

The International Centre for Criminal Law  
Reform and Criminal Justice Policy

# **International Criminal Court**

**Manual for the Ratification  
and Implementation of the  
Rome Statute**

**Third Edition  
March 2008**

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# **International Criminal Court**

## **Manual for the Ratification and Implementation of the Rome Statute**

### **Third Edition**

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ICCLR is indebted to the accomplished colleagues of the Manual's Peer Review Committee whose informed and helpful comments greatly enhanced the final product:

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Finally, please note that the analysis and recommendations in this Manual do not necessarily reflect the views of any of the aforementioned individuals or organizations.

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## FOREWORD

With the tenth anniversary of the adoption of the Rome Statute establishing the International Criminal Court (“ICC”) approaching on July 17, 2008, the International Centre for Criminal Law Reform and Criminal Justice Policy is honoured to contribute to the evolution of international criminal justice through the production of this third edition of the Manual for the Ratification and Implementation of the Rome Statute.

As of March 2008, 106 countries are States Parties to the Rome Statute. Investigations of mass atrocities and abuses have taken place: the Democratic Republic of the Congo, Northern Uganda, the Central African Republic and Darfur, Sudan. Numerous arrest warrants have resulted from these investigations - some of which have been enforced and some of which are still outstanding. The Court has been operational for over five years and the first trial is scheduled for March 31, 2008.

These accomplishments would not have been possible without the cooperation of the international community. The support and interaction of States, the United Nations and other international organizations, civil society, including victims and witnesses all working together are essential to the success of the court. The ICC is a critical component of the international criminal justice system that actively contributes to improving accountability, the rule of law and human rights throughout the world.

We would like to take this opportunity to recognize and thank the Government of Canada for their generous support and leadership on the ICC. It is our pleasure to work with the Canadian Government in creating leadership tools, such as this Manual.

In his address to the 6th Assembly of States Parties to the Rome Statute of the International Criminal Court, the Secretary General Ban Ki-moon emphasized that “there can be no sustainable peace without justice. Peace and justice, accountability and reconciliation are not mutually exclusive. To the contrary, they go hand in hand. It is up to all of us to advance the cause of justice and peace everywhere.”

We hope that this Manual provides a useful resource tool that contributes to achieving the goal of ensuring a strong, effective and efficient Court advancing the cause of justice and peace everywhere.

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# EXECUTIVE SUMMARY

## 1. INTRODUCTION

The Introduction provides an overview of the main features of the International Criminal Court (ICC), giving the context for the substantive Chapters 2, 3 and 4. It covers:

- The scope and structure of the ICC.
- Triggering an investigation and how a case is brought to trial.
- General principles of criminal law, cooperation and gender analysis.

The Introduction also informs the readers of the purpose of this Manual. In order to assist interested States with the ratification and implementation of the Rome Statute, the various chapters 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.

## 2. GENERAL ISSUES OF IMPLEMENTATION

Chapter 2 guides States in reviewing their national law as an approach to ratification and implementation of the Rome Statute. States Parties are obliged to provide the ICC with their full cooperation. They should also be ready to investigate and prosecute genocide, crimes against humanity and war crimes as provided in the Statute. Legislative and sometimes constitutional amendments will be needed to achieve these goals, although their exact scope and legal form will vary from one State to another. Governments should thus undertake a thorough review of their national law, with broad consultation, in order to determine their approach to ratification and implementation of the Rome Statute.

This Chapter covers:

- Broad issues that might arise when States are deciding their overall approach to ratification and implementation.
- The need, generally, for implementing legislation and what form and scope this could take.
- Managing the implementation process: review, consultation and training.
- Constitutional issues that may arise during implementation.

### **3. COOPERATION**

Chapter 3 highlights the various forms of State cooperation that are detailed in the Rome Statute and suggests ways that a State Party can ensure its ability to provide such assistance, as required. Each type of cooperation may require a different approach to implementation, depending on a particular State's existing criminal procedure and approach to international judicial assistance. The sections in this Chapter identify the various implementation options available to States. These are based in large part on the experience of States that have adopted cooperation legislation so far. The sections cover:

- An overview of the Rome Statute's scheme for State cooperation.
- Arrest, surrender and transportation of suspects.
- Collecting and preserving evidence.
- Enforcement of fines and forfeiture orders and sentences of imprisonment.
- Privileges and immunities of ICC personnel.
- Offences against the administration of justice of the ICC.
- Procedures where the ICC wishes to investigate the same matter as a State Party.

### **4. IMPLEMENTATION AND THE COMPLEMENTARY JURISDICTION OF THE ICC**

Chapter 4 explains how States may avail themselves of the Rome Statute's "complementarity principle," which grants States priority over the ICC in investigating and prosecuting ICC crimes. The Chapter clarifies the nature of the complementarity principle, describes requirements for its application in specific cases and suggests a number of implementation measures that will allow States to take full advantage of the principle in accordance with the Rome Statute. It covers:

- The nature and purpose of the complementarity principle.
- Requirements for the application of the principle of complementarity to assist States that are preparing implementing legislation and wishing to avail themselves of this principle.
- Jurisdictional considerations relevant to complementarity. Understanding the ICC's jurisdiction will enable States wishing to avail themselves of the complementarity principle to match that jurisdiction in their domestic implementing legislation.
- The ICC's subject matter jurisdiction: genocide, crimes against humanity and war crimes; individual criminal responsibility and inchoate offences; responsibility of commanders and other superiors; and grounds for excluding criminal responsibility. A critical factor governing availability of the

complementarity principle is whether domestic criminal jurisdiction extends to the full range of events and behaviour coming within the ICC's jurisdiction.

- Rules of evidence and procedural standards in national criminal justice proceedings and implementation considerations.

## **5. FURTHER INFORMATION ON THE RELATIONSHIP BETWEEN THE ICC AND STATES**

Chapter 5 provides information on the broader obligations and rights of those States that become parties to the Rome Statute. It covers:

- Various administrative obligations and rights of States Parties, such as declarations and withdrawals, financial obligation and nominating judges and providing for other ICC personnel.
- Major developments in the first years of the Court, such as the procedure, powers and recent activity of the Assembly of States Parties; the Official Journal of the ICC; the recent Court's Strategic Plan; the Office of the Prosecutor's Policy, regulations and practice; and issues relating to defence counsel and victims.
- Two of the current debates: the development of the crime of aggression and the possible scope of the Review Conference.



# TABLE OF CONTENTS

<b>ACKNOWLEDGMENTS.....</b>	<b>i</b>
<b>FOREWORD .....</b>	<b>iii</b>
<b>EXECUTIVE SUMMARY.....</b>	<b>v</b>
<b>1. INTRODUCTION .....</b>	<b>1</b>
1.1 Overview of the International Criminal Court .....	1
The place of the ICC in the international legal system .....	2
Scope of the ICC .....	2
The Assembly of States Parties .....	3
The structure of the Court .....	4
Triggering an investigation .....	4
How a case is brought to trial.....	6
General principles of criminal law .....	6
Cooperation .....	7
The importance of gender analysis.....	8
1.2 Purpose and use of the Manual.....	8
<b>2. GENERAL ISSUES OF IMPLEMENTATION.....</b>	<b>11</b>
To implement or not to implement? .....	12
2.1 Ratification before implementation, or vice versa? .....	13
2.2 One law, or several? .....	14
2.3 The scope of the implementing law.....	16
Rome Statute implementation as an opportunity for broader reform .....	16
2.4 Managing the implementation process: Review, consultation, training .....	18
Capacity-building .....	18
2.5 Constitutional issues that may arising during ratification.....	19
Absence of immunity for heads of state and other officials .....	21
No statute of limitations .....	22
The surrender by a State of its own nationals.....	23
The possibility of sentences of life imprisonment.....	23
The Prosecutor's power of investigation on the territory of States Parties .....	24
The ICC's complementary jurisdiction.....	25
Ne bis in idem .....	25
<b>3. COOPERATION .....</b>	<b>27</b>
3.1 Overview of the Rome Statute's scheme for State cooperation .....	27
The duty to assist the Court .....	27
<i>The duty to legislate, where necessary</i> .....	28

The formalities of ICC requests .....	28
<i>Ensuring confidentiality</i> .....	30
<i>Consultation with the Court in case of difficulty and the         postponement of assistance</i> .....	31
<i>The Article 99 exception</i> .....	31
3.2 Arrest, surrender and transportation of suspects .....	32
Arrest .....	32
<i>Overview of arrest procedures</i> .....	32
<i>Issuance and execution of warrants of arrest</i> .....	32
<i>Provisional arrest</i> .....	33
<i>Giving national legal force to ICC arrest warrants</i> .....	33
<i>Rights of suspects and accused persons</i> .....	34
<i>Hearing before a competent judicial authority</i> .....	35
<i>Interim release</i> .....	36
<i>Issuance of a summons</i> .....	37
Surrender.....	37
<i>The “distinct nature” of the ICC, and postponing surrender             on ne bis in idem grounds</i> .....	37
<i>Competing requests</i> .....	39
<i>Conflicts with other international obligations</i> .....	39
Transit across State territory .....	41
3.3 Collecting and preserving evidence .....	42
General matters .....	42
<i>Admissibility of evidence before the ICC</i> .....	43
<i>Receiving and channelling the request</i> .....	43
<i>Three limited exceptions to the duty to assist the Court</i> .....	44
<i>Privileged communications and information</i> .....	45
Witnesses and testimonial evidence .....	45
<i>a) Identification and location of persons</i> .....	46
<i>b) Witnesses: Taking statements and facilitating their appearance             before the Court</i> .....	46
<i>c) Questioning any person being investigated or prosecuted</i> .....	47
<i>d) Protecting victims, witnesses and accused persons</i> .....	47
<i>e) Transferring persons in custody to the Court</i> .....	48
Physical and documentary evidence and proceeds of crime.....	48
<i>Examination of sites</i> .....	49
<i>Searches and seizures</i> .....	49
<i>Proceeds of crime</i> .....	50
<i>Other assistance</i> .....	50
Protection of national security information .....	50
Protection of third-party information .....	51
3.4 Enforcement .....	52
Fines and forfeiture orders .....	52
Sentences of imprisonment .....	53
<i>Accepting sentenced persons</i> .....	53
<i>Enforcement of sentences</i> .....	54

---

<i>Review of the sentence by the Court</i> .....	55
<i>Legislative implementation</i> .....	55
3.5 Privileges and immunities of ICC personnel.....	56
3.6 Offences against the administration of justice of the ICC .....	57
3.7 Procedures where the ICC wishes to investigate the same matter as a State Party .....	60
<b>4. IMPLEMENTATION AND THE COMPLEMENTARY JURISDICTION OF THE ICC .....</b>	<b>61</b>
4.1 The principle of complementarity of the ICC .....	61
4.2 Requirements for application of the complementarity principle .....	63
The twin aspects of complementarity.....	63
Genuine national investigation or prosecution .....	63
Prior national trial for conduct amounting to an ICC crime.....	65
<i>Complementarity and the ne bis in idem principle</i> .....	65
<i>Exceptions to the ne bis in idem principle in the Rome Statute</i> .....	65
Complementarity determinations .....	66
Implementation considerations .....	67
4.3 Jurisdictional considerations relevant to complementarity .....	67
The link between jurisdiction and complementarity.....	67
The jurisdiction of the ICC.....	68
<i>The three dimensions of ICC jurisdiction</i> .....	68
<i>The ICC's temporal jurisdiction</i> .....	68
<i>The ICC's personal jurisdiction</i> .....	68
Implementation of jurisdictional requirements.....	69
<i>Temporal jurisdiction</i> .....	69
<i>Personal jurisdiction</i> .....	70
4.4 The ICC's subject-matter jurisdiction .....	72
Mirroring criminal responsibility under the Rome Statute in national law .....	72
The ICC Crimes: Genocide, crimes against humanity and war crimes .....	73
<i>General considerations</i> .....	73
<i>Genocide</i> .....	73
<i>Crimes against humanity</i> .....	74
<i>War crimes</i> .....	76
<i>Implementation considerations</i> .....	82
Individual criminal responsibility and inchoate offences .....	84
<i>Individual and inchoate criminal responsibility under the         Rome Statute</i> .....	84
<i>Implementation considerations</i> .....	85
Responsibility of commanders and other superiors.....	86
<i>The general principle of command or superior responsibility</i> .....	86
<i>Military commanders</i> .....	86
<i>Non-military superiors</i> .....	87
<i>Considerations relevant to both command and superior responsibility</i> .....	88
<i>Implementation considerations</i> .....	88

---

Grounds for excluding criminal responsibility.....	89
<i>The scope of the Rome Statute's grounds for excluding criminal responsibility.....</i>	89
<i>Implementation considerations.....</i>	91
4.5 Rules of evidence and procedural standards in national criminal justice proceedings.....	92
The significance of rules of evidence and procedure to complementarity.....	92
Implementation considerations.....	92
<i>General.....</i>	92
<i>Military tribunals.....</i>	93
<b>5. FURTHER INFORMATION ON THE RELATIONSHIP BETWEEN THE ICC AND STATES.....</b>	<b>95</b>
5.1 Administrational state obligations and rights of states parties.....	95
Treaty requirements.....	95
<i>Ratification, acceptance, approval or accession.....</i>	95
<i>Reservations and declarations under the Statute.....</i>	95
<i>Withdrawal from the Statute.....</i>	96
<i>Settlement of disputes.....</i>	96
<i>Implementation issues.....</i>	96
Financing of the court.....	97
<i>Financial contributions and the scale of assessment.....</i>	97
<i>The budget.....</i>	97
<i>The financial regulations and rules of the Court.....</i>	98
<i>Arrears.....</i>	98
<i>Implementation issues.....</i>	98
Nominating judges and providing other personnel to the Court.....	98
<i>Nomination of judges.....</i>	98
<i>Ensuring the impartiality of judges.....</i>	99
<i>Other ICC personnel.....</i>	100
Other rights of States Parties.....	100
<i>State referral of a situation.....</i>	100
<i>States Parties rights to present evidence.....</i>	101
<i>States Parties rights to certain information.....</i>	101
<i>States Parties rights to receive cooperation and assistance.....</i>	101
5.2 Developments of the first years.....	101
Assembly of States Parties.....	101
<i>The procedure of the Assembly of States Parties.....</i>	101
<i>The powers of the Assembly of States Parties.....</i>	102
<i>The Bureau.....</i>	103
<i>Plan of Action.....</i>	103
The Official Journal of the ICC.....	104
<i>Elements of Crimes.....</i>	104
<i>The Rules of Procedure and Evidence.....</i>	104

---

<i>The Agreement on the Privilege and Immunities of the International Criminal Court</i> .....	104
The Court's Strategic Plan .....	105
Office of the Prosecutor .....	105
<i>The policy</i> .....	105
<i>Regulations</i> .....	106
<i>Relationship between State Parties and the Office of the Prosecutor</i> ...	106
Defence counsel .....	107
<i>Rights of the accused</i> .....	107
<i>Defence counsel and the Court</i> .....	107
Trust Fund for Victims .....	107
5.3 Current debates .....	108
Crime of aggression .....	108
<i>Historical background to the crime of aggression</i> .....	108
<i>Current status of debate</i> .....	109
<i>Defining individual conduct</i> .....	109
<i>Defining the State act of aggression</i> .....	109
<i>Conditions for the exercise of jurisdiction</i> .....	110
<i>The incorporation of the definition into the Statute</i> .....	110
Review of the Statute .....	110
<i>The first Review Conference</i> .....	110
<i>Amendments to the Statute</i> .....	112
<i>Amendments to crimes within the Court's jurisdiction</i> .....	112
<i>Amendments of an exclusively institutional nature</i> .....	113
<i>Amendments to the Rules of Procedure and Evidence and to the Elements of Crimes</i> .....	113
<i>Effect of amendments to the Statute on States Parties' rights to withdraw from the Statute</i> .....	114
<b>6. SELECT RESOURCES</b> .....	<b>115</b>
6.1 Select resources on the ICC .....	115
6.2 International Criminal Court implementing legislation .....	117
6.3 Select resources on ICC implementation .....	119
<b>APPENDIX I: ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT</b> .....	<b>121</b>

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# 1. INTRODUCTION

**This Chapter provides an overview of the main features of the International Criminal Court (ICC), giving the context for the substantive Chapters 2, 3 and 4. It covers:**

- **The scope and structure of the ICC.**
- **Triggering an investigation and how a case is brought to trial.**
- **General principles of criminal law, cooperation and gender analysis**

**This Introduction also informs the readers of the purpose of this Manual. In order to assist interested States with the ratification and implementation of the Rome Statute, the various chapters 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.**

## 1.1 Overview of the International Criminal Court

The Rome Statute established a permanent International Criminal Court (ICC) with the power to investigate and prosecute those who commit genocide, crimes against humanity, war crimes and aggression. Its adoption on 17 July 1998 and the subsequent speedy entry into force on 1 July 2002 represent a significant achievement for the world community. One hundred and twenty States out of the 160 or so that assembled in Rome for the United Nations conference voted in support of the Statute's final text. Subsequently, 139 States signed the Statute, and currently 106 States from every region and legal system of the world have become Parties to the Statute. The creation of the Court therefore represents the realization 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 United Nations General Assembly had first addressed this question over 50 years ago. Not only is the ICC a principal means of combatting impunity, it promises to contribute to the preservation, restoration and maintenance of international peace and security.

The Court has been operational for over five years, with the judges, Prosecutors and Registrar having taken up their offices in the Court's facilities in The Hague in the Netherlands. The Court has built up much of its internal administration procedures and is now well into the exercise of its judicial activities at the pre-trial and appeals level. The Court has issued arrest warrants for suspects of atrocities in Uganda, Democratic Republic of the Congo and Darfur in Sudan, has three suspects in

custody in The Hague and has also issued important decisions elaborating on the rights for victims to act as participants in judicial proceedings. The first trial is anticipated to commence 31 March 2008.

### ***The place of the ICC in the international legal system***

The ICC fills a significant void in the international legal system. First, unlike the International Court of Justice, which is concerned with issues of State responsibility, the ICC has jurisdiction over individuals. Furthermore, unlike tribunals that have been established by the United Nations Security Council on an ad hoc basis, such as the International Criminal Tribunals for the Former Yugoslavia and for Rwanda (ICTY/R) or “hybrid” tribunals such as those in East Timor, Sierra Leone or Cambodia, which have been created to respond to specific situations and exist for a limited time period, the ICC is a permanent body with a much broader mandate. As a treaty-based institution, the ICC has a unique relationship with the United Nations system. The Negotiated Relationship Agreement between the ICC and the United Nations, signed in October 2004, establishes the legal foundation for cooperation between the two organizations within their respective mandates.

The ICC is intended to complement, not be a substitute for, national criminal justice systems. This “principle of complementarity” ensures that the Court will intervene only in those 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(1)). The Court will not, therefore, encroach on an individual State's jurisdiction over crimes covered by the Statute.

### ***Scope of the ICC***

Article 5 of the Statute lists the crimes that are within the jurisdiction of the Court: genocide, crimes against humanity, war crimes and the crime of aggression. Article 6 defines the crime of genocide for the purposes of ICC prosecutions in substantially the same way as it is currently defined 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 mostly 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).

Currently, the Court exercises jurisdiction over all the listed crimes except aggression. Article 5(2) provides that the Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with article 121 and 123, defining the crime and setting out conditions under which the Court shall exercise jurisdiction with respect to the crime. Such a provision must be consistent with the Charter of the United Nations. (The progress of the Working Group on the Crime of Aggression is discussed in more detail in Chapter 5 of this Manual.)

The procedural provisions of the Rome Statute have been drafted in an effort to create a balance between the following priorities:

- 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.
- The right of States to take primary responsibility for prosecuting such crimes if they are genuinely willing and able.
- The need to give victims of such crimes adequate redress and compensation.
- The need to protect the rights of accused persons.
- 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 in its relationship with other entities, as set out under the Statute.

### ***The Assembly of States Parties***

The Assembly of States Parties, comprising representatives from each State Party, is the management oversight and legislative body of the ICC. It is responsible for making decisions on matters such as the administration and budget of the Court, as well as on future amendments to the Statute (article 112). The Assembly meets regularly to ensure the efficient functioning of the Court and has so far convened six sessions. At its first session in September 2002, the Assembly adopted a range of legal documents that had been prepared by the Preparatory Commission for the Establishment of an ICC. These included:

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

Another important document adopted by the Assembly of States Parties is the Plan of Action for Achieving Universality and Full Implementation of the Rome Statute. More information on the ICC and the work of the Assembly of States Parties can be obtained from the Web site of the ICC:



<http://www.icc-cpi.int>.



## ***The structure of the Court***

The ICC is composed of the following organs: the Presidency, the Judicial Divisions, the Office of the Prosecutor, and the Registry (article 34). The Presidency is responsible for the proper administration of the Court, with the exception of the Office of the Prosecutor (article 38). The Judicial Divisions, made up of the Pre-Trial Division, the Trial Division, and the Appeals Division, consist of 18 judges who are elected by the Assembly of States Parties, by a two-thirds majority of those present and voting, based on nominations made by States Parties (article 36(6)). The Registry is responsible for the non-judicial aspects of the administration and servicing of the Court and the Registrar is elected by the judges (article 43). This includes the establishment of a Victims and Witnesses Unit within the Registry, which employs staff with expertise in trauma (article 43(6)). The Registry also has responsibilities relating to the rights of the defence (article 43(1), rules 20 and 21, Rules of Procedure and Evidence). Regulations of the Registry were adopted in March 2006, Staff Regulations in September 2003 and the Code of Professional Conduct for Counsel in December 2005.

The Prosecutor and Deputy Prosecutors are elected by the Assembly of States Parties based on criteria similar to that for judges (article 42). The Office of the Prosecutor is responsible for receiving referrals and information on crimes within the jurisdiction of the Court, examining and analyzing that information, and conducting investigations and prosecutions. The Office of the Prosecutor has issued a Policy Paper and Regulations that, in part, highlight the priority tasks and set out an institutional framework to ensure independence and accountability. Other documents issued by the Office of the Prosecutor include an Annex to the Policy Paper on Communications and Referrals and a Policy Paper on the Interests of Justice; the latter sets out the Office's understanding of the concept of the interests of justice as mentioned in article 53 of the Statute.

The ICC judges, Prosecutor, Deputy Prosecutors and the Registrar are 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 carrying out 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 Assembly of States Parties has established a Trust Fund for Victims (article 79) and subsequently adopted the Regulations of the Trust Fund in December 2005. 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.

## ***Triggering an investigation***

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

- 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 (articles 13(a) and 14). The Court has received three State referrals to date: from Uganda, from Democratic Republic of the Congo and from the Central African Republic. These self-referrals have been somewhat surprising as it was envisaged that under this mechanism States would refer situations outside their own country.
- 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(b)). This has occurred with the referral of the situation in Darfur, Sudan.
- The Prosecutor may initiate investigations proprio motu on the basis of information received from any reliable source on the commission of crimes within the jurisdiction of the Court (articles 13(c) and 15).

The Prosecutor is 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 or when he receives information from communications. The Policy of the Prosecutor notes that factors such as gravity, the interests of victims, the particular circumstances of the suspect, complementarity and the interests of justice are examined during the legal analysis. However, there are rigorous 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 18 and 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 United Nations Charter (article 16).

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

- the alleged crime was committed on the territory of a State Party; or
- 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(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 made a declaration under article 12(3) as a non-State Party for the crime in question (article 11(b); see also article 126(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 and 13).

### ***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 and 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(5)). The person is entitled to apply for interim release at several stages in the pre-trial phase (articles 59(3) and 60(2)). There are also several opportunities for the accused, the Prosecutor and the 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 and 53).

### ***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 and 23). In addition, no person will be prosecuted by the ICC for any conduct that 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). Furthermore, the application and interpretation of the applicable law must be consistent with internationally recognized human rights. Article 26 also provides that no person who was under the age of 18 at the time of the alleged crime will be prosecuted. (These principles are covered in more detail in Chapter 4 of this Manual).

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). Under article 25(1), the Court has jurisdiction over natural persons only. This means that corporations cannot be indicted or tried by the ICC. However, this restriction is not to be confused with the responsibility of 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.

The Statute provides for the rights of the accused as well as victims and witnesses (articles 63 and 66 to 70). The rights of the accused to a fair and public hearing are to be conducted in accordance with standards that are derived from the International Covenant on Civil and Political Rights and other widely accepted international instruments. These include the following rights:

- The accused must be present during the trial.
- The accused is entitled to be presumed innocent until proven guilty before the Court in accordance with the applicable law.
- 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.
- The Court's decisions must be in writing and contain reasons and sentences pronounced publicly and in the presence of the accused, wherever possible.

Vulnerable witnesses and victims will also be protected during any proceedings and the Court will decide which evidence is admissible. Victims may make presentations to the Court at various stages of the proceedings, either in person or through their legal counsel.

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 to 84).

The Court may impose one of the following penalties on a convicted person:

- Imprisonment for a maximum of 30 years.
- A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.
- In addition, the Court may order:
  - A fine.
  - Forfeiture of the proceeds of the crime (article 77).

Finally, the Court may order the convicted person to pay reparations to victims, in the form of restitution, compensation or rehabilitation (article 75(2)).

### ***Cooperation***

The Court will rely on States to provide cooperation and assistance throughout the investigation, prosecution and punishment process, as necessary (articles 86 to 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(5) and 109). In addition, any State may volunteer to accept and supervise sentenced persons (articles 103 to 107). However, such States may not modify the sentence of the person or release the person before expiry of the sentence pronounced by the Court (articles 105 and 110). (Chapter 3 provides more details as to the various forms of State cooperation).

The reality is that the Court does not possess an international police force of its own and relies on States to perform all cooperation tasks. In 2007, the Court submitted a report to the Bureau of the Assembly of States Parties that identified areas of cooperation needed. These included the adoption of domestic implementing legislation; support for the enforcement of the Court's decisions such as arrest and surrender; and diverse forms of practical cooperation such as victim protection and support, logistics and security. The Assembly of States Parties also considered a comprehensive report on cooperation at its last session; this report was prepared by the Bureau's Working Groups on Cooperation based in The Hague and New York.

### ***The importance of gender analysis***

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(3)). The Statute also includes important provisions for the prosecution of crimes of sexual and gender-based violence. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence are defined as crimes against humanity and war crimes.

The Statute also provides a voice to victims to testify, to participate at all stages of the Court proceedings and to protect their safety, interests, identity and privacy. In so doing, the Court is to have regard for factors such as gender and the nature of the crime, particularly where the crime involves sexual or gender violence or violence against children (article 68(1)). The Prosecutor is also required to take appropriate measures to protect victims and witnesses during the investigation and prosecution of such crimes (article 68(1)). Article 68(2) provides for measures to facilitate the testimony of victims of sexual violence. The Court is staffed with people knowledgeable in issues relating to violence against women, and there is to be a fair representation of both female and male judges on the Court.

## **1.2 Purpose and use of the 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. The Rome Statute cannot operate independently of State action. With the Court now fully operational, the

international community continues to strive to achieve universality and full implementation of the Rome Statute, as called for in the recent Assembly of States Parties Plan of Action. The incorporation into domestic law of Statute provisions is imperative for the Court's ability to operate effectively as well as to address the "impunity gap" since the Court has a strategy of focusing on those that bear the greatest responsibility. This revised edition of the Manual is designed to support that Plan of Action, to be a further resource alongside other useful tools developed by other organizations and to contribute to ensuring an effective end to impunity for the perpetrators of the most serious crimes of international concern.

For those States that are Parties to the Rome Statute and that are preparing to implement the Statute, this Manual attempts to address a range of different contexts for implementation. For those States that are contemplating ratification, this Manual attempts to address the legal and constitutional obstacles that may prevent them from doing so quickly. This Manual contemplates that ratification and implementation are interrelated, and it highlights the obligations of States Parties to the Statute as well as 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 on how States with different legal systems might implement their obligations into their national legal systems. 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. Examples from States that have already ratified, as well as from States that are still in the process of preparing for ratification, are included. Policymakers, government administrators and various criminal justice professionals may find this Manual particularly useful in assessing the Statute's overall and specific impacts on their respective jurisdictions. People working in the military context should also find it helpful.

This third edition of the Manual has updated the general information about the ICC and its current status, as well as the implementation sections. The latter now takes into account the numerous implementation laws, be they in draft form or enacted, as well as previously unforeseen obstacles to implementation that have emerged around the globe since the earlier editions of this Manual were produced. 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.

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 organizations and individuals to contribute to ensuring 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

This Chapter guides States in reviewing their national law as an approach to ratification and implementation of the Rome Statute. States Parties are obliged to provide the ICC with their full cooperation. They should also be ready to investigate and prosecute genocide, crimes against humanity and war crimes as provided in the Statute. Legislative and sometimes constitutional amendments will be needed to achieve these goals, although their exact scope and legal form will vary from one State to another. Governments should thus undertake a thorough review of their national law, with broad consultation, in order to determine their approach to ratification and implementation of the Rome Statute. This Chapter covers:

- Broad issues that might arise when States are deciding their overall approach to ratification and implementation.
- The need, generally, for implementing legislation and what form and scope this could take.
- Managing the implementation process: review, consultation and training.
- Constitutional issues that may arise during implementation.

A State that ratifies a treaty such as the Rome Statute accepts obligations that international law requires it to fulfill in good faith. It is no excuse under international law that the State's national law, or even its constitution, prevents it from respecting its treaty obligations. States therefore typically review their national law before ratifying a new instrument to determine what changes might be needed.

How a treaty is implemented (that is, how it is given force under domestic law, or what legal or regulatory changes are made to allow the State to act in accordance with its international obligations) often varies enormously from State to State, legal system to legal system and treaty to treaty.

For the Rome Statute, issues of implementation will arise for two major dimensions of the agreement: cooperation and complementarity. State cooperation will be essential to the ICC to ensure that suspects are arrested, evidence is gathered, and fines or sentences are enforced. No international institutions exist independent of States to perform these functions. (The detailed forms of cooperation required of ICC States Parties and the implementation challenges that these may pose are discussed in Chapter 3). The principle of complementarity, on the other hand, recognizes that States have primary responsibility for investigating and prosecuting international crimes (Preamble and article 1), and dictates that the ICC will exercise jurisdiction only over those cases that States are unwilling or unable to address

themselves. Budgetary and practical realities, moreover, dictate that the Court will in fact prosecute only a fraction of its potential caseload. As discussed in Chapter 4, the “complementarity” framework gives States Parties good reason to ensure that their criminal courts have jurisdiction over genocide, crimes against humanity and war crimes within the full scope covered by the Rome Statute.

A State's approach to ratification and implementation, as well as the content of any legislation it adopts, should reflect the fact that the ICC is no ordinary international body. It has a role in confronting “the most serious crimes of concern to the international community as a whole” (article 5(1)) and thereby to promote international peace and security. The ICC will only be able to do this, however, if States give the Court their unequivocal political support (first and foremost by ratifying the Statute) and ensure that the Statute is effectively implemented within their own legal systems, thus paving the way for full cooperation with the Court and for the effective prosecution of ICC crimes before national jurisdictions. The specific character of the Rome Statute and of the Court will have profound implications for how States proceed along both these lines.

The sections below highlight broad issues that present themselves when States are in the process of deciding their overall approach to ratification and implementation of the Rome Statute, giving examples from State practice so far. The discussion includes why implementing legislation is typically needed, whether such legislation should take the form of a single law or of multiple amendments to existing laws, what such laws are likely to include within their scope, and why training and consultation should be undertaken before, during and after implementation.

As will be made clear, a State that has the political will needed to join the States Parties to the Rome Statute in their affirmation of the ICC's mandate and purpose will typically have little difficulty in resolving the legal or constitutional questions that might arise during the implementation process.

### ***To implement or not to implement?***

How a State implements its obligations under an international agreement like the Rome Statute will depend on how its legal and constitutional system incorporates international norms. Some governments may well ask themselves whether, as a matter of law, their State needs to take any steps at all beyond simple ratification in order to ensure that the Statute is respected within their internal legal system. This might occur in those systems labelled “monist,” where the State's constitution allows in principle for the direct incorporation of international norms into domestic law once the instrument in question has been ratified. In other cases, direct incorporation occurs only for a smaller subset of norms deemed “self-executing.” International doctrine traditionally distinguishes “monist” systems from “dualist” ones in which a distinct step is needed (typically through the adoption of legislation) for international obligations to be incorporated into the domestic legal system.



However, the distinction between monist and dualist, while well established in tradition and doctrine, has proven to be less useful in the Rome Statute context than it might be elsewhere. This is in part because of the many exceptions and variations that exist in systems that are notionally monist (such as many civil law systems of continental Europe) or notionally dualist (such as the common-law systems of the United Kingdom, Australia, Canada and South Africa). It is also in part because of the distinct nature of the ICC Statute, which has extremely detailed cooperation provisions and a distinctive complementarity structure.

Those States Parties that have seriously examined the question of implementation have come to the unanimous conclusion that, regardless of their legal tradition or normal practice, the Statute requires some form of domestic implementing legislation. Different States will have different assessments of which of the Statute's provisions will be automatically incorporated into their domestic law (that is, be deemed "self-executing"), and which will require implementation (and in what degree of detail). Nonetheless, it has become clear that, at a minimum, legislation can eliminate confusion and streamline State action by indicating which authorities are empowered to provide the cooperation that the Statute requires, and by making clear the links between existing procedures (for example, extradition) and the Rome Statute. (Finland's cooperation legislation provides a striking example of such a minimalist approach).

On the complementarity side of the ledger, the March 2001 decision of the Dakar Court of Cassation in the case against Hissène Habré (dismissing charges of torture against the former Chadian president on the grounds that Senegal's ratification of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading treatment or Punishment (Convention Against Torture) did not suffice to make torture a crime in Senegal) demonstrates that legislative incorporation of ICC crimes may serve a useful purpose even in an ostensibly monist, civil law jurisdiction. Consequently, States Parties or potential States Parties are best to assume that some form of legislation, whether simple or complex, will be needed to ensure that they are able to cooperate fully with the ICC and to prosecute ICC crimes before their own courts. Implementation of the Statute's provisions in order for States to avail themselves of the complementarity principle is discussed in more detail in Chapter 4 of this Manual.

## **2.1 Ratification before implementation, or vice versa?**

The monist-dualist distinction may have an impact on deciding whether legislation must be adopted before ratification, or whether it can be left for later. Some dualist States, especially Commonwealth members such as Australia, are obliged by their constitutional practice to prepare comprehensive implementing legislation before ratifying or acceding to an international treaty. Others States - probably the majority - are not legally required to modify their domestic legislation before ratifying a treaty (although constitutional amendments in case of conflict will be a different

matter; see section 2.5 below), making the decision whether to do so a policy matter for the government to decide.

In the case of the Rome Statute, there is good reason for States to implement the treaty either upon ratification or very soon thereafter. Most of the 66 States Parties that ratified the Rome Statute prior to its entry into force on 1 July 2002 left the adoption of implementing legislation for later, either because they wished to ratify quickly in order to be among the Assembly of States Parties founding members or because they assumed it was unlikely that the Court would be fully operational in the near future. States that have ratified since or that will ratify in future, however, do not have the luxury of putting off implementation for these reasons. With the Court now a functioning institution, States Parties may, in principle, be called upon to provide cooperation from the moment that the Statute enters into force for them (that is, on the first day of the month after the sixtieth day following the deposit of the State's instrument of ratification or accession, as stipulated by article 126(2)). Moreover, if a State Party wishes to have the option of addressing a given alleged crime itself, rather than having it investigated and prosecuted by the ICC, it will have to ensure that its criminal law covers the conduct and forms of responsibility provided for in the Statute from the date at which the Court's jurisdiction begins (essentially, as of the Statute's entry into force for that State; see Chapter 4).

Notwithstanding the good reasons that exist for making the legal changes needed for effective implementation either upon or shortly after ratification, as a practical matter a State might feel it unlikely that the Court will call upon it to provide cooperation soon after ratification (because it has few connections with situations currently being investigated by the Court, for example). Nonetheless, where the political will to ratify exists, it should be taken advantage of to achieve implementation as well. Experience has shown that the process of implementation can be handled both expeditiously and responsibly where prevailing political conditions are positive.

## **2.2 One law, or several?**

As with the implementation of any treaty, States seeking to bring their national legal order into line with the Statute may adopt a single comprehensive piece of implementing legislation, amend relevant laws separately, or combine these approaches. To date, States have tended to cover issues of complementarity (domestic prosecution of ICC crimes) and cooperation with the Court by enacting either one or two dedicated laws. These are sometimes free-standing and sometimes embedded in the nation's criminal code or the criminal procedural code; they sometimes incorporate by reference relevant provisions of existing criminal or cooperation laws.

Each State will have to decide on the exact form of implementation (law, regulation, decree, executive order, declaration, or a combination of these) in accordance with

its own hierarchy of laws and the subject matter concerned. Regardless of the form finally adopted by a given State, the nature and mandate of the ICC present special considerations to take into account. Some States have legislation allowing for cooperation with international institutions such as the United Nations or with the ad hoc international tribunals established for Rwanda and for the former Yugoslavia by the Security Council. Nonetheless, the Rome Statute's detailed scheme for the cooperation of States Parties does not lend itself to being incorporated into such laws, and it can be incorporated even into existing arrangements for state-to-state cooperation only with considerable modification. For example, unlike inter-state extradition, no grounds for refusal are available when a State is asked to surrender an arrested person to the ICC (article 89). States will therefore often prefer to draft new ICC-specific "surrender" legislation instead of making all the changes necessary in order to adapt existing extradition laws.

Among those States that have adopted largely self-contained ICC Acts, rather than putting the emphasis on the amendment of existing laws, only a small number have enacted truly comprehensive legislation establishing national jurisdiction over ICC crimes and providing for cooperation with the Court in a single Act: these include Argentina, New Zealand, Samoa, South Africa, the United Kingdom and Uruguay. Others (such as Germany and the Netherlands) have tended rather to adopt two ICC-related laws, one for complementarity and one for cooperation. Still others have chosen to adopt an integrated law on cooperation while incorporating ICC crimes into their existing criminal law (for example, Australia, Spain, Switzerland), while Canada has done the reverse, adopting a law to establish jurisdiction over ICC crimes while amending piecemeal its various national laws relating to cooperation (including its Citizenship Act, Corrections and Conditional Release Act, Criminal Code, Extradition Act, Foreign Missions and International Organizations Act, Immigration Act, Mutual Legal Assistance in Criminal Matters Act, State Immunity Act, and Witness Protection Program Act). Finland accomplishes essentially the same thing as Canada by another means, incorporating by reference existing procedures under its extradition, mutual legal assistance, and other legislation into its (very brief) law on ICC cooperation.

To date, no State is known to have proceeded only by amending pre-existing legislation on both the cooperation and complementarity sides of the equation. Commentators have tended to favour the adoption of self-contained laws over the piecemeal approach, arguing that the latter encourages more minimal changes to existing procedure while the former allows for a more robust and ICC-specific approach. Generalizations aside, the essential question is whether legislation allows a given State to meet its obligation to cooperate fully with the Court and its objective of favouring national over ICC prosecution of the crimes in question. Each State will have to make its own choice of legal forms to best achieve these aims.

## 2.3 The scope of the implementing law

The Rome Statute requires States to ensure that they are able to cooperate fully with the Court (article 86) and to adopt laws to this effect where necessary (article 88). At the same time, States Parties have a strong policy incentive - not strictly a legal obligation - to ensure that their criminal courts are able to exercise jurisdiction over ICC crimes if that State wishes to see relevant matters addressed by its own institutions rather than on the international level before the ICC. To achieve these objectives, the law or laws adopted to implement the Statute will be guided by the cooperation obligations of the Statute (see Chapter 3) and the scope of the Court's jurisdiction under the principle of complementarity (see Chapter 4).

While it might seem that a simple law declaring that the Rome Statute's provisions form part of the domestic law of the State Party (and including the Rome Statute in an annex) would be the most expedient way of achieving these objectives, such a conclusion would be mistaken for at least three reasons.

- First, administrative efficiency requires that the role of relevant authorities in executing ICC cooperation requests and in exercising jurisdiction over ICC crimes be made clear, and the implementing law will often be the logical place to do this. (Finland's legislation does this, for example, despite opening with a broad direct incorporation of the Rome Statute's provisions "insofar as they are of a legislative nature.")
- Second, the terms used in the Rome Statute to describe the cooperation that the Court expects or the jurisdiction that it may exercise will not correspond in all cases with the legal terminology used by a given State at the national level. Thus, many States Parties use their implementing legislation to "translate" the Statute into procedural or sub-stantive terminology familiar within their domestic system. (Sweden expressly aimed to do so, for example, in designing its cooperation law.)
- Finally, for all its detail the Rome Statute in fact touches on many matters in only the most abridged manner. Thus, for example, its provisions on the tracing, freezing and seizure of assets for the enforcement of fines or reparation of victims are extremely simplified (see in particular articles 77(2), 93(1)(k) and 109), while national law on such matters is often very elaborate.

Thus, in addition to making it possible at all for national authorities to cooperate with the Court or to investigate and prosecute crimes in accordance with the principle of complementarity, Rome Statute implementing legislation clarifies lines of authority, makes Rome Statute procedures cognizable in domestic law terms and fills gaps that the Statute leaves open.

### ***Rome Statute implementation as an opportunity for broader reform***

The main objective of a State undertaking implementation will be to ensure that it is capable of meeting its Rome Statute obligations. Nonetheless, it may also choose

to go beyond what is strictly called for by those obligations for two reasons. First, it may do so because it has adopted a national policy of advancing as much as possible the overall aims of the ICC regime - to contribute to international peace and security and the rule of law by addressing impunity for the gravest international crimes. In this vein Germany and Sweden, among others, have reinforced the ICC's cooperation regime by providing for the compelling of witness testimony at the national level - something not strictly called for by the Statute, but which will be potentially helpful in some instances. Such examples of "super-charging" implementing legislation in order to help the Court or to advance the aims of international justice are pointed out in Chapters 3 and 4.

Second, States may choose to exceed the Rome Statute's strict requirements during implementation on the grounds that the Statute represents in some respects only the minimum required under international law. Thus, bringing national law into line with the International Covenant on Civil and Political Rights, with other "fair trial" instruments or with customary law may require more than simple adherence to the Statute. For example, article 55(2) of the Statute requires that State officials respect certain fundamental rights when questioning a suspect at the request of the Court (the right to have counsel present, to remain silent, to be informed that he or she is suspected of a crime under the Statute, etc.). While many States will already provide for the routine protection of such rights under their criminal procedural law, others may not. In the latter case, the State may prefer to take the opportunity to bring its general criminal law into line with international standards, rather than create a small and ICC-specific "island of due process." At the same time, however, the procedural and institutional reforms needed to comply with international due process standards often entail far-reaching and long-term law reform efforts, and Rome Statute implementation should not be too closely tied to such efforts if doing so would risk indefinite delay.

The Rome Statute anticipates that national laws will vary in terms of how the cooperation requested by the Court will be given, provided that States Parties comply with requests in good faith and according to the terms of the Statute (see Chapter 3). In the domain of complementarity, the Court will expect not that national law reflects exactly all aspects of the Rome Statute or international fair trial protections, but rather that State authorities conduct proceedings genuinely and in a manner consistent with the intent to bring the person(s) concerned to justice (see Chapter 4). Thus, while respect for international due process standards and implementation of the Rome Statute undoubtedly reinforce each other, they are also distinct processes in many respects. Each State will have to decide how far political circumstances and technical requirements allow the two to be aligned.

## **2.4 Managing the implementation process: Review, consultation, training**

Once a State decides to ratify the Rome Statute (or even before, if it is merely considering ratification), it should conduct a review to identify the changes that ratification might require of its domestic legal system. The aim of this review will be to determine, in light of both the Rome Statute's provisions and existing national law, what might be needed to ensure that the State will be able to cooperate fully with the Court and to prosecute genocide, crimes against humanity and war crimes before its own judicial authorities, as foreseen by the Statute. Importantly, the review process will identify constitutional and legal hurdles that arise and elaborate on the options for dealing with these. Participants should include relevant organs of the State, the parliament and civil society as appropriate. Such a review will normally result in the adoption of an approach to ratification and implementation that reflects the State's internal law, legal tradition and political situation.

The Rome Statute leaves the State free to decide on its own approach to ratification and implementation, provided only that at the end of the process the State is able to fulfill its obligations under the Statute effectively and in good faith. Some systems will require their executive branch to consult with a constitutional court or to obtain the consent of the legislature prior to ratification, while others will not. In the rare event that a constitutional amendment is needed (see section 2.5 below), this would be undertaken either prior to or upon ratification. More generally, a number of States have, in recent years, introduced reforms increasing the amount of consultation with government organs or with civil society prior to the ratification of a treaty, mindful of the impact that treaties may have on the domestic sphere. The involvement of the executive, legislative and judicial branches, the creation of interministerial committees (involving justice, constitutional affairs, foreign affairs and defence ministries, etc.), and a role for a range of civil society actors (bar associations, law professors, victims' support groups, and non-governmental organizations), all serve to foster national dialogue on the ICC. Such consultative processes do tend to lengthen the ratification and implementation process, but they can also improve the quality of implementation and enhance understanding of and support for ratification. Ultimately, each government will have to design and manage its own process of ratification and implementation in order to achieve optimal results in terms of timely ratification, effective implementation and clear understanding of the ICC among relevant constituencies.

### ***Capacity-building***

Since the implementation of the Statute involves a broad range of criminal-justice areas (including criminal investigation, proceeds of crime, witness and victim protection, mutual legal assistance, national security and military law), States should anticipate how they will respond to an ICC request for assistance if and when one is received. A given State is likely to need a core group of personnel (criminal justice, diplomatic, perhaps military) who are familiar with the Rome Statute and able to effectively coordinate government departments and other relevant entities.

From a practical point of view, whether States introduce ICC-specific legislation or amend existing law, relevant personnel will need to be aware of their country's legislative changes, the main features of the Rome Statute system and how the ICC operates. In virtually all jurisdictions, national authorities who are largely unfamiliar with the Rome Statute may eventually be called upon to cooperate with the Court, and thus may need training and ongoing support. Such training and support can come from within those units of government with the greatest expertise in the Rome Statute, from external sources or from both. Having successfully assisted the process in many States, non-governmental organizations, academic experts, bar associations and bilateral or multilateral governmental programs are available to train officials and sensitize the public regarding the Rome Statute, the Court, the needs under national law and the practice of other States. At the same time, the process of ratification and implementation can be managed with a view to preparing national authorities for the day when they will have to act. To take just one example, the interministerial committee charged with preparing South Africa's implementing law circulated a draft bill in order to familiarize government and civil society with the requirements of the Rome Statute and to identify how best to implement. While this consultation no doubt prolonged the implementation process, South African authorities that may one day be called upon to assist the ICC are now familiar with the Statute and the Court and are thus in a better position to cooperate, while civil society is also aware and supportive of the ICC.

## **2.5 Constitutional issues that may arising during ratification**

A number of States considering ratification of the Rome Statute have encountered issues, mostly relating to cooperation with the ICC, that raise possible conflicts with their national constitutions. Since many jurisdictions forbid the ratification of any treaty that conflicts with the national constitution, the question of constitutional conflicts is one of the first, and potentially most serious, issues that arises in the process leading to ratification. In some jurisdictions, judicial review through a constitutional court or non-judicial review by the Attorney General, a constitutional commission or council of state is required prior to ratification. In some States the decisions of such a review body are binding while in others they are not. The decisions of constitutional bodies from around the globe now provide a wealth of interpretive experience available to other States.

When assessing the potential impact of the Rome Statute on a State's constitution, it is important to keep in mind that the Statute ultimately seeks to uphold the values of justice, the rule of law, the protection of human rights and the ending to impunity for grave crimes caused by the abuse of power. These are all values that most constitutionalists would immediately claim for their own country's constitution. The ample common ground that exists in this sense between national legal orders and the Rome Statute should help reconcile any apparent inconsistencies between constitutional provisions and the requirements of the Statute.

States dealing with a (potential) constitutional conflict generally have the choice of amending their constitution, of interpreting it in such a way as to resolve any nascent problem or of setting the issue aside to resolve in the future, should it ever arise. To date, only a relatively small number of States have felt it necessary to amend their constitution to ensure the possibility of full compliance with the Rome Statute.

Because constitutional amendment is often both politically charged and time-consuming, States should, in principle, do everything possible either to pre-empt the problem through interpretation or to seek the most streamlined approach to amendment possible in order to ensure that they join the Assembly of States Parties with minimum delay. Each State, however, will have to decide the best approach for itself in its particular circumstances. France was the first to amend its constitution, addressing all possible issues at once through a generally worded formula: "The Republic may recognize 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). This elegant solution appears to allow France to avoid the possible conflicts previously identified in its constitutional council's review of the Rome Statute, without having opened the extensive and divisive debates that would probably have been sparked by more detailed reforms (concerning the president's immunity, or power to grant amnesty, for example). Variants on this approach have since been followed by Portugal, Colombia and Luxembourg. In the case of the last, Luxembourg, the formulation leaves the least room for doubt perhaps, by stating: "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."

Most States have preferred to take an interpretative approach in which the relevant national authority (constitutional court, parliamentary committee, council of state, Attorney General, etc.) favours an interpretation of a particular constitutional provision that avoids the need to amend it. In general terms, the fundamental principles underlying the Rome Statute are consistent with those of most constitutions of the world. As the Ecuadorian constitutional tribunal stated in its opinion on the compatibility of the Rome Statute with its national constitution:

*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...*

*... 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 has resulted in several States finding it unnecessary to amend provisions on the immunity of their head of state. One of the reasons cited was that a head of state who commits a crime as grave as those under the Rome Statute would thereby place him- or herself outside the constitution (for example, Norway).

Deferring to the future the resolution of potential constitutional conflicts - rather than facing them head-on through amendment or interpretation - is the least desirable option as it does not ensure that the State will be able to assist the Court when requested. Nevertheless, a small number of States decided that this was their only option in the face of an extraordinarily lengthy, complex and uncertain process of constitutional amendment. States taking this approach often judged the conflict of norms in question to be merely theoretical and unlikely to arise in practice (for example, a figurehead monarch being involved in crimes against humanity). This reasoning does not excuse or justify this approach, of course, as it leaves the State open to later violations of the Rome Statute and sets a bad example for others, whatever difficulty constitutional change might entail in some instances.

Several provisions of the Rome Statute that have raised questions of potential constitutional conflict warrant a brief review here.

### ***Absence of immunity for heads of state and other officials***

Under many constitutions, heads of state and other officials (such as parliamentarians, government ministers and judges) enjoy immunity from criminal prosecution, either during their time in office or permanently. Under article 27 of the Rome Statute, however, a head of state or other official has no immunity from proceedings before the ICC, and national procedures cannot limit the Court's exercise of jurisdiction over such officials. While States may be able to continue to assert immunities for some officials when it is a question of criminal proceedings before the courts of another State, they cannot do so with the ICC, which in this respect follows well-established rules set by the Nuremberg Tribunal, the International Criminal Tribunal for the Former Yugoslavia, the Special Court for Sierra Leone and the International Court of Justice. However, States Parties to the Rome Statute need not eliminate all existing forms of immunity for their officials. They need only ensure that immunities under their constitutional or other law will not prevent an individual from being arrested and transferred to the Court in accordance with articles 59 and 89 in the event of a request of this effect. Of course, if a State wished to take advantage of the complementarity principle by prosecuting at the national level in order to prevent ICC exercise of jurisdiction, it would have to ensure that relevant immunities either could be lifted or did not apply to ICC crimes.

Where there is concern about inconsistencies between the Rome Statute and national constitutions over immunities, States have taken one of the following steps:

- Amended their constitution (Brazil, France, Ireland, Latvia, Luxembourg, Portugal - these being broad generic amendments not specific to immunities like those quoted above).
- Interpreted the national constitution to be compliant with the Statute, either because ICC crimes would fall outside the scope of existing immunities or because immunities were subject to impeachment or waiver proceedings making cooperation with the ICC possible in principle (Argentina, Sweden, among others).
- Left the issue for the future when it was judged highly unlikely to have any real application (the Netherlands, Norway and Spain essentially did this with respect to their monarchs).

The need for constitutional amendment is most likely to arise where the immunity provided for is absolute and the process for lifting it extremely rigid. The broad and ICC-specific constitutional amendments adopted by States to date necessarily leave aside the question of the revocation of immunities for purposes of domestic prosecution.

### ***No statute of limitations***

The ICC may not investigate and try crimes that are committed before the Statute enters into force (articles 11 and 24). However, crimes occurring after entry into force are not subject to any statute of limitations. That is, perpetrators of crimes covered by the Statute may be prosecuted and punished by the ICC regardless of the number of years that have elapsed since the commission of the crime (article 29; this is subject to the “interests of justice” that the Prosecutor takes into account under article 53, as well as other factors). Thus, 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. Likewise, if States wish to take advantage of the principle of complementarity in order to avoid the ICC exercise of jurisdiction, limitation periods will have to be made inapplicable also with respect to domestic proceedings.

The non-applicability of statutory limitations to ICC crimes does not normally raise constitutional issues since such limitations are usually established by legislation. However, in France, the Constitutional Council found that French sovereignty was violated by the possibility that the Court might exercise jurisdiction, not on the grounds that the State in question was unwilling or unable, but on the grounds that it was taking no action for a given crime (because of a limitation period imposed by national law), thus adding to the arguments for amendment of the French constitution. In any event, exempting genocide, crimes against humanity and war crimes from any statute of limitations conforms not only with the Rome Statute, but 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 United Nations General Assembly in 1968, and which some argue reflects an emerging rule of customary law.

### ***The surrender by a State of its own nationals***

An ICC request for a State Party to surrender one of its own nationals may pose difficulties for States whose law prohibits extradition of their nationals. Where such a prohibition is based in legislation, crafting and adopting the appropriate exemption will be straightforward (provided the political will exists). In the case of a constitutionally based prohibition, however, several possibilities exist.

The first is based on the Court's "distinct nature" (article 91(2)(c)) and the distinction that the Statute makes between "surrender" and "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. Constitutional provisions against extradition of a State's own nationals either expressly refer to the latter (referring to "extradition" or "extradition to another State"), or can be interpreted in this way on the grounds that the ICC does not raise the concerns that underlie the prohibition. Constitutional courts (or the equivalent) in Ukraine, Honduras and Guatemala adopted the extradition-surrender distinction in interpreting their constitutions as being compatible with the Statute in this respect. The extradition-surrender distinction is based on the fact that fair trial standards are so exhaustively respected by the Statute, which is the creation of all States, as well as on the fact that the requested State Party continues to have a kind of participation in the Court process; it is not abandoning its national to another sovereign State as it does when it engages in extradition. The ICC is not, therefore, a "foreign" court, but in some sense an extension of domestic jurisdiction; different considerations therefore apply.

States that cannot interpret their way around a constitutional problem have other choices. They will be able either to adopt a general constitutional amendment (like France, Luxembourg, Portugal, etc.) or craft a specific amendment aimed at exempting the ICC (as was done in Germany and Slovenia, without naming the ICC specifically). A similar exercise may be required, and similar reasoning applied, where the national constitution protects citizens from quitting the national territory against their will. This was the approach of Costa Rica's constitutional court, which held that the provision in question should be interpreted in light of evolving international law standards.

### ***The possibility of sentences of life imprisonment***

The ICC is empowered 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" (article 77(1)(b)). The maximum imprisonment for offences under the Rome Statute is otherwise 30 years. Some constitutions prohibit imprisonment for life, or even for 30 years (or extradition to States imposing such sentences), on the grounds that such sentences do not provide opportunity for rehabilitation, or that they are inherently disproportionate. Regardless, 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, and may have to amend their constitution as a result. Such amendments may either be general in scope (as with all Rome Statute-related amendments to date), or may recognize specifically that the provision in question presents no bar to surrender to the Court. Alternatively, constitutional court or council of state opinions in various States, including Spain, Costa Rica, Ecuador and Ukraine, have interpreted the constitutional prohibition of life sentences, or declarations to the effect that the penal system's main objective is rehabilitation, to be consistent with the Statute. Such provisions may also be interpreted as not applying to relations with the Court, similar to the interpretation that the prohibition on the extradition of nationals is limited to extradition between States and does not apply in surrender to the ICC.

It should be noted that the Court must review all sentences of imprisonment after they have been two-thirds served, or after 25 years in the case of a life sentence, and then determine based on a range of factors whether the person's sentence should be reduced (articles 110(3) and (4)). Thus, a sentence of life imprisonment imposed by the Court is in effect a sentence of at least 25 years, with possible reduction thereafter. A refusal to reduce the person's sentence after the first review results in subsequent reviews every three years, or as decided by the Court (article 110(5) and rules 223 and 224(3)). Moreover, States are free to impose penalties more in keeping with national traditions if they conduct the proceedings themselves under the principle of complementarity (see article 80). States Parties are also free to specify conditions on the acceptance of persons convicted by the Court (article 103), including a condition that they will not have to enforce a sentence of life imprisonment.

### ***The Prosecutor's power of investigation on the territory of States Parties***

In limited circumstances, the Prosecutor may conduct investigations on the territory of a State Party (article 54(2)). In particular, the Prosecutor may be authorized 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 57(3)). The Prosecutor may also, under strictly limited conditions, enter the territory of States Parties in order to take investigative steps not involving compulsory measures (notably, to examine sites or gather witness depositions, including in the absence of the authorities of the State Party in question) (article 99(4)).

Through their ratification of the Rome Statute, States Parties accept the possibility that the Prosecutor will exercise these powers of investigation on their territories. This has raised constitutional concerns for certain States. In France, for example, the constitutional council expressed concern that article 99 impinges on national sovereignty by contradicting the rule giving French judicial authorities sole responsibility for providing legal cooperation sought by a foreign authority; France's all-encompassing constitutional amendment appears to have resolved the issue. The Luxembourg council of state took an opposing view, namely that since

consultations with the State concerned would precede the Prosecutor's action, and since voluntary interviews were the main measure foreseen, no incompatibility between Luxembourg's constitution and the Rome Statute arose. Spain considered the powers to be exercised by the ICC Prosecutor to be in effect those whose transfer to an international organization was permitted by the Spanish constitution, while Ecuador's court was of the opinion that while the Prosecutor's powers of investigation may be seen to encroach on the powers of the minister responsible, they could be construed as an acceptable form of international judicial cooperation. Most States have so far found either that no constitutional problem arises with regard to these investigative powers, or that the constitutional principle in question can easily be interpreted in a manner consistent with the Statute.

### ***The ICC's complementary jurisdiction***

Under the principle of complementarity, the ICC will generally - but not always - defer to national jurisdictions that wish to investigate and prosecute cases otherwise falling within the jurisdiction of the ICC (see Chapter 4). This arrangement has given rise to different interpretations of its constitutionality among (prospective) States Parties. Ukraine and Chile, for example, considered their constitutional provisions regarding the exclusive competence of national authorities as precluding any delegation to a jurisdiction supplementary to the national system, therefore requiring a constitutional amendment. France, on the other hand, considered that the limits placed on the principle of complementarity when a State deliberately evaded its duty to prosecute were clear, well defined and based on the rule *pacta sunt servanda* (i.e., that a treaty is binding on the parties and must be executed in good faith), while the Spanish council of states was of the opinion that Spain's constitution recognizes the existence of jurisdictions superior to that of Spanish jurisdictional organs.

### ***Ne bis in idem***

Under very limited circumstances, a person already tried before a national court can be retried before the ICC (article 20(3); see Chapter 4), and States Parties are thus obliged to surrender an individual to the Court upon its request, regardless of the fact that, in their view, the individual is protected by the *ne bis in idem* or "double jeopardy" principle. The very limited exception contained in the Rome Statute must be understood in light of the principle as it is protected under many national constitutions. The purpose of the *ne bis in idem* principle as upheld by national constitutions is to prevent abuses of justice, while the exception enshrined in the Rome Statute is to allow genuine justice to be carried out before the Court where a parody of justice has taken place at the national level. The underlying principle - that justice should be done and the process of justice not subjected to abuse - is the same in each case, and a number of States Parties have so found. The courts of Ecuador and Honduras, for example, considered the Rome Statute exceptions to conform with the principle of *ne bis in idem*, and the likelihood of their invocation by the Court exceedingly rare with respect to any democratic State applying basic guarantees of due process.

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## 3. COOPERATION

This Chapter highlights the various forms of State cooperation that are detailed in the Rome Statute and suggests ways that a State Party can ensure its ability to provide such assistance, as required. Each type of cooperation may require a different approach to implementation, depending on a particular State's existing criminal procedure and approach to international judicial assistance. The sections listed in this Chapter identify the various implementation options available to States. These are based in large part on the experience of States that have adopted cooperation legislation so far. The sections cover:

- An overview of the Rome Statute's scheme for State cooperation.
- Arrest, surrender and transportation of suspects.
- Collecting and preserving evidence.
- Enforcement of fines and forfeiture orders and sentences of imprisonment.
- Privileges and immunities of ICC personnel.
- Offences against the administration of justice of the ICC.
- Procedures where the ICC wishes to investigate the same matter as a State Party.

### 3.1 Overview of the Rome Statute's scheme for State cooperation

#### *The duty to assist the Court*

The Rome Statute's Part 9 (International cooperation and judicial assistance) sets out its scheme for cooperation between States and the Court. It describes two main types of cooperation, namely the arrest and surrender to the Court of persons believed to have committed crimes within ICC jurisdiction, and other forms of assistance, in particular related to evidence, witnesses, victims and the seizing of assets. In addition, Part 10 (Enforcement) outlines how the Court will interact with States Parties regarding the enforcement of sentences and of fines. Further aspects of cooperation are dealt with in other parts of the Statute, notably in articles 55 (Rights of persons during an investigation) and 48 (Privileges and immunities, supplemented by the Agreement on Privileges and Immunities of the Court).

Article 86, which opens Part 9, states:

*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.*

This categorical language - which is not restricted to Part 9, but encompasses all cooperation duties throughout the Statute - requires full cooperation except insofar as limits or exceptions are provided for within the Statute itself.

The duty to cooperate applies from the moment that the Statute becomes binding on the State in question. This is normally at the moment of the Statute's entry into force after ratification (articles 11 and 126). A duty to provide cooperation under Part 9 "without any delay or exception" is also required of States that declare their acceptance of the Court's jurisdiction ad hoc with regard to a given situation (article 12(3), rule 44).

States Parties that, contrary to the provisions of the Statute, fail to comply with a cooperation request from the Court and thereby prevent it from exercising its functions and powers, may be subject to a finding to this effect, with a consequent referral of the matter either to the Assembly of States Parties or to the Security Council, if it was the latter that referred the situation to the Court (article 87(7)). The consequences of such non-cooperation are not specified in the Statute and will be decided either by the Assembly or by the Security Council respectively.

### ***The duty to legislate, where necessary***

As for modalities, article 88 stipulates that States Parties must "ensure that there are procedures available under their national law for all of the forms of cooperation that are specified under this Part." Thus, national law must facilitate the "full cooperation" required of States Parties by the Statute and not pose obstacles to it. While article 88 expressly applies only to Part 9 of the Statute, the duty to cooperate fully under article 86 applies equally to cooperation provisions found in other Parts, and since internal law provides no excuse for the non-respect of international obligations, States Parties will equally have to legislate with regard to cooperation duties lying outside Part 9, where this is necessary for compliance.

The broad and detailed duty to cooperate, with its limited exceptions (as discussed below), creates a need on the part of all States Parties (and non-States Parties accepting the Court's jurisdiction ad hoc under article 12(3)) to review their national law and develop a plan for designing and adopting the necessary implementing legislation, be it in the form of a dedicated law or laws or amendments to existing laws, as discussed in Chapter 2. Such laws should ensure that the State is able to provide all forms of cooperation provided for in the Statute, effectively and promptly, subject only to the few conditions, limitations and exceptions.

### ***The formalities of ICC requests***

Requests to assist the ICC can come from several organs of the Court. The Prosecutor will normally request the Pre-Trial Chamber to issue any orders or warrants required for purposes of the investigation in accordance with Part 9 of the Statute (article 57(3)(a); but see the exception of article 99(4), section 2.5 above). The Prosecutor can also seek cooperation directly, or seek to enter into arrangements to



facilitate cooperation throughout the investigation (article 54(3)(c) and (d)). In addition, the Pre-Trial Chamber has the power to issue orders and seek State cooperation for the preparation of the defence case at the request of the accused or on its own motion, as well as to seek the protection of victims, witnesses and national security information (article 57(3)(b) and (c)). The power of requesting cooperation can be exercised by the Trial Chamber once it becomes seized of a matter (article 64(6)(b)).

The Court's requests to States Parties for cooperation will generally be in writing (articles 91(1) and 96(1)). In urgent cases, requests may be made by any medium capable of delivering a written record, such as facsimile or e-mail, as long as the request is subsequently confirmed through the appropriate channel (articles 91(1) and 96(1)). States are obliged to respond urgently when the Court makes an urgent request for documents or evidence (article 99(2)).

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” (article 87). When a State has an embassy in The Hague, it may prefer to designate it as responsible for receiving ICC communications (as a number of States Parties have done, following common practice of the ICTY). In other cases, States have generally referred to “diplomatic channels,” with nothing more. Still other States have chosen to name a specific authority in their capital (Minister of Justice, Attorney General, etc.), often naming a particular department or office. This is particularly helpful when the authority named is one who is responsible generally for international cooperation matters as they will be able to bring that expertise and knowledge to the execution of ICC requests.

Declarations could also specify an office dealing expressly with ICC requests, as in Switzerland's designation of the Central Office for Cooperation with the ICC within its federal Bureau of Justice. Some declarations, such as Finland's, have in addition to identifying the diplomatic route expressly stated in an ICC-friendly manner that the Court can enter into direct contact with other competent authorities in the State. It should be noted that requests from the Court can also be transmitted through Interpol or any appropriate regional organization (article 87(1)(b)).

Upon ratification a State must also designate its preferred language of correspondence (an official language of the State in question, or one of the working languages of the Court, those being English and French) (article 87(2)). The most efficient and Court-friendly option will usually be to choose an official language of the Court (as Timor-Leste did, choosing English) in order to reduce the Court's time and expense. Requesting translation into the State's official language may sometimes be the best option, however, if the State lacks resources to translate the documents itself and the Court's official languages are not well understood by the various personnel that will be involved in executing a request.

Subsequent changes to either of the above designations may be made in accordance with rule 176 of the Rules of Procedure and Evidence.

It is States Parties that bear the “ordinary costs for execution of requests in their territory,” with certain exceptions (article 100(1)). However, such costs are likely to be minimal since, on the one hand, the number of requests received by any given State Party is likely to be low and, on the other hand, such requests are likely to be covered, where they are made, by personnel already responsible for mutual legal assistance within the national criminal justice system and Ministry of Foreign Affairs. The Australian legislation (AU s. 184) states simply that Australia will pay costs incurred in dealing with an ICC request for cooperation other than those borne by the Court.

### ***Ensuring confidentiality***

In designing their implementing legislation, (prospective) States Parties will have to take into account the reciprocal obligations of confidentiality provided for in the Rome Statute. Thus, article 87(3) provides that 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 the execution of the request.” This provision aims to preserve the integrity of ICC investigations and thereby, for example, prevent accused persons from fleeing, witnesses from being threatened or harmed, or evidence from disappearing. States must therefore reveal only to the appropriate authorities (e.g., the police in the case of an arrest warrant) the information needed to carry out the request.

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 (article 87(4)). Such protection might obviously involve confidentiality. The Australian and New Zealand laws have similar provisions to ensure confidentiality and the protection of victims, witnesses and their families when executing cooperation requests (AU s. 13 and NZ s. 29).

The Court, for its part, has a duty to ensure the confidentiality of documents and information received from States pursuant to requests for cooperation, except as required for the investigation and proceedings described in the request (article 93(8)(a)). Moreover, the Court's power to use information received for purposes of its own investigations is subject to article 93(8)(b) by virtue of which a State receiving a request for cooperation other than arrest and surrender may transmit documents and information to the Prosecutor on a confidential basis, in which case the Prosecutor may use that information solely for the purpose of generating new evidence (unless the State subsequently consents to disclosure). A State may also request the Court to take measures for the protection of confidential or sensitive information, and for the protection of State servants or agents (article 68(6)).

***Consultation with the Court in case of difficulty and the postponement of assistance***

States Parties are obliged to consult with the Court without delay in order to resolve potential problems that might impede or prevent execution of requests for cooperation under Part 9 of the Statute. Such problems might include insufficiency of information, inability to locate the requested person or item (or discovery that the person found in the requested State is not the one sought), and the appearance of conflict with a pre-existing treaty obligation of the State (article 97). 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).

The Statute allows States Parties to postpone the execution of requests in certain situations, one of which is where the immediate execution of the request would interfere with an ongoing investigation or prosecution of a different matter (article 94). The requested State must then agree with the Court on a period of time for postponing execution of the request, although such postponement must not be longer than necessary in order to complete the relevant investigation or prosecution. The requested State must also consider whether it could provide the assistance immediately, but subject to certain conditions. Where a request for assistance is made while an admissibility ruling is pending (that is, before the Court has decided whether it, or a given State, will be entitled to exercise jurisdiction over the matter), the requested State may postpone execution of a request until the Court makes its decision (article 95).

The New Zealand legislation (NZ ss. 56 and 58 to 60) provides an example of how national law can provide expressly for these exceptions, while assuming, like the Statute, that requests will normally be responded to immediately. Each of these provisions of the Statute, however, is subject to an exception in cases where the Court has made an exception allowing the Prosecutor to take certain steps aimed essentially at preserving evidence for subsequent ICC proceedings.

***The Article 99 exception***

As indicated in Chapter 2, section 2.5, the Prosecutor may in limited circumstances conduct investigative measures on the territory of a State Party, either with or without the authorization of the Pre-Trial Chamber (articles 57(3)(d) and 99(4)). National legislation may sometimes require express recognition of these powers. The Swiss legislation specifies (as per article 99(4)) 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), allowing the Attorney General to consult with the ICC in the event of difficulties arising with the execution of a request under article 99.

## 3.2 Arrest, surrender and transportation of suspects

### **Arrest**

#### ***Overview of arrest procedures***

The ICC can seek the appearance of an accused person before the Court by three means:

- Issuing an arrest warrant in accordance with articles 58, 89 and 91.
- Issuing a provisional arrest warrant in accordance with articles 58(5) and 92 in urgent cases where the required supporting documentation is not yet available.
- Issuing a summons in accordance with article 58(7), where the Pre-Trial Chamber is satisfied that a summons is sufficient to ensure the person's appearance. If the Pre-Trial Chamber decides to issue a summons instead of a warrant, it may attach certain conditions to the summons if provided for by national law (article 58(7)).

States are required to respond promptly to all such requests to execute a warrant or to serve a summons in their territory (articles 59(1) and 89).

Once a person has been arrested by the State, he or she must be brought before a competent judicial authority and provided the opportunity to apply for interim release pending surrender (article 59(2) to (6)). The judicial authority will then order the person to be surrendered to the ICC in most cases (article 59(7); see the section "Surrender" below for details and exceptions).

Persons subject to an ICC warrant have various rights that must be respected by State authorities (article 55; see "Rights of suspects and accused persons," below). In some circumstances, once the ICC has issued a warrant, States may be required to take protective measures - including identifying, tracing, freezing, or seizing proceeds, property, assets and instrumentalities of crime - for the purpose of eventual forfeiture (article 57(3)(e)).

#### ***Issuance and execution of warrants of arrest***

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

In most cases, 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(2)(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(2)(a)).

The Court can also request States to provide it with information on the requirements under national law for supporting documentation. States are required to consult with the Court if such a request is made (article 91(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(2)(c)). This point is discussed in more detail in the section “Surrender.”

Once the warrant has been issued by the Pre-Trial Chamber, the Court may request the State to execute the warrant in accordance with the relevant provisions of Part 9 (article 58(5)). 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(1)). If the person sought cannot be located, despite the requested State's best efforts, or if investigation has revealed that the person in the requested State is clearly not the one named in the warrant, the State must then “consult with the Court without delay in order to resolve the matter” (article 97(b)).

### ***Provisional arrest***

Where the Court has issued a warrant of arrest in accordance with article 58 but does not yet have the required documentation to support a request for arrest and surrender, it may request a State to provisionally arrest the person subject to the warrant (articles 58(5) and 92). Such a request for provisional arrest is only to be used in urgent cases (article 92(1)). This request need not be in writing, but can be communicated by any medium capable of delivering a written record, such as e-mail (article 92(2)). The requirements of the request are outlined in article 91(2)(a) to (d). States are then required to execute the request immediately (article 59(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(3) and rule 188). However, if the documents subsequently arrive, States must immediately rearrest the person (article 92(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 permissible under the law of the requested State. In such a case, the requested State must surrender the person to the Court as soon as possible (article 92(3)); States with existing national law that might impede such voluntary surrender should consider amending it during the implementation process in order to better assist the Court.

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

### ***Giving national legal force to ICC arrest warrants***

Criminal laws and procedures are needed that allow relevant national officials to arrest or provisionally arrest both nationals and non-nationals for all crimes within

the jurisdiction of the ICC. It is left to individual States Parties to determine which mechanisms will be used under domestic law to fulfill these obligations pursuant to articles 89 and 92. Approaches already taken by States Parties indicate the wide variety of options available, with most opting for the transformation of the ICC warrant into a national one or the endorsement of the former by the national authority. Thus, for example, under the New Zealand law, the minister approves and sends the request and documents to a judge who then can issue a warrant (NZ Part 4). For provisional arrests, the request goes directly to the judge, with notice 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). That officer, once satisfied of the authenticity of the ICC request, endorses the ICC warrant for execution in the United Kingdom. For a provisional warrant, the Secretary of State transmits the request to a constable or other official and directs that person to apply for a warrant of arrest before an appropriate court. Canada's legislation provides that arrest procedures under the Canadian Extradition Act apply to ICC requests (CA ss. 47 to 53).

The example that stands out from the point of view of its commitment to the effectiveness of ICC procedures and its faithfulness to the spirit of the Rome Statute is that of France (s. 627-4), which allows an ICC arrest warrant - after the responsible authority has received it and verified its formal regularity - to be transferred to the authorities and executed directly, with neither "transformation" nor endorsement. This Court-friendly approach deserves careful consideration from States Parties considering how best to implement their obligations in future.

### ***Rights of suspects and accused persons***

A number of the Rome Statute provisions protecting fair trial rights refer either implicitly or explicitly to proceedings before the Court (articles 66 and 67). The Statute also requires, however, that the authorities of States Parties respect the following rights of persons suspected of having committed a crime within ICC jurisdiction and inform the person of those rights prior to any questioning pursuant to a request from the Court (article 55(2)):

- To be informed, prior to being questioned on any matter including the person's identity, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court.
- To remain silent, without such silence being a consideration in the determination of guilt or innocence.
- 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.

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

These minimum rights under the Statute will of course be supplemented in practice by fair trial rights derived from other sources, notably customary international law, conventional international law (for parties to the International Covenant on Civil and Political Rights, for example) as well as national constitutional or criminal law. In addition, States Parties should note that while the Statute's preceding paragraph (article 55(1)) applies above all to activities undertaken by the Court and its officials, violations of the rights set out in that provision (that a person not be compelled to incriminate him- or herself; not be subject to any coercion, duress, threat or torture; have access to necessary translation and interpretation; and not be subject to arbitrary arrest or detention) might prompt challenges by defence counsel as to the admissibility of evidence (see the discussion under "Admissibility of evidence before the ICC" in section 3.3 below).

States Parties should also take note of article 85(1), which provides: "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." While referring to a right to compensation by the ICC, States may wish in the same spirit to make provision at the national level for the compensation of persons wrongfully arrested or detained by State authorities.

### ***Hearing before a competent judicial authority***

Once a person is arrested, he or she must be brought promptly before the competent judicial authority in the custodial State. That authority will determine, in accordance with the law of that State, that:

- The warrant applies to that person.
- The person has been arrested in accordance with the proper process.
- The person's rights have been respected (article 59(2)).

This provision reflects a carefully crafted scheme devised by the negotiators of the Rome Statute to ensure the effectiveness and efficiency of ICC proceedings. Crucially, State judicial authorities are not to consider whether the ICC warrant was properly issued by the Court (article 59(4)). Such a challenge is only to be made before the ICC. Moreover, as shown in the South African legislation, even the limited national review permitted under article 59(2) can be dispensed with if the arrested person agrees to his or her surrender to the Court (SA s. 10).

The Statute does not specify what the consequences should be when a national judicial authority identifies a problem with the three lines of inquiry mandated under article 59(2)(b) and (c): in the case of subparagraph (a), where the national judicial authority determines that the arrested person is clearly not the one named in the warrant, it has a duty to consult with the Court (article 97). The best approach, however, is that taken by the United Kingdom, which simply stipulates that

violations of the rights of the arrested person are to be reported to the ICC (UK s. 5).

If the arrested person 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 to determine how best to proceed (article 89(4)).

### ***Interim release***

At the initial hearing before the State judicial authority, the arrested person is entitled to apply for interim release pending surrender (article 59(3)), and national implementing law must provide for the exercise of this right (for example, through amendment or adaptation of its existing procedures on bail or sureties, or other forms of conditional release). The ICC Pre-Trial Chamber must be notified by the State authority of any requests for interim release, and it will make recommendations to which “full consideration” must be given by the latter before rendering its decision (article 59(5)). In Canada, applications for judicial interim release must be adjourned at the request of the Attorney General in the event that recommendations from the ICC are pending. If the recommendations are not received within six days of the adjournment, judges may proceed with the application. 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.

State authorities must take into account certain factors when considering whether to grant interim release (article 59(4)), including the gravity of the alleged crimes, whether “there are urgent and exceptional circumstances to justify interim release,” and whether “necessary safeguards exist to ensure that the custodial State can fulfill its duty to surrender the person to the Court.” This provision states expressly that “[i]t shall not be open to the competent authority of the custodial State to consider whether the warrant of arrest was properly issued [by the ICC].” If the person is granted interim release, the State Party in question is required, upon request, to provide to the Pre-Trial Chamber with periodic reports on the status of the interim release (articles 59(6) and 86).

The reference to “urgent and exceptional circumstances to justify interim release” implies a presumption in favour of detention in the case of arrests carried out on behalf of the ICC, putting the onus on the arrested person to justify interim release. While Rome Statute drafters felt this was justified in light of the gravity of ICC crimes and the flight risk that might often be present, the scheme may constitute a reversal of the normal position in States whose law presumes in favour of liberty at this stage. Canada, to take one example, revised its existing scheme for interim release to incorporate the reverse onus (CA s. 50). In Switzerland, the decisions of the Central Authority for detention pending surrender may be appealed to the federal Supreme Court within 10 days of the ruling (SW s.20).



### ***Issuance of a summons***

When satisfied that it would be sufficient to secure a person's appearance, the Pre-Trial Chamber may issue a summons as an alternative to an arrest warrant, which States Parties are then required to serve (article 58(7)). The summons will identify the person concerned, specify the appearance date, specify the crimes and outline the facts alleged (article 58(7)(a)-(d)). Such a summons may be issued with or without conditions restricting liberty, other than detention, as long as those conditions are provided for by the law of the custodial State. State laws may allow, for example, for the confiscation of the person's passport in such circumstances. Legislation and procedures may be needed to ensure the service and execution of process for such a summons within States Parties' jurisdictions.

In the United Kingdom, when the Secretary of State receives a summons from the ICC, he or she directs the chief police officer for the area in question to have the document personally served (UK s. 31). The chief of police reports back on when and how service was performed, or if not, why. In Australia, the service of summons is included within the provisions relating to the service of other documents requested by the Court (AU Part 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 if no procedure is specified, then it should be served in accordance with Australian law. South Africa's implementing legislation provides that a summons issued for attendance of a person before the Court is to be endorsed by a magistrate, and it is then served as if it were a summons issued by the domestic courts; non-compliance with such a summons is an offence punishable by up to 12 months' imprisonment (SA s. 19).

### ***Surrender***

#### ***The “distinct nature” of the ICC, and postponing surrender on ne bis in idem grounds***

The Statute defines “surrender” in article 102(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,” described in article 102(b) as “the delivering up of a person by one State to another as provided by treaty, convention or national legislation.”

The Rome Statute asks States Parties to take into account “the distinct nature of the Court” when determining requirements for the surrender process at the national level. 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” (article 91(2)(c)).

This provision encourages States to introduce the most streamlined process possible for surrendering persons to the ICC, and to distinguish between ICC surrender and existing processes of interstate extradition, which often involve lengthy delays. Extradition involves one sovereign State, with its own judicial traditions and standards of fairness, transferring an individual for criminal

prosecution to another State, with different traditions and standards. The ICC, however, is not a foreign jurisdiction in the way that the court of another State may be. The protections embodied in the Rome Statute and the Rules of Procedure and Evidence reflect high international standards crafted during negotiations in which the vast majority of States participated actively. Moreover, the requested State Party will already have expressed its support for the Court and its procedures through ratification, and will in fact have a continuing role in the management oversight of the Court through its role in the Assembly of States Parties. Thus, very different considerations apply than in the case of extradition, justifying more efficient proceedings.

Thus, while national law will govern surrender, just as it governs all cooperation with the Court, the Statute imposes strict considerations on what the national surrender procedure can and cannot consider. Only the factors relevant to the arrest warrant mentioned in article 59(2) can be considered (see “Hearing before a competent judicial authority,” above), and not even these can act as a bar to surrender to the Court. Importantly, the Statute provides no grounds for refusing to surrender a person to the ICC and requires States Parties to comply with all requests for arrest and surrender (article 89(1)). Thus, rules related to the sufficiency of the evidence, dual criminality, non-surrender of nationals, etc., cannot be taken into account as they would be in the case of extradition. National implementing laws must therefore reflect this, and States Parties have commonly established an ICC-specific surrender regime or, as Canada did, adapted existing extradition procedures (notably by eliminating grounds for refusal that would apply between States).

States should also ask themselves how to minimize national appeals against surrender in light of the extensive procedures available before the ICC and the limited discretion available to national authorities under the Statute. The Statute is silent on the topic of such appeals, although it is noteworthy that the International Covenant on Civil and Political Rights mentions only a right of appeal against conviction or sentence, not extradition or surrender (article 14(5)). Once the State has ordered the surrender of the person, the person must be delivered to the Court as soon as possible (article 59(7)). States are not required to pay for the cost of transporting the person to the Court (article 100(1)(e)).

There is one instance in which States may postpone the execution of the request for surrender. The person sought for surrender may bring a challenge before a national court on the basis of the principle of *ne bis in idem* (articles 20(3) and 89(2)), which provides that if the person has already been tried before for conduct that would constitute genocide, a crime against humanity, or a war crime, as defined by the Statute, the ICC will not try the person for the same conduct. The only exception to this principle is discussed in Chapter 4. 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(2)), and implementing legislation should obviously provide for procedures to this effect. If the Court has

already determined that the case is admissible, then the requested State must proceed with the surrender. 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(2)). Under no circumstances is it for the national court or authority to determine whether the case is admissible before the ICC or whether the principle of *ne bis in idem* is validly raised by the arrested person. Only the ICC can make such a determination.

### ***Competing requests***

The Statute sets out in considerable detail the procedures to be followed when a State Party receives competing requests for the surrender and/or extradition of a given individual made by the Court and another State (article 90). In essence, the requested State Party is to favour the request of the Court where the competing request comes from another State Party to the Rome Statute and the Court has ruled the case admissible. Where the requesting State is not a State Party, the Statute distinguishes between (i) situations in which the requested State is not under an international obligation to make the extradition, in which case it must favour the request from the Court, and (ii) situations in which the requested State is under such an obligation (for example, under a bilateral treaty with the requesting State), in which case the requested State “shall determine” what to do; that is, it has the option which to favour, although it must decide based on certain criteria (article 90(6)).

In designing its implementing law, a State may decide simply to incorporate article 90 by reference. If it does not, great care will have to be taken to ensure that the article's detailed procedures are faithfully reflected in the legislation, as was done in Australia's law (AU(C) ss. 37 to 40 and 56 to 62).

### ***Conflicts with other international obligations***

Article 98(1) states that:

*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.*

Two important aspects of this provision should be noted, one substantive and one procedural. Substantively, it is clear that article 98(1) does not refer to the immunity of any officials of the requested State itself (for example, its president and the immunities he or she might enjoy under their national constitution), since such immunity cannot apply to bar or delay surrender to the Court by virtue of the Statute's article 27 (see “Absence of immunity for heads of state and other officials,” section 2.5 above). Rather, it refers to “the State or diplomatic immunity” accorded under international law to “a person or property of a third State” found to be on the

territory of a State Party that receives a request for assistance from the Court. Regarding property, the Rome Statute contains no provisions that diminish or alter the inviolability of a diplomatic mission's premises, of its archives and documents, of the diplomatic bag, etc., as protected under the 1961 Vienna Convention on Diplomatic Relations, and the Court would proceed with no request for assistance requiring a requested State Party to do so.

Matters are more complicated for the arrest and surrender of persons. On the one hand, international law continues to bestow immunity upon diplomats, heads of state, heads of government and foreign ministers (as evidenced notably by the 2002 Belgian Arrest Warrant decision of the International Court of Justice). On the other hand, such immunities are limited to the legal process of other States and do not apply to international criminal courts within the sphere of their jurisdiction. In interpreting article 98(1) it should be noted, moreover, that the 1969 Vienna Convention on the Law of Treaties states that "third State" means a State, not a party to the treaty (article 2(1)(h)). Thus, and while this is ultimately a question for the Appeals Chamber of the Court to decide, there is good reason to believe that States Parties to the Rome Statute will ultimately be found to have constructively waived the immunity of their officials as between themselves for purposes of ICC procedures. Article 98(1) will then operate only in cases where immunities arise for officials of non-States Parties. Regardless of how one interprets "third State," however, it must be remembered that immunities are undergoing considerable evolution in the present era and may not be the same in 10 years' time as they were 10 years ago, or as they are today.

Procedurally, it is important to note that it is the ICC, and not a given State, that will determine whether immunities exist in a particular situation, although the ICC will refer to information provided by the State (rule 195). Because the ICC has the authority to determine whether or not immunities apply in a given situation, States Parties would be wise in their legislation to specify simply that immunities will not bar cooperation with the ICC. This ensures that the State Party will be able to meet its obligation to arrest and surrender individuals to the Court when required to do so. Canada, for example, amended its Extradition Act to provide procedures for surrender to the ICC, adding a provision to clarify that in the context of such procedures no claim could be made of "immunity under statute or common law"; it also specified in its State Immunity Act that the law would not apply to the extent that it conflicted with the Extradition Act (CA ss. 48 and 70, respectively).

Article 98(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 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.*

The term “sending State” refers to another State that has sent members of its armed forces onto the territory of the requested State under the terms of a Status of Forces Agreement (SOFA). 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. In other cases, however, and particularly where non-States Parties are involved, the Court will have to obtain the consent of the sending State. It must be underscored, however, that the traditional SOFAs aimed at by article 98(2) apply exclusively to persons sent to another country on official (typically military) business by their State and accepted by the host State for that purpose. The United States, on the contrary, has waged a campaign for the adoption of broad bilateral agreements aimed at preventing surrender to the ICC of all US nationals, whatever the purpose of their presence in the other State, as well as non-nationals contracted by the US government. Such agreements will be invalid to the extent that they go beyond the scope of the exception that article 98(2) provides.

This view was affirmed by the European Union in its Common Position on the matter, adopted in 2002 and 2003, which would restrict such agreements essentially to military personnel. Likewise, the presidents of the MERCOSUR member states adopted a Declaration at their 2005 summit stating that they would not enter into agreements tending to impinge on ICC jurisdiction. Traditional SOFAs aside, broad agreements of the type just identified should be avoided as likely to draw a State Party into eventual conflict with its obligations under the Statute.

### ***Transit across State territory***

A State Party is obliged to authorize transportation through its territory of a person being surrendered to the Court by another State, in accordance with its national procedural law, except where transit through that State would impede or delay the surrender (article 89(3)). The person being transported must be detained in custody during the period of transit (article 89(3)(c)). No specific authorization is required if the person is transported by air and no landing is scheduled on the territory of the transit State (article 89(3)(d)). However, if an unscheduled landing occurs on the territory of the transit State, that State may require a request for transit from the Court (article 89(3)(e)). 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.

States Parties will have to provide a legal foundation for such transportation through their territory of a person being surrendered by another State, particularly to ensure that there is a basis for the required detention. 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. Canada provides an example of such an approach; it amended its Extradition Act to ensure compliance with article 89 (CA(E) s. 76).

A second method of implementation is to establish a distinct regime within “free-standing” implementing legislation. New Zealand, Australia, the United Kingdom and Switzerland have effectively mirrored the obligations provided for in article 89 (NZ ss. 136 to 138, AU Part 9, UK ss. 21 to 22, SW article 13). In New Zealand, Part 7 of its implementing legislation deals with three situations: persons being surrendered to the ICC by another State under article 89, persons who are being temporarily transferred to the ICC by another State pursuant to article 93 and 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 implementing legislation in the United Kingdom treats requests for transit as if they were ordinary ICC requests for arrest and surrender, but with an expedited process for transferring the person to the ICC. The South African legislation refers to entry and passage of persons in custody through its territory; any warrant or order lawfully issued by the ICC will be deemed to be lawful in that territory.

### 3.3 Collecting and preserving evidence

#### *General matters*

In making a request for cooperation, 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.
- Any additional information that the State needs to execute the request (article 96(2)).

States Parties must in turn advise the Court of any special requirements for executing requests under their national laws (article 96(3)). Such laws and procedures must, however, be flexible enough to allow States Parties to comply with any specifications that accompany the request. Thus, the Statute states that requests for assistance are to be executed “in accordance with the relevant procedure under the law of the requested State” but that, unless prohibited by that law, such requests are to be executed in the manner specified by the Court, “including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process” (article 99(1)). These persons might include ICC personnel such as the Prosecutor or Deputy Prosecutors, and might also include defence counsel. In order to maximize their

contribution to the Court's work, States should design their implementing legislation to maximize flexible cooperation and minimize possible friction between their law and the requests of the Court.

### ***Admissibility of evidence before the ICC***

The Court has the power to decide whether or not to admit evidence (articles 64(9) and 69(4)), but 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 (i) the violation casts substantial doubt on the reliability of the evidence, or (ii) the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings (article 69(7)). In ruling on the relevance or admissibility of evidence, the Court shall not rule on the application of the State's national law (article 69(8)). Rather, in assessing "internationally recognized human rights" for the purposes of determining the admissibility of evidence, it is likely that the Court will rely on - among other sources - the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the United Nations Convention Against Torture, and such standards adopted or approved by the UN General Assembly as 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 four Geneva Conventions and their Additional Protocols, which have received widespread support from the international community.

Because the Court's decisions on relevance and admissibility of evidence will often have a decisive impact on ICC proceedings, States Parties should assist the Court in the collection and preservation of evidence in full awareness of the requirements of their national law, of international norms and standards, and of the Rome Statute.

### ***Receiving and channelling the request***

Since States Parties must comply with all requests for assistance in providing evidence and information (subject to the limited exceptions described immediately below), regardless of when and by what organ of the Court such requests are made, procedures need to be in place to ensure that all assistance requests are directed to the appropriate authority as soon as possible after they are received. Canada chose to implement this obligation by amending its Mutual Legal Assistance in Criminal Matters Act to add the ICC to the list of entities from which it can entertain requests for assistance. In Canada, the Minister of Justice has the authority to approve requests for assistance from the ICC and to authorize State authorities to apply for and execute search warrants according to existing legal procedures (ss. 11(1) and (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 authorize national officials to facilitate the investigation process. The United Kingdom legislation, like Canada's, applies existing procedural laws to the collection of evidence.

### ***Three limited exceptions to the duty to assist the Court***

Certain important exceptions or conditions to the duty to cooperate do exist. Thus, while article 93(1) requires States Parties to provide a range of assistance in response to requests made in the course of ICC investigations and prosecutions (including witness protection, search and seizure, and collection of evidence), three relatively narrow grounds for denying such a request can be identified.

The first is where the request concerns the production of documents or disclosure of evidence that relates to the requested State's national security (article 93(4)). Article 72 (discussed below) provides further detail on the procedures to be followed in such cases.

The second exception arises where the Court requests a form of assistance other than those explicitly set out in article 93(1)(a) to (k) - that is, making its request through the catch-all provision under subparagraph (l) of the same paragraph - and where such a form of assistance is prohibited by the law of the requested State. In such cases, and before denying the request, the State in question is obliged to "...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..." (article 93(5)). Only after having taken these steps in good faith would the State be entitled to deny the Court's request.

The third exception arises 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(3)). This exception to the duty to cooperate was settled on as a compromise between governments seeking a broad "national law" limitation on the duty, and those supporting no or minimal limits arising from that law. The qualification that the principle be of "general application" excludes norms aimed specifically at the ICC, while "fundamental" principles will generally have constitutional rank or the equivalent. While this provision does not explicitly state that the requested State can refuse to comply with the request, it does state that, after the failure of consultations (which the State is obliged to undertake in good faith) seeking to identify an alternative manner or conditions in which the assistance might be provided, the Court will "modify the request as necessary." The State would then be obliged to comply with the modified request, unless it in turn violated such a "fundamental legal principle." Cases where objections arise under this heading are bound to be rare, however. A hypothetical example would arise were the Court to issue requests for search and seizure under article 93(1)(h) without respecting the need for a prior judicial determination of necessity and proportionality - fundamental requirements of many legal systems. Yet such a development is highly unlikely to arise in the practice of the ICC. Moreover, as is



generally the case with the Rome Statute regime, it is the ICC that will decide whether or not the article 93(3) exception is validly invoked in a given situation.

### ***Privileged communications and information***

The ICC will recognize as privileged certain communications (whether written or oral) that consequently will not be subject to disclosure of any kind, even to an organ of the Court (article 69(5); rule 73). Specifically, communications in the context of a professional relationship between a person and his or her legal counsel are privileged, as is information received by the International Committee for the Red Cross in the course of its functions.

For other classes of privileged or confidential relationships, rule 73(2) sets out criteria by which the Court will make future decisions without setting out definitively which classes of relationship will benefit from privileges on confidentiality, and which will not. Rule 72(3) indicates, however, that the Court should “give particular regard to recognizing as privileged” certain communications with medical doctors, psychiatrists, psychologists, counsellors and religious clergy. Among other unnamed classes of relationships, the Court might one day decide to accord a qualified privilege to communications between journalists reporting from conflict zones and their sources, as the International Criminal Tribunal for the Former Yugoslavia has done. All such privileges can be lifted either by the written consent of the person concerned or by voluntary disclosure to a third person (rule 73(1)).

In order to assist the Court, States should ensure that privileged communications are appropriately protected and not subject to disclosure in the context of an ICC investigation. New Zealand did so by specifying in the cooperation provisions of its ICC law 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 (NZ s. 85(4)).*

Similarly, Canada's applicable law (the Mutual Legal Assistance in Criminal Matters Act, s. 18(7)) provides that persons named in an order for examination may refuse to answer questions or to produce records if to do so would violate the rules of the requesting entity (the ICC in this case).

### ***Witnesses and testimonial evidence***

Witnesses are required to give evidence in person unless the Court orders otherwise. Even a person in detention at the national level who agrees to testify before the Court will (if both the detainee and the State in question consent) be transferred to the Court and kept in custody for the duration of the relevant procedures (article

93(7)). The Statute does, however, allow the presentation of oral or recorded testimony either by video or audio technology in certain circumstances (article 69(2)). The Court also has the power to assure witnesses and experts appearing before it that they 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 (article 93(2)).

In relation to testimonial evidence, the main types of assistance likely to be requested of States Parties include the following:

**a) *Identification and location of persons***

Administrative procedures may be needed to enable States to identify and locate persons if requested (article 93(1)(a)). Such requests might relate to individuals (nationals or non-nationals of the requested State) who are present, as well as those who are about to enter, or who have recently left, their territory. While some States have implemented this provision simply by listing the cooperation measures listed in article 93 and indicating that they shall be undertaken upon request in any way not prohibited by national law (SW article 30, SA s. 14(a)), Australia and New Zealand have taken an approach whereby the legislation specifies the procedures to be undertaken. In Australia, such procedures involve the Attorney General executing the request by authorizing 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 authorized 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) *Witnesses: Taking statements and facilitating their appearance before the Court***

The taking of witness statements at the national level (article 93(1)(b); rules 74 and 75), including under oath, will be a key form of assistance that States Parties will be able to provide in order to assist the Court. When such statements are being taken for the purpose of later being introduced before the Court, then the Court may request that such statements be recorded in a particular form (normally by video) and in such a way as to allow the Prosecutor and defence counsel and perhaps others to have the opportunity (either in person or at a distance) to examine the witness during the recording. Since Court requests as to the manner used and persons present during the execution of requests for assistance are to be followed unless prohibited under national law (article 99(1)), it is extremely important for States Parties to ensure that their national implementing legislation allows the Prosecutor and defence counsel to participate accordingly.

Not all implementing legislation has been adequate in this regard, although it should be noted that the laws of Canada, France and New Zealand all appear able to accommodate the presence of representatives of participants in ICC procedures during the taking of testimony. The Netherlands and Switzerland helpfully anticipate that the Prosecutor and defence counsel will be able to put questions to

the witness directly rather than, for example, by merely suggesting questions to the national authority.

In addition, because the Statute fails to provide that witnesses should be compellable at the national level (that is, should be subject to subpoena in order to ensure that they appear to give their testimony before the relevant authority at the time and place indicated), States Parties can provide a “Court-friendly” aspect to their implementing legislation by expressly making enforceable their requests to witnesses to provide testimony. In a similar spirit, some States Parties (including Finland, Germany and Sweden) have provided in their ICC cooperation laws for the enforceability of summons to witnesses to appear before the Court, despite the reference to the duty of States Parties to facilitate the “voluntary appearance” of witnesses before the Court (article 93(1)(e)). Such provision for the enforceability of witness summons will assist the Court considerably. Even more States (including Finland, Spain and Sweden) have provided for (advance) compensation to witnesses travelling to the seat of the Court (which the State Party will then be entitled to seek reimbursement from the Court).

**c) *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 (article 93(1)(c)). States will need procedures to allow them to question the person, while ensuring that his or her rights are respected (see article 55(2) and the section “Rights of suspects and accused persons,” above). A written, audio or video record of the questioning must be kept in every case. 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 and 90) and the United Kingdom (UK s. 28).

In the interests of fairness, 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” (SW s. 2, article 34. 1). Article 55(1)(c) 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. The Court will pay the costs of translation, interpretation and transcription (article 100(1)(b)).

**d) *Protecting victims, witnesses and accused persons***

Extensive protections are provided to witnesses and victims by the Rome Statute, which contains numerous provisions on this subject (of which article 68 is the cornerstone) and mandates the establishment of a Victims and Witnesses Unit within the Court (article 43(6)). The Statute also requires States Parties to take measures for

the protection of victims and witnesses (article 93(1)(j)) and indeed of accused persons (articles 57(3)(c) and 64(6)(e)) upon request. While victims and witnesses have distinct roles before the Court, their fundamental requirements in this respect are the same, namely, protection from physical harm or any kind of intimidation, whether before, during or even after ICC proceedings. The protective measures requested by the Court will vary. They may involve providing a temporary safe residence for victims, witnesses, and their families, moving them to a different location within the State or to another State if necessary, perhaps even providing them with a new identity.

States Parties' implementing legislation anticipates in various ways the possibility of ICC requests for assistance in protecting victims and witnesses. For example, in the Australian and New Zealand legislation, the Attorney General is the person responsible for authorizing the request to proceed if he or she is satisfied that it 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. The Swiss legislation states simply that preventive measures may be taken to ensure the safety or physical or psychological well-being of victims, witnesses or their families (SW s. 32(c)). Canada's amendment to its Witness Protection Act and the United Kingdom's extension of the relevant provisions of its Criminal Evidence Order to its ICC legislation show how States with a national unit already dedicated to protecting victims and witnesses may simply be able to expand its mandate to include persons involved in ICC proceedings. The United Kingdom legislation also extends the protection afforded to victims and witnesses of sexual offences under pre-existing domestic legislation to victims and witnesses in proceedings brought in the context of the ICC (UK s. 57).

***e) Transferring persons in custody to the Court***

A State Party may consent to the temporary transfer to the ICC of persons who finds themselves in detention at the national level, but who agree to help the Court as witnesses (article 93(7)). In States that already have mutual legal assistance legislation allowing transfer of prisoners from one State to another for purposes of giving testimony, this optional form of cooperation may be provided for by fairly straightforward amendment (as Canada did, for example, in adjusting its existing mutual assistance scheme). New Zealand, on the other hand, created specific provisions in its ICC legislation on the temporary transfer of prisoners to the Court (see NZ s. 95 to 99).

***Physical and documentary evidence and proceeds of crime***

The ICC may request a wide range of assistance related to physical and documentary evidence from States Parties. Some of these are mentioned expressly in the Statute, including:

- The identification and whereabouts of persons or the location of items (article 93(1)(a)).
- The examination of places or sites, including the exhumation and examination of grave sites (article 93(1)(g)).
- The execution of searches and seizures (article 93(1)(h)).
- The provision of records and documents, including official records and documents (article 93(1)(i)).
- The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes (article 93(1)(k)).

The Court may also request “[a]ny other type of assistance which is not prohibited by the law of the requested State” (article 93(1)(l)). States concerned with assisting the Court therefore need to provide as few limits as possible on the kinds of evidence and evidence-gathering services they can provide to the Court.

Some of these tasks, such as identifying items requested by the Court (article 93(1)(a)) is, on a legislative level, a simple matter of adding the ICC to the list of those entities (States, normally) entitled to request legal assistance from the State, or otherwise of authorizing national authorities to respond to the relevant request. Likewise, the service of Court documents (article 93(1)(d)) will generally require only that there be a procedure for funnelling ICC requests into the national machinery for executing such service. States will need similar mechanisms to allow them to preserve evidence (article 93(1)(j)) and to provide official documents to the ICC (article 93(1)(i)): while these documents might sometimes be of a sensitive nature, the limited procedure for non-disclosure of national security information (see below) needs to be borne in mind.

### ***Examination of sites***

States may need to review any laws that prohibit persons from visiting or examining or disturbing particular locations in the State's territory (article 93(1)(g)). The Statute makes specific mention of the examination of grave sites, which may raise cultural or religious concerns in some States. However, the experience of the two International Criminal Tribunals has shown that sensitivities such as these can be successfully negotiated. Canada, by adding the ICC to the list of entities in its mutual assistance legislation from which it can entertain requests for assistance, 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).

### ***Searches and seizures***

As for searches and seizures (article 93(1)(h)), States Parties will need to ensure that when the ICC requests assistance in conducting a search, there exists a basis in national law for doing so (through issuing a search warrant, typically, or through giving legal force to an ICC request through endorsement by the responsible national authority). New Zealand incorporated this obligation into its ICC legislation

while also making reference to its Police Act (see NZ s. 77). Canada, which amended its mutual legal assistance legislation, indicated that searches are to be conducted in accordance with its Criminal Code (CA(L), s. 10 and 12 (4)).

### ***Proceeds of crime***

For proceeds of crime (articles 93(1)(k), 77, and 109), States that already have legislation may only need to make minor amendments to allow the relevant authorities to identify, trace and freeze or seize the proceeds, property, assets and instrumentalities of crimes when so requested by the ICC. Such actions are to be without prejudice to the rights of bona fide third parties.

Such laws are by now of course quite common in jurisdictions around the world as a result of the development of international cooperation and the harmonization of standards in the areas of drug trafficking, terrorist financing, organized crime and corruption. States that do not yet have proceeds of crime legislation may need to adopt more substantial amendments to enable them to fulfill all of the obligations contained in the Statute, including the freezing of assets before conviction where justified, “having due regard to the strength of the evidence and the rights of the parties concerned” (article 57(3)(e)). Canada implemented this obligation by amending its pre-existing Mutual Legal Assistance Act to include the ICC and to add specific language on the enforcement of ICC orders and judgments for forfeiture and collection of fines (see Canada's ICC legislation s. 57, and MLA Act ss. 9.1 and 9.2). Under the Swiss legislation, and as with other ICC cooperation requests, the Central Authority executes a request by authorizing officials to enforce orders for freezing proceeds of crime (SW article 30(j)). Forfeiture is ultimately for the benefit of victims of crimes within the jurisdiction of the ICC.

### ***Other assistance***

Apart from the specific forms of cooperation that the Court may request under article 93(1)(a) to (k), the Court may 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(1)(l)). Where problems might arise with any such request, States Parties are required to consult with the Court to determine whether the assistance might be provided subject to specified conditions (article 93(5)). The Swiss legislation provides for cooperation in such matters that includes “any procedural acts not prohibited by Swiss law” (SW article 30).

### ***Protection of national security information***

The Statute provides that States Parties 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 that relates to its national security (article 93(4)). The potential for such denials is strictly limited, however, and the Statute sets out a detailed procedure for dealing with claims for the protection of such information (article 72).

The State in whose opinion the disclosure of information or documents would prejudice its national security interests must, notably, take “all reasonable steps” to seek to resolve the matter in cooperation with the Prosecutor, the defence or the Pre-Trial Chamber or Trial Chamber as the case may be. Such “reasonable 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 (article 72(5)). Once all such steps have been exhausted, however, the Court may take steps set out in article 72(7), such as requesting further consultations with the State, ordering disclosure, or reporting the matter to the Assembly of States Parties. This scheme is based on an assumption that States Parties will engage in good faith negotiation with the Court to reduce to a minimum any non-disclosure of evidence on the grounds of national security concerns. While the Court and the Assembly of States Parties can ultimately find the State to be in violation of its international obligations if it unreasonably refuses to disclose information, a State Party that engages in good faith in the dialogue envisioned by article 72 should have no grounds for worry.

Some States may feel that they have no need to reflect the essentially procedural obligations under article 72 in their implementing legislation, since both the determination that a national security interest arises and the decision as to procedures to follow are often matters for the executive. However, a review of national procedures should be undertaken in any event to ensure that the dialogue envisioned by article 72 will be possible. States may also find that it helps to prevent abuse of article 72 to frame principles in their legislation for its use, or to assigning to judicial authorities - as Uruguay did, naming its Supreme Court - the exclusive competence to decide whether a refusal to cooperate under article 72 could properly be invoked. As a general matter, because of their potential damaging impact on ICC procedures, States Parties should endeavour to invoke article 72 as rarely and as narrowly as possible.

### ***Protection of third-party information***

If the Court requests that a State Party provide a document or information that was disclosed to it in confidence by a third party (State, intergovernmental organization or international organization), the requested State must seek the consent of the originator before disclosure (article 73). If the originator is a State Party, then it shall either consent or undertake to resolve the issues with the Court. 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.

Although procedures for dealing with third-party information and its provision to the Court may be regulated by the executive and not through legislation in certain jurisdictions, 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 and 165) and Australia (AU Part 7). In each of these examples, the Attorney General

must seek the consent of the originator of the information or document and follow the procedures required. Both pieces of legislation also provide for the situation in which the State is the originator of the information or documents in question and another State is seeking consent for their disclosure to the ICC.

### **3.4 Enforcement**

The following discussion makes a distinction, as does the Rome Statute (article 77), between fines and the ordering of forfeiture, on the one hand, and sentences of imprisonment on the other.

#### ***Fines and forfeiture orders***

Once a person has been convicted by the ICC, the Court may request a State Party to identify, trace and freeze or seize the relevant proceeds, property and assets and instrumentalities of the crime for purpose of forfeiture (articles 77(2)(a) and 93(1)(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, the Court may order a convicted person to provide reparations to, or in respect of, victims, including restitution, compensation and rehabilitation (article 75(2)). States Parties must cooperate in the execution of fines and forfeiture orders or orders of reparation in accordance with procedures under national law (articles 109 and 75(5)). If States Parties are unable to give effect to a reparation or forfeiture order, they must take measures to recover the value of the proceeds, property or assets ordered forfeited by the Court, without prejudice to the rights of bona fide third parties (article 109(2)). States may initially be requested simply to freeze assets subject to a particular fine, forfeiture or reparation order, pending appeal.

States Parties have taken various approaches to implementing their obligations regarding these obligations. The Canadian legislation amends pre-existing mutual legal assistance legislation to provide that ICC orders are to be enforced as if they were special search warrants or restraining orders (CA ss. 56 to 69). The legislation establishes a process where the Minister of Justice may authorize the Attorney General to make arrangements for enforcement and then file the ICC order giving it status of its domestic equivalent. Likewise, under the United Kingdom legislation, the Secretary of State designates a person to act on behalf of the ICC and directs that person to apply essentially for the conversion of the ICC request into a national court order (UK ss. 37, 38 and 49). The New Zealand legislation (NZ Part 6) establishes a scheme that applies existing proceeds of crime legislation for freezing and establishes a separate domestic forfeiture regime and separate powers for fines and reparation orders. Under Swiss legislation, all decisions on whether to proceed or not with the execution of relevant ICC requests lies with a central authority (SW



articles 3 and 41). The South African legislation also establishes a central authority that receives and authorizes all requests from the ICC and sets out detailed procedures regarding requests for entry, search and seizure as well as restraint and confiscation orders (SA ss. 25 to 29). The Norwegian and Finnish implementing laws (NO s. 11, FI s. 9,) establish general powers to enforce fines and reparation orders, referring to the use of existing legislation, but leaving out procedural detail.

The Court can order fines and other property collected through forfeiture or reparation orders to be transferred to the Court or specifically to the Trust Fund for Victims established by the Assembly of States Parties (articles 79(2) and 109(2)). Where appropriate, the Court can order that payment of reparations be made through this Fund (article 75(2)). The New Zealand legislation, accordingly, ensures that money or property recovered as a result of ICC orders must be transferred to the Court, but without specifying procedures for doing so, while Canada's legislation authorizes the creation of a national Crimes Against Humanity Fund in which to deposit money collected through enforcement of ICC orders for subsequent payments either to the ICC Trust Fund or to victims themselves.

## ***Sentences of imprisonment***

### ***Accepting sentenced persons***

States Parties are not required to accept persons convicted by the ICC to serve their sentences of imprisonment on their territory. Such a commitment is voluntary (article 103). A sentence imposed by the Court will be served in a State that the Court has selected from a list of States willing to accept the sentenced person (article 103). When the Court designates a State in a particular case, it is required to inform the Court promptly whether it accepts the designation (article 103(1)(c)). A State that has indicated its willingness to accept sentences to be served in its system may attach conditions agreed upon by the Court and consistent with Part 10 of the Statute (article 103(1)(b)). 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)).

States Parties should therefore decide whether they are prepared to accept persons sentenced by the ICC and, if so, on what conditions. Some of the conditions cited by States that declared their willingness to accept sentenced persons when they signed the Rome Statute include accepting only persons of the accepting State's nationality, or those sentenced to not more than 30 years' imprisonment, or those whose sentence would be enforced in accordance with national legislation on the maximum duration of sentences. Agreements between the Court and States Parties may ultimately govern the relationship under this part; Austria entered into an agreement with the Court on the enforcement of sentences in 2005, and the United Kingdom did so in 2007.

States that accept ICC prisoners make a positive contribution to the fulfillment of the Court's purpose. The Court has only very limited detention facilities in The

Hague and will rely almost entirely on States to enforce its sentences of imprisonment in national facilities. Any shortage of suitable facilities will certainly create difficulties for the Court. At a minimum, States may wish to accept their own nationals so that these can serve their sentences close to family and home-State officials and in conditions corresponding to national expectations. States should, of course, also consider their capacity and resources. ICC cases will often involve notorious facts and be highly charged politically; they might therefore impose greater demands on national correctional services than on regular cases, for example by requiring increased security for detained persons, 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 domestic law may also be needed to reflect in the enforcement scheme of the Statute, for example to ensure privacy of communication between sentenced persons and the Court.

Even once a State Party has declared its willingness in principle to accept convicted persons (and subject to whatever general conditions), a decision will still have to be made whether to accept any particular prisoner in a given situation when requested by the Court. Domestic legislation may therefore provide for consultations with the appropriate national authorities before taking such a decision, may set out conditions to be contemplated or may simply empower the responsible authority to make (unspecified) conditions. The New Zealand legislation - which expressly provides that the State is not obliged to accept every prisoner - stipulates, for example, that the Minister of Justice must consult with the police, the Department of Corrections and the Department of Labour (NZ ss. 139 to 156). Conditions stipulated by existing legislation include requiring the written consent of the prisoner to serving the sentence in the State, requiring ministerial consent, requiring that at least six months of the sentence remains to be served (AU Part 12), and requiring the convicted person to be a citizen or permanent resident of the enforcing State (SW Chapter 5).

### ***Enforcement of sentences***

The Court's designation of a State of enforcement is based on several governing principles (article 103(3)). These include "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," as well as the application of widely accepted international treaty standards, the views and nationality of the sentenced person, and other factors. The Court may decide to transfer a sentenced person to another State at any time it considers necessary, including in response to a request from the prisoner, and States Parties must assist the Court with the transfer (articles 104 and 107).

The Court's sentence of imprisonment is binding on the State responsible for its enforcement, "which shall in no case modify it" (article 105). A State cannot modify the sentence on its own initiative. Where new circumstances arise that did not exist at the time of acceptance and that substantially affect the terms or length of

imprisonment, the State must notify the Court so that it may review the situation and, if necessary, transfer the sentenced person to another State (article 103(2)).

The Court has primacy in supervising the enforcement of sentences and the conditions of imprisonment (article 106). The State of enforcement is required to allow “unimpeded and confidential” communication between the Court and the sentenced person and in particular not to impede the latter from applying for appeal or revision (articles 105(2) and 106(3)). Conditions of imprisonment are governed by the law of the State of enforcement and “shall be consistent with widely accepted international treaty standards governing treatment of prisoners” (article 106(2)). Conditions may be neither more nor less favourable than those of national prisoners.

After completion of the sentence, a person who has served a sentence in a State that is not of his or her nationality shall be transferred to a State obliged or willing to receive that person, unless the State of enforcement agrees to him or her remaining on its own territory (article 107). The State of enforcement cannot extradite the sentenced person to a third State, nor prosecute the person, for any conduct that arose prior to the transfer of the individual to the State unless either the Court agrees or the individual voluntarily remains in the State of enforcement after the completion of the sentence (article 108).

### ***Review of the sentence by the Court***

The Court shall review a sentence of imprisonment when the person has served two-thirds of the sentence, or 25 years in the case of life imprisonment (article 110). The Court may reduce the sentence based on certain factors (article 110(4)). States that accept sentenced persons will need to establish appropriate procedures to allow the effective and expeditious conduct of such a review.

### ***Legislative implementation***

Considering all of the above dimensions of the enforcement of ICC sentences of imprisonment, States Parties may need to adopt changes to both their legislative and administrative regimes. Norway took the simple approach of stating that the enforcement of sentences will be in accordance with Part 10 of the Rome Statute (NO s. 10). Finland extended its pre-existing domestic enforcement scheme to ICC sentences (FI s. 7), while both Switzerland and South Africa applied their domestic enforcement scheme while making express provision for communication of requests by the ICC as well as between the prisoner and the ICC through the State's central authority. A more comprehensive approach is to provide in the legislation for a detailed, self-contained enforcement scheme that covers transportation, enforcement warrants or orders, detention, review, communication, and so on (AU Part 12, NZ ss. 139 to 156, UK Part 4). In the United Kingdom and New Zealand, once a warrant is issued, the prisoner is treated for all purposes as if he or she were 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. In

addition, a number of States have legislation that specifically deals with the issue of costs. For example, the Swiss law sets out which costs will be covered by the ICC and which 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.

### **3.5 Privileges and immunities of ICC 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.” 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(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.” All of these provisions aim to help prevent any politically motivated allegations against such personnel or any reprisals after they retire from 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, and in September 2002 the Assembly of States Parties adopted the Agreement on the Privileges and Immunities of the International Criminal Court (APIC), which was opened for signature and entered into force for the 10 States that had ratified it on 22 July 2004. As of the beginning of 2008, the Agreement had 52 States Parties. APIC contains additional definitions and places some additional obligations on States beyond those set out in article 48 of the Rome Statute. It is therefore imperative for the effective operation of the ICC and its personnel that States Parties (and even non-States Parties) ratify and implement APIC in addition to the Rome Statute.

Article 48(5) of the 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.

Since most States already have in place general privileges and immunities legislation or regulations dealing with diplomatic relations, foreign missions or

international organizations, States may have little difficulty in recognizing the privileges and immunities of officials, personnel and others participating in the proceedings of the ICC in their implementing legislation. Because a number of Rome Statute States Parties drafted implementing legislation prior to the adoption of APIC, provision was sometimes made for the executive to pass regulations, such as orders in council, to give effect to APIC (UK Sch. 1 s. 1(2) and CA s. 54). South Africa's ICC Act refers to the procedure established in its Diplomatic Immunities and Privileges Act to elaborate details of the privileges and immunities of certain ICC officials and personnel by proclamation (SA s. 6). The Canadian ICC legislation simply amends the existing Canadian Foreign Missions and International Organizations Act by adding a reference to the privileges and immunities of ICC personnel (CA s. 54). Other States may not have to implement article 48 into domestic legislation at all if these provisions could be considered self-executing and thus applicable without the authorization of domestic law.

### **3.6 Offences against the administration of justice of the ICC**

Article 70(1) of the Rome Statute creates certain offences against the administration of justice of the ICC, for which the maximum penalty is five years imprisonment and/or a fine (article 70(3)). These are as follows:

- Intentionally giving false testimony when under an obligation pursuant to article 69(1) to tell the truth.
- Intentionally presenting evidence that the party knows is false or forged.
- Intentionally 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.
- Intentionally 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.
- Intentionally soliciting or accepting a bribe as an official of the Court in connection with his or her official duties.

Article 70(4)(a) requires all States Parties to extend their criminal laws that penalize such offences in order to include article 70(1) offences where these are committed by their nationals or on their territory. Article 70(4)(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 required 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(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 to 172). For example, they provide details of the considerations relevant to the 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 and 17 to 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 overburdened with minor prosecutions that States could manage.

Article 70(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 it 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.

Most, if not all, States Parties will already have legislation in place (within their criminal code, for example) that creates offences against the administration of justice within their own legal systems. Article 70(4)(a) suggests that such legislation should merely be extended to include persons involved in ICC proceedings in order to comply with the Rome Statute. States Parties should, however, ensure that their national legislation includes all of the offences listed under article 70(1), for example by reproducing the offences set out in the Rome Statute.

In response to the above obligations, Finland, in its 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 amended the existing Criminal Code Act by adding a section on crimes against the administration of justice of the ICC (AU(C) Subdiv. J). Norway chose simply to provide in its legislation that certain sections of the domestic penal code correspond to the offences listed under article 70 (NO s. 12). 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 to 26). Canada essentially took certain provisions from

its Criminal Code and updated, reworded and applied them to the ICC context, thereby harmonizing domestic criminal law with the Rome Statute. Canada went beyond its obligations under article 70 by criminalizing 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 to 23, SA s. 36, UK s. 54).

National legislation implementing a State's article 70 obligations must also have both territorial and extraterritorial application so that States Parties can prosecute such offences when committed both on the State's territory and by nationals while at the Court or elsewhere outside the State (article 70(4)). Accordingly, 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 can be found in legislation from Argentina, Norway, South Africa and the United Kingdom (AG s. 23, NO s. 12, SA s. 37(1), UK s. 54(4)).

The Statute is silent on the maximum or minimum penalty that a State can impose when prosecuting such offences. However, given the potentially serious impact of such offences on the justice process, a maximum penalty of no less than five years is a good guide, as per article 70(3). States may also wish to provide for different penalties for different types of article 70 offences, as some States Parties have done in their implementing legislation, with penalties ranging from one to 15 years' imprisonment.

In addition to providing for their own prosecution of these offences, States should have legislation and procedures in place to enable them to provide cooperation to the ICC when it is the latter that prosecutes article 70 offences. Such cooperation 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 cooperation can be governed by the national laws of the requested State (article 70(2)) while still enabling the State to "cooperate 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, and in fact 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, such as 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 judgments or decisions of the ICC and also permits the

national courts to take account of any other relevant international jurisprudence (UK s. 54(2)).

Finally, 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, although 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, such as the Court's primary role in supervising and reviewing the sentence of the person, do not apply to offences under article 70. A State could nonetheless choose to enforce a sentence of imprisonment under this provision in accordance with the principles set out in that Part.

### **3.7 Procedures where the ICC wishes to investigate the same matter as a State Party**

During the potentially complicated procedures under articles 18 and 19 for determining whether it will be the ICC or a given State that will investigate and prosecute a particular matter (see Chapter 4.2 "Requirements for application of the complementarity principle) 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. During this period, certain measures are provided for in the Statute that may trigger a State's duty to cooperate with the Court and therefore to legislate to this effect. Alternatively, even where the duty to cooperate does not arise, States may opt to provide for the possibility of such cooperation under their national law in order to better aid the Court in the fulfillment of its mission. For example, the Court may, in exceptional circumstances, authorize the ICC Prosecutor to collect and preserve evidence during these periods (articles 18(6) and 19(8)), which assumes that, even at the stage at which the admissibility of a case is still in question, procedures must be in place to allow the cooperation envisioned under Part 9 of the Statute. Moreover, where the ICC Prosecutor has deferred the investigation of a given matter to a State at its request, the Prosecutor can ask those States to provide periodic reports on the progress of their investigations and any subsequent prosecutions (article 18(5)). States Parties are required to "respond to such requests without undue delay." Even where the Prosecutor decides to postpone investigation in the absence of a State request, the Prosecutor can request the relevant State to make available information on any proceedings in the same matter (article 19(11)), and that information can be kept confidential by the Prosecutor at the State's request.

Most of the matters just outlined will not require implementing legislation, but will require efficient communication between the ICC and national authorities, making it desirable for the national authorities to have efficient administrative procedures in place for dealing with such matters.



## 4. IMPLEMENTATION AND THE COMPLEMENTARY JURISDICTION OF THE ICC

This Chapter explains how States may avail themselves of the Rome Statute's "complementarity principle," which grants States priority over the ICC in investigating and prosecuting ICC crimes. The Chapter clarifies the nature of the complementarity principle, describes requirements for its application in specific cases and suggests a number of implementation measures that will allow States to take full advantage of the principle in accordance with the Rome Statute. It covers:

- The nature and purpose of the complementarity principle.
- Requirements for the application of the principle of complementarity to assist States that are preparing implementing legislation and wishing to avail themselves of this principle.
- Jurisdictional considerations relevant to complementarity. Understanding the ICC's jurisdiction will enable States wishing to avail themselves of the complementarity principle to match that jurisdiction in their domestic implementing legislation.
- The ICC's subject matter jurisdiction: genocide, crimes against humanity and war crimes; individual criminal responsibility and inchoate offences; responsibility of commanders and other superiors; and grounds for excluding criminal responsibility. A critical factor governing availability of the complementarity principle is whether domestic criminal jurisdiction extends to the full range of events and behaviour coming within the ICC's jurisdiction.
- Rules of evidence and procedural standards in national criminal justice proceedings and implementation considerations.

### 4.1 The principle of complementarity of the ICC

The ICC was designed to play a role that is complementary to that of national legal systems in the investigation and prosecution of serious international crimes. Rather than substituting the ICC for national criminal processes, the Rome Statute makes it clear that States continue to bear the primary responsibility for investigating and prosecuting such crimes that come within their jurisdiction. For example, its Preamble affirms that the effective prosecution of the most serious crimes of concern to the international community as a whole must be ensured by taking measures at the national level and by enhancing international cooperation. The Preamble similarly recalls that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.

It must be noted that the operative provisions of the Rome Statute do not themselves explicitly impose an obligation of prosecution on States Parties. However, at least with some of the crimes covered by the Rome Statute, such an obligation can be found in other widely ratified treaties. For example, 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. Similarly, under article V of the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”), States Parties undertake to enact the necessary legislation to provide effective penalties for persons guilty of genocide and related offences. Moreover, as implied in the Preamble’s provisions of the Rome Statute referenced above, it can be argued that all States bear a general, customary international legal obligation to ensure investigation and prosecution of all crimes coming within the jurisdiction of the ICC.

Building on the premise that States have a duty to exercise their criminal jurisdiction over perpetrators of international crimes, the Rome Statute subordinates the ICC’s exercise of jurisdiction over such crimes to that of States. In other words, the ICC may only exercise its jurisdiction over a crime if States also having jurisdiction over that crime fail genuinely to investigate or prosecute it. Every State’s duty to exercise criminal jurisdiction over those responsible for international crimes is thus matched, under the Rome Statute, with the first opportunity to do so. In this sense, the jurisdiction of the ICC is “residual” or “complementary” to that of States, which have priority in investigating and prosecuting ICC crimes coming within their jurisdiction.

This principle of complementarity, which lies at the heart of the ICC’s jurisdictional scheme, reflects the primacy of States’ responsibility to ensure that perpetrators of serious international crimes are brought to justice. It is also rooted in sound, practical considerations. As reflected in policies adopted by the Office of the ICC Prosecutor, the ICC is obliged to focus its limited investigative and prosecutorial resources on only those most responsible for only the gravest of ICC crimes. Therefore, the goal of ending impunity for all perpetrators of all international crimes requires, of necessity, investigative and prosecutorial efforts by States as well. Moreover, States will often be, for evidentiary and other reasons, in the best position to investigate or prosecute international crimes, particularly those perpetrated in their territory or by their nationals. In short, the interests of international criminal justice are best served by active engagement by States in the investigation and prosecution of serious international crimes, and, hence, by the principle of complementarity.

For all these reasons, States Parties implementing their obligations under the Rome Statute should carefully consider whether and how to enhance their ability to investigate and prosecute ICC crimes. So, too, should States that have not yet become parties to the Rome Statute, as nothing in the Statute limits application of the complementarity principle to States Parties.

The remaining sections of this Chapter examine specific issues that should be considered by States wishing to put the principle of complementarity into practice, including:

- Requirements and limitations of the complementarity principle.
- Jurisdictional considerations related to national investigation and prosecution of ICC crimes.
- Correspondence between national law and the Rome Statute's definitions of ICC crimes, rules relating to individual criminal responsibility and grounds for excluding criminal responsibility.
- Consistency of national rules of evidence and procedure with genuine national investigation and prosecution of ICC crimes.

## **4.2 Requirements for application of the complementarity principle**

### ***The twin aspects of complementarity***

Article 17 of the Rome Statute gives operative expression to two key aspects of the principle of complementarity. A case is deemed inadmissible before the ICC if:

- There is prior or ongoing genuine investigation or prosecution by a State having jurisdiction over it.
- The accused has already been tried for the same conduct by another court (such as a national court) in accordance with internationally recognized norms of due process and with an intent to bring the person to justice.

The applicability of both aspects of the complementarity principle is conditional. For the first, inadmissibility before the ICC turns critically on the *genuineness* of the national investigation or prosecution; for the second, it depends primarily on *proper prosecutorial and judicial intent* and respect for certain *due process guarantees* in the prior proceedings. These conditions for application of each aspect of the principle of complementarity are examined in more detail in the following two subsections.

### ***Genuine national investigation or prosecution***

Where a State having jurisdiction over an ICC crime chooses to exercise that jurisdiction by investigating or prosecuting the crime, the principle of complementarity will normally be triggered, preventing the ICC from exercising its jurisdiction over the case. However, any such national investigation or prosecution must be genuine to have this effect. This necessary safeguard is meant to ensure that perpetrators of ICC crimes do not escape justice as a result of inadequate national investigations or prosecutions.

Article 17(1) foresees four specific scenarios in which a national investigation or prosecution will fail to trigger the complementarity principle and therefore fail to prevent the ICC from exercising its jurisdiction over a case:

- Where the State is unwilling genuinely to investigate or prosecute.
- Where the State has investigated but has decided not to prosecute due to an unwillingness to do so genuinely.
- Where the State is unable genuinely to investigate or prosecute.
- Where the State has investigated but has decided not to prosecute due to an inability to do so genuinely.

For the first two such scenarios, article 17(2) provides further guidance to the ICC in deciding whether there is or has been State *unwillingness* genuinely to investigate or prosecute. In determining this issue, the ICC is to consider whether, in light of due process principles recognized by international law:

- the purpose of the national proceedings or of the decision not to prosecute was or is to shield the person in question from criminal responsibility for a crime within the jurisdiction of the ICC;
- the national proceedings have been delayed unjustifiably and in a manner inconsistent with an intent to bring the person concerned to justice; or
- the national proceedings were not or are not being conducted independently or impartially, and in a manner consistent with an intent to bring the person concerned to justice.

Thus, unwillingness genuinely to investigate or prosecute ultimately comes down to evidence of an ulterior motive inconsistent with bringing perpetrators of ICC crimes to justice.

Many constitutions allow the head of state or executive branch a discretionary power to grant amnesties or pardons. Amnesties and pardons (whether or not linked to national truth commissions and the like) are not explicitly addressed in the Rome Statute, even in its provisions on complementarity, reflecting the mixed views within the international community as to the effectiveness of such measures in bringing about lasting peace and reconciliation. However, it is arguable that granting amnesties for serious international crimes is inconsistent with the duty of States, recognized in the Preamble of the Rome Statute, to prosecute or otherwise exercise their criminal jurisdiction over such crimes. There is also a growing body of opinion that amnesties for serious international crimes are inconsistent with customary international law, and a number of jurisdictions, such as Panama and Uruguay, have prohibited them in their Rome Statute implementing legislation. In cases where amnesties or pardons have been granted as part of a national reconciliation process, article 17(2) requires that the ICC consider whether that process is a genuine attempt to achieve justice, or rather an attempt to shield perpetrators of ICC crimes from criminal responsibility for those crimes.

In determining *inability* of a State genuinely to investigate or prosecute, article 17(3) requires that the ICC consider whether, due to a total or substantial collapse or unavailability of its national judicial system, a State is unable to obtain the accused or necessary evidence or is otherwise unable to carry out national proceedings. As a result, a finding of inability genuinely to investigate or prosecute turns on issues of capacity rather than on issues of motivation or intent.

### ***Prior national trial for conduct amounting to an ICC crime***

#### ***Complementarity and the ne bis in idem principle***

It is a general principle of criminal law that a person may not be tried or punished twice for the same conduct or crime (*ne bis in idem*). This principle is found, in one form or another, in most national criminal codes, in some constitutions and in article 14 of the International Covenant on Civil and Political Rights (ICCPR). It is also enshrined in article 20 of the Rome Statute.

Article 20(3) specifically addresses the situation where a person has already been tried by another court (such as a national court) for conduct amounting to an ICC crime. In such a situation and as a general rule, the ICC will not be able to try that person for the same conduct. This, then, is the second aspect of the complementarity principle described above. As such, this particular facet of the *ne bis in idem* principle is incorporated into article 17 as one of the grounds of inadmissibility of a case before the ICC.

Note that application of the *ne bis in idem* principle, as expressed in article 20(3), does not require that the prior national trial be related to charges of ICC crimes per se. The question is whether the person concerned has been tried for conduct amounting to an ICC crime. For example, a national trial for multiple counts of premeditated murder, “hate crimes” or other sufficiently serious crimes under national law may, depending on the circumstances, be found to constitute a trial for conduct amounting to genocide or crimes against humanity within the meaning of the Rome Statute, and thus oust an exercise of jurisdiction by the ICC. What matters, in other words, is the substance of the charges on which the national trial proceeds, rather than on their formal appellation. On the other hand, a national trial for domestic criminal offences that do not reflect the seriousness of corresponding ICC crimes will likely not trigger the *ne bis in idem* or complementarity principles. As is discussed below, such a trial may be considered an attempt to shield the alleged perpetrator from criminal responsibility for ICC crimes, and thus fail to block the ICC's exercise of jurisdiction.

#### ***Exceptions to the ne bis in idem principle in the Rome Statute***

As in the case of national investigations or prosecutions, it is necessary to ensure that prior national trials neither allow perpetrators of ICC crimes to escape justice for their actions, nor amount to violations of internationally recognized due process requirements. In other words, an acquittal secured in a national court through

violation of due process standards or for purposes other than bringing the relevant person to justice does not serve the goals of international criminal justice. Nor will it bar the ICC from trying that person for the same conduct. Article 20(3) of the Rome Statute specifically allows the ICC to try a person for an ICC crime, even after being tried for the same conduct in a national court, if the national proceedings were either:

- aimed at shielding the person from criminal responsibility for ICC crimes; or
- not conducted independently or impartially in accordance with international due process norms and in a manner consistent with an intent to bring the person concerned to justice.

An example of the first exception to the *ne bis in idem* principle would be a situation where a State tries a perpetrator of genocide for common assault. Such a trial, even if respecting all international legal standards concerning impartiality, independence and due process, could well be interpreted as an attempt to shield the person from full responsibility for an extremely serious crime. If that were the ICC's conclusion, it would not bar the ICC from trying the person for ICC crimes.

When a national court convicts a person for conduct amounting to an ICC crime, it of course has the power to impose the sentence it considers appropriate. The nature or severity of the sentence imposed, or any subsequent rulings concerning pardon, parole or suspension of sentence, will not normally form the basis for an exercise of jurisdiction by the ICC over the case unless the ICC finds that the purpose of the sentence or other ruling was to shield the convicted person from criminal responsibility for ICC crimes.

The second exception to the *ne bis in idem* principle contemplated in article 20(3) focuses on the extent to which the national trial is conducted in accordance with due process requirements recognized in international law. Articles 9, 14 and 15 of the ICCPR form the primary source of such requirements. This focus does not mean, however, that the ICC has the power to retry every case in which a procedural safeguard was violated in the national proceedings. In order for the ICC to proceed with its own trial in such a case, it would have to find that, in addition to procedural violations, the overall conduct of the trial betrays an intent to prevent the person concerned from being brought to justice.

Given that the *ne bis in idem* principle is found in most national criminal codes, it would be preferable for the national law implementing the Rome Statute to explicitly provide for the exceptions to the principle set out in article 20(3).

### ***Complementarity determinations***

Under the Rome Statute, the ultimate authority to decide whether the principle of complementarity applies in any particular case is placed in the hands of the ICC itself. At the same time, the Statute and the Rules of Procedure and Evidence provide

that States exercising jurisdiction over a case will have numerous opportunities to present information concerning national proceedings to the ICC in order to ensure a fair and informed assessment of the adequacy of those proceedings. States may also challenge the admissibility of cases, on the basis of complementarity at a number of stages in the proceedings (articles 18 and 19). Decisions on admissibility may be appealed to the Appeals Chamber (article 82). With the 18 ICC judges representing every region and principal legal system of the world, the ICC is able to take into account legitimate cultural differences and approaches to national investigations, prosecutions and trials.

### ***Implementation considerations***

A State wishing to take advantage of the Rome Statute's complementarity provisions should:

- Ensure that national laws and procedures are in place to carry out investigations and prosecutions of conduct amounting to ICC crimes.
- Ensure that national trials for such conduct are held before independent and impartial tribunals in accordance with due process requirements recognized in international law.
- Implement procedures to enable relevant national authorities to provide relevant information to the ICC concerning national investigations and prosecutions and, where necessary, to challenge the admissibility of cases before the ICC on the basis of complementarity.

As ultimate authority to determine issues of complementarity rests with the ICC, States may need to review and amend existing regimes if domestic courts have such a power. Alternatively, States Parties may choose to provide for final ICC authority on issues of complementarity in their implementing legislation, as in the case of New Zealand (NZ ss. 8 to 13).

## **4.3 Jurisdictional considerations relevant to complementarity**

### ***The link between jurisdiction and complementarity***

The complementarity principle in essence provides that the ICC will not exercise its jurisdiction over a particular case where a State also having jurisdiction over the case exercises that jurisdiction. In order to put this principle into practice, therefore, it is necessary both to:

- Understand the scope of the ICC's jurisdiction.
- Ensure that commensurate national jurisdiction exists to the extent permissible under international law.

The next two subsections discuss, respectively, the jurisdiction of the ICC and approaches to implementing adequate national jurisdiction over ICC crimes for purposes of invoking the complementarity principle.

## ***The jurisdiction of the ICC***

### ***The three dimensions of ICC jurisdiction***

The jurisdiction of the ICC can be broken down into three basic components:

- Its *temporal* jurisdiction (that is, the time period during which acts must have occurred for the ICC to be able to investigate or prosecute those acts).
- Its *personal* jurisdiction (that is, the range of persons it may investigate or prosecute).
- Its *subject-matter* jurisdiction (that is, the nature of the conduct which may form the basis of an ICC investigation or prosecution).

Given its complexity, the last of these is considered at length in section 4.4 below. Here is discussed the first two dimensions of the jurisdiction of the ICC: its temporal and personal jurisdiction.

### ***The ICC's temporal jurisdiction***

The jurisdiction of the ICC is non-retroactive. Article 11 of the Rome Statute states that the ICC has jurisdiction only with respect to crimes committed after the Statute entered into force (1 July 2002). As a result, no one may be held criminally responsible by the ICC for ICC crimes committed prior to 1 July 2002.

Where the ICC's personal jurisdiction depends on a State being a party to the Rome Statute (as discussed further below), and the Statute comes into force for that State after 1 July 2002 (for example, where the State ratifies or accedes to the Statute after 1 May 2002), the ICC may exercise its jurisdiction only for crimes committed after entry into force of the Statute for that State. There is, however, an exception to this rule in cases where the State has made a declaration under article 12(3) accepting the exercise of ICC jurisdiction over the crime in question. Nevertheless, in no case may the ICC exercise jurisdiction over crimes committed prior to the coming into force of the Rome Statute on 1 July 2002.

Conversely, article 29 provides that the jurisdiction of the ICC is not subject to any statute of limitations.

### ***The ICC's personal jurisdiction***

Article 25(1) of the Rome Statute, addressing individual criminal responsibility, confines the jurisdiction of the ICC to natural persons, as opposed to corporations or other legal persons. This is confirmed by Article 77, which contemplates a term of imprisonment for all persons convicted by the ICC. Article 26 further limits the



range of natural persons subject to the ICC's jurisdiction to those 18 years of age or older at the time of the alleged commission of an ICC crime. It should also be noted that, pursuant to article 27, an individual's official capacity, even as head of state or government, is irrelevant to issues of jurisdiction and will not bar an exercise of jurisdiction by the ICC.

The personal jurisdiction of the ICC is, however, constrained by its status as a treaty-based court. Article 12(2) provides that, as a general rule, the ICC may only exercise jurisdiction over a person who:

- commits an ICC crime on the territory of (or aboard a vessel or aircraft registered in) a State Party to the Rome Statute, or a State that has made a declaration under article 12(3) accepting the exercise of ICC jurisdiction over the crime; or
- is a national of a State Party to the Rome Statute or of a State that has made a declaration under article 12(3) accepting the exercise of ICC jurisdiction over the crime.

However, in the exceptional case where the United Nations Security Council, acting under Chapter VII of the Charter of the United Nations, refers a situation to the ICC, the limitations of article 12(2) do not apply. In other words, when the Security Council refers a situation to the ICC, the ICC may exercise jurisdiction over any adult individual in relation to that situation, regardless of his or her nationality or where the conduct may have occurred.

## ***Implementation of jurisdictional requirements***

### ***Temporal jurisdiction***

A State wishing to take advantage of the Rome Statute's complementarity principle should, at a minimum, ensure that national authorities have jurisdiction to investigate or prosecute ICC crimes occurring since 1 July 2002 (or any later date on which the Rome Statute may have come into force for that State). However, the temporal constraints imposed on the ICC's jurisdiction do not limit the duty of States to exercise their criminal jurisdiction for serious international crimes that may have occurred prior to the coming into force of the Rome Statute. Most ICC crimes were international crimes before the establishment of the ICC and were also criminally punishable in many national legal systems. States should therefore consider exercising jurisdiction over ICC crimes on a retrospective basis, while having due regard for the principle against retroactive criminalization (*nullum crimen sine lege*) and relevant domestic principles concerning the extension of criminal liability. The New Zealand and Canadian implementing statutes provide examples of retrospective assertions of jurisdiction over serious international crimes (NZ s. 8, CA s. 8).

As the ICC's jurisdiction is not subject to any statute of limitations, States wishing to rely upon the complementarity principle should consider amending or repealing any such statutes to the extent they apply to ICC crimes.

### ***Personal jurisdiction***

At a minimum, national legislation should extend criminal liability for ICC crimes to adult individuals, although nothing in the Rome Statute prevents the exercise of national criminal jurisdiction over individuals under the age of 18, corporations or other legal persons. Canadian implementing legislation, for example, extends criminal liability for serious international crimes to corporations and individuals under the age of 18 in addition to adult individuals (CA s. 2(2)). As official capacity cannot bar exercise of the ICC's jurisdiction over a person, national legislation should be amended as required in order to remove any immunity from criminal liability for ICC crimes that may exist for heads of state or government or the like.

As noted above, in most cases the personal jurisdiction of the ICC will be limited to persons who have committed an ICC crime on the territory of a State Party or who are nationals of a State Party. Practically, then, a State wishing to ensure availability of the complementarity principle in the majority of cases likely to arise should, at a minimum, enact legislation allowing it to exercise jurisdiction over ICC crimes occurring within its territory (and aboard vessels and aircraft bearing its registration), as well as extraterritorial jurisdiction over its nationals committing such crimes abroad. An example of this approach is found in the United Kingdom legislation, which extends jurisdiction to crimes committed on its territory or on its registered vessels and aircraft or by an accused who is a United Kingdom national (UK ss. 54 and 67).

It should be noted, however, that such legislation alone will not prevent the ICC from exercising its jurisdiction over certain perpetrators of ICC crimes who are in a State's territory. The personal jurisdiction of the ICC extends to persons who commit an ICC crime in the territory, or who are nationals, of *any* State Party. Consider, for example, States A, B and C, only the first of which is a State Party to the Rome Statute. If a national of State Party A commits an ICC crime in the territory of State B and subsequently settles in State C, the ICC's personal jurisdiction over that person is established due to the national link with State Party A. Alternatively, if a national of State B commits an ICC crime in the territory of State Party A and subsequently settles in State C, the ICC's personal jurisdiction over that person is established by virtue of the occurrence of the crime in the territory of State Party A. However, if State C has enacted legislation only permitting it to prosecute ICC crimes committed by its nationals or occurring in its territory, it will be unable to prosecute either perpetrator or, hence, to invoke the complementarity principle in either case.

Similar considerations arise in the exceptional case of a Security Council referral of a situation to the ICC. As noted, the ICC's personal jurisdiction is not limited by national or territorial links with a State Party in such a case. A State that has enacted

legislation permitting it only to prosecute ICC crimes committed by its nationals or occurring in its territory will be unable to prosecute other perpetrators of ICC crimes who may be in its territory and who are subject to the ICC's jurisdiction. It will therefore be unable to invoke the complementarity principle for such persons. The same will be true, albeit to a lesser degree, even if the State has extended its jurisdiction to ICC crimes committed by nationals, or in the territory, of any State Party. Even in such a case it is possible that persons coming within the personal jurisdiction of the ICC will not be subject to the exercise of the State's jurisdiction. Again, the State will be unable to invoke the complementarity principle for such persons.

Consider also that a number of regional and universal treaties other than the Rome Statute impose an obligation on States Parties to extradite or prosecute persons of any nationality suspected of certain conduct occurring anywhere (also known as *aut dedere aut judicare*). In some cases, such conduct will amount to an ICC crime. Merely providing for territorial or national jurisdiction for ICC crimes will therefore fail to fulfill the *aut dedere aut judicare* obligations of States Parties to any such treaties.

Thus, a State wishing to ensure availability of the complementarity principle for all persons potentially subject to Rome Statute jurisdiction (and incidentally fulfill any *aut dedere aut judicare* obligations it may have under other treaties) should consider asserting universal jurisdiction over ICC crimes in order to permit their prosecution at the national level wherever and by whomever they may have been committed.

Note that there are varying conceptions of “universal jurisdiction.” A modest model, invoked by States such as Argentina and Belgium, asserts jurisdiction over conduct, wherever and by whomever it may have been committed, on the basis of binding international agreements providing for such jurisdiction (for example, the provisions of the 1949 Geneva Conventions and their 1977 Additional Protocols relating to “grave breaches”). Another interpretation of the concept, espoused by such States as Canada, France, Samoa and Senegal, would permit the exercise of jurisdiction by a State over any perpetrator of a serious international crime, regardless of whether a treaty explicitly provides for such jurisdiction, if the perpetrator is found in that State's territory. Still another approach, invoked for example by New Zealand, Costa Rica, Cyprus and Spain, eschews the latter requirement of territorial presence. In this interpretation, jurisdiction is asserted by a State over serious international crimes committed anywhere by anyone, regardless of the perpetrator's presence in the territory of that State.

While there remains uncertainty as to the precise scope of the concept of universal jurisdiction as well as the full range of conduct to which it applies, many States, spurred in part by the coming into force of the Rome Statute, have adopted legislation asserting universal jurisdiction for ICC crimes committed anywhere by anyone, as long as the suspected perpetrator is present in their jurisdiction.

Sometimes this form of universal jurisdiction is asserted along with other, more traditional bases of jurisdiction, such as the status or nationality of the victim or jurisdictional rules applicable in armed conflict. The result is a national assertion of jurisdiction over ICC crimes that virtually guarantees that a State will be in a position to invoke the complementarity principle for any person found within its territory.

For example, the Canadian Crimes Against Humanity and War Crimes Act provides that a person alleged to have committed genocide, crimes against humanity, war crimes or breach of command responsibility outside Canada may be prosecuted for any such offence if:

- (i) at the time the offence is alleged to be committed,
  - the person was a Canadian citizen or was employed by Canada in a civilian or military capacity,
  - 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,
  - the victim of the alleged offence was a Canadian citizen, or
  - the victim of the alleged offence was a citizen of a State that was allied with Canada in an armed conflict; or
- (ii) after the time the offence is alleged to have been committed, the person is present in Canada.

## **4.4 The ICC's subject-matter jurisdiction**

### ***Mirroring criminal responsibility under the Rome Statute in national law***

A State wishing to avail itself of the complementarity principle must be in a position to exercise its criminal jurisdiction over conduct amounting to ICC crimes. As was seen in subsection 4.2 above, while this does not necessarily require that national investigations or prosecutions be framed in terms of ICC crimes per se, it would be prudent for States to incorporate the Rome Statute's definitions of ICC crimes in national law for this purpose. It would similarly be prudent to incorporate the Rome Statute's provisions relating to command responsibility, inchoate offences, individual criminal responsibility and grounds precluding criminal responsibility. This will avoid questions that may arise as to whether a national investigation or prosecution truly relates to conduct corresponding in all respects to ICC crimes, or constitutes an attempt to shield persons from full criminal responsibility for crimes within the jurisdiction of the ICC.

Such incorporation will also serve to update national laws that already assert jurisdiction over international crimes. This is an important function, given that the Rome Statute's provisions reflect recent refinements to international criminal law

evidenced in the jurisprudence of international criminal tribunals (such as the ICTY/R), modern treaty law and customary practice, as well as the views expressed by the 120 States that adopted the Rome Statute at the Rome Conference.

The following subsections discuss therefore the provisions of the Rome Statute and associated implementation considerations relating to the ICC crimes, command responsibility, inchoate offences, individual criminal responsibility and grounds precluding criminal responsibility.

## ***The ICC Crimes: Genocide, crimes against humanity and war crimes***

### ***General considerations***

The Rome Statute's definitions of crimes over which the ICC has jurisdiction reflect widely accepted international norms and are based on existing humanitarian treaty and customary international law. It must, however, be recalled that more than half a century has passed since the adoption of the Genocide Convention and the four Geneva Conventions. In that time, international humanitarian law has evolved and the definitions of war crimes and crimes against humanity have developed. In some cases the definitions of crimes in the Rome Statute reflect a conservative interpretation of these changes, whereas in others they reflect a more progressive interpretation. The growing consensus among legal experts, however, is that the Rome Statute's definitions of ICC crimes reflect, for the most part, the current state of customary international law.

As suggested above, those States that have previously implemented the Geneva Conventions or other humanitarian law treaties in their national laws will likely have to consider changes to those laws to fully reflect the Rome Statute's modern definitions of crimes. In order to assist States in fully reflecting the ICC's subject-matter jurisdiction in their national laws, the definition of each ICC crime is reviewed in detail below. In addition, the antecedents for each category of ICC crime are analyzed and compared. (Note that, as the crime of aggression has not yet been defined in the Rome Statute and the ICC therefore exercises no jurisdiction over it at the time of writing, the following discussion is limited to the ICC crimes of genocide, crimes against humanity and war crimes.)

### ***Genocide***

Article 6 of the Rome Statute adopts word for word the definition of genocide set out in Article II of the Genocide Convention. The definition of this crime includes two principal components:

- (i) Commission of one or more of the five following acts:
  - Killing members of a national, ethnical, racial or religious group.
  - Causing serious bodily or mental harm to members of such a group.

- Deliberately inflicting on such a group conditions of life calculated to bring about its physical destruction in whole or in part.
- Imposing measures intended to prevent births within such a group.
- Forcibly transferring children of such a group to another group.

(ii) Intent to destroy, in whole or in part, the group as such.

The requirement of intent to destroy must accompany the acts committed, and it is very specific. Genocide cannot be committed by negligence. The person must be shown to have acted with intent to destroy a group, in whole or in part, specifically on the basis of its nationality, ethnicity, race or religion. Thus, an isolated act of racist violence unconnected to the broader goal of destroying a racial group cannot constitute genocide. The term “in whole or in part” signifies that intent to destroy an entire group is not required. However, to satisfy the definition of genocide, the intent to destroy must relate at least to a substantial part of the relevant group. Determining whether a relevant “group” has been targeted involves an assessment of objective and subjective elements relating to the existence and composition of the group. A specific national, ethnic, racial or religious group must be targeted; it will not suffice if the alleged group is defined in the negative or in relation to another group (for example, “non-Muslims” or “non-Serbs”).

Where genocide's very specific intent requirement is not present, the acts may still, in appropriate circumstances, amount to crimes against humanity or war crimes.

### ***Crimes against humanity***

Under article 7 of the Rome Statute, the expression “crimes against humanity” is used to designate certain inhumane acts knowingly committed as part of a widespread or systematic attack directed against a civilian population. The Rome Statute's definition of crimes against humanity consists of three essential components.

The first component is commission of one or more inhumane acts. The Statute lists 11 acts that may constitute crimes against humanity when the other elements of the crime are present:

- Murder.
- Extermination.
- Enslavement.
- Deportation or forcible transfer of population.
- Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law.
- Torture.
- Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.

- Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds universally recognized as impermissible under international law, in connection with any other act in this list or any other ICC crime.
- Enforced disappearance of persons.
- Apartheid.
- Other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health.

Note that several of these acts are further defined in article 7(2) of the Statute.

The second component is widespread or systematic attack directed against a civilian population. The inhumane act must not occur in isolation but must be committed as part of a broader attack. “Widespread” signifies a significant number of victims, and “systematic” refers to the non-accidental repetition of criminal conduct pursuant to a plan or policy. The use of the word “or” means that these are alternative, not cumulative, requirements. Accordingly, if the attack is systematic it need not be widespread, and vice versa. However, article 7(2)(a) further defines “attack directed against a civilian population” in terms of the multiple commission of inhumane acts in furtherance of a State or organizational policy. This suggests that the relevant attack must always consist of more than a single inhumane act and be pursuant to a policy or plan. This is not to say, however, that a person cannot be convicted of a crime against humanity for having committed a single inhumane act. Such a conviction is possible as long as that single act was committed as part of an attack involving other inhumane acts (committed, for example, by other persons) pursuant to a State or organizational policy.

Note that the attack must be against any civilian population. This means that the attack need not be committed against a particular group sharing certain characteristics such as nationality, ethnicity or the like. The only relevant characteristic of the group is that it be civilian in nature. However, in cases where the inhumane act committed is persecution or the crime of apartheid, it may well be that the broader attack of which such act forms a part is indeed directed against a group defined by race or (in the case of persecution only) nationality, ethnicity and the like.

The third and final component is knowledge of the attack. To be guilty of a crime against humanity, the perpetrator of an inhumane act must know that his or her act formed part of a broader, policy-driven course of conduct involving other inhumane acts. In other words, the perpetrator must be aware that the act is not merely an isolated crime against one or more individuals, but rather forms part of a broader context of widespread or systematic acts of inhumanity against a civilian population. It is this link to a broader attack that elevates an inhumane act, which may in itself constitute an ordinary crime under national or even international law, to one of the “most serious crimes of international concern” over which the ICC has jurisdiction.

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

- The Rome Statute does not confine its definition of crimes against humanity to inhumane acts committed in armed conflict, as does the Statute of the ICTY. Accordingly, crimes against humanity within the meaning of the Rome Statute may be committed in times of peace or of armed conflict.
- The definition of torture in the Rome Statute, whether as an element of a crime against humanity or a war crime, differs from that found in the Convention Against Torture. In particular, it does not require that the act of torture be committed for a purpose such as punishment or obtaining a confession. Nor does it require that 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 definition of enslavement found in the Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926 ("Slavery Convention").
- The Rome Statute expands the list of grounds of impermissible persecution from those listed in the Nuremberg Charter as well as the Statutes of the ICTY/R to include national, ethnic, cultural, gender or other grounds universally recognized as impermissible under international law. It also expands the "connection" element to include not only connection with any ICC crime but also with any inhumane act that may form the basis of an act against humanity.
- In the Rome Statute, the definition of enforced disappearance provides that such an act may be attributable to political organizations in addition to States. It also adds the requirements of a refusal to acknowledge the deprivation of freedom or to provide information on the victim, and an intention to remove the victim from the protection of the law for a prolonged period of time in order to distinguish enforced disappearance from other unlawful deprivations of liberty.

### ***War crimes***

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

- Grave breaches of the 1949 Geneva Conventions, which apply to international armed conflict.



- Other serious violations of the laws and customs applicable to international armed conflict.
- Serious violations of article 3 common to the 1949 Geneva Conventions, which apply to armed conflict not of an international character.
- Other serious violations of the laws and customs applicable in armed conflict not of an international character.

Article 8 provides that the ICC has jurisdiction for these categories 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.” The use of the non-exclusive phrase “in particular” suggests that, unlike the case of crimes against humanity, the ICC’s jurisdiction over war crimes is not strictly limited to such crimes committed as part of a plan or policy or on a large scale. However, this language does suggest that the ICC will tend to focus its attention on serious cases of widespread or systematic commission of war crimes rather than on isolated occurrences. This would be consistent with article 1 of the Rome Statute, which provides that the ICC will exercise its jurisdiction over persons for “the most serious crimes of international concern.”

The negotiating process that culminated in adoption of the Rome Statute was characterized both by compromise and the development of international law. The Statute’s definition of war crimes is narrower in some respects than traditional definitions. However, it is also broader in some respects in that it includes war crimes that have not previously been codified. The Rome Statute’s major innovation is that it enshrines recent international legal developments criminalizing war crimes committed during non-international armed conflict.

Such innovations underscore the importance of incorporating the Rome Statute’s definitions of crimes in national legislation if States wish to benefit from the complementarity principle. This is the case even if other international humanitarian law treaties, such as the 1949 Geneva Conventions or their Additional Protocols, have already been implemented, as those treaties do not cover certain war crimes within the ICC’s jurisdiction. Conversely, it should be noted that criminalizing war crimes as defined in the Rome Statute will not necessarily be sufficient in itself to fulfill States’ obligations under international humanitarian law.

The sources for each of the Rome Statute’s categories of war crimes are discussed below with any innovations highlighted.

*Grave breaches of the Geneva Conventions of 1949 applicable to international armed conflict (article 8(2)(a))*

Under this category, the Rome Statute essentially repeats all of the acts defined as “grave breaches” in the four Geneva Conventions. Thus, the Statute criminalizes the following acts committed against wounded, sick or shipwrecked members of armed forces, prisoners of war or civilians:

- Wilful killing.
- Torture or inhuman treatment, including biological experiments.
- Wilfully 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.
- Wilfully 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.

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

These crimes are derived from various sources and reproduce to a large extent rules found in the 1907 Hague Regulations Concerning the Laws and Customs of War on Land, Additional Protocol I of 1977 to the 1949 Geneva Conventions, the 1899 Hague Declaration IV Concerning Expanding Bullets, the 1925 Geneva Gas Protocol, as well as various conventions limiting or banning the use of specific weapons. The war crimes listed in this category include the following:

- Intentionally directing attacks against civilian objects, the civilian population as such, or individual civilians not taking direct part in hostilities.
- Intentionally directing attacks against personnel, installations, material, units or vehicles involved in humanitarian assistance or a 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.
- 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 that would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.
- Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings that are undefended and that are not military objectives.
- Killing or wounding a combatant who, having laid down his or her arms or having no longer means of defence, has surrendered at discretion.
- 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.

- Transferring, directly or indirectly, by the occupying power parts of its own civilian population into the territory it occupies, or deporting or transferring all or parts of the population of the occupied territory within or outside this territory.
- 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.
- Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind that 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.
- Killing or wounding treacherously individuals belonging to the hostile nation or army.
- Declaring that no quarter will be given.
- Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war.
- Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party.
- 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.
- Pillaging a town or place, even when taken by assault.
- Employing poison or poisoned weapons.
- Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices.
- Employing bullets that expand or flatten easily in the human body, such as those with a hard envelope that does not entirely cover the core or is pierced with incisions.
- Employing weapons, projectiles and material and methods of warfare that are of a nature to cause superfluous injury or unnecessary suffering or that 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 the Rome Statute, by an amendment in accordance with the relevant provisions of articles 121 and 123.
- Committing outrages upon personal dignity, in particular humiliating and degrading treatment.
- Committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence also constituting a grave 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.
- 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.
- 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.
- Conscripting or enlisting children under the age of 15 years into the national armed forces or using them to participate actively in hostilities.

In most respects, the Rome Statute's definitions of war crimes in this category are consistent with pre-existing international law. There are, however, some enhancements. For example, the Rome Statute recognizes as war crimes specific sexual and gender-based offences, conscription or enlistment of children under 15 years of age and attacks against humanitarian personnel. Similarly, the war crime of launching an attack against a military objective, knowing that it will result in widespread, long-term and severe damage to the natural environment that is clearly excessive in relation to the overall military advantage anticipated, is not found in the Geneva Conventions and exceeds the protection of the natural environment found in Additional Protocol I. The Rome Statute also criminalizes direct and indirect transfers of civilian populations by an occupying power and includes in this war crime the transfer of its own civilian population into territory it occupies, thus expanding on corresponding provisions in the fourth Geneva Convention in a manner consistent with Additional Protocol I. Moreover, the Rome Statute's definitions of the three war crimes of intentionally directing attacks against civilian objects, intentionally launching an attack in the knowledge that the attack will cause incidental civilian losses, and attacking or bombarding towns, etc., do not explicitly require "death, serious injury to body or health" in connection with these three crimes, as do the corresponding provisions of Additional Protocol I.

Conversely, not all serious violations of international humanitarian law applicable to international armed conflict have been included in the Rome Statute. For example, the Rome Statute's provisions relating to the use of certain weapons are not as extensive as those found in other treaties. Similarly, the Rome Statute does not include in this category of war crimes unjustifiable delay in the repatriation of prisoners of war or civilians.

*Serious violations of article 3 common to the Geneva Conventions applicable to non-international armed conflict (article 8(2)(c))*

The Rome Statute's definition of war crimes in this category borrows directly from Common Article 3 of the Geneva Conventions. The following list of war crimes would apply in non-international armed conflict when committed against individuals taking no active part in the hostilities, including members of armed

forces who have laid down their arms or have been placed *hors de combat* due to sickness, wounds, detention or any other cause:

- Committing 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.
- Passing sentences and carrying out executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees that are generally recognized as indispensable.

Note that article 8(2)(d) excludes internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature, from the scope of non-international armed conflict for purposes of this category of war crimes.

*Other serious violations of the laws and customs applicable to non-international armed conflict (article 8(2)(e))*

This category of war crimes is derived from various sources, including Additional Protocol II to the Geneva Conventions, various treaties on the laws of warfare and customary international law. Under article 8(2)(f), these crimes can occur only in cases of protracted non-international armed conflict occurring in the territory of a State between governmental authorities and organized armed groups, or between such groups. States should be aware that this threshold is lower than the one applicable to Additional Protocol II: unlike the latter, the Rome Statute threshold does not require that organized armed groups be under responsible command or in control of territory.

The war crimes in this category include the following:

- Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.
- 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.
- 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.
- 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.

- Pillaging a town or place, even when taken by assault.
- Committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions.
- Conscripting or enlisting children under the age of 15 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.
- Killing or wounding treacherously a combatant adversary.
- Declaring that no quarter will be given.
- 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 that are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and that cause death to or seriously endanger the health of such person or persons.
- Destroying or seizing the property of an adversary unless such destruction or seizure is imperatively demanded by the necessities of the conflict.

Recognition of this category of war crimes in the Rome Statute, which builds on prior ICTY jurisprudence, is considered a significant advance in the development of international humanitarian law applicable in non-international armed conflict. Particularly significant is the recognition, as war crimes committed in non-international armed conflict, of specific sexual and gender-based offences, conscription and enlistment of children under the age of 15, and attacks against humanitarian personnel. However, not all serious violations of international humanitarian law applicable in non-international conflict are included in the Rome Statute's definition of war crimes. This includes the intentional starvation of civilians.

### ***Implementation considerations***

Almost every State Party to the Rome Statute has implemented the ICC crimes in its national law or is in the process of doing so. For States wishing similarly to harness the complementarity principle, two main approaches may be taken.

The first approach, which is most likely to ensure availability of the complementarity principle, is to incorporate the ICC crimes in their entirety into national law. As seen in Chapter 2, this can be achieved in at least three ways: incorporation by reference, creation of a separate piece of legislation enacting ICC crimes or amendment of existing domestic legislation that already implements the Geneva Conventions, the Additional Protocols, the Genocide Convention or any other relevant treaty.

Examples of incorporation by reference can be found in the implementing legislation of Kenya, New Zealand, South Africa, Uganda and the United Kingdom. While this method may seem obvious and simple, consideration should be given to whether such an approach may dissuade some domestic courts and lawyers from applying the incorporated provisions in their entirety. To overcome this possibility, as well as any other potential issues concerning accessibility of the relevant law, consideration should be given to annexing the relevant provisions of the Rome Statute as a schedule to the incorporating legislation.

Where new legislation enacting ICC crimes is adopted, States will want to consider any conflicts that may arise as a result of the existence of prior legislation implementing the Geneva Conventions, its Additional Protocols, the Genocide Convention or other relevant treaties. The New Zealand legislation addresses this issue by maintaining both schemes and providing that the new legislation does not limit the application of pre-existing legislation. This approach preserves pre-existing legislation that may implement international humanitarian law obligations not covered by the Rome Statute.

Another consideration when enacting new ICC implementing legislation is whether to confine the scope of such legislation to crimes as specifically defined in the Rome Statute, or to expand the scope of such crimes for the purposes of domestic investigation and prosecution. For example, the legislation of Canada, Ecuador and Uruguay expands the nature of the groups against which the crime of genocide may be committed beyond those specifically provided for in the Rome Statute.

A similar consideration is whether to draft domestic legislation to provide for “static” definitions of crimes, or to draft it to cover future developments in the definitions of those crimes or even the emergence of new international crimes. This last approach has been taken by Canada, which has the advantage of automatically incorporating future developments in conventional and customary international law without having to amend the domestic legislation.

Where reliance is placed on existing legislation that already incorporates international humanitarian law, States will likely have to amend some existing offences and establish a number of new offences in order to give effect to the Rome Statute's innovative provisions, as outlined above.

The second approach available to States wishing to rely on the complementarity principle is to use existing national laws that criminalize conduct that is similar in substance, if not in form or detail, to the crimes defined in the Rome Statute. As discussed in subsection 4.2 above, States may seek to prosecute conduct amounting to ICC crimes using common domestic offences that are sufficiently serious to describe the crime perpetrated. This is the approach taken by Denmark and Norway. States must understand, however, that if there are significant discrepancies between the domestic offence invoked and the corresponding crime under the Rome Statute, the complementarity principle may not be triggered and the case may remain

admissible before the ICC. The same may be true if domestic principles of individual criminal responsibility, grounds for excluding criminal responsibility, or applicable penalties differ significantly from those prescribed under the Rome Statute. It may also be that using domestic analogues will be perceived as diminishing the gravity of the offence. For example, to prosecute pillage by invoking the domestic offence of theft will likely not reflect the severity of the offence. This could well lead to a finding that the national prosecution was not consistent with an intent to impose criminal responsibility on the accused for ICC crimes or to bring him or her to justice. The result may be a finding of admissibility of the case before the ICC. The domestic laws of Denmark and Norway address this difficulty by providing for harsher sentencing regimes in cases of conviction of domestic offences corresponding to international crimes.

Finally, pursuant to article 9 of the Rome Statute, the Assembly of States Parties has adopted “Elements of Crimes.” The purpose of the Elements of Crimes is to assist, rather than bind, the ICC in its interpretation and application of the definitions of crimes in articles 6 to 8 of the Statute. They therefore serve merely as guidelines for the ICC in determining individual criminal responsibility - and in the event of a conflict between the Statute and Elements, the Statute will prevail. The Elements of Crimes provide a description of the various material (conduct, consequences and circumstances) and mental elements constituting each ICC offence. Thus, notwithstanding their non-binding character, the Elements of Crimes may be expected to have an impact on the ICC's interpretation of the crimes within its jurisdiction. They may also assist domestic prosecutors and courts in exercising jurisdiction over ICC crimes at the national level. States may therefore wish to implement these Elements as part of their national laws as well. The United Kingdom, for example, has included a requirement in its implementing legislation that domestic courts take account of the Elements of Crimes, as well as any relevant ICC case law, in interpreting the ICC crimes incorporated by reference into its domestic law. New Zealand's implementing legislation gives the Elements of Crimes similar status in a domestic prosecution.

### ***Individual criminal responsibility and inchoate offences***

#### ***Individual and inchoate criminal responsibility under the Rome Statute***

The crimes within the jurisdiction of the ICC 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 have no direct contact with the victims. They either issue the orders, incite others to commit the crimes or furnish the means by which the crimes can be committed.

It is for this reason the Rome Statute does not limit criminal responsibility for ICC crimes to individuals directly involved in their commission, but rather extends it to those indirectly involved as well. Under article 25(3), a person is criminally responsible for an ICC crime if he or she:



- Commits such a crime, whether as an individual, jointly with 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, provides the means for, or otherwise assists in the commission or attempted commission of such a crime.
- Intentionally contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose, either with the aim of furthering the criminal activity or purpose of the group or with knowledge of the group's intention to commit the crime.

In addition, given the seriousness of ICC crimes and the goal of preventing their commission, the Rome Statute imposes “inchoate” criminal liability in circumstances where an underlying ICC crime has not in fact been committed. Thus, under article 25(3), even if an ICC crime has not been committed, a person is nevertheless considered criminally responsible for such a crime if he or she:

- Attempts to commit such a crime, unless the person abandons the attempt or otherwise prevents the completion of the crime while completely and voluntarily giving up the criminal purpose.
- In respect of the crime of genocide, directly and publicly incites others to commit genocide.

### ***Implementation considerations***

States desiring to prosecute criminals in their national courts under the principle of complementarity should ensure that their national legislation includes all the forms of individual and inchoate criminal responsibility covered by the Rome Statute. Otherwise, they may not be able to prosecute in their own courts a significant number of individuals who may be responsible for the commission, attempted commission or incitement to commission of the crimes described in the Statute.

Many States have criminal legislation that already extends individual and inchoate criminal responsibility in terms very similar to those found in the Rome Statute. In such cases, there will generally be no need to adopt any particular legislative amendments providing for such responsibility. States should, however, ensure that these notions of individual and inchoate criminal responsibility clearly apply to the crimes within the ICC's jurisdiction.

Note that no provision imposing criminal responsibility for the inchoate offence of conspiracy to commit genocide appears in the Rome Statute. This is likely an oversight, as Article III of the Genocide Convention and customary international law require that such an offence be made punishable. States should therefore ensure that their national legislation also provide for prosecution of conspiracy to commit

genocide, as has been done, for example, in the legislation of Canada, New Zealand and Samoa.

One of the approaches taken by States to incorporating the Rome Statute's principles of individual and inchoate criminal responsibility into national legislation is to incorporate article 25(3) by reference. An example of this approach is found in the New Zealand legislation. Other States have enacted domestic provisions paralleling article 25(3), such as the provisions in the United Kingdom legislation relating to "ancillary offences." Still other States have created specific offences relating to each extended form of individual and inchoate criminal responsibility. For example, the implementing legislation of Uruguay and Colombia, and the draft implementing legislation of Brazil, create the separate offence of incitement to commit genocide. This approach has the advantage of ensuring that all forms of individual and inchoate criminal responsibility contemplated in the Rome Statute are clearly reflected in national law.

### ***Responsibility of commanders and other superiors***

#### ***The general principle of command or superior responsibility***

It is a general principle of international humanitarian law that persons in positions of authority must prevent those under their command or control from violating the rules of international humanitarian law. Article 86(2) and article 87 of Additional Protocol I to the Geneva Conventions codify this principle in the specific context of international armed conflict. The practical implications of such an obligation have been explained by the ICTY: military commanders of each party to an armed conflict should correctly instruct their forces concerning the rules of international humanitarian law, ensure that these rules are observed when making decisions concerning military operations and set up a communications or reporting network that ensures that commanders will be informed of breaches of the laws of war committed by their forces. Commanders must also apply corrective measures for violations of international humanitarian law.

Article 28 of the Rome Statute thus imposes criminal responsibility on military commanders, as well as other non-military superiors, for failure to fulfill this obligation of prevention in relation to ICC crimes. The criminal responsibility of military commanders and non-military superiors differs somewhat, and both categories are considered in turn below.

#### ***Military commanders***

The criminal responsibility of military commanders for ICC crimes committed by subordinates requires three essential elements:

- The crimes were committed by forces under the commander's effective command or authority and control.

- The commander knew or should have known that such forces were committing or about to commit the crimes.
- The commander failed to take all necessary and reasonable measures within his or her power to prevent the crimes, ensure their investigation or prosecution, or punish the perpetrators.

### ***Non-military superiors***

A non-military superior may be held responsible for ICC crimes committed by their sub-ordinates if:

- The crimes were committed by subordinates under the superior's effective authority and control.
- The superior either knew or consciously disregarded information that clearly indicated that the subordinates were committing or about to commit the crimes.
- The crimes concerned activities within the effective responsibility and control of the superior.
- The superior failed to take all necessary and reasonable measures within his or her power to prevent the crimes, ensure their investigation or prosecution, or punish the perpetrators.

The civilian authorities primarily targeted by these provisions include political leaders, high-level officials and business leaders. The essential differences between the responsibility of such non-military superiors and that of military commanders relate to the knowledge element and the degree of connection required between the ICC crimes and the superior's/commander's areas of responsibility. In both cases, military commanders are held to a stricter standard because military command structures and the need to maintain military discipline make this necessary and appropriate.

On the first of these differences, constructive knowledge must be established on a more stringent standard for non-military superiors than for military commanders. In particular, a non-military superior who did not have actual knowledge of the commission of an ICC crime must at least be shown to have had actual knowledge of information that clearly indicated the commission of such a crime. In contrast, a military commander need not be shown to have had any such actual knowledge at all, as long as it can be shown that he or she *ought* to have had such knowledge owing to the circumstances at the time.

On the second difference between non-military superior and military command responsibility, the underlying ICC crimes must be shown to have related to a non-military superior's area of responsibility and control. Such a requirement would make little sense in the case of a military commander given that such a commander's responsibility is deemed to extend to all conduct by forces under his

or her command and control. It therefore does not appear in the Rome Statute's definition of military command responsibility.

### ***Considerations relevant to both command and superior responsibility***

The presence of a hierarchy of authority is the linchpin of both military command and non-military superior criminal responsibility. However, authority does not derive solely from the official position of a commander or superior in a formally constituted hierarchy. The determining factor is the effective, de facto exercise of authority and control over the actions of subordinates. Control can be officially conferred or simply exercised as a matter of fact. Thus, for example, military leaders may be held responsible for ICC crimes committed by individuals not officially under their control in the chain of command, but over whom they in fact exercise authority and control. This scenario is captured in the Rome Statute's extension of command responsibility to a "military commander *or person effectively acting as a military commander.*"

Similar considerations apply when evaluating whether a commander or superior failed to take appropriate steps to prevent, punish or report the commission of an ICC crime. While a commander or superior may only be held responsible for omitting to take measures that are within his or her power, nothing in the Rome Statute limits the latter concept to officially defined or conferred power. In other words, even if a commander or superior has no official power to take measures concerning the commission by subordinates of ICC crimes, he or she may be held criminally responsible if it can be demonstrated that the taking of such measures was nevertheless factually possible in the circumstances.

### ***Implementation considerations***

Few national criminal codes deal with the concept of military command responsibility in relation to the commission of domestic crimes. Still fewer address the responsibility of superiors in non-military contexts. Most States desiring to prosecute commanders or superiors in their national courts under the complementarity principle should therefore incorporate these concepts, as defined in article 28, into their national law. Failure to do so may deprive States of the benefit of the complementarity principle in a wide array of cases, given that high-ranking military and civilian authorities will frequently be the focus of investigations or prosecutions by the ICC.

Possible approaches to incorporating the concepts of command and superior responsibility into national law include incorporating article 28 of the Rome Statute by reference, or enacting such forms of responsibility in amending or new legislation. The Canadian ICC legislation takes the latter approach by introducing a number of new crimes in Canadian law, including "breach of responsibility by a military commander" and "breach of responsibility by a superior." The Argentinean implementing legislation 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 subordinates according to applicable principles of Swiss criminal law. The United Kingdom ICC legislation goes beyond pre-existing English law relating to command responsibility and assimilates failure of a commander or superior to fulfill the obligations set out in article 28 of the Rome Statute to the offence of aiding or abetting the commission of an ICC crime. The relevant provisions of the draft Brazilian legislation meld responsibility of military commanders and civilian superiors, whereas the Canadian and United Kingdom legislation distinguish the circumstances in which military and civilian commanders will be held criminally liable in a manner comparable to article 28 of the Rome Statute.

It should be noted that the formulation of article 28 of the Rome Statute differs somewhat from that of article 86(2) of Additional Protocol I, which arguably imposes a stricter form of command or superior responsibility. States Parties to the latter instrument should therefore ensure that their domestic legislation is compatible with both formulations.

### ***Grounds for excluding criminal responsibility***

#### ***The scope of the Rome Statute's grounds for excluding criminal responsibility***

The final piece of the puzzle in seeking to mirror the ICC's subject-matter jurisdiction in national law for complementarity purposes is to consider limitations imposed on that jurisdiction by the Rome Statute. In particular, articles 31 to 33 set out certain grounds for excluding criminal responsibility for ICC crimes. (Lawyers from the common and civil law traditions respectively may be more familiar with the concepts of “defences” and/or “matters of justification or excuse,” which have essentially the same effect as “grounds for excluding criminal responsibility” under the Rome Statute.) To understand the true scope of the ICC's subject-matter jurisdiction, these grounds for excluding criminal responsibility must be read along with the Rome Statute's definitions of ICC crimes and various bases for imposing individual criminal, inchoate, command and superior responsibility.

A cautionary note is, however, in order: the grounds for excluding criminal responsibility explicitly set out in articles 31 to 33 of the Rome Statute are not exhaustive. Article 31(3) specifically provides that the ICC may apply other grounds for excluding criminal responsibility that may exist in other sources of law that are applicable, pursuant to Article 21, in ICC proceedings. This means that the subject-matter jurisdiction of the ICC may be slightly narrower in some cases than may at first appear upon reading articles 31 to 33. A slightly different way of thinking of this is to consider articles 31 to 33 of the Rome Statute as delineating the outer limits of the ICC's subject-matter jurisdiction. Understanding these provisions therefore provides a useful guide for States wishing to avail themselves of the complementarity principle by assuming subject-matter jurisdiction over ICC crimes that is at least as great as that of the ICC.

Article 31 of the Statute explicitly provides that the criminal responsibility of a person shall be excluded on the following bases:

- 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 to control his or her conduct in conformity with law.
- The person is in a state of intoxication that destroys his or her capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct in conformity with law, unless the person has become voluntarily intoxicated knowing or disregarding the risk that, as a result of the intoxication, he or she was likely to commit an ICC crime.
- The person acts reasonably and proportionately to defend him- or herself or another person or, in the case of war crimes, property essential for the survival of the person or another person or for accomplishing a military mission, against an imminent and unlawful use of force.
- The person acts under duress resulting from a threat (whether by other persons or circumstances beyond the threatened person's control) of imminent death or continuing or imminent serious bodily harm, and acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause greater harm than the one sought to be avoided.

Article 32 provides for more limited exclusions from criminal responsibility arising from mistakes of fact or of law (that is, mistakes as to whether a particular type of conduct is an ICC crime). A mistake of either type excludes criminal responsibility only if it negates the mental element of the relevant crime.

Article 33 provides for the defence of “superior orders” in even more circumscribed terms. This defence has always been controversial. The Charters of the Nuremberg and Tokyo Tribunals, as well as the Statutes of the ICTY/R, provide that the defence of superior orders is not admissible in any circumstance. 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. Article 33 of the Rome Statute adopts a slightly more nuanced position. Essentially, the fact that an ICC crime was committed by a person pursuant to an order of a government or superior – whether military or civilian – does not absolve the perpetrator of criminal responsibility, unless:

- The person was under a legal obligation to obey orders of the government or superior.
- The accused person did not know that the order was unlawful.
- 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 will always be deemed manifestly unlawful. As a result, this ground for excluding criminal responsibility is probably

only available to persons unaware of the unlawfulness of an order, not in itself manifestly unlawful, to commit a war crime.

### ***Implementation considerations***

Most of the Rome Statute's grounds for excluding criminal responsibility are already recognized in most jurisdictions. Where this is not the case, States may wish to adopt new provisions, or adapt existing provisions that exclude criminal responsibility, to bring their national legislation into conformity with the provisions of the Statute. In this way, a person charged before a national court would be entitled to rely upon the same grounds for excluding criminal responsibility as in proceedings before the ICC. This would minimize the risk of a finding by the ICC that the national proceedings failed to meet international legal standards or were not consistent with an intent to achieve justice for the accused individual.

Incorporation of grounds for excluding criminal responsibility into domestic legislation may be accomplished by simple reference to articles 31 to 33 of the Rome Statute. New Zealand's legislation illustrates this approach. A variation on this method that does not refer explicitly to the Rome Statute is to enact a provision allowing accused persons to invoke defences available under domestic or international law, which would of course include the Rome Statute. Canada's ICC legislation adopts this approach. Of course, a further alternative is to enact in domestic law either new or amended defences as necessary to reflect the provisions of articles 31 to 33 of the Rome Statute.

In any case, all States wishing to rely upon the complementarity principle should review existing defences under their national criminal law in order to ensure that these defences do not potentially shield persons from criminal responsibility for acts amounting to ICC crimes. The existence and application of such a defence in a national trial may lead to a finding by the ICC that the national proceedings were inconsistent with an intent to impose criminal responsibility on the accused person for ICC crimes. The New Zealand implementing legislation illustrates how this can be avoided: it allows a person accused of an ICC crime to invoke defences that are available under domestic law and international law, but only to the extent consistent with the Rome Statute.

For the specific defence of superior orders, many States have adopted the approach taken in article 33 of the Rome Statute. This means that in most States a subordinate is not criminally responsible unless the order was manifestly unlawful or the subordinate knew it was unlawful. This highly conditional recognition of the defence of superior orders rule is found in the codes of military discipline of Germany, the United States, Italy and Switzerland, as well as in the jurisprudence of a number of national war crimes tribunals. Only a handful of States categorically exclude the availability of the defence of superior orders in all circumstances. Some States take a two-pronged approach: they permit limited use of the superior orders defence when one of their nationals has been charged, but prohibit it when the

accused person is an enemy combatant or bases his or her plea on the laws of a foreign country.

It would be prudent for States to amend their national law to ensure that any defence of superior orders is not available in prosecutions for ICC crimes on grounds broader than those contemplated in article 33. If a national court were to acquit an individual on the basis of a defence of superior orders available on a significantly lower threshold than in article 33, it could be interpreted as an attempt to shield the person from the appropriate criminal responsibility. For example, the availability of the defence of superior orders in cases of an order to commit genocide or a crime against humanity could have the effect of shielding an accused person from criminal responsibility for an ICC crime in circumstances not permitted by the Rome Statute. The result might be a finding of admissibility by the ICC in respect of the same conduct.

Some regional or universal treaties other than the Rome Statute categorically reject the defence of superior orders for certain conduct. For example, article 2(3) of the Convention Against Torture prohibits the defence of superior orders as a justification for torture. States Parties to any such treaties should therefore ensure that their domestic legislation implementing the limited defence of superior orders contemplated in article 33 of the Rome Statute is compatible with their obligations under such treaties.

## **4.5 Rules of evidence and procedural standards in national criminal justice proceedings**

### ***The significance of rules of evidence and procedure to complementarity***

The Rome Statute does not explicitly require that States modify national judicial procedures in criminal matters to conform with those applicable to the ICC. However, the rules of evidence and procedure found in the Rome Statute, the Rules of Procedure and Evidence, and the Regulations of the Court are derived from international human rights law establishing standards of due process and fairness in the conduct of criminal trials. Moreover, as seen above, the admissibility provisions of the Rome Statute emphasize that complementarity turns in part on domestic proceedings' impartiality, independence and respect for due process norms recognized by international law.

### ***Implementation considerations***

#### ***General***

At minimum, States should maintain a system of independent and impartial criminal courts or tribunals and ensure that domestic criminal processes comply with the due process and fair trials requirements of the ICCPR.



Further, in order to ensure availability of the complementarity principle, States should consider reviewing national codes of criminal procedure and evidence to ascertain whether any domestic procedural or evidentiary rules may have the effect of shielding a perpetrator of an ICC crime from criminal responsibility. For example, some evidentiary rules will almost systematically result in acquittal. An illustration of this is the requirement, found in some jurisdictions, that rape be established on the basis of the eye witness testimony of several men, even if only one man was involved in the rape. Indeed, rules of evidence and procedure concerning sexual offences, which are a prominent feature of the subject-matter jurisdiction of the ICC, are among those most likely to inhibit genuine investigation or prosecution of such crimes by some States. Another area deserving particular scrutiny are any rules limiting the ability of victims of crimes to bring complaints or lay charges for such crimes.

### ***Military tribunals***

The Rome Statute's complementarity provisions do not draw any distinction between domestic civilian and military procedures. Under the Rome Statute, States wishing to avail themselves of the complementarity principle may therefore conduct genuine investigations or prosecutions through their ordinary, civilian criminal justice system, their military justice system or both. As a practical matter, however, most domestic military tribunals have limited jurisdiction in criminal matters. As a general rule they only have jurisdiction to investigate or prosecute military personnel or acts committed in the course of armed conflict. Further, there is a growing body of opinion that international human rights law prohibits the prosecution by military tribunals of civilians for peacetime acts. ICC crimes, on the other hand, may occur in times of peace and be committed by civilians. As a result, States will likely have to resort to their civilian criminal justice system to ensure coverage of all ICC crimes.

In circumstances where resort to military tribunals is appropriate and consistent with the human rights obligations of States, careful consideration should be given to whether such tribunals meet the independence, impartiality and due process standards required by the complementarity provisions of the Rome Statute. While some domestic military tribunals do, States should be aware that resort to military justice procedures that fail to meet the due process requirements recognized in international law may fail to trigger the Rome Statute's complementarity provisions and may result in an assumption of jurisdiction by the ICC. In cases of doubt, therefore, States should consider pursuing investigations or prosecutions of ICC crimes through their civilian justice system in accordance with international standards or, alternatively, amending their system of military justice to comport with such standards.

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## 5. FURTHER INFORMATION ON THE RELATIONSHIP BETWEEN THE ICC AND STATES

This Chapter provides information on the broader obligations and rights of those States that become parties to the Rome Statute. It covers:

- Various administrative obligations and rights of States Parties, such as declarations and withdrawals, financial obligation and nominating judges and providing other ICC personnel.
- Major developments in the first years of the Court, such as the procedure, powers and recent activity of the Assembly of States Parties; the Official Journal of the ICC; the recent Court's Strategic Plan; the Office of the Prosecutor's policy, regulations and practice; and issues relating to defence counsel and victims.
- Two of the current debates: the development of the crime of aggression and the possible scope of the Review Conference.

### 5.1 Administrative state obligations and rights of states parties

#### *Treaty requirements*

##### *Ratification, acceptance, approval or accession*

In order to become a Party, a State must ratify, accept, approve or accede to the Treaty. "Accession" is the appropriate way for a State that did not sign the Statute to become a party to it. The entry into force of the Statute for such a State shall be the first day of the month following 60 days after its action of ratifying, accepting, approving or acceding to the Statute (article 126(2)).

##### *Reservations and declarations under the Statute*

Under article 120, States cannot 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 concerning war crimes, as some of the provisions in the Statute may differ from existing international obligations. Therefore other than a declaration pursuant to article 124, States, in becoming parties to the Rome Statute, should not make any kind of unilateral statement that could defeat the object and purpose of the Statute or in any way undermine its text.

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 decided to make a declaration under article 124 and was subsequently invaded by a hostile force that committed numerous war crimes, yet the State could not find any redress because it had not accepted 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. Only Colombia and France have made an article 124 declaration upon ratification, and for France the seven years have passed.

### ***Withdrawal from the Statute***

Article 127 provides that a State Party may withdraw by giving written notification to the Secretary General of the United Nations, with the withdrawal taking effect one year from the date of the notification or at a later date if the State so declares. There are obligations and duties of the State that persist notwithstanding the notice of withdrawal and the actual withdrawal itself (article 127(2)).

### ***Settlement of disputes***

Under article 119, disputes that arise between Parties relating to the interpretation or application of the Statute should initially be settled through negotiations, if possible. If a dispute cannot be settled in this manner within three months, the matter will be referred to the Assembly of States Parties, which may either seek to settle the dispute itself or recommend further means of settlement.

The Assembly of States Parties has the power to refer the dispute to the International Court of Justice “in conformity with the Statute of that Court” (article 119(2)).

### ***Implementation issues***

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 crime 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 criminalized 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.

### ***Financing of the court***

#### ***Financial contributions and the scale of assessment***

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 (article 114). The funds of the Court include:

- Specified financial contributions provided by States Parties.
- Any voluntary contributions.

Specified financial contributions provided by States Parties are assessed in accordance with an agreed scale. According to the Statute, the scale is based on the one adopted by the United Nations for its regular budget and adjusted in accordance with the principles on which that scale is based (articles 115(a) and 117). The general principle referred to 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. A resolution at the fifth session of the Assembly of States Parties provides that for 2007, the Court's scale of assessment is to be adjusted to take into account the difference in membership between the United Nations and Assembly of States Parties.

The funds do not come 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(b)).

#### ***The budget***

An annual budget of the Court is set by the Assembly of States Parties as reflected in the annual audit clause in article 118. The annual budgets provide, among other things, for all operating and human resource expenses of the Presidency, the Prosecutor and the Registrar, as well as the Common Services Division. The voluntary contributions to the Court, as permitted under article 116, provide that they must be considered as additional funds. Thus they may not be sought or utilized in any manner to replace or fulfill the regular budget expenses.

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 financial regulations and rules of the Court***

The financial regulations and rules of the Court, adopted by the Assembly of States Parties, 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 regulations and rules.

### ***Arrears***

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(8)).

### ***Implementation issues***

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.

## ***Nominating judges and providing other personnel to the Court***

### ***Nomination of judges***

The nomination of judges to the ICC is a right of States Parties, and therefore a State Party may wish to implement procedures for nominating candidates. If a State Party decides to nominate a candidate for election as a judge, it must take the following steps:

- Observe the requirements under article 36 as to the type of qualities that the candidate must possess.
- Follow the procedure set out in article 36(4).
- Follow the terms of the resolution governing the procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the ICC adopted by the Assembly of States Parties (ICC-ASP/1/Res. 2). This resolution specifies that judicial nominations should be accompanied by a statement indicating, among other things, how the candidate fulfills the various requirements set out in article 36.

Article 36(4) sets out the procedures that a State Party may use to nominate both candidates for appointment to the highest judicial offices in the State in question and 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)(b)).

The criteria for nominating judges are:

- High moral character, impartiality and integrity.
- Possession of the qualifications required in their respective States for appointment to the highest judicial offices.
- 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.
- Excellent knowledge of and fluency in at least one of the working languages of the Court, which are English and French.

Election of the judges will be by secret ballot at a meeting of the Assembly of States Parties held for that purpose (article 36(6)). The selection process outlined in the Statute (article 36(8)) requires the Assembly to take into account the need for judges who:

- Represent the principal legal systems of the world.
- Represent an equitable geographical representation.
- Comprise fair representation of female and male judges.
- Have legal expertise on specific issues, such as violence against women and children.

These criteria will ensure that the highest standards of competence and representativeness will be met in the selection of the judges.

### ***Ensuring the impartiality of judges***

Under article 41(2), a judge will be disqualified from hearing a case where that judge has previously been involved in any capacity 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(1)(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.

### ***Other ICC personnel***

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 ICC. The resolution provides that:

- Nominations for the post of Prosecutor should preferably be made with the support of multiple States Parties.
- 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(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 for which they have previously been involved in any capacity 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.

### ***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.

#### ***State referral of a situation***

States Parties may refer a "situation" to the Prosecutor, which gives jurisdiction to the Court to investigate the matter (under articles 13(a) and 14).

- States Parties 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(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(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(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(3)(a)).

### ***States Parties rights to present evidence***

If a State becomes a party to proceedings in the ICC, it has the right to present evidence (article 69(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(3)).

### ***States Parties rights to certain information***

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(3)).

### ***States Parties rights to receive cooperation and assistance***

States Parties also have the right to receive cooperation 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 (articles 93(10) and 96(4)).

## **5.2 Developments of the first years**

### ***Assembly of States Parties***

#### ***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 on the procedures it must follow. The Rules of Procedure of the Assembly of States Parties are available at:



[http://www.icc-cpi.int/library/asp/ICC-ASP-Rules\\_of\\_Procedure\\_English.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP-Rules_of_Procedure_English.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).
- 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).

### ***The powers of the Assembly of States Parties***

Article 112 of the Rome Statute sets out some of the broad functions that are imparted to the Assembly, including decisions it makes on the budget for the Court. The general powers given to the President and the Vice-President are further defined in rules 29 to 33 of the Rules of Procedure of the Assembly of States Parties. Article 112(4) of the Statute, complemented by rule 83, grants additional powers to the Assembly, such as the power to create subsidiary bodies as necessary. The Assembly established the Committee on Budget and Finance to provide an appropriate mechanism for the budgetary and financial review and monitoring of the resources of the ICC (see ICC-ASP/1/Res. 4). Article 112(6) sets out the timetable and preferred venue of meetings for the Assembly. Rules 3 to 9 complement these prescriptions.

There are numerous additional references throughout the Statute and Rules to the details of the Assembly's role and responsibilities. Most of the relevant provisions are in Part 4 of the Statute, including the following:

- A key role of the Assembly is the election of the Court's judges and Prosecutor and the selection of other personnel for the Court. 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 (articles 46(2) and 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(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(2)(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 to 59.

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(2)(g)).

### ***The Bureau***

The management structure of the Assembly comprises 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 (article 112(3)). The President of the Court, the Prosecutor and the Registrar may participate in meetings of the Assembly and of the Bureau (article 112(5) and rule 35).

The Bureau established two Working Groups in 2004; these were reconstituted in 2006:

- The Hague Working Group engages with the Court on the strategic planning process and its implementation and considers the issue of the Budget while respecting the special role of the Committee on Budget and Finance.
- The New York Working Group monitors the Plan of Action for Achieving Universality and Full Implementation of the Rome Statute, looks at independent oversight mechanisms and carries out consultations on the Review Conference.

### ***Plan of Action***

In 2006, the Assembly of States Parties adopted the Plan of Action for Achieving Universality and Full implementation of the Rome Statute. The Plan calls on States Parties to proactively promote universality and suggests that one way to support ratification is for States Parties to provide technical or financial assistance to States wishing to become States Parties.

The Plan also calls on States Parties to provide to the Secretariat relevant information regarding implementation issues. This information should include:

- Obstacles to ratification or full implementation facing States, national or regional strategies or plans of actions.
- Examples of implementing legislation and bilateral agreements between the Court and the State party.
- Solutions to constitutional issues arising from ratification.

The Secretariat is to be the focal point for information exchange and issued a note verbale in July 2007 calling on States to provide such information. States responses can be viewed at:



[http://www.icc-cpi.int/asp/Action\\_Plan/AP\\_2007.html](http://www.icc-cpi.int/asp/Action_Plan/AP_2007.html).

### ***The Official Journal of the ICC***

An Official Journal has been created (Reg. 7 of the Regulations of the Court) and a number of documents are available on a Web site created by the Court at:

 [http://www.icc-cpi.int/about/Official\\_Journal.html](http://www.icc-cpi.int/about/Official_Journal.html).

In addition to the documents described below, there are also texts of various agreements between the ICC and other organizations, such as the European Union and the International Committee of the Red Cross; various Codes, such as those on judicial ethics and professional conduct for counsel; and a number of Regulations, such as those for the Court, the Registry, the Trust Fund and the staff.

### ***Elements of Crimes***

The Elements of Crimes document, adopted at the first meeting of the Assembly of States Parties, 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 Rules of Procedure and Evidence***

The Rules of Procedure and Evidence, adopted at the first meeting of the Assembly of States Parties, are intended to clarify and elaborate upon the procedural matters covered in general terms in the Statute. As the 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(5)).

States Parties may need to change some of their national procedures to reflect the requirements of the Rules of Procedure and Evidence to ensure that they can continue to cooperate fully with the Court, in accordance with articles 86 and 88 of the Statute.

An ICCLR guide on implementing any obligation arising under the Rules of Procedure and Evidence is available at:

 [http://www.icclr.law.ubc.ca/Publications/Reports/ICC%20Reports/RPE\\_2nd\\_ed\\_English.pdf](http://www.icclr.law.ubc.ca/Publications/Reports/ICC%20Reports/RPE_2nd_ed_English.pdf).

### ***The Agreement on the Privilege and Immunities of the International Criminal Court***

The Agreement on Privileges and Immunities of the ICC, adopted at the first meeting of the Assembly of States Parties, came into effect on 22 July 2004 and now has been ratified by 52 States. The purpose of the privileges and immunities of the Court, its personnel and officials and those participating in proceedings of the Court is to safeguard the integrity and autonomy of the Court. The Agreement covers privileges

and immunities relating to the legal status of the Court and those dealing with the representatives of States Parties, personnel and officers of the Court, experts, witnesses, victims and any other person required to be present at the seat of the Court.

An ICCLR guide on implementing any obligations arising under the Agreement on Privileges and Immunities is available at:



[http://www.icclr.law.ubc.ca/Publications/Reports/ICC%20Reports/APIC\\_Guide\\_ENG.pdf](http://www.icclr.law.ubc.ca/Publications/Reports/ICC%20Reports/APIC_Guide_ENG.pdf).

### ***The Court's Strategic Plan***

The Court has developed a Strategic Plan setting out the overarching objectives and priorities of the Court's work over a 10-year framework. The plan identifies three goals for the Court:

- To ensure the quality of justice.
- To be a well-understood and well-supported institution.
- To become a model for public administration.

The Court is now in the process of developing a Victims Strategy and a Defence Strategy. Part of the Court's Strategic Plan contains the Prosecutorial Plan. For the Victims' Strategy, the Court identified main areas for elaboration: outreach and information, protection, assistance to the victims, participation, reparation and legal representation.

The Assembly of States Parties continues to call on States to enter into arrangements with the Court concerning, among other things, witness relocation and sentence enforcement.

### ***Office of the Prosecutor***

#### ***The policy***

The Office of the Prosecutor has issued a Policy Paper and Regulations as part of setting out an institutional framework that ensures independence and accountability. The Policy highlights the priority tasks of the Office. Given the reality of limited resources, the Policy provides for a two-tiered approach: to initiate prosecution of the leaders who bear most responsibility for the crimes while also encouraging national prosecutions, where possible, for the lower-ranking perpetrators, or work with the international community to ensure that the offenders are brought to justice by some other means.

The Policy of the Prosecutor notes that factors such as gravity, the interests of victims, the particular circumstances of the accused, complementarity and the

interests of justice are examined during the legal analysis. Factors relevant in assessing gravity include the scale, nature and manner of commission of the crimes and the impact of the crimes. The operation of this Policy is reflected in the four situations that have been opened to date: Democratic Republic of Congo, Uganda, Darfur in the Sudan and Central African Republic, which all involve high levels of killings, large-scale sexual violence and abductions and large numbers of displacement.

### ***Regulations***

The 2003 draft regulations do not replace the principles in the Statute or the Rules of Procedure and Evidence, but rather promote transparent decision making and consistency of approach. The regulations cover a code of conduct; the management of preliminary examinations, article 53(1) evaluation and start of investigation; article 53(1) evaluation and start of investigation pursuant to article 13(a) and (b); decisions to start investigations; the investigation; interviews of witnesses, suspects and accused; the prosecution; information and evidence management; data security; presentation of evidence to the Court; archiving and deleting stored information; data security; management away from the seat of the Court; national security information; and external communications.

### ***Relationship between State Parties and the Office of the Prosecutor***

Agreements with States will be necessary to support the Court's efforts by providing security, police and investigative teams and giving intelligence and other evidence, especially noting investigations in the area of financial links to crimes. The extent of the analysis by the Office of the Prosecutor to determine whether there is a reasonable basis to proceed depends on the information available to the Office. States Parties may receive specific focused requests from the Prosecutor for information and, therefore, should ensure procedures are in place to facilitate the exchange of information.

In an effort to ensure transparency, the Office of the Prosecutor disseminates regular updates regarding communications received. As of February 2006, the Prosecutor had received over 1700 communications from individuals or groups in at least 103 different countries regarding allegations of crimes in 139 countries in all regions of the world.

- Eighty percent were found to be manifestly outside the jurisdiction of the Court after an initial review. Some of the reasons include those related to events prior to 1 July 2002, crimes that were not within the subject matter of the Court, crimes committed outside the personal or territorial jurisdiction of the Court and manifestly ill-founded communications.
- Twenty percent were found to warrant further analyses.

## ***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. Furthermore, article 21 of the Statute provides that the law of the Court must generally comply with internationally recognized human rights standards. 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 to ensure that national investigation and arrest procedures comply with internationally recognized human rights standards and complement the work of the Court.

### ***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 institutionalize the role of the defence. The appearance before the Court of organized, knowledgeable and accountable defence counsel is essential to its effective functioning and the efficient administration of justice. The necessary privileges and immunities are to be ensured to defence counsel and persons working for defence counsel and are discussed in more detail in Chapter 3, section 3.5.

The Court's Rules of Procedure and Evidence calls for the Registrar to create and maintain a list of counsel who meet certain criteria. The Office of Public Counsel for the Defence is to function as an independent office, but for administrative purposes is within the remit of the Registry. This new office represents progress in the organization of the defence within the ICC system but does not constitute a fully independent organ for the defence that stands in full equality of the Office of the Prosecutor, as has been established recently in the structure of the new Special Tribunal for Lebanon, which was set up by the Security Council of the United Nations in 2007. The International Criminal Bar (ICB) has been organized to represent all counsel practising before the ICC and has self-regulatory procedures including ethics and disciplinary procedures. The ICB's Web site is at:



<http://www.bpi-icb.org/>.

### ***Trust Fund for Victims***

The Assembly has established and administers 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(1)). The Assembly is responsible for the criteria for managing the Trust Fund (article 79(3)), and consequently adopted the Regulations of the Trust Fund in December 2005.

The Fund, an independent institution committed to assisting victims in countries where the Court has opened an investigation, has become fully operational. 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.

## 5.3 Current debates

### *Crime of aggression*

Article 5(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 (1 July 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.

At the Preparatory Commission, with delegates representing over 100 States, the negotiations on the crime of aggression were not concluded by the final session. Consequently, the Assembly of States Parties passed a resolution on continuing the work on the crime of aggression at its first meeting (ICC-ASP/1/Res. 1). This resolution established a Special Working Group on the Crime of Aggression open to all member States of the United Nations and members of specialized agencies. The purpose of the Special Working Group is to elaborate proposals for a provision on aggression in accordance with article 5(2) of the Statute. The Special Working Group is to submit proposals to the Assembly for consideration at a Review Conference.

All States involved in the negotiations to date are committed to finding an acceptable compromise for all concerned States. The work of the Special Working Group is to be concluded at least 12 months before the Review Conference.

### *Historical 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 (Kellogg-Briand Pact). But none of these declared aggression an international crime. 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.” 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 United Nations General Assembly adopted a Resolution on the Definition of Aggression, which provided that “a war of aggression is a crime against international peace.” However, the Resolution did not deal with individual criminal responsibility for acts of aggression, and so it is questionable whether the definition in that Resolution is applicable to individual criminal acts.

### ***Current status of debate***

There are three main substantive issues under discussion:

- Defining the individual's conduct.
- Defining the State act of aggression.
- The role of the Security Council, or the conditions for the exercise of jurisdiction.

The Chairman of the Special Working Group submitted a paper to the Assembly of States Parties in January 2007, reflecting the discussions held in the intersessional meetings in Princeton, to guide further discussion. This paper reflects certain progress regarding the description of the individual conduct and the definition of the State act of aggression as well as the core debate of the preconditions for the exercise of jurisdiction.

### ***Defining individual conduct***

There appears to be consensus on the absolute leadership nature of the crime of aggression as established in Nuremberg and Tokyo. Recent discussions have examined the forms of individual participation that are listed in article 25(3).

- The “differentiated approach” focuses on the principal perpetrator and would be treated in this regard like other crimes under the jurisdiction of the Court; however, a leadership clause may also be attached to article 25(3)(a)-(d).
- The “monistic approach” focuses on perpetrators who “order or participate” and where article 25(3)(a)-(f) is not applicable.

### ***Defining the State act of aggression***

One debate is whether the definition of the State act of aggression should be generic or specific, which would include a list of acts of aggression. There has been discussion as to whether there should be a qualifier to limit the definition of the State act to those instances of the use of armed force that, by their character, gravity and scale, constitute a manifest violation of the United Nations Charter. Options have been discussed as to how to regard the General Assembly Resolution 3314: as a general reference, some partial incorporation or reproduction of specific parts of the text.

### ***Conditions for the exercise of jurisdiction***

The role of the United Nations Security Council with respect to the crime of aggression remains very controversial. Some States are of the view that the meaning of the phrase in article 5(2), which provides that any provision on the crime of aggression “shall be consistent with the relevant provisions of the Charter of the United Nations,” means that the Security Council has to make a determination that an act of aggression has occurred in accordance with its powers under Chapter VII of the Charter of the United Nations 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 Charter of the United Nations, for determining that acts of aggression have occurred.

Some positions include having the Court ask the Security Council before starting an investigation into a crime of aggression, but if the Security Council does not answer, the Court will then be able to proceed. Involving the United Nations General Assembly, following the Uniting for Peace formula, or following the International Court of Justice in either its contentions or its advisory capacity have been put forward as options.

### ***The incorporation of the definition into the Statute***

Another point that remains unclear is whether the incorporation of the definition and triggering mechanism on the crime of aggression into the Statute would be considered an amendment to the Statute and, if so, what would the amendment procedure be and which States would it apply to? Several arguments have been presented:

- The incorporation of the definition into the Statute would be an amendment to article 5 of the Statute and then, according to article 121(5), the provision must apply only to those parties that have accepted the amendment.
- According to article 121(3), the provision on aggression would apply to all States Parties if adopted by two-third majority.
- According to article 121(4), seventh-eighths must accept the provision before all States Parties are bound.
- The provision is not an amendment, but simply the fulfilment of expectations that something would be drafted later.

## ***Review of the Statute***

### ***The first Review Conference***

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 First Review Conference is to be held in the first semester of 2010 for five to 10 working days (ICC-ASP/6/Res. 2). The draft rules of procedure for the Conference have been endorsed by the Assembly of States Parties. The venue has not yet been decided. The Assembly established a Focal Point on the Review Conference who submitted his report at the sixth session of the Assembly of States Parties meeting. The report contains a list of criteria for choosing a venue.

The only mandatory instruction contained in the Statute regarding amendments to consider at the First Review Conference is to review the provisions in article 124 which enables States to opt out of the war crimes obligation of article 8 for seven years. Other potential subjects of amendments that could be reviewed at the first Conference involve crimes either mentioned in the Final Act of the Rome Conference or implicit in the Statute, such as the following:

- The provisions on the crime of aggression is referred to both in article 5(2) of the Statute as well as Resolution F of the Final Act and the reference is that it should be considered at “a Review Conference,” not necessarily the first Conference. However, it is clear that there is a general expectation that the 2010 Conference will review this issue.
- Crimes of terrorism and drug crimes are specifically recommended in the Final Act of the Rome Conference (Resolution E) to be considered for inclusion on the list of crimes within the jurisdiction of the Court. There are no current proposals for the inclusion of this in the first Conference.
- Implicit in article 8(2)(b)(xx) is that a Review Conference may consider the matters concerning weapons, projectiles, material and methods of warfare. There are no current proposals for the inclusion of this in the first Conference.

Other potential subjects for consideration at a Review Conference noted from various sources include adding a specific structure concerning defence counsel to the Statute, clarification of articles 17 and 20 in relation to national proceedings that might not comply with due process standards, adding the inchoate offence of “conspiracy to commit genocide” to article 25, adding jurisdiction over legal persons and expanding or contracting article 12's preconditions to the exercise of jurisdiction.

The Assembly of States Parties recommends that in addition to a focus on amendments, the Review Conference also involve “stocktaking” of international criminal justice (ICC-ASP/6/Res. 2).

### ***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(1)).
- 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.
- May not be considered for adoption unless a majority of the States Parties that 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 amendment directly or submit it to a Review Conference if the issue involved so warrants (article 121(2)).

Adoption of an amendment to the Statute requires a two-thirds majority of States Parties (article 121(3)). Note that this article repeats the Assembly's mandate to attempt to adopt measures first by consensus (see article 112(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 affect 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(6)).

### ***Amendments to crimes within the Court's jurisdiction***

There is an exception to the general rule regarding amendments: When an amendment concerns the crimes within the jurisdiction of the Court, specifically any amendments to articles 5, 6, 7 and 8 (article 121(5)), the same requirement of adoption by a majority of two-thirds of States Parties is required, but the

amendment is effective only for States that ratify or accept it. For a State Party that 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.

### ***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 that 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 organization of chambers.
- Some of the provisions concerning the Office of the Prosecutor, the Registry and 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.
- 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 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 they need only be adopted by a two-thirds majority of States Parties (articles 9(2) and 51(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 (articles 9(2)(a) and 51(2)(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(6)). Upon its withdrawal, a State shall not be discharged from the obligations that had arisen while it was a State Party, including any financial obligations (article 127(2)).

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., *The Statute of the International Criminal Court and Related Instruments: Legislative History 1994-2000* (New York: Transnational Publishers Inc, 2002).

Bassiouni, M.C., ed., *The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Test* (New York: Transnational Publishers Inc, 2005).

Broomhall, Bruce, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford University Press, 2004).

Cassese, A., Gaeta, P., and Jones, J.R.W.D., *The Rome Statute of the International Criminal Court: A Commentary (3 volumes)* (New York: Oxford University Press, 2002).

Calvo-Goller, Karin N., *The Trial Proceedings of the International Criminal Court, ICTY and ICTR Precedents* (Martinus Nijhoff Publishers, 2006).

Curat, Philippe, *Les crimes contre l'humanité dans le Statut de la Cour pénale internationale* (Schulthess, 2006).

Doria, Jose, Gasser, Hans-Peter and Bassiouni, M.C., eds., *The Legal Regime of the International Criminal Court. Essays in honour of Professor Igor Blishchenko* (Brill Academic Publishers, 2008).

Dormann, Knut, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary* (Cambridge University Press, 2003).

Dixon, R., Khan, K.A.A., and May, R., eds., *Archbold International Criminal Courts: Practice, Procedure & Evidence* (London: Sweet & Maxwell, 2003).

Kress, Claus, Lattanzi, Flavia, Broomhall, Bruce and Santori, Valeria, eds., *The Rome Statute and Domestic Legal Orders. Volume II: Constitutional issues, Cooperation and Enforcement* (Baden-Baden/Ripa Fagnano Alto: Nomos Verlagsgesellschaft/Editrice il Sirente, 2005).

Laucci, Cyril, ed., *The Annotated Digest of the International Criminal Court 2004-2006* (Brill Academic Publishers, 2007).

Lee, Roy S., ed., *State's Responses to the International Criminal Court: Methods and Techniques for Handling Issues of Criminal Law, Constitution and Sovereignty* (Brill Academic Publishers, 2005).

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).

Olasolo, Hector, *The Triggering Proceedings of the International Criminal Court* (International Criminal Law Review, 2005).

Sadat, L. N., *The International Court and the Transformation of International Law: Justice for the New Millennium* (New York: Transnational Publishers, 2002).

Schabas, W.A. *An Introduction to the International Criminal Court, third edition* (Cambridge University Press, 2007).

Triffterer, Otto, ed., *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article, second edition* (Baden-Baden: Nomos Verlagsgesellschaft, 2004).

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 12 August 2003) "International Criminal Court: Resources in Print and Electronic Format"

 (<http://www.lib.uchicago.edu/~llou/icc.html>).

The American Society of International Law Guide to Electronic Resources has a section dedicated to electronic Web sites for the International Criminal Court, with updates:

 <http://www.asil.org/resource/crim1.htm#International%20Criminal%20Court>

The Coalition for the International Criminal Court (CICC) has provided an updated section with information on publication and electronic resources, bibliographies and related Web sites on a number of ICC and Rome Statute topics:

 <http://www.iccnw.org/?mod=publications>



## 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 non-governmental organization CICC's online Ratification and Implementation page:

 <http://www.iccnw.org/?mod=ratimp>

or the University of Nottingham Human Rights Law Centre's Web site at

 <http://www.nottingham.ac.uk/law/hrlc/projects/icj-projects.php>

- AR** - Ley de Implementacion de Estatuto de Roma de la Corte Penal Internacional, enacted 5 January 2007, 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, 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 (N.B.: 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
- WS** - International Criminal Court Act enacted 9 November 2007, Samoa
- CW** - Commonwealth Model Law to Implement the Rome Statute of the ICC, 31 August 2006, (draft legislation)

### 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 Web site on ICC implementation:



<http://www.icc.gc.ca>

CICC Ratification and Implementation at



<http://www.icc.now.org/?mod=ratimp>.

This Web site contains the following information: (i) ICC implementation checklists in all published languages, including a country-by-country list detailing the status and content of implementation; (ii) existing ICC legislation; (iii) status and content of implementation; (iv) draft ICC legislation; (v) NGO analyses of ICC legislation; and (vi) articles on ICC ratification and implementation.

Dipartimento di Scienze Giuridiche Pubblicistiche, Università degli Studi de Teramo, Italy, Report on the Round Table Meeting on The Implementation of the International

Criminal Court Statute in Domestic Legal Systems, 12-13 November 1999 (1999).

European Union agreement on cooperation and assistance for the ICC at



<http://europa.eu/scadplus/leg/en/lvb/r10150.htm>.

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.

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# APPENDIX I:

## 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 acquiescence 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) Employing bullets which expand or flatten easily 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, on an exceptional basis, seek authority 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 disqualification 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 be eligible 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 inter-governmental 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, inter-governmental 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 recom-

mendations 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 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.



### **About the International Centre for Criminal Law Reform and Criminal Justice Policy**

The International Centre for Criminal Law Reform and Criminal Justice Policy is an independent, international institute based in Vancouver, Canada and officially affiliated with the United Nations. The Centre was founded in 1991 as a result of an initiative by the Government of Canada, the University of British Columbia, Simon Fraser University and the International Society for the Reform of Criminal Law. The mandate of the Centre is to promote human rights, the rule of law, democracy and good governance. The Centre focuses its activities on technical co-operation, research, training and advisory services.

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