicable in non-international armed conflict (article 8, paragraph (2), subparagraphs (e))

This category is derived from various sources including Additional Protocol II and various treaties on the laws of warfare and customary international law. However, under paragraph (f), these crimes can occur only when there is a protracted armed conflict on a State's territory between State forces and organized armed groups, or between organized armed groups. States should be aware that the threshold of paragraph (e) of the Statute is lower than the threshold of Protocol II: neither responsible commanders, nor control on a part of the territory is required. The existence of a protracted armed conflict is sufficient. The crimes listed in paragraph (c) could also apply during such a conflict. The criminal acts listed under article 8, paragraph (2), subparagraphs (e) include:

- Intentionally directing attacks against the civilian population not taking direct part in hostilities;
- Intentionally launching attacks against personnel or equipment of a humanitarian or peacekeeping mission, according to the Charter of the United Nations;
- Committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a serious violation of the four Geneva Conventions;
- Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
- Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand.

The Rome Statute is considered to advance the development of international humanitarian law by including in the definition of war crimes serious violations of international humanitarian law committed during non-international armed conflicts. The definition includes specific sexual and gender-based offences; conscription and enlistment of children under fifteen and attacks against humanitarian personnel as war crimes. Not all serious violations of international humanitarian law committed during non-international conflict are considered as war crimes under the Rome Statute. This includes the intentional starvation of civilians. It should be noted that approximately

half of the war crimes defined for international armed conflicts are not included in the section on non-international armed conflict.

Complementarity Requirements

The ICC Statute does not obligate States to create a domestic regime for prosecution of the crimes under the jurisdiction of the ICC. Each State must decide whether to enact domestic law incorporating ICC crimes. Factors to consider include whether States are prepared to have the ICC make a finding that they are unable to prosecute. Also States may want to ensure they have the power to prosecute domestically particular situations, such as cases of internal conflict or invasion. A State may need to consider that domestic prosecution of these cases may be costly, however it must also consider the likelihood of never being faced with a prosecution. Each State that intends to incorporate these crimes into its domestic system should consider how to define the crimes and what penalties should be prescribed. They should also consider, what use, if any, should be made of the Elements of Crimes.

Implementation

Almost every State Party to the Rome Statute has implemented the ICC crimes into national law, or is in the process of doing this. Once States have decided to incorporate the crimes into domestic law, there are various methods that can be used. There are two main options available for States. The first is to incorporate the crimes in their entirety into national laws. This option can be approach in at least three ways – incorporating by reference; creating of a separate piece of legislation to cover ICC crimes; or amending existing domestic legislation where there is already domestic legislation implementing the Geneva Conventions, the Additional Protocols and the Genocide Convention to add additional offences not addressed in those conventions. A second option would be to rely on existing national laws, criminalizing violations that are similar in nature, if not identical to those in the Rome Statute. Another consideration for States would be whether to adopt the ICC crimes only, or to go further and cover additional matters that were not included in the ICC Statute, such as the use of nuclear or biological weapons.

If the decision were made to restrict the scope of domestic law to the ICC Statute crimes, then a simple method would be to incorporate the crimes by reference, as has been done in New Zealand and the United Kingdom (NZ ss. 8-11, UK ss. 51-52). While this method may seem the obvious method, a concern may be that this would not necessarily be the best way of ensuring that domestic courts and practitioners would apply these provisions.

Where a separate scheme is adopted, States will want to consider any conflicts that may arise as a result of the existence of legislation implementing the Geneva Conventions, its Additional Protocols and the Genocide Convention. The New Zealand legislation addresses this question by maintaining both scheme but providing that the new legisla-

tion does not limit the application of existing legislation. This approach allows States to use a more familiar framework of law when incorporating ICC crimes.

Where there is existing legislation incorporating international humanitarian law, States may need to create newly domestic offences where they did not exist before as well as amending existing offences to ensure that they wholly succeed in giving full effect to the Rome Statute.

Another approach is to not only incorporate in domestic law the ability to prosecute ICC crimes, but also the ability to prosecute other crimes under International Humanitarian Law, whether conventional or customary international law. This is the approach followed in Canada (CA ss. 4-8). This has the advantage of automatically incorporating new developments in conventional and customary international law without having to amend the legislation in the future.

States may decide to use existing law offences to prosecute ICC crimes using offences sufficiently serious to describe the crime perpetrated. States must understand, however, that if there are significant discrepancies between national law and the Rome Statute, it may not be sufficient for the exercise of complementarity to rely on existing laws. This would not only mean if the definitions of the crimes were not sufficient but also the grounds for excluding criminal responsibility and the penalties attached. Using domestic analogues may diminish the gravity of the offence. For example, to equate pillage with the domestic offence of theft does not reflect the severity of the offence.

The Elements of Crimes, as previously mentioned, are guidelines for the ICC judges and prosecutors. There is no specific obligation to incorporate these elements in domestic laws. However, some States, such as the United Kingdom, have provided a requirement in the ICC legislation that domestic courts take account of the Elements of Crimes and any relevant ICC case law in interpreting the new relevant international jurisprudence. In New Zealand, its implementing legislation gives the Elements of Crimes status in a domestic prosecution.

4.4 Grounds for Excluding Criminal Responsibility

Description

Part 3 of the Rome Statute, which includes articles 22-33, outlines the principles of criminal law that will guide the work of the ICC. The Court is intended to have universal application, and therefore those who drafted the Rome Statute wanted to ensure that it reflected universal values in every respect. This includes the principles of criminal law by which the Court will abide. National jurisdictions observe a range of different principles in the area of criminal law. Part 3 of the Rome Statute is an attempt to incorporate and harmonise the principles and values of all the different legal systems of the world in this area. As such, some provisions in Part 3 may be more familiar to national legislators than other parts, depending upon which legal tradition they come from.

The provisions of Part 3 address three different issues:

(i) **when** someone can be found criminally responsible by the ICC;

(ii) **who** can be found criminally responsible by the ICC; and

(iii)in what situations criminal responsibility can be **excluded**.

In the case of (iii), lawyers from the common law tradition may be more familiar with the concept of "defences" to crimes, which have essentially the same effect as "exclusion of criminal responsibility", which is the terminology of the Rome Statute.

The first two issues are discussed in Section 4.2 Jurisdiction of the ICC and Section 4.5 on Individual Criminal Responsibility and Inchoate Offences Provided Under the Statute. This Section will focus on the third issue only. Articles 31-33 set out certain grounds for excluding criminal responsibility in the context of ICC prosecutions. The Statute provides for the exclusion of responsibility based on the capacity or ability to control and assess one's own conduct such as:

- mental disease or defect; involuntary intoxicated; proportional self-defence; duress; and other grounds derived from the applicable law (article 31);
- mistake of fact or mistake of law (article 32);
- superior orders (article 33).

Complementarity Requirements

States that decide to try persons charged with one of the crimes mentioned in the Statute in their national courts are not obliged to allow an accused person to use the grounds of defence provided under the Statute, or the other means of defence accepted by international criminal law. However, States Parties may need to revise defences allowed under their national criminal justice system in order to ensure that these defences do not shield the person from criminal responsibility for acts that constitute ICC crimes. A trial where a person is acquitted of an ICC crime by a national court because of a means of defence too easy to raise could be considered a sham trial.

Implementation

Many of the grounds for excluding criminal responsibility under the Statute are already recognized in most jurisdictions, as well as under international criminal law. In common law jurisdictions, they are more frequently described as defences. The principle of complementarity does not require that States Parties establish a national judicial system that is governed by the same rules as those governing the ICC.

Nevertheless, States may wish to adapt existing provisions to bring them into conformity with the provisions of the Statute. These new grounds of defence would be admissible for the prosecution of international crimes. The advantage of this solution is that it brings uniformity to the proceedings. A person who is charged whether before a

national court or the ICC can use the same grounds for excluding criminal responsibility. Incorporation of grounds for excluding criminal responsibility into domestic legislation can be done by reference to the Rome Statute. New Zealand is an example of using this approach. In addition, the New Zealand legislation allows for the accused to use other defences that are available under domestic law and international law, although if any conduct arises with the defence that is inconsistent with the Rome Statute, then the Statute would prevail. Rather than referring to the Rome Statute, States may provide for the use of defences available under domestic law and international law, which would include the Rome Statute.

The defence of superior orders

Description

Article 33 of the Statute indicates that the fact that a crime under the ICC's jurisdiction was committed under orders of a superior—whether military or civilian—does not absolve the perpetrator of criminal responsibility. There is an exception however, where:

1. the accused person was under a legal obligation to obey orders of the government or of the superior in question;

2. the accused person did not know that the order was unlawful; and

3. the order was not manifestly unlawful.

These three conditions are cumulative, and the Statute specifies that any order to commit genocide or a crime against humanity is manifestly unlawful at all times. This ground of defence is thus probably only applicable to persons who were ordered to commit war crimes or, when it will be defined, a crime of aggression. Otherwise, the defence of superior orders can only be used as an attenuating circumstance, for example, to reduce the penalty.

This means of defence has always been controversial. The Charters of the Nuremberg and the Tokyo Tribunals, as well as the Statutes of the ICTY and the ICTR state that the defence of superior orders is not admissible in any situation. It was believed that as the order to commit a crime was in itself unlawful, it could not be used as a justification for the behaviour of a subordinate.

Yet national law in many States has adopted the opposite point of view with regard to the defence of superior orders, and so is in overall conformity with article 33. This means that in most States this ground of defence exists as such and a subordinate cannot be found guilty of the crime unless he or she knew that the order was unlawful or if the order given by the superior was manifestly unlawful. This rule is contained in the codes of military discipline of Germany, the United States, Italy and Switzerland, and the notion of conditional responsibility has been enshrined by the jurisprudence of na-

tional tribunals on war crimes. Only a handful of States prohibits the defence of superior orders in their national legislation. Other States take a two-pronged approach: they permit use of the superior orders defence when one of their nationals has been charged, but prohibit it when the accused person was in combat against an enemy or bases their plea on the law of a foreign country.

Complementarity Requirements

It would be prudent for States Parties to make some changes to their national law if this is required to ensure that any such defence is no broader than article 33. If a national judicial system were to acquit an individual because it had a significantly lower threshold for superior orders, this could be seen as a means of shielding the person from the appropriate criminal responsibility. For example, the defence of superior orders may not be used in cases where there was an order to commit a crime against humanity or genocide.

Implementation

States Parties to the Statute do not have to change their national legislation if it does not provide this ground of defence to an accused person. In States where the national law provides this ground of defence, an amendment may need to be made making it inadmissible when the order in question concerned the commission of a crime against humanity or genocide.

Still, States Parties desiring to harmonize criminal procedures could adapt their national law to the Statute's provisions. In this case, the following adjustments may need to be made:

- declare the defence of superior orders generally inadmissible;
- declare it admissible only when the accused person could show that his or her case conformed to these three cumulative conditions:
  1. the legal obligation to obey the order;
  2. he or she did not know the order was unlawful;
  3. the order was not manifestly unlawful;
- declare the defence of superior orders as inadmissible when the accused person received an order to commit a crime against humanity or genocide;
- declare that the defence of superior orders should be subject to the same rules, whether the order in question was given by a military or a civilian authority.

4.5 Individual Criminal Responsibility and Inchoate Offences Provided Under the Statute

Description

The crimes within the jurisdiction of the Statute are most often offences committed by a number of persons. Crimes against humanity and genocide are offences that are generally committed by many individuals operating as part of an extensive criminal organization. Those holding the highest degree of criminal responsibility for these crimes are most often individuals in positions of authority who had no direct contact with the victims. They either issued the orders, incited others to commit the crimes, or furnished the means with which to commit these crimes.

This is why the Statute does not restrict criminal responsibility for these crimes to individuals who are directly involved in their commission, but extends it to those who were indirectly involved as well. Under article 25, a person is criminally responsible if he or she:

- commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
- contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either be made with the aim of furthering the criminal activity or criminal purpose of the group, or be made in the knowledge of the intention of the group to commit the crime;
- in respect of the crime of genocide, directly and publicly incites others to commit genocide;
- attempts to commit such a crime.

However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under the Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose (article 25, paragraph (3), subparagraph (f)).

Complementarity Requirements

States Parties to the Statute desiring to prosecute criminals in their national courts under the principle of complementarity should ensure that their implementation legislation includes all the forms of individual criminal responsibility and inchoate offences provided by the Statute. Otherwise, they may not be able to prosecute in

national courts the majority of individuals responsible for the commission of the crimes described in the Statute.

Implementation

Most national criminal legislation already describes individual criminal responsibility in these terms; there would be no need therefore to adopt any particular legislative amendments. States should however ensure that this responsibility applies to all the crimes within the ICC's jurisdiction. Some of the approaches States have taken to implement the principles of criminal responsibility in national legislation for ICC crimes include incorporating the provision by reference to the Rome Statute. An example of this approach is found in the New Zealand legislation. Other States have included the provision in amended form. Whereas other States have created separate offences. For example, the Brazil legislation creates the offence of "formation of an association to commit genocide" as well as "inciting to commit genocide". In the United Kingdom legislation, there is a provision which criminalises conduct in England and Wales (or that of a UK national, UK resident or person subject to UK Service jurisdiction abroad) that is ancillary to an act, which if committed in England and Wales, would constitute an offence of genocide, crimes against humanity and war crimes as defined in the legislation or under this section but which being committed, or intended to be committed outside of England and Wales does not constitute such an offence.

4.6 Responsibility of Commanders and Other Superiors

Description

International law requires that all persons in positions of authority have the obligation to prevent those under their orders from violating the rules of international humanitarian law. Article 86, paragraph (2) and article 87 of the First Additional Protocol to the Geneva Conventions codified this principle. As stated by the ICTY in the Delalic case, military commanders of each State Party to the Statute should correctly instruct their soldiers concerning the rules of international humanitarian law, ensure that these rules are observed when making decisions on military operations, and set up a communications network so that commanders can be quickly informed of each breach of the laws of war committed by their soldiers. They should also apply corrective measures for every violation of international humanitarian law.

Article 28 of the Statute covers the responsibility of commanders and other superiors, and is divided in two sections. Paragraph (a) deals with the responsibility of military commanders. Paragraph (b) details the responsibility of commanders of civilian authorities.

Military commanders

Military commanders may be held responsible for crimes committed by their soldiers if the commanders knew or should have known that the crimes had been committed, and

if they neglected to take the necessary measures for preventing or repressing the commission of these crimes. The responsibility of military commanders involves three essential elements:

- effective command and control over the persons committing the crimes;
- the commander knew of or should have known that a crime was about to be committed or had already been committed;
- the commander did not take all necessary and reasonable measures within his or her power to prevent the crime or punish the perpetrator.

Non-military superiors

Non-military superiors may be held responsible for crimes committed by their subordinates when they had knowledge of, or consciously disregarded information which clearly indicated that the subordinates were committing or about to commit ICC crimes; when the crimes were connected to activities under the control of the superior; and when the superior neglected to take the necessary measures for preventing or repressing the crimes or to inform civilian authorities with competency to investigate and initiate appropriate judicial proceedings. The elements of the offence are the same for non-military commanders, with the exception of the element concerning knowledge of commission of crimes. Article 28, paragraph (b) of the Statute indicates that in the case of a civilian commander, the level of proof required in order to convict is higher than that required for military superiors. Either knowledge of the crime's commission or a conscious disregard of pertinent information must be demonstrated. In other words, to establish the guilty intent of a non-military superior, it is necessary to show that information indicating the significant possibility that subordinates had committed or were about to commit a crime was available, that the superior was in possession of this information, and he or she decided not to act on it. The civilians targeted by these provisions are political leaders, business people and high officials. Military commanders are held to a stricter standard under international humanitarian law because military structure and the need to maintain military discipline make this necessary and appropriate.

Subordinates

The presence of a hierarchy of power is a necessary condition to the determination of responsibility of a superior. However, power does not derive solely from the official title of the accused person. The determining factor is the effective exercise of authority and control over the actions of subordinates. Control can be officially conferred or simply exercised. Also, the legal power to lead subordinates does not constitute an absolute condition for establishing responsibility of the commander, who may in some cases be part of an indirect line of command. For example, military leaders can be held responsible for acts committed by individuals who are not officially under their control in the chain of command, but on whom they could have exercised in fact power to prevent or repress the commission of a crime.

Omission to take necessary measures

A superior can only be held responsible for omitting to take measures that were within his or her capacity to take. Therefore, even if a superior did not officially have the power to take measures concerning offences that had been committed, he or she can be held responsible if it is demonstrated that in the circumstances, he or she could have acted.

Complementarity Requirements

States Parties to the Statute desiring to prosecute criminals in their national courts under the principle of complementarity should incorporate the concept of responsibility of commanders and superiors into their national law, as defined in article 28.

Implementation

Few national criminal codes deal with the concept of the responsibility of commanders. It would be prudent for an implementing law to introduce this concept into national law. Generally speaking, the notion of the responsibility of commanders does not exist for general law offences. For example, a deputy minister cannot be held criminally responsible for fraud committed by an employee in his or her department, nor can a captain be held responsible for the murder of a soldier by another soldier. International crimes are treated differently; high-ranking military and civilian authorities are frequently found to have criminal responsibility. Since it is often extremely difficult to establish responsibility, due among other reasons to the complexity of the chain of command, the concept of the responsibility of commanders and superiors is an essential tool for the prosecution.

Alternative approaches to cover this issue include incorporating the provision by reference from the Rome Statute, including it in amended form or creating a separate offence. The Canadian ICC legislation introduces a number of new crimes to Canada one of which is "breach of command responsibility". This covers both military and civilian commanders. The Argentina draft law expressly extends criminal responsibility to commanders and other superiors. The Swiss law states that a superior can be held criminally responsible for crimes committed by his subordinates according to applicable principles of Swiss criminal law. The United Kingdom ICC Act creates a new basis in their domestic laws of criminal responsibility and goes beyond the existing forms of liability in English law to include indirect command responsibility in order to reflect the doctrine of command responsibility set out in the Rome Statute.

The Brazilian draft bill contains a detailed provision regarding command responsibility. Criminal liability includes – whoever, on account of office, position or function, whether official or not, should and could prevent the crimes being committed and is deliberately negligent when he or she was in a position to prevent them or to cause them to cease in time to prevent threats or injury; military commander or any person acting as one, for those under his command and control, or his effective authority and

control for having failed to exercise proper control over those persons when he knew or because of the circumstance, ought to have known, or he has not taken all necessary and reasonable steps within the scope of his range of competence to prevent or curb their being committed or to draw the case to the attention of the competent authorities for investigation and follow-up. Whereas the Brazilian provision refers to both military and civilian commanders, the United Kingdom legislation distinguishes the circumstances where military and civilian commanders will be held criminally liable.

4.7 Rules of Evidence and National Criminal Justice Proceedings

Description

The principles in the Statute on which the Court's procedures are based, are derived from existing international human rights standards. The Statute does not explicitly require States Parties to modify judicial procedures in criminal matters. Yet, rules of evidence and rules of proceedings in criminal matters should not unnecessarily restrict proceedings initiated concerning crimes defined by the Statute. There are some evidentiary rules that almost systematically result in acquittal. For example, some criminal jurisdictions require the testimony of several men in order to establish proof that a woman was raped, even if only one man was involved in the rape.

Complementarity Requirements

Under the principle of complementarity, States Parties should ensure that when crimes listed in the Statute are committed, they can be effectively investigated and prosecuted. They should also make sure that their rules of proceedings in criminal matters do not prevent victims from laying charges, or prevent the establishment of evidence of crimes.

Implementation

Not all States Parties may wish to adjust their rules of proceedings in criminal matters. Also, the adjustment will probably only affect a few rules. However, every act that is likely to constitute one of the crimes listed in the Rome Statute should be considered in terms of the rules of evidence and proceedings in order to determine if any rules could pose a major obstacle to the proper functioning of an investigation or trial, and to ensure that persons are not shielded from criminal responsibility. The rules of evidence and proceedings concerning sexual offences are those that are most likely to present a problem of this kind in many jurisdictions.

4.8 Military Tribunals

Military tribunals, just like ordinary courts, can be used to prosecute the authors of ICC crimes. The Statute does not make any distinction between these two types of systems and States Parties are free to choose which domestic court will have jurisdiction over ICC crimes. A State Party can decide that the procedures related to the Statute will be

taken in charge by its ordinary courts, by its martial courts or by both, depending on the general organization of its judicial system. Nevertheless, military tribunals generally have a restricted competence. They can only prosecute military personnel and usually do not have jurisdiction over civilians. ICC crimes, however, can be committed in times of peace by both members of armed forces and civilians. For example, police forces or non-State armed groups can commit crimes against humanity, as a civilian can participate in the recruiting of children, thereby committing a war crime. Therefore, States Parties willing to prosecute authors of ICC crimes should, most of the time, use their common law jurisdictions, except if their military tribunals have a sufficiently broad jurisdiction to cover crimes committed in times of peace and crimes committed by civilians.

The Special Character of Military Proceedings

In many States, proceedings before military tribunals are different than those before ordinary courts. Proceedings are sometimes more expeditious in military tribunals, and in some jurisdictions due process may not be guaranteed to the same extent as in ordinary criminal proceedings. Nevertheless, the ICC can not find admissible a case prosecuted by national jurisdictions unless the proceedings at the national level were undertaken with the aim of shielding the person from criminal responsibility or are being conducted in a manner inconsistent with an intention to bring the person concerned to justice. Thus, any military proceeding undertaken in good faith is highly unlikely to result in the ICC subsequently assuming jurisdiction over the same matter, just because the proceedings were expeditious. Military tribunals should be able to determine the criminal responsibility of an individual that is described by the Statute, taking into account as much as possible the definitions of the crimes, the means of defence, and the general principles of criminal law described by the Statute.

Military Justice and Practice

The Statute does not state explicit obligations for States Parties with respect to the conduct of their armies. Nevertheless, one of the aims of the Statute is to ensure a greater respect for the laws of armed conflicts and many ICC crimes are related to military practice. Thus, every prohibition resulting from the definitions of genocide, crimes against humanity and war crimes should be applicable to the members of the armed forces of the States Parties. Furthermore, the general principles of criminal law, and the defences established by the Statute should be incorporated in States' military codes. As prevention measures, States Parties should include in their military manual and adapt the training and the instruction of their troops, if necessary, in order to respect the prohibition of the use of certain arms stated by the Statute. The same should be done concerning the questions related to the superior orders defence.

5. RELATIONSHIP BETWEEN THE ICC AND STATES

5.1 Broader State Obligations and Rights of States Parties

Treaty Requirements

Description

The Rome Statute stipulates in article 126 that the International Criminal Court will come into existence on the 1st day of the month that follows the period of 60 days after the deposit of the 60th instrument of "ratification, acceptance, approval or accession". The 60th ratification of the Rome Statute was obtained on April 11, 2002 and the Rome Statute entered into force on July 1, 2002.

In order to become a Party, a State must either ratify, accept, approve or accede to the Treaty. The term "accession" means adhering to the treaty after its entry into force and requires a specific process for a given State to establish at the international level that it consents to be bound.

For a State ratifying, accepting, approving or acceding to the Statute after April 11, 2002, (the date of the deposit of the 60th instrument), the entry into force of the Statute for such a State shall be the 1st day of the month following 60 days after its action of ratifying, accepting, approving or acceding to the Statute (article 126, paragraph (2)).

Reservations and declarations under the Statute

Under article 120, States can not make any reservations to the Statute. States Parties must accept the Statute as adopted by the Rome Conference.

However, article 124 of the Statute provides that a State may declare that upon becoming a party to the Statute, "for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory." This provision is intended to allow States Parties sufficient time to train all their military personnel in the requirements of the Statute with respect to war crimes, as some of the provisions in the Statute may differ from existing international obligations.

Withdrawal from the Statute

Article 127 provides that a State Party may withdraw by giving a written notification to the Secretary General of the United Nations that it intends to withdraw from the Statute, taking effect one year from the date of the notification or at a later date if the State so declares. It should be noted that article 127, paragraph (2) outlines the obligations and duties of the State, which persist notwithstanding the notice of withdrawal and the actual withdrawal itself.

Settlement of disputes

Under Article 119, disputes which arise between Parties relating to the interpretation or application of the Statute should initially be settled through negotiations, if possible. If it cannot be settled in this manner within three months, the matter will be referred to the Assembly of States Parties, which may seek to settle the dispute itself, or make recommendations on further means of settlement of the dispute. The Statute gives the Assembly of States Parties the power to refer the dispute to the International Court of Justice "in conformity with the Statute of that Court" (article 119, paragraph (2)).

Obligations

a) States may ratify, accept, approve or accede to the Rome Statute, as appropriate (article 125).

b) States may not make any reservations to the Statute (article 120), but they may make a declaration under article 124, which defers acceptance of the jurisdiction of the Court over war crimes within its jurisdiction, for seven years after entry into force of the Statute for the State concerned, when a war crime is alleged to have been committed by the State's nationals or on its territory.

c) States Parties wishing to withdraw from the Statute must follow the procedure, and continue to observe the relevant obligations and duties, as outlined in article 127.

Implementation

States will probably already have in place procedures to address all of these issues. The only provision that may differ significantly from other standard treaty provisions is article 124 on the special case of war crimes within the jurisdiction of the ICC. States should note that the basic principles underlying the war crimes provisions of the Statute do not deviate markedly from existing humanitarian treaty and customary law obligations. The main difference is that breaches other than "grave breaches" of the Geneva Convention are also criminalised under the Statute.

However, States should already have legislation proscribing such conduct as breaches of the laws of war, if they are parties to the Geneva Conventions, and military personnel should already be aware of these provisions. Therefore, most States are unlikely to require seven years to educate the relevant personnel on the requirements of the war crimes provisions of the Statute. It would be unfortunate if a State Party decides to make a declaration under article 124, and is subsequently invaded by a hostile force that commits numerous war crimes, yet the State cannot find any redress because it does not accept the jurisdiction of the ICC over such crimes and may not have the resources to carry out such a prosecution itself. Therefore, States should consider carefully whether to make a declaration under article 124, when ratifying the Statute, as it could have unwelcome consequences.

Financing of the Court

Description

Article 114 states that the expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be paid from the funds of the Court. The funds of the Court are provided by States Parties and any voluntary contributions, rather than from the general budget of the United Nations. However, there are provisions that the United Nations may contribute to the Court, subject to approval by the General Assembly and that the United Nations contribution will, in particular, relate to operations referred to the Court by the Security Council (article 115, paragraph (b)).

The financial obligations to the Court of States Parties have been established following the assessment parameters provided in article 117 of the Statute, notably an agreed scale of assessed contributions. The scale is based on that used by the United Nations to assess the contributions of its member States.

Article 117 further states that the scale of assessment shall be adjusted in accordance with the principles on which the scale is based. This refers to the general principle of the regular budget of the United Nations which limits the minimum and maximum contributions that a State may be required to make: no less than 0.001% and no more than 25% of the total budget.

An important feature of the financial arrangements for the Court is that the budget of the Court is set annually by the Assembly of States Parties.

The Budget

The budget for the first financial period of the Court was adopted by the Assembly of States Parties based on the proposed draft submitted by the Preparatory Commission. The budget of the Court is set on a year to year basis as reflected in the annual audit clause in article 118. Thus, although the volume of the Court's activity and the activities of the Prosecutor and the Registrar will vary, the requirement for annual budgets allows the Court to adapt to changing circumstances. The annual budgets of the Court provide, *inter alia*, for all operating and human resource expenses of the Presidency, the Prosecutor and the Registrar, as well as the Common Services Division.

The Financial Regulations and Rules of the Court were also adopted at the first meeting of the Assembly of Statute Parties. The Financial Regulations and Rules govern all the financial administration of the Court, except as otherwise provided by the Assembly of States Parties or if specifically exempted by the Registrar. The Registrar is responsible for ensuring that all organs of the Court administer the Rules in a coherent manner. Officials of the Court shall be guided by the principles of effective financial administration and the exercise of economy in the application of the Financial Regulations and Rules of the Court. The Financial Regulations and Rules of the Court are available at: http://www.dfait-maeci.gc.ca/foreign_policy/icc/documents-en.asp.

Note that States Parties' voting rights in the Assembly of States Parties and in its Bureau may be affected in certain circumstances as stipulated in article 112(8) where a State's arrears equal or exceed the contributions required for the preceding two years. The same paragraph provides for the suspension of this sanction where the Assembly of States Parties is satisfied that the failure to pay is due to conditions beyond the control of the State Party.

Voluntary contributions to the Court are permitted under article 116 where it is stated that they must be considered as additional funds. Thus they may not be sought or utilised in any manner to replace or fulfil the regular budget expenses.

Obligations

States Parties must provide the Court with specified financial contributions, which are assessed in accordance with an agreed scale of assessment, based on the scale adopted by the United Nations for its regular budget and adjusted in accordance with the principles on which that scale is based (article 115, paragraph (a), and article 117).

States Parties that are in arrears may lose their right to vote in the Assembly of States Parties and in the Bureau, if the amount of their arrears equals or exceeds the amount of the contributions due from them for the preceding two full years. However, the Assembly may permit a State Party to vote where it is satisfied that the failure to pay is due to conditions beyond the control of the State Party (article 112, paragraph (8)).

Implementation

Member States of the United Nations will already be familiar with the method of providing contributions to an international body in accordance with an agreed scale of assessed contributions. All States Parties must ensure that the funds are available to pay their annual assessed contributions to the ICC.

Allowing the ICC to sit in a State's territory

Description

Article 3(1) provides that the seat of Court will be in The Hague.

Article **(3) of the Statute also permits** the Court **to** sit outside of its headquarters for a specific trial or series of trials regarding a situation referred to the Court. Thus, States Parties may provide for the Court to sit in their territory where this is necessary or desirable.

Rule 100 of the Rules of Procedure and Evidence of the Court elaborates that the Court may decide to sit in a State other than the host State when in the interests of justice. The State must agree that the Court can sit in that State.

Should the Court decide to sit on the territory of a State Party other than the host State, all of the individuals involved in the proceeding may be required to be in the State during the course of the proceedings. Article 48 of the Statute provides that the Court shall enjoy in the territory of each State Party such privileges and immunities necessary to fulfil its purposes.

The Agreement of the Privileges and Immunities of the International Criminal Court was negotiated by States Parties and adopted by the Assembly of State Parties. This Agreement provides varying levels of immunity to individuals involved in proceedings of the Court when it sits in another State. The Agreement provides immunities to the Court itself, as well as to representatives of States Parties, officials of the Court (such as Judges, the Prosecutor and Registrar), counsel, the Court's personnel, victims, witnesses, experts and other persons required to be in attendance by the Court.

The Agreement of the Privileges and Immunities of the Court has the status of an international agreement and therefore must be signed, ratified and/or acceded to by States Parties. The Agreement of the Privileges and Immunities of the Court is available at: http://www.un.org/law/icc/asp/1stsession/report/english/part_ii_e_e.pdf.

Obligations

None of these provisions create obligations for States, however States have a general obligation to cooperate fully with the Court in its investigation and prosecution of crimes, pursuant to Article 89 of the Statute.

Implementation

Many States may already have legislation and administrative procedures to allow for the ICTY/R to sit in their territory. This legislation and procedures would only require minor amendment, to allow the ICC to sit in their territory as well. In allowing the Court to sit on their territory, some States have enacted legislation that provides for their Head of State to declare any place in the country to be the seat of the Court, subject to specified procedures. For example, see Section 6 of South Africa's *Implementation of the Rome Statute of the International Criminal Court Act, 2002*.

Given that the Agreement on the Privileges and Immunities of the International Criminal Court has the status of an international agreement, States may undertake the national processes required for its ratification or accession and implement its provisions into their national laws. Most States have privileges and immunities legislation or regulations in place dealing with diplomatic relations, foreign missions, or international organisations. The relevant pieces of national legislation could be reviewed for amendment or States may enact a single piece of legislation that covers every aspect of implementation in order to comply with the Agreement on Privileges and Immunities. States could also use a hybrid approach.

When requested by the Court to sit in a territory outside the Netherlands, States Parties may need to negotiate an arrangement allowing the Court to sit and exercise the func-

tions of the Court on their territory (see Articles 3 and 12 of the Agreement). These Agreements should also guarantee the inviolability of the Court's premises. Most States have experience in granting inviolability to the premises of embassies of other States and international organisations as well as their property, funds, assets, archives and documents.

The Agreement on Privileges and Immunities also provides that the Court will be exempt from taxation. Many States have implemented international treaties containing privileges and immunities which exempt United Nations agencies or international organisations from taxes, customs duties and import or export restrictions. States Parties may have to review national laws and regulations regarding taxation, international trade (import and export), and currency exchange in order to ensure compliance with the taxation provisions of the Agreement on Privileges and Immunities.

As for the representatives of States under the Agreement on Privileges and Immunities, such representatives generally travel with diplomatic privileges and immunities according to the *Vienna Convention on Diplomatic Relations.* Intergovernmental organisations are also often covered by agreements such as the *Convention on the Privileges and Immunities of the United Nations*. Accordingly, it should not be difficult for States Parties to implement their obligations toward State representatives on their territory for ICC proceedings, as most States already have general privileges and immunities legislation or regulations in place. Legislative amendments could be made to specifically recognise the representative of States or intergovernmental organisations with regard to the ICC.

As noted, the Agreement on Privileges and Immunities also affords various levels of immunity to officials of the Court (such as Judges, the Prosecutor, Registrar), counsel, the Court's personnel, victims, witnesses, experts and other persons required by the Court. States Parties can implement each specific privilege and immunity by either incorporating them into existing legislation or drafting new legislation.

A guide has been prepared by ICCLR, "Agreement on Privileges and Immunities of the International Criminal Court: Implementation Considerations."

Nominating judges and providing other personnel to the Court

Description

The nomination of judges to the ICC is a right of States Parties, therefore States may wish to implement procedures for nominating candidates. Article 36(4) sets out the procedures that a State Party may use to make nominations:

i) the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question; or

ii) the procedure provided for the nomination of candidates to the International Court of Justice in the Statute of that Court.

Note that States Parties may nominate only one candidate for any given election. Candidates need not be nationals of the nominating State Party, but they must be nationals of one of the States Parties (article 36(4), paragraph (b)).

Election of the judges will be by secret ballot at a meeting of the Assembly of States Parties held for that purpose (article 36, paragraph (6)). Judicial candidates must be chosen from among persons of high moral character, impartiality and integrity and who possess the qualifications required in their respective States for appointment to the highest judicial offices (article 36, paragraph (3), subparagraph (a)). In addition, judicial candidates must have established competence in domestic criminal law and procedure or international law and must have an excellent knowledge of and be fluent in English or French (article 36, paragraph (3), subparagraphs (b) and (c)).

A resolution governing the procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the ICC was adopted at the first meeting of the Assembly of States Parties (ICC-ASP/1/Res. 2). It specifies that judicial nominations should be accompanied by a statement indicating, inter alia, how the candidate fulfils the various requirements set out in article 36.

Ensuring the impartiality of judges and other ICC personnel

Under article 41, paragraph (2), a judge will be disqualified from hearing a case where that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated. The Rules of Procedure and Evidence provide further examples of situations in which a judge may be disqualified, such as "performance of functions, prior to taking office, during which he or she could be expected to have formed an opinion on the case in question, on the parties or on their legal representatives that, objectively, could adversely affect the required impartiality of the person concerned" (Rule 34, paragraph (1), subparagraph (c)). States Parties should keep accurate records of the criminal trials that their judges are involved in, if they envisage nominating their judges to the ICC at some stage.

States Parties may nominate a candidate for Prosecutor. If they do so, they must follow the procedure set out in the Assembly's resolution governing the procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court. The resolution states that nominations for the post of Prosecutor should preferably be made with the support of multiple States Parties. The resolution also states that every effort shall be made to elect the Prosecutor by consensus, and in the absence of consensus, the Prosecutor shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties (as set out in article 42, paragraph (4)). The Prosecutor nominates three candidates for the position of Deputy Prosecutor and States Parties elect the Deputy Prosecutor from that list.

Article 42(7) provides that Prosecutors and Deputy Prosecutors will be disqualified from a case if they have previously been involved in any capacity in that case before the Court or in a related case at the national level involving the person being investigated

or prosecuted. The grounds for disqualification are further elaborated in the Rules of procedure and Evidence (Rule 34). States Parties that envisage providing any personnel to the Court should ensure that they keep accurate records of all persons involved in criminal cases at the national level, to avoid the possibility of any of these persons giving the appearance of partiality and thereby undermining the legitimacy of the Court.

Obligations

If a State Party decides to nominate a candidate for election as a judge of the ICC, it must observe the requirements under article 36 as to the type of qualities that the candidate must possess and must follow the procedure set out in article 36, paragraph (4) and the terms of the resolution governing the procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court adopted by the Assembly of States Parties.

Implementation

States Parties that wish to take advantage of these provisions should implement appropriate procedures for selecting and nominating such persons. They may wish to create a list of persons who would be suitable candidates for various positions within the Court. They should also establish procedures, if they have not already, for keeping accurate records of all persons involved in criminal investigations and prosecutions in the State, to ensure that the ICC may have all the relevant information on which to base a decision to disqualify a person from involvement in an ICC case, if this is required.

Other rights of States Parties

The following situations are other instances in the Statute where rights of States Parties arise and States may wish to implement national procedures to facilitate the exercise of these rights:

- Under article 13, paragraph (a), and article 14, States Parties may refer a "situation" to the Prosecutor, which gives jurisdiction to the Court to investigate the matter. They have a right to be informed where the Prosecutor concludes that information given by the State Party on a situation does not form a reasonable basis for an investigation (article 15, paragraph (6)). States Parties also have a right to be informed of all investigations that are initiated by the Prosecutor, either *proprio motu* or on the basis of a State Party referring a situation (article 18, paragraph (1)). Where the State Party referred a particular situation to the Prosecutor, it may submit observations where the Prosecutor seeks a ruling from the Court regarding a question of jurisdiction or admissibility (article 19, paragraph (3)). The State Party may also request the Pre-trial Chamber to review a decision of the Prosecutor to initiate or not an investigation (article 53, paragraph (3), subparagraph (a)).
- If a State becomes a party to proceedings in the ICC, it has the right to present evidence (article 69, paragraph (3)). Where a State Party is allowed to intervene in a

case, it can request the use of a language other than English or French in which to address the Court (article 50, paragraph (3)).

- States Parties have the right to receive the Regulations of the Court and any amendments adopted by the judges of the Court. States Parties may make comments and objections (article 52, paragraph (3)).
- States Parties also have the right to receive co-operation and assistance from the Court where they are conducting an investigation or prosecution either in regard to situations where a crime is within the jurisdiction of the Court, or which is a serious crime under the national law of the requesting State Party (article 93, paragraph (10) and article 96, paragraph (4)).

5.2 Developments since Rome

Entry-into-Force

When the Rome Statute was adopted by 120 countries at the Diplomatic Conference in 1998, some commentators speculated that the Rome Statute would never receive the 60 ratifications required to enter into force or that, optimistically, it might happen within the following decade. Less than four years later, on April 11, 2002, the Rome Statute of the International Criminal Court received its 60th ratification at a special ceremony at the United Nations Headquarters in New York. Accordingly, pursuant to article 126, the Rome Statute entered into force on July 1, 2002, thereby establishing the Court and becoming binding international law.

An Advance Team of international experts was dispatched to The Hague to undertake the preliminary logistical tasks for the opening of the Court. The Advance Team was later replaced by the Office of Common Services which continued to administer preparations.

Following entry-into-force, the Preparatory Commission convened in New York, July 1-12, 2002 and concluded its work on the Court's subsidiary documents. The Assembly of States Parties held its historic first meeting September 3-10, 2002 in New York, at which it adopted the documents prepared by the Preparatory Commission, including the Court's Rules of Procedure and Evidence and Elements of Crimes. At its second session, February 3-7, 2003, the Assembly of States Parties elected the Court's 18 judges.

The official opening of the ICC was held March 11, 2002 in The Hague, during which the Court's first judges were sworn-in. The ICC's permanent seat is The Hague, where it continues to fulfill its mandate under the Rome Statute: to investigate and prosecute the world's worst crimes.

Assembly of States Parties

The Assembly of States Parties provides management oversight on matters regarding the administration of the Court, similar to how the General Assembly manages the UN.

It is comprised of representatives of all States Parties, who meet on a regular basis to ensure the efficient functioning of the Court.

The Procedure of the Assembly of States Parties

Article 112 of the Statute makes reference to the procedures of the Assembly of States Parties. The Assembly has since adopted its own rules, which provide further guidance and detail with regard to the procedures it must follow. The Rules of Procedure of the Assembly of States Parties are available at: http://www.un.org/law/icc/asp/1stsession/ report/english/part_ii_c_e.pdf.

The Rules of Procedure of the Assembly of States Parties provide that non-States Parties that have signed the Final Act of the Rome Conference and / or the Rome Statute are entitled to participate as "observers" in the Assembly, but are not entitled to vote (Rule 1). Each State Party shall have one representative in the Assembly of States Parties, however States may also bring their advisers and other personnel with them to meetings of the Assembly (Rule 23). Each State Party has one vote (Rule 60). Any decisions on matters of substance must be approved by a two-thirds majority of those present (Rule 63) and matters of procedure are to be decided by simple majority vote (Rule 64). However, the Assembly is mandated to try to reach consensus in its decisions in the first instance (Rule 61).

Article 112, paragraph (8) of the Statute stipulates that any State Party in arrears in the payment of its financial contributions towards the cost of the Court for the previous two years shall lose its right to vote, unless the Assembly is satisfied that the failure to pay is due to conditions beyond the control of the State Party.

The Structure and Powers of the Assembly of States Parties

Article 112 of the Statute also sets out some of the broad functions of the Assembly, including deciding the budget for the Court. Paragraph 3 describes the management structure of the Assembly, comprising a Bureau consisting of a President, two Vice-Presidents, and 18 members elected by the Assembly for three-year terms, taking into account equitable geographical distribution and the adequate representation of the principal legal systems of the world. This structure, and the general powers of the President and Vice-President, are further defined in Rules 29-33 of the Rules of Procedure of the Assembly of States Parties.

Article 112, paragraph (4) of the Statute, complemented by Rule 83, grants additional powers to the Assembly, such as the power to create subsidiary bodies as necessary, such as the Committee on Budget and Finance (see ICC-ASP/1/Res. 4). Article 112, paragraph (5) and corresponding Rule 35 provides that the President of the Court, the Prosecutor and the Registrar may participate in meetings of the Assembly and of the Bureau. Article 112, paragraph (6) sets out the timetable and preferred venue of meetings for the Assembly. Rules 3-9 complement these prescriptions. There are numerous

additional references throughout the Statute and Rules to the details of the Assembly's role and responsibilities.

A key role of the Assembly is the election of the Court's judges and Prosecutor and selection of other personnel for the Court. Most of the relevant provisions are in Part 4 of the Statute. The Assembly of States Parties has adopted resolutions on the procedure of the nomination and election of judges, the Prosecutor and Deputy Prosecutor of the Court (see ICC-ASP/1/Res. 2 and Res. 3) as well as on the selection of the Court's staff (ICC-ASP/1/Res. 10). The Assembly may also discipline and remove judges and prosecutors, if necessary, and decide the salaries of all senior ICC personnel (article 46, paragraph (2) and article 49, Rules 81, 82 and 87).

The Assembly may also serve a dispute resolution role vital to the effective-functioning of the ICC . Under article 87, paragraph (7), if the Court concludes that a State is acting inconsistently with its obligations under the Statute, it can refer the matter to the Assembly. There is no mention, however, in the Statute of the Assembly's obligations once a question of non-cooperation has been referred for consideration (article 119, paragraph (2), subparagraph (f). Reference to the Assembly ensures that the matter will be considered by the States Parties in the conducting of business by the Assembly pursuant to Rules 44-59.

Also, the Assembly is to establish and administer a Trust Fund "for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims" (article 79, paragraph (1)). The Assembly is responsible for the criteria for managing the Fund (article 79, paragraph (3)).

In addition to the powers specifically enumerated in the Statute, the Assembly is mandated to perform any other function consistent with the Statute or the Rules of Procedure and Evidence (article 112, paragraph (2), subparagraph (g)).

Elements of Crimes

The Elements of crimes document was adopted at the first meeting of the Assembly of States Parties, September 1-12, 2002 in New York, pursuant to article 119, paragraph (2), subparagraph (a) of the Statute.

The Elements of Crimes document specifies the type of facts, mental awareness, and circumstances that the ICC Prosecutor will have to prove in order to convict a person of crimes within the jurisdiction of the Court. It is intended to provide guidance to the judges of the Court. The ICC's Elements of Crimes are available at: http://www.un.org/law/iss/asp/1stsession/report/english/part_ii_b_e.pdf.

Rules of Procedure and Evidence

The Rules of Procedure and Evidence were adopted at the first meeting of the Assembly of States Parties, September 1-12, 2002 in New York, pursuant to article 119, paragraph (2), subparagraph (a) of the Statute.

The purpose of the Rules is to clarify and elaborate upon the procedural matters covered in general terms in the Statute. As their title suggests, the Rules elaborate on procedures and evidentiary requirements for the Court's proceedings. The Statute takes precedent over all Rules of Procedure and Evidence in the event of any conflict (article 51, paragraph (5)).

States Parties may need to change some of their national procedures to reflect the requirements of the Rules of Procedure and Evidence in order to ensure that they can continue to co-operate fully with the Court, in accordance with articles 86 & 88 of the Statute.

The ICC Rules of Procedure and Evidence are available at: http://www.un.org/law/icc/ asp/1stsession/report/english/part_ii_a_e.pdf.

A guide on implementing any obligation arising under the Rules of Procedure and Evidence is available.

Other Documents

In addition to the Rules of Procedure and Evidence and the Elements of Crimes, the Assembly of States Parties has adopted other important documents for official use by the Court. These include:

- The Agreement on the Privileges and Immunities of the International Criminal Court (available at: http://www.un.org/law/icc/asp/1stsession/report/english/part_ii_ e_e.pdf);
- The basic principles governing a headquarters agreement to be negotiated between the Court and the Host Country (available at: http://www.un.org/law/icc/asp/1stsession/ report/ english/ part_ii_f_e.pdf); and
- The Draft Relationship Agreement between the Court and the United Nations (available at: http://www.un.org/law/icc/asp/1stsession/report/english/part_ii_g _e.pdf)
- At its first meeting, the Assembly also adopted the budget for the first financial period of the Court (available at: http://www.un.org/law/icc/asp/1stsession/report/english/part_iii_e.pdf)

Crime of Aggression

Article 5, paragraph (2) provides that the Court shall exercise jurisdiction over the crime of aggression once an acceptable provision is adopted.

Article 5, paragraph (2) requires that the definition of the crime of aggression be added as an amendment at a Review Conference, no earlier than seven years from the entry into force of the Statute (July 1, 2002). Any provision on the crimes of aggression must set out both the definition of the crime and the conditions under which the Court shall

exercise jurisdiction and be consistent with the "relevant provisions" of the UN Charter.

A Working Group on the Crime of Aggression was established at the third session of the Preparatory Commission in November 1999, representing delegates from over 100 States. The negotiations on the crime of aggression were not concluded by the final session of the Preparatory Commission, therefore the Assembly of States Parties passed a resolution on the continuity of work in respect of the crime of aggression at its first meeting (ICC-ASP/1/Res. 1). This resolution acknowledged the work of the Preparatory Commission and established a Special Working Group on the crime of aggression open to all member States of the United Nations and members of specialised agencies. The purpose of the Special Working Group is to elaborate proposals for a provision on aggression in accordance with article 5, paragraph (2) of the Statute. The Special Working Group is to submit proposals to the Assembly for consideration at a Review Conference.

Background to the crime of aggression

The crime of aggression has always proved controversial. Proscriptions against "aggressive wars" were set out in the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes, and the 1928 Pact of Paris (Kellog-Briand Pact). But none of these declared aggression an international crime. Needless to say, most of these agreements were made amongst the Western nations only, and did not even attempt to encompass the views of the rest of the world, unlike the Rome Statute.

After the Second World War, the UN War Crimes Commission *Draft Convention for the Establishment of a United Nations War Crimes Court* provided that such a Court would only prosecute persons "acting under the authority of, or claim or colour of authority of, or in concert with a State or political entity engaged in war or armed hostilities with any of the High Contracting Parties, or in hostile occupation of territory of any of the High Contracting Parties." In other words, Allied personnel could not be prosecuted by such a court, no matter how atrociously they behaved themselves. The judges at the Nuremberg Tribunal, in finding that "crimes against peace" and "war crimes" had been committed, relied mostly on peace and war crimes treaties to which Germany was a party.

In 1974, the General Assembly adopted a Resolution on the Definition of Aggression, which provided that "a war of aggression is a crime against international peace" (article 5, paragraph (2)). However the Resolution did not deal with individual criminal responsibility for acts of aggression, and so it is questionable whether the definition of aggression in that Resolution is applicable to individual criminal acts.

The ICC Working Group on the Crime of Aggression has a challenging task ahead of it, if it is to reach consensus on this issue. There is also considerable controversy over the exact meaning of the phrase in article 5, paragraph (2) of the Statute, which provides that any provision on the crime of aggression "shall be consistent with the relevant provisions of the Charter of the United Nations." Many States are of the view that this

means the Security Council has to make a determination that an act of aggression has occurred, in accordance with its powers under Chapter 7 of the UN Charter, before the ICC can assume jurisdiction over a crime of aggression. However, other States do not support such an interpretation. They say that the Security Council has "primary" responsibility, not "exclusive" responsibility under the UN Charter, for determining that acts of aggression have occurred. All States involved in the negotiations to date are committed to finding an acceptable compromise for all concerned States.

Defence Counsel

Rights of the Accused

The rights of the accused during investigations and trials are contained in articles 55 and 67 of the Statute. The rights of the accused before the Court reflect the Universal Declaration of Human Rights, and those guaranteed by the International Covenant on Civil and Political Rights which is binding on the majority of member States of the United Nations. As these rights affect the proceedings within the jurisdiction of the arresting and detaining State, States Parties may need to adapt certain aspects of their criminal justice systems in order to ensure that national investigation and arrest procedures do not compromise the work of the Court.

The Accused and the Court

Guaranteeing the rights of the accused is fundamental to the administration of justice. Accordingly, the success of the Court depends on ensuring a fair trial for all accused persons. The Statute, and its subsidiary documents, consider the rights of the accused, and facilitate a fair trial, in a variety of ways.

For example, in addition to the legal rights contained in article 67 of the Statute, the Rules of Procedure and Evidence require the Registrar to provide support to the defence. Under article 68, paragraph (5), the Prosecutor may not withhold evidence in a manner which is prejudicial to, or inconsistent with, the rights of the accused and the provision of a fair and impartial trial. The Rules of Procedure and Evidence mandate that the Registry of the Court shall organize its staff in a manner that promotes the rights of the defence (Rule 20). Also, defence attorneys are covered by the Agreement on Privileges and Immunities of the International Criminal Court so that the lawyers of each accused may be present without interference when the Court sits outside of The Hague.

States Parties should ensure that all persons involved in the work of the Court are treated appropriately, by ratifying and implementing the Agreement on Privileges and Immunities.

Defence Counsel and the Court

While the Office of the Prosecutor is obviously fundamental to the operation of the Court, no specific provision is made in the Statute to institutionalise the role of the defence. The appearance before the Court of organized, knowledgeable and accountable defence counsel are essential to its effective functioning and efficient administration of justice.

The Court's Rules of Procedure and Evidence contemplate the consultation of any independent representative body of counsel or legal associations, in such matters as the legal aid and the development of a Code of Professional Conduct. To this end, the International Criminal Bar (ICB) has been organized. The ICB's website is available at: http://www.bpi-icb.org/.

Review of the Statute

Article 123 provides that the Secretary-General of the United Nations is to convene a Review Conference seven years after the entry into force of the Statute. At that Conference, the Assembly will consider any amendments to the Statute that have been proposed by States Parties, in accordance with article 121. The Assembly and the Secretary-General may then convene further review conferences, as required.

The Final Act of the Rome Conference recommended that the crimes of terrorism and international trafficking of illicit drugs should be considered for inclusion on the list of crimes within the jurisdiction of the Court. In addition, the definition and jurisdictional issues concerning the crime of aggression may be discussed at the first Review Conference.

Amendments to the Statute

As amendments may change the relationship with the Court established in the Statute, States Parties must follow detailed procedures for proposing amendments, as well as for agreeing to consider them for adoption by the Assembly of States Parties, and for giving them effect. Therefore States Parties may wish to implement appropriate procedures in order to facilitate the exercise of their rights to propose amendments to the Statute.

Amendments to the Statute can only be proposed seven years after the entry into force of the Statute (article 121, paragraph (1)). Amendments may only be proposed by a State Party, must be circulated by the Secretary General of the United Nations to the States Parties, may only be considered after a period of at least three months from the date of notification to the Secretary General and may not be considered for adoption unless a majority of the States Parties which are present and voting at the Assembly of States Parties decide to consider the amendment. If the required majority agrees to consider an amendment the Assembly of States Parties may deal with the amendments directly or submitted to a Review Conference if the issue involved so warrants (article 121, paragraph (2)).

Adoption of an amendment to the Statute requires a two-thirds majority of States Parties (article 121, paragraph (3)). Note that this article repeats the Assembly's mandate to attempt to adopt measures first by consensus (see article 112, paragraph (7)) and provides for the adoption of amendments by a two-thirds majority of all members only where consensus cannot be reached.

The next step to amend the Statute is a ratification or acceptance process outlined in paragraph 4 of article 121, which entails the approval of seven-eighths of the States Parties, upon which amendments enter into effect for all States Parties.

Amendments to the Statute have the potential to effect State Party's relationship with the Court. Thus, any State Party not in agreement with an amendment has the right to withdraw, with immediate effect, from the Statute (article 121, paragraph (6)).

Amendments to crimes within the Court's jurisdiction

An exception to the general rule regarding amendments is when an amendment concerns the crimes within the jurisdiction of the Court (article 121, paragraph (5)). In the case of such amendments the same requirement of adoption by a majority of two-thirds of States Parties is required. However, the amendments are effective only for States that ratify or accept them.

Amendments of an exclusively institutional nature

State Parties are able to propose certain amendments to the Statute at any time. Enumerated in article 122, these amendments concern matters which are exclusively institutional in nature.

Amendments considered to be of an exclusively institutional nature are the following: the service of judges; some of the provisions concerning the qualifications, nomination and election of judges; judicial vacancies; the presidency; the organisation of chambers; some of the provisions concerning the Office of the Prosecutor, the registry, the staff of the Prosecutor and Registrar's Offices; removal of judges, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar from office; disciplinary measures; and salaries, allowances and expenses (article 122).

There is no change to the majority of States Parties required to adopt an institutional amendment, but the date for entry into force of such amendments is six months after adoption by the required majority of States Parties rather than one year after ratification or acceptance as is the case for the general amendments anticipated in article 121. Amendments to these articles apply to all States Parties. There is no need for post-adoption ratification by a State Party for institutional-type amendments.

Amendments to the Rules of Procedure and Evidence and to the Elements of Crimes

Amendments to the Rules of Procedure and Evidence and amendments to the Elements of Crimes may be proposed by other entities as well as by States Parties, and need only be adopted by a two-thirds majority of States Parties (article 9, paragraph (2) and article 51, paragraph (2)). They are similar in that respect to amendments of an exclusively institutional nature. Further, States Parties may suggest amendments to the Rules at any time after their initial adoption by the Assembly of States Parties (article 9, paragraph (2), subparagraph (a) and article 51, paragraph (2), subparagraph (a)). The rights of States Parties that these amendments generate are similar to those amendments of an institutional nature, despite the different time period in which they enter into effect.

Effect of amendments to the Statute on States Parties' rights to withdraw from the Statute

Any amendment to the Statute will give rise to the right of immediate withdrawal by States Parties from the Statute, except where the amendment is of an exclusively institutional nature or amends the list of crimes within the jurisdiction of the Court (article 121, paragraph (6)).

The option of withdrawal with an immediate effect can be exercised when an amendment has been accepted by seven-eighths of the States Parties. Every State that did not accept the amendment can, during a period of one year after its entry into force, withdraw immediately from the Statute.

6. SELECT RESOURCES

6.1 Select resources on the ICC

Bassiouni, M. C., ed., *The Statute of the International Criminal Court: A Documentary History*, (New York: Transnational Publishers, 1998).

Cassese, A., Gaeta, P., & Jones, J.R.W.D., *The Rome Statute of the International Criminal Court: A Commentary (3 volumes),* (New York: Oxford University Press, 2002).

Dixon, R., Khan, K.A.A., & May, R., (eds.), *Archbold International Criminal Courts: Practice, Procedure & Evidence,* (London: Sweet & Maxwell, 2003).

Duffy, H. and Suhr, B. "The Debate on Constitutional Compatibility with the ICC" (Human Rights Watch).

Lattanzi, F. & W. A. Schabas, eds., *Essays on the Rome Statute of the ICC,* (Teramo, Italy: il Sirente, 1999).

Lee, Roy S., ed., *The International Criminal Court - Elements of Crimes and Rules of Procedure and Evidence,* (New York: Transnational Publishers, 2001).

Lee, Roy S., ed., *The International Criminal Court. The Making of the Rome Statute. Issues-Negotiations-Results*, (The Hague/London/Boston: Kluwer Law International, 1999).

Sadat, L. N., *The International Court and the Transformation of International Law: Justice for the New Millenium,* (New York: Transnational Publishers, 2002).

Triffterer, Otto, ed., *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, (Baden-Baden: Nomos Verlagsgesellschaft, 1999).

For more general information on the ICC, including articles and other publications, please see a 50 page bibliography compiled by Lyonette Louis-Jacques (last updated 15 August 2002) "*International Criminal Court: Resources in Print and Electronic Format*" (http://www.lib.uchicago.edu/~llou/icc.html).

6.2 International Criminal Court Implementing Legislation

Note that this is not a comprehensive list of all models available. Most of the ICC laws listed here, as well as several other laws and new laws as they become available, are available online via the NGO Coalition for the ICC's (CICC's) online "Ratification and Implementation Toolkit": http://www.iccnow.org/resourcestools/ratimptoolkit.html or the Council of Europe's website on the International Criminal Court: http://www.legal.coe.int/criminal/icc:

AR - *Proyecto de Ley Sobre Crímenes de la Corte Penal Internacional* (Two drafts have been made available to date), 2002, Argentina

AU – *International Criminal Court Act 2002,* Act No. 41, 2002, 27 June 2002, Australia (addresses co-operation issues)

AU(C) - *International Criminal Court (Consequential Amendments) Act 2001*, Act No. 42, 2002, 27 June 2002, Australia (addresses complementarity issues)

AZ - *Criminal Code of the Republic of Azerbaijan,* adopted 30 December 1999, entered into force 1 September 2000 (unofficial translation)

AZ(E) - *Law of the Republic of Azerbaijan on Extradition of Criminals,* adopted 15 May 2001, entered into force 19 June 2001 (unofficial translation)

AZ(L) - *Law of the Republic of Azerbaijan on Legal Assistance in Criminal Matters,* adopted June 2001 (unofficial translation)

BE - *Belgian Provisional Draft Law on Co-operation with the ICC and the International Criminal Tribunals* (French only)

BR - *Draft Bill on the International Criminal Court*, available in English and Portuguese (at http://mj.gov.br/sal/tpi/), Brazil

CA - *Crimes Against Humanity and War Crimes Act,* S.C. 2000, c. C-24, assented to 29 June 2000, entered into force 23 October 2000, Canada

CA(E) - *Extradition Act,* S.C. 1999, c. C-18, assented to 17 June 1999, amendments concerning the International Criminal Court entered into force 23 October 2000, Canada

CA(L) - *Mutual Legal Assistance in Criminal Matters Act,* R.S. 1985, c. 30 (4th Supp.), 1988, c. 37 assented to 28 July 1988, amendments concerning the International Criminal Court entered into force 23 October 2000, Canada

DC - *Implementation of the Statute of the International Criminal Court (Draft),* Democratic Republic of the Congo (available in French and English)

ES - *Rome Statute of the International Criminal Court Ratification Act (Draft),* Estonia (unofficial translation)

ES(P) - *Amendment Act to the Code of Criminal Procedure (Draft),* Estonia (unofficial translation)

ES(C) - Special Part, *Penal Code,* Estonia (unofficial translation)

FI - *Act on the implementation of the provisions of a legislative nature of the Rome Statute of the International Criminal Court and on the application of the Statute,* No. 1284/2000, issued in Helsinki 28 December 2000, Finland (unofficial translation)

FI(C) - *The Penal Code of Finland,* No. 39/1889 (unofficial translation)

FI(A) - *Act on the amendment of the Penal Code,* No. 1285/2000, issued in Helsinki 28 December 2000, Finland (unofficial translation)

FI(D) - *Decree on the application of Chapter 1, section 7 of the Penal Code* (No. 627/1996 as amended by Decrees 353/1997, 118/1999, 537/2000 and 370/2001), 11 September 2001, Finland (unofficial translation)

FI(L) - *International Legal Assistance in Criminal Matters Act,* No. 4/1994, 5 January 1994, Finland (unofficial translation)

GE - *Act on the Rome Statute of the International Criminal Court of 17 July 1998 (ICC Statute Act),* entered into force 4 December 2000, Germany (unofficial translation)

GE(C) *Act to Introduce the Code of Crimes against International Criminal Law,* adopted 26 June 2002, Germany

GE(E) - *An Act to Amend the Basic Law (Article 16),* entered into force 29 November 2000, Germany (unofficial translation)

NZ - *International Crimes and International Criminal Court Act 2000,* No. 26/2000, assented to 6 September 2000, most sections entered into force 1 October 2000, New Zealand

NO - *Act No. 65 of 15 June 2001 relating to the implementation of the Statute of the International Criminal Court of 17 July 1998 (the Rome Statute) in Norwegian Law* (unofficial translation)

PO - *Penal Code of 6 June 1997,* Poland (nb. further amendments are being considered) (unofficial translation)

SA - *Implementation of the Rome Statute of the International Criminal Court Act, 2002,* No. 27 of 2002, adopted 18 July 2002, South Africa

SW - *Federal Law on Cooperation with the International Criminal Court (CICCL) of 22 June 2001,* Switzerland (unofficial translation)

UK - *International Criminal Court Act 2001,* Chapter 17, enacted 11 May 2001, United Kingdom (note also the availability of Explanatory Notes for this Act)

UK(S) - *International Criminal Court (Scotland) Bill,* introduced April 2001, United Kingdom, Scottish Parliament

UK(F) - *The International Criminal Court Act 2001 (Enforcement of Fines, Forfeiture and Reparation Orders) Regulations 2001,* No. 2379/2001, entered into force 1 August 2001, United Kingdom

UK(M) - *The Magistrates' Courts (International Criminal Court) (Forms) Rules 2001,* No. 2600/2001 (L. 27), entered into force 1 September 2001, United Kingdom

UK(R) - *The International Criminal Court Act 2001 (Elements of Crimes) Regulations 2001,* No. 2505/2001, entered into force 1 September 2001, United Kingdom

6.3 Select Resources on ICC Implementation

Amnesty International, Checklist on Implementation of the Rome Statute

Broomhall, B. "The International Criminal Court: A Checklist for National Implementation", in M. C. Bassiouni, ed., ICC Ratification and National Implementing Legislation, (France: érès, 1999).

Broomhall, B. "The International Criminal Court: Overview and Co-operation", in M. C. Bassiouni, ed., ICC Ratification and National Implementing Legislation, (France: érès, 1999).

Canadian Government website on ICC implementation: http://www.icc.gc.ca

CICC Ratification and Implementation Toolkit at *http://www.icc.now.org/resourcestools/ratimptoolkit.html*. This website contains the following information: (1) ICC implementation checklists in all published languages, including a country by country list detailing the status and content of implementation (2) existing ICC legislation (3) draft ICC legislation (4) NGO analyses of ICC legislation and (5) articles on ICC ratification and implementation.

Council of Europe website on the International Criminal Court: *http://www.legal.coe.int/criminal/icc*

Dipartimento di Scienze Giuridiche Pubblicistiche, Universitá degli Studi de Teramo, Italy, Report on the Round Table Meeting on The Implementation of the International Criminal Court Statute in Domestic Legal Systems, 12th – 13th November, 1999 (1999).

Human Rights Watch, Comparative Tables: How Various Countries are Implementing the Rome Statute, (two drafts have been circulated, the second in July 2002)

No Peace Without Justice, International "Ratification Now! Campaign for the establishment of the International Criminal Court by year 2000: A Manual for Legislators", (Roma: No Peace Without Justice, 1999).

SADC (Southern African Development Community) Workshop on Ratification of the Rome Statute of the International Criminal Court, Pretoria, 5-9 July 1999, ICC Ratification Kit – MODEL Enabling Act.

APPENDIX I:

CHECKLIST OF IMPLEMENTATION CONSIDERATIONS AND EXAMPLES RELATING TO THE ROME STATUTE AND THE RULES OF PROCEDURE & EVIDENCE

IMPLEMENTATION ISSUE	Ref. in RS & RPE	TYPE OF IMPLEMENTING REQUIREMENTS AND CONSIDERATIONS	Example
THE "COMPLEMENTARY" JURISDICTION OF THE COURT			
Taking full advantage of the Court's "complementary" jurisdiction	Pre-amble Arts. 1 5-8 9 11 17 19-20 22-33 Rules 51-62 133 144	• [optional but desirable for the effective functioning of the Court] determine whether the State wishes to investigate and prosecute ICC crimes itself, in which case ensure that there are laws and procedures in place to carry out such investigations and prosecutions in accordance with the relevant provisions of the Rome Statute to ensure that the ICC will defer to the State's jurisdiction (article 1, 5-8, 17, 19-20, 25, 27-33) • ensure that no person may be tried by national authorities concerning a crime for which that person has already been convicted or acquitted by the ICC (article 20, paragraph (2)) • [optional but desirable for the effective functioning of the Court] implement into national legislation the crimes within the jurisdiction of the ICC (see articles 5-8) • [optional but desirable for the effective functioning of the Court] implement into national legislation the elements of crimes (see article 9 and the *Elements of Crimes*, adopted by the Preparatory Commission for the ICC, 30 June 2000 • [optional but desirable for the effective functioning of the Court] implement into national legislation the general principles of criminal law under the Rome Statute (see articles 22-33) • [optional but desirable for the effective functioning of the Court] grant "universal" or other appropriate jurisdiction to all relevant national authorities, in order to facilitate prosecution of ICC crimes at the national level, wherever and whenever they have been committed • [optional] implement procedures to enable relevant authorities to take full advantage of the Court's "complementary" jurisdiction, in accordance with articles 17-19 and rules 51-62, 133, 144)	AU(C) - all AZ - Art. 100-119 CA - ss. 4-14 ES(C) - Chap. 8 FI(C) - Chap. 1, 11-12 FI(D) - all GE(C) - all NZ - ss. 8-13 PO - Art. 114, Chap. XVI SA - s. 4 UK - Pt 5 UK (R) - all UK(S) - Part 1

IMPLEMENTATION ISSUE	Ref. in RS & RPE	TYPE OF IMPLEMENTING REQUIREMENTS AND CONSIDERATIONS	Example
			UK (S) - Pt 1
INTERNATIONAL COOPERATION UNDER PART 9			
Recognising the jurisdiction of the ICC	Pre-amble Arts. 1 12 13 126	• recognise the complementary jurisdiction of the ICC to investigate and prosecute all crimes listed in the Rome Statute, from the date of entry into force of the Statute, including jurisdiction over natural persons committing crimes on State Party territory and State Party nationals, but not over persons who were under 18 years old at the time of the commission of the crime (article 1, article 12, paragraph (1), and article 13, and see article 126 re entry into force of the Statute) • accept the jurisdiction and authority of the Court to exercise its functions and powers on the State Party's territory, as provided under the Rome Statute (article 4, paragraph	AU - s. 3, Pt 5 ES - Art. 1 NZ - s. 3, Pt 9 SA - ss. 3, 5, 6 SW - Art. 27

IMPLEMENTATION ISSUE	Ref. in RS & RPE	TYPE OF IMPLEMENTING REQUIREMENTS AND CONSIDERATIONS	Example
		(2)) • grant jurisdiction to all relevant national authorities over all persons and objects that may be involved in ICC proceedings	
Full cooperation with the Court	Arts. 86 87(7) 88	• ensure that there are no limits on cooperation with the ICC, apart from those listed in the Statute (article 86 and article 87, paragraph (7)) • ensure that there are procedures available under national law for all of the forms of cooperation specified in Part 9 of the Statute (article 88)	ES(P) - Art. 415 FI - s. 4
Responding to requests for assistance (generally)	Arts. 50(2) 87 91 96 99 Rules 3 15 40-43 117 176-180 187 194	• ensure that there are procedures and/or laws in place to recognise the validity of all requests for assistance from the ICC that comply with the requirements of the Rome Statute (article 50, paragraph (2), article 87, paragraph (2), article 91, and article 96) • advise the ICC of any special requirements under national law for executing requests (article 96, paragraph (3)) • ensure that requests can be executed in accordance with any specifications that accompany the request, as long as these are not prohibited under national law (article 99, paragraph (1)) • provide for an urgent response to any urgent requests for assistance from the Court (article 99, paragraph (2)) • ensure that all replies by the State are transmitted to the Court in their original language and form (article 99, paragraph (3)) ensure that there are procedures and/or laws in place to facilitate prompt and effective execution of all requests from the ICC for cooperation, except as provided for under the Rome Statute (see article 72, article 73, article 93, paragraph (1), subparagraph (l), article 93, paragraph (3), article 93, paragraph (4), and article 93, paragraph (5) - discussed below)	AU - Pt 2 NZ - Pt 3 NO - s. 3 SW - Arts. 3, 42
Consulting with the Court where there may be difficulties in executing requests	Arts. 93 (1)(l) 93(3) 93(5) 97	• ensure that the relevant authorities consult with the Court where execution of a particular measure would normally be prohibited in the State on the basis of an existing fundamental legal principle of general application (article 93, paragraph (3)), or where the State has identified problems which may impede or prevent the execution of the request (article 97) • ensure that there are procedures in place to allow the relevant national authorities to	AU - s. 12 NZ - s. 30 SW - Art. 4

IMPLEMENTATION ISSUE	Ref. in RS & RPE	TYPE OF IMPLEMENTING REQUIREMENTS AND CONSIDERATIONS	Example
	Rule 81	consider whether certain types of assistance can be provided subject to conditions, at a later date, or in an alternative manner, where the type of assistance requested would normally be prohibited by the law of the requested State (article 93, paragraph (1), subparagraph (l), article 93, paragraph (3), and article 93, paragraph (5))	
Postponement of the execution of requests for assistance	Arts. 94 95	• ensure that there is a procedure in place for checking whether the execution of a request from the ICC would interfere with an ongoing State investigation or prosecution, once a request is received (article 94) • ensure that there are procedures in place for consulting with the Court, and possibly postponing execution of a request, where execution of a particular request would interfere with an ongoing State investigation or prosecution of *a different* matter (in accordance with article 94) or of *the same* matter (in accordance with article 95)	AU - ss 15, 51, 53
Cost of executing requests	Art. 100 Rule 208	• ensure that sufficient funds are available to cover the cost of executing certain requests from the Court (only those not listed in article 100, paragraph (1))	AU - s. 173
Designation of an "appropriate channel" for receiving requests	Arts. 50 87 Rules 176-180	• [optional] upon ratification, designate a preferred channel for communication with the Court (article 87, paragraph (1)) • [optional] upon ratification, designate a preferred language of correspondence, either an official language of the State or a working language of the Court (English or French) (articles 50, paragraph (2) and article 87, paragraph (2)) • ensure that there are appropriate procedures and institutions available under national law for receiving requests for cooperation and communicating with the Court, and changing the channels and language of communication if need be, in accordance with rules 176-180 • ensure that the State is also able to receive requests transmitted through appropriate regional organisations or through Interpol (article 87, paragraph, (1), subparagraph (b))	AU - ss. 9, 10 ES(P) - Art. 398 FI - s. 2 NZ - s. 25 SW - Arts. 3, 10

IMPLEMENTATION ISSUE	Ref. in RS & RPE	TYPE OF IMPLEMENTING REQUIREMENTS AND CONSIDERATIONS	Example
Protecting victims, witnesses and their families when executing requests	Art 87(4)	• be prepared to provide and handle certain information in a manner that protects the safety and well-being of victims, witnesses, and their families, as the Court directs (article 87, paragraph (4))	NZ - s. 29 (2)
Provision for future amendments	Arts. 51 121 Rules 1-3	• [optional but desirable] make provision for possible future amendments to national laws and procedures for cooperating with the ICC, where this is necessary once the Rules of Procedure & Evidence have been adopted by the Assembly of States Parties (articles 51 & 121)	
ARREST AND SURRENDER			
Arresting a person in accordance with a warrant issued by the ICC	Arts. 59 89 91 97 Rules 117 181-184 187-189	• ensure that there is a procedure and/or laws in place to verify the contents of all requests for arrest and surrender received from the ICC, that comply with Article 91 • provide all relevant personnel with the authority to arrest both nationals and non-nationals, in relation to any crime within the jurisdiction of the ICC, in accordance with a request for arrest and surrender and in accordance with the relevant procedures under national law (articles 59 & 89) • require all relevant authorities to take immediate steps to respond to all requests for arrest and surrender from the Court (article 59) and require the relevant authority to consult with the ICC if it identifies any problems which may impede or prevent execution of the request (article 97) • ensure that the relevant authorities consult with the Court, if requested, regarding any requirements under national law that may apply to the surrender process in the requested State (article 91, paragraph (4)) • take into account the distinct nature of the Court to ensure that any requirements under national law are no more burdensome than those applicable to extradition requests from other States (article 91, paragraph (2), subparagraph (c)) • keep accurate records of any time that the person spends in custody, so that the ICC can take this into account when determining any sentences of imprisonment (see article	AU - Pt 3 CA (E) - Pt 2 FI - s. 3 NZ - Pt 4 SA - Pt 3 SW - Chap. 3 UK - Pt 2

IMPLEMENTATION ISSUE	Ref. in RS & RPE	TYPE OF IMPLEMENTING REQUIREMENTS AND CONSIDERATIONS	Example
		78)	
Arresting a person in accordance with a provisional warrant issued by the ICC	Arts. 58 (5) 59 (1) 92 97 Rules 117-120 123 181-184 188 189	• ensure that there is a procedure and/or laws in place to verify the contents of all requests for provisional arrest received from the ICC, that comply with article 92, paragraph (2) • provide all relevant personnel with the authority to provisionally arrest both nationals and non-nationals, in relation to any crime within the jurisdiction of the ICC, in accordance with a request for provisional arrest and in accordance with the relevant procedures under national law (article 58, paragraph (5), article 59, paragraph (1) and article 92) • require all relevant authorities to take immediate steps to respond to all requests for provisional arrest from the Court (article 59, paragraph (1)) • require the relevant authority to consult with the ICC if it identifies any problems which may impede or prevent execution of the request (article 97) • ensure that there is a procedure and/or laws in place to allow a provisionally arrested person to be released from custody, if the required documentation for an arrest does not arrive within a certain time to be stipulated in the Rules of Procedure and Evidence (article 92, paragraph (3) – the Finalized draft text of the Rules of Procedure and Evidence provides for a time limit of 60 days from the date of provisional arrest (rule 188) • require all relevant authorities to immediately re-arrest the person if the documentation arrives subsequently (article 92, paragraph (4)) • [optional but desirable for the effective functioning of the Court]if national laws allow it, make provision for the voluntary surrender of a provisionally arrested person (article 92, paragraph (3)) • keep accurate records of any time that the person spends in custody, so that the ICC can take this into account when determining any sentences of imprisonment (see article 78)	AU - Pt 3 CA(E) - Pt 2 FI - s. 3 NZ - Pt 4 SA - Pt 3 SW - Chap. 3 UK - Pt 2

IMPLEMENTATION ISSUE	Ref. in RS & RPE	TYPE OF IMPLEMENTING REQUIREMENTS AND CONSIDERATIONS	Example
Preventing certain persons from absconding	Art. 19 (8)(c) Rules 57 61	• ensure that there are laws and/or procedures in place to prevent persons who are the subject of a warrant from absconding, pending a decision on the admissibility of a case under article 19 (article 19, paragraph (8), subparagraph (c))	
Taking protective measures for the purpose of forfeiture, where a warrant or summons has been issued	Arts. 57 (3)(e) 93 (1)(k) Rule 99	• require the relevant authorities to identify, trace and freeze or seize the proceeds, property and assets and instrumentalities of crimes within the ICC's jurisdiction, for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties, pursuant to • a request from the ICC, where a warrant or summons has been issued (article 57, paragraph (3), subparagraph (e) and article 93, paragraph (1), subparagraph (k))	AU - Pt 4 Div 14 CA - ss. 27-32 CA(L) - s. 9.1, 9.2 FI - s. 8 NZ - ss. 111, 112, 126-135 SA - ss. 22-29 SW - Art. 41, 58 UK - ss. 37, 38, Sch. 5, 6 UK(S) - ss. 19, 20

IMPLEMENTATION ISSUE	Ref. in RS & RPE	TYPE OF IMPLEMENTING REQUIREMENTS AND CONSIDERATIONS	Example
Protecting the rights of persons being arrested	Art. 55 66 67(1) and Int'l Covenant on Civil & Political Rights Rules 20-22 111-113 117	• ensure that the person being arrested is presumed to be innocent until proven guilty before the ICC in accordance with the applicable law (article 66) • require all relevant authorities to observe the right of all persons to a fair trial, starting from the moment the person is arrested, in accordance with the minimum guarantees set out in article 67 and the rights set out under article 55, paragraph (1) • require all relevant authorities to observe the rights of persons being questioned in relation to any ICC proceeding, in accordance with article 55, paragraph (2) • ensure that free legal assistance is available to arrested persons who do not have sufficient means to pay for such assistance (article 55, paragraph (2), subparagraph (c)) • [optional but desirable] if possible, segregate accused persons from convicted persons in any detention facility and ensure that they are accorded the treatment that is appropriate to their status as unconvicted persons (article 10, *International Covenant on Civil & Political Rights*) • [optional but desirable] if possible, ensure that there are sufficient funds to compensate persons who are wrongfully detained or arrested by State authorities	SA - s. 10
Hearing before a competent judicial authority	Arts. 59(2) 89(4) 97 Rules 117 183 184	• require all arrested persons to be brought before the competent judicial authority as soon as possible after being arrested (article 59, paragraph (2)) • require the competent judicial authority to determine that the warrant applies to the person, that the person has been arrested in accordance with the proper process under national law, and that the person's rights under national law have been respected (article 59, paragraph (2)) • [optional but desirable] if possible, provide redress at the national level where the person was not arrested in accordance with the proper process under national law and/or the person's rights under national law were not respected, as long as such redress does not interfere with the surrender of the person • require the relevant authority to consult with the ICC if it identifies any problems which may impede or prevent the subsequent surrender of the person (article 97), or if the arrested person is already being investigated or serving a term of imprisonment for a different offence (article 89, paragraph (4))	AU - s. 23 NZ - s. 39 UK - ss. 4, 5 SA - s. 10

IMPLEMENTATION ISSUE	Ref. in RS & RPE	TYPE OF IMPLEMENTING REQUIREMENTS AND CONSIDERATIONS	Example
Serving a summons to appear before the ICC	Art. 58(7) Rules 112 117 119 123	• ensure that there is a procedure and/or laws in place to verify the contents of a summons for a person to appear before the ICC, that complies with article 58, paragraph (7) • ensure that there are laws and/or procedures in place to allow for the service of such a summons within the territory of the State and, if possible, on its nationals wherever they may be (article 58, paragraph (7)) • inform the ICC as to what conditions restricting liberty (other than detention) are allowable under national law, in relation to a summons to appear before the ICC (article 58, paragraph (7)) • ensure that any allowable conditions attaching to a summons are enforced by the relevant authority	AU - Pt 4 Div 7 FI - s. 5 SA - ss. 19, 21 UK - s. 31 UK(S) - s. 15
Surrendering a person to the ICC	Arts. 59(7) 89(1) 89(4) Rules 117 183 184	• grant the relevant authority the power to order any person to be surrendered to the ICC, pursuant to a request from the ICC (article 89, paragraph (1)) • ensure that there are no grounds available for refusing to surrender any person to the ICC when requested, including both nationals and non-nationals (article 89, paragraph (1)) • ensure that there are procedures and/or laws in place to require a person to be transported and surrendered to the ICC as soon as possible after the relevant national authority makes the order for surrender (article 59, paragraph (7)) • require the relevant authority to consult with the ICC if the person being sought for surrender is being proceeded against or is serving a sentence in the requested State for a crime other than the one for which surrender is sought (article 89, paragraph (4))	AU - Pt 3 Div 4 CA(E) - Pt 2 ES - Art. 3 NO - s.2 NZ - ss. 33-35, 43-76 SA - s. 10 SW - Chap. 3 UK - Pt 2 UK(M) - all
Requirements for surrender in the requested State	Art. 91 (2)(c) Rules	• take into account the distinct nature of the ICC when determining national requirements for the surrender process – these requirements should not be more burdensome than those applicable to requests for extradition between States and should, if possible, be less burdensome (article 91, paragraph (2), subparagraph (c))	CA(E) - Pt 2 UK - Pt 2, Sch. 2

IMPLEMENTATION ISSUE	Ref. in RS & RPE	TYPE OF IMPLEMENTING REQUIREMENTS AND CONSIDERATIONS	Example
	117 187	• [optional but desirable for the effective functioning of the Court] if possible, introduce a streamlined approach for surrendering persons to the ICC quickly, such as removing any right of appeal to a national authority • if adapting extradition procedures to enable surrender to the ICC, ensure that there are no grounds for refusing to surrender a person to the ICC and in particular that all ICC crimes are extraditable offences if dual criminality is a requirement	
Postponement of requests for surrender (ne bis in idem challenges)	Arts. 20 89(2) Rule 181	• require the relevant authority to consult immediately with the ICC if a person being sought for surrender makes a challenge on the basis of ne bis in idem (ie. where the ICC is seeking the person's • surrender in relation to a crime for which the person claims to have already been convicted or acquitted) (article 89, paragraph (2)) • require the relevant authority to surrender the person, if the ICC has already determined that the case is admissible in accordance with article 20 (article 89, paragraph (2)) • ensure that there are procedures and/or laws in place for determining whether to postpone execution of the request for surrender, if the ICC has yet to make a determination on the admissibility of the case (article 89, paragraph (2))	AU - s. 32 NZ - s. 57
Competing requests to surrender a person	Art. 90 Rule 186	• ensure that there are procedures and/or laws in place to enable and require the appropriate authority to deal with competing requests for surrender in accordance with the provisions of article 90	AU - ss. 36-39 NZ - ss. 61-64 SW - Art. 14
Conflicts with other international obligations	Art. 98 Rule 195	• ensure that non-nationals who would normally enjoy diplomatic or other immunity may be surrendered when requested by the ICC, where the consent of the State of nationality of the requested person has been obtained or is not required (article 98, paragraph (1)) • ensure that all requested persons who are also the subject of international agreements may be surrendered to the ICC, where the consent of the State of nationality of the requested person has been obtained or is not required (article 98, paragraph (2))	AU - s. 13 NZ - s. 66 UK - s. 23

IMPLEMENTATION ISSUE	Ref. in RS & RPE	TYPE OF IMPLEMENTING REQUIREMENTS AND CONSIDERATIONS	Example
		• [optional but desirable for the effective functioning of the Court] if possible, ensure that no restrictions are placed, by means of international agreements, on the ability of other States to surrender State Party nationals to the ICC when requested (article 98, paragraph (2)) • [optional but desirable for the effective functioning of the Court] if possible, be prepared to disclose to the ICC any international obligations or agreements that may conflict with a request for surrender, if the Court requires this information	
Absence of immunity for Heads of State	Art. 27	• ensure that no immunities under national laws will prevent a person from being surrendered to the ICC when requested (article 27 and article 89, paragraph (1))	AZ(E) - Art. 1.3 CA(E) - s. 6.1 NZ - s. 31 UK - s. 23
No limitations period	Art. 29	• ensure that no limitations periods under national laws will prevent a person from being surrendered to the ICC when requested (article 29 and article 89, paragraph (1))	
Surrendering persons who may face life imprisonment	Art. 89(1)	• ensure that all persons who would normally be exempt under national laws from imposition of any of the penalties set out in article 77, may be surrendered to the ICC when requested (article 77 and article 89, paragraph (1))	
No trial by jury	Art. 39 (2)(b)	• ensure that all persons who would normally have a right to trial by jury may be surrendered to the ICC when requested, even though they will be tried by a three-judge chamber of the ICC and not by a jury of their peers (article 39, paragraph (2), subparagraph (b) and article 89, paragraph (1))	

IMPLEMENTATION ISSUE	Ref. in RS & RPE	TYPE OF IMPLEMENTING REQUIREMENTS AND CONSIDERATIONS	Example
Allowing suspects to be transported across State territory en route to the ICC	Art. 89(3) Rule 117	• authorise transportation through State territory of any person being surrendered to the ICC by another State, except where transit through the State would impede or delay the surrender (article 89, paragraph (3), subparagraph (a)) • [optional but desirable for the effective functioning of the Court] if possible and where necessary, authorise transportation through State territory of any convicted person being sent from the ICC to another State to serve a term of imprisonment • ensure that no authorisation is required if the person is transported by air and no landing is scheduled on the territory of the transit State (article 89, paragraph (3), subparagraph (d)) • ensure that there are laws and/or procedures in place to detain a person until they can resume their journey, when an unscheduled landing occurs on the territory of the transit State, as long as the detention does not exceed 96 hours from the time of the unscheduled landing, unless a request for transit is received within that time (article 89, paragraph (3), subparagraph (e)) • if there is an unscheduled landing and a transit request is required by the transit State, ensure that there are laws and/or procedures to detain the person until the request for transit is received and transit is effected, as long as the detention does not exceed 96 hours from the time of the unscheduled landing, unless the request is received within that time (article 89, paragraph (3), subparagraph (e)) • keep accurate records of any time that the person spends in custody, and arrange for these to be transmitted to the Court for its purposes, so that the ICC can take this into account when determining any sentences of imprisonment (see article 78)	AU - Pt 9 CA(E) - s. 76 NZ - ss. 136-138 SA - s. 12 SW - Art. 13 UK - ss. 21, 22
EVIDENCE			
Collecting and preserving evidence for the ICC	Arts. 64(9) 66 67(1) 69 Rules 63	• when collecting and preserving evidence for ICC proceedings, States should try to ensure that all relevant standards under national laws, internationally recognised human rights, and the relevant provisions of the Rome Statute are respected, in order to ensure the admissibility of that evidence before the ICC (article 64, paragraph (9), article 66, article 67, paragraph (1), and article 69)	AU - Pt 4 Div 11, Pt 6 NZ - Pt 5

IMPLEMENTATION ISSUE	Ref. in RS & RPE	TYPE OF IMPLEMENTING REQUIREMENTS AND CONSIDERATIONS	Example
	69		
Allowing the ICC Prosecutor to execute requests directly	Art. 99(4)	• ensure that there are procedures in place to consult with the ICC if necessary, to negotiate reasonable conditions or address any concerns on the part of the State, when the ICC Prosecutor wishes to execute requests directly on the State's territory, in accordance with article 99, paragraph (4), subparagraphs (a) or (b)	NZ - s. 123
Identifying and locating persons	Art. 93 (1)(a)	• empower the relevant authorities to obtain necessary information as to the identity and location of persons, when the ICC requests this information (article 93, paragraph (1), subparagraph (a)) • ensure that nationals and non-nationals can be identified and located when they are present upon, or about to leave or enter State territory (article 93, paragraph (1), subparagraph (a))	AU - Pt 4 Div 4 NZ - s. 81 SA - s. 14
Obtaining expert reports and opinions	Art. 93 (1)(b) Rule 81	• ensure that there are laws and/or procedures in place to assist the ICC in obtaining reports and opinions from experts as required (article 93, paragraph (1), subparagraph (b))	NZ - s. 82
Questioning victims and witnesses	Arts. 55(1) 93 (1)(b) 100 (1)(b) Rule 111	• provide all relevant personnel with the authority to question victims and witnesses in relation to ICC proceedings, when requested (article 93, paragraph (1), subparagraph (b) • as far as possible, ensure that an adequate record is created and maintained by the State, of any statements taken from victims or witnesses in connection with an ICC investigation • as far as possible, ensure that all relevant personnel respect the rights of all persons involved in ICC investigations, as set out under article 55, paragraph (1) • ensure that competent translators and interpreters are available free of charge to the victim or witness, if required (article 55, paragraph (1), subparagraph (c)) [nb. the ICC will usually pay for these (article 100, paragraph (1), subparagraph (b))]	AU - ss. 63, 64 NZ - ss. 82, 83 SA - ss. 15, 16 SW - Art. 34 UK - ss. 29, 30 UK(S) - ss. 13, 14

IMPLEMENTATION ISSUE	Ref. in RS & RPE	TYPE OF IMPLEMENTING REQUIREMENTS AND CONSIDERATIONS	Example
Questioning accused persons	Art. 55(2) 93 (1)(c) Rules 20 111 112 113	• provide all relevant personnel with the authority to question a person being investigated or prosecuted by the ICC, when requested (article 93, paragraph (1), subparagraph (c)) • as far as possible, ensure that an adequate record is created and maintained by the State, of any statements taken from a person being investigated or prosecuted by the ICC • require all relevant authorities to observe the rights of persons being questioned in relation to an ICC proceeding, in accordance with article 55, paragraph (2)	AU - Pt 4 Div 6 NZ - ss. 89, 90 SW - Art. 35 UK - s. 28, Sch 3 UK(S) - s. 12
Serving documents, such as requests to testify before the ICC	Art. 93 (1)(d)	• ensure that there are laws and/or procedures in place to allow for the effective service of documents from the ICC on all State Party nationals and all persons who are on the State's territory (article 93, paragraph (1), subparagraph (d))	AU - Pt 4 Div 7 FI - s. 5 NZ - s. 91 SA - ss. 19, 21 UK - s. 31 UK(S) - s. 15
Assisting witnesses and experts to attend ICC proceedings	Arts. 93 (1)(e) 100 (1)(a)	• provide assistance to witnesses and experts in order to facilitate the voluntary appearance of such persons before the ICC (article 93, paragraph (1), subparagraph (e)) [nb. the ICC will usually pay for the costs associated with the travel and security of witnesses and experts (article 100, paragraph (1), subparagraph (a))]	AU - Pt 4 Div 8 FI - ss. 5, 6 NZ - ss. 92-94
Conducting searches of persons	Art. 93 (1)(h)	• empower the relevant authorities to conduct searches of persons for the purposes of ICC investigations, in accordance with internationally recognised human rights (article 93, paragraph (1), subparagraph (h))	AU - Pt 6 Div 4, Div 5 NZ - s. 77

IMPLEMENTATION ISSUE	Ref. in RS & RPE	TYPE OF IMPLEMENTING REQUIREMENTS AND CONSIDERATIONS	Example
			SA - s. 30
Preserving testimonial evidence	Art. 93 (1)(j) Rule 81	• ensure that there are laws and/or procedures in place to preserve and protect all testimonial evidence collected for the purposes of ICC investigations (article 93, paragraph (1), subparagraph (j))	
Protecting victims and witnesses	Art. 93 (1)(j) Rules 81 85-99	• ensure that there are laws and/or procedures in place to provide adequate protection for victims, witnesses, and their families who are involved in ICC proceedings, including both nationals and non-nationals (article 93, paragraph (1), subparagraph (j))	AU - Pt 4 Div 13 CA - ss. 71-75 NZ - ss. 85, 87, 110 NO - ss. 6, 8 SA - s. 17 SW - Art. 32
Providing protection for accused persons	Arts. 57 (3)(c) 64 (6)(e) Rules 76 77 81 115 116	• ensure that there are laws and/or procedures in place to provide adequate protection for accused persons who are involved in ICC proceedings, including both nationals and non-nationals (article 57, paragraph (3), subparagraph (c) and article 64, paragraph (6), subparagraph (e))	NO - s. 5

IMPLEMENTATION ISSUE	Ref. in RS & RPE	TYPE OF IMPLEMENTING REQUIREMENTS AND CONSIDERATIONS	Example
Transferring persons in custody	Arts. 93 (1)(f) 93(7) Rules 192 193	• [optional but desirable for the effective functioning of the Court] if possible, ensure that there are laws and/or procedures in place to allow for the temporary transfer to the ICC of persons in custody in the State, for purposes of identification or for obtaining testimony or other assistance, as long as such persons freely give their informed consent to such transfers, and in accordance with any conditions agreed between the State and the ICC (article 93, paragraph (1), subparagraph (f) and article 93, paragraph (7))	AU - Pt 4 Div 9 NZ - ss. 95-99 SA - s. 20 SW - Art. 26, 39 UK - s. 32
Providing other types of assistance	Arts. 93 (1)(l) 93(5)	• [optional but desirable for the effective functioning of the Court] if possible, be prepared to provide any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the work of the ICC, and subject to any conditions that may be negotiated with the Court (article 93, paragraph (1), subparagraph (l) and article 93, paragraph (5))	NZ - s. 113 SW - Chap. 4
Identification and whereabouts of items of evidence	Arts. 57 (3)(b) 93 (1)(a) 99 (4)(b) Rules 76 77 81 115 116	• empower the relevant authorities to obtain necessary information as to the whereabouts of any items of evidence requested by the Court (article 93, paragraph (1), subparagraph (a)) • ensure that there are no limits on the types of evidence which can be identified and located by the relevant authorities (article 93, paragraph (1), subparagraph (a)) • ensure that there are laws and/or procedures in place to monitor and/or restrict the movement of items of evidence across State borders, particularly if any neighbouring States are non-States Parties • wherever possible, allow the ICC Prosecutor and relevant defence counsel to look for items of evidence on State territory, after consulting with the State in accordance with article 57, paragraph (3), subparagraph (b) and article 99, paragraph (4), subparagraph (b) (article 93, paragraph (1), subparagraph (a))	NZ - s. 81
Service of documents	Art. 93 (1)(d)	• ensure that there are laws and/or procedures in place to allow for the effective service of documents from the ICC concerning items of evidence (article 93, paragraph 1), subparagraph (d))	NZ - s. 91

IMPLEMENTATION ISSUE	Ref. in RS & RPE	TYPE OF IMPLEMENTING REQUIREMENTS AND CONSIDERATIONS	Example
			UK(S) - s. 15
Examination of places or sites, including grave sites	Art. 93 (1)(g)	• ensure that there are appropriate laws and/or procedures in place to allow the relevant authorities to examine places or sites within State territory, including the exhumation and examination of grave sites, as far as possible in accordance with respect for any traditions and beliefs that may pertain to the places or sites or their contents (article 93, paragraph (1), subparagraph (g))	AU - Pt 4 Div 10 NZ - s. 100 UK - ss. 33, 35
Search and seizure of items of evidence	Art. 93 (1)(h) Rules 77 78 84	• empower the relevant authorities to conduct searches for and to seize items of evidence requested by the ICC, in accordance with internationally recognised human rights and as far as possible in accordance with respect for any traditions and beliefs that may pertain to the items (article 93, paragraph (1), subparagraph (h))	AU - Pt 4 Div 11, Pt 6 CA(L) - ss. 10-16 NZ - ss. 77, 78, 101-108 SA - s. 30 UK - s. 33
Provision of records and documents, including official documents	Art. 93 (1)(i) Rules 77 78 84	• ensure that there are laws and/or procedures in place to require the relevant authorities to provide official and other documents to the ICC when requested (article 93, paragraph (1), subparagraph (i))	AU - Pt 4 Div 12 CA(L) - s. 18 NZ - ss. 82, 84, 86, 88, 109 UK - s. 36 UK(S) - s. 18
Preserving items of evidence	Art. 93 (1)(j)	• ensure that there are laws and/or procedures in place to restrict and control which persons have access to evidence once it has been collected, in order to ensure its	AU - Pt 4 Div 13

IMPLEMENTATION ISSUE	Ref. in RS & RPE	TYPE OF IMPLEMENTING REQUIREMENTS AND CONSIDERATIONS	Example
		preservation (article 93, paragraph (1), subparagraph (j)) • ensure that any item of evidence likely to deteriorate is stored under appropriate conditions that minimise the likelihood of such deterioration (article 93, paragraph (1), subparagraph (j))	NZ - s. 110
Identifying, tracing and freezing evidence of proceeds, etc. of crime	Art. 93 (1)(k)	• enable the relevant authorities, before or after conviction, to identify, trace, and freeze or seize the proceeds, property and assets and instrumentalities of crimes, for the purposes of eventual forfeiture, without prejudice to the rights of bona fide third parties (article 93, paragraph (1), subparagraph (k))	AU - Pt 4 Div 14 CA - ss. 27-32 CA(L) - s. 9.1, 9.2 FI - s. 8 NZ - ss. 111, 112, 126-135 SA - ss. 22-29 SW - Art. 41, 58 UK - ss. 37, 38, Sch. 5, 6 UK(S) - ss. 19, 20
Protection of national security information	Arts. 72 93(4) Rule 81	• ensure that there are procedures in place to ascertain whether a request for cooperation from the ICC concerns the production of any documents or disclosure of any information which relates to the State's national security, in which case the State Party may deny such a request for assistance, in whole or in part, in accordance with article 72 (article 93, paragraph (4)) • ensure that there are procedures in place to allow the State to intervene in an ICC proceeding if the State learns that information or documents of the State are being, or are likely to be, disclosed at any stage of the proceedings, and the State is of the opinion that disclosure would prejudice its national security interests (article 72, paragraph (4)) • ensure that the relevant national authorities will take all reasonable steps to seek to	AU - Pt 8 NZ - Pt 8 NO - s. 7 SW - Art. 44 UK - s. 39

IMPLEMENTATION ISSUE	Ref. in RS & RPE	TYPE OF IMPLEMENTING REQUIREMENTS AND CONSIDERATIONS	Example
		resolve by cooperative means any concerns over potential prejudice to the State's national security interests, acting in conjunction with the ICC Prosecutor, the defence, the Pre-trial Chamber or the Trial Chamber, as the case may be (article 72, paragraph (5)) • require the relevant authority to notify the Prosecutor or the Court of specific reasons for any decision not to provide or disclose the information or documents, unless a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests, once all reasonable steps have been taken to resolve the matter through cooperative means, and if the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests (article 72, paragraph (6)) • be prepared to undertake further consultations with the Court, including in camera and ex parte hearings for the purpose of enabling the Court to consider the State's representations, if the Court determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused (article 72, paragraph (7), subparagraph, (a), sub-subparagraph (i))	
Protection of third party information	Art. 73	• require the relevant national authority to seek the consent of the originator of any document or information in the custody, possession or control of the State, which was disclosed to it in confidence by a State, intergovernmental organization or international organization, and which is requested by the Court (article 73) • require the relevant national authority to inform the Court if the State is unable to provide the document or information because of a pre-existing obligation of confidentiality to the originator and the originator does not consent to disclosure • ensure that there are procedures in place where the State Party is the originator of documents that have been requested from another State, and those documents or information were disclosed to the other State in confidence by the originator, in order to allow the originator of those documents or information in the custody, possession or control of the other State, to consent to disclosure of the information or document to the ICC, or to undertake to resolve the issue of disclosure with the Court in accordance with the provisions of article 72 where necessary (article 73)	AU - Pt 7 NZ - ss. 164-165

IMPLEMENTATION ISSUE	Ref. in RS & RPE	TYPE OF IMPLEMENTING REQUIREMENTS AND CONSIDERATIONS	Example
ENFORCEMENT			
Enforcement of fines and forfeiture and reparations orders (pp. 78-80)	Arts. 75(4) 75(5) 93 (1)(k) 109 Rules 99 217-222	• require the relevant authorities, after conviction, to identify, trace, and freeze or seize the proceeds, property and assets and instrumentalities of crimes, for the purposes of eventual forfeiture, without prejudice to the rights of bona fide third parties, when requested by the ICC (article 75, paragraph (4) and article 93, paragraph (1), subparagraph (k)) • ensure that there are laws and/or procedures in place to give effect to any reparations orders made by the ICC, in accordance with the provisions of article 109 (article 75, paragraph (5)) • ensure that there are laws and/or procedures in place to give effect to penalties that are imposed by the ICC on a convicted person in the form of fines or forfeiture orders, without prejudice to the rights of bona fide third parties, and in accordance with the procedure of national law (article 109, paragraph (1)) • ensure that there are laws and/or procedures in place to recover the value of any proceeds, property or assets ordered by the ICC to be forfeited, without prejudice to the rights of bona fide third parties, where the State is unable to give effect to an order for forfeiture (article 109, paragraph (2)) • require the relevant authority to transfer to the ICC any property, or the proceeds of the sale of real property or, where appropriate, the sale of other property, which is obtained by the State as a result of its enforcement of a judgement of the Court (article 109, paragraph (3))	AU - Pt 10, 11 FI - s. 9 NZ - Pt 6 NO - s. 11 SA - ss. 25-29 UK - s. 49 UK(F) - all UK(S) - s. 25

IMPLEMENTATION ISSUE	Ref. in RS & RPE	TYPE OF IMPLEMENTING REQUIREMENTS AND CONSIDERATIONS	Example
Enforcement of sentences of imprisonment [optional but desirable for the effective functioning of the Court]	Arts. 103 - 108 110 – 111 Rules 198-216 223-225	[all optional but desirable for the effective functioning of the Court] • determine whether or not to accept persons sentenced by the ICC to a term of imprisonment (article 103, paragraph (1), subparagraph (a)) • determine any conditions that the State may wish to attach to the acceptance of sentenced persons, which are to be agreed upon with the Court, and may include further prosecution, punishment or extradition to a third State at the conclusion of the person's sentence (article 103, paragraph (1), subparagraph (b) and article 108) • require the relevant authority to inform the Court promptly if the State chooses to accept a particular designation by the Court (article 103, paragraph (1), subparagraph (c)) • require the relevant authority to notify the Court at least 45 days in advance of any known or foreseeable circumstances, including the exercise of conditions, which could materially affect the terms or extent of the imprisonment, once the State has accepted the sentenced person, and ensure that the relevant authorities do not take any prejudicial action during that 45 day period (article 103, paragraph (2), subparagraph (a)) • assist the Court as far as possible in transferring the person to another State, where necessary (article 104 and article 107) • ensure that any sentence imposed by the ICC cannot be modified or reduced by national authorities, including releasing the person before expiry of the sentence imposed by the Court, subject to any conditions which the State may have specified when it accepted the sentenced person (article 105, paragraph (1) and article 110) • ensure that all communications between the prisoner and the ICC are unimpeded and confidential and in particular that the person is not impeded from making applications to the ICC for appeal and revision (article 105, paragraph (2) and article 106, paragraph (3)) • ensure that the conditions of imprisonment for the sentenced person are consistent with widely accepted international treaty standards governing treatment of prisoners and that they are not more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement (article 106, paragraph (2))	AU - Pt 12 CA - ss. 15, 34-40 FI - s. 7 NZ - ss. 139-156 NO - s. 10 SA - s. 31 SW - Chap. 5 UK - Pt 4 UK(S) - ss. 23, 24

IMPLEMENTATION ISSUE	Ref. in RS & RPE	TYPE OF IMPLEMENTING REQUIREMENTS AND CONSIDERATIONS	Example
MISCELLANEOUS OBLIGATIONS			
Protecting the privileges and immunities of ICC personnel	Art. 48	• enable the Court to enjoy in the territory of the State Party such privileges and immunities as are necessary for the fulfilment of the Court's purposes (article 48, paragraph (1)) • recognise and protect the privileges and immunities of the ICC judges, Prosecutor, Deputy Prosecutors and Registrar, as set out in article 48, paragraph (2) • recognise and protect the privileges and immunities necessary for the performance by the Deputy Registrar, the staff of the Office of the Prosecutor, and the staff of the Registry, of their respective functions, in accordance with the agreement on the privileges and immunities of the Court (article 48, paragraph (3)) – see *Draft Agreement on the Privileges and Immunities of the International Criminal Court*, adopted by the Preparatory Commission for the ICC, 5 October 2001 • recognise and protect the rights of counsel, experts, witnesses, and any other person required to be present at the seat of the Court, to be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on the privileges and immunities of the Court (article 48, paragraph (4)) – see *Draft Agreement on the Privileges and Immunities of the International Criminal Court*, adopted by the Preparatory Commission for the ICC, 5 October 2001	CA - s. 54 ES(P) - Art. 415 SA - s. 6 UK - Sch. 1
Creating offences against the administration of justice of the ICC	Art. 70 Rules 162-172 217 220-221	• extend existing domestic criminal laws penalizing offences against the integrity of the State's own investigative or judicial process to offences against the administration of justice of the ICC, where committed on the State Party's territory or by its nationals (article 70, paragraph (4), subparagraph (a)) • ensure that all relevant national authorities have the jurisdiction and authority to investigate and prosecute these offences • provide sufficient resources to enable national prosecutions to be treated diligently and conducted effectively (article 70, paragraph (4), subparagraph (b)) • ensure that all relevant authorities can provide full co-operation to the ICC, in accordance with the domestic laws of the requested State, while the Court is determining whether to investigate or prosecute one of these offences, or to request the host State to take jurisdiction over the matter (article 70, paragraph (2) and rule 162)	CA - ss. 16-26 FI(A) - ss. 12a, 19a, 20 NZ - ss. 14-23 NO - s. 12 SA - s. 36

IMPLEMENTATION ISSUE	Ref. in RS & RPE	TYPE OF IMPLEMENTING REQUIREMENTS AND CONSIDERATIONS	Example
		• ensure that all relevant authorities can provide full co-operation to the ICC, in accordance with the domestic laws of the requested State, if the Court decides to investigate and prosecute one of these offences (article 70, paragraph (2) and rule 167) • ensure that there are laws and/or procedures in place to require national authorities to enforce fines and forfeiture orders imposed by the ICC for offences against the administration of justice of the ICC, without modification by national authorities, without prejudice to the rights of bona fide third parties and in accordance with the procedure of national law (article 70, paragraph (3) and article 109, paragraph (2), and rule 166, paragraph (5), rule 217, rule 220 and rule 221) • [optional but desirable for the effective functioning of the Court] make provision for the enforcement of sentences of imprisonment of persons convicted of these offences by the ICC, in accordance with Part 10, Rome Statute, except articles 104-6, 108 & 110 (see rule 163, paragraph (3))	
Provision of certain information where the ICC wishes to investigate the same matter as a State Party	Arts. 13-15 18-19, 56 93 (1)(j) Rules 52-56 61 81 112(5)114	• ensure that there is a procedure in place to enable the State that is already investigating a matter to notify the ICC within one month of receiving notice from the ICC that the Court wishes to investigate the same matter (article 18, paragraph (2)), taking into account the right of a State to request additional information from the Prosecutor (rule 52(2)) • ensure that there is a procedure in place for the State to request the Prosecutor to defer an investigation in accordance with article 18, paragraph (2) and rule 53 • ensure that there is a procedure in place for the State to submit observations to the Pre-Trial Chamber where the Prosecutor has nevertheless requested the authorisation of the investigation in accordance with article 18, paragraph (2) (rule 55) • ensure that there is a procedure in place for responding to any requests for periodic updates made by the ICC Prosecutor, where the Prosecutor has deferred an investigation at the request of a State Party (article 18, paragraph (5) and rule 56, paragraph (2)) • ensure that there is a procedure in place for providing the relevant information on national proceedings, where the ICC Prosecutor has deferred an investigation without a request from a State Party, but requests the State Party to provide that information (article 19, paragraph (11)) [nb. this information can be provided on a	NZ - ss. 110, 114-120

IMPLEMENTATION ISSUE	Ref. in RS & RPE	TYPE OF IMPLEMENTING REQUIREMENTS AND CONSIDERATIONS	Example
		confidential basis and may not be subject to disclosure – see rule 81] • ensure that all relevant evidence in the possession of the State will be preserved and protected, until it is clear whether the State or the ICC will eventually take charge of the investigation or prosecution (article 93, paragraph (1), subparagraph (j)) • [optional but desirable for the effective functioning of the Court] if possible, provide that all relevant authorities are in a position to co-operate with the ICC Prosecutor and any other relevant personnel, if the Prosecutor has been authorised by the Pre-trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence, where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available, in accordance with article 18, paragraph (6), article 19, paragraph (8), and article 56, and rule 57, rule 61, rule 112, paragraph (5), and rule 114	
RELATIONSHIP BETWEEN THE ICC AND STATES PARTIES			
Entry into force of the Rome Statute	Art. 126	• States Parties must ensure that the relevant implementing laws and procedures are in place by the time the Statute enters into force in accordance with article 126	
Signing and ratifying or acceding to the Statute without any reservations	Arts. 112(1) 120 125	• ensure that no reservations are made to the Statute by States Parties (article 120) • if possible, ensure that signatory States ratify, accept or approve the Statute as soon as possible, so that the number of Parties to the Statute reaches 60 as soon as possible, thereby enabling the Court to come into operation (article 125, paragraph (2), and article 126) • if possible, ensure that non-signatory States accede to the Statute as soon as possible (article 125, paragraph (3))	
Withdrawing from the Statute	Art. 127	• ensure that States Parties follow the procedure and observe the relevant obligations and duties set out in article 127, if they wish to withdraw from the Statute	

IMPLEMENTATION ISSUE	Ref. in RS & RPE	TYPE OF IMPLEMENTING REQUIREMENTS AND CONSIDERATIONS	Example
Settlement of disputes	Art. 119	• any disputes concerning the judicial functions of the Court should be referred to the Court for settlement (article 119, paragraph (1)) • ensure that any disputes between two or more States Parties relating to the interpretation or application of the Statute are settled in accordance with article 119, paragraph (2)	
Declaration on war crimes	Art. 124	• [optional but undesirable] States may declare at the time they become a Party to the Statute that they do not accept the jurisdiction of the ICC over war crimes committed by their nationals or on their territory, for a period of 7 years after the entry into force of the Statute for the State concerned (article 124)	
Financing of the Court	Arts. 112(8) 115 117	• provide the Court, in a timely manner, with the required financial contributions, which will be assessed in accordance with an agreed scale of assessment, based on the scale adopted by the United Nations for its regular budget and adjusted in accordance with the principles on which that scale is based, and ensure that the State Party does not fall into arrears equal to or exceeding 2 years' worth of contributions, or the State Party will lose its right to vote in the Assembly of States Parties, unless failure to pay is due to conditions beyond the control of the State Party (article 112, paragraph (8), article 115, paragraph (a) and article 117)	
Allowing the Court to sit in the State's territory	Arts. 3(3) 62 Rule 100	• [optional but desirable for the effective functioning of the Court] ensure that there are laws and procedures in place to allow the ICC to sit in the State's territory, in accordance with the relevant provisions of the Statute and the Rules of Procedure and Evidence (article 3, paragraph (3) and article 62)	AU - Pt 5 NZ - Pt 9 SA - ss. 5, 6
Nomination of judges and provision of other	Arts. 36	• [optional but desirable for the effective functioning of the Court] nominate judges and provide other personnel to the Court in accordance with the relevant provisions of the	

IMPLEMENTATION ISSUE	Ref. in RS & RPE	TYPE OF IMPLEMENTING REQUIREMENTS AND CONSIDERATIONS	Example
personnel to the Court	41(2) 42(7) 44(4)	Statute and ensure the impartiality of all such persons (article 36, article 41, paragraph (2), article 42, paragraph (7), article 44, paragraph (4))	
Rights of States Parties	Many	• [optional but desirable for the effective functioning of the Court] ensure that there are appropriate procedures and/or laws in place in order to effectively exercise all the rights of States Parties provided for under the Statute (eg. article 13, paragraph (a), article 14, article 15, paragraph (6), article 18, paragraph (1), article 19, paragraph (3), article 50, paragraph (3), article 52, paragraph (3), article 53, paragraph (3), subparagraph (a), article 69, paragraph (3), article 93, paragraph (10), article 96, paragraph (4), article 112, paragraph (9), article 112, article 113)	
Looking to the Future	Arts. 5 9 48(4) 51 54 - 55 65(5) 67 68(5) 112 121 – 123	• once the Court is operational, ensure that laws and/or procedures are in place to ensure the efficient functioning of the Court in relation to the Assembly of States Parties (article 112), elements of crimes (article 9), rules of procedure and evidence (article 51), review of the Statute (articles 121-123), the Crime of Aggression (article 5), and assistance of defence counsel (articles 48(4), 54, 55, 65(5), 67 & 68(5))	

APPENDIX II:

ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

UNITED NATIONS
2000

PREAMBLE

The States Parties to this Statute,

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

Recognizing that such grave crimes threaten the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,

Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State,

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

Resolved to guarantee lasting respect for and the enforcement of international justice,

Have agreed as follows:

PART 1. ESTABLISHMENT OF THE COURT

Article 1
The Court

An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

Article 2
Relationship of the Court with the United Nations

The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.

Article 3
Seat of the Court

1. The seat of the Court shall be established at The Hague in the Netherlands ("the host State").

2. The Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.

3. The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.

Article 4
Legal status and powers of the Court

1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Article 5
Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide;

(b) Crimes against humanity;

(c) War crimes;

(d) The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Article 6
Genocide

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

Article 7
Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as
impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and
children;

(d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquies-cence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

Article 8
War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in

violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical

mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

Article 9
Elements of Crimes

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Elements of Crimes may be proposed by:

(a) Any State Party;

(b) The judges acting by an absolute majority;

(c) The Prosecutor.

Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

3. The Elements of Crimes and amendments thereto shall be consistent with this Statute.

Article 10

Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

Article 11
Jurisdiction ratione temporis

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

Article 12
Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.

3. 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.

Article 13
Exercise of jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

Article 14
Referral of a situation by a State Party

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

Article 15
Prosecutor

1. The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.

2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of
the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.

6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

Article 16
Deferral of investigation or prosecution

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Article 17
Issues of admissibility

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.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Article 18
Preliminary rulings regarding admissibility

1. When a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States.

2. Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

3. The Prosecutor's deferral to a State's investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation.

4. The State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber, in accordance with article 82. The appeal may be heard on an expedited basis.

5. When the Prosecutor has deferred an investigation in accordance with paragraph 2, the Prosecutor may request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions. States Parties shall respond to such requests without undue delay.

6. Pending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has deferred an investigation under this article, the Prosecutor may, from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available.

7. A State which has challenged a ruling of the Pre-Trial Chamber under this article may challenge the admissibility of a case under article 19 on the grounds of additional significant facts or significant change of circumstances.

Article 19
Challenges to the jurisdiction of the Court or the admissibility of a case

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.

2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:

(a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;

(b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or

(c) A State from which acceptance of jurisdiction is required under article 12.

3. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.

4. The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c).

5. A State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity.

6. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or

admissibility may be appealed to the Appeals Chamber in accordance with article 82.

7. If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17.

8. Pending a ruling by the Court, the Prosecutor may seek authority from the Court:

(a) To pursue necessary investigative steps of the kind referred to in article 18, paragraph 6;

(b) To take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and

(c) In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58.

9. The making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge.

10. If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on
which the case had previously been found inadmissible under article 17.

11. If the Prosecutor, having regard to the matters referred to in article 17, defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. That information shall, at the request of the State concerned, be confidential. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State to which deferral of the proceedings has taken place.

Article 20
Ne bis in idem

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.

3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Article 21
Applicable law

1. The Court shall apply:

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW

Article 22
Nullum crimen sine lege

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.

2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

Article 23
Nulla poena sine lege

A person convicted by the Court may be punished only in accordance with this Statute.

Article 24
Non-retroactivity ratione personae

1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.

2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

Article 25
Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily
gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Article 26
Exclusion of jurisdiction over persons under eighteen

The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

Article 27
Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 28
Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities
for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his
or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Article 29
Non-applicability of statute of limitations

The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

Article 30
Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

Article 31
Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

(a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

(b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a
result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for
accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not

intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) Made by other persons; or

(ii) Constituted by other circumstances beyond that person's control.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

Article 32
Mistake of fact or mistake of law

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

Article 33
Superior orders and prescription of law

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

(a) The person was under a legal obligation to obey orders of the Government or the superior in question;

(b) The person did not know that the order was unlawful; and

(c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

PART 4. COMPOSITION AND ADMINISTRATION OF THE COURT

Article 34
Organs of the Court

The Court shall be composed of the following organs:

(a) The Presidency;

(b) An Appeals Division, a Trial Division and a Pre-Trial Division;

(c) The Office of the Prosecutor;

(d) The Registry.

Article 35
Service of judges

1. All judges shall be elected as full-time members of the Court and shall be available to serve on that basis from the commencement of their terms of office.

2. The judges composing the Presidency shall serve on a full-time basis as soon as they are elected.

3. The Presidency may, on the basis of the workload of the Court and in consultation with its members, decide from time to time to what extent the remaining judges shall be required to serve on a full-time basis. Any such arrangement shall be without prejudice to the provisions of article 40.

4. The financial arrangements for judges not required to serve on a full-time basis shall be made in accordance with article 49.

Article 36
Qualifications, nomination and election of judges

1. Subject to the provisions of paragraph 2, there shall be 18 judges of the Court.

2. (a) The Presidency, acting on behalf of the Court, may propose an increase in the number of judges specified in paragraph 1, indicating the reasons why this is considered necessary and appropriate. The Registrar shall promptly circulate any such proposal to all States Parties.

(b) Any such proposal shall then be considered at a meeting of the Assembly of States Parties to be convened in accordance with article 112. The proposal shall be considered adopted if approved at the meeting by a vote of two thirds of the members of the Assembly of States Parties and shall enter into force at such time as decided by the Assembly of States Parties.

(c) (i) Once a proposal for an increase in the number of judges has been adopted under subparagraph (b), the election of the additional judges shall take place at the next session of the Assembly of States Parties in accordance with paragraphs 3 to 8, and article 37, paragraph 2;

(ii) Once a proposal for an increase in the number of judges has been adopted and brought into effect under subparagraphs (b) and (c) (i), it shall be open to the Presidency at any time thereafter, if the workload of the Court justifies it, to propose a reduction in the number of judges, provided that the number of judges shall not be reduced below that specified in paragraph 1. The proposal shall be dealt with in accordance with the procedure laid down in subparagraphs (a) and (b). In the event that the proposal is adopted, the number of judges shall be progressively decreased as the terms of office of serving judges expire, until the necessary number has been reached.

3. (a) The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.

(b) Every candidate for election to the Court shall:

(i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or

(ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court;

(c) Every candidate for election to the Court shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. (a) Nominations of candidates for election to the Court may be made by any State Party to this Statute, and shall be made either:

(i) By the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question; or

(ii) By the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court.

Nominations shall be accompanied by a statement in the necessary detail specifying how the candidate fulfils the requirements of paragraph 3.

(b) Each State Party may put forward one candidate for any given election who need not necessarily be a national of that State Party but shall in any case be a national of a State Party.

(c) The Assembly of States Parties may decide to establish, if appropriate, an Advisory Committee on nominations. In that event, the Committee's composition and mandate shall be established by the Assembly of States Parties.

5. For the purposes of the election, there shall be two lists of candidates:

List A containing the names of candidates with the qualifications specified in paragraph 3 (b) (i); and

List B containing the names of candidates with the qualifications specified in paragraph 3 (b) (ii).

A candidate with sufficient qualifications for both lists may choose on which list to appear. At the first election to the Court, at least nine judges shall be elected from list A and at least five judges from list B. Subsequent elections shall be so organized as to maintain the equivalent proportion on the Court of judges qualified on the two lists.

6. (a) The judges shall be elected by secret ballot at a meeting of the Assembly of States Parties convened for that purpose under article 112. Subject to paragraph 7, the persons elected to the Court shall be the 18 candidates who obtain the highest number of votes and a two-thirds majority of the States Parties present and voting.

(b) In the event that a sufficient number of judges is not elected on the first ballot, successive ballots shall be held in accordance with the procedures laid down in subparagraph (a) until the remaining places have been filled.

7. No two judges may be nationals of the same State. A person who, for the purposes of membership of the Court, could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.

8. (a) The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:

(i) The representation of the principal legal systems of the world;

(ii) Equitable geographical representation; and

(iii) A fair representation of female and male judges.

(b) States Parties shall also take into account the need to include judges with legal

expertise on specific issues, including, but not limited to, violence against women or children.

9. (a) Subject to subparagraph (b), judges shall hold office for a term of nine years and, subject to subparagraph (c) and to article 37, paragraph 2, shall not be eligible for re-election.

(b) At the first election, one third of the judges elected shall be selected by lot to serve for a term of three years; one third of the judges elected shall be selected by lot to serve for a term of six years; and the remainder shall serve for a term of nine years.

(c) A judge who is selected to serve for a term of three years under subparagraph (b) shall be eligible for re-election for a full term.

10. Notwithstanding paragraph 9, a judge assigned to a Trial or Appeals Chamber in accordance with article 39 shall continue in office to complete any trial or appeal the hearing of which has already commenced before that Chamber.

Article 37
Judicial vacancies

1. In the event of a vacancy, an election shall be held in accordance with article 36 to fill the vacancy.

2. A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term and, if that period is three years or less, shall be eligible for re-election for a full term under article 36.

Article 38
The Presidency

1. The President and the First and Second Vice-Presidents shall be elected by an absolute majority of the judges. They shall each serve for a term of three years or until the end of their respective terms of office as judges, whichever expires earlier. They shall be eligible for re-election once.

2. The First Vice-President shall act in place of the President in the event that the President is unavailable or disqualified. The Second Vice-President shall act in place of the President in the event that both the President and the First Vice-President are unavailable or disqualified.

3. The President, together with the First and Second Vice-Presidents, shall constitute the Presidency, which shall be responsible for:

(a) The proper administration of the Court, with the exception of the Office of the Prosecutor; and

(b) The other functions conferred upon it in accordance with this Statute.

4. In discharging its responsibility under paragraph 3 (a), the Presidency shall coordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern.

Article 39
Chambers

1. As soon as possible after the election of the judges, the Court shall organize itself into the divisions specified in article 34, paragraph (b). The Appeals Division shall be composed of the President and four other judges, the Trial Division of not less than six judges and the Pre-Trial Division of not less than six judges. The assignment of judges to divisions shall be based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law. The Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience.

2. (a) The judicial functions of the Court shall be carried out in each division by Chambers.

(b) (i) The Appeals Chamber shall be composed of all the judges of the Appeals Division;

(ii) The functions of the Trial Chamber shall be carried out by three judges of the Trial Division;

(iii) The functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division in accordance with this Statute and the Rules of
Procedure and Evidence;

(c) Nothing in this paragraph shall preclude the simultaneous constitution of more than one Trial Chamber or Pre-Trial Chamber when the efficient management of the Court's workload so requires.

3. (a) Judges assigned to the Trial and Pre-Trial Divisions shall serve in those divisions for a period of three years, and thereafter until the completion of any case the hearing of which has already commenced in the division concerned.

(b) Judges assigned to the Appeals Division shall serve in that division for their entire term of office.

4. Judges assigned to the Appeals Division shall serve only in that division. Nothing in this article shall, however, preclude the temporary attachment of judges from the Trial Division to the Pre-Trial Division or vice versa, if the Presidency considers that the efficient management of the Court's

workload so requires, provided that under no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial
Chamber hearing that case.

Article 40
Independence of the judges

1. The judges shall be independent in the performance of their functions.

2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.

3. Judges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature.

4. Any question regarding the application of paragraphs 2 and 3 shall be decided by an absolute majority of the judges. Where any such question concerns an individual judge, that judge shall not take part in the decision.

Article 41
Excusing and disqualification of judges

1. The Presidency may, at the request of a judge, excuse that judge from the exercise of a function under this Statute, in accordance with the Rules of Procedure and Evidence.

2. (a) A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, inter alia, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted. A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence.

(b) The Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph.

(c) Any question as to the disqualification of a judge shall be decided by an absolute majority of the judges. The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part
in the decision.

Article 42
The Office of the Prosecutor

1. The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.

2. The Office shall be headed by the Prosecutor. The Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof. The Prosecutor shall be assisted by one or more Deputy Prosecutors, who shall be entitled to carry out any of the acts required of the Prosecutor under this Statute. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. They shall serve on a full-time basis.

3. The Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. They shall have an excellent knowledge of and be fluent in at least one of the working languages of the
Court.

4. The Prosecutor shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties. The Deputy Prosecutors shall be elected in the same way from a list of candidates provided by the Prosecutor. The Prosecutor shall nominate three candidates for each position of Deputy Prosecutor to be filled. Unless a shorter term is decided upon at the time of their election, the Prosecutor and the Deputy Prosecutors shall hold office for a term of nine years and shall not be eligible for
re-election.

5. Neither the Prosecutor nor a Deputy Prosecutor shall engage in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence. They shall not engage in any other occupation of a professional nature.

6. The Presidency may excuse the Prosecutor or a Deputy Prosecutor, at his or her request, from acting in a particular case.

7. Neither the Prosecutor nor a Deputy Prosecutor shall participate in any matter in which their impartiality might reasonably be doubted on any ground. They shall be disqualified from a case in accordance with this paragraph if, inter alia, they have previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted.

8. Any question as to the disqualification of the Prosecutor or a Deputy Prosecutor shall be decided by the Appeals Chamber.

(a) The person being investigated or prosecuted may at any time request the disqualifica-

tion of the Prosecutor or a Deputy Prosecutor on the grounds set out in this article;

(b) The Prosecutor or the Deputy Prosecutor, as appropriate, shall be entitled to present his or her comments on the matter;

9. The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children.

Article 43
The Registry

1. The Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor in accordance with article 42.

2. The Registry shall be headed by the Registrar, who shall be the principal administrative officer of the Court. The Registrar shall exercise his or her functions under the authority of the President of the Court.

3. The Registrar and the Deputy Registrar shall be persons of high moral character, be highly competent and have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The judges shall elect the Registrar by an absolute majority by secret ballot, taking into account any recommendation by the Assembly of States Parties. If the need arises and upon the recommendation of the Registrar, the judges shall elect, in the same manner, a Deputy Registrar.

5. The Registrar shall hold office for a term of five years, shall beeligible for re-election once and shall serve on a full-time basis. The Deputy Registrar shall hold office for a term of five years or such shorter term as may be decided upon by an absolute majority of the judges, and may be elected on the basis that the Deputy Registrar shall be called upon to serve as required.

6. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

Article 44
Staff

1. The Prosecutor and the Registrar shall appoint such qualified staff as may be required to their respective offices. In the case of the Prosecutor, this shall include the appointment of investigators.

2. In the employment of staff, the Prosecutor and the Registrar shall ensure the highest standards of efficiency, competency and integrity, and shall have regard, mutatis mutandis, to the criteria set forth in article 36, paragraph 8.

3. The Registrar, with the agreement of the Presidency and the Prosecutor, shall propose Staff Regulations which include the terms and conditions upon which the staff of the Court shall be appointed, remunerated and dismissed. The Staff Regulations shall be approved by the Assembly of States Parties.

4. The Court may, in exceptional circumstances, employ the expertise of gratis personnel offered by States Parties, intergovernmental organizations or non-governmental organizations to assist with the work of any of the organs of the Court. The Prosecutor may accept any such offer on behalf of the Office of the Prosecutor. Such gratis personnel shall be employed in accordance with guidelines to be established by the Assembly of States Parties.

Article 45
Solemn undertaking

Before taking up their respective duties under this Statute, the judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall each make a solemn undertaking in open court to exercise his or her respective functions impartially and conscientiously.

Article 46
Removal from office

1. A judge, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar shall be removed from office if a decision to this effect is made in accordance with paragraph 2, in cases where that person:

(a) Is found to have committed serious misconduct or a serious breach of his or her duties under this Statute, as provided for in the Rules of Procedure and Evidence; or

(b) Is unable to exercise the functions required by this Statute.

2. A decision as to the removal from office of a judge, the Prosecutor or a Deputy Prosecutor under paragraph 1 shall be made by the Assembly of States Parties, by secret ballot:

(a) In the case of a judge, by a two-thirds majority of the States Parties upon a recommendation adopted by a two-thirds majority of the other judges;

(b) In the case of the Prosecutor, by an absolute majority of the States Parties;

(c) In the case of a Deputy Prosecutor, by an absolute majority of the States Parties upon the recommendation of the Prosecutor.

3. A decision as to the removal from office of the Registrar or Deputy Registrar shall be made by an absolute majority of the judges.

4. A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar whose conduct or ability to exercise the functions of the office as required by this Statute is challenged under this article shall have full opportunity to present and receive evidence and to make submissions in accordance with the Rules of Procedure and Evidence. The person in question shall not otherwise participate in the consideration of the matter.

Article 47
Disciplinary measures

A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar who has committed misconduct of a less serious nature than that set out in article 46, paragraph 1, shall be subject to disciplinary measures, in accordance with the Rules of Procedure and Evidence.

Article 48
Privileges and immunities

1. The Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfilment of its purposes.

2. The judges, the Prosecutor, the Deputy Prosecutors and the Registrar shall, when engaged on or with respect to the business of the Court, enjoy the same privileges and immunities as are accorded to heads of diplomatic missions and shall, after the expiry of their terms of office, continue to be accorded immunity from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity.

3. The Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry shall enjoy the privileges and immunities and facilities necessary for the performance of their functions, in accordance with the agreement on the privileges and immunities of the Court.

4. Counsel, experts, witnesses or any other person required to be present at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on the privileges and immunities of the Court.

5. The privileges and immunities of:

(a) A judge or the Prosecutor may be waived by an absolute majority of the judges;

(b) The Registrar may be waived by the Presidency;

(c) The Deputy Prosecutors and staff of the Office of the Prosecutor may be waived by the Prosecutor;

(d) The Deputy Registrar and staff of the Registry may be waived by the Registrar.

Article 49
Salaries, allowances and expenses

The judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall receive such salaries, allowances and expenses as may be decided upon by the Assembly of States Parties. These salaries and allowances shall not be reduced during their terms of office.

Article 50
Official and working languages

1. The official languages of the Court shall be Arabic, Chinese, English, French, Russian and Spanish. The judgements of the Court, as well as other decisions resolving fundamental issues before the Court, shall be published in the official languages. The Presidency shall, in accordance with the criteria established by the Rules of Procedure and Evidence, determine which decisions may be considered as resolving fundamental issues for the purposes of this paragraph.

2. The working languages of the Court shall be English and French. The Rules of Procedure and Evidence shall determine the cases in which other official languages may be used as working languages.

3. At the request of any party to a proceeding or a State allowed to intervene in a proceeding, the Court shall authorize a language other than English or French to be used by such a party or State, provided that the Court considers such authorization to be adequately justified.

Article 51
Rules of Procedure and Evidence

1. The Rules of Procedure and Evidence shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Rules of Procedure and Evidence may be proposed by:

(a) Any State Party;

(b) The judges acting by an absolute majority; or

(c) The Prosecutor.

Such amendments shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

3. After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties.

4. The Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute. Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.

5. In the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail.

Article 52
Regulations of the Court

1. The judges shall, in accordance with this Statute and the Rules of Procedure and Evidence, adopt, by an absolute majority, the Regulations of the Court necessary for its routine functioning.

2. The Prosecutor and the Registrar shall be consulted in the elaboration of the Regulations and any amendments thereto.

3. The Regulations and any amendments thereto shall take effect upon adoption unless otherwise decided by the judges. Immediately upon adoption, they shall be circulated to States Parties for comments. If within six months there are no objections from a majority of States Parties, they shall remain in force.

PART 5. INVESTIGATION AND PROSECUTION

Article 53
Initiation of an investigation

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;

(b) The case is or would be admissible under article 17; and

(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

(a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;

(b) The case is inadmissible under article 17; or

(c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime; the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.

3. (a) At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.

(b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.

4. The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.

Article 54
Duties and powers of the Prosecutor with respect to investigations

1. The Prosecutor shall:

(a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;

(b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children; and

(c) Fully respect the rights of persons arising under this Statute.

2. The Prosecutor may conduct investigations on the territory of a State:

(a) In accordance with the provisions of Part 9; or

(b) As authorized by the Pre-Trial Chamber under article 57, paragraph 3 (d).

3. The Prosecutor may:

(a) Collect and examine evidence;

(b) Request the presence of and question persons being investigated, victims and witnesses;

(c) Seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate;

(d) Enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person;

(e) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and

(f) Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.

Article 55
Rights of persons during an investigation

1. In respect of an investigation under this Statute, a person:

(a) Shall not be compelled to incriminate himself or herself or to confess guilt;

(b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;

(c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and

(d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.

2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:

(a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;

(b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;

(c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and

(d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

Article 56
Role of the Pre-Trial Chamber in relation to a unique investigative opportunity

1. (a) Where the Prosecutor considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be

available subsequently for the purposes of a trial, the Prosecutor shall so inform the Pre-Trial Chamber.

(b) In that case, the Pre-Trial Chamber may, upon request of the Prosecutor, take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence.

(c) Unless the Pre-Trial Chamber orders otherwise, the Prosecutor shall provide the relevant information to the person who has been arrested or appeared in response to a summons in connection with the investigation referred to in subparagraph (a), in order that he or she may be heard on the matter.

2. The measures referred to in paragraph 1 (b) may include:

(a) Making recommendations or orders regarding procedures to be followed;

(b) Directing that a record be made of the proceedings;

(c) Appointing an expert to assist;

(d) Authorizing counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance or counsel has not been designated, appointing another counsel to attend and represent the interests of the defence;

(e) Naming one of its members or, if necessary, another available judge of the Pre-Trial or Trial Division to observe and make recommendations or orders regarding the collection and preservation of evidence and the questioning of persons;

(f) Taking such other action as may be necessary to collect or preserve evidence.

3. (a) Where the Prosecutor has not sought measures pursuant to this article but the Pre-Trial Chamber considers that such measures are required to preserve evidence that it deems would be essential for the defence at trial, it shall consult with the Prosecutor as to whether there is good reason for the Prosecutor's failure to request the measures. If upon consultation, the Pre-Trial Chamber concludes that the Prosecutor's failure to request such measures is unjustified, the Pre-Trial Chamber may take such measures on its own initiative.

(b) A decision of the Pre-Trial Chamber to act on its own initiative under this paragraph may be appealed by the Prosecutor. The appeal shall be heard on an expedited basis.

4. The admissibility of evidence preserved or collected for trial pursuant to this article, or the record thereof, shall be governed at trial by article 69, and given such weight as determined by the Trial Chamber.

Article 57
Functions and powers of the Pre-Trial Chamber

1. Unless otherwise provided in this Statute, the Pre-Trial Chamber shall exercise its functions in accordance with the provisions of this article.

2 . (a) Orders or rulings of the Pre-Trial Chamber issued under articles 15, 18, 19, 54, paragraph 2, 61, paragraph 7, and 72 must be concurred in by a majority of its judges.

(b) In all other cases, a single judge of the Pre-Trial Chamber may exercise the functions provided for in this Statute, unless otherwise provided for in the Rules of Procedure and Evidence or by a majority of the Pre-Trial Chamber.

3. In addition to its other functions under this Statute, the Pre-Trial Chamber may:

(a) At the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation;

(b) Upon the request of a person who has been arrested or has appeared pursuant to a summons under article 58, issue such orders, including measures such as those described in article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence;

(c) Where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information;

(d) Authorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State under Part 9 if, whenever possible having regard to the views of the State concerned, the Pre-Trial Chamber has determined in that case that the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9.

(e) Where a warrant of arrest or a summons has been issued under article 58, and having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in this Statute and the Rules of Procedure and Evidence, seek the cooperation of States pursuant to article 93, paragraph 1 (k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims.

Article 58
Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear

1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

(a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and

(b) The arrest of the person appears necessary:

(i) To ensure the person's appearance at trial,

(ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or

(iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

2. The application of the Prosecutor shall contain:

(a) The name of the person and any other relevant identifying information;

(b) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed;

(c) A concise statement of the facts which are alleged to constitute those crimes;

(d) A summary of the evidence and any other information which establish reasonable grounds to believe that the person committed those crimes; and

(e) The reason why the Prosecutor believes that the arrest of the person is necessary.

3. The warrant of arrest shall contain:

(a) The name of the person and any other relevant identifying information;

(b) A specific reference to the crimes within the jurisdiction of the Court for which the person's arrest is sought; and

(c) A concise statement of the facts which are alleged to constitute those crimes.

4. The warrant of arrest shall remain in effect until otherwise ordered by the Court.

5. On the basis of the warrant of arrest, the Court may request the provisional arrest or the arrest and surrender of the person under Part 9.

6. The Prosecutor may request the Pre-Trial Chamber to amend the warrant of arrest by modifying or adding to the crimes specified therein. The Pre-Trial Chamber shall so amend the warrant if it is satisfied that there are reasonable grounds to believe that the person committed the modified or additional crimes.

7. As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than
detention) if provided for by national law, for the person to appear. The summons shall contain:

(a) The name of the person and any other relevant identifying information;

(b) The specified date on which the person is to appear;

(c) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed; and

(d) A concise statement of the facts which are alleged to constitute the crime.

The summons shall be served on the person.

Article 59
Arrest proceedings in the custodial State

1. A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9.

2. A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:

(a) The warrant applies to that person;

(b) The person has been arrested in accordance with the proper process; and

(c) The person's rights have been respected.

3. The person arrested shall have the right to apply to the competent authority in the custodial State for interim release pending surrender.

4. In reaching a decision on any such application, the competent authority in the custodial State shall consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the Court. It shall not be open to the competent authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b).

5. The Pre-Trial Chamber shall be notified of any request for interim release and shall make recommendations to the competent authority in the custodial State. The competent authority in the custodial State shall give full consideration to such recommendations, including any recommendations on measures to prevent the escape of the person, before rendering its decision.

6. If the person is granted interim release, the Pre-Trial Chamber may request periodic reports on the status of the interim release.

7. Once ordered to be surrendered by the custodial State, the person shall be delivered to the Court as soon as possible.

Article 60
Initial proceedings before the Court

1. Upon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under this Statute, including the right to apply for interim release pending trial.

2. A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.

3. The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.

4. The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions.

5. If necessary, the Pre-Trial Chamber may issue a warrant of arrest to secure the presence of a person who has been released.

Article 61
Confirmation of the charges before trial

1. Subject to the provisions of paragraph 2, within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel.

2. The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has:

(a) Waived his or her right to be present; or

(b) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held.

In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice.

3. Within a reasonable time before the hearing, the person shall:

(a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and

(b) Be informed of the evidence on which the Prosecutor intends to rely at the hearing.

The Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of the hearing.

4. Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any charges. The person shall be given reasonable notice before the hearing of any amendment to or withdrawal of charges. In case of a withdrawal of charges, the Prosecutor shall notify the Pre-Trial Chamber of the reasons for the withdrawal.

5. At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may

rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.

6. At the hearing, the person may:

(a) Object to the charges;

(b) Challenge the evidence presented by the Prosecutor; and

(c) Present evidence.

7. The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:

(a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;

(b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence;

(c) Adjourn the hearing and request the Prosecutor to consider:

(i) Providing further evidence or conducting further investigation with respect to a particular charge; or

(ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

8. Where the Pre-Trial Chamber declines to confirm a charge, the Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence.

9. After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional
charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.

10. Any warrant previously issued shall cease to have effect with respect to any charges which have not been confirmed by the Pre-Trial Chamber or which have been withdrawn by the Prosecutor.

11. Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.

PART 6. THE TRIAL

Article 62
Place of trial

Unless otherwise decided, the place of the trial shall be the seat of the Court.

Article 63
Trial in the presence of the accused

1. The accused shall be present during the trial.

2. If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

Article 64
Functions and powers of the Trial Chamber

1. The functions and powers of the Trial Chamber set out in this article shall be exercised in accordance with this Statute and the Rules of Procedure and Evidence.

2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:

(a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;

(b) Determine the language or languages to be used at trial; and

(c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate
preparation for trial.

4. The Trial Chamber may, if necessary for its effective and fair functioning, refer preliminary issues

to the Pre-Trial Chamber or, if necessary, to another available judge of the Pre-Trial Division.

5. Upon notice to the parties, the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused.

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

(a) Exercise any functions of the Pre-Trial Chamber referred to in article 61, paragraph 11;

(b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute;

(c) Provide for the protection of confidential information;

(d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties;

(e) Provide for the protection of the accused, witnesses and victims; and

(f) Rule on any other relevant matters.

7. The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence.

8. (a) At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber. The Trial Chamber shall satisfy itself that the accused understands the nature of the charges. It shall afford him or her the opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty.

(b) At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute.

9. The Trial Chamber shall have, inter alia, the power on application of a party or on its own motion to:

(a) Rule on the admissibility or relevance of evidence; and

(b) Take all necessary steps to maintain order in the course of a hearing.

10. The Trial Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is made and that it is maintained and preserved by the Registrar.

Article 65
Proceedings on an admission of guilt

1. Where the accused makes an admission of guilt pursuant to article 64, paragraph 8 (a), the Trial Chamber shall determine whether:

(a) The accused understands the nature and consequences of the admission of guilt;

(b) The admission is voluntarily made by the accused after sufficient consultation with defence counsel; and

(c) The admission of guilt is supported by the facts of the case that are contained in:

(i) The charges brought by the Prosecutor and admitted by the accused;

(ii) Any materials presented by the Prosecutor which supplement the charges and which the accused accepts; and

(iii) Any other evidence, such as the testimony of witnesses, presented by the Prosecutor or the accused.

2. Where the Trial Chamber is satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt, together with any additional evidence presented, as establishing all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime.

3. Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt as not having been made, in which case it shall order that the trial be continued under the ordinary trial procedures provided by this Statute and may remit the case to another Trial Chamber.

4. Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims, the Trial Chamber may:

(a) Request the Prosecutor to present additional evidence,
including the testimony of witnesses; or

(b) Order that the trial be continued under the ordinary trial procedures provided by this Statute, in which case it shall consider the admission of guilt as not having been made and may remit the case to another Trial Chamber.

5. Any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court.

Article 66
Presumption of innocence

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.

2. The onus is on the Prosecutor to prove the guilt of the accused.

3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

Article 67
Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

(c) To be tried without undue delay;

(d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks;

(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

(h) To make an unsworn oral or written statement in his or her defence; and

(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends
to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

Article 68
Protection of the victims and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a
fair and impartial trial. Such views and concerns may be presented by the legal representatives of the

victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6.

5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information.

Article 69
Evidence

1. Before testifying, each witness shall, in accordance with the Rules of Procedure and Evidence, give an undertaking as to the truthfulness of the evidence to be given by that witness.

2. The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.

3. The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

4. The Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

5. The Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence.

6. The Court shall not require proof of facts of common knowledge but may take judicial notice of them.

7. Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

(a) The violation casts substantial doubt on the reliability of the evidence; or

(b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

8. When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law.

Article 70
Offences against the administration of justice

1. The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:

(a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;

(b) Presenting evidence that the party knows is false or forged;

(c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;

(d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;

(e) Retaliating against an official of the Court on account of duties performed by that or another official;

(f) Soliciting or accepting a bribe as an official of the Court in connection with his or her official duties.

2. The principles and procedures governing the Court's exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence. The conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State.

3. In the event of conviction, the Court may impose a term of imprisonment not exceeding five years, or a fine in accordance with the Rules of Procedure and Evidence, or both.

4. (a) Each State Party shall extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this article, committed on its territory, or by one of its nationals;

(b) Upon request by the Court, whenever it deems it proper, the State Party shall submit the case to its competent authorities for the purpose of prosecution. Those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively.

Article 71
Sanctions for misconduct before the Court

1. The Court may sanction persons present before it who commit misconduct, including disruption of its proceedings or deliberate refusal to comply with its directions, by administrative measures other than imprisonment, such as temporary or permanent removal from the courtroom, a fine or other similar measures provided for in the Rules of Procedure and Evidence.

2. The procedures governing the imposition of the measures set forth in paragraph 1 shall be those provided for in the Rules of Procedure and Evidence.

Article 72
Protection of national security information

1. This article applies in any case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests. Such cases include those falling within the scope of article 56, paragraphs 2 and 3, article 61, paragraph 3, article 64, paragraph 3, article 67, paragraph 2, article 68, paragraph 6, article 87, paragraph 6 and article 93, as well as cases arising at any other stage of the proceedings where such disclosure may be at issue.

2. This article shall also apply when a person who has been requested to give information or evidence has refused to do so or has referred the matter to the State on the ground that disclosure would prejudice the national security interests of a State and the State concerned confirms that it is of the opinion that disclosure would prejudice its national security interests.

3. Nothing in this article shall prejudice the requirements of confidentiality applicable under article 54, paragraph 3 (e) and (f), or the application of article 73.

4. If a State learns that information or documents of the State are being, or are likely to be, disclosed at any stage of the proceedings, and it is of the opinion that disclosure would prejudice its national security interests, that State shall have the right to intervene in order to obtain resolution of the issue in accordance with this article.

5. If, in the opinion of a State, disclosure of information would prejudice its national security interests, all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor, the defence or the Pre-Trial Chamber or Trial Chamber, as the case may be, to seek to resolve the matter by cooperative means. Such steps may include:

(a) Modification or clarification of the request;

(b) A determination by the Court regarding the relevance of the information or evidence sought, or a determination as to whether the evidence, though relevant, could be or has been obtained from a source other than the requested State;

(c) Obtaining the information or evidence from a different source or in a different form; or

(d) Agreement on conditions under which the assistance could be provided including, among other things, providing summaries or redactions, limitations on disclosure, use of in camera or ex parte proceedings, or other protective measures permissible under the Statute and the Rules of Procedure and Evidence.

6. Once all reasonable steps have been taken to resolve the matter through cooperative means, and if the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it shall so notify the Prosecutor or the Court of the specific reasons for its decision, unless a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests.

7. Thereafter, if the Court determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused, the Court may undertake the following actions:

(a) Where disclosure of the information or document is sought pursuant to a request for cooperation under Part 9 or the circumstances described in paragraph 2, and the State has invoked the ground for refusal referred to in article 93, paragraph 4:

(i) The Court may, before making any conclusion referred to in subparagraph 7 (a) (ii), request further consultations for the purpose of considering the State's representations, which may

include, as appropriate, hearings in camera and ex parte;

(ii) If the Court concludes that, by invoking the ground for refusal under article 93, paragraph 4, in the circumstances of the case, the requested State is not acting in accordance with its obligations under this Statute, the Court may refer the matter in accordance with article 87, paragraph 7, specifying the reasons for its conclusion; and

(iii) The Court may make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances; or

(b) In all other circumstances:

(i) Order disclosure; or

(ii) To the extent it does not order disclosure, make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances.

Article 73
Third-party information or documents

If a State Party is requested by the Court to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a State, intergovernmental organization or international organization, it shall seek the consent of the originator to disclose that document or information. If the originator is a State Party, it shall either consent to disclosure of the information or document or undertake to resolve the issue of disclosure with the Court, subject to the provisions of article 72. If the originator is not a State Party and refuses to consent to disclosure, the requested State shall inform the Court that it is unable to provide the document or information because of a pre-existing obligation of confidentiality to the originator.

Article 74
Requirements for the decision

1. All the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations. The Presidency may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending.

2. The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.

3. The judges shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges.

4. The deliberations of the Trial Chamber shall remain secret.

5. The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court.

Article 75
Reparations to victims

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.

4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.

5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.

6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

Article 76
Sentencing

1. In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to

be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence.

2. Except where article 65 applies and before the completion of the trial, the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence.

3. Where paragraph 2 applies, any representations under article 75 shall be heard during the further hearing referred to in paragraph 2 and, if necessary, during any additional hearing.

4. The sentence shall be pronounced in public and, wherever possible, in the presence of the accused.

PART 7. PENALTIES

Article 77
Applicable penalties

1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:

(a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or

(b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

2. In addition to imprisonment, the Court may order:

(a) A fine under the criteria provided for in the Rules of Procedure and Evidence;

(b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

Article 78
Determination of the sentence

1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.

3. When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with article 77, paragraph 1 (b).

Article 79
Trust Fund

1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.

2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.

3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

Article 80
Non-prejudice to national application of penalties and national laws

Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.

PART 8. APPEAL AND REVISION

Article 81
Appeal against decision of acquittal or conviction or against sentence

1. A decision under article 74 may be appealed in accordance with the Rules of Procedure and Evidence as follows:

(a) The Prosecutor may make an appeal on any of the following grounds:

(i) Procedural error,

(ii) Error of fact, or

(iii) Error of law;

(b) The convicted person, or the Prosecutor on that person's behalf, may make an appeal on any of the following grounds:

(i) Procedural error,

(ii) Error of fact,

(iii) Error of law, or

(iv) Any other ground that affects the fairness or reliability of the proceedings or decision.

2. (a) A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence;

(b) If on an appeal against sentence the Court considers that there are grounds on which the conviction might be set aside, wholly or in part, it may invite the Prosecutor and the convicted person to submit grounds under article 81, paragraph 1 (a) or (b), and may render a decision on conviction in accordance with article 83;

(c) The same procedure applies when the Court, on an appeal against conviction only, considers that there are grounds to reduce the sentence under paragraph 2 (a).

3. (a) Unless the Trial Chamber orders otherwise, a convicted person shall remain in custody pending an appeal;

(b) When a convicted person's time in custody exceeds the sentence of imprisonment imposed, that person shall be released, except that if the Prosecutor is also appealing, the release may be subject to the conditions under subparagraph (c) below;

(c) In case of an acquittal, the accused shall be released immediately, subject to the following:

(i) Under exceptional circumstances, and having regard, inter alia, to the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal, the Trial Chamber, at the request of the Prosecutor, may maintain the detention of the person pending appeal;

(ii) A decision by the Trial Chamber under subparagraph (c) (i) may be appealed in accordance with the Rules of Procedure and Evidence.

4. Subject to the provisions of paragraph 3 (a) and (b), execution of the decision or sentence shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings.

Article 82
Appeal against other decisions

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

(a) A decision with respect to jurisdiction or admissibility;

(b) A decision granting or denying release of the person being investigated or prosecuted;

(c) A decision of the Pre-Trial Chamber to act on its own initiative under article 56, paragraph 3;

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

2. A decision of the Pre-Trial Chamber under article 57, paragraph 3 (d), may be appealed against by the State concerned or by the Prosecutor, with the leave of the Pre-Trial Chamber. The appeal shall be heard on an expedited basis.

3. An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence.

4. A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 75 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence.

Article 83
Proceedings on appeal

1. For the purposes of proceedings under article 81 and this article, the Appeals Chamber shall have all the powers of the Trial Chamber.

2. If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may:

(a) Reverse or amend the decision or sentence; or

(b) Order a new trial before a different Trial Chamber.

For these purposes, the Appeals Chamber may remand a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly, or may itself call evidence to determine the issue. When the decision or sentence has been appealed only by the person convicted, or

the Prosecutor on that person's behalf, it cannot be amended to his or her detriment.

3. If in an appeal against sentence the Appeals Chamber finds that the sentence is disproportionate to the crime, it may vary the sentence in accordance with Part 7.

4. The judgement of the Appeals Chamber shall be taken by a majority of the judges and shall be delivered in open court. The judgement shall state the reasons on which it is based. When there is no unanimity, the judgement of the Appeals Chamber shall contain the views of the majority and the minority, but a judge may deliver a separate or dissenting opinion on a question of law.

5. The Appeals Chamber may deliver its judgement in the absence of the person acquitted or convicted.

Article 84
Revision of conviction or sentence

1. The convicted person or, after death, spouses, children, parents or one person alive at the time of the accused's death who has been given express written instructions from the accused to bring such a claim, or the Prosecutor
on the person's behalf, may apply to the Appeals Chamber to revise the final judgement of conviction or sentence on the grounds that:

(a) New evidence has been discovered that:

(i) Was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and

(ii) Is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict;

(b) It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified;

(c) One or more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under article 46.

2. The Appeals Chamber shall reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:

(a) Reconvene the original Trial Chamber;

(b) Constitute a new Trial Chamber; or

(c) Retain jurisdiction over the matter,

with a view to, after hearing the parties in the manner set forth in the Rules of Procedure and Evidence, arriving at a determination on whether the judgement should be revised.

Article 85
Compensation to an arrested or convicted person

1. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

2. When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly
attributable to him or her.

3. In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.

PART 9. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

Article 86
General obligation to cooperate

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.

Article 87
Requests for cooperation: general provisions

1. (a) The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each
State Party upon ratification, acceptance, approval or accession.

Subsequent changes to the designation shall be made by each State Party in accordance with the Rules of Procedure and Evidence.

(b) When appropriate, without prejudice to the provisions of subparagraph (a), requests may also be transmitted through the International Criminal Police Organization or any appropriate regional organization.

2. Requests for cooperation and any documents supporting the request shall either be in or be accompanied by a translation into an official language of the requested State or one of the working languages of the Court, in accordance with the choice made by that State upon ratification, acceptance, approval or accession.

Subsequent changes to this choice shall be made in accordance with the Rules of Procedure and Evidence.

3. The requested State shall keep confidential a request for cooperation and any documents supporting the request, except to the extent that the disclosure is necessary for execution of the request.

4. In relation to any request for assistance presented under this Part, the Court may take such measures, including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families. The Court may request that any information that is made available under this Part shall be provided and handled in a manner that protects the safety and physical or psychological well-being of any victims, potential witnesses and their families.

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.

6. The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate.

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.

Article 88
Availability of procedures under national law

States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.

Article 89
Surrender of persons to the Court

1. The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.

2. Where the person sought for surrender brings a challenge before a national court on the basis of the principle of ne bis in idem as provided in article 20, the requested State shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the requested State shall proceed with the execution of the request. If an admissibility ruling is pending, the requested State may postpone the execution of the request for surrender of the person until the Court makes a determination on admissibility.

3. (a) A State Party shall authorize, in accordance with its national procedural law, transportation through its territory of a person being surrendered to the Court by another State, except where transit through that State would impede or delay the surrender.

(b) A request by the Court for transit shall be transmitted in accordance with article 87. The request for transit shall contain:

(i) A description of the person being transported;

(ii) A brief statement of the facts of the case and their legal characterization; and

(iii) The warrant for arrest and surrender;

(c) A person being transported shall be detained in custody during the period of transit;

(d) No authorization is required if the person is transported by air and no landing is scheduled on the territory of the transit State;

(e) If an unscheduled landing occurs on the territory of the transit State, that State may require a request for transit from the Court as provided for in subparagraph (b). The transit State shall detain the person being transported until the request for transit is received and the transit is effected, provided that detention for purposes of this subparagraph may not be extended beyond 96 hours from the unscheduled landing unless the request is received within that time.

4. If the person sought is being proceeded against or is serving a sentence in the requested State for a crime different from that for which surrender to the Court is sought, the requested State, after making its decision to grant the request, shall consult with the Court.

Article 90
Competing requests

1. A State Party which receives a request from the Court for the surrender of a person under article 89 shall, if it also receives a request from any other State for the extradition of the same person for the same conduct which forms the basis of the crime for which the Court seeks the person's surrender, notify the Court and the requesting State of that fact.

2. Where the requesting State is a State Party, the requested State shall give priority to the request from the Court if:

(a) The Court has, pursuant to article 18 or 19, made a determination that the case in respect of which surrender is sought is admissible and that determination takes into account the investigation or prosecution conducted by the requesting State in respect of its request for extradition; or

(b) The Court makes the determination described in subparagraph (a) pursuant to the requested State's notification under paragraph 1.

3. Where a determination under paragraph 2 (a) has not been made, the requested State may, at its discretion, pending the determination of the Court under paragraph 2 (b), proceed to deal with the request for extradition from the requesting State but shall not extradite the person until the Court has determined that the case is inadmissible. The Court's determination shall be made on an expedited basis.

4. If the requesting State is a State not Party to this Statute the requested State, if it is not under an international obligation to extradite the person to the requesting State, shall give priority to the request for surrender from the Court, if the Court has determined that the case is admissible.

5. Where a case under paragraph 4 has not been determined to be admissible by the Court, the requested State may, at its discretion, proceed to deal with the request for extradition from the requesting State.

6. In cases where paragraph 4 applies except that the requested State is under an existing international obligation to extradite the person to the requesting State not Party to this Statute, the requested State shall determine whether to surrender the person to the Court or extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to:

(a) The respective dates of the requests;

(b) The interests of the requesting State including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought; and

(c) The possibility of subsequent surrender between the Court and the requesting State.

7. Where a State Party which receives a request from the Court for the surrender of a person also receives a request from any State for the extradition of the same person for conduct other than that which constitutes the crime for which the Court seeks the person's surrender:

(a) The requested State shall, if it is not under an existing international obligation to extradite the person to the requesting State, give priority to the request from the Court;

(b) The requested State shall, if it is under an existing international obligation to extradite the person to the requesting State, determine whether to surrender the person to the Court or to extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to those set out in paragraph 6, but shall give special consideration to the relative nature and gravity of the conduct in question.

8. Where pursuant to a notification under this article, the Court has determined a case to be inadmissible, and subsequently extradition to the requesting State is refused, the requested State shall notify the Court of this decision.

Article 91
Contents of request for arrest and surrender

1. A request for arrest and surrender shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1 (a).

2. In the case of a request for the arrest and surrender of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber under

article 58, the request shall contain or be supported by:

(a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;

(b) A copy of the warrant of arrest; and

(c) Such documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State, except that those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court.

3. In the case of a request for the arrest and surrender of a person already convicted, the request shall contain or be supported by:

(a) A copy of any warrant of arrest for that person;

(b) A copy of the judgement of conviction;

(c) Information to demonstrate that the person sought is the one referred to in the judgement of conviction; and

(d) If the person sought has been sentenced, a copy of the sentence imposed and, in the case of a sentence for imprisonment, a statement of any time already served and the time remaining to be served.

4. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (c). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

Article 92
Provisional arrest

1. In urgent cases, the Court may request the provisional arrest of the person sought, pending presentation of the request for surrender and the documents supporting the request as specified in article 91.

2. The request for provisional arrest shall be made by any medium capable of delivering a written record and shall contain:

(a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;

(b) A concise statement of the crimes for which the person's arrest is sought and of the facts which are alleged to constitute those crimes, including, where possible, the date and location of the crime;

(c) A statement of the existence of a warrant of arrest or a judgement of conviction against the person sought; and

(d) A statement that a request for surrender of the person sought will follow.

3. A person who is provisionally arrested may be released from custody if the requested State has not received the request for surrender and the documents supporting the request as specified in article 91 within the time limits specified in the Rules of Procedure and Evidence. However, the person may consent to surrender before the expiration of this period if permitted by the law of the requested State. In such a case, the requested State shall proceed to surrender the person to the Court as soon as possible.

4. The fact that the person sought has been released from custody pursuant to paragraph 3 shall not prejudice the subsequent arrest and surrender of that person if the request for surrender and the documents supporting the request are delivered at a later date.

Article 93
Other forms of cooperation

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:

(a) The identification and whereabouts of persons or the location of items;

(b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;

(c) The questioning of any person being investigated or prosecuted;

(d) The service of documents, including judicial documents;

(e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;

(f) The temporary transfer of persons as provided in paragraph 7;

(g) The examination of places or sites, including the exhumation and examination of grave sites;

(h) The execution of searches and seizures;

(i) The provision of records and documents, including official records and documents;

(j) The protection of victims and witnesses and the preservation of evidence;

(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; and

(l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.

2. The Court shall have the authority to provide an assurance to a witness or an expert appearing before the Court that he or she will not be prosecuted, detained or subjected to any restriction of personal freedom by the Court in respect of any act or omission that preceded the departure of that person from the requested State.

3. Where execution of a particular measure of assistance detailed in a request presented under paragraph 1, is prohibited in the requested State on the basis of an existing fundamental legal principle of general application, the requested State shall promptly consult with the Court to try to resolve the matter. In the consultations, consideration should be given to whether the assistance can be rendered in another manner or subject to conditions. If after consultations the matter cannot be resolved, the Court shall modify the request as necessary.

4. In accordance with article 72, a State Party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security.

5. Before denying a request for assistance under paragraph 1 (l), the requested State shall consider whether the assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later date or in an alternative manner, provided that if the Court or the Prosecutor accepts the assistance subject to conditions, the Court or the Prosecutor shall abide by them.

6. If a request for assistance is denied, the requested State Party shall promptly inform the Court or the Prosecutor of the reasons for such denial.

7. (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.

8. (a) The Court shall ensure the confidentiality of documents and information, except as required for the investigation and proceedings described in the request.

(b) The requested State may, when necessary, transmit documents or information to the Prosecutor on a confidential basis. The Prosecutor may then use them solely for the purpose of generating new evidence.

(c) The requested State may, on its own motion or at the request of the Prosecutor, subsequently consent to the disclosure of such documents or
information. They may then be used as evidence pursuant to the provisions of Parts 5 and 6 and in accordance with the Rules of Procedure and Evidence.

9. (a) (i) In the event that a State Party receives competing requests, other than for surrender or extradition, from the Court and from another State pursuant to an international obligation, the State Party shall endeavour, in consultation with the Court and the other State, to meet both requests, if necessary by postponing or attaching conditions to one or the other
request.

(ii) Failing that, competing requests shall be resolved in accordance with the principles established in article 90.

(b) Where, however, the request from the Court concerns information, property or persons which are subject to the control of a third State or an international organization by virtue of an international agreement, the requested States shall so inform the Court and the Court shall direct its request to the third State or international organization.

10. (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; and

b. The questioning of any person detained by order of 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;

b. If the statements, documents or other types of evidence have been provided by a witness or expert, such transmission shall be subject to the provisions of article 68.

(c) The Court may, under the conditions set out in this paragraph, grant a request for assistance under this paragraph from a State which is not a Party to this Statute.

Article 94
Postponement of execution of a request in respect of ongoing investigation or prosecution

1. 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. However, the postponement shall be no longer than is necessary to complete the relevant investigation or prosecution in the requested State. Before making a decision to postpone, the requested State should consider whether the assistance may be immediately provided subject to certain conditions.

2. If a decision to postpone is taken pursuant to paragraph 1, the Prosecutor may, however, seek measures to preserve evidence, pursuant to article 93, paragraph 1 (j).

Article 95
Postponement of execution of a request in respect of an admissibility challenge

Where there is an admissibility challenge under consideration by the Court pursuant to article 18 or 19, the requested State may postpone the execution of a request under this Part pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to article 18 or 19.

Article 96
Contents of request for other forms of assistance under article 93

1. A request for other forms of assistance referred to in article 93 shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1 (a).

2. The request shall, as applicable, contain or be supported by the following:

(a) A concise statement of the purpose of the request and the assistance sought, including the legal basis and the grounds for the request;

(b) As much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided;

(c) A concise statement of the essential facts underlying the request;

(d) The reasons for and details of any procedure or requirement to be followed;

(e) Such information as may be required under the law of the requested State in order to execute the request; and

(f) Any other information relevant in order for the assistance sought to be provided.

3. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (e). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

4. The provisions of this article shall, where applicable, also apply in respect of a request for assistance made to the Court.

Article 97
Consultations

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. Such problems may include, inter alia:

(a) Insufficient information to execute the request;

(b) In the case of a request for surrender, the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant; or

(c) The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State.

Article 98
Cooperation with respect to waiver of immunity and consent to surrender

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

Article 99
Execution of requests under articles 93 and 96

1. Requests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request, including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process.

2. In the case of an urgent request, the documents or evidence produced in response shall, at the request of the Court, be sent urgently.

3. Replies from the requested State shall be transmitted in their original language and form.

4. Without prejudice to other articles in this Part, where it is necessary for the successful execution of a request which can be executed without any compulsory measures, including specifically the interview of or taking evidence from a person on a voluntary basis, including doing so without the presence of the authorities of the requested State Party if it is essential for the request to be executed, and the examination without modification of a public site or other public place, the Prosecutor may execute such request directly on the territory of a State as follows:

(a) When the State Party requested is a State on the territory of which the crime is alleged to have been committed, and there has been a determination of admissibility pursuant to article 18 or 19, the Prosecutor may directly execute such request following all possible consultations with the requested State Party;

(b) In other cases, the Prosecutor may execute such request following consultations with the requested State Party and subject to any reasonable conditions or concerns raised by that State Party. Where the requested State Party identifies problems with the execution of a request pursuant to this subparagraph it shall, without delay, consult with the Court to resolve the matter.

5. Provisions allowing a person heard or examined by the Court under article 72 to invoke restrictions designed to prevent disclosure of confidential information connected with national security shall also apply to the execution of requests for assistance under this article.

Article 100
Costs

1. The ordinary costs for execution of requests in the territory of the requested State shall be borne by that State, except for the following, which shall be borne by the Court:

(a) Costs associated with the travel and security of witnesses and experts or the transfer under article 93 of persons in custody;

(b) Costs of translation, interpretation and transcription;

(c) Travel and subsistence costs of the judges, the Prosecutor, the Deputy Prosecutors, the Registrar, the Deputy Registrar and staff of any organ of the Court;

(d) Costs of any expert opinion or report requested by the Court;

(e) Costs associated with the transport of a person being surrendered to the Court by a custodial State; and

(f) Following consultations, any extraordinary costs that may result from the execution of a request.

2. The provisions of paragraph 1 shall, as appropriate, apply to requests from States Parties to the Court. In that case, the Court shall bear the ordinary costs of execution.

Article 101
Rule of speciality

1. A person surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered.

2. The Court may request a waiver of the requirements of paragraph 1 from the State which surrendered the person to the Court and, if necessary, the Court shall provide additional information in accordance with article 91. States Parties shall have the authority to provide a waiver to the Court and should endeavour to do so.

Article 102
Use of terms

For the purposes of this Statute:

(a) "surrender" means the delivering up of a person by a State to the Court, pursuant to this Statute.

(b) "extradition" means the delivering up of a person by one State
to another as provided by treaty, convention or national legislation.

PART 10. ENFORCEMENT

Article 103
Role of States in enforcement of sentences of imprisonment

1. (a) A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.

(b) At the time of declaring its willingness to accept sentenced persons, a State may attach conditions to its acceptance as agreed by the Court and in accordance with this Part.

(c) A State designated in a particular case shall promptly inform the Court whether it accepts the Court's designation.

2. (a) The State of enforcement shall notify the Court of any circumstances, including the exercise of any conditions agreed under paragraph 1, which could materially affect the terms or extent of the imprisonment. The Court shall be given at least 45 days' notice of any such known or foreseeable circumstances. During this period, the State of enforcement shall take no action that might prejudice its obligations under article 110.

(b) Where the Court cannot agree to the circumstances referred to in subparagraph (a), it shall notify the State of enforcement and proceed in accordance with article 104, paragraph 1.

3. In exercising its discretion to make a designation under paragraph 1, the Court shall take into account the following:

(a) The principle that States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with
principles of equitable distribution, as provided in the Rules of Procedure and
Evidence;

(b) The application of widely accepted international treaty standards governing the treatment of prisoners;

(c) The views of the sentenced person;

(d) The nationality of the sentenced person;

(e) Such other factors regarding the circumstances of the crime or the person sentenced, or the effective enforcement of the sentence, as may be appropriate in designating the State of enforcement.

4. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State, in accordance with the conditions set out in the headquarters agreement referred to in article 3, paragraph 2. In such a case, the costs arising out of the enforcement of a sentence of imprisonment shall be borne by the Court.

Article 104
Change in designation of State of enforcement

1. The Court may, at any time, decide to transfer a sentenced person to a prison of another State.

2. A sentenced person may, at any time, apply to the Court to be transferred from the State of enforcement.

Article 105
Enforcement of the sentence

1. Subject to conditions which a State may have specified in accordance with article 103, paragraph 1 (b), the sentence of imprisonment shall be binding on the States Parties, which shall in no case modify it.

2. The Court alone shall have the right to decide any application for appeal and revision. The State of enforcement shall not impede the making of any such application by a sentenced person.

Article 106
Supervision of enforcement of sentences and

conditions of imprisonment

1. The enforcement of a sentence of imprisonment shall be subject to the supervision of the Court and shall be consistent with widely accepted international treaty standards governing treatment of prisoners.

2. The conditions of imprisonment shall be governed by the law of the State of enforcement and shall be consistent with widely accepted international treaty standards governing treatment of prisoners; in no case shall such conditions be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.

3. Communications between a sentenced person and the Court shall be unimpeded and confidential.

Article 107
Transfer of the person upon completion of sentence

1. Following completion of the sentence, a person who is not a national of the State of enforcement may, in accordance with the law of the State of enforcement, be transferred to a State which is obliged to receive him or her, or to another State which agrees to receive him or her, taking into account any wishes of the person to be transferred to that State, unless the State of enforcement authorizes the person to remain in its territory.

2. If no State bears the costs arising out of transferring the person to another State pursuant to paragraph 1, such costs shall be borne by the Court.

3. Subject to the provisions of article 108, the State of enforcement may also, in accordance with its national law, extradite or otherwise surrender the person to a State which has requested the extradition or surrender of the person for purposes of trial or enforcement of a sentence.

Article 108
Limitation on the prosecution or punishment of other offences

1. A sentenced person in the custody of the State of enforcement shall not be subject to prosecution or punishment or to extradition to a third State for any conduct engaged in prior to that person's delivery to the State of enforcement, unless such prosecution, punishment or extradition has been approved by the Court at the request of the State of enforcement.

2. The Court shall decide the matter after having heard the views of the sentenced person.

3. Paragraph 1 shall cease to apply if the sentenced person remains voluntarily for more than 30 days in the territory of the State of enforcement after having served the full sentence imposed by the Court, or returns to the territory of that State after having left it.

Article 109
Enforcement of fines and forfeiture measures

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.

Article 110
Review by the Court concerning reduction of sentence

1. The State of enforcement shall not release the person before expiry of the sentence pronounced by the Court.

2. The Court alone shall have the right to decide any reduction of sentence, and shall rule on the matter after having heard the person.

3. When the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time.

4. In its review under paragraph 3, the Court may reduce the sentence if it finds that one or more of the following factors are present:

(a) The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions;

(b) The voluntary assistance of the person in enabling the enforcement of the judgements and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims; or

(c) Other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules of Procedure and Evidence.

5. If the Court determines in its initial review under paragraph 3 that it is not appropriate to reduce the sentence, it shall thereafter review the question of reduction of sentence at such intervals and applying such criteria as provided for in the Rules of Procedure and Evidence.

Article 111
Escape

If a convicted person escapes from custody and flees the State of enforcement, that State may, after consultation with the Court, request the person's surrender from the State in which the person is located pursuant to existing bilateral or multilateral arrangements, or may request that the Court seek the person's surrender, in accordance with Part 9. It may direct that the person be delivered to the State in which he or she was serving the sentence or to another State designated by the Court.

PART 11. ASSEMBLY OF STATES PARTIES

Article 112
Assembly of States Parties

1. An Assembly of States Parties to this Statute is hereby established. Each State Party shall have one representative in the Assembly who may be accompanied by alternates and advisers. Other States which have signed this
Statute or the Final Act may be observers in the Assembly.

2. The Assembly shall:

(a) Consider and adopt, as appropriate, recommendations of the Preparatory Commission;

(b) Provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court;

(c) Consider the reports and activities of the Bureau established under paragraph 3 and take appropriate action in regard thereto;

(d) Consider and decide the budget for the Court;

(e) Decide whether to alter, in accordance with article 36, the number of judges;

(f) Consider pursuant to article 87, paragraphs 5 and 7, any question relating to non-cooperation;

(g) Perform any other function consistent with this Statute or the Rules of Procedure and Evidence.

3. (a) The Assembly shall have a Bureau consisting of a President, two Vice-Presidents and 18 members elected by the Assembly for three-year terms.

(b) The Bureau shall have a representative character, taking into account, in particular, equitable geographical distribution and the adequate representation of the principal legal systems of the world.

(c) The Bureau shall meet as often as necessary, but at least once a year. It shall assist the Assembly in the discharge of its responsibilities.

4. The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy.

5. The President of the Court, the Prosecutor and the Registrar or their representatives may participate, as appropriate, in meetings of the Assembly and of the Bureau.

6. The Assembly shall meet at the seat of the Court or at the Headquarters of the United Nations once a year and, when circumstances so
require, hold special sessions. Except as otherwise specified in this Statute, special sessions shall be convened by the Bureau on its own initiative or at the request of one third of the States Parties.

7. Each State Party shall have one vote. Every effort shall be made to reach decisions by consensus in the Assembly and in the Bureau. If consensus cannot be reached, except as otherwise provided in the Statute:

(a) Decisions on matters of substance must be approved by a two-thirds majority of those present and voting provided that an absolute majority of States Parties constitutes the quorum for voting;

(b) Decisions on matters of procedure shall be taken by a simple majority of States Parties present and voting.

8. A State Party which is in arrears in the payment of its financial contributions towards the costs of the Court shall have no vote in the Assembly and in the Bureau if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The Assembly may, nevertheless, permit such a State Party to vote in the Assembly and in the Bureau if it is satisfied that the failure to pay is due to conditions beyond the control of the State Party.

9. The Assembly shall adopt its own rules of procedure.

10. The official and working languages of the Assembly shall be those of the General Assembly of the United Nations.

PART 12. FINANCING

Article 113
Financial Regulations

Except as otherwise specifically provided, all financial matters related to the Court and the meetings of the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be governed by this Statute and the Financial Regulations and Rules adopted by the Assembly of States Parties.

Article 114
Payment of expenses

Expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be paid from the funds of the Court.

Article 115
Funds of the Court and of the Assembly of States Parties

The expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following
sources:

(a) Assessed contributions made by States Parties;

(b) Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.

Article 116
Voluntary contributions

Without prejudice to article 115, the Court may receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties.

Article 117
Assessment of contributions

The contributions of States Parties shall be assessed in accordance with an agreed scale of assessment, based on the scale adopted by the United Nations for its regular budget and adjusted in accordance with the principles on which that scale is based.

Article 118
Annual audit

The records, books and accounts of the Court, including its annual financial statements, shall be audited annually by an independent auditor.

PART 13. FINAL CLAUSES

Article 119
Settlement of disputes

1. Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.

2. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.

Article 120
Reservations

No reservations may be made to this Statute.

Article 121
Amendments

1. After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties.

2. No sooner than three months from the date of notification, the Assembly of States Parties, at its next meeting, shall, by a majority of those present and voting, decide whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference if the issue
involved so warrants.

3. The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.

4. Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-

General of the United Nations by seven-eighths of them.

5. Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

6. If an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect, notwithstanding article 127, paragraph 1, but subject to article 127, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.

7. The Secretary-General of the United Nations shall circulate to all States Parties any amendment adopted at a meeting of the Assembly of States Parties or at a Review Conference.

Article 122
Amendments to provisions of an institutional nature

1. Amendments to provisions of this Statute which are of an exclusively institutional nature, namely, article 35, article 36, paragraphs 8 and 9, article 37, article 38, article 39, paragraphs 1 (first two sentences), 2 and 4, article 42, paragraphs 4 to 9, article 43, paragraphs 2 and 3, and articles 44, 46, 47 and 49, may be proposed at any time, notwithstanding article 121, paragraph 1, by any State Party. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations or such other person designated by the Assembly of States Parties who shall promptly circulate it to all States Parties and to others participating in the Assembly.

2. Amendments under this article on which consensus cannot be reached shall be adopted by the Assembly of States Parties or by a Review Conference, by a two-thirds majority of States Parties. Such amendments shall enter into force for all States Parties six months after their adoption by the Assembly or, as the case may be, by the Conference.

Article 123
Review of the Statute

1. Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.

2. At any time thereafter, at the request of a State Party and for the purposes set out in paragraph 1, the Secretary-General of the United Nations shall, upon approval by a majority of States Parties, convene a Review Conference.

3. The provisions of article 121, paragraphs 3 to 7, shall apply to the adoption and entry into force of any amendment to the Statute considered at a Review Conference.

Article 124
Transitional Provision

Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.

Article 125
Signature, ratification, acceptance, approval or accession

1. This Statute shall be open for signature by all States in Rome, at the headquarters of the Food and Agriculture Organization of the United Nations, on 17 July 1998. Thereafter, it shall remain open for signature in Rome at the Ministry of Foreign Affairs of Italy until 17 October 1998. After that date, the Statute shall remain open for signature in New York, at United Nations Headquarters, until 31 December 2000.

2. This Statute is subject to ratification, acceptance or approval by signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

3. This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 126
Entry into force

1. This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

2. For each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its
instrument of ratification, acceptance, approval or accession.

Article 127
Withdrawal

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

2. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

Article 128
Authentic texts

The original of this Statute, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies
thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Statute.

DONE at Rome, this 17th day of July 1998.