International Criminal Court

Manual for the Ratification and Implementation of the Rome Statute

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

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

ICCLR has been, and continues to be, committed to supporting efforts to establish a permanent, effective and just International Criminal Court. ICCLR began its work on international criminal court issues within a short time of its inception. By 1993, it had assisted the UN Security Council and UN Legal Affairs Office by holding a large meeting of experts in Vancouver and made many recommendations that ended up in the ad hoc Tribunal for the Former Yugoslavia’s statute, as noted in the May 1993 Secretary General’s Report. Renewed efforts to establish a permanent ICC coincided with the creation of this ad hoc tribunal and the Rwanda Tribunal. ICCLR continued to expand its research and program activities dealing with international criminal court issues, and has since written numerous research papers on the topic, participated in many conferences, including the Diplomatic Conference in Rome and subsequent Preparatory Commission Meetings, hosted prominent lecturers who spoke on the topic, and provided public lectures.

Rights and Democracy (short version of the International Centre for Human Rights and Democratic Development (ICHRDD)) is a Canadian institution with an international mandate, created by an Act of Parliament in 1988. It works with citizens’ groups and governments in Canada and abroad to promote human rights and democracy, as defined in the International Bill of Human Rights. ICHRDD’s work emphasizes advocacy and capacity building. It provides political, financial and technical support to many frontline human rights groups, indigenous peoples’ groups and democratic movements around the world. It advocates policy changes in national and international institutions, and strengthens the capacity of its partners to do the same. It assists non-governmental organizations (NGOs) gain access to multilateral institutions and works to mainstream women’s rights in human rights mechanisms. It advocates policy changes in national and international institutions, and strengthens the capacity of its partners to do the same. It assists non-governmental organizations (NGOs) gain access to multilateral institutions and works to mainstream women’s rights in human rights mechanisms. It brings together members of civil society and the State from different countries to discuss fundamental human rights and democratic development issues. It increases public awareness, in Canada and abroad, of human rights violations and sponsors publications, research, conferences, missions of enquiry as well as public events.

ICHRDD has been at the forefront of the international movement for the creation of an effective International Criminal Court. The creation of an ICC relates directly to the International Centre’s campaign against impunity initiated in 1993 with the organisation of an International Popular Tribunal on Haiti (September 1993) and an international conference on impunity in Africa, in Ouagadougou, Burkina Faso (March 1996). ICHRDD’s campaign against impunity emphasized the importance of knowing the truth about the past, the necessity of effective prosecution and compensation, and the prerequisite of strengthening the rule of law for the sake of punishment and deterrence of serious and large-scale violations of human rights. In its advocacy for the creation of a strong and effective ICC, ICHRDD encouraged the Francophonie’s Hanoï (1997) and Moncton (1999) summits and the Commonwealth Heads of Government meeting in Edinburgh (1997) to adopt resolutions in favour of the ICC. ICHRDD has closely followed the work of the International Criminal Tribunals for Rwanda and the former-Yugoslavia. Furthermore, ICHRDD organized, in March 1998, a meeting of experts to devise lobbying strategies in support of the creation of the ICC.

Moreover, in collaboration with Canadian and international NGOs, ICHRDD contributed to the debate on the structure and mandate of the ICC, participating in all 6 Preparatory Committees since 1996 and the 1998 Rome Diplomatic Conference as well as facilitating the participation of some southern partners including women’s rights activists to the Preparatory Committees. ICHRDD is an active member of the Steering Committee of the NGO Coalition for an ICC. A key partner is the Women’s Caucus for Gender Justice in the International Criminal Court. ICHRDD is now working with partners to lobby States for a quick ratification of the Rome Statute.
TABLE OF CONTENTS

1. INTRODUCTION .................................................................................................................. 7
   1.1 OVERVIEW OF THE ICC ............................................................................................. 12
   1.2 How the ICC will function ......................................................................................... 13
   1.3 Triggering an investigation ....................................................................................... 14
   1.4 How a case is brought to trial ................................................................................... 16

2. GENERAL ISSUES OF IMPLEMENTATION ....................................................................... 18
   2.1 RATIFICATION FIRST VERSUS IMPLEMENTATION FIRST ........................................... 19
   2.2 APPROACHES TO IMPLEMENTATION ....................................................................... 20
   2.3 INTRODUCTION OF NEW PROCEDURES ................................................................ 22
   2.4 FEDERAL ISSUES ........................................................................................................ 22
   2.5 COMPATIBILITY WITH DIFFERENT LEGAL SYSTEMS .............................................. 22

3. SPECIFIC ISSUES OF IMPLEMENTATION .................................................................... 23
   3.1 PRIVILEGES AND IMMUNITIES OF ICC PERSONNEL .............................................. 23
   3.2 OFFENCES AGAINST THE ADMINISTRATION OF JUSTICE OF THE ICC ............... 25
   3.3 PROCEDURES WHERE THE ICC WISHES TO INVESTIGATE THE SAME MATTER AS A STATE PARTY ................................................................. 28
   3.4 IMPORTANT PROVISIONS IN THE STATUTE RELATING TO STATE CO-OPERATION ................................................................. 31
      Requests for co-operation and assistance .................................................................... 33
      Postponement of execution of requests ...................................................................... 35
      Costs of executing requests ....................................................................................... 37
      Designation of an appropriate channel for receiving requests .................................. 37
      Ensuring the confidentiality of requests .................................................................... 38
      Provision for future amendments ............................................................................. 39
   3.5 RESPONDING TO A REQUEST FROM THE ICC TO ARREST A PERSON ................... 40
      Overview of arrest procedures .................................................................................. 40
      Issue and execution of warrants of arrest .................................................................. 41
      Rights of the person ................................................................................................. 44
      Hearing before a competent judicial authority ......................................................... 46
      Interim release ......................................................................................................... 48
      Issuing of a summons ................................................................................................ 49
   3.6 SURRENDERING A PERSON TO THE ICC .................................................................. 50
      “Distinct nature” of the ICC ..................................................................................... 50
      Postponement of requests for surrender and ne bis in idem ..................................... 53
      Competing requests .................................................................................................. 55
      Conflicts with other international obligations .......................................................... 57
   3.7 POSSIBLE CONSTITUTIONAL ISSUES RELATING TO SURRENDER ....................... 58
      Absence of immunity for Heads of State .................................................................. 59
      No statute of limitations ............................................................................................ 61
      The surrender by a State of its own nationals ............................................................ 62
      The sentence of life imprisonment .......................................................................... 63
      The right to trial by jury ............................................................................................. 64
   3.8 ALLOWING SUSPECTS TO BE TRANSPORTED ACROSS STATE TERRITORY EN ROUTE TO THE ICC ................................................................. 65
   3.9 COLLECTING AND PRESERVING EVIDENCE ................................................................. 66
      Admissibility of evidence before the ICC .................................................................. 66
      Requests for assistance with evidence .................................................................... 68
      Testimonial evidence and other evidence concerning specific persons .................. 70
      Items of evidence ....................................................................................................... 75
   3.10 PROTECTION OF NATIONAL SECURITY INFORMATION ........................................ 77
   3.11 PROTECTION OF THIRD-PARTY INFORMATION .................................................... 78
   3.12 ENFORCEMENT OF FINES, FORFEITURE ORDERS, AND REPARATIONS ORDERS ........................................................................................................ 78

TABLE OF CONTENTS................................................................................................................. 4
3.13 Enforcement of Sentences of Imprisonment .................................................. 80
   Accepting sentenced persons ........................................................................ 81
   Sentences of Imprisonment ............................................................................. 81
   Review by the Court for reduction of sentences .......................................... 83

4. COMPLEMENTARITY OF THE JURISDICTION OF THE ICC .......................... 83
   4.1 The Principle of Complementarity of the ICC ........................................... 83
      Exceptions to the principle ............................................................................. 84
      Ne bis in idem .................................................................................................. 84
   4.2 The Jurisdiction of the ICC ......................................................................... 86
   4.3 Crimes Listed Under the Statute ................................................................. 87
      Genocide ......................................................................................................... 87
      Crimes against humanity ............................................................................... 89
      War crimes ..................................................................................................... 90

4.4 Grounds for Excluding Criminal Responsibility .......................................... 94
4.5 Individual Criminal Responsibility and Inchoate Offences Provided Under the Statute 96
4.6 Responsibility of Commanders and Other Superiors ................................... 97
4.7 Rules of Evidence and National Criminal Justice Proceedings .................. 99
4.8 Military Tribunals ......................................................................................... 99

5. RELATIONSHIP BETWEEN THE ICC AND STATES ..................................... 100
   5.1 Broader State Obligations and Rights of States Parties ............................... 100
      Treaty Requirements ...................................................................................... 100
      Financing of the Court .................................................................................. 102
      Allowing the ICC to sit in a State’s territory ............................................... 104
      Nominating judges and providing other personnel to the Court ............... 104
      Other rights of States Parties ........................................................................ 106
   5.2 Looking to the Future .................................................................................. 106
      Assembly of States Parties ........................................................................... 106
      Elements of Crimes ....................................................................................... 108
      Rules of Procedure and Evidence ................................................................ 108
      Review of the Statute .................................................................................... 109
      Crime of Aggression ...................................................................................... 111
      Assistance of Defence Counsel .................................................................... 112

6. SELECT BIBLIOGRAPHY AND RESOURCES ................................................. 115
   6.1 International Documents and Treaties ....................................................... 115
   6.2 International Criminal Court Implementing Legislation .......................... 116
   6.3 Jurisprudence ............................................................................................... 116
   6.4 Books ........................................................................................................... 116
   6.5 Articles ......................................................................................................... 117

APPENDIX I – THE FRENCH SOLUTION TO CONSTITUTIONAL ISSUES .................. 119

APPENDIX II – INTERNATIONAL INSTRUMENTS CRIMINALISING WAR CRIMES ........ 121

APPENDIX III - CASES RELATED TO THE RESPONSIBILITY OF COMMANDERS ......... 122
FOREWORD

The 20th Century witnessed a litany of inhumanity and lawlessness mocking the notion of global order. Here at the beginning of the 21st Century, the key measures to apply law and protect human rights around the world are within reach. What is needed now is the political will to move forward - to ratify and implement the provisions of the Rome Statute for an International Criminal Court, an historical watershed in the fight to end the impunity long enjoyed by the perpetrators of heinous crimes. This Manual seeks to support this will by providing practical advice to governments and legislators on how to accomplish these goals.

The political success of the Rome Conference in July 1998 was only a partial victory; the permanent court will only be established when at least 60 States have ratified the Rome Statute. International mobilization is required to assist the ratification and implementation of the Statute by as many States as possible, as soon as possible. Any delay could mean a loss of momentum that would deprive the international community of a fundamental instrument to defend human rights and to prosecute and hold accountable those responsible for the most egregious crimes under international law – genocide, crimes against humanity and war crimes.

To neglect ratification of the International Criminal Court would send a negative message to the international community, precisely when it is the moment to capitalize on the successes and progress made in this direction so far. In addition, the longer it takes for the ICC Statute to enter into force, the more chances a negative campaign against the Court will have.

We must therefore build on the enthusiasm and momentum generated at the Rome Conference and the recent Preparatory Commission meetings – and trust that the publication of this Manual will contribute to the rapid establishment of this vital tribunal and the consolidation of the Rule of Law on the international plane.

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EXECUTIVE SUMMARY

1. INTRODUCTION

1.1 Overview of the International Criminal Court
This section of the Manual provides an introduction to the main features of the proposed International Criminal Court (ICC). It describes how the Statute for this Court was finalised in Rome in July 1998 (Rome Statute), representing the culmination of 50 years of work to create a permanent institution for trying those accused of the most serious crimes of concern to the international community as a whole. The Statute will come into force on the 1st. day of the month after the 60th. day following the date of the deposit of the 60th. instrument of ratification.

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

The Court will be managed by an Assembly of States Parties, representing all States Parties. In addition, any States that have signed the Rome Statute or the Final Act of the Rome Conference will have observer status in the Assembly. States that did not sign the Final Act and have not signed the Rome Statute should note that the Rome Statute will only be open for signature until 31 December 2000. After that date, such States will not be able to participate in the Assembly of States Parties unless they sign and/or ratify the Statute in the interim.

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

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

1.2 Purpose of the Manual

The Manual has been developed to assist interested States with the ratification and implementation of the Rome Statute. The ICC will rely on the co-operation and assistance of States Parties, in order to realise its potential, so States Parties need to ensure that they are able to provide this assistance. The various sections of the Manual highlight the obligations of States Parties to the Statute, and the features of the Statute that may affect the approach taken by States to ratification and implementation. It is recognized that the views and the statements in the Manual are not intended to be the last word on all requirements of the Rome Statute for implementation by States.
2. GENERAL ISSUES OF IMPLEMENTATION

This section discusses the following points:

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

3. SPECIFIC ISSUES OF IMPLEMENTATION

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

The main obligations to be implemented are described in:

3.1 Protecting the privileges and immunities of the personnel of the Court;
3.2 Creating offences against the administration of justice of the ICC;
3.5 & 3.6 Executing requests for arrest and surrender of persons to the ICC;
3.9 Collecting and preserving evidence for the ICC;
3.12 Enforcing fines, forfeiture and reparations orders;

Section 3.12 describes how States may protect their national security information when assisting the Court, in accordance with article 72 of the Statute.

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

3.3 Procedures where the ICC wishes to investigate the same matter as a State Party;
3.4 Important provisions in the Statute relating to State co-operation, such as:
   • the obligation to “co-operate fully”;
   • postponement of execution of requests;
   • costs of executing requests;
   • designation of an “appropriate channel” for receiving requests;
   • ensuring the confidentiality of requests; and
   • provision for future amendments;

3.7 Possible constitutional issues relating to surrender of a person to the ICC, such as:
   • the absence of immunity for Heads of State,
   • the non-applicability of a statute of limitations to the crimes listed under the Statute,
• surrendering nationals to the ICC,
• life imprisonment, and
• the right to trial by jury;

3.8 Allowing suspects to be transported across State territory en route to the ICC;
3.11 Protection of third party information; and
3.13 The option for States to enforce sentences of imprisonment, including review by the Court for reduction of sentences and other issues pertaining to the acceptance of sentenced persons.

4. COMPLEMENTARITY OF THE JURISDICTION OF THE ICC

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

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

5. RELATIONSHIP BETWEEN THE COURT AND STATES

5.1 Broader State Obligations and Rights of States Parties

This section provides guidance on:
• treaty requirements of the Rome Statute;
• financing of the Court;
• allowing the ICC to sit in a State’s territory;
• nomination of personnel such as judges for the Court; and
• some of the other rights of States Parties, such as referring situations to the Court for investigations;
5.2 Looking to the Future

The last section of the Manual deals with:

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

1.1 Overview of the ICC

The attainment, in July 1998, of a Statute for a permanent International Criminal Court (ICC) with the power to investigate and prosecute those who commit genocide, crimes against humanity and war crimes, represents a significant achievement for the world community. Of the 160 or so States that assembled in Rome for the United Nations conference that finalised and adopted the Statute for the ICC (Rome Statute), 120 voted in support of the Statute’s final text. The creation of the Court will therefore represent the realisation of a strong consensus among States – a remarkable feat, considering the various interests and legal systems that contributed to the process, as well as the fact that the General Assembly had first addressed this question some 50 years ago.

The ICC, once operational, will not only be a principal means of combating impunity, but will also contribute to the preservation, restoration and maintenance of international peace and security. More than 90 State governments have already signed the Statute, and the number of ratifications is growing steadily. The Statute will enter into force once it is ratified by 60 States.

The place of the ICC in the international legal system

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

As a treaty-based institution, the ICC will have a unique relationship with the United Nations system. Unlike the ICTY/R, the ICC is not a creation of the Security Council, nor will it be managed by the UN General Assembly. Yet it will be based in the Hague and will receive some financial support from the UN, particularly when the Security Council refers matters to it for investigation (articles 3, 13(b) & 115(b)). The exact relationship between the ICC and the UN will be detailed in a special agreement that will be negotiated and approved by the ICC Assembly of States Parties (article 2). This Assembly, comprising representatives from each State Party, will also be responsible for making decisions on such matters as the administration and budget of the Court, as well as on future amendments to the Statute (article 112). The expenses of the Court and of the Assembly of States Parties will be paid from the funds of the Court, which will be provided by States Parties on an agreed scale of assessment, as well as by the UN and any voluntary contributors (articles 114-116). Thus, States Parties to the Rome Statute will have a significant role to play in the management of the ICC. If the Court is to realise its potential, it must be aided by States to enforce the existing rules, laws and norms that prohibit serious crimes of concern to the international community as a whole.

However, the ICC is intended to complement, not substitute national criminal justice systems. This principle of complementarity ensures that the Court will only intervene in cases
where national courts are unable or unwilling to initiate or conduct their own proceedings (these circumstances are carefully defined in the Statute, article 17(1)). The Court will not therefore encroach on an individual State's jurisdiction over crimes covered by the Statute.

**How the ICC will function**

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

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

**The personnel of the Court**

The ICC will be comprised of the following organs: the Presidency, the Pre-Trial Division, the Trial Division, the Appeals Division, the Office of the Prosecutor, and the Registry (article 34). The President and First and Second Vice-Presidents will be elected by an absolute majority of the judges and will have limited terms of appointment to these positions (article 38). The Assembly of States Parties will elect the judges, after nominations have been made by States Parties (article 36). The elected judges will serve on the Court for a maximum of nine years (article 36(9)).

The criteria for nominating judges is: (i) high moral character, impartiality and integrity; (ii) possession of the qualifications required in their respective States for appointment to the highest judicial offices; (iii) established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings, or established competence in relevant areas of international
law such as international humanitarian law and the law of human rights, and extensive experience in a professional capacity which is of relevance to the judicial work of the Court; and (iv) excellent knowledge of and fluency in at least one of the working languages of the Court, which are English and French (articles 36(3) & 50(2)).

The Assembly of States Parties may only elect one judge from any one State (article 36(7)), and the selection process outlined in the Statute requires the Assembly to take into account the need for judges who (i) represent the principal legal systems of the world; (ii) represent an equitable geographical representation; (iii) comprise a fair representation of female and male judges; and (iv) have legal expertise on specific issues, such as violence against women and children (article 36(8)). Therefore the highest standards of competence and representativeness will be ensured in the selection of the judges.

The Assembly of States Parties also elects the Prosecutor and Deputy Prosecutors, based on similar criteria to that for judges (article 42). The judges will elect the Registrar (article 43(4)), who will be responsible for establishing a special Victims and Witnesses Unit within the Registry, which will employ staff with expertise in trauma (article 43(6)).

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

**Triggering an investigation**

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

(i) a State Party may refer a “situation” to the Prosecutor, where it appears that one or more crimes within the jurisdiction of the Court have been committed (articles 13(a) & 14);

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

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

The Prosecutor will be responsible for determining which individuals should be investigated and for which particular crimes, when a “situation” is referred by either a State Party or the Security Council. However, there are 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 15-19). The Security Council may also request the Court to defer any investigation or prosecution for 12
months, by means of a resolution to that effect adopted under Chapter VII of the UN Charter (article 16).

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

(i) the alleged crime was committed on the territory of a State Party; or
(ii) the crime was allegedly committed by a national of a State Party (article 12).

However, non-States Parties may accept the jurisdiction of the Court over particular crimes committed on their territory or by their nationals, by means of a declaration lodged with the Registrar (article 12(3)). If a State becomes a Party after entry into force of the Statute, the Court may only exercise its jurisdiction with respect to crimes committed after entry into force of the Statute for that State, unless the State has already made a declaration under article 12(3) as a non-State Party with respect to 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 & 13).

**General principles of criminal law**

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

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

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

How a case is brought to trial

Upon the application of the Prosecutor, the Pre-Trial Chamber decides whether or not to issue a warrant for the arrest and surrender of a person suspected of committing an ICC crime. The Statute sets out a number of factors that the Chamber must take into account, before issuing such a warrant, including reasonable grounds to believe that the person committed the crime that is under investigation (article 58). States Parties are required to assist the Court in executing requests to arrest and surrender persons to the ICC (articles 59 & 89). Once the person is brought before the Court, either voluntarily or by means of a warrant, the Pre-Trial Chamber must hold a confirmation hearing, to ensure that the Prosecutor has sufficient evidence to support each charge (article 61(5)). The person is entitled to apply for interim release at several stages in the pre-trial phase (articles 59(3) & 60(2)). There are also several opportunities for the accused, the Prosecutor and States to ask the Pre-Trial Chamber to review various decisions of the Prosecutor and to appeal certain decisions of the Pre-Trial Chamber prior to the commencement of a trial (for example, see articles 19 & 53).

The right to a fair trial

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

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

The Statute provides that the Court will have its own Rules of Procedure and Evidence, which will be finalised by the Assembly of States Parties (article 51). These will provide greater detail on the provisions in the Statute pertaining to the conduct of all ICC proceedings. For example, the Rules are likely to stipulate such practical matters as the factors that the Court must take into account when imposing a fine, the procedure for determining what reparations may be appropriate, and the time period for lodging an appeal.

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

Other important features of the Court

The Statute embodies a traditional concept of justice that provides for the prosecution and punishment of the guilty and obliges the Court to establish principles relating to reparation to, or in respect of, victims, including restitution, compensation and rehabilitation (article 75). Furthermore, article 79 provides that a Trust Fund will be established by decision of the Assembly of States Parties. The Fund will be managed according to criteria to be determined by the Assembly (article 79(3)). The Court can decide whether to compensate victims through this Fund and it may order that money or other property collected through fines and forfeiture be transferred to the Fund (articles 75(2) & 79(2)).

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

The participants in the Rome Conference were particularly sensitive to the need to address gender issues in all aspects of the Court’s functions. The Statute includes important provisions with respect to the prosecution of crimes of sexual and gender-based violence. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence are defined as crimes against humanity and war crimes. The Court will be staffed with people knowledgeable in issues relating to violence against women, and there will be a fair representation of both female and male judges on the Court.

1.2 Purpose and Use of Manual

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

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

The Manual focuses on the following key areas: General Issues of Implementation; Specific Issues of Implementation; Complementarity; Broader State Obligations and Rights of States Parties; and Looking to the Future. It also includes a select bibliography. It is recognised that the views and the statements in the Manual are not intended to be the last word on all requirements of the Rome Statute for implementation by States.

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

2. GENERAL ISSUES OF IMPLEMENTATION

As with any international treaty, States need to consider whether becoming a Party to the Rome Statute will require changes to be made to their national laws or administrative procedures, to enable them to meet all of their obligations under the treaty. For example, some legislative measures may need to be taken to ensure effective co-operation between States Parties and the Court during its investigations. If States already have national legislation pertaining to international legal assistance and extradition, there will be little difficulty to introduce these measures.

The purpose of this section of the Manual is to highlight the particular features of the Rome Statute that may affect the approach taken by States to ratify and implement the Statute. This section does not attempt a thorough analysis of the various approaches that are possible under the various legal systems of the world.

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

Possible approaches to implementation

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

Some States generally ratify treaties first, and then the rules included in the treaty automatically become a part of national law upon ratification and publication in an official journal (monist system). Other States, especially those in the Commonwealth, are obliged by their constitutions to prepare implementing legislation before ratifying or acceding to any international treaties (dualist system). Each particular system has its own advantages and disadvantages, which must be borne in mind during the ratification and implementation processes. For example, in some States the Executive branch of government may need the consent of the Legislature to ratify, or to consult with constitutional courts before ratifying. Such processes inevitably slow down the ratification and implementation process, but also provide an opportunity for more widespread consideration of the impact of certain treaties on that State.

Several States have revised their approach to ratification of international treaties in recent years, in order to increase the amount of consultation involving government members or with civil society, in light of an increased awareness of the significant impact that many of today’s treaties have in the domestic sphere (see for example, Zimbabwe’s revised Cabinet procedures between 1993-1997 and Australia’s treatymaking reforms in 1996). This consultation process may lengthen the process of ratification and implementation in such States, yet it ensures that more people are better informed about the particular treaty once it is ratified.

2.1 Ratification First Versus Implementation First

Article 126 provides that the ICC will come into operation on the 1st day of the month after the 60th day after the deposit of the 60th instrument of ratification. From that time, the Court will have jurisdiction to try persons accused of genocide, crimes against humanity, and war crimes. The sooner the Court is created, the sooner such persons will be deterred from committing such crimes, under threat of prosecution by the ICC. States can help to speed up the process of creating the Court by ensuring that they ratify the Rome Statute as quickly as possible.

Numerous examples of ICC ratification bills and the like have already been drafted by many States and can be used as a guide for others. These include examples from States that have already ratified, such as Ghana and Senegal, as well as States that are still in the process of preparing for ratification, such as Belgium. Members of the Southern African Development Community have also prepared an ICC Ratification Kit, which includes a Model Enabling Act.

There is another advantage to States in ratifying the ICC Statute quickly - once 60 States have ratified, the Assembly of States Parties can be formed, comprising representatives of those 60 States, plus any that ratify subsequently (article 112). At the initial meetings of the
Assembly, many important decisions on the administration of the ICC will be made, such as
electing judges and prosecutors, deciding on the budget of the Court, and so on. These meetings
will also be the forum for the adoption of the Rules of Procedure and Evidence for the Court, and
the Elements of Crimes, which will play a crucial role in the effectiveness of the Court.
Therefore, the first 60 States to ratify will have the opportunity to contribute significantly to the
future direction of the Court.

States that have signed the Rome Statute or the Final Act, but not ratified the Rome
Statute, will be given observer status and will not be entitled to vote in the Assembly until they
have ratified (article 112). Those States that have not signed either the Statute or the Final Act
should note that the Statute will not be open for signature beyond 31 December 2000 (article
125(1)). They will not be entitled to observer status at the Assembly of States Parties, unless
they sign and/or ratify the Statute before then.

Reversing the usual order

Some States in Europe and Africa are considering reversing the usual order of their
particular ratification and implementation processes, in order to ratify the Statute more quickly
than is usual. In this way, they hope to speed up the creation of the Court. Under their
constitutions, these States usually have to have implementing legislation prepared before they
ratify a treaty. However, they have decided to ratify the Rome Statute first and then use the time
between ratification and entry into force to draft and adopt implementing legislation. If States
wish to ensure their place within the first 60 States Parties, they may wish to examine the
feasibility of this approach.

2.2 Approaches to Implementation

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

States Parties will have a special relationship with the ICC, particularly in terms of
providing judicial assistance. As such, there are some particular features of the ICC that may not
lend themselves to being incorporated as amendments to existing arrangements for State-to-State
co-operation. For example, there will be no grounds for refusal when a State is asked to
surrender a person to the Court (article 89). This is clearly different from the usual extradition
arrangements between States. Therefore, States may wish to draft new ICC-specific “surrender”
legislation, instead of trying to adapt existing laws on extradition.

Most common law and other dualist jurisdictions will be familiar with the process of
preparing the appropriate legislation, regulations, decrees, executive orders, or declarations, in
order to implement international treaties. The exact form of the implementing law can be
decided by each State, in accordance with its own hierarchy of laws. The most important thing is
that this legislation implements all the elements of the Statute that are not self-executing.

In monist systems also, it is likely that the implementation of the Statute will involve
some modifications to existing national laws. For example, every State must create technical
mechanisms with which to co-operate with the Court and determine which State institutions or
agencies will be competent to ensure co-operation with the Court. On the other hand, much of the substance of the Statute is a reflection of existing international law standards. If States have already implemented such standards, this may help to minimise the amount of implementing legislation required.

**A single piece of legislation**

Where a State chooses to introduce a single piece of legislation, or to annex the entire Rome Statute to a single piece of implementing legislation, it may be necessary to specify that such pieces of legislation take precedence over existing legislation, should there be a conflict between the ICC legislation and existing legislation. This will help to avoid potential breaches of a State Party’s obligations. However, although the adoption of a unique law covering every aspect of the Statute is possible, some modifications or incorporations by reference will probably need to be made to some national laws, such as the code of criminal law and procedure, mutual legal assistance legislation, extradition laws, and human rights legislation, in order to recognise the special status of the Court.

**Amending all relevant pieces of legislation separately**

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

**Hybrid approach**

Some States may be able to create a single piece of legislation that also effectively amends all the relevant pieces of legislation already in force. This is the approach taken by the Canadian Government in its Bill C-19 (to be known as the "Crimes Against Humanity and War Crimes Act"), which will implement Canada's obligations under the Rome Statute. This Bill is a mixture of completely new provisions and amendments to existing provisions in a wide range of Acts. Note, however, that the Bill goes well beyond the minimum requirements under the Statute. It has been drafted to address a number of concerns of a constitutional nature that will likely not arise in most other States. However, the list of Canadian Acts that will be amended by the Bill provides a useful checklist for other States of the types of national legislation that may need to be reviewed in order to implement the Rome Statute (this list is under the heading "Consequential Amendments" in the Bill): Citizenship Act, Corrections and Conditional Release Act, Criminal Code, Extradition Act, Foreign Missions and International Organizations Act, Immigration Act, Mutual Legal Assistance in Criminal Matters Act, State Immunity Act, and Witness Protection Program Act.

**Dissemination of the requirements of the Statute**

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

2.3 Introduction of New Procedures

Many States will also need to introduce new procedures in certain areas, in order to ensure that they can meet their obligations under the Statute (article 88). The Statute covers a broad range of areas of administration, such as criminal procedure, proceeds of crime, witness and victim protection, mutual legal assistance, national security, dissemination of the rules of engagement in military law, and financial assistance to the Court. It will likely be necessary that a State do more than merely append the Rome Statute to a piece of legislation that makes it the law in the State. This will involve co-ordination between government departments and between the various branches of government as well as the military forces.

2.4 Federal Issues

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

2.5 Compatibility With Different Legal Systems

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

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

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

Parts 9 and 10 of the Statute set out the general types of co-operation that may be requested by the Court and the obligations of States Parties in this respect. However, not all of the forms of State assistance are set out in detail in Parts 9 and 10, as earlier parts of the Statute also deal with co-operation that may be required during ICC investigations and prosecutions. For example, the various chambers of the ICC and the ICC Prosecutor may make certain requests of States at different stages of a criminal proceeding, and the functions of these entities are set out in Part 5 - Investigation and Prosecution; Part 6 - The Trial; and Part 8 - Appeal and Revision. Therefore, the rest of this section of the Manual draws together the various forms of assistance that are detailed throughout the Statute, in roughly the order that a criminal investigation occurs.

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

3.1 Privileges and Immunities of ICC Personnel

Description

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

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

The ICC Preparatory Commission will develop a further agreement on privileges and immunities, once it has completed developing the draft Rules of Procedure and Evidence and draft Elements of Crimes as of June 30, 2000. Under article 48(3), this agreement will cover the Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry, and will be linked to the "privileges and immunities and facilities necessary for the performance of their functions". In addition, this agreement will cover counsel, experts, witnesses and "any other person required to be present at the seat of the Court", and is limited to such privileges and immunities as are necessary "for the proper functioning of the Court". The Assembly of States Parties will adopt the agreement on privileges and immunities, after which time it will take effect.

Article 48(5) 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.

Obligations

a) States must recognise the privileges and immunities of the judges, Prosecutor, Deputy Prosecutors and Registrar, and accord them the same immunities as are accorded heads of diplomatic missions.

b) States must also recognise the privileges and immunities of counsel, experts, witnesses and "any other person required to be present at the seat of the Court", once the ICC's agreement on privileges and immunities is concluded.

Implementation

States should recognise the privileges and immunities of the judges, Prosecutor, Deputy Prosecutors and Registrar in their implementing legislation. This should not be difficult, considering that most States will already have in place general privileges and immunities legislation or regulations, and legislative amendments could be made to specifically recognise the ICC judges, Prosecutor, Deputy Prosecutors and Registrar.

With respect to counsel, experts, witnesses and "any other person required to be present at the seat of the Court", the ICC's agreement on privileges and immunities is not yet negotiated and therefore the exact extent of the privileges and immunities that will be extended to this group is not known. It is possible that the general legislation of some States may not cover these particular privileges or immunities. Therefore, States may wish to "reserve" the right to issue regulations governing the privileges and immunities of this group in the future. In Canada's Crimes Against Humanity and War Crimes Act, for example, the Foreign Missions and International Organisations Act will be amended to allow for regulations providing that "the judges, officials and staff of the International Criminal Court ... and counsel, experts, witnesses and other persons required to be present at the seat of the Court shall have the privileges and immunities set out in article 48 of the Rome Statute, as defined in that subsection, and the agreement on privileges and immunities contemplated in that article."
3.2 Offences Against the Administration of Justice of the ICC

Description

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

“Intentionally:

(a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;
(b) Presenting evidence that the party knows is false or forged;
(c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;
(d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;
(e) Retaliating against an official of the Court on account of duties performed by that or another official;
(f) Soliciting or accepting a bribe as an official of the Court in connection with his or her official duties.”

Under article 70(3), the maximum penalty for committing one of these offences is five years imprisonment, and/or a fine that is to be stipulated in the Rules of Procedure and Evidence. The Rules will also elaborate the principles and procedures for the ICC to exercise its jurisdiction over these offences (article 70(2)). Unlike the Statute’s detailed provisions on the admissibility of cases involving “crimes” within the jurisdiction of the Court (articles 1 & 17-20), article 70 does not attempt to establish how and when the ICC will exercise jurisdiction over these “offences” where a State Party may also wish to exercise jurisdiction over the same matter and has the authority to do so. These issues will be dealt with under a special regime that will be set out in the Rules, representing the views of all States Parties.

However, article 70(4)(a) requires all States Parties to extend their criminal laws penalizing such offences, 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.

It is not entirely clear how article 70 stands in relation to the other provisions of the Statute, in terms of other State co-operation requirements. Article 70(2) states: “The conditions for providing international co-operation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State.” The Rules will likely clarify this provision. In the meantime, States Parties should try to ensure that any “conditions”
they wish to impose on co-operation do not interfere with their ability to provide full co-operation to the Court with respect to these offences, in accordance with article 86.

**Obligations**

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

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

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

**Implementation**

a) Options for penalising offences

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

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

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

The Statute is silent as to the maximum or minimum penalty that a State can impose when it is prosecuting such offences. However, these offences strike at the very heart of any justice system, by potentially undermining its legitimacy and credibility. Therefore, a maximum penalty of no less than 5 years for all of those offences is a good guide, as per article 70(3). States may also wish to provide for different penalties for different types of offences, depending upon their seriousness.
States may also wish to go beyond the requirements of article 70, by providing for further variations of the offences listed in that article, and by assigning different penalties to different offences, sometimes greater than 5 years imprisonment. This has the benefit of deterring a greater variety of potential attacks on the integrity of the ICC justice system.

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

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

States should ensure that they have provided for all of the offences listed under article 70(1), not just those in the ICTY/R Rules, because those Rules do not provide for certain article 70 offences, such as retaliating against officials of the tribunal (article 70(1)(e)).

(iii) Create a new piece of legislation

Alternatively, States could create article 70 offences either by a specific piece of legislation on offences against the administration of justice, or by including such offences within a broader ICC-specific piece of legislation, as the Canadian government has proposed in its Bill C-19, Crimes Against Humanity and War Crimes Act. Sections of this Bill propose to create new offences in Canada and for Canadian citizens, in accordance with the Rome Statute.

b) Giving national courts jurisdiction over article 70 offences

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

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

Article 70(4)(b) specifically provides that a State Party “shall submit” any cases under this article to its competent authorities, once requested by the Court to do so. It also provides that “those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively.” Clearly the drafters of the Statute envisaged that these types of offences should be taken seriously by States Parties. After all, any kind of impropriety on the part of those participating in ICC proceedings could bring the whole Court into disrepute, and reduce its potential deterrent effect.
States Parties should therefore ensure that sufficient financial and human resources would be available to the various sectors of their criminal justice system that would be involved in investigating and prosecuting such crimes, and supervising those convicted of such offences. However, it is unlikely that prosecution of these crimes will require many resources, as such crimes will rarely be committed in most States. States may wish to undertake an information campaign, to ensure that all relevant persons know of the new offences and the maximum penalty, and give them due consideration. This would help to reduce the incidence of such crimes.

d) Enforcement of sentences

States Parties should also consider making provisions for enforcing the sentences of persons convicted of these offences by the ICC. This is not mentioned in the Statute, however, the Court will have limited detention facilities and will rely on States to accept and supervise all sentenced persons in accordance with the principles set out in Part 10 of the Statute.

e) Co-operation measures

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

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

Description

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

Relevant procedures under the Statute

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

**Keeping the ICC informed**

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

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

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

**Responsibilities of the ICC**

If the ICC Prosecutor or Pre-Trial Chamber have concerns over the conduct of the State investigation or prosecution, the Pre-Trial Chamber can authorise the Prosecutor to proceed with the investigation, either at first instance, or after a certain period of time has elapsed, or where there has been a significant change of circumstances in the State (article 18(2) & (3)). Note that States are able to appeal such preliminary rulings on admissibility to the ICC Appeals Chamber, under article 18(4). Where the Prosecutor made the decision to defer investigation in the absence of notification from the State, the relevant State must be notified if the Prosecutor resumes the investigation (article 19(11)). In certain circumstances, States can then challenge the admissibility of the case under article 19.

**Protection of evidence**

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

**Obligations**

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

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

**Implementation**

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

a) Notification and co-ordination

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

(i) a procedure whereby national investigators and prosecutors must notify the relevant authority whenever they commence an investigation or prosecution of a crime that is also within the jurisdiction of the ICC; and/or
(ii) designation of a person within the relevant authority to keep track of all national investigations and/or prosecutions for crimes that are also within the jurisdiction of the ICC, or who is able to obtain information about particular cases of that kind promptly; and
(iii) an expedited procedure for bringing to the attention of the appropriate person the notification from the ICC and for responding to the ICC’s notification within one month.

b) Periodic updates

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

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

d) Protection of evidence

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

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

Description

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

(i) arrest and surrender of persons at the request of the Court; and
(ii) other practical assistance with the Court’s investigations and prosecutions, e.g. collecting evidence.

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

“Co-operate fully with the Court”

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

Article 88 stipulates that States Parties must “ensure that there are procedures available under their national law for all of the forms of co-operation which are specified under this Part.” In other words, it is envisaged that States will use their national laws to establish all the procedures necessary to be able to assist the Court. All such procedures should allow the State organs to respond as rapidly as possible to requests from the Court.
States Parties should also note that if they fail to comply with a request to co-operate by the Court, contrary to the provisions of the Statute, thereby preventing the Court from exercising its functions and powers under the Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council (article 87(7)). The Statute does not provide specifically for any sanctions. However, a State Party that does not comply with requests from the Court will effectively be in breach of its treaty obligations in most instances, and this may have undesirable political consequences for that State.

**Jurisdiction of the ICC**

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

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

**Obligations**

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

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

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

**Implementation**

A State that becomes a Party to the Statute is thereby accepting that the Court has jurisdiction over the crimes listed in article 5, from the date of entry into force of the Statute, and that the Court may take jurisdiction over its nationals or other persons on its territory, in certain well-defined circumstances. Therefore States Parties should ensure that there are no obstacles to co-operation with the Court. A non-State Party that accepts the jurisdiction of the Court over a particular crime should also ensure that there are no obstacles to co-operation in accordance with whatever agreement or arrangement it enters into with the Court. For example, States should ensure that all of the relevant State authorities are empowered to assume jurisdiction as necessary, in relation to ICC investigations and prosecutions.
States will most likely have to enact implementing legislation, and implement appropriate procedures, to enable them to meet all of their obligations under the Rome Statute. However, those States that already have arrangements for State-to-State co-operation may only need to modify these arrangements slightly, to enable them to co-operate with the ICC as well.

Requests for co-operation and assistance

Description

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

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

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

Exceptions to the duty to comply with requests

Article 93 lists some of the main forms of assistance with ICC investigations that States are required to provide, such as witness protection, search and seizure, and collection of evidence. Note that this article requires States to “comply” with any requests by the Court for the kinds of assistance listed in this article. There are only two narrow grounds for denying such a request. The first is where the request concerns the production of documents or disclosure of evidence which relates to the requested State's national security (article 93(4)). Article 72 provides further detail on the procedures to be followed when a State has national security concerns.

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

**Duty to consult**

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

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

**Obligations**

a) States Parties must comply with all requests made by the Court in accordance with article 93, except where they have national security concerns (articles 72 & 93(4)), or if the type of assistance being requested is not listed in article 93(1) and it is prohibited by the law of the requested State (article 93(1)(l)) and the State has considered whether the assistance can be provided subject to conditions and so forth as per article 93(5).

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

c) Under article 96(3), States Parties must consult with the Court when requested, regarding any requirements under their national law for executing requests from the Court. During such consultations, they must advise the Court of the specific requirements under their law.
d) Article 97, which relates to other perceived problems with executing requests, requires the State to consult with the Court “without delay in order to resolve the matter”.

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

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

**Implementation**

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

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

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

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

**Postponement of execution of requests**

**Description**

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

Article 95 addresses the case of a request for assistance that is made when an admissibility ruling is still pending. The ICC has the competence to decide all jurisdictional matters pertaining to itself. However, the requested State may postpone the execution of a request pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may collect evidence before the Court has ruled on the admissibility issue. In other words, it may be unclear at that stage as to whether a State authority or the ICC will eventually prosecute the matter. So States are entitled to wait and see if the ICC will definitely be assuming jurisdiction before being required to execute requests made under Part 9, unless the Court orders otherwise.

**Obligations**

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

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

**Implementation**

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

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

Where a State has postponed execution of a request in accordance with article 94, those involved in the State’s investigation or prosecution will need to keep in contact with the relevant authorities, so that the State can notify the ICC when it has completed its investigations or prosecutions.
States should ensure that they keep themselves informed as to preliminary proceedings in the ICC, such as admissibility challenges. If they decide to postpone execution of a request pending the resolution of an admissibility issue, they should notify the Court of this decision. However, where the Prosecutor has permission from the Court to collect evidence on the requested State’s territory, the State must have laws and procedures in place to be able to provide any assistance to the Prosecutor that the Court has requested.

Costs of executing requests

**Description**

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

(a) Costs associated with the travel and security of witnesses and experts or the transfer under article 93 of persons in custody;
(b) Costs of translation, interpretation and transcription;
(c) Travel and subsistence costs of the judges, the Prosecutor, the Deputy Prosecutors, the Registrar, the Deputy Registrar and staff of any organ of the Court;
(d) Costs of any expert opinion or report requested by the Court;
(e) Costs associated with the transport of a person being surrendered to the Court by a custodial State; and
(f) Following consultations, any extraordinary costs that may result from the execution of the request.

**Obligations**

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

**Implementation**

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

Designation of an appropriate channel for receiving requests

**Description**

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

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

**Obligations**

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

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

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

**Implementation**

With respect to the diplomatic or other appropriate channel, a State may prefer to follow the practice already established by that State for the ICTY. For example, many States receive communications from the ICTY through their embassies based in The Hague. In cases where a State has no established ICTY practice, the State might want to designate that communication be directed through a particular section/department of its Ministry of Foreign Affairs or Ministry of Justice.

With respect to choosing a language of communication with the ICC, the State can designate either an official language of the State or a working language of the Court. Again, States may wish to follow their practice established for communicating with the ICTY. Of course, a State must take into account any legislation it has on its official languages.

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

**Ensuring the confidentiality of requests**

**Description**

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

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

Under article 93(8)(b), a State receiving a request for co-operation may transmit documents and information to the Prosecutor on a confidential basis, and the Prosecutor may use that information solely for the purpose of generating new evidence. Subparagraph (c) provides that the State may subsequently consent to the disclosure of the documents.

Obligations

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

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

Implementation

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

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

Provision for future amendments

Description

Any new national procedures or laws should be flexible enough to allow for changes from time to time. At present, a Preparatory Commission is drafting the Rules of Procedure and Evidence for the Court, which will provide more detail on many of the Statute’s provisions.
These Rules are unlikely to require any legislative amendments at the national level, because the Rules must be consistent with what is already set out in the Statute (article 51(4)). However, some national procedures might conceivably be affected by what is required under these Rules.

Seven years after the Statute comes into force, States Parties will be able to suggest amendments to the Statute itself (article 121). Therefore, States Parties need to have a mechanism to allow them to make the necessary adjustments to their laws and procedures over time, to ensure that vital evidence will not be excluded for lack of compliance with a new article or Rule, for example.

**Obligations**

States must be prepared to revise their legislation and procedures in future, in case this is needed to reflect any changes that are made to the Rome Statute or to the Rules of Procedure and Evidence.

**Implementation**

States Parties need to make provision for future amendments to their laws and procedures for co-operating with the ICC. One approach would be to ensure that any ICC-related legislation is not too difficult to amend. For example, it may create unnecessary barriers to implement the Rome Statute’s provisions on State Co-operation as an Organic Law, requiring a special majority for any amendments. On the other hand, it may be appropriate to empower the relevant authority to make simple amendments or regulations at a later date, if need be, without necessitating further legislative approval.

It may be useful for States Parties to keep appraised of developments at the Preparatory Commission meetings that are continuing throughout 2000 and possibly 2001. The work undertaken at these meetings may have a significant impact on the future running of the Court. For example, the meeting in November/December 2000 will discuss the arrangements for the financing of the Court. Most of the material from these meetings is available on the internet (via the UN website: http://www.un.org/). However, there are often delays in posting these materials and many proposals at these meetings are made informally. Therefore States may need to organise a representative to attend these meetings, to ensure that they have the most up-to-date information on the procedural details that are currently being negotiated.

### 3.5 Responding to a Request From the ICC to Arrest a Person

**Overview of arrest procedures**

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

1. Issuing an arrest warrant in accordance with articles 58, 89, & 91;
2. Issuing a provisional arrest warrant in accordance with articles 58(5) & 92, in urgent cases where the required supporting documentation is not yet available; and
3. 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.

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

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

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

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

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

**Issue and execution of warrants of arrest**

**Description**

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

Once the warrant has been issued by the Pre-Trial Chamber, the Court may then request the State to execute the warrant in accordance with the relevant provisions of Part 9 (article 58(5)). In most cases, all requests for arrest and surrender must be in writing and supported by certain information, documents, and statements, as set out in article 91. Such information will include the probable location of the person (article 91(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(1)).

The Court can also request States to provide it with information as to the requirements under national law for supporting documentation and States are required to consult with the Court if such a request is made (article 91(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 latter point is discussed in more detail in the section “Surrendering a person to the ICC”.
The requested State must “immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9” (article 59(1)). Note that article 66 requires that the person be presumed innocent until proved guilty before the Court in accordance with the applicable law.

**Provisional arrest**

When the Court has already issued a warrant of arrest in accordance with article 58 but does not have the required documentation available to support a request to a State for arrest and surrender, articles 58(5) & 92 allow the Court to request a State to provisionally arrest the person who is the subject of the warrant. Such a request for provisional arrest is only to be used in urgent cases (article 92(1)). This request need not be in writing, but can be communicated by any medium capable of delivering a written record, such as email (article 92(2)). The requirements of the request are outlined in article 91(2)(a)-(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 a certain time, then the person may be released from custody. The time limit for this will be set by the Rules of Procedure and Evidence (article 92(3)). However, once the documents do arrive, States must immediately re-arrest 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 this is permitted by the law of the requested State. In that case, the requested State must surrender the person to the Court as soon as possible (article 92(3)).

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

**Obligations**

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

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

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

(d) If: (i) a person has been provisionally arrested and the time limit for receipt of the supporting documents has not yet expired; and (ii) the person who is the subject of the provisional arrest warrant voluntarily consents to be surrendered to the Court; and (iii) this is permitted by the law of the requested State; then (iv) the State must proceed to surrender the person to the Court as soon as possible (article 92(3)).
(e) When requested, States must assist the ICC Prosecutor in preventing certain persons from absconding, pending a decision on the admissibility of a case under article 19, where a warrant of arrest has already been issued (article 19(8)(c)).

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

**Implementation**

(a) Verification of requests

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

(b) National requirements

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

(c) Apprehension of suspects

Criminal laws and procedures are needed that allow the relevant people to apprehend, detain, arrest, and/or provisionally arrest both nationals and non-nationals for all crimes within the jurisdiction of the ICC. The Statute also refers to the need for observance of national laws, if these exist. In other words, States could grant this jurisdiction to their regular law enforcement officers, who would already be familiar with national laws.

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

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

(d) Voluntary surrender

If a State wishes to, and adequate national laws do not already exist, the State may need to draft new laws to allow for persons who are provisionally arrested to be voluntarily surrendered to the Court as soon as possible. Article 92(3) allows for this to occur if the time period has not expired for delivery to the State of supporting documentation for a regular arrest warrant. However, the State need not impose such a restriction.

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

(f) Preventing persons from absconding

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

(g) Forfeiture

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

Rights of the person

Description

As mentioned previously, article 66 provides that everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law. Article 67 further provides that the accused is entitled to a fair hearing conducted impartially, in accordance with the guarantees set out in that article. In order that these procedural guarantees to the accused are respected and to ensure that the proceedings are not compromised, States should respect the following rights of the person they are arresting, in accordance with article 55(2):

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

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

(c) To have legal assistance of the person’s choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it;
(d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

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

“In respect of an investigation under the Statute:

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

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

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

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

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

**Obligations**

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

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

Implementation

a) Recognition of rights

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

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

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

b) Training and provision of relevant personnel

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

c) Segregated prison accommodation and compensation

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

Hearing before a competent judicial authority

Description

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

(a) The warrant applies to that person;

(b) The person has been arrested in accordance with the proper process; and
(c) The person’s rights have been respected.

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

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

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

**Obligations**

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

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

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

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

**Implementation**

a) Time in custody

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

b) Competent judicial authority

States Parties need to designate the appropriate level of judicial authority for assuming jurisdiction over such matters and grant that authority the relevant jurisdiction to order the
surrender of the person. The authority must then be required to make the determinations under article 59(2), in accordance with article 59(4).

c) Duty to consult

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

Interim release

Description

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

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

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

Obligations

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

b) The competent authority in the requested State must consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the Court. However, it is not open to the competent authority of the requested State to consider whether the warrant of arrest was properly issued in accordance with the Rome Statute (article 59(4)).
c) States must notify the ICC Pre-Trial Chamber of any requests for interim release and provide that the competent State authority gives full consideration to any recommendations of the Pre-Trial Chamber before rendering its decision (article 59(5)).

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

**Implementation**

a) Interim release

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

b) Periodic reports on interim release

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

c) Records of time spent in custody

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

**Issuing of a summons**

**Description**

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

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

(a) The name of the person and any other relevant identifying information;
(b) The specified date on which the person is to appear;
(c) A specific reference to the crimes within the jurisdiction of the ICC which the person is alleged to have committed; and
(d) A concise statement of the facts which are alleged to constitute the crime.
States are required to serve such summons on the person.

**Obligations**

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

**Implementation**

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

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

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

**3.6 Surrendering a Person to the ICC**

“Distinct nature” of the ICC

**Description**

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

The idea behind this is that there are many lengthy delays involved in current procedures for extradition of nationals from one State to another. This is understandable where there are differences in the jurisprudence and standards of trial fairness between different jurisdictions, and States may need to protect their nationals from potential injustices. However, the ICC regime has been established by States Parties themselves. During the surrender of persons to the ICC, considerations relative to the impact of national values on the exercise of criminal law in different States need not be taken into account. These concerns do not arise in the same way with the ICC, to the extent that it is not a foreign jurisdiction, as is the court of another State. All States Parties actively participated in drafting the Rome Statute and will in future actively participate in developing its procedural rules, through their involvement in the Assembly of States Parties. Thus every national will be treated according to the standards set and maintained by the States Parties and there is no need for States to go through elaborate procedures to safeguard their nationals from processes that they have no control over.
Preconditions to an order for surrender

The Statute also creates a considerable number of procedural hurdles for the ICC Prosecutor to overcome, before a request for surrender can be issued by the Court (articles 53, 54 & 58). Therefore, a request for surrender from the ICC is a reliable basis for assuming that: a crime within the jurisdiction of the Court has been or is being committed (article 53(1)(a)); there is a sufficient legal or factual basis to seek a warrant (article 53(2)(a)); the prosecution is in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime (article 53(2)(c)); in order to establish the truth, the Prosecutor has or will extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under the Statute, including incriminating and exonerating circumstances equally (article 54(1)(a)); the arrest of the person appears necessary to the Pre-Trial Chamber in order to ensure the person’s appearance at trial, to ensure that the person does not obstruct or endanger the investigation or the court proceedings, or to prevent the person from continuing with the commission of the crime (article 58(1)); and the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crimes stated in the warrant (article 58(1)(a)).

No grounds for refusal

Furthermore, all States have a vested interest in eliminating the crimes over which the ICC has jurisdiction, as these are the most serious crimes of concern to the international community as a whole. The Statute was written specifically to deal with these crimes, independent of any political or diplomatic considerations, which may exist between States. The Statute provides many assurances that these crimes will be tried according to the highest standards of international law, and procedural safeguards that ensure the utmost protection, submitted to an extremely rigorous regime of eligibility which gives States the initial responsibility to prosecute and punish these crimes.

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

Obligations

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

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

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

a) Streamlined approaches

States may wish to take a streamlined approach to executing requests for surrender from the ICC, in order to ensure that the Court is not delayed unnecessarily in carrying out its valuable work for the international community. If possible, they should establish a special procedure for surrender to the ICC, which eliminates some of the usual hurdles involved in extradition proceedings. For example, they may wish to reduce the number of appeals that a person can make, or dispense with the right of appeal altogether, in order to speed up the process of bringing the person before the ICC. Under article 14(5) of the International Covenant on Civil and Political Rights, which sets out the basic minimum standards under international law, a person only has a right of appeal against a conviction or a sentence, not an order for extradition or surrender. The Rome Statute is silent on the issue of appeals against orders for surrender at the national level.

b) At the very least, States Parties should ensure that they have an expedited procedure for transporting persons to the ICC, once an order for surrender has been made by the State. In most cases they should be able to claim the cost from the ICC of transporting the person there.

c) Nationals and non-nationals

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

d) Prosecutors’ discretions.

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

e) Sufficiency of evidence

Article 91(2)(c) allows States to determine their own requirements for the surrender process in their State. One requirement to consider is the sufficiency of evidence that will be required in order to allow the State to order the surrender. This requirement should be as minimal as possible, bearing in mind the need for States to avoid creating burdensome requirements for the Court. Article 58(3) provides that all warrants for arrest from the ICC will contain the following: “(a) the name of the person and any other relevant identifying information; (b) a specific reference to the crimes within the jurisdiction of the Court for which the person’s arrest is sought; and (c) a concise statement of the facts which are alleged to constitute these crimes.” These components should provide sufficient evidence upon which to make an order for surrender, given the procedural safeguards in the Statute. Therefore the best and easiest method of ensuring the sufficiency of evidence for meeting ICC requests is to make the required contents of an ICC arrest warrant the minimum requirement.
f) Use of normal extradition procedures

If the State decides to use its normal extradition procedures in order to surrender persons to the ICC, this may require substantial amendments to existing laws and procedures.

The issue of dual/double criminality may be raised in terms of national requirements. Double criminality is not actually a requirement under the ICC Statute. In other words, the Statute does not require States to criminalise all ICC offences within their territory, in order to be able to surrender persons to the ICC. This is an issue for each State to decide: whether they will make dual criminality a requirement for themselves when surrendering a person to the ICC. However, States may not use a failure to establish dual criminality as grounds for refusing to surrender a person to the ICC. If this issue is likely to be raised at a national level, the easiest way to pre-empt any such claims is to make all the ICC crimes into crimes on the State’s territory, by annexing or reproducing the appropriate section of the ICC Statute to the code of crimes or equivalent. All such crimes should also be made into extraditable offences. Both of these approaches would have the further advantage of enabling the State to co-operate more easily with other States in prosecuting the crimes within the jurisdiction of the ICC, because there would be no issue as to double criminality or extraditable offences in State-to-State extraditions.

If the State Party’s extradition procedures make extradition conditional upon the existence of a treaty, in case the State receives a request from a State Party with which it has no extradition treaty, it should enable itself to treat the Rome Statute as the legal basis of extradition in respect of those crimes.

Postponement of requests for surrender and ne bis in idem

Description

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

Ne bis in idem

There is, however, one instance where States may be able to postpone the execution of the request for surrender. In accordance with articles 20(3) and 89(2), the person sought for surrender may bring a challenge before a national court on the basis of the principle of ne bis in idem. Under article 20(3), this principle means: 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 with respect to the same conduct. The only exception to this principle is discussed below in the section “Complementarity”.

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

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

Obligations

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

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

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

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

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

Implementation

a) States Parties should ensure that they have procedures in place to allow rapid and efficient communication with the Court, in the event that there is a problem in executing a request for surrender, including inability to locate the requested person (article 97(b)).
b) States Parties should also establish procedures and introduce legislation, if they have not already, to ensure that persons sought by the ICC for surrender may have some form of redress at the national level, where the proper process under national laws was not followed, or the person’s rights under national law were not respected when they were being arrested (article 59(2)(b) & (c)).

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

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

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

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

Competing requests

Description

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

Obligations

a) If a State Party receives requests from both the ICC and another State for the surrender of a person under article 89, where the same person is being requested in relation to the same conduct, then the State Party must notify the Court and the requesting State of that fact (article 90(1)).
b) Where (i) the requesting State is also a State Party; and (ii) the Court has already made a determination as to admissibility, taking into account the investigation or prosecution being conducted by the requesting State; then (iii) the requested State must give priority to the request from the Court. If the Court is still considering the admissibility issue, the State must not extradite the person to the State until the Court has determined whether the case is admissible before it. However, the requested State may proceed to deal with the request for extradition in all other respects (article 90(2)).

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

d) Where (i) the requesting State is not a State Party; and (ii) the requested State is under an international obligation to extradite the person to the requesting State; and (iii) the Court has determined already that the case is admissible; then (iv) the requested State must determine whether to surrender the person to the Court or extradite the person to the requesting State. In making its decision, the requested State must take into account at least the following factors: (a) The respective dates of the request; (b) The interests of the requesting State, such as whether the crime was committed in its territory or against one of its nationals; and (c) The possibility of subsequent surrender between the Court and the requesting State (article 90(6)).

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

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

**Implementation**

States Parties must ensure that they have laws or procedures to deal with all of these obligations in the manner that the Statute specifies. Any legislation or policy directive must state clearly which request the State must give priority to in each situation. The only exception to this is where the State must make the decision. In each of those cases, the legislation or policy
directive must require the decision maker to consider all of the relevant factors, especially those set out in article 90(6) & (7).

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

Conflicts with other international obligations

*Description*

International law bestows Heads of State and diplomatic officials with immunity from criminal prosecution by foreign States (*Vienna Convention on Diplomatic Relations*, article 31(1)). However, the crimes listed under the Statute may be committed by diplomats, Heads of State, government officials or by any other person enjoying diplomatic immunity, and international law may not recognise any immunity from prosecution for such heinous crimes.

The ICC will determine whether any immunities exist, when a matter is referred to it. However, article 98 places certain restrictions on the Court, when it is making requests for surrender or other types of assistance from States. Article 98(1) deals with the situation where surrendering a person would conflict with a State’s obligation under international law with respect to the State or diplomatic immunity of a non-national or their property. The onus is on the ICC to ensure that it does not request a State to act inconsistently with its international obligations. Therefore, this situation will most likely never arise for a State because the Court will investigate such possibilities before making any request for surrender. In addition, the “obligations under international law” applicable to States Parties would include their obligations under the Rome Statute. By agreeing to articles 27 and 86 of the Statute, States Parties arguably have waived any immunities they may have had against the ICC. Therefore, where a national of a State Party is the subject of a request from the Court, that national may not be able to claim the normal immunities that may exist with respect to criminal prosecution by foreign States and the requested State may not be in breach of its international obligations if it surrendered that person to the ICC.

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

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

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

**Obligations**

a) A State Party has the obligation to surrender a person enjoying diplomatic immunity, when the Court requests this surrender after it obtained the co-operation of the third State for the waiver of the immunity (article 98(1)).

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

**Implementation**

States Parties should provide in their national legislation, the possibility of surrendering a person to the ICC who would normally enjoy State or diplomatic immunity, when the State that this person is from agrees to the waiver of his or her immunity. Because the ICC has the authority to determine whether or not immunities exist, States would be wise to specify simply that immunities will not bar co-operation with the ICC. This ensures that the State Party will be able to meet its obligation to surrender. States Parties should also ensure that their nationals can be surrendered to the ICC by other States, where appropriate, and that there are no bilateral or multilateral agreements hindering this process. States Parties should be prepared to disclose to the Court any relevant international obligations and agreements that may conflict with a request for surrender that the Court is preparing, if the Court needs this information.

**3.7 Possible Constitutional Issues Relating to Surrender**

Some of the provisions of the Statute may appear to conflict with constitutional requirements in some States, particularly those relating to surrender of a person to a tribunal outside of the State. When assessing the potential impact of the Statute on a State’s constitution, it is important to keep in mind the values that the ICC seeks to uphold, namely, justice and an end to impunity for those who wield their power destructively and wantonly. It would be hard to find a constitution in the world that does not also aspire to these values. When States consider the interests that are intended to be protected in each case, they are sure to find ample common ground. This should point the way for reconciling any apparent inconsistencies between
constitutional provisions and Statute requirements. For example, several European States have found it unnecessary to amend constitutional provisions on the immunity of their Head of State. They believe that any Head of State who commits one of the crimes within the ICC’s jurisdiction would place themselves outside of the Constitution.

The process of amending a constitution is often a difficult and time-consuming procedure in many countries. If possible, it would be more desirable to find another way to meet the particular ICC obligation. For example, some constitutions prohibit the extradition of nationals to another State. However, these constitutions do not specifically mention a prohibition against surrendering a national to an international tribunal. These States may be able to draft appropriately worded legislation that allows them to surrender their nationals to the ICC, without requiring a constitutional amendment.

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

The following are some provisions under the Rome Statute that could involve constitutional questions for States Parties when they are requested to surrender a person to the ICC:

- the absence of immunity for Heads of State (article 27);
- crimes listed under the Statute are not subject to a statute of limitations (article 29);
- the obligation of a State to surrender its nationals at the ICC’s request (articles 59 & 89);
- the ICC’s power to impose a sentence of life imprisonment (article 77(1)(b)); and
- persons appearing before the ICC will be judged by a three-judge chamber rather than by a jury (article 39(2)(b)(ii)).

Absence of immunity for Heads of State

Description

Under many constitutions, Heads of State enjoy immunity from criminal prosecution with respect to acts committed in the performance of their duties. Some constitutions also protect members of government and government officials. Under article 27, a Head of State or other official who commits a crime within the jurisdiction of the ICC will lose his or her immunity and can be prosecuted by the ICC. The provisions of the Statute are applicable to everyone regardless of any distinction based on official capacity.

The idea of an absence of immunity for Heads of State accused of international crimes is not new. The existence of this rule was recognised following the First World War in the Treaty of Versailles, after the Second World War in the Charter of the Nuremberg Tribunal, in the Genocide Convention, by the International Law Commission, and in the Statutes of ICTY/R.
Article 27 confirms the rule that individuals cannot absolve themselves of criminal responsibility by alleging that an international crime was committed by a State or in the name of a State, because in conferring this mandate upon themselves, they are exceeding the powers recognised by international law. With respect to immunity for former Heads of State for crimes committed while they were in power, the United Kingdom’s House of Lords ruled that Senator Augusto Pinochet was not entitled to immunity in any form for the acts of torture committed under his orders when he was Chile’s Head of State. The House indicated that because the alleged acts of torture could not be considered as constituting part of the functions of a Head of State, these acts were not protected by any immunity.

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

**Obligations**

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

**Implementation**

a) Provide exceptions to absolute immunity

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

However, several European States have decided that they do not need to amend their constitutions, in order to provide for an exception to immunities under national law. They believe it is already implicit in their constitutions. If the unlikely situation arises where the ICC requests the surrender of an official, such as their Head of State, a purposive interpretation of the relevant constitutional provision would allow for that official to be surrendered, given that the purpose of the ICC is to combat impunity for "the most serious crimes of concern to the international community as a whole". If a State official commits such a crime, this would probably violate the underlying principles of any constitution. Therefore, other States may be able to surrender State officials to the ICC, notwithstanding the protection that their constitutions may appear to offer to the official under normal circumstances.

b) Ensure that State courts can prosecute ICC crimes (Complementarity)

A State could also make provisions to ensure that its own courts can prosecute the Head of State for the commission of crimes within the jurisdiction of the ICC. The advantage of this approach is that, as a result of the principle of complementarity running through the Statute, the State would likely exercise jurisdiction in this matter. Another advantage is that it may be easier for States to prosecute their leaders themselves.
Whatever solution is adopted, immunity should no longer be absolute and should not prevent the ICC from prosecuting the perpetrators of the international crimes listed under the Statute.

No statute of limitations

Description

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

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

Obligations

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

Implementation

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

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

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

Description

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

Obligations

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

Implementation

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

a) Establish clearly, in the act implementing the Statute, the distinction between extraditing a person to another State and surrendering a person to the ICC

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

b) Amend the constitution

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

Description

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

Provision for rehabilitation under the Rome Statute

Furthermore, the Rome Statute does in fact provide for the possibility of rehabilitation. Under article 110(3), the Court must review all sentences of imprisonment after the person has served two thirds of the sentence, or 25 years in the case of a life sentence, to determine whether the person's sentence should be reduced. At that stage, the Court will consider such matters as whether the person has assisted the Court in locating any assets that are subject to fine, forfeiture or reparation orders, which can be used for the benefit of victims (article 110(4)(b)). The Court may also consider any "other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence" (article 110(4)(c)). Therefore, a life sentence may be reduced to 25 years in some cases. If the Court decides not to reduce the person's sentence after the first review, the Statute requires the Court to continue to review the question of reduction of sentence in accordance with provisions that are being drafted for inclusion in the Rules of Procedure and Evidence (article 110(5)).

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

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

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

Implementation

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

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

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

b) Amend the constitution

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

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

The right to trial by jury

Description

Some constitutions provide for the right to trial by jury. Under article 39(2)(b), persons appearing before the ICC will be tried by a three-judge Trial Chamber. The ICTY/R function in the same way. Constitutional problems should not result, however, because generally speaking this right does not apply with respect to extradition to a foreign jurisdiction. For example, in Reid v. Covert (354 U.S. 1, 6 1957), the United States Supreme Court found that the right to trial by jury should not be interpreted in such a way as to prevent the extradition of an American
citizen to face trial in another jurisdiction. An individual may have the right to be judged by a
jury before judicial authorities of their own State, but may not necessarily enjoy this right in
other jurisdictions. This rule should be applied in the case of the ICC, because it does not
constitute a foreign jurisdiction, but is rather an international jurisdiction that the States Parties
have decided to vest with specific powers. Moreover, the guarantees of judicial independence
and competency provided by the Rome Statute are sufficient to guarantee an accused person a
fair trial despite the absence of a jury.

Obligations

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

Implementation

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

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

Description

Under article 89(3)(a), a State Party must authorise, in accordance with its national
procedural law, transportation through its territory of a person being surrendered to the Court by
another State, except where transit through that State would impede or delay the surrender.
Article 89(3)(b) sets out the required contents of a request by the Court for transit.

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

Obligations

a) A State must ensure that its laws provides for transportation through its territory of a
person being surrendered to the Court by another State.
b) These laws must not require authorisation if the person is transported by air and no landing is scheduled on the territory of the transit State.

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

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

Implementation

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

3.9 Collecting and Preserving Evidence

Admissibility of evidence before the ICC

Description

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

The relevant provisions of the Statute includes article 66, which states that accused persons will be presumed innocent until proven guilty before the Court, with the onus on the Prosecutor to prove to the Court the guilt of the accused beyond a reasonable doubt, if the Court is to convict the person. At the same time, the Court must ensure that every trial is a fair trial, conducted impartially (article 67(1)).
With this in mind, the Prosecution must disclose any evidence in its possession to the defence, where such evidence shows the accused may be innocent, or suggests that the Prosecution evidence may be less than credible (article 67(2)). The defence is entitled to challenge the evidence that the Prosecutor presents, and the manner in which it was collected, in the interests of due process. The defence must also have the opportunity to present as much evidence as it believes is necessary to ensure that the Court has all the relevant facts before it, prior to passing judgement on the accused (articles 67(1)(e) & 69(3)). In addition, the Court itself has the authority to request the submission or production of any evidence that it considers necessary for the determination of the truth (articles 64(6)(d) & 69(3)).

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

Internationally recognised human rights

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

As their name suggests, the Rules of Procedure and Evidence will probably elaborate further on the Court’s requirements in this regard, but these Rules will be consistent with the relevant provisions of the Statute discussed below. For more detail on these Rules, see the section on “Looking to the Future”.

Privileges on confidentiality

Article 69(5) recognises that certain conversations and written communications should be kept confidential and not exposed to scrutiny of any kind, even by the Court. For example, whatever a lawyer says to their client is generally considered a “privileged” communication in many countries, to which courts cannot demand access. Similarly, health professionals and humanitarian workers need to be able to keep confidential certain information that has been
provided by people they have treated or assisted, so that potential patients are not afraid to reveal important information required for diagnosis and treatment. The Rules of Procedure and Evidence will provide a list of the exact types of communications that the ICC considers to be privileged. States should bear these privileges in mind whenever they are collecting evidence for the ICC, so as not to prejudice the trial before the ICC.

**Obligations**

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

**Implementation**

When States are implementing legislation and procedures to allow the relevant personnel to collect and preserve evidence for the ICC, as detailed below, that legislation and those procedures should make reference to the relevant standards for evidence, as described above. If States have not previously implemented the relevant international human rights standards, then persons collecting and preserving evidence for the ICC will probably need to be trained in any new procedures that are introduced. In particular, the rights of all persons being questioned must be respected, in order to ensure a fair trial for all.

In order to assist the Court, States should attempt to ensure that privileged communications are not required to be disclosed by anyone. The best way to ensure this is to make sure that none of their laws require the disclosure of such communications, particularly as part of an ICC investigation. The relevant persons should be entitled to bring a claim before a judicial authority, if someone is about to disclose one of these communications, or refuses to return a copy of it that they have obtained without the person’s permission. In the same way, the ICC will not accept secretly recorded evidence of such communications, unless the relevant person waives their privilege.

**Requests for assistance with evidence**

**Description**

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

**Investigations**

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

The Prosecutor may also execute requests on State territory in certain limited
circumstances. Under article 57(3)(d), the Pre-Trial Chamber may authorise the Prosecutor to
take specific investigative steps within the territory of a State Party without having secured the
cooperation of the State Party, if the Chamber has determined that the State’s judicial system
and other forms of authority are clearly unable to meet any request for co-operation due to the
unavailability of such systems of authority, such as during situations of armed conflict. The Pre-
Trial Chamber is encouraged to consult with the State Party if possible, before authorising the
Prosecutor. Under Article 99(4), the Prosecutor may execute requests that do not require
compulsory measures, such as taking evidence on a voluntary basis. Where the ICC has not yet
determined whether the case is admissible, the Prosecutor needs to consult with the State Party
first and observe any reasonable conditions or concerns raised by that State Party.

Hearings

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

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

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

Obligations

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

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

c) Requests for assistance must be executed in accordance with the relevant procedure
under the law of the requested State and, unless prohibited by such law, in the manner specified
in the request. This may include following any procedure outlined in the request, or permitting
persons specified in the request to be present at and to assist in the execution process (article 99(1)).

**Implementation**

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

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

**Testimonial evidence and other evidence concerning specific persons**

**Description**

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

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

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

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

**Obligations**

In general terms, States will need to assist with the following, where requested by the Court:
a) Identifying and locating persons (article 93(1)(a)).
b) Obtaining expert opinions and reports (article 93(1)(b)).
c) Questioning victims and witnesses, including taking sworn statements from them (article 93(1)(b)).
d) Questioning accused persons (article 93(1)(c)).
e) Serving documents, such as requests to testify before the Court (article 93(1)(d)).
f) Assisting witnesses and experts to attend the relevant proceedings (article 93(1)(e)).
g) Conducting searches of persons (article 93(1)(h)).
h) Preserving evidence such as audio, video, or written copies of interviews, statements and reports (article 93(1)(j)).
i) Protecting victims and witnesses (article 93(1)(j)).
j) [optional] Transferring persons in custody to the Court (article 93(7)).
k) Ensuring the protection of the rights of all persons taking part in investigations in any capacity, in accordance with Article 55.
l) Providing adequate physical protection for accused persons (articles 57(3)(c) & 64(6)(e)).
m) Providing any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court (article 93(1)(l)).

Implementation

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

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

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

b) Obtaining expert opinions and reports

It would also be desirable for States to create and keep a register of different types of experts who reside in the State, who may be asked to prepare reports, such as medical experts, weapons experts, military strategy experts, and experts on gender issues. Article 100(1)(d) provides that the Court will pay the costs of any expert opinion or report requested by the Court.

c) Questioning victims and witnesses, including taking sworn statements from them
A record of some kind will need to be made of all statements made by persons questioned in connection with an ICC investigation. At the very least, this will need to be a written record. However, it would be desirable to have as complete a record as possible, such as a video recording, in case the person is not able to attend the Court for some reason. Then their statement will be much more helpful to the Court, if the Court agrees to admit it into evidence. Note that the Court will pay the costs of translation, interpretation and transcription, under article 100(1)(b).

Note also Article 55(1) which applies to all persons involved in investigations under the Rome Statute. All persons being questioned, including victims and potential witnesses, should be granted the rights in this paragraph. They shall not be compelled to incriminate themselves, or to confess guilt, nor shall they be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment, nor shall they be subjected to arbitrary arrest or detention. States that have implemented the International Covenant on Civil and Political Rights or the Convention Against Torture will already be in compliance with these provisions, as long as the laws in their present state can also apply to people involved in ICC investigations. Other States may need to revise their laws and procedures on the treatment of persons being questioned.

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. 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, and organise for the Court to pay for these, in accordance with article 100(1)(b).

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

d) Questioning any person being investigated or prosecuted

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

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

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

e) Serving documents, such as requests to testify before the Court
Because the ICC cannot demand that victims and witnesses provide information or testimony, States are not required to subpoena such persons to provide statements or to attend the Court. However, it would assist the Court considerably if States decided to make use of subpoenas or summons, to ensure that vital evidence is collected in a timely but fair fashion. Persons within the requested State and nationals of that State could be subpoenaed by the State authorities to provide statements for the Court, as long as the appropriate protections are also provided. This may require some revision to the State’s laws on service of documents, to include such subpoenas. On the other hand, States may choose merely to deliver requests to give evidence before the ICC, without any provision for enforcement of a response to such a request. Delivering requests may also need laws that require a person to ensure that the right person receives the request, and that the delivery of the request is kept confidential.

f) Assisting witnesses and experts to attend the relevant proceedings

Article 100(1)(a) provides that the Court will pay the costs associated with the travel and security of witnesses and experts. However, States are required to "facilitate the voluntary appearance of persons as witnesses or experts before the Court" (article 93(1)(e). In other words, they should do everything possible to make it easy for witnesses and experts from their State to travel to the Court, of their own volition. This may include making the travel arrangements, arranging extra counselling, or anything else that the State thinks will assist such persons.

g) Conducting searches of persons

State laws will need to provide for the issuing of warrants to allow the relevant personnel to search persons, if the ICC requires this. They may also need to allow representatives of the Prosecutor and the defence counsel to be present during such searches, if requested by the Court to do so, after consultations with the State concerned.

State authorities should note that there are different types of searches, from “frisking” a person’s body outside of their clothes, to a full body cavity search. The invasiveness of the search is usually determined by the amount of probability that the person is carrying something particularly harmful or something that carries a high penalty if found in one’s possession, such as certain banned drugs. States need to ensure that they do not carry out searches that are any more invasive than they need to be, given all the circumstances. Otherwise the person can claim that their rights have been violated, such as their right not to be subjected to cruel, inhuman, or degrading treatment (article 55(1)(b)). Then whatever evidence is found on them may not be admissible, in accordance with Article 69(7).

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

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

i) Protecting victims and witnesses

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

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

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

j) Transferring persons in custody to the Court

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

Many States may already have mutual legal assistance legislation, which allows them to transfer prisoners from one State to another, for the purpose of giving evidence or something similar. This legislation should only require minor modification to allow those States to transfer prisoners to the Court.

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

k) Respecting the rights of all persons being questioned

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

l) Protecting accused persons

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

m) Other types of assistance

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

Items of evidence

Description

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

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

Obligations

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

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

b) Service of documents (article 93(1)(d)).

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

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

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

f) Preservation of evidence (article 93(1)(j)).

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

Implementation

a) Identification and whereabouts of items

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

b) Service of documents, including judicial documents

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

c) Examination of sites

States may need to review any laws which prohibit persons from visiting or examining or disturbing particular locations in the State’s territory. The Statute makes specific mention of the examination of grave sites, which may raise cultural or religious concerns in some States. However, recent experience with the two International Criminal Tribunals has shown that issues such as these can be negotiated, where the gravity of the crime is such that the need for adequate prosecution overrides the need to meticulously observe particular practices.

d) Search and seizure

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

e) Provision of official documents

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

f) Preservation of evidence

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

g) Proceeds of crime

States may need special laws to enable the relevant authorities to identify, trace, and freeze the proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties. The difference between such laws and some other search and seizure laws is in the fact that the property will not be returned to the person afterwards, if it is connected to the crimes that the person is found to
have committed. In other words, court orders that effectively require the potentially permanent confiscation of property need to be issued before it is proved that the person has actually committed the offence under investigation. Of course, these orders should provide that the property be returned where appropriate. They also need to protect the rights of bona fide third parties.

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

3.10 Protection of National Security Information

Description

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

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

Obligations

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

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

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

**3.11 Protection of Third-Party Information**

**Description**

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

**Obligations**

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

**Implementation**

The procedures to deal with third-party information, and provision of information to the Court, are likely to be regulated by the executive and not through legislation. However, a State must take into account its national privacy legislation when establishing these procedures, and will need to determine if amendments are required.

**3.12 Enforcement of Fines, Forfeiture Orders, and Reparations Orders**

**Description**

Once a person has been convicted by the ICC, the Court may make a request to a State Party for identification, tracing and freezing or seizing of the relevant proceeds, property and assets and instrumentalities of the crime, for the purpose of eventual forfeiture, if this appears necessary (articles 75(4) & 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, under article 75(2), the Court may order a convicted person to provide reparations to, or in respect of, victims, including restitution, compensation and
rehabilitation. Article 109 provides that States Parties must participate in the application and execution of all penalties that are in addition to incarceration. This includes fines and orders for the forfeiture of proceeds of crime, which must be enforced in accordance with the procedures of the national law. Note that this general obligation on States Parties is to be carried out without prejudicing the rights of “bona fide third parties”. Article 75(5) provides that States Parties must also give effect to reparations orders in accordance with the provisions of article 109. Note that orders for reparations may be appealed, by the legal representative of the victims, the convicted person, or a bona fide owner of property adversely affected by such an order (article 82(4)). A convicted person or the ICC Prosecutor can also appeal decisions on penalties (article 81(2)(a)). Therefore, States may have to respond to a subsequent request not to enforce the particular fine or forfeiture order, if an appeal is lodged.

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

**Obligations**

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

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

c) Under article 109(2), if States Parties are unable to give effect to an order for forfeiture, they must take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties.

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

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

**Implementation**

a) Proceeds of crime legislation

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

b) Enforcement of fines, forfeiture orders and reparations orders

Article 109(1) provides that States Parties must give effect to these types of orders "in accordance with the procedure of their national law." Thus States Parties need to ensure that they have laws and procedures in place that allow them to enforce all of these orders. They can determine for themselves what the appropriate laws and procedures should be, as long as these are consistent with the other provisions in article 109 and with the Statute. Those States with mutual legal assistance legislation will probably only need to make minor modifications to this legislation and to the relevant administrative procedures, to enable them to enforce these types of orders from the ICC. However, States should ensure that the rights of bona fide third parties are protected in all cases. They should also ensure that the relevant authorities can respond in a timely fashion to any orders for a stay of execution of such orders, for example where an appeal is lodged subsequent to the order being made.

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

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

3.13 Enforcement of Sentences of Imprisonment

The Statute provides that States Parties are not required to accept sentenced persons, in order to enforce sentences imposed by the Court. This is a voluntary commitment (article 103). When States are considering whether to volunteer for such a role, they should however take into account the positive effect that this would have on the efficient functioning of the Court. The Court will have only very limited detention facilities at the Hague, so it will be relying almost entirely on States to enforce its sentences of imprisonment in national detention facilities. If there is a shortage of suitable facilities, this may create administrative difficulties for the Court and may lead to challenges by convicted persons to the conditions of their detention, if the facility at the Hague becomes overcrowded. Such challenges would take up the time of the Court and thus may interfere with the carrying out of its investigations and prosecutions. States may wish to ensure that their nationals, at least, are imprisoned in facilities that the State has jurisdiction over, to ensure that their conditions of imprisonment are in accordance with the person's rights under national laws. Thus, there are a number of good reasons for States Parties to volunteer to accept sentenced persons from the Court.
Accepting sentenced persons

Description

States Parties will need to determine if they are prepared to be a willing party to accept sentenced persons. In the process of doing so, they will need to determine what conditions they may wish to attach to acceptance, which are to be agreed upon by the Court (article 103(1)(b)). Consideration to agreements between the Court and States Parties may be appropriate to govern the relationship under this part.

Obligations

States are not obliged to accept sentenced persons by the ICC. However, if they do so, they must abide by the terms of the agreement with the Court.

Implementation

A revision of national legislation may be needed, with particular attention being paid to such matters as privacy of communication by sentenced persons with the Court and transfer of sentenced persons.

Sentences of Imprisonment

Description

Article 103 provides for a sentence of imprisonment imposed by the Court to be served in a designated State which the Court has selected from a list of States willing to accept the sentenced person. A State that has indicated its willingness to accept sentences to be served in their system may attach conditions agreed upon by the Court. However, a State of enforcement must notify the Court if these conditions or any other circumstances could materially affect the terms or extent of the imprisonment (article 103(2)).

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

The sentence of imprisonment is binding

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

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

The supervision of enforcement of sentences and the conditions of imprisonment

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

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

After completion of the sentence

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

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

Obligations

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

Implementation

This may necessitate both legislative and administrative changes on the part of the accepting State.
Review by the Court for reduction of sentences

Description

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

Obligations

States must not interfere with sentences imposed by the ICC, either by reducing or modifying the penalty.

Implementation

States should review their legislation to avoid this possibility.

4. COMPLEMENTARITY OF THE JURISDICTION OF THE ICC

4.1 The Principle of Complementarity of the ICC

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

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

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

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

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

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

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

Under article 17(3), “Unable” means:

1. The State’s national judicial system has substantially or totally collapsed;
2. The State’s national judicial system is unable to obtain the accused or the necessary evidence or otherwise unable to carry out its proceedings.

Although it was imperative that priority be given to States to prosecute and punish perpetrators of international crimes, it was equally necessary to have a mechanism ready in the event that a State would conduct sham proceedings or would not possess the technical means required for a proper investigation and trial. Without this mechanism, it would be too easy to defeat justice. A State who was unwilling to prosecute the perpetrator of a crime could manipulate the procedures to ensure a not-guilty verdict by engineering a stay of proceedings, buying off the jury, deliberately violating the fundamental rights of the defendant, or by creating unreasonable delays. More simply still, a State could deliberately omit to present critical evidence to the hearing.

Ne bis in idem

The jurisdiction of the ICC to try an individual who has been the object of sham proceedings in a national court is technically an exception to the principle of criminal law in which a person may not be prosecuted twice for the same crime (*ne bis in idem*). Article 20
allows the ICC to prosecute a person for a crime referred to in the Statute, even after being tried for the same act in a national court if:

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

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

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

The principle of *ne bis in idem* can be found in most national criminal codes, in some constitutions and in article 14 of the International Covenant on Civil and Political Rights. It would be preferable if the national law implementing the ICC Statute made mention of the exception to this principle provided by the Statute.

**Ordinary offences versus ICC crimes**

Article 20 (2) states that a State may not prosecute someone for a crime listed under the Statute for which he or she has already been sentenced or acquitted by the ICC.

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

**Sentences**

When a national court prosecutes and sentences the perpetrator of an offence referred to in the Statute, it has the power to impose the sentence it considers appropriate. Article 80 does not affect application of sentences provided by the domestic law of States Parties. Nor may subsequent rulings concerning pardon, parole or suspension of sentence result in the case being referred to the ICC.

**Amnesties and pardons**

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

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

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

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

4.2 The Jurisdiction of the ICC

Description

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

Non retroactive jurisdiction

Article 11 states that the Court has jurisdiction only with respect to crimes committed after entry into force of the Statute. If a State becomes a Party after entry into force, then the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, except where it has made a declaration under article 12(3) accepting the jurisdiction of the Court as a non-State Party.

Complementarity Requirements

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

Implementation

States that wish to prosecute ICC crimes should ensure that they have national legislation in place that allows them to exercise jurisdiction over people committing crimes in their territory, and nationals who commit crimes abroad. This may simply require an amendment to the criminal code.

A further basis that a State may wish to consider for exercising jurisdiction is "universal jurisdiction", as set out in the 1949 Geneva Conventions and their 1977 Additional Protocols in
relation to "grave breaches". Note that different concepts of “universal jurisdiction” exist: some interpret this term to mean that a State can exercise jurisdiction over anyone found in its territory, while others interpret it to mean that a State can arrest anyone, wherever that person may be in the world and regardless of any linkage to the State in question. Other grounds States may wish to consider include jurisdiction based on the victim’s status.

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

4.3 Crimes listed under the Statute

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

Genocide

Description

Genocide is the “crime of all crimes”. It can be considered as the most serious of all crimes against humanity. The Rome Statute has adopted word for word the definition of genocide established by the 1948 Convention for the Prevention and Repression of the Crime of Genocide. The definition of this crime is based on three components:

1) commission of one or more of the five following acts:
   • murder;
   • causing serious physical or mental harm;
   • deliberately inflicting conditions of life calculated to bring about physical destruction in whole or in part;
   • imposing measures intended to prevent births;
• forcibly transferring children of the group to another group.

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

3) intent to destroy the group, in whole or in part. The requirement of guilty intent is very high. The person must be shown to have acted with the intent to destroy a group. Genocide cannot be committed by negligence. The term “in whole or in part” signifies that an isolated act of racist violence does not constitute genocide. There must be an intent to eliminate large numbers of the group, although not necessarily to completely destroy the group.

Complementarity Requirements

It would be prudent for States Parties to the Rome Statute to incorporate the offence of genocide as defined by the Statute into their national law. States that have ratified the Convention on the Prevention and Punishment of the Crime of Genocide have already undertaken to enact the necessary legislation to give effect to the provisions of this convention and to provide effective penalties for persons guilty of genocide.

Implementation

If States Parties to the Statute have not already incorporated genocide into their national legislation, they have several options, if they wish to be able to prosecute such crimes themselves:

a) First, they could adopt a definition taken verbatim from article 6 of the Statute, or that refers to it directly. The advantage of this method is its simplicity for the author of the implementation law and the fact that it would bring the law into concordance with the Statute’s requirements.

b) Another option would be to adopt a series of independent offences connected with each of the acts listed in the Statute. For example, a State’s criminal code could specify that multiple murder committed with the intent to destroy in whole or in part, a national, ethnic, racial or religious group, as such, constitutes genocide. The same could be done for the four other acts listed under article 6 of the Statute. This is a similar approach to the one that was taken by Australia with its existing War Crimes legislation.

c) States can also use existing general law offences to prosecute the authors of genocide, using offences sufficiently serious to describe the crime perpetrated. However, if some of the acts that constitute genocide do not constitute any general law offence under national law, a State Party may need to amend its criminal code and create new offences covering those acts. States Parties need to ensure that prosecution under general law offences does not shield persons from criminal responsibility for their actions.

The definition of genocide may be somewhat modified for adoption into national law, but only with the object of bestowing it with a similar or broader meaning than that provided by the Statute. For example, France indicated in its national legislation that genocide could be committed against any group. Care must be taken in this process, however, because each of the terms contained in Article 6 has a particular significance and is the result of extensive debate, both in 1948 and 1998.
Crimes against humanity

Description

Under article 7, the expression crime against humanity is employed to designate multiple acts of inhumanity committed as part of a widespread or systematic attack directed against a civilian population, in peacetime or wartime. The Rome Statute definition of crimes against humanity contains six components, some of which may differ from previous definitions of this crime:

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

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

c) Commission of inhumane acts. The Statute lists the acts that could constitute crimes against humanity in the context of such an attack:

- murder
- extermination
- enslavement
- deportation or forcible transfer of a 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 universally recognized grounds;
- 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.

d) Knowledge of the attack against a civilian population.

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

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

Finally, it should be noted that the second paragraph of article 7 of the Statute contains definitions for all of the important terms contained in the first paragraph.
Complementarity Requirements

It would be prudent for States Parties to the Statute to incorporate all acts defined as crimes against humanity in the Statute into their national laws. States who already have a law regarding crimes against humanity may need to modify it so that it closely reflects the developments contained in the Statute. For example, the Statute develops international criminal law by explicitly listing sexual offences and large-scale enforced disappearances as crimes against humanity. The definitions contained in the second paragraph of Article 7 should also be respected and reflected in national legislation.

Implementation

States Parties to the Statute can incorporate the offence of crime against humanity into their national law in a variety of ways.

a) First, they could adopt a definition taken verbatim from article 7 of the Statute or that refers to it directly. The advantage of this option is that it is easy for the author of the implementation legislation and it brings the law into concordance with the Statute’s requirements.

b) Another option would be to adopt a series of independent offences, linked to each of the acts listed in the Statute. For example, a state’s criminal code could provide that slavery, committed in the context of a widespread or systematic attack launched against a civilian population, constitutes a crime against humanity. It would also be necessary to include in each relevant provision of the criminal code, a similar definition of the acts to that described in the Statute. This would have to be done for every act listed under article 7 of the Statute. The advantage of this method is that it simplifies the task of national judges and allows drafters to make certain adaptations. Clearly, some modifications can be made to the definitions of this offence, but only to bestow it with a similar or broader meaning than that provided by the Statute, to ensure that it does not shield anyone from criminal responsibility for such crimes.

c) States can also use existing general law offences to prosecute the authors of crimes against humanity, using offences sufficiently serious to describe the crimes perpetrated. However, if some of the acts that constitute a crime against humanity do not constitute any general law offence under national law, a State Party may need to amend its criminal code and create new offences covering those acts.

War crimes

Description

War crimes have traditionally been defined as a violation of the most fundamental laws and customs of war. Such criminal acts are listed in numerous international instruments (see the list of instruments in Appendix II). The negotiating process that culminated in the Rome Statute was characterized by both compromise and the development of international law. The Statute definition of war crimes is narrower in some respects than the traditional definitions of war crimes. At the same time, it is broader than the traditional definition, because it covers acts that had never before been codified. The major innovation of the Statute is that it enshrines the
recent evolution of international jurisprudence criminalizing war crimes committed during non-
international armed conflict.

**War crimes committed during an international armed conflict**

International armed conflict exists at the moment there is a confrontation between armed
forces of different nations. Article 8 does not define an international armed conflict. However,
some jurists have suggested that armed conflict may be considered to be international in the
following six cases:

1. armed conflict between States;
2. internal armed conflict that has been recognized as belligerency;
3. internal armed conflict involving one or several foreign interventions;
4. internal armed conflict involving UN intervention;
5. wars of national liberation;
6. war of secession.

Acts committed during an international armed conflict that are defined as war crimes
under article 8 (2)(a) of the Statute are as follows:

1) Grave breaches of the Geneva Conventions of 1949, in other words the following acts
committed against wounded, sick or shipwrecked members of armed forces, prisoners of war or
civilians:

- Willful killing;
- Torture or inhuman treatment, including biological experiments;
- Willfully causing great suffering, or serious injury to body or health;
- Extensive destruction and appropriation of property, not justified by military
  necessity and carried out unlawfully and wantonly;
- Compelling a prisoner of war or other protected person to serve in the forces of a
  hostile power;
- Willfully depriving a prisoner of war or other protected person of the right to a fair
  and regular trial;
- Unlawful deportation or transfer or unlawful confinement;
- Taking of hostages.

2) Article 8(2)(b) also criminalizes other serious breaches of laws and customs applicable
in international armed conflicts. It is unnecessary to provide the complete list here; the text of the
Statute is sufficiently clear in this respect. These crimes are based on various sources, including
the 1907 Hague Regulations, the First Additional Protocol to the Geneva Conventions, and
various conventions banning certain weapons. The criminal acts include:

- Intentionally directing attacks against the civilian population not taking direct part in
  hostilities;
- Intentionally launching an attack in the knowledge that such attack will cause
  incidental loss of life or injury to civilians or damage to civilian objects or
  widespread, long-term and severe damage to the natural environment which would be
clearly excessive in relation to the concrete and direct overall military advantage anticipated;

• Intentionally launching an attack against personnel or installations involved in humanitarian assistance or a peacekeeping mission in accordance with the Charter of the United Nations;

• The transfer by an occupying power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

• Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence constituting a serious breach of the Geneva Conventions;

• Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

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

War crimes committed during a non-international armed conflict

The Statute criminalizes certain serious violations of the laws of war committed during internal armed conflicts. In all cases, the definition of “internal armed conflict” as stated by the Statute does not include situations of simple internal disturbances such as riots, sporadic or isolated acts of violence or any similar act (article 8(2)(d)). Crimes committed during non-international armed conflicts are separated into two paragraphs.

First, article 8(2)(c) criminalizes the acts enumerated in article 3 common to the four Geneva Conventions, which deals with serious violations. The crimes in paragraph (c) can occur in any non-international armed conflict. The following list of war crimes would apply when committed against individuals not directly participating in the hostilities, including members of armed forces who have laid down their arms or been placed hors de combat due to illness, injury, detention, or any other cause:

• Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

• Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

• Taking of hostages;

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

Second, paragraph 8(2)(e) criminalizes some acts prohibited by the two additional Protocols of 1977, various treaties on the laws of warfare and customary international law. However, under paragraph (f), these crimes can occur only when there is a protracted armed conflict on a State’s territory between State forces and organized armed groups, or between organized armed groups. States should be aware that the threshold of paragraph (e) of the Statute is lower than the threshold of Protocol II: neither responsible commanders, nor control on a part of the territory is required. The existence of a protracted armed conflict is sufficient. The
crimes listed in paragraph (c) could also apply during such a conflict. The criminal acts listed under article 8(2)(e) include:

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

**Complementarity Requirements**

It would be prudent for States Parties to the Rome Statute to incorporate the offence of war crimes as described in the Statute. Their laws should cover both war crimes committed during international armed conflict and those committed during an internal armed conflict, and should be applied to civilians and State officials as much as to members of its armed forces. States that have ratified the Geneva Conventions have already undertaken to enact legislation necessary to provide effective penal sanctions for persons committing grave breaches of these instruments during international armed conflicts (now all offences under article 8(2)(a)).

**Implementation**

The chapters on article 8 in Otto Triffterer’s “Commentary on the Rome Statute of the International Criminal Court” describe the exact source of each of the crimes listed under this article. Those States that have already incorporated many of the existing conventions on war crimes may wish to review those chapters, to identify the relevant modifications and additions they may need to make to national laws, to ensure that they can prosecute all of the crimes within the ICC’s jurisdiction. Otherwise, States Parties can employ a variety of means of incorporating the definition of a war crime into their national legislation.

a) The easiest method is to adopt a definition taken verbatim from the text of article 8 of the Rome Statute or that refers directly to it. This solution has the advantage of being easy for the author of the national law and brings it into concordance with the requirements of the Statute.

b) Follow the example of existing Australian War Crimes legislation, which makes murder and similar acts into war crimes in certain situations.

c) States could also use their general law offences to prosecute the authors of war crimes, using offences sufficiently serious to describe the crimes perpetrated. However, if some of the acts that constitute a war crime do not constitute any general law offence under national law, a State Party may need to amend its criminal code and create new offences covering those acts, to ensure that no-one is shielded from criminal responsibility for such crimes.
4.4 Grounds for Excluding Criminal Responsibility

Description

Article 31 sets out certain grounds for excluding criminal responsibility in the context of ICC prosecutions. Other provisions that are relevant in this respect are contained in Part 3 of the Statute on General Principles of Criminal Law.

Complementarity Requirements

States that decide to try persons charged with one of the crimes mentioned in the Statute in their national courts are not obliged to allow an accused person to use the grounds of defence provided under the Statute, or the other means of defence accepted by international criminal law. However, States Parties may need to revise defences allowed under their national criminal justice system in order to ensure that these defences do not shield the person from criminal responsibility for acts that constitute ICC crimes. A trial where a person is acquitted of an ICC crime by a national court because of a means of defence too easy to raise could be considered a sham trial.

Implementation

Many of the grounds for excluding criminal responsibility under the Statute are already recognized in most jurisdictions, as well as under international criminal law. In common law jurisdictions, they are more frequently described as defences. The principle of complementarity does not require that States Parties establish a national judicial system that is governed by the same rules as those governing the ICC.

Nevertheless, States may wish to adapt existing provisions to bring them into conformity with the provisions of the Statute. These new grounds of defence would be admissible for the prosecution of international crimes. The advantage of this solution is that it brings uniformity to the proceedings. A person who is charged whether before a national court or the ICC can use the same grounds for excluding criminal responsibility.

The defence of superior orders

Description

Article 33 of the Statute indicates that the fact that a crime under the ICC’s jurisdiction was committed under orders of a superior—whether military or civilian—does not absolve the perpetrator of criminal responsibility. There is an exception however, where:

1. the accused person was under a legal obligation to obey orders of the government or of the superior in question;
2. the accused person did not know that the order was unlawful; and
3. the order was not manifestly unlawful.

These three conditions are cumulative, and the Statute specifies that any order to commit genocide or a crime against humanity is manifestly unlawful at all times. This ground of defence is thus probably only applicable to persons who were ordered to commit war crimes or, when it
will be defined, a crime of aggression. Otherwise, the defence of superior orders can only be used as an attenuating circumstance, for example, to reduce the penalty.

This means of defence has always been controversial. The Charters of the Nuremberg and the Tokyo Tribunals, as well as the Statutes of the ICTY and the ICTR state that the defence of superior orders is not admissible in any situation. It was believed that as the order to commit a crime was in itself unlawful, it could not be used as a justification for the behaviour of a subordinate.

Yet national law in many States has adopted the opposite point of view with regard to the defence of superior orders, and so is in overall conformity with article 33. This means that in most States this ground of defence exists as such and a subordinate cannot be found guilty of the crime unless he or she knew that the order was unlawful or if the order given by the superior was manifestly unlawful. This rule is contained in the codes of military discipline of Germany, the United States, Italy and Switzerland, and the notion of conditional responsibility has been enshrined by the jurisprudence of national tribunals on war crimes. Only a handful of States prohibits the defence of superior orders in their national legislation. Other States take a two-pronged approach: they permit use of the superior orders defence when one of their nationals has been charged, but prohibit it when the accused person was in combat against an enemy or bases their plea on the law of a foreign country.

**Complementarity Requirements**

It would be prudent for States Parties to make some changes to their national law if this is required to ensure that any such defence is no broader than article 33. If a national judicial system were to acquit an individual because it had a significantly lower threshold for superior orders, this could be seen as a means of shielding the person from the appropriate criminal responsibility. For example, the defence of superior orders may not be used in cases where there was an order to commit a crime against humanity or genocide.

**Implementation**

States Parties to the Statute do not have to change their national legislation if it does not provide this ground of defence to an accused person. In States where the national law provides this ground of defence, an amendment may need to be made making it inadmissible when the order in question concerned the commission of a crime against humanity or genocide.

Still, States Parties desiring to harmonize criminal procedures could adapt their national law to the Statute’s provisions. In this case, the following adjustments may need to be made:

- declare the defence of superior orders generally inadmissible;
- declare it admissible only when the accused person could show that his or her case conformed to these three cumulative conditions:
  1. the legal obligation to obey the order;
  2. he or she did not know the order was unlawful;
  3. the order was not manifestly unlawful;
- declare the defence of superior orders as inadmissible when the accused person received an order to commit a crime against humanity or genocide;
• declare that the defence of superior orders should be subject to the same rules, whether the order in question was given by a military or a civilian authority.

4.5 Individual Criminal Responsibility and Inchoate Offences Provided Under the Statute

Description

The crimes within the jurisdiction of the Statute are most often offences committed by a number of persons. Crimes against humanity and genocide are offences that are generally committed by many individuals operating as part of an extensive criminal organization. Those holding the highest degree of criminal responsibility for these crimes are most often individuals in positions of authority who had no direct contact with the victims. They either issued the orders, incited others to commit the crimes, or furnished the means with which to commit these crimes.

This is why the Statute does not restrict criminal responsibility for these crimes to individuals who are directly involved in their commission, but extends it to those who were indirectly involved as well. Under article 25, a person is criminally responsible if he or she:

• commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
• orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
• aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
• contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either be made with the aim of furthering the criminal activity or criminal purpose of the group, or be made in the knowledge of the intention of the group to commit the crime;
• in respect of the crime of genocide, directly and publicly incites others to commit genocide;
• attempts to commit such a crime.

However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under the Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose (article 25(3)(f)).

Complementarity Requirements

States Parties to the Statute desiring to prosecute criminals in their national courts under the principle of complementarity should ensure that their implementation legislation includes all the forms of individual criminal responsibility and inchoate offences provided by the Statute. Otherwise, they may not be able to prosecute in national courts the majority of individuals responsible for the commission of the crimes described in the Statute.
Implementation

Most national criminal legislation already describes individual criminal responsibility in these terms; there would be no need therefore to adopt any particular legislative amendments. States should however ensure that this responsibility applies to all the crimes within the ICC’s jurisdiction.

4.6 Responsibility of Commanders and Other Superiors

Description

International law requires that all persons in positions of authority have the obligation to prevent those under their orders from violating the rules of international humanitarian law. Articles 86(2) and 87 of the First Additional Protocol to the Geneva Conventions codified this principle. As stated by the ICTY in the Delalic case, military commanders of each State Party to the Statute should correctly instruct their soldiers concerning the rules of international humanitarian law, ensure that these rules are observed when making decisions on military operations, and set up a communications network so that commanders can be quickly informed of each breach of the laws of war committed by their soldiers. They should also apply corrective measures for every violation of international humanitarian law.

Article 28 of the Statute covers the responsibility of commanders and other superiors, and is divided in two sections. Paragraph (a) deals with the responsibility of military commanders. Paragraph (b) details the responsibility of commanders of civilian authorities.

Military commanders

Military commanders may be held responsible for crimes committed by their soldiers if the commanders knew or should have known that the crimes had been committed, and if they neglected to take the necessary measures for preventing or repressing the commission of these crimes. The responsibility of military commanders involves three essential elements:

- effective command and control over the persons committing the crimes;
- the commander knew of or should have known that a crime was about to be committed or had already been committed;
- the commander did not take all necessary and reasonable measures within his or her power to prevent the crime or punish the perpetrator.

Non-military superiors

Non-military superiors may be held responsible for crimes committed by their subordinates when they had knowledge of, or consciously disregarded information which clearly indicated that the subordinates were committing or about to commit ICC crimes; when the crimes were connected to activities under the control of the superior; and when the superior neglected to take the necessary measures for preventing or repressing the crimes or to inform civilian authorities with competency to investigate and initiate appropriate judicial proceedings. The elements of the offence are the same for non-military commanders, with the exception of the element concerning knowledge of commission of crimes. Article 28(b) of the Statute indicates that in the case of a civilian commander, the level of proof required in order to convict is higher.
than that required for military superiors. Either knowledge of the crime’s commission or a conscious disregard of pertinent information must be demonstrated. In other words, to establish the guilty intent of a non-military superior, it is necessary to show that information indicating the significant possibility that subordinates had committed or were about to commit a crime was available, that the superior was in possession of this information, and he or she decided not to act on it. The civilians targeted by these provisions are political leaders, business people and high officials. Military commanders are held to a stricter standard under international humanitarian law because military structure and the need to maintain military discipline make this necessary and appropriate.

**Subordinates**

The presence of a hierarchy of power is a necessary condition to the determination of responsibility of a superior. However, power does not derive solely from the official title of the accused person. The determining factor is the effective exercise of authority and control over the actions of subordinates. Control can be officially conferred or simply exercised. Also, the legal power to lead subordinates does not constitute an absolute condition for establishing responsibility of the commander, who may in some cases be part of an indirect line of command. For example, military leaders can be held responsible for acts committed by individuals who are not officially under their control in the chain of command, but on whom they could have exercised in fact power to prevent or repress the commission of a crime.

**Omission to take necessary measures**

A superior can only be held responsible for omitting to take measures that were within his or her capacity to take. Therefore, even if a superior did not officially have the power to take measures concerning offences that had been committed, he or she can be held responsible if it is demonstrated that in the circumstances, he or she could have acted.

**Complementarity Requirements**

States Parties to the Statute desiring to prosecute criminals in their national courts under the principle of complementarity should incorporate the concept of responsibility of commanders and superiors into their national law, as defined in article 28.

**Implementation**

Few national criminal codes deal with the concept of the responsibility of commanders. It would be prudent for an implementing law to introduce this concept into national law. Generally speaking, the notion of the responsibility of commanders does not exist for general law offences. For example, a deputy minister cannot be held criminally responsible for fraud committed by an employee in his or her department, nor can a captain be held responsible for the murder of a soldier by another soldier. International crimes are treated differently; high-ranking military and civilian authorities are frequently found to have criminal responsibility. Since it is often extremely difficult to establish responsibility, due among other reasons to the complexity of the chain of command, the concept of the responsibility of commanders and superiors is an essential tool for the prosecution.
4.7 Rules of evidence and national criminal justice proceedings

Description

The principles in the Statute on which the Court’s procedures are based, are derived from existing international human rights standards. The Statute does not explicitly require States Parties to modify judicial procedures in criminal matters. Yet, rules of evidence and rules of proceedings in criminal matters should not unnecessarily restrict proceedings initiated concerning crimes defined by the Statute. There are some evidentiary rules that almost systematically result in acquittal. For example, some criminal jurisdictions require the testimony of several men in order to establish proof that a woman was raped, even if only one man was involved in the rape.

Complementarity Requirements

Under the principle of complementarity, States Parties should ensure that when crimes listed in the Statute are committed, they can be effectively investigated and prosecuted. They should also make sure that their rules of proceedings in criminal matters do not prevent victims from laying charges, or prevent the establishment of evidence of crimes.

Implementation

Not all States Parties may wish to adjust their rules of proceedings in criminal matters. Also, the adjustment will probably only affect a few rules. However, every act that is likely to constitute one of the crimes listed in the Rome Statute should be considered in terms of the rules of evidence and proceedings in order to determine if any rules could pose a major obstacle to the proper functioning of an investigation or trial, and to ensure that persons are not shielded from criminal responsibility. The rules of evidence and proceedings concerning sexual offences are those that are most likely to present a problem of this kind in many jurisdictions.

4.8 Military Tribunals

Military tribunals, just like ordinary courts, can be used to prosecute the authors of ICC crimes. The Statute does not make any distinction between these two types of systems and States Parties are free to choose which domestic court will have jurisdiction over ICC crimes. A State Party can decide that the procedures related to the Statute will be taken in charge by its ordinary courts, by its martial courts or by both, depending on the general organization of its judicial system. Nevertheless, military tribunals generally have a restricted competence. They can only prosecute military personnel and usually do not have jurisdiction over civilians. ICC crimes, however, can be committed in times of peace by both members of armed forces and civilians. For example, police forces or non-State armed groups can commit crimes against humanity, as a civilian can participate in the recruiting of children, thereby committing a war crime. Therefore, States Parties willing to prosecute authors of ICC crimes should, most of the time, use their common law jurisdictions, except if their military tribunals have a sufficiently broad jurisdiction to cover crimes committed in times of peace and crimes committed by civilians.
The Special Character of Military Proceedings

In many States, proceedings before military tribunals are different than those before ordinary courts. Proceedings are sometimes more expeditious in military tribunals, and in some jurisdictions due process may not be guaranteed to the same extent as in ordinary criminal proceedings. Nevertheless, the ICC can not find admissible a case prosecuted by national jurisdictions unless the proceedings at the national level were undertaken with the aim of shielding the person from criminal responsibility or are being conducted in a manner inconsistent with an intention to bring the person concerned to justice. Thus, any military proceeding undertaken in good faith is highly unlikely to result in the ICC subsequently assuming jurisdiction over the same matter, just because the proceedings were expeditious. Military tribunals should be able to determine the criminal responsibility of an individual that is described by the Statute, taking into account as much as possible the definitions of the crimes, the means of defence, and the general principles of criminal law described by the Statute.

Military Justice and Practice

The Statute does not state explicit obligations for States Parties with respect to the conduct of their armies. Nevertheless, one of the aims of the Statute is to ensure a greater respect for the laws of armed conflicts and many ICC crimes are related to military practice. Thus, every prohibition resulting from the definitions of genocide, crimes against humanity and war crimes should be applicable to the members of the armed forces of the States Parties. Furthermore, the general principles of criminal law, and the defences established by the Statute should be incorporated in States’ military codes. As prevention measures, States Parties should include in their military manual and adapt the training and the instruction of their troops, if necessary, in order to respect the prohibition of the use of certain arms stated by the Statute. The same should be done concerning the questions related to the superior orders defence.

5. RELATIONSHIP BETWEEN THE ICC AND STATES

5.1 Broader State Obligations and Rights of States Parties

Treaty Requirements

Description

The Rome Statute stipulates in article 126 that the International Criminal Court will come into existence on the 1st day of the month that follows the period of 60 days after the deposit of the 60th instrument of “ratification, acceptance, approval or accession”.

Thus, once 60 States have acknowledged their acceptance in the form required by their constitutional regime, the Statute will enter into force some 2-3 months later.

Signature of the Statute closes on December 31, 2000, as provided for in paragraph 1 of article 125. In order to become a Party, a State must either ratify, accept, approve or accede to the Treaty. The term “accession” usually means adhering to the treaty after its entry into force but may designate a specific process for a given State. A State wishing to ratify the Statute before the closure of the date for signature would normally sign it and then deposit its
instruments of ratification, acceptance or approval with the Secretary General of the United Nations.

For a State ratifying, accepting, approving or acceding to the Statute after the deposit of the 60th instrument, the entry into force of the Statute for such a State shall be the 1st day of the month following 60 days after its action of ratifying, accepting, approving or acceding to the Statute (article 126(2)).

**Reservations and declarations under the Statute**

Under article 120, States can not make any reservations to the Statute. States Parties must accept the Statute as adopted by the Rome Conference.

However, article 124 of the Statute provides that a State may declare that upon becoming a party to the Statute, "for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory." This provision is intended to allow States Parties sufficient time to train all their military personnel in the requirements of the Statute with respect to war crimes, as some of the provisions in the Statute may differ from existing international obligations.

**Withdrawal from the Statute**

Article 127 provides that a State Party may withdraw by giving a written notification to the Secretary General of the United Nations that it intends to withdraw from the Statute, taking effect one year from the date of the notification or at a later date if the State so declares. It should be noted that article 127(2) outlines the obligations and duties of the State, which persist notwithstanding the notice of withdrawal and the actual withdrawal itself.

**Settlement of disputes**

Under Article 119, disputes which arise between two or more States Parties relating to the interpretation or application of the Statute should initially be settled through negotiations, if possible. If it cannot be settled in this manner within three months, the matter will be referred to the Assembly of States Parties, which may seek to settle the dispute itself, or make recommendations on further means of settlement of the dispute. The Statute gives the Assembly of States Parties the power to refer the dispute to the International Court of Justice "in conformity with the Statute of that Court" (article 119(2)).

**Obligations**

a) States may ratify, accept, approve or accede to the Rome Statute, as appropriate (article 125).

b) States may not make any reservations to the Statute (article 120), but they may make a declaration under article 124, which defers acceptance of the jurisdiction of the Court over war crimes within its jurisdiction, for seven years after entry into force of the Statute for the State concerned, when a war crime is alleged to have been committed by the State's nationals or on its territory.
c) States Parties wishing to withdraw from the Statute must follow the procedure, and continue to observe the relevant obligations and duties, as outlined in article 127.

**Implementation**

States will probably already have in place procedures to address all of these issues. The only provision that may differ significantly from other standard treaty provisions, is article 124 on the special case of war crimes within the jurisdiction of the ICC. States should note that the basic principles underlying the war crimes provisions of the Statute do not deviate markedly from existing humanitarian law treaty and customary law obligations. The main difference is that breaches other than "grave breaches" of the Geneva Convention are also criminalised under the Statute.

However, States should already have legislation proscribing such conduct as breaches of the laws of war, and military personnel should already be aware of these provisions. Therefore, most States are unlikely to require seven years to educate the relevant personnel on the requirements of the war crimes provisions of the Statute. It would be unfortunate if a State Party decides to make a declaration under article 124, and is subsequently invaded by a hostile force that commits numerous war crimes, yet the State cannot find any redress because it does not accept the jurisdiction of the ICC over such crimes and may not have the resources to carry out such a prosecution itself. Therefore, States should consider carefully whether to make a declaration under article 124, when ratifying the Statute, as it could have unwelcome consequences.

**Financing of the Court**

**Description**

Article 114 states that the expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be paid from the funds of the Court. The funds of the Court will be provided by States Parties and any voluntary benefactors, rather than by the general budget of the United Nations. However, there are provisions that the United Nations may contribute, 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 Statute does not make the financing of the Court a universal, compulsory obligation for all States in the United Nations, but rather provides that the financial obligations to the Court of States Parties will be established following the assessment parameters provided in article 117 of the Statute, notably an agreed scale of assessment based on the scale adopted by the United Nations for its regular budget.

Article 117 further states that the scale of assessment shall be adjusted in accordance with the principles on which the scale is based. This refers to the general principle of the regular budget of the United Nations adopted by the General Assembly that there is a limit to the maximum contribution a State is required to make. At the present time no State may pay less than 0.001% and no State may be required to pay more than 25% of the budget.
An important feature of the financial arrangements for the Court concerns the stipulation that the budget of the Court will be set by the Assembly of States Parties. The assessed contributions therefore will be established after the budget is adopted.

The Budget

The budget will be on a year to year basis as reflected in the annual audit clause in article 118. Thus, although the volume of the Court's activity and the activities of the Prosecutor and the Registrar will vary in relation to the volume, the requirement for annual budgets will allow the Court to adapt to changing circumstances when required.

The budget for the first fiscal year of the Court will be adopted by the Assembly of States Parties based on the proposal submitted by the Preparatory Commission. The Financial Rules and Regulations of the Court, and the meetings of the Assembly of States Parties, including its Bureau and subsidiary bodies are to be established by the Assembly of States Parties as provided for in article 113.

Note that States Parties' voting rights in the Assembly of States Parties and in its Bureau may be affected in certain circumstances as stipulated in article 112(8) where a State's arrears equal or exceed the contributions required for the preceding two years. The same paragraph provides for the suspension of this sanction where the Assembly of States Parties is satisfied that the failure to pay is due to conditions beyond the control of the State Party.

Voluntary contributions to the Court are permitted under article 116 where it is stated that they must be considered as additional funds. Thus they may not be sought or utilised in any manner to replace or fulfil the regular budget expenses.

Obligations

States Parties must provide the Court with specified financial contributions, which will be assessed in accordance with an agreed scale of assessment, based on the scale adopted by the United Nations for its regular budget and adjusted in accordance with the principles on which that scale is based (articles 115(a) & 117).

States Parties that are in arrears may lose their right to vote in the Assembly of States Parties and in the Bureau, if the amount of their arrears equals or exceeds the amount of the contributions due from them for the preceding two full years. However, the Assembly may permit a State Party to vote where it is satisfied that the failure to pay is due to conditions beyond the control of the State Party (article 112(8)).

Implementation

Member States of the United Nations will already be familiar with the method of providing contributions to an international body in accordance with an agreed scale of assessment of contributions. All States Parties must ensure that their annual budgets provide for their assessed contributions to the ICC.
Allowing the ICC to sit in a State’s territory

Description

Article 3(1) provides that the seat of Court will be in The Hague and that the Assembly of States Parties will approve the headquarters agreement between the Court and the host State. Articles 3(2) & 62 suggest that the Court may also sit outside of its headquarters for a specific trial or series of trials regarding a situation referred to the Court. Thus, States Parties may wish to provide for the Court to sit in their territory where this is necessary or desirable. The Rules of Procedure and Evidence are likely to specify more detailed procedures for the Court to sit outside of its headquarters.

Obligations

None of these provisions create obligations for States.

Implementation

Many States may already have legislation and administrative procedures to allow for the ICTY/R to sit in their territory. This legislation and procedures would only require minor amendment, to allow the ICC to sit in their territory as well. Sometimes the effect of holding a trial in the place where the crime was committed is to give victims more of a sense that justice is being done, because they can clearly see the Court at work. Therefore States should consider the possibility of allowing for the ICC to sit in their territory.

Nominating judges and providing other personnel to the Court

Description

The nomination of judges to the ICC is a right of States Parties, therefore States may wish to implement procedures for nominating candidates. Article 36(4) sets out the procedures that a State Party may use to make nominations:

i) the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question; or

ii) the procedure provided for the nomination of candidates to the International Court of Justice in the Statute of that Court.

Note that States Parties may nominate only one candidate for any given election. Candidates need not be nationals of the nominating State Party, but they must be a national of one of the States Parties (article 36(4)(b)).

Election of the judges will be by secret ballot at a meeting of the Assembly of States Parties held for that purpose (article 36(6)). Two methods of choosing a nominee are spelled out in considerable detail in the Statute. All candidates for judgesthips on the Court must be chosen from among persons of high moral character, impartiality and integrity and who possess the qualifications required in their respective States for appointment to the highest judicial offices (article 36(3)).
Under article 35, all judges of the Court shall be elected as full time members of the Court and shall be available to serve as such from the commencement of their terms of office. However, the judges comprising the Presidency shall serve on a full time basis as soon as they are elected. The Presidency may decide to what extent the remaining judges shall be required to serve on a full-time basis in consultation with its members.

**Ensuring the impartiality of judges and other ICC personnel**

Under article 41(2), a judge will be disqualified from hearing a case where that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated. Therefore States Parties need to keep accurate records of the criminal trials that their judges are involved in, if they envisage nominating their judges to the ICC at some stage.

States Parties may also provide Prosecutors and other ICC personnel for the Court, although there is no specific right for them to nominate such persons under the Statute. The Statute provides that the Prosecutor will be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties, but it does not specify who can make nominations of Prosecutors (article 42(4)). However, it specifies that the Prosecutor provides a list of candidates for the Deputy Prosecutors. Under article 44(4), States Parties may also offer gratis personnel to assist with the work of the organs of the Court.

Article 42(7) provides that Prosecutors and Deputy Prosecutors will be disqualified from a case if they have previously been involved in any capacity in that case before the Court or in a related case at the national level involving the person being investigated or prosecuted. It may also cause problems for the Court if any gratis personnel provided by a State Party could be perceived as partial by reason of previous involvement in a related case at the national level. Therefore, States Parties that envisage providing any personnel to the Court should ensure that they keep accurate records of all persons involved in criminal cases at the national level, to avoid the possibility of any of these persons giving the appearance of partiality and thereby undermining the legitimacy of the Court.

**Obligations**

If a State Party decides to nominate a candidate for election as a judge of the ICC, it must follow one of the procedures set out in article 36(4). It must also observe the requirements under article 36(3) as to the type of qualities that the candidate must possess.

**Implementation**

States Parties that wish to take advantage of these provisions should implement appropriate procedures for selecting and nominating such persons. They may wish to create a list of persons who would be suitable candidates for various positions within the Court. They should also establish procedures, if they have not already, for keeping accurate records of all persons involved in criminal investigations and prosecutions in the State, to ensure that the ICC may have all the relevant information on which to base a decision to disqualify a person from involvement in an ICC case, if this is required. When States Parties are putting forward any candidates for the Court, they should bear in mind that the working languages of the Court will
be English and French in most cases, so their candidates will need to be fluent in at least one of these languages (article 50(2)).

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 procedures to facilitate the exercise of these rights:

- States Parties may participate in the making of the Financial Rules and Regulations of the Court (article 113) and the rules of procedure of the Assembly of States Parties (article 112(9)).

- Under articles 13(a) & 14, States Parties may refer a "situation" to the Prosecutor, which gives jurisdiction to the Court to investigate the matter. They have a right to be informed where the Prosecutor concludes that information given by the State Party on a situation does not form a reasonable basis for an investigation (article 15(6)). They 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 (53(3)(a)).

- 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 have the right to receive Regulations of the Court and to accept or object to them (article 52(3)).

- They also have the right to receive co-operation and assistance from the Court where they are conducting an investigation or prosecution either in regard to situations where a crime is within the jurisdiction of the Court, or which is a serious crime under the national law of the requesting State Party (articles 93(10) & 96(4)).

5.2 Looking to the Future

Assembly of States Parties

The Assembly of States Parties is going to be the manager of the Court, just as the General Assembly manages the UN. It will be comprised of representatives of all States Parties, who will meet on a regular basis to ensure the efficient functioning of the Court. 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 (article 112(1)).
The main provision of the Rome Statute that deals with the Assembly of States Parties is article 112. Each State Party shall have one representative in the Assembly, however States may also bring their advisers and other personnel with them to meetings of the Assembly. Each State Party has one vote (article 112(7)). Any decisions on matters of substance must be approved by a two-thirds majority of those present and decisions on matters of procedure are to be taken by a simple majority of States Parties present. However, the Assembly is exhorted to try to reach consensus in its decisions in the first instance.

Paragraph 112(8) stipulates that any State Party in arrears in the payment of its financial contributions towards the cost of the Court for the last two years shall lose its right to vote, unless the Assembly is satisfied that the failure to pay is due to conditions beyond the control of the State Party.

The Powers of the Assembly of States Parties

Paragraph 2 of article 112 sets out some of the broad functions of the Assembly, including deciding the budget for the Court. Paragraph 3 describes the management structure of the Assembly, comprising a Bureau consisting of a President, two Vice-Presidents, and 18 members elected by the Assembly for three-year terms, taking into account equitable geographical distribution and the adequate representation of the principal legal systems of the world.

Paragraph 4 grants additional powers to the Assembly, such as the power to create subsidiary bodies as necessary. Paragraph 5 provides that the President of the Court, the Prosecutor and the Registrar may participate in meetings of the Assembly and of the Bureau. Paragraph 6 sets out the timetable and preferred venue of meetings for the Assembly.

There are numerous additional references throughout the Statute to the details of the Assembly’s role and responsibilities. For example, articles 2 & 3 provide that the Assembly will have to approve the agreements that are to be made between the Court and the UN, and between the Court and the host State. Under article 44, the Assembly is required to establish guidelines for the employment of any “gratis personnel offered by States Parties, intergovernmental organisations or non-governmental organisations”.

One of the most influential roles that the Assembly will have is the selection of judges and other personnel for the Court. Most of the relevant provisions are in Part 4. Composition and Administration of the Court. The Assembly also makes the decision to remove judges and prosecutors if necessary and decides the salary of all senior ICC personnel (articles 46(2) & 49).

As mentioned previously, the Assembly must also adopt the Elements of Crimes and the Rules of Procedure and Evidence established by the Preparatory Commission (articles 9(1) & 51(1)). For details on these texts, see below.

The Assembly may also have a disciplinary role, if this is ever needed. 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 in the Statute of the Assembly’s obligations once a matter has been referred to it. But it is likely to consider the seriousness of the allegation and arrive at a suitable political solution. The Assembly will also have a role in the settlement of any disputes between States Parties (article 119).
Finally, the Assembly is to establish and administer a Trust Fund “for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims” (article 79(1)). The Assembly will determine the criteria for managing the Fund (article 79(3)).

Elements of Crimes

The Preparatory Commission of the ICC, comprised of representatives from over 100 States, adopted in June 2000 the Elements of Crimes within the jurisdiction of the Court. The Elements need to be adopted by a two-thirds majority of the Assembly of States Parties before they come into force (article 9(1)).

The purpose of these Elements is to specify the type of facts, mental awareness, and circumstances that the ICC Prosecutor will have to prove, in order to convict a person of one of the crimes within the jurisdiction of the Court. This precision will help in the successful dissemination of information about the ICC crimes to all of those who may potentially commit one of these crimes. For example, military personnel engaged in peacekeeping operations will need to know about the exact details of the requirements under the Elements of Crimes, in order to be in compliance with international humanitarian law governing war crimes and crimes against humanity. States should endeavour to ensure that all of their nationals are appropriately informed and trained in any new procedures that may be required, in light of the Elements of Crimes, once they come into force.

Rules of Procedure and Evidence

The Preparatory Commission also adopted in June 2000 the Rules of Procedure and Evidence that are needed by the new Court. The Rules and any amendments thereto are to be adopted by a two-thirds majority of the Assembly of States Parties before they can take effect (article 51(1)).

Once the Court is established, if the judges need to draw up their own provisional Rules in urgent cases, the Assembly can decide to adopt, amend or reject them at its next session (article 51(3)). Any amendments to the Rules cannot be applied retroactively to the detriment of an accused or convicted person (article 51(4)).

These Rules must also be consistent with the Statute and, in the event of any apparent conflict, the Statute takes precedence over all Rules of Procedure and Evidence (article 51(5)).

The purpose of the Rules is to clarify some of the procedural matters covered in very general terms in the Statute. For example, the Rules will specify the exact time limits that are required under certain provisions of the Statute, such as in article 92(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 ... within the time limits specified in the Rules of Procedure and Evidence.” Such provisions were drafted in this manner in order to expedite the process of negotiations at the Rome Conference, by leaving such issues to the States involved in drafting the Rules of Procedure and Evidence.

As their title suggests, the Rules will elaborate on procedures and evidentiary requirements for the Court’s proceedings. States Parties may need to change some of their procedures when the Rules are adopted, in order to ensure that they can continue to co-operate fully with the Court, in accordance with articles 86 & 88.
Review of the Statute

Article 123 provides that the Secretary-General of the United Nations is to convene a Review Conference seven years after the entry into force of the Statute. At that Conference, the Assembly will consider any amendments to the Statute that have been proposed by States Parties, in accordance with article 121. The Assembly and the Secretary-General may then convene further review conferences, as required.

The Final Act of the Rome Conference recommended that the crimes of terrorism and international trafficking of illicit drugs should be considered for inclusion on the list of crimes within the jurisdiction of the Court. In addition, the definition and jurisdictional issues concerning the crime of aggression will be discussed at the first Review Conference.

Amendments to the Statute

Generally, making amendments to the Statute, amendments to the Rules of Procedure and Evidence and to the Elements of Crimes are some of the most important rights that will concern States who ratify the Statute or adhere to it. Because amendments may change the relationship with the Court established in the Statute, States Parties have specific rights and must follow detailed procedures for proposing amendments, as well as for agreeing to consider them for adoption in a meeting of 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 these rights.

Amendment procedures

Generally, an amendment to the Statute can only be proposed seven years after the entry into force of the Statute (article 121(1)). In addition, it may only be proposed by a State Party, it must be circulated by the Secretary General of the United Nations to the States Parties, it may only be considered after a period of at least three months from the date of notification to the Secretary General and may not be considered for adoption unless a majority of the States Parties which are present and voting at the next Assembly of States Parties decide to take it up. If the required majority agrees to take it up, it may be considered directly at the Assembly of States Parties or submitted 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 emphasis on adoption of measures by consensus first enunciated in article 112(7) and provides for the two-thirds majority of all members only where consensus cannot be reached.

The next step in amending the Statute consists of a ratification or acceptance process outlined in paragraph 4 of article 121, entailing the approval of seven-eighths of the States Parties. These amendments enter into effect for all States Parties at that point. However, as mentioned above, amendments have the potential to effect a major change in a State Party's relationship to the Court, thus any State Party not in agreement with a given amendment of this type has a right to a withdrawal with immediate effect from the Statute (article 121(6)).
Amendments to crimes within the Court’s jurisdiction

A special case of amendments which is an exception to the general rule is set out in article 121(5), where an amendment concerns the crimes within the jurisdiction of the Court. For these amendments the same requirement of a majority of two-thirds of States Parties is required. However, the amendments become effective only for States that ratify or accept them. This is an important provision, in terms of the future effectiveness of the Court. It is especially significant in the case of the crime of aggression, as the definition that is yet to be determined will constitute an amendment to article 5 and therefore the Court will not be able to exercise its jurisdiction in respect to that crime if it is committed by the nationals or on the territory of a State Party that does not accept the amendment. Therefore it is particularly important for States Parties to achieve a consensus on any amendments to articles 5-8 of the Statute.

Amendments of an exclusively institutional nature

State Parties will be able to propose certain amendments to the Statute at any time after its entry into force. Enumerated in article 122, these amendments concern matters which are of an exclusively institutional nature.

There is no change to the majority of States Parties required to adopt an amendment, but the date for entry into force of amendments in this category is six months after adoption by the required majority of States Parties rather than one year after ratification or acceptance as is the case 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 this kind of amendment.

Article 122 identifies the specific amendments considered to be of an exclusively institutional nature under the Statute as follows: the service of judges; some of the provisions concerning the qualifications, nomination and election of judges; judicial vacancies; the presidency; the organisation of chambers; some of the provisions concerning the Office of the Prosecutor, the registry, the staff of the Prosecutor and Registrar’s Offices; removal of judges, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar from office; disciplinary measures; and salaries, allowances and expenses.

Amendments to the Rules of Procedure and Evidence and to the Elements of Crimes

Amendments to the Rules of Procedure and Evidence and amendments to the Elements of Crimes may be proposed by other entities as well as by States Parties, and need only be adopted by a two-thirds majority of States Parties (articles 9(2) & 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) & 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 from the Statute, with two exceptions: amendments of an exclusively institutional nature discussed above, and amendments to the list of crimes under the jurisdiction of the Court. There are two modes of withdrawal related to amendment of the Statute: specific withdrawal, with immediate
effect, as provided for in article 121(6), and non-acceptance of amendments concerning the list of the crimes as provided in article 121(5).

The option of withdrawal with an immediate effect can be taken 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.

The non-acceptance of an amendment concerning the list of the crimes under the jurisdiction of the Court will prevent the Court from exercising its jurisdiction over a new type of crime committed by a national or committed on the territory of the State that did not accept the amendment.

The amendments of an exclusively institutional nature do not confer any right of immediate withdrawal on a State desiring to withdraw as a consequence of adoption of the amendment. In such cases, as with amendments to the Rules and Elements, the normal withdrawal regime of article 127 applies.

Crime of Aggression

Article 5(2) provides that the Court shall exercise jurisdiction over the crime of aggression once an acceptable provision is adopted at a Review Conference, no earlier than seven years from the entry into force of the Statute. This provision must set out both the definition of the crime and the conditions under which the Court shall exercise jurisdiction with respect to this crime, and be consistent with the “relevant provisions” of the Charter of the UN.

A Working Group on this crime was established at the third Prepcom meeting in November 1999, representing delegates from over 100 States. Many of these States are hopeful that an acceptable provision on aggression will be negotiated before the Court comes into operation. However, articles 5(2), 121 & 123 make it clear that the Court will not have jurisdiction over the crime of aggression until at least seven years after entry into force of the Statute.

Background to the crime of aggression

The crime of aggression has always proved controversial. Proscriptions against "aggressive wars" were set out in the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes, and the 1928 Pact of Paris (Kellog-Briand Pact). But none of these declared aggression an international crime. Needless to say, most of these agreements were made amongst the Western nations only, and did not even attempt to encompass the views of the rest of the world, unlike the Rome Statute.

After the Second World War, the UN War Crimes Commission Draft Convention for the Establishment of a United Nations War Crimes Court provided that such a Court would only prosecute persons "acting under the authority of, or claim or colour of authority of, or in concert with a State or political entity engaged in war or armed hostilities with any of the High Contracting Parties, or in hostile occupation of territory of any of the High Contracting Parties." In other words, Allied personnel could not be prosecuted by such a court, no matter how atrociously they behaved themselves. The judges at the Nuremberg Tribunal, in finding that
"crimes against peace" and "war crimes" had been committed, relied mostly on peace and war crimes treaties to which Germany was a party.

In 1974, the General Assembly adopted a Resolution on the Definition of Aggression, which provided that “a war of aggression is a crime against international peace” (article 5(2)). However the Resolution did not deal with individual criminal responsibility for acts of aggression, and so it is questionable whether the definition of aggression in that Resolution is applicable to individual criminal acts.

The ICC Prepcom Working Group on the Crime of Aggression has a challenging task ahead of it, if it is to reach consensus on this issue. There is also considerable controversy over the exact meaning of the phrase in article 5(2) of the Statute, which provides that any provision on the crime of aggression “shall be consistent with the relevant provisions of the Charter of the United Nations.” Many States are of the view that this means the Security Council has to make a determination that an act of aggression has occurred, in accordance with its powers under Chapter 7 of the UN Charter, before the ICC can assume jurisdiction over a crime of aggression. However, other States do not support such an interpretation. Therefore, work is proceeding slowly on an acceptable compromise for all concerned States.

Assistance of Defence Counsel

The development of the international rule of law is obviously centred on the vigorous prosecution of alleged war criminals, which translates itself into the support of a strong and independent prosecutorial process. The implementation of the rule of law is equally based, however, on the way accused persons are brought before the ICC. The process for achieving such an objective includes ensuring a fair trial for all accused persons. That is why it is necessary to enable the development of a strong and independent defence process. Guaranteeing the rights of the accused is crucial to the establishment of such a strong defence process, and States Parties may need to adapt certain aspects of their criminal justice systems in the future, to ensure that their practices in relation to accused persons take into account the development of ICC jurisprudence in this area. Otherwise they may jeopardise the integrity of the process and undermine the future work of the Court.

One of the goals of the international criminal justice system is to encourage reconciliation between peoples and avoid acts of collective retribution. For this to happen, trial proceedings should respect the rights of the accused, guaranteeing them employment of all the means of defence to which they are entitled. There must be a fair trial, or members of the group to which the accused belongs will perceive themselves as being wronged by a justice system that is nothing but a front for organised vengeance.

The Rights of the accused

Articles 55 and 67 outline the general rights granted to accused persons, and these rights affect the proceedings within the jurisdiction of the arresting and detaining State.

The rights and obligations alluded to are within the contemplation of the Universal Declaration of Human Rights, and more specifically guaranteed by the International Covenant on Civil and Political Rights (ICCPR) which is binding on the majority of member States of the United Nations. Article 67 makes it abundantly clear that there should be full equality between the defence and prosecution in any proceeding before the ICC. Thus the Rome Statute entrenches the principle of equality of arms.
In light of the rights of the suspect set out in both article 55 and article 67, it is crucial to a fair and effective proceeding that such rights are fully enabled and protected during the whole process. It is advisable that the arresting and/or detaining State endeavour to comply with all the rights set out in article 55 to guarantee fair trial procedures, and to avoid jeopardising the process in the event of any judicial review.

Article 54 states that the Prosecutor shall also fully respect the rights of persons arising under the Statute. This means that local authorities should co-operate fully with the Office of the Prosecutor during on-site investigations, and meet any requirements that will permit a full investigation to uncover both exculpatory and inculpatory evidence to be brought before the ICC.

Privileges and Immunities of defence counsel

The exercise of the rights of the accused as detailed under both articles 55 and 67 will be facilitated by the general disposition concerning privileges and immunities as provided for in article 48. Article 48(4), in particular, grants counsel, experts, witnesses, and any other person required to be present at the seat of the Court "such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on privileges and immunities of the Court." This agreement is yet to be finalised by the Preparatory Commission. States Parties should ensure that this agreement is implemented once it is finalised, so that all persons involved in the work of the Court are treated appropriately.

Defence counsel and the Pre-Trial Chamber procedures

In order to ensure a fair and effective trial, including a full and effective defence, the State in which the Pre-Trial Chamber is performing any of its functions under article 57 should ensure that defence counsel be appointed as soon as possible. Such States should also facilitate the work of the Pre-Trial Chamber in safeguarding and making available all evidence deemed necessary. Local authorities will be key actors in this investigative stage. National bar associations will be of great assistance in enabling the appointment of local counsel during this process.

Proceedings on an admission of guilt

Article 65(5) sets out that any discussions between the Prosecutor and the defence regarding modification of the charges, admission of guilt, or penalty to be imposed shall not be binding on the Court. Local bar associations should make certain that any member counsel involved in the process are properly trained and fully aware that there is no enforceable plea bargaining before the ICC.

Protection of witnesses and their participation in the proceedings

Article 68(5), in particular, raises issues of concern for the rights of the accused. Article 68(5) discusses situations where the disclosure of evidence may lead to grave endangerment to a witness or his or her family. In light of the rights provided to the accused, the Prosecutor must carefully weigh those rights in determining when to withhold evidence. Such measures should be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and the provision of a fair and impartial trial as entrenched in the Rome Statute.

Responsibilities of the Registrar related to the rights of the defence

Pursuant to the Rules of Procedure and Evidence, the Registrar may be required to provide support to defence attorneys. For example, defence counsel may be entitled to copies of
recent ICC judgements that are otherwise unavailable. The Registrar may also be involved with the development of a code of professional conduct and consult with independent legal associations on matters of mutual importance.

**Defence attorney training**

The need for on-going education and training for potential defence lawyers cannot be over-emphasised. In order to ensure the strength and legitimacy of the Court, States should contact their national bar associations and request them to designate a co-ordinator/liaison for interested defence attorneys in that State. The co-ordinator/liaison could establish a relationship with the International Criminal Defence Attorneys Association (ICDAA) who would be prepared to assist with training for prospective defence attorneys to ensure they understand the operation of the ICC.
6. SELECT BIBLIOGRAPHY AND RESOURCES

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APPENDIX I – THE FRENCH SOLUTION TO CONSTITUTIONAL ISSUES


1) absence of immunity for Heads of state, contained in Article 27 of the Statute, contradicts three articles of the French Constitution.

Articles 26, 68 and 61-1 of the French Constitution read as follows:

Article 26

No Member of Parliament shall be prosecuted, investigated, arrested, detained or tried in respect of opinions expressed or votes cast in the exercise of his duties. No Member of Parliament shall be arrested for a serious crime or other major offence, nor shall he be subjected to any other custodial or semi-custodial measure, without the authorization of the Bureau of the assembly of which he is a member. Such authorization shall not be required in the case of a serious crime or other major offence committed flagrant delicto or a final sentence. The detention, subjection to custodial or semi-custodial measures, or prosecution of a Member of Parliament shall be suspended for the duration of the session if the assembly of which he is a member so requires. The assembly concerned shall convene as of right for additional sittings in order to permit the preceding paragraph to be applied should circumstances so require.

Article 68

The President of the Republic shall not be held liable for acts performed in the exercise of his duties except in the case of high treason. He may be indicted only by the two assemblies ruling by identical votes in open ballots and by an absolute majority of their members; he shall be tried by the High Court of Justice.

Title X - The criminal liability of members of the government

Article 68-1

Members of the Government shall be criminally liable for acts performed in the exercise of their duties and classified as serious crimes or other major offences at the time they were committed. They shall be tried by the Court of Justice of the Republic. The Court of Justice of the Republic shall be bound by such definition of serious crimes and other major offences and such determination of penalties as are laid down by statute.

2) The jurisdiction of the ICC affects the conditions for exercise of national sovereignty.
There are two scenarios where this would be so. First, in the event that the French Parliament passed an amnesty bill, the ICC might decide it had jurisdiction to prosecute individuals benefiting from such a law. Further, since there is no statute of limitations for crimes listed under the Statute, the ICC could exercise its jurisdiction and prosecute an individual despite the existence of French laws providing limitations on criminal offences, including international crimes.

3) The powers of the ICC Prosecutor affect the conditions for exercise of national sovereignty.

The power of the prosecutor to gather depositions from witnesses and conduct site inspections on a State’s territory contradicts the rule giving French judicial authorities sole responsibility to perform actions requested in the name of legal co-operation by a foreign authority.

**The Solution Adopted by France**

The French government considered that these were not major obstacles and could be surmounted by the inclusion of a new provision in the Constitution. They therefore added Article 53-2, written as follows:


The French justice minister affirms that this new article covers all the issues of unconstitutionality raised by the Constitutional Council and allows France to ratify the Rome Statute (Ministry of Justice of France, Cour pénale internationale, adoption du projet de loi constitutionnelle, 1999, http://www.justice.gouv.fr/arbo/publicat/note13.htm). The advantage of this type of constitutional reform is that it implicitly amends the constitutional provisions in question, without opening an extensive public debate on the merits of the provisions themselves.
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It is also useful to cite the Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, Second Peace Conference of The Hague, 1907, June 15 – October 18 1907, Acts and Documents, The Hague, 1907, Vol. I, at 626-637. This Treaty does not incriminate violations of the laws of armed conflicts, but contains a lot of rules that have been incriminated by further instruments.
APPENDIX III- CASES RELATED TO THE RESPONSIBILITY OF COMMANDERS


*United States v. Karl Brandt et al. (Medical Case)*, Trials of War Criminals before the Nuremberg Military Tribunal under Control Council Law no. 10, Vol. II, 171, 121.


*Prosecutor v. Delalic, Mucic and Landzo* (1998), Case No. It-96-21, (International Tribunal for the Former Yugoslavia, Trial Chamber)