

International Criminal Court

Rules of Procedure and Evidence Implementation Considerations

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A Supplement to the
"Manual for the Ratification and Implementation of the Rome Statute"

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NOTES ON THE CONTRIBUTORS

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Since 1992, ICCLR has been actively committed to supporting global efforts in combating international crimes and prioritising the creation of a permanent, effective and just International Criminal Court (ICC). In March of 1993, ICCLR organised and sponsored *The International Meeting of Experts on the Establishment of an International Criminal Court*, which final report was transmitted to the United Nations Legal Office in New York and was used extensively in the design of the *ad hoc* International Criminal Tribunal for the Former Yugoslavia, as noted in the May 1993 Secretary General's Report.

In the ensuing years, ICCLR continued to develop its expansive collection of substantive and comprehensive ICC-related papers while participating in many negotiating conferences, including several United Nations *ad hoc* Committee meetings for the Establishment of the ICC in 1995 and Preparatory Committee meetings from 1996 to 1998. In 1998, ICCLR representatives participated in the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the ICC. This landmark conference ultimately led to an overwhelming vote in favour of the adoption of a convention on the establishment of an international criminal court. ICCLR subsequently participated in the United Nations' periodic meetings of the Preparatory Commission for the ICC and the Assembly of States Parties meetings. Among the numerous ICC-related reports and guides developed by ICCLR are the *Manual for the Ratification and Implementation of the Rome Statute* (developed in cooperation with Rights & Democracy—formerly the International Centre for Human Rights and Democratic Development and available in Arabic, French, Portuguese, Russian, Spanish and Chinese), a *Checklist of Implementation Considerations and Examples under the Rome Statute*, and *Rules of Procedure and Evidence – Implementation Considerations*.

Since August 2000 ICCLR has been involved in organizing workshops to promote the expeditious establishment of a just and permanent ICC, and to assist countries in the development of legislation and administrative procedures to support the ICC. ICCLR has provided regional workshops with support from the Canadian International Development Agency (CIDA), the Department of Justice, and the Department of Foreign Affairs and International Trade and most recently provided country-specific ICC technical assistance to numerous countries with funding from the Department of Foreign Affairs and International Trade.

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1. INTRODUCTION AND PURPOSE OF THIS SUPPLEMENT

1.1 Background to the International Criminal Court and its Rules of Procedure and Evidence

In July 1998, the *Rome Statute of the International Criminal Court* was adopted by 120 States participating in a United Nations sponsored conference in Rome. The “Rome Statute” sets out the structure and functions of the first ever permanent international criminal tribunal, which will have jurisdiction to try people accused of genocide, crimes against humanity, war crimes, and the crime of aggression. This is a remarkable historical achievement, and 139 States from all over the globe subsequently showed their support for this institution by becoming signatories to the Rome Statute. In accordance with the Statute, the International Criminal Court (“ICC”) came into being in The Hague on 1st July 2002, after more than 60 States had ratified or acceded to the Statute (see article 126). At the time of writing, almost 100 States have become Parties, representing every region of the world, and the 18 judges of the Court have been elected, ready to commence their work some time in 2003. More up-to-date information is available from the website of the ICC: <http://www.icc-cpi.int>

When the Rome Statute was adopted in 1998, it was clear that the Statute alone could provide only a basic framework for the establishment of the Court. There was a multitude of details that could not be included within one document, and warranted separate discussions. Thus, Resolution F, *Final Act* of the July 1998 Rome Conference established a Preparatory Commission (“Prepcom”) to work on various supplemental agreements to the Rome Statute, in order to address these outstanding issues. The Prepcom met ten times between February 1999 and July 2002. In September 2002, the Court’s Assembly of States Parties met for the first time and adopted most of the documents prepared by the Prepcom (see article 112). Complete information and documentation relating to the work of the Prepcom and the Assembly is available via the ICC website (mentioned above).

One of the key documents prepared by the Prepcom was the Court’s Rules of Procedure and Evidence (“RPE”). The RPE entered into force when adopted by consensus by all the members of the Assembly of States Parties in September 2002 (see articles 51 and 112, Rome Statute). This document represents the views of States from every region and principal legal system of the world, since those who participated in the Prepcom process were not just the States Parties to the Rome Statute, and all the participants in the Prepcom process adopted the draft text of the RPE by consensus, which was then referred to the Assembly for adoption without amendment. The RPE clarifies many sensitive provisions in the Rome Statute, and therefore it was important to obtain the consent of all potential States Parties in finalising the text of the RPE.

This procedure for adopting rules of procedure and evidence is quite different from that followed by the International Criminal Tribunals for the Former Yugoslavia and for Rwanda (“ICTY/R”). In the case of ICTY/R, as with many national courts, the judges were able to establish and develop many of the procedural rules themselves, and have greater flexibility in determining appropriate evidentiary rules in each case. The United Nations Security Council, in setting up

the ICTY/R, had already determined that international peace and security had been threatened by the conflicts in those two regions, and decided that the creation of *ad hoc* international criminal tribunals was the most appropriate international response to the crimes committed during those conflicts.

By contrast, the ICC is a permanent institution which is largely independent of the Security Council, and which will assume jurisdiction over cases it will identify in accordance with the procedural provisions set out under the Rome Statute. Thus, States Parties to the Rome Statute will play a more active role in determining the rules of procedure and evidence that the ICC should follow. Under article 51, Rome Statute, the RPE and any amendments to the document have to be adopted by a two-thirds majority of the members of the Assembly of States Parties. The ICC judges acting by an absolute majority may suggest amendments to the RPE, as may the Prosecutor and any State Party (article 51, paragraph 2). The judges may also draw up provisional rules, “in urgent cases where the Rules do not provide for a specific situation before the Court” (paragraph 3). But all non-provisional amendments to the RPE must be adopted by a two-thirds majority of members of the Assembly of States Parties, in order to ensure that those States that have submitted themselves to the Court’s jurisdiction, have final say over any rules that may affect the delicate compromises achieved in the Rome Statute with respect to the powers of the Court, especially the “complementary” jurisdiction of the Court in relation to national jurisdiction (discussed further below, under *Rules of particular interest to States Parties*).

In addition, this amount of consistency and predictability in the way that the Court will operate, is intended to encourage as many States as possible to ratify the Rome Statute, confident that it will not be used by a small number of governments, or a small group of judges, to pursue politically-motivated or frivolous prosecutions. With universal ratification of the Rome Statute, those who commit international crimes will no longer have anywhere to run and hide from their responsibilities to the international community.

1.2 Relationship between the ICC Rome Statute and the RPE

The RPE is an instrument for the application of the Rome Statute. It is intended to emphasise and further ensure the high standards of due process set forth in the Statute. The RPE needs to be read in conjunction with the relevant provisions of the Rome Statute, because the texts of the rules do not repeat the wording of the Statute.

Most importantly, the Rome Statute takes precedence over the RPE in all cases (article 51). Many States participating in the Prepcom process were concerned that the wording of the RPE potentially could change the meaning of certain provisions in the Rome Statute. Therefore, throughout the negotiations every effort was made to ensure that the integrity of the Rome Statute would not be undermined by the RPE. In addition, the Rome Statute makes it clear that all the rules must be “consistent with” the Statute and, “in the event of a conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail” (article 51, paragraphs 4 & 5).

The Explanatory note at the beginning of the RPE also emphasises the primacy of the Rome Statute: “In all cases, the Rules of Procedure and Evidence should be read in conjunction with and subject to the provisions of the Statute.” See also the “*Summary of statements made in plenary in connection with the adoption of the report of the Working Group on the Rules of Procedure and Evidence and the report of the Working Group on the Elements of Crimes*”, available via the website of the ICC.

1.3 Purpose of this supplement

The purpose of this supplement is to provide a very general overview of the RPE, especially those rules that may be relevant to legislators and national authorities of States Parties and other interested States. A unique feature of the Rome Statute is that it places certain obligations on States Parties to cooperate with the ICC in its investigations and prosecutions (article 86). Non-States Parties may also enter into *ad hoc* arrangements to cooperate with the ICC on a case-by-case basis (article 87, paragraph 5). This cooperation regime will ensure that the ICC can carry out its investigations and prosecutions efficiently, relying on the expertise and assistance of national authorities whenever required, since the ICC will not have its own police force.

In order to fulfil their obligations, many States Parties are currently in the process of adopting special implementing laws and procedures. A “*Manual for the Ratification and Implementation of the Rome Statute*” was developed by two Canadian organisations in 2000, with support from the Government of Canada. This “Manual” sets out in detail the obligations of States Parties to the Rome Statute, including how these obligations may be implemented into domestic legal systems. The Manual is available in several languages at different websites, including <http://www.icclr.law.ubc.ca>, <http://www.ichrdd.ca> and <http://www.icc.gc.ca/>

Since the Manual was completed before the RPE was adopted, the Manual does not contain a discussion of the rules in the RPE that may be relevant to the obligations of States Parties. Of the 225 rules contained in the RPE, many of these would be of interest to States currently in the process of ratifying and implementing the Rome Statute. Many rules would also be of interest to those States Parties with existing implementing laws wishing to establish effective administrative procedures to complement these. This supplement is intended to highlight these details so they can be taken into account at the same time as implementing legislation and procedures are being introduced, rather than causing unnecessary confusion at a later stage.

In some cases, the “Rules of Procedure and Evidence” was already mentioned explicitly in certain provisions in the Rome Statute. It was identified as a source of further details yet to be negotiated in specific provisions. For example, see the references to the RPE in article 57, in relation to forfeiture of an accused person’s assets, article 70, in relation to the exercise of jurisdiction over offences against the administration of the Court, and article 92 on provisional arrest procedures. Such provisions in the Rome Statute could not include the RPE numbers, because the RPE was drafted after the Statute was finalised. In addition, some of the rules have been drafted to provide further clarification of some of the Court’s procedures with the benefit of hindsight, even though this need for clarification was not foreseen when the Rome Statute was being drafted. The Table at the end of this guide sets out which rules relate to each article of the Rome Statute, for ease of reference.

This supplement should be read in conjunction with the Rome Statute, the “*Manual for the Ratification and Implementation of the Rome Statute*”, and the text of the RPE itself, and should not be taken as a complete guide to any of those documents. Both the Rome Statute and the RPE are available online via the ICC website.

1.4 Overview of the RPE

Much of the RPE relates to the Court’s administrative procedures, including rules for the management of the Registry, and to evidentiary rules – such as rules for disclosure of evidence prior to trial. None of these rules affect States Parties as such. However, as a matter of general interest, readers may wish to peruse some of the rules that will guide the ICC in some of its most important and potentially controversial functions. Generally speaking, these might include:

- the proceedings for authorising the ICC Prosecutor to initiate an investigation *proprio motu*, and in relation to the Prosecutor’s decision not to initiate an investigation or prosecution referred by a State Party or the Security Council (see articles 15 & 53, and rules 46-50 & 104-110);
- procedures for the removal and disciplining of judges (see article 46 and rules 23-32);
- the important role that victims will play in ICC proceedings and the need to ensure their safety at all times (see articles 68 & 75, and rules 16-19 & 85-99);
- rules on the admissibility and disclosure of evidence (see article 69 and rules 63-84);
- rules on how the conduct of the trial will proceed (see article 64 and rules 131-144);
- factors that the Court will take into account when determining the appropriate sentence (see articles 76-78 and rules 145-148);
- and finally, rules on the conduct of any appeals (see articles 81-84 and rules 149-161).

Rules of particular interest to States Parties

One of the key features of the Rome Statute is the “complementary” jurisdiction of the ICC (Preamble and article 1, Rome Statute). This does not create any obligations on States Parties, but provides an incentive for them to implement the crimes within the jurisdiction of the ICC into their national laws. The “principle of complementarity” means that the ICC will only prosecute a case where there is no State willing and able genuinely to prosecute a case within its jurisdiction (see articles 17-19). In order to take advantage of this principle, and to reduce the potential caseload of the ICC, many States are using their ICC implementation process to introduce comprehensive legislation empowering their national courts to assume jurisdiction over cases of genocide, crimes against humanity, and war crimes, in accordance with the definitions of these crimes and the general principles of criminal responsibility set out in the Rome Statute. More details on this issue are available in the Manual on implementation mentioned previously.

The RPE does not touch upon the nature of the Court’s jurisdiction, nor the crimes the Court can prosecute. However, the RPE has clarified the procedures that the ICC must follow when it is

considering whether a State is “unwilling or unable genuinely” to prosecute a case also within the competence of the ICC (see article 17). This is a particularly sensitive issue for many States, and readers interested in understanding the clarified procedures should refer to rules 51-62, 133, & 154. In general terms, the clarifications outlined in the RPE now emphasise that the relevant State has a number of different opportunities throughout the Court’s various proceedings to reassure the ICC that a particular investigation or prosecution is being carried out in good faith, with no intention to shield the perpetrator from criminal responsibility in any way. This approach is intended to give States the broadest opportunity to take responsibility for prosecuting the crimes within the jurisdiction of the ICC, in accordance with their own national processes. Section 3.2 of this document highlights the administrative procedures that States Parties may wish to implement so they may take advantage of these opportunities in the future if the situation ever arises.

Once the ICC has assumed jurisdiction over a case, States Parties are under an obligation to cooperate with the ICC in its investigations and prosecutions. A number of rules pertain to these obligations. However, the RPE is not intended to place any additional obligations on States Parties. It merely clarifies procedures and requirements which are already provided for under the Rome Statute. It is expected that the ICC will have its own team of investigators, and the RPE is directed more towards those working directly for the ICC. At the same time, when States are implementing procedures and requirements in accordance with the Rome Statute, it may be more efficient to recognise the additional clarifications provided by the RPE, so that national authorities are in the best position to assist all those who are working for the ICC. The rules which appear potentially relevant to domestic implementation of the Rome Statute are highlighted by two asterisks (**) in the Table at the end of this supplement. Section 2 of this supplement discusses in detail the considerations that may be relevant to implementation of each of these rules. Section 3 of this document discusses the rules that are relevant to State Party participation in ICC proceedings. Many of these will not become relevant for some time, but should probably be kept in mind when implementing general administrative procedures for communicating with the Court.

2. RULES RELATING TO STATE PARTY OBLIGATIONS UNDER THE ROME STATUTE

2.1 Overview of State Party Obligations Under the Rome Statute

The obligations of States Parties to the Rome Statute are set out in considerable detail in the “*Manual for the Ratification and Implementation of the Rome Statute*”, mentioned above. For ease of reference, a brief overview of these obligations is provided here.

Article 86 of the Rome Statute requires all States Parties to “cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.” Under article 88, all States Parties are required to “ensure that there are procedures available under their national law for all of the forms of cooperation” which are listed under Part 9 of the Statute. Part 10 of the Statute also requires States Parties to assist the Court with enforcement of all penalties other than imprisonment, and provides a regime for States Parties to supervise sentences of imprisonment, if they choose. In addition, articles 48 and 70 place certain obligations on States Parties, in relation to preserving the integrity and inviolability of the Court. Therefore, as discussed in the Manual, the main obligations of States Parties under the Rome Statute can be summarised as:

- (i) protecting the privileges and immunities of ICC personnel [article 48];
- (ii) proscribing offences against the administration of justice of the ICC [article 70];
- (iii) arresting and surrendering persons to the ICC, and allowing persons in custody to be transported across State territory en route to the ICC [articles 58, 59, 89, 91 & 92];
- (iv) collecting and preserving evidence for the ICC (including evidence pertaining to the proceeds of crimes) [articles 57(3)(e) & 93];
- (v) other forms of assistance with investigations and prosecutions, such as victim and witness protection, and allowing the ICC Prosecutor to conduct certain investigations on State Party territory [articles 68, 93 & 99];
- (vi) enforcement of fines, forfeiture measures, and reparations orders [articles 75, 93(1)(k) & 109]; and
- (vii) States Parties may also choose to enforce sentences of imprisonment, and thereby undertake certain obligations in relation to supervision of sentences [article 103].

The RPE includes rules pertaining to each of these obligations, except (i) protecting the privileges and immunities of ICC personnel [article 48, Rome Statute]. The International Centre for Criminal Law Reform & Criminal Justice Policy has prepared a separate guide to this issue, explaining the special agreement on the issue of the privileges and immunities of ICC personnel which is referred to in article 48 - the “*Agreement on the Privileges and Immunities of the International Criminal Court*”. See our website for further details: <http://www.icclr.law.ubc.ca>

2.2 Rules Relating to Offences Against the Administration of Justice of the Court

References: Article 70, Rome Statute;

Rules 162-169 & 172

Description

Article 70 of the Rome Statute proscribes certain offences against the administration of justice of the ICC, and establishes sanctions for these offences (see paragraphs 1 and 3). Article 70, paragraph 2 allows the Court to request cooperation from States Parties in relation to proceedings under this article. Article 70, paragraph 4 (a) provides that every State Party is also required to “extend its criminal laws penalizing offences against the integrity of its own investigations or judicial process to offences against the administration of justice [of the ICC] ... committed on its territory, or by one of its nationals.” States Parties must empower the appropriate authorities in their territory to prosecute these offences, whenever requested to do so by the ICC, treating all such cases “with diligence” and devoting “sufficient resources to enable them to be conducted effectively” – see article 70, paragraph 4 (b). However, during the negotiations on article 70 in Rome, it was decided to leave aside all the procedural issues relating to this provision, to be addressed in the context of the RPE rather than in the Rome Statute.

Rule 162 now deals with the issue of determining jurisdiction over offences listed under article 70. It elaborates the procedures and considerations for the Court to take into account when it decides whether or not to prosecute a particular case. Sub-rule 1 allows the Court to consult with States Parties that may also have jurisdiction over the offence. Sub-rule 2 lists a range of considerations that the Court may wish to take into account, including “the availability and effectiveness of prosecution in a State Party” (paragraph 2 (a)). Sub-rule 3 recognises the special position of the host State in relation to these types of offences, allowing the host State to request the Court to waive its power to exercise jurisdiction in certain cases. If the Court decides not to exercise its jurisdiction, sub-rule 4 reiterates that the Court may then request a State Party to exercise jurisdiction pursuant to article 70, paragraph 4. In other words, the RPE clarify that the ICC has primary jurisdiction over article 70 offences.

This is unlike the “complementary” jurisdiction of the ICC over the main offences listed under article 5 of the Rome Statute, by which the ICC must defer to all investigations and prosecutions being carried out by States, unless the relevant State is “unwilling or unable genuinely to carry out the investigation or prosecution” – see articles 17 & 19, which do not apply to article 70 (see rule 163, sub-rule 2). The ICC ultimately will determine the appropriate forum in each particular case. The idea behind these provisions was to allow both the ICC and States Parties to have the jurisdiction to investigate and prosecute offences under article 70. In this way, the Court would not become over-burdened with numerous minor prosecutions that States could manage, while maintaining the Court’s right to prosecute these offences whenever it was deemed appropriate. These provisions will ensure that States do not allow the integrity of the ICC’s proceedings to be undermined by national proceedings that are not genuine, using the guise of “protecting national interests” or “national security”.

The remainder of the rules relating to article 70 mostly focus on which parts of the Rome Statute will or will not apply when the ICC investigates and prosecutes these offences. Rule 163, sub-rule 1 provides that in most cases, the Statute and the Rules will apply *mutatis mutandis* to the Court's investigation, prosecution and punishment of these offences. Subsequent rules outline what the exceptions to this principle are. In summary, the following parts of the Rome Statute do **not** apply in the case of the Court's investigation and prosecution of offences under article 70:

- all of Part 2 on jurisdiction and admissibility, except for article 21 – see rule 163, sub-rule 2 (in other words, *inter alia*, jurisdiction and admissibility challenges are not allowed and the usual system of referrals is not used when the Court is investigating or prosecuting an offence under article 70; however, article 21 on the law that the Court should apply in all other cases is applicable to these offences);
- unlike article 29, which provides that the Court cannot impose any periods of limitation in relation to the substantive crimes within the jurisdiction of the Court, rule 164 provides that the Court must recognise a five year period of limitation on its prosecutions and enforcement of sanctions under article 70 (note that the period of limitation will be interrupted by the initiation of an investigation or prosecution during the period, either by the Court or by a State Party with jurisdiction over the offence);
- articles 53 and 59 will not apply where the Prosecutor initiates and conducts investigations *proprio motu* under article 70 – see rule 165 (see also discussion below of some of the implications of this for States Parties); note that rule 169 allows the Prosecutor to request the Court orally for the immediate arrest of a person alleged to have committed an offence in the presence of a Chamber;
- article 77 on applicable penalties will not apply, except for orders of forfeiture under article 77, paragraph 2 (b) and the corresponding rule 147 – see rule 166 (discussed further below in the context of enforcement by States Parties); note that neither rule 145 on considerations relevant to sentencing, nor rule 146 on considerations relevant to ordering a fine, will apply to sanctions imposed under article 70;
- None of Part 10 on enforcement will apply, except for articles 103, 107, 109, and 111 – see rule 163, sub-rule 3 (these will be discussed in further detail below, in the context of the impact on a State Party's obligations).

Note that the corresponding rules to each of these provisions do **not** apply either – see further the **Table: Which Rules Relate to Each Article of the Rome Statute**.

The RPE also clarify some important parts of the Rome Statute which **do** apply to the prosecution of these offences, with some minor variations. Rule 167 is relevant to requests for cooperation under article 70, paragraph 2, the latter of which provides that the conditions for providing such cooperation to the Court “shall be governed by the domestic laws of the requested State.” The rule now clarifies what kind of cooperation the Court may request from the State (discussed below). In addition, rule 168 now applies the principle of *ne bis in idem* (see article 20) to the Court's prosecution of offences under article 70, although without the exceptions provided for in article 20. Rule 172 allows the Court to proceed in accordance with article 70 and rules 162-169, where a case of misconduct before the Court under article 71 would also constitute one of the offences defined in article 70. Note also rule 165, sub-rule 4, which

allows the Trial Chamber to join the charges under article 70 with charges under articles 5-8, taking into account the rights of the defence.

Most of these rules are only directed to the Court and are not intended to affect national laws. However, some of these rules are relevant to States Parties and provide clarification on their obligations under the Rome Statute, as follows.

a) Rules relating to international cooperation under Part 9

Rule 167 is directly relevant to States Parties, as it addresses the issue of international cooperation and judicial assistance. It simply clarifies that the Court may request a State to provide any form of international cooperation or judicial assistance corresponding to those forms set forth in Part 9 of the Rome Statute, and requires the Court to indicate that article 70 is the basis for the request. The forms of cooperation outlined in Part 9 include arresting and surrendering persons to the Court, assisting the Court with the location of evidence, and so forth. This rule does not affect article 70, paragraph 2, which provides that the conditions for providing such cooperation to the Court are to be governed by the domestic laws of the requested State (see rule 167, sub-rule 2). In other words, States need only provide such cooperation in accordance with their existing laws, and no additional domestic implementation should be necessary for a State to cooperate with the Court in relation to an investigation or prosecution under article 70.

b) Rules relating to enforcement of sanctions imposed under article 70

Upon conviction, article 70, paragraph 3 allows the Court to impose “a term of imprisonment not exceeding five years, or a fine in accordance with the Rules of Procedure and Evidence, or both.” Rule 166 now clarifies the Court’s method of imposition of fines in relation to article 70 offences. Note that this is a different régime from that provided for in rule 146 on imposition of fines under article 77.

In addition, rule 166, sub-rule 2 clarifies that the Court may also impose an order of forfeiture under article 77, paragraph 2 (b), which may be ordered in addition to imprisonment or a fine or both. Rule 147 is relevant here, because it applies to “any hearing to consider an order of forfeiture.” It sets out the procedure and requirements for such hearings, before the Court may issue an order of forfeiture in relation to specific proceeds, property or assets.

States Parties are required to enforce all of the Court’s fines and forfeiture measures, in accordance with the procedure of their national law (article 109). Rule 163, sub-rule 3 specifically provides that article 109 applies to proceedings under article 70. Rule 166, sub-rule 5 also clarifies that the Court may request a State Party to enforce a fine imposed in accordance with rule 166, sub-rule 4, where the convicted person does not pay the fine within a reasonable period of time. Rules 217-222 will also become relevant in such situations (see further **Chapter 2.6 Rules relating to enforcement of fines, forfeiture and reparations orders**).

Article 103 provides that enforcement of ICC sentences of imprisonment by States Parties is on a voluntary basis. Rule 163, sub-rule 3 clarifies that this principle also applies in relation to enforcing sentences of imprisonment imposed under article 70. The rest of article 103 also applies, namely the procedure for the Court to choose an appropriate State of enforcement. This includes taking into account the application of widely accepted international treaty standards governing the treatment of prisoners (article 103, paragraph 3 (b)). However, most of the rest of Part 10 does not apply to persons sentenced to imprisonment under article 70. Only articles 107

(transfer of the person upon completion of the sentence) and 111 (escape) apply – note that the rules relating to articles 107 and 111, namely 198-208, 213, 217-222 & 225, are discussed in **Chapter 2.7 Rules relating to enforcement of sentences**.

In other words, the ICC will be much less actively involved in supervising such sentences of imprisonment, than in cases where the person is convicted for crimes committed under articles 5-8. This is so that the ICC can focus its attention on the more important work of investigating, prosecuting, and supervising persons who commit crimes under articles 5-8. Where a person is convicted under article 70, the Court cannot change the State of enforcement, because article 104 does not apply. The Court's sentence is not binding on the States Parties, because article 105 does not apply. The Court will not supervise the sentence and the conditions of imprisonment, because article 106 does not apply. There is no limit on the prosecution or punishment of the prisoner for other offences allegedly committed before delivery to the State of enforcement, because article 108 does not apply. Nor will the ICC be able to review the sentence, because article 110 does not apply. Presumably, because neither article 105 nor article 110 applies, the State of enforcement may review the sentence of the prisoner in accordance with national laws on parole and so forth.

Note that in all cases, there is now a limitation period on the enforcement of sanctions imposed by the ICC under article 70. Rule 164, sub-rule 3 provides that enforcement of sanctions imposed under article 70 shall be subject to a period of limitation of ten years from the date on which the sanction became final. In addition, this period of limitation will be interrupted if the convicted person is detained, or is outside the territory of the States Parties.

c) Rules relating to State obligations with respect to initiation of investigations

Rule 165 allows the ICC Prosecutor to initiate and conduct investigations under article 70 on her/his own initiative, “on the basis of information communicated by a Chamber or any reliable source.” Rule 163, sub-rule 2 provides that most of Part 2 on other jurisdiction and admissibility considerations do not apply, including article 15 on the initial procedures for *proprio motu* investigations by the Prosecutor of crimes allegedly committed under articles 5-8. From Part 2, only article 21 on applicable law is relevant to investigations and prosecutions of offences committed under article 70. Rule 165, sub-rule 2 further provides that articles 53 and 59, and any rules thereunder, do not apply to article 70 investigations and prosecutions.

The removal of the Prosecutor's obligations under article 53 and its corresponding rules greatly simplifies the procedures for the Prosecutor to follow when investigating these offences, and will reduce the potential involvement of States in the preliminary stages of such investigations. Rule 92, sub-rule 2 would normally require the Court to notify victims concerning the decision of the Prosecutor not to initiate an investigation or a prosecution pursuant to article 53. In addition, States Parties would normally be required to assist with such notifications in accordance with article 93, paragraph 1 (d) and (l) – see rule 92, sub-rule 7 (discussed further in **Chapter 2.5 Rules relating to collecting and preserving evidence**). States will now not be required to assist with such notification, in cases involving offences under article 70.

Of even more relevance to States Parties is the fact that the provisions of article 59 will not apply to investigations under article 70. Article 59 outlines the usual requirements on a State Party which has been requested to arrest and surrender a person to the ICC, or provisionally arrest a person for the ICC (discussed in detail in **Chapter 2.4 Rules relating to arrest, surrender, and**

summonses). Rule 167 allows the ICC to ask for the cooperation of a State Party in arresting a person suspected of committing an offence under article 70, because it is one of the forms of cooperation set forth in Part 9, Rome Statute. However, article 70, paragraph 2 and rule 167, sub-rule 2 provide that the conditions for arresting such persons shall be governed by the domestic laws of the requested State, not by article 59.

Note that States Parties may also be requested to assist in collecting evidence in relation to the Prosecutor’s investigation of an offence under article 70, in accordance with article 93 and rule 167. Even though the conditions for providing such assistance shall be governed by the domestic laws of the requested State, the ICC may not apply national laws governing evidence, other than in accordance with article 21 (see rule 63, sub-rule 5, noting that article 21 does apply to article 70 prosecutions – see rule 163, sub-rule 2). Therefore, State authorities should familiarise themselves with the evidentiary provisions relevant to ICC investigations and prosecutions, which also apply to offences under article 70. This will ensure that the evidence they gather for the ICC is admissible, and thus their efforts are not wasted.

Implementation Considerations

a) Implementation of rules relating to jurisdiction and international cooperation

All relevant State authorities must defer to the authority of the ICC to assert primary jurisdiction over offences committed under article 70. This requirement for deferral may or may not require legislative implementation, depending on the nature of the State’s legal system. Relevant authorities should also be made aware that no jurisdiction or admissibility challenges are allowed in relation to prosecutions under article 70, even if the person accused is a national of that State (rule 163, sub-rule 2). However, the ICC will most likely consult with a State Party that has jurisdiction over the offence, in order to determine the most appropriate forum (rule 162, sub-rules 1 & 2).

Even if the ICC decides to exercise its jurisdiction over a person, rule 163, sub-rule 3 implies that an interested State may also be able to prosecute the person subsequently, since article 108 does not apply to limit a sentenced person from being prosecuted, punished or extradited to a third State for “conduct engaged in prior to that person’s delivery to the State of enforcement”. However, any national laws on the principles of *ne bis in idem*, double jeopardy, and so forth, would most likely apply to restrict national authorities from re-prosecuting the person for the same offence.

Where the ICC decides to exercise its jurisdiction, article 70, paragraph 2 and rule 167 provide that States must cooperate with the Court in its investigations and prosecutions. The Court may request a State to provide “any form of international cooperation or judicial assistance corresponding to those forms set forth in Part 9.” All of these forms of cooperation and their corresponding rules are discussed throughout this document, and will not be repeated here. However, note that the Court must indicate that the basis for any such request is an investigation or prosecution of offences under article 70 (rule 167, sub-rule 1).

The other main difference is that the conditions for the State to provide cooperation to the Court in accordance with article 70 will be governed by the domestic laws of the requested State, such as domestic laws on extradition and mutual legal assistance. However, such laws may currently only apply to requests from other States. Therefore, these laws may need to be amended to allow

the State to extradite a person to the ICC and to provide judicial assistance to the ICC. Ideally, States should be able to provide full cooperation to the Court in accordance with Part 9, and this would also simplify the implementing process. If they have not done so already, States could incorporate a simple provision in their ICC implementing legislation to clarify that all of the forms of cooperation they can provide under Part 9 can also be provided in accordance with a request for cooperation under article 70. Otherwise, States may have to amend each relevant domestic law individually, to ensure that all of the relevant forms of cooperation can be provided to the ICC as well as to other States.

If the ICC decides not to exercise its jurisdiction over a person, States must prosecute these cases when asked (article 70, paragraph 4 and rule 162, sub-rule 4). The RPE do not provide any further guidance as to the requirements for a prosecution by State authorities, other than those already set out in article 70, paragraph 4: States Parties must have appropriate laws in place to prosecute these offences where committed on their territory or by their nationals, and competent authorities must treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively.

b) Implementation of rules relating to enforcement of sanctions imposed under article 70

Chapter 2.6 highlights the implementation considerations relevant to rules on enforcement of sanctions in general terms. This section will merely highlight the special nature of rules relating to sanctions imposed under article 70.

States need to have legislation and procedures in place to ensure that they can enforce fines and forfeiture orders imposed by the ICC in accordance with article 70, article 77, paragraph 2 (b), and rules 147 & 166. These orders will be no different from those imposed by the ICC under Part 7, and should be enforced in accordance with article 109. Note that States Parties must give effect to fines and forfeiture orders imposed by the Court, “without prejudice to the rights of bona fide third parties, and in accordance with the procedure of their national law” (article 109, paragraph 1). Thus, the enforcement of these orders should require minimal implementation.

Enforcement of ICC prison sentences is optional for States Parties. Where a State chooses to supervise someone convicted of committing one of the crimes under articles 5-8, there are certain obligations that the State must honour. However, most of these are not relevant if the person is convicted under article 70 (rule 163, sub-rule 3). The only provisions that are relevant arise where the person has finished the sentence, or has escaped (see articles 107 & 111). Therefore, if a State wishes to supervise persons convicted by the ICC under article 70, they may need a separate régime from their program for supervising persons sentenced to imprisonment for committing the crimes under articles 5-8. They may wish to transfer all relevant responsibilities to national authorities, who can then supervise the conditions of imprisonment and review the sentence in accordance with national laws. However, these authorities must be required to follow articles 107 and 111. This means that they must determine where the person should be sent once the sentence is finished in accordance with article 107. They must also advise the ICC Registrar as soon as possible if the sentenced person has escaped (article 111 and rule 225, sub-rule 1).

States should also note the ten year limitation period for enforcement of all sanctions imposed by the ICC under article 70 (rule 164). This limitation period only applies to the Court, but States may wish to reflect this limitation in their legislation on responding to requests from the Court.

For the purposes of determining the period of limitation, States need to keep accurate records of any time the person spends in custody, or if the person escapes to the territory of a non-State Party – both of these occurrences interrupt the period of limitation (rule 164, sub-rule 3).

c) Implementation of rules relating to initiation of investigations

Rule 165, sub-rule 2 excludes articles 53 and 59 from applying to investigations and prosecutions for offences under article 70. States may wish to reflect these exclusions in the relevant implementing legislation and procedures. In relation to article 53 and rule 92, it means that States are not required to provide notification to victims of any decisions that the Prosecutor may make when deciding whether or not to commence an investigation or start a prosecution under article 70. In relation to article 59, it means that States are not required to observe many of the obligations normally imposed when States arrest persons for the ICC. They are not required to bring the person before a competent judicial authority, nor to allow the person to apply for interim release pending surrender, unless national laws already provide for this. Nor does the relevant judicial authority need to take into account recommendations from the Pre-Trial Chamber in relation to interim release. However, States should observe the basic rights of all accused persons set out in article 55, paragraph 1, and in the *International Covenant on Civil & Political Rights*, as well as all relevant international standards on the treatment of persons in custody. Otherwise, the ICC may find that the person has been denied due process and cannot be convicted, on that basis alone.

Similarly, when national authorities are collecting evidence to assist the ICC with an investigation under article 70, they are entitled to provide such cooperation in accordance with the domestic laws of the State. However, the ICC will not generally recognise domestic laws on evidence and admissibility (article 21 and rule 63, sub-rule 5). Therefore, national authorities should be properly trained in the rules of evidence of the ICC, to ensure that all evidence they may collect for the ICC will be admissible, and will not jeopardise the right of the accused to a fair trial. These rules of evidence are discussed in more detail in **Chapter 2.5**.

2.3 Rules Relating to General Provisions on International Cooperation with the Court

References: Article 87, Rome Statute (articles 86, 88, 93-97, 99 & 100 are also relevant to general State Party obligations but there are no relevant rules for these obligations) and

Rules 176-180

Description

Article 87 outlines the general requirements relating to all requests for cooperation from the ICC, including the possibility that States Parties can designate their preferred channel for communications with the Court, which may be other than their regular diplomatic channel for communications on international matters (see paragraph 1 (a)). This designation may be made at

the time of ratifying, accepting, approving, or acceding to the Rome Statute. At that time, States Parties may also choose in which language they wish to receive requests from the Court – either one of their official languages or one of the working languages of the Court (see article 87, paragraph 2). Note that the working languages of the Court are English and French – see article 50, paragraph 2. Paragraphs 5 & 6 of article 87 also provide that the ICC can invite non-States Parties and intergovernmental organizations (IGO's) to provide assistance with the Court's investigations and prosecutions.

Rules 176-180 now provide further details on various issues relating to communications between the organs of the Court, States, and IGO's, in relation to requests for cooperation under article 87. Note that none of these rules affect paragraphs 3 & 4 of article 87, which provide that certain information relating to requests for cooperation must be kept confidential, or “handled in a manner that protects the safety and physical or psychological well-being of any victims, potential witnesses and their families”.

Rule 176 outlines which organs of the ICC will be responsible for the various types of communications between the Court and States, and between the Court and IGO's, in relation to requests for cooperation. In general, the Registry will take responsibility for transmitting and receiving communications on most matters, including information pertaining to preferred channels of communication and languages of requests for cooperation. The Registry is the appropriate organ of the Court to which requested States should transmit all responses, information and documents requested by the various Chambers of the Court (sub-rules 2 & 4), unless otherwise specified in the Rome Statute or the RPE. The Registry is also the appropriate organ to receive the communication if a State wishes to change its national channel for receiving requests for cooperation, or the language in which it receives requests (rule 176, sub-rule 3). However, the Office of the Prosecutor will transmit any requests for cooperation made by the Prosecutor, and will be the appropriate organ to which States and IGO's receiving such requests should transmit their responses, information and documents (sub-rules 2 & 4; see also rule 13).

Rule 176 also sets out the responsibilities of the Registrar in relation to maintaining the channels of communication between States, IGO's, and all the relevant organs of the Court. The Registrar is required to make available to States Parties “such information ... as may be appropriate”, whenever a State Party makes a request for information (sub-rule 3).

Rule 177 requires States to “provide all relevant information” about the national authority that has been designated as the channel for communications from the Court, at the time of ratification, acceptance, approval, or accession to the Rome Statute (sub-rule 1). Once the Court is established and subsequently, any such communications will be obtained by the Registrar from the Secretary-General of the United Nations (rule 176, sub-rule 1). If an IGO has been requested to assist the Court, the Registrar will ascertain its designated channel of communication and obtain all the relevant information (sub-rule 2).

Rules 178-179 clarify the procedures for States wishing to designate a language for communication with the Court, in accordance with article 87, paragraph 2, and taking into account article 87, paragraph 5, on the potential for non-States Parties to provide cooperation to the Court. If no language of communication is designated by a State, then requests for cooperation to that State will either be in, or be accompanied by a translation into, one of the working languages of the Court.

Rule 180 outlines the procedures for States wishing to change their channel of communication or language of requests for cooperation.

Implementation Considerations

It is highly unlikely that any of these rules will require legislative implementation. They are merely procedural matters, which can all be handled administratively. For the sake of efficiency, States should consider designating a particular administrative authority to manage all communications with the Court, including requests for cooperation from the Court, taking into account the following considerations:

- (1) If a State wishes to designate a particular channel for communications with the ICC - other than the State's diplomatic channel - this can be done at the time of ratifying, accepting, approving, or acceding to the Rome Statute (article 87, paragraph 1 (a)). All such communications made at that time concerning the designated channel must "provide all relevant information" about that channel (rule 177, sub-rule 1). Such information should probably include the title of the national authority, a designated contact person, and all relevant contact details for that authority.
- (2) If a State wishes to designate the language in which it would like to receive requests for cooperation and supporting documents, this can be done at the time of ratifying, accepting, approving, or acceding to the Rome Statute. However, the choice of languages is limited to "an official language of the requested State or one of the working languages of the Court" (article 87, paragraph 2). If a State Party has more than one official language, it can indicate upon ratification, acceptance, approval or accession that requests for cooperation and any supporting documents can be drafted in any one of its official languages (rule 178, sub-rule 1).
- (3) If a State Party does not choose a language for communication with the Court at the time of ratification, acceptance, approval or accession, then all requests for cooperation made to that State will either be in, or be accompanied by a translation into, one of the working languages of the Court (rule 178, sub-rule 2), until the State Party requests a different language for requests.
- (4) Where a non-State Party has agreed to assist the Court in accordance with article 87, paragraph 5, it should designate its preferred channel of communication at the earliest opportunity, providing all relevant details to the Court, and it should designate the language in which it wishes to communicate with the Court, if that language is not one of the working languages of the Court (rule 179).
- (5) If a State (whether a Party to the Rome Statute or not) wishes to change its designated channel for communications with the Court, or the language in which it wishes to receive such communications, it must communicate this to the ICC Registrar "at the earliest opportunity" (rule 176, sub-rule 3 & rule 180, sub-rule 1). Note that such changes shall take effect in respect of requests for cooperation made by the Court at a time agreed between the Court and the State or, in the absence of such an agreement, 45 days after the Court has received the communication and, in all cases, without prejudice to current requests or requests in progress (rule 180, sub-rule 2).

- (6) States should ensure that they transmit to the Registrar all responses, information and documents requested by the various Chambers of the Court (rule 176, 2), unless the Rome Statute or the RPE provide otherwise.
- (7) Where the Prosecutor has made the request for cooperation, States should transmit all responses, information and documents to the Office of the Prosecutor (rule 176, sub-rule 2).

2.4 Rules Relating to Arrest, Surrender, Transfer of Persons in Custody, and Summonses

References: Articles 19-20, 27, 48, 55, 58-59, 61, 66-67, 86, & 89-92, article 93, paragraph 7, and articles 94, 97-98, 101 & 111, and Part 10, Rome Statute;

Rules 20-22, 61, & 117, rule 119, sub-rule 5, and rules 123, 181-189, 192-193, 195-197, 207 & 225

Description

Article 55, Rome Statute provides that when the ICC is investigating a case, “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 this Statute” (paragraph 1 (d)).

The ICC will rely to some extent on national authorities to detain suspects, or otherwise put them on notice that their presence is required before the Court, and then to ensure the attendance by these persons at the Court. There are three means by which the ICC can request the assistance of national authorities to ensure that a suspect appears before the Court:

- i. Issuing an arrest warrant along with a request for arrest and surrender of the person, in accordance with articles 58, 67, 89 & 91, and rule 117, rule 123, sub-rule 1, & rule 187;
- ii. Issuing an arrest warrant along with a request for provisional arrest, in accordance with article 58, paragraph 5, articles 67 & 92, and rules 117, 123 & 187-9, in urgent cases where the required supporting documentation is not yet available; and
- iii. Issuing a summons, with or without conditions restricting liberty (other than detention) if provided for by national law, in accordance with article 58, paragraph 7, article 67, and rule 119 & rule 123, sub-rule 1, where the Pre-Trial Chamber is satisfied that a summons is sufficient to ensure the person’s appearance.

This Chapter will first discuss the rules that are particularly relevant to each of these three approaches, and then highlight rules that are relevant to all three situations. Note that rules pertaining to the *questioning* of accused persons will be discussed in **Chapter 2.5 Rules relating to collecting and preserving evidence**.

a) Rules relating to the arrest

Article 67, Rome Statute provides that every accused person has the right to a fair trial and pre-trial process, which includes the right “to be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks” (paragraph 1 (a)). In order to facilitate this requirement, the RPE clarify the documentation that a person is entitled to receive upon arrest in accordance with articles 59, 89 and 91.

Rule 117, sub-rule 1 provides that the ICC must ensure that an arrested person receives a copy of the arrest warrant issued by the Pre-Trial Chamber “and any relevant provisions of the Statute.” These documents must be made available to the arrested person “in a language that the person fully understands and speaks.” Rule 187 further provides that in all relevant cases, the Court’s request for arrest and surrender will be accompanied by the translation of the warrant of arrest or of the judgement of conviction and by the translation of the text of any relevant provisions of the Statute, in a language that the person fully understands and speaks. This language may be different from the official language of the State, or another language chosen by the State as the designated language for all requests from the ICC (see article 87, paragraph 2).

Note that these rules do not place any obligations on States Parties, over and above their obligations under the Rome Statute to “comply with requests for arrest and surrender” (article 89). The onus is on the ICC to ensure that it provides this additional documentation and that the arrested person receives it. Note also article 100, paragraph 1 (b), which provides that the ICC will bear the costs of all translation. However, it would help the Court considerably if State authorities undertake to inform the Court if a person has been arrested by them, and if these authorities are also made aware beforehand of the possibility that the ICC may send some additional documentation with the request for arrest and surrender. It would also help the Court if arresting authorities were required to give this additional documentation to the arrested person on behalf of the Court. This would help to ensure that all the arrested person’s rights are protected from the moment of arrest, so that the case can proceed without any subsequent due process challenges.

Rule 123, sub-rule 1 places another obligation on the ICC, in terms of information to be given to an arrested person. Entitled “Measures to ensure the presence of the person concerned at the confirmation hearing”, the rule provides that the Pre-Trial Chamber must ensure that the person who has been arrested “is notified of the provisions of article 61, paragraph 2.” The latter provision allows the ICC to hold a confirmation hearing in the absence of the accused, *inter alia*, where the accused has waived her/his right to be present, or has fled and cannot be found. One of the other considerations in determining whether to hold the hearing in the absence of the accused, is whether “all reasonable steps have been taken ... to inform the person of the charges and that a hearing to confirm those charges will be held” (article 61, paragraph 2 (b)). Clearly, rule 123, subrule 1 is intended to give the arrested person the earliest possible opportunity to appreciate the importance of attending the confirmation hearing. Note that rule 124 sets out the procedure for a person to waive her/his right to be present at the confirmation hearing.

Once again, these rules do not place any actual obligations on States Parties. However, it would greatly facilitate the work of the Court if national arresting authorities were aware of the significance of the arrested person receiving this information.

Rule 123, sub-rule 3 is also relevant to ensuring that a person attends his/her confirmation hearing, without placing additional obligations on the requested State. The ICC Pre-Trial Chamber is required to ensure that the arrest warrant has actually been issued and, “if the warrant of arrest has not been executed within a reasonable period of time after the issuance of the warrant, that all reasonable measures have been taken to locate and arrest the person.” Presumably part of the Pre-Trial Chamber’s investigation will be communications with the requested State, to ascertain why the person has not yet been arrested. The need for the cooperation of the requested State under such circumstances is consistent with article 59, Rome Statute, which provides that States Parties must “*immediately* take steps to arrest the person in question” once a request is received, and article 97, which requires States Parties to “consult with the Court without delay” wherever a problem is identified with respect to execution of a request from the Court.

Note that national authorities may not determine whether the ICC’s arrest warrant was properly issued (article 59, paragraph (4)). Only the ICC can make such a determination. Rule 117, sub-rule 3 now sets out the requirements for such challenges.

b) Rules relating to provisional arrest

Article 92 provides that the ICC may request States to provisionally arrest a person in urgent cases. The requirements for supporting documentation in such cases are different from requests for arrest and surrender (see article 92, paragraph 2, compared with article 91, paragraph 2). Delivery of the ICC’s arrest warrant and the request for surrender cannot be prerequisites for provisional arrest. However, under the RPE, persons who are provisionally arrested are entitled to receive certain information from the ICC once they have been arrested and the Court is aware of their arrest: (i) a copy of the arrest warrant issued by the Pre-Trial Chamber, together with relevant provisions of the Statute, all “in a language that the person fully understands and speaks” (rule 117, sub-rule 1); and (ii) notification of the provisions of article 61, paragraph 2 on confirmation hearings (rule 123, sub-rule 1 – see description above). Where the ICC subsequently forwards the request for surrender to the State, it must be accompanied by the documents listed in rule 187 – a translation of the warrant of arrest and a translation of the text of any relevant provisions of the Statute, in a language that the person fully understands and speaks – if they have not been provided to the accused person already.

As with the execution of arrest warrants, the requirement for this documentation to be given to the arrested person does not place any obligations on States Parties. The onus is on the ICC to ensure that the person receives the documents. However, it would greatly facilitate the work of the ICC and help ensure the protection of the rights of the accused if national authorities could assist the Court in the delivery of these additional documents.

c) Rules relating to a summons

When a person is served with a summons by national authorities, the Pre-Trial Chamber must ensure that the person who has been summonsed is notified of the provisions of article 61, paragraph 2, which relates to confirmation hearings (rule 123, sub-rule 1). This is intended to

make sure that the person attends the confirmation hearing. While placing no obligations on States Parties, it would greatly assist the work of the Court if national authorities are required to provide the Pre-Trial Chamber's notification to the person at the same time as serving the summons.

Article 58, paragraph 7 allows the ICC to issue a summons with or without conditions restricting liberty, other than detention, as long as these conditions are provided for by national law. Rule 119, sub-rule 1 sets out some examples of conditions that the ICC may impose. Sub-rule 5 of rule 119 requires the Pre-Trial Chamber to ascertain the relevant provisions of the national law of the State receiving the summons, in order to ensure that any conditions it may wish to impose are provided for under the State's law.

Even though the onus is on the Pre-Trial Chamber to review the State's law, it would help the Court immeasurably if State authorities were able to provide such information to the Court whenever requested. This would be similar to the obligation that is imposed in relation to surrender requirements under article 91, paragraph 4, which provides that "a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (c)" – which covers "documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State".

Note that the Pre-Trial Chamber subsequently may issue a warrant of arrest for the person, if it is convinced that the summonsed person has failed to comply with any of the conditions imposed (rule 119, sub-rule 4).

d) Rules relating to defence counsel

Article 67, paragraph (b) provides that accused persons have the right "to have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence." Rule 117, sub-rule 2 further clarifies one aspect of this right, by providing: "At any time after arrest, the person may make a request to the Pre-Trial Chamber for the appointment of counsel to assist with proceedings before the Court and the Pre-Trial Chamber shall take a decision on such request". This right to request counsel arises irrespective of whether the arrested person is about to be questioned or not. The person may be entitled to challenge the ICC's arrest warrant, or even the jurisdiction of the ICC, and needs legal advice as to all her/his entitlements under the Rome Statute, at the earliest possible opportunity (see also the separate discussion on the rights of accused persons being questioned under article 55, paragraph 2, in **Chapter 2.5 Rules relating to collecting and preserving evidence**).

Rules 20 to 22 set out the ICC's responsibilities in relation to defendants and their counsel. In terms of assignment of counsel for arrested persons, Rule 20, sub-rule 1 (c) obliges the Registrar of the ICC, *inter alia*, to "assist arrested persons ... in obtaining legal advice and the assistance of legal counsel". Rule 21, sub-rule 1 provides that the criteria and procedures for the Court's assignment of legal counsel have yet to be established, but will be included in the Court's Regulations, "based on a proposal by the Registrar, following consultations with any independent representative body of counsel or legal associations". These criteria and procedures will be subject to article 55, paragraph 2 (c), and article 67, paragraph 1 (d). Rule 22 sets out the necessary qualifications of Counsel for the defence.

Clearly, it would be helpful if national authorities could facilitate an arrested person's request for counsel being delivered to the Pre-Trial Chamber in the Hague. On a practical level, this request to the Pre-Trial Chamber will probably take some time to process, given the geographical distances involved, unless the person is arrested in The Netherlands. Thus, it would be extremely useful if national arresting and/or remand authorities could also facilitate the appointment of local "interim" counsel, in situations where the accused person requests legal assistance.

The privileges and immunities of defence counsel proved to be a difficult issue during the Prepcom negotiations, given the range of different legal systems represented, particularly the difficulties faced by non-adversarial systems in adapting to a more adversarial approach to criminal justice. An *Agreement on the Privileges and Immunities of the International Criminal Court* was finally adopted by the Prepcom in October 2001, taking into account article 48, paragraphs 3 & 4, Rome Statute. This agreement was adopted by the Assembly of States Parties at their first meeting in New York, September 2002. This agreement is relevant in terms of international criminal lawyers being able to have unimpeded access to their clients, no matter where in the world their clients are detained. States Parties should ensure that they implement this agreement so that the defence is not impeded in any way from ensuring that the Court has all relevant evidence before it.

e) Rules relating to interim release

Once a person has been arrested or provisionally arrested by national authorities, article 59 requires, *inter alia*, that the person "be brought promptly before the competent judicial authority in the custodial State", and provided the opportunity to apply for "interim release pending surrender" (paragraphs 2 & 3). The ICC's Pre-Trial Chamber must be notified and make recommendations if a person applies for interim release (article 59, paragraph 5). Under rule 117, sub-rule 4, the Pre-Trial Chamber must observe any time limits that the custodial State may set upon the Pre-Trial Chamber in terms of providing its recommendations. Note that national authorities must then "give full consideration to such recommendations" before rendering any decisions on interim release (article 59, paragraph 5).

Although this is not explicit in the Rome Statute or the RPE, it seems reasonable to assume that the custodial State should inform the Pre-Trial Chamber whether or not the person has been granted interim release by the national judicial authority. This will assist the work of the Pre-Trial Chamber in monitoring the progress of all ICC-related proceedings. The Rome Statute provides that if the person is granted interim release, the Pre-Trial Chamber may request periodic reports on the status of the interim release (article 59, paragraph 6). Rule 117, sub-rule 5 now adds: when the Pre-Trial Chamber is informed that the person has been granted interim release, it must inform the custodial State as to how and when it would like to receive these periodic reports.

Where a person has been provisionally arrested and denied interim release, the national authorities may subsequently release the person from custody if the request for surrender and the documents supporting the request are not received within a certain time limit (article 92, paragraph 3). Rule 188 now establishes this time limit as 60 days from the date of the provisional arrest. However, once the requisite documents do arrive, the person must be arrested again, and brought back before the competent judicial authority as described above (article 92,

paragraph 4). Note that a provisionally arrested person may voluntarily consent to being surrendered to the ICC before the requisite documents arrive, if this is permitted by national laws (article 92, paragraph 3). In that case, the requested State must surrender the person to the Court as soon as possible (article 92, paragraph 3) and the Court is not required to provide the documents described in article 91 unless the requested State indicates otherwise (rule 189).

f) Rules relating to “ne bis in idem” challenges

Where the arrested person believes s/he has already been prosecuted for the same offence, or conduct that relates to that offence, the person may bring a challenge before the national court on the principle of *ne bis in idem* (see article 20 and article 89, paragraph 2). If a person sought for surrender 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” by the Court (article 89, paragraph 2). If the Court has already determined that the case is admissible, then the requested State must proceed with the surrender.

If, however, an admissibility ruling is pending, then the requested State may postpone execution of the request until the ICC makes its determination on admissibility (article 89, paragraph 2). When this situation arises, rule 181 now provides that the Chamber dealing with the case must “take steps to obtain from the requested State all the relevant information about the *ne bis in idem* challenge brought by the person.” States Parties should provide this information in accordance with the obligation to consult with the Court in such circumstances (article 89, paragraph 2). Note that the provision of this information by the State is without prejudice to the provisions of article 19 and rules 58-62 on procedures applicable to challenges to the jurisdiction of the Court or to the admissibility of a case.

As long as the admissibility ruling is pending, the ICC Prosecutor may seek an order from the Court requesting the State to prevent the absconding of the person who is the subject of the warrant of arrest (article 19, paragraph 8 (c)). Rule 61 now provides that the Prosecutor’s application for such measures will be considered *ex parte* and *in camera*, and the Pre-Trial Chamber shall rule on the application on an expedited basis. However, article 19, paragraph 8 requires the Prosecutor to act “in cooperation with the relevant States” to prevent the person from absconding. Therefore, the requested State should assist the Prosecutor as soon as it is informed of the issuance of the order, to prevent absconding of the person making the *ne bis in idem* challenge.

g) Rules relating to other consultations with the Court on issues of surrender

In most cases, the national judicial authority of a State Party must order the surrender of a person who is the subject of a request for arrest and surrender from the ICC (article 59, paragraph 7 and article 89, paragraph 1). However, certain situations allow the requested State to consult with the Court before surrendering the person, and may allow the State to delay the surrender in accordance with the relevant provisions of the Rome Statute.

In the first case, if the arrested person is already being investigated, or serving a term of imprisonment, for a different offence than the one described in the ICC arrest warrant, then the requested State must consult with the Court after granting the request for surrender, in order to determine the most appropriate course of action (article 89, paragraph 4). Article 94 provides

that the requested State may postpone the execution of the request for a period of time agreed upon with the Court, if the immediate execution of the request would interfere with an ongoing investigation or prosecution of a different matter. Rule 183 also clarifies that the requested State may choose temporarily to surrender the person sought, in accordance with conditions that may be determined between the requested State and the Court. In such cases, the person is to be kept in custody while before the ICC, and transferred back to the requested State when no longer required, or at the latest when the proceedings have been completed.

Secondly, article 98 prevents the ICC from requesting the surrender of a person, where the surrender would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, or inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court. An example of the latter would be obligations under a Status of Forces Agreement (SOFA). However, in both cases the Court may avoid these problems by obtaining the cooperation of the relevant State in waiving the immunity or otherwise giving consent for the surrender. This provision has always been considered controversial, as it touches upon the duties of States to honour their international legal obligations with regard to diplomatic or State immunity, as well as to extradition agreements, while still trying to ensure that the ICC's jurisdiction is not unnecessarily restricted. Numerous commentators have suggested that all States Parties to the Rome Statute have impliedly waived the immunity of all their State officials in relation to ICC investigations and prosecutions, in accordance with article 27, and have already consented to have their nationals surrendered to the ICC in accordance with the relevant provisions of the Rome Statute, simply by becoming States Parties to the Statute.

Nevertheless, should the request for surrender still raise a problem of execution in respect of article 98, now rule 195 adds some clarifications. Rule 195, sub-rule 1 clarifies that the requested State must provide any information relevant to assist the Court in the application of article 98. In addition, any concerned third State or sending State may provide additional information to assist the Court. This is consistent with the obligation of all States Parties to cooperate with the Court in its investigations and prosecutions (article 86), and to consult with the Court without delay wherever there may be a problem in executing a request (article 97).

Rule 195, sub-rule 2 is more complex, both legally and politically. As a result of the negotiations held during the Prepcom, a compromise was reached between several strongly-held views. When the wording of the sub-rule is compared with article 98, paragraph 2, it may appear that the requested State is now to be left out of negotiations for surrendering the person, while the State of nationality of the person who is being requested for surrender may prevent surrender to the Court. However, the explicit reference in the sub-rule to article 98, paragraph 2 ensures that the nature of the requested State's obligations are the key issue, not the attitude of the sending State, in accordance with that article. When the RPE were adopted in June 2000, numerous delegations also reiterated the principle that the RPE could not be interpreted inconsistently with the Rome Statute (see "*Summary of statements made in plenary in connection with the adoption of the report of the Working Group on the Rules of Procedure and Evidence and the report of the Working Group on the Elements of Crimes*"). Note also the proviso to be included in the Prepcom's Summary of Proceedings, that was considered necessary because of another possible misinterpretation of the final wording of rule 195, sub-rule 2: "It is generally understood that Rule [195, sub-rule 2] should not be interpreted as requiring or in any

way calling for the negotiation of provisions in any particular international agreement by the Court or by any other international organization or State.”

Thirdly, article 90 requires a State Party that has been requested to surrender a person, to notify the ICC if it also receives a request from any other State for the extradition of the same person for the same conduct which forms the basis of the crime for which the Court seeks the person’s surrender. If the ICC consequently finds its case to be inadmissible, but the State Party then decides not to extradite the person to the requesting State, the State Party must notify the Court of this decision (article 90, paragraph 8). Rule 186 is also pertinent to this situation, clarifying that the requested State must notify the ICC Prosecutor directly. This will enable the Prosecutor to seek immediate review of the Court’s previous decision on the inadmissibility of the case (see article 19, paragraph 10).

Note that the rules do not add anything to the general obligation on a State Party to consult with the ICC if other problems are identified which may impede or prevent the execution of a request for any form of cooperation (article 97). Nor do they add any clarifications to the situation described in article 95, where the arrested person is already being investigated by the requested State for the same offence, and thus the State may postpone execution of the request, in most circumstances.

h) Rules relating to the surrender

Article 59, paragraph 7 provides that once the custodial State has ordered the surrender of a person, the person must be delivered to the Court as soon as possible. Rule 184 now describes the practical arrangements for surrender, which include coordination with the ICC Registrar as to the date and manner of surrender. If circumstances prevent the surrender of the person by the date agreed, the authorities of the requested State and the Registrar must agree upon a new date and manner of surrender (sub-rule 3).

Article 101, paragraph 1 provides that a person surrendered to the Court may not be proceeded against for any conduct committed prior to surrender, other than the conduct which forms the basis of the crimes for which the person was surrendered. However, paragraph 2 of article 101 allows the Court to request from the custodial State a waiver of this requirement, if necessary after the provision of additional information in accordance with article 91. Rule 196 now makes it clear that the surrendered person may provide his/her views to the Court on a perceived violation of article 101, paragraph 1. Rule 197 now also applies where the Court has requested a waiver of the requirements of article 101, paragraph 1. It allows the requested State to ask the Court to obtain and provide the views of the person who has been surrendered to the Court. This would assist the State in determining whether or not to waive the requirements of article 101, paragraph 1.

Note also rule 225, which now provides more detail on the procedures to be followed under article 111, when a person convicted by the ICC escapes from the custody of the State of enforcement. This rule is discussed in more detail in **Chapter 2.7 Rules relating to enforcement of sentences of imprisonment**. However, it is relevant to note that the State to which the person has escaped, may be required to surrender the person back to the State of enforcement, pursuant to either international agreements or national legislation, or to the ICC, pursuant to Part 9. In the latter case, all relevant rules on surrender to the Court will apply. Where the State to which the person has escaped agrees to surrender the person back to the State

of enforcement, rule 225, sub-rule 2 stipulates that the person must “be surrendered to the State of enforcement as soon as possible, if necessary in consultation with the Registrar, who shall provide all necessary assistance, including, if necessary, the presentation of requests for transit to the States concerned, in accordance with rule 207.” In addition, this sub-rule provides that the costs associated with the surrender of the sentenced person will be borne by the Court if no State assumes responsibility for them.

Rule 225, sub-rule 4 also clarifies that any time the person spends in custody in the State to which s/he has escaped, will be deducted from the sentence remaining to be served. Thus, any State that detains such a person should keep accurate records of the time that the person spends in custody.

i) Rules relating to transferring persons in custody

Article 93, paragraph 7 allows the ICC to request the temporary transfer of a person in custody in a State, in order to assist with an ICC investigation or prosecution. However, the person must freely consent to the transfer, and the requested State needs to agree to the transfer, subject to conditions it may wish to impose. Rule 192 now elaborates the procedure for transferring such people. Sub-rule 1 provides that national authorities should make the necessary arrangements for the transfer with both the ICC Registrar and the authorities of the host State (The Netherlands). Sub-rule 2 places an onus on the Registrar to “ensure the proper conduct of the transfer, including the supervision of the person while in the custody of the Court.” Sub-rule 3 allows the prisoner to raise matters concerning the conditions of her/his detention at the ICC. Finally, sub-rule 4 requires the Registrar to arrange for the return of the prisoner in custody to the requested State, once the purposes of the transfer have been fulfilled.

In the same spirit, rule 193 now clarifies that the ICC can order the temporary transfer of a person serving a sentence of imprisonment imposed by the ICC in a State facility, in accordance with Part 10, Rome Statute. Note that the provisions of article 93, paragraph 7 do not apply in such circumstances (rule 193, sub-rule 1). In other words, the Court does not need to obtain the consent of either the prisoner, or the State of enforcement. This is consistent with the Rome Statute, which gives to the ICC overall supervision of its prisoners, even where they are being housed in State detention facilities. It is likely that the ICC will make State consent to such transfers a condition of any agreement between the Court and States of enforcement.

Rule 193, sub-rule 2 provides that the ICC Registrar must ensure the proper conduct of the transfer, in liaison with the authorities of the State of enforcement and the authorities of the host State. It also provides that when the purposes of the transfer have been fulfilled, the Court shall return the sentenced person to the State of enforcement.

j) Rules relating to transportation through State territory of persons in custody

Article 89, paragraph 3 requires States Parties to authorise transportation through their territory of a person being surrendered to the Court by another State, except where transit through their territory would impede or delay the surrender. Sub-paragraph (d) provides that no request for transit should be required from the Court where the person is being transported by air and no landing is scheduled on State territory. However, if there is an unscheduled landing, sub-paragraph (e) allows the State to seek a request for transit from the Court, as provided for in sub-paragraph (b). Note that the request for transit must be transmitted in accordance with article 87 – either through the diplomatic channel or another channel designated previously by the State.

Sub-paragraph (e) further provides that the person must be detained by the transit State until the request for transit arrives, as long as the request for transit arrives in less than 96 hours. If not, the person may be released from custody by the transit State.

Rule 182 provides further clarification of these arrangements. In situations where an unscheduled landing has occurred and the transit State has sought a request for transit, sub-rule 1 allows the Court to transmit the request for transit “by any medium capable of delivering a written record.” This would include faxes and emails. Sub-rule 2 makes it explicit that where the time limit for the delivery of the request for transit has expired, and the person has been released, this release is “without prejudice to a subsequent arrest of the person in accordance with the provisions of article 89 or article 92.” In other words, a request from the ICC for arrest and surrender, or for provisional arrest, must then be transmitted to the State, in order to oblige national authorities to detain the person again.

Rule 207 applies the same principle to situations where a person sentenced by the ICC is being transported to the State of enforcement and needs to be transported through the territory of another State Party. Such situations were overlooked when the Rome Statute was being drafted. However, since the RPE must be consistent with the Rome Statute, and therefore cannot place any additional obligations on States Parties, rule 207 accords ultimate discretion to the transit State, except where the sentenced person is transported by air and no landing is scheduled on the territory of the transit State. In such a case, no authorisation can be required by the transit State. In all other cases, States are only required to cooperate with the Court “to the extent possible under the procedure of national law”. Sub-rule 2 suggests that States Parties should authorise the transit of a sentenced person through their territory, in accordance with article 89, paragraph 3 (b) and (c), and articles 105 and 108, as well as any other relevant rules, such as rule 182. A copy of the final judgement of conviction and of the sentence imposed is to be attached to any such request for transit. Where there is an unscheduled landing, sub-rule 1 suggests that the transit State should detain the person in custody until a request for transit as specified in sub-rule 2 is received, or until a request for arrest and surrender, or provisional arrest, is received.

k) Rules concerning transfers when a person is released from custody other than upon completion of sentence

Article 107 sets out the arrangements for transferring persons from the State of enforcement upon completion of their sentences (see **Chapter 2.7 Rules relating to enforcement of sentences**). However, the Rome Statute fails to address what should happen to a person who is released from the custody of the Court other than upon completion of a sentence. This may occur after a successful admissibility challenge by the accused, or by a State (see article 19), or where the charges are not confirmed, or are withdrawn at the accused’s confirmation hearing (see article 61), or where the accused is acquitted either at trial, or on appeal (see articles 74, 81 & 83).

Rule 185 now clarifies the arrangements for transferring such persons. Sub-rule 2 addresses the situation where the Court has determined a case to be inadmissible because it is already being investigated or prosecuted by a State which has jurisdiction over it and the State is willing and able genuinely to carry out the investigation or prosecution (see article 17, paragraph 1 (a)). In such situations, the Court must make arrangements for the transfer of the person to the State

whose investigation or prosecution formed the basis of the successful challenge to admissibility, unless the State that originally surrendered the person requests her/his return.

Rule 185, sub-rule 1 addresses all other situations where the person may be released from the custody of the Court, other than upon completion of a sentence. It provides much the same range of options to the Court as is provided to the State of enforcement under article 107, namely, transferring the person to: (i) a State which is obliged to receive the person; (ii) another State which agrees to receive the person; or (iii) a State which has requested his/her extradition with the consent of the original surrendering State (this latter option differs slightly from article 107, paragraph 3, where the consent of the original surrendering State is irrelevant because the person has already been prosecuted and convicted by the ICC). Note that the views of the person must be taken into account by the Court when it decides between these three options. Note also that the host State is required to “facilitate” the transfer, in accordance with the agreement that will be adopted between The Netherlands and the ICC (the “Headquarters Agreement” – see article 3, paragraph 2).

Clearly, the key issue in determining the destination of such persons, is whether another State wishes to prosecute the person or enforce a sentence against him/her. In such cases, the person may need to be kept in custody during the transfer. Where the person is being transferred to a State whose investigation or prosecution formed the basis of a successful challenge to admissibility, rule 185, sub-rule 2 places the onus on the ICC to make the necessary arrangements for transferring the person, which may mean keeping the person in custody throughout the transfer. In all other cases where a State is seeking the extradition or surrender of the person, then the Court may seek the assistance of the host State in keeping the person in custody during the transfer, since the ICC does not have that authority under the Rome Statute. Article 61, paragraph 10 merely provides that warrants will cease to have effect if the relevant charges are not confirmed at the confirmation hearing, or are withdrawn by the Prosecutor.

In all cases, both the Rome Statute and the RPE are silent as to the requirements for possible transportation through the territory of other States Parties. The RPE cannot place any additional obligations on States Parties. However, it would greatly facilitate such transfers if all States Parties were willing to apply the relevant provisions of article 89, paragraph 3, and rule 182 to such situations. This would help to ensure that perpetrators of atrocities are not able to escape for want of appropriate mechanisms to keep them in detention if they need to be transferred between various jurisdictions, once the ICC has determined that it does not have jurisdiction or authority.

Implementation Considerations

Most of these rules do not require legislative implementation. The only rule that is likely to require legislative recognition concerns the time limit within which the relevant documents must arrive after a person is provisionally arrested, and before the person can be granted release from custody (see section *b*), which is related to a State Party’s obligations under article 92. However, it may also be desirable to implement many of the other rules into legislation or regulations, in order to facilitate and ensure smooth and efficient cooperation with the Court. The exception to the need for legislative implementation would be most of the communications and consultations with the Court that may be desirable at various stages of the process of arrest and surrender, arising out of the RPE. These are compiled at the end of the following list of

implementation considerations, and most need only be considered in the context of implementing administrative arrangements for all communications with the Court.

a) to c) Implementation of rules relating to documentation entitlements for arrested and summonsed persons

The RPE require the ICC to ensure that arrested persons receive certain documents. Rule 187 provides that the request for arrest and surrender must be accompanied by some of these. However, from a practical point of view, in most cases the national arresting authorities will be in the best position to deliver these documents to the person, at the point of arrest. Therefore, States may wish to provide that delivery of these additional documents to the arrested person are the responsibility of arresting authorities.

In summary, the documents in question are as follows:

- All persons arrested or provisionally arrested under article 89 or 92, respectively, are entitled to receive a copy of the arrest warrant issued by the Pre-Trial Chamber and “any relevant provisions” of the Rome Statute, in a language that the person fully understands and speaks (rule 117, sub-rule 1);
- All persons arrested or provisionally arrested under article 89 or 92, and all those served with a summons to appear before the ICC under article 58, paragraph 7, are entitled to receive notification of the provisions of article 61, paragraph 2 (rule 123, sub-rule 1) – clearly, this would be one of the “relevant provisions” of the Statute which the Court should provide in accordance with rule 117.

Ideally, delivery of the additional documents to the relevant person should be a requirement on arresting officers and those who will be serving summonses. In addition, if possible, when national authorities are trained on the procedures required under the Rome Statute to protect the rights of accused persons and the integrity of all evidence, they should be made aware that the ICC has a responsibility to ensure that all arrested persons are given a copy of its warrant of arrest and of relevant provisions of the Statute, in a language that the person fully understands and speaks. Further, if it appears to the arresting authority that the person is unlikely to understand the ICC warrant of arrest, it would be helpful if such authorities know to check whether the ICC has sent additional documentation with the request for arrest and surrender, including translations of relevant documents.

b) Implementation of other rules relating to provisional arrest

Article 92 sets out the requirements on both the ICC and on States Parties concerning the provisional arrest of persons. Paragraph 3 provides that “a person who is provisionally arrested may be released from custody if the requested State has not received the request for surrender and the documents supporting the request as specified in article 91 within the time limits specified in the Rules of Procedure and Evidence.” Rule 188 now provides that this time limit is 60 days from the date of the provisional arrest.

Many jurisdictions require all provisions concerning detention of persons to be set out clearly and comprehensively in legislative form, in order to avoid the arbitrary use of detention for improper reasons. Those States that have already implemented the Rome Statute have generally

taken into account the fact that the RPE would specify this time limit for releasing a provisionally arrested person, and have allowed for the creation of subordinate legislation to take into account such details. Those States yet to implement the Rome Statute may wish to include the 60 day time limit in their legislation on provisional arrest, in order to ensure that the rights of provisionally arrested persons are adequately protected by national laws.

When a provisionally arrested person has consented to surrender before the requisite documents have arrived, rule 189 provides that “the Court shall not be required to provide the documents described in article 91 unless the requested State indicates otherwise.” The relevant State authorities need to give some thought as to whether they will require the documents anyway for their own records, and should communicate this to the Court as soon as feasible.

d) Implementation of rules relating to defence counsel

As discussed previously, rule 117, sub-rule 2 allows an arrested person to make a request to the Pre-Trial Chamber for the appointment of counsel to assist with proceedings before the Court, “at any time after arrest”. There may be a delay of several days while the Pre-Trial Chamber processes the request, and the counsel assigned by the Court, in accordance with rules 20-22, travels to the State. During this time the person should be able to consult with a local “interim” counsel provided by the State. The person needs to understand his/her rights under the Rome Statute, and should have the opportunity to seek clarification from suitably qualified persons as soon as possible. Some of these rights are set out in article 55, paragraph 1, and include: not being compelled to incriminate himself/herself or to confess guilt; and not being subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment.

Many jurisdictions already provide for a right to counsel from the moment of arrest, even for non-nationals. National criminal justice systems may also provide for a system of legal aid for indigent accused persons. These could be extended, as appropriate, to include all such persons arrested for the ICC.

However, there is currently no consensus in the international community that every arrested person has an automatic right to counsel. Article 55, Rome Statute makes it very clear that the only time a State may be under an obligation to provide counsel to an accused person, is “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” (paragraph 2). Note that article 55, paragraph 2 (c) also specifies the type of legal assistance to which the person is entitled, including free legal assistance if the person does not have sufficient means to pay.

At the same time, there are now many international agreements that provide for the right to counsel, and call upon States to guarantee progressive development of comprehensive systems of legal aid (see, for example: *United Nations Standard Minimum Rules for the Treatment of Prisoners*, 1955, ECOSOC Resolution 663 (XXIV); *Legal Aid*, General Assembly Resolution 2449 (XXIII), 1968; *The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, General Assembly Resolution 43/173 (XLIII), 9 December 1988; *The Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New International Economic Order*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders; and *The Basic Principles*

on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders).

Therefore, it would be desirable if all States could make interim arrangements to provide counsel to all persons arrested in accordance with the Rome Statute, to ensure that all persons accused by the ICC are accorded the same rights from the moment of arrest, no matter where in the world they are arrested.

In addition, it would assist the Court greatly if States were able to assist relevant local, regional and national associations to identify local lawyers and “train” them in ICC procedures, to ensure the protection of the rights of all persons accused by the ICC. Otherwise, charges may have to be dismissed, if the person requested by the ICC is not treated in accordance with her/his rights as set out under the Rome Statute. Rule 22 sets out the qualifications for counsel who will be assigned by the ICC. These provide a good starting point to identify lawyers who could act as “interim” counsel after a person is arrested for the ICC, and before the counsel assigned by the Court arrives.

Note that protecting the privileges and immunities of defence counsel is also an important aspect of the right to a fair trial. The *Agreement on the Privileges and Immunities of the International Criminal Court*, adopted by the Assembly of States Parties in September 2002, sets out these privileges and immunities.

e) Implementation of rules relating to interim release

All persons arrested or provisionally arrested for the ICC are entitled to apply for interim release, and the custodial State must notify the Pre-Trial Chamber if a request for release has been made by the person arrested, so that the Pre-Trial Chamber can make recommendations to the relevant national judicial authority on the issue (article 59, paragraph 5). Rule 117, sub-rule 4 provides that the Pre-Trial Chamber must “provide its recommendations within any time limit set by the custodial State.” Nowhere in the Rome Statute or the RPE is there another provision on time limits for the Pre-Trial Chamber to provide its recommendations to a State on interim release. This is entirely up to the State in question, and it would show respect for the important work of the Pre-Trial Chamber if the State did not impose any time restrictions. However, as mentioned previously, many jurisdictions require greater certainty when it comes to issues of detaining persons. Therefore, it may be necessary for a State to specify a time limit for the Pre-Trial Chamber to provide its recommendations, so that persons arrested for the ICC are not kept in custody for longer periods than other persons arrested by the State for the same types of crimes.

Custodial States should also be prepared to make efficient administrative arrangements for the provision to the Pre-Trial Chamber of periodic reports on the status of the interim release, in accordance with any time frames and delivery requirements that the Pre-Trial Chamber may establish in accordance with rule 117, sub-rule 5.

g) and i) Implementation of rules relating to temporary transfers to the Court of persons in custody

There are now three situations where a State may find itself temporarily transferring persons in custody to the ICC, to assist the Court with its investigations and prosecutions:

- (i) Voluntarily and temporarily surrendering a person in the custody of the State in accordance with article 89, paragraph 4 and rule 183, where the person is being proceeded against or is serving a sentence imposed by domestic authorities for a crime different from that for which surrender to the Court is sought under article 89, and the Court agrees that the State may postpone execution of the request for surrender in accordance with article 94;
- (ii) Voluntarily transferring a prisoner of the State in accordance with article 93, paragraph 7 and rule 192, where the person was sentenced to detention by a domestic authority and the Court has not otherwise sought the surrender of the person; and
- (iii) Transferring a prisoner of the ICC in accordance with Part 10 of the Rome Statute and rule 193, where the sentence is being enforced by the State and the ICC requires the temporary transfer of the person who was convicted and sentenced by the ICC.

In the first two cases, the State may determine conditions it may wish to impose on the ICC, in consultation with the Court. In the case of temporary transfer of an ICC prisoner in accordance with rule 193, States may not impose any conditions upon the Court, and the transfer of the person is not optional. In the case of temporary surrender in accordance with rule 183, it seems from the order of the rule within the RPE that the arrangements for the surrender will be those stipulated in rule 184, since it is the rule immediately following rule 183. In the case of temporary transfer in accordance with rule 192, the arrangements are set out under the rule. All of the arrangements for transferring these people involve coordinating with the ICC Registrar and possibly the authorities of the host State. In all three cases, the person must be returned to the State once the proceedings have been completed, or when the purposes of the transfer have been fulfilled. National correctional authorities should familiarise themselves with all the procedures outlined in these rules.

On a practical level, it may be desirable to implement the procedures for such transfers as part of the same continuum, despite the fact that they arise from different parts of the Rome Statute and RPE, and they are not all obligatory. On this point, note article 106, paragraph 2, which stipulates that conditions of imprisonment for ICC prisoners shall in no case “be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.” The arrangements for transferring prisoners are part of their conditions of imprisonment. However, since the transfer of ICC prisoners is not voluntary, States may choose to have an entirely separate regime for transferring and supervising prisoners convicted by the ICC. This would help to avoid any confusion amongst domestic authorities as to the relevant judicial authority that ultimately is supervising the sentence.

h) Implementation of rules relating to the surrender

Rule 184 sets out the practical arrangements for surrender in accordance with articles 59 and 89. Rule 184, sub-rule 1 requires the custodial State immediately to inform the ICC Registrar when the person sought for surrender is available. The Registrar and the authorities of the requested State will then agree upon the date and the manner of the surrender (sub-rule 2). If circumstances prevent the surrender of the person by the date agreed, the authorities of the requested State and the Registrar must agree upon a new date and manner of surrender (sub-rule 3). The Registrar is also required to maintain contact with the authorities of the host State (The

Netherlands), in relation to the arrangements for the surrender of the person to the Court (sub-rule 4). It would greatly facilitate the process if States had appropriate agreements with The Netherlands. National corrections authorities should also familiarise themselves with all of these arrangements as soon as possible.

Article 111 addresses the situation where a person has escaped from the custody of a State that is enforcing an ICC sentence. The State to which the person has escaped may be required to surrender the person back to the Court, in accordance with Part 9, Rome Statute (see rule 225, sub-rule 3). In this case, all relevant rules will apply, such as rule 184. National laws and procedures on surrender should provide for this possibility, if they do not already. Note that the ICC may agree to change the designated State of enforcement to the State to which the person escaped, in accordance with article 103 and rules 203-206 (rule 225, sub-rule 3).

Note also rule 225, sub-rule 2, which allows the State to which the person has escaped to surrender the person straight back to the State of enforcement if it chooses, pursuant to either international agreements or national laws. Once the State has agreed to such surrender, the sub-rule stipulates that the person *must* be surrendered back to the State of enforcement “as soon as possible”. This terminology is usually included in extradition agreements, but may not be in national laws. Note that the Registrar must assist the States involved, if requested, and the Court may pay the costs of the surrender, if no State assumes responsibility for them (rule 225, sub-rule 2). The relevant domestic authorities need to be made aware of the availability of these types of assistance. In addition, accurate records should be kept of any time the person spends in custody in the State to which s/he escapes. This period of time will be deducted by the Court from the sentence remaining to be served (rule 225, sub-rule 4).

j) Implementation of rules relating to transit of persons in custody through State territory

Article 89, paragraph 3 obliges States Parties to allow persons in custody to be transported through the State’s territory, under most circumstances. Paragraph 3 (b) sets out the required contents of the Court’s request for transit. Paragraph 3 (e) specifies the obligations of a State in situations where there is an unscheduled landing. In such situations, rule 182, sub-rule 1 now provides that the Court can transmit its request for transit by any medium capable of delivering a written record. Where the person is released because the requisite documents did not arrive within the time limit specified in article 89, paragraph 3, now rule 182, sub-rule 2 clarifies that “such a release is without prejudice to a subsequent arrest of the person in accordance with the provisions of article 89 or article 92.” National legislation and procedures should take these clarifications into account.

Amongst the other rules discussed in this Chapter, there are several other situations where it would greatly facilitate the work of the Court if States apply the same principles as in article 89, paragraph 3 and rule 182, even though this is not obligatory:

- (i) where a person sentenced by the ICC is being transported to the State of enforcement and has to transit through another State – rule 207 (note that articles 105 and 108 and any relevant rules would also apply in this situation, and that a copy of the final judgement of conviction and of the sentence imposed must be attached to the Court’s request for transit (see sub-rule 2));
- (ii) where a person has escaped the custody of a State that is enforcing an ICC sentence, and has to transit in another State on the way back to the State of enforcement – rule

225, sub-rule 2 (note that the Registrar is obliged to present requests for transit to the States concerned, if necessary, in accordance with rule 207);

- (iii) where a person is being transferred from the Court to a State after a successful admissibility challenge, but is still being kept in custody pending other proceedings in a national court, and has to transit in another State – rule 185, sub-rule 2 (note that the Court is required to “make arrangements, as appropriate, for the transfer of the person to a State whose investigation or prosecution has formed the basis of the successful challenge to admissibility, unless the State that originally surrendered the person requests his or her return”); and
- (iv) in all other situations where a person is released from the custody of the Court other than upon completion of sentence, but is still being kept in custody pending other proceedings in a national court, and has to transit in another State – rule 185, sub-rule 1 (note that the original surrendering State must consent to the person being extradited and that the host State will facilitate such transfers).

In all of these situations, there may be unscheduled landings in a transit State where it would be important to ensure that the person is kept in custody to prevent possible escape. It would also be important to keep accurate records of the time that the person spends in custody in the transit State. If the person has already been sentenced by the ICC, any time in detention needs to be deducted from the sentence remaining to be served. If the person has yet to be convicted and sentenced, this time in custody may be taken into account when the sentence is determined.

a) to k) Implementation of rules relating to consultations and communications with the ICC

Amongst all the rules outlined previously, there are many situations where good communications with the ICC would be desirable, as well as situations where national authorities are required to consult with the Court on particular matters. Following is a summary of all the types of information that may need to flow between a State and the Court when a person is to be arrested and surrendered to the Court, or served with a summons, as suggested by the RPE. Most of these are not obligatory, but it would be helpful if administrative procedures addressing these points were implemented by States Parties to ensure the smooth functioning of the ICC:

- (i) in relation to rule 117, sub-rule 1 on arrests, national arresting authorities should inform the ICC once a person has been arrested or provisionally arrested in accordance with an ICC request, so that the ICC knows when to provide all the required documentation, if it has not already provided this documentation with the request for arrest;
- (ii) in relation to rule 117, sub-rule 2 on arrests, national arresting authorities should assist the arrested person to make a request for counsel to the Pre-Trial Chamber, if the person wishes to do so;
- (iii) in relation to rule 117, sub-rule 5 on interim release, relevant authorities should inform the Pre-Trial Chamber whether or not a person has been granted interim release by a competent domestic judicial authority, so that the Pre-Trial Chamber can make its decision whether or not to request periodic reports on the status of the interim release;

- (iv) in relation to rule 119 on summonses, relevant authorities should advise the Court of any conditions restricting liberty provided for by national law; note that rule 119, sub-rule 3 provides that before imposing or amending conditions restricting liberty, the Pre-Trial Chamber must consult, *inter alia*, with any relevant State - this would be the best opportunity for the State to inform the Pre-Trial Chamber of any national laws that are relevant to conditions restricting liberty that may be imposed under a summons;
- (v) in relation to rule 123, sub-rule 3 on arrests, those authorities responsible for arrests should provide the necessary information to the Pre-Trial Chamber when it is trying to determine whether or not an ICC arrest warrant has been executed, and if not, whether all reasonable measures have been taken to locate and arrest the person;
- (vi) in relation to rule 181 on the principle of *ne bis in idem*, relevant authorities should provide to the relevant Chamber of the ICC all the relevant information about the challenge brought by the person in the domestic tribunal – note that provision of this information is without prejudice to article 19 and rules 58-62 on procedures applicable to challenges to the jurisdiction of the Court or the admissibility of the case, where an admissibility ruling is still pending;
- (vii) in relation to rule 186 on competing requests, relevant authorities should advise the ICC Prosecutor directly if the ICC previously found the case inadmissible because another State was willing and able to prosecute, and the custodial State subsequently decides not to extradite the person to that State;
- (viii) in relation to rule 195, sub-rule 1 on problems with the surrender, when a requested State notifies the Court that a request for surrender raises a problem of execution in respect of article 98, relevant authorities in the requested State *must* provide any information relevant to assist the Court in the application of article 98 (this is consistent with the obligation to consult under article 97) – note that concerned third States and sending States may also provide information; and
- (ix) in relation to rules 196-197 on the rule of specialty, relevant authorities are entitled to ask the Court to obtain and provide the views of the person surrendered to the Court, where the Court has requested a waiver of the rule.

2.5 Rules Relating to Collecting and Preserving Evidence

References: Article 15, paragraph 2; article 18, paragraph 6; article 19, paragraph 8; article 43, paragraph 6; article 54, paragraph 3 (e); articles 55-57, 61, 64, 66-69, & 72; article 75, paragraph 4; article 79, paragraph 2; articles 93, 96, 99, & 109, Rome Statute; and

Rules 16-19, 20-22, 43, 46-47, 50, 57, 61, 63-84, 85-93, 96, 99, 101, 104, 107, & 111-116; rule 117, sub-rule 2; rules 121, 127-129, 134, 151, 155, & 190-193; rule 194, sub-rule 3; and rule 221.

Description

Collecting and preserving evidence for the ICC is an obligation for all States Parties under article 93, Rome Statute. The various provisions in that article set out the main types of evidence that a State Party may need to collect and preserve, such as the identity of victims and witnesses, testimony given under oath for the Court, and evidence of the proceeds of ICC crimes. Other provisions in the Statute establish which organs of the Court may request such cooperation from a State Party. Under article 54, paragraph 3, the ICC Prosecutor may request the cooperation of States Parties in obtaining and protecting all kinds of evidence once an investigation has been initiated. Article 57 establishes that the ICC Pre-Trial Chamber also has the authority to request the cooperation of States Parties in obtaining and protecting evidence. Article 64, paragraph 6 (b) provides that the ICC Trial Chamber has this authority as well. Article 99 specifies that 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” (paragraph 1). In accordance with article 88, States Parties must therefore “ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under” article 93.

The “Rules of Procedure & Evidence”, as the title suggests, provides considerable clarification on the way that all ICC evidence is to be handled and disclosed. Most of the rules are addressed to the Court’s Chambers and to the Prosecutor, and will have little or no impact on States Parties. In most cases, it is expected that the Court’s own team of investigators within the Office of the Prosecutor will be responsible primarily for gathering evidence, especially evidence that is central to a particular investigation (based on the experience of the ICTY). However, States Parties need to provide the ICC investigators with access to that evidence, if it is within their jurisdiction, and may also be obliged to assign national authorities to collect and preserve some of the evidence, in accordance with article 93.

This Chapter highlights some of the procedures under the RPE that national authorities of States Parties may be required to follow when the State is requested by the ICC to collect and protect certain types of evidence, or to assist the ICC’s investigators with the collection or preservation of evidence. The Chapter is divided into the following topics, within which there are several

sub-topics: a) General considerations relevant to collecting and preserving evidence for the ICC under the Rome Statute and the RPE; b) Rules relating to assistance to the Prosecutor in certain specific situations; c) Rules relating to victims and witnesses, d) Rules relating to defence issues and evidence and e) Rules relating to collecting evidence of the proceeds of crimes.

a) *General considerations relevant to collecting and preserving evidence for the ICC under the Rome Statute and the RPE*

The Court will determine the relevance and admissibility of all evidence, in accordance with article 69 and the RPE. Some of the considerations that the Court will take into account include “any prejudice that such evidence may cause to a fair trial”, and whether evidence was obtained in violation of the Rome Statute or internationally recognised human rights, such that “the violation casts substantial doubt on the reliability of the evidence” (see article 69, paragraphs 4 & 7). Note also article 69, paragraph 8, which expressly provides that the Court will not rule on the application of a State’s national law, when deciding on the relevance or admissibility of evidence collected by a State. Thus, State authorities need to ensure that all the evidence they collect for the Court has been obtained in accordance with the relevant provisions of the Rome Statute and the RPE, as well as internationally recognised human rights, whether or not these are in accordance with the State’s national laws. Otherwise, the Court may rule the evidence inadmissible, thus potentially jeopardising the trial of someone accused of the most serious crimes of concern to the international community as a whole. This could cause considerable embarrassment for the State.

Therefore, national authorities should familiarise themselves with the relevant provisions of both the Rome Statute and the RPE. In particular, rules 63-84 deal exclusively with evidentiary matters.

However, the RPE does not contain comprehensive evidentiary rules, unlike many national sets of rules on evidence. For example, common lawyers will not find complex rules on matters such as “hearsay” evidence, with which they would be familiar. The Court is intended to represent the international community as a whole, and so its evidentiary rules reflect a compromise between the different approaches to criminal procedure of the major legal systems of the world. There are some detailed evidentiary rules in a select number of areas in the RPE. But there are no general rules or principles on why other types of evidence should be considered relevant or admissible, apart from the principles set out in article 69. Such determinations will be made by the ICC judges, who have been drawn from all the principal legal systems of the world, and from all the geographical regions of the globe (see article 36, paragraph 8). Under article 51, paragraphs 2-4, the judges are also able to develop appropriate evidentiary rules as needed, subject to the approval of the Assembly of States Parties. Note also article 69, paragraph 3, which states “The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.”

There are three particular areas of evidence that may be relevant to national authorities who are collecting evidence for the ICC and have been elaborated in considerable detail in the RPE – (i) privileged communications; (ii) evidence in cases of sexual violence; and (iii) disclosure of evidence. Note that all of the points discussed under these three sub-topics are also relevant to sections b) – e) of this Chapter on other issues relevant to collection and preservation of evidence for the ICC.

(i) Rules relating to privileged communications -

Article 69, paragraph 5 provides that the Court will “respect and observe privileges on confidentiality as provided for in the Rules of Procedure & Evidence”. Even though this obligation is placed on the Court, national authorities also need to make sure that they respect and observe relevant privileges on confidentiality if they are collecting evidence for the ICC, even if their actions would not constitute a violation of such privileges under national laws. Otherwise, evidence obtained by means of a violation of privilege, or evidence obtained subsequently on the basis of information contained in a privileged communication, may not be admissible before the ICC.

Rule 73 now elaborates the principles for the Court to follow when determining the status of a particular communication in a given case. This issue was discussed and debated at length at the Prepcom, because domestic laws on privileged communications vary enormously from one jurisdiction to another. The rule represents a delicate compromise between a wide range of views. In the first place, sub-rule 1 creates a presumption that communications between the accused and his/her legal counsel are privileged, where made in the context of their professional relationship, and where the accused has not already voluntarily consented to disclosure, either to the Court or to a third party. Therefore, national authorities need to ensure that an accused person in their custody has every opportunity to consult privately with her/his counsel, without any kind of surveillance.

Sub-rules 2 and 3 need to be read together, in terms of identifying other relationships that could give rise to a privilege of confidentiality. Rather than provide a comprehensive list of these relationships, upon which no agreement could be reached when the RPE was being negotiated, the sub-rules provide that the Court must recognise that communications arising from a certain “class” of professional or other confidential relationships are privileged, if the Chamber decides that: “(a) Communications occurring within that class of relationship are made in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure; (b) Confidentiality is essential to the nature and type of relationship between the person and the confidant; and (c) Recognition of the privilege would further the objectives of the Statute and the Rules” (sub-rule 2). Sub-rule 3 then provides some examples of particular classes of relationships to which the Court must give particular regard: “the professional relationship between a person and his or her medical doctor, psychiatrist, psychologist or counsellor, in particular those related to or involving victims, or between a person and a member of the religious clergy; and in the latter case, the Court shall recognise as privileged those communications made in the context of a sacred confession where it is an integral part of the practice of that religion.” When collecting evidence for the ICC, national authorities should also pay particular regard to the need to protect the privacy of communications between persons involved in such relationships, and ensure that those communications remain confidential, unless the Court determines that they can be disclosed.

The values and objectives underlying the Rome Statute will provide sufficient guidance to the ICC Prosecutor and judges, in determining the appropriate balance between the need for all relevant material to be available to the Court, and the need to protect certain vulnerable groups within society, as well as to protect the confidential nature of certain relationships within society. These values and objectives include the need to address impunity for heinous international crimes, the rights of accused persons to a fair trial, the right to protection and rehabilitation for victims and witnesses, and the need for all participants in the process to have their human rights

and equality respected. To emphasise that the Court must uphold the universal values and objectives of the Rome Statute, note that rule 63, sub-rule 5 is mentioned explicitly in sub-rule 2 of rule 73, in relation to types of communications that should be regarded as privileged. Rule 63, sub-rule 5 provides that the ICC “shall not apply any national laws governing evidence, other than in accordance with article 21.” In other words, when the Court is trying to decide whether a particular communication is to be considered privileged, only where the Rome Statute, the RPE, and relevant international laws fail to provide sufficient guidance to the Court, will the Court rely on “general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognised norms and standards” (article 21, paragraph 1 (c)). Thus, national authorities collecting evidence for the ICC must not rely on national laws relating to privileged communications, but should keep confidential all evidence collected on behalf of the ICC, until the Court determines whether the information is subject to privilege or not, in accordance with the Rome Statute and the RPE.

Rule 73, sub-rules 4-6 set out considerations relevant to another type of privileged communication, which recognises the special status of the International Committee of the Red Cross (ICRC) under international humanitarian law. In most cases, the Court must regard as privileged any information, documents or other evidence in the possession of the ICRC (sub-rule 4). This ensures that the ICRC is able to continue its crucial work of providing humanitarian relief to victims of wars and other atrocities, confident that it will not be asked to disclose sensitive information it may unwittingly glean through carrying out such activities. Otherwise, neither the victims nor the perpetrators of international crimes would be able to trust the ICRC’s officials, and may not seek the assistance they need, or cooperate in providing adequate security for ICRC personnel in conflict zones. National authorities should also familiarise themselves with these rules, to ensure that all those involved in assisting an ICC investigation respect the sensitivities of the ICRC’s work. Ideally, national authorities should also apply similar respect to the work of other international humanitarian organisations, especially those providing medical and psychological care to victims of mass humanitarian tragedies. Note that communications involving representatives of such organisations may also meet the criteria of a class of relationship that the Court will consider to be privileged under rule 73, sub-rules 2-3. Therefore, they should be treated as confidential until the Court determines otherwise.

(ii) Rules relating to principles of evidence in cases of sexual violence -

A number of these principles are detailed under the RPE, and may be relevant to the collection by national authorities of evidence for the ICC. Again, this is an area where domestic and even international approaches vary widely. For many years, crimes of sexual violence during wartime were not recognised explicitly as international crimes. In more recent times, the human rights of women and children have been strengthened under international law, leading to a wider recognition of the need to proscribe such violence (see in particular article 7, paragraph 1 (g), Rome Statute). Article 21, paragraph 3 also provides that the ICC must apply all relevant law consistently with “internationally recognised human rights” and “without any adverse distinction founded on grounds such as gender”. However, interpretations of these principles vary widely when it comes to balancing the rights of an accused person to face her/his accusers, against the need to protect victims of particularly invasive crimes, such as rape. Therefore, it was deemed

appropriate to draft rules to guide the Court when it is considering the evidence of alleged victims of sexual violence. Such rules should also be kept in mind when investigators are collecting evidence such as testimony from such victims.

Rules 70-72 elaborate the principles and the procedures that the Court is required to observe in all cases of sexual violence. Rule 70 outlines certain basic principles to guide the Court in cases of sexual violence, mostly concerning the issue of not inferring consent from certain specified situations. This recognises the particularly vulnerable place of women and children during conflicts. Rule 71 provides that, in most cases, the Court may not admit evidence “of the prior or subsequent sexual conduct of a victim or witness.” This principle is drawn, *inter alia*, from national and international jurisprudence recognising that anyone, regardless of his/her sexual history, can be a victim of sexual violence and that the credibility of that person’s testimony is not related to their sexual history. In addition, previous or subsequent consensual sexual activity by a person cannot be used to imply that the person must have consented to an act of sexual violence. Rule 72 details a special procedure that the Court and counsel must observe if counsel wishes to elicit evidence that a victim or witness consented to an alleged crime of sexual violence. In addition, rule 63, sub-rule 4 states that corroboration may not be required in order to prove any crime within the jurisdiction of the Court, “in particular, crimes of sexual violence.” This principle recognises that such crimes are usually committed in private settings, where there are no witnesses other than the accused and the alleged victim.

The Rome Statute and the RPE do not require States to amend their own evidentiary laws to reflect these principles, although this approach is worth considering in light of gender equality rights and the complementarity regime under the Statute. However, whenever national authorities are taking evidence from victims of sexual violence, in response to a request from the ICC and in accordance with article 55, paragraph 1 and article 93, paragraph 1 (b), those authorities need to be familiar with all of these principles. Otherwise, they may unnecessarily distress the victim by pursuing lines of questioning that are irrelevant for the Court’s purposes, and ultimately discourage the victim from testifying before the ICC, in the worst case. This may allow a perpetrator to enjoy complete impunity for other crimes as well. It would also be in violation of a State Party’s obligation to facilitate the voluntary appearance of persons as witnesses before the Court (see article 93, paragraph 1 (e)).

(iii) Rules relating to disclosure of evidence -

The issue of disclosure of evidence may also become relevant to States Parties. Article 67, paragraph 1 (b) gives an accused the right “to have adequate time and facilities for the preparation of the defence”. This includes having adequate time to gather all relevant evidence from appropriate sources, in order to ensure that the Court will have before it all information necessary to determine whether the accused is guilty or not (see further: *d) Rules relating to defence issues and evidence*, below). Article 67, paragraph 2 ensures that the Prosecutor will disclose to the defence, in addition to any other type of disclosure provided for under the Statute, any “evidence in the Prosecutor’s possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence.” Article 61, paragraph 3 (b), and article 64, paragraphs 3 (c) and 6 (d) together provide that both the Pre-Trial Chamber and the Trial Chamber may order that relevant evidence be disclosed prior to the relevant hearing – either the confirmation hearing, another preliminary hearing, or the trial itself.

Rules 76-84 now provide detailed principles and procedures for all relevant parties to follow prior to trial, to ensure that all relevant evidence ultimately is brought before the Court. This includes disclosure by both the Prosecutor and the defence. Rule 121 also provides for disclosure prior to the accused's confirmation hearing. Note that disclosure of evidence must take into account the potential need to protect certain victims and witnesses (see article 68, paragraph 5 and rule 76).

The steps involved in these procedures may be relevant to States Parties that are collecting evidence for the ICC. Such States may be required to transmit the evidence to the Prosecutor at various stages of the proceedings, to help the Prosecutor meet certain strict time limits (see rule 84 and article 99, paragraphs 1 & 2). Note also rule 101, sub-rule 2, which provides: "Taking into account the rights of the accused, in particular under article 67, paragraph 1 (c) [the right to be tried without undue delay], all those participating in the proceedings to whom any order is directed shall endeavour to act as expeditiously as possible, within the time limit ordered by the Court." This should apply to national authorities who may be responding to a request to collect certain evidence for the Court.

The issue of disclosure is also relevant to national security concerns. Article 72, article 93, paragraph 4, and article 99, paragraph 5 all address the various issues relevant to the protection by a State of information that may prejudice its national security interests if disclosed. Article 72, paragraph 5 provides that the Court and the State must try to resolve any such concerns through cooperative means. Rule 81 now clarifies how the Court must deal with evidence provided to it in confidence, including evidence provided by a State in accordance with article 72, paragraph 5. The relevant provisions of article 72 must be observed, which may allow for limited disclosure. In addition, rule 81, sub-rule 3 provides that when disclosure of such information may create a risk to the safety of the witness, the Court shall take measures to inform the witness in advance. Sub-rule 4 further provides that the Chamber dealing with the matter "shall, on its own motion or at the request of the Prosecutor, the accused or any State, take the necessary steps to ensure the confidentiality of information, in accordance with articles ... 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of the trial."

Note that States may request the Court to provide various types of evidence to them, in order to assist with a national investigation or trial of a person suspected of committing a crime within the jurisdiction of the ICC, "or which constitutes a serious crime under the national law of the requesting State", in accordance with the principle of "complementarity" (article 1 and article 93, paragraph 10). Rule 194 now sets out the procedure for requesting and executing such cooperation, as well as principles to guide the Court when determining whether to meet the request or not.

Note also that there are no further rules on the confidentiality of third party information or documents, relevant to article 73.

b) Rules relating to assistance to the Prosecutor in certain specific situations

There are four specific situations where slightly different or additional rules may apply when a State is assisting the Prosecutor to collect and preserve evidence and information at different stages of an ICC proceeding:

- (i) where the Prosecutor is seeking more information under article 15, paragraph 2 in order to determine whether or not to commence an investigation;
- (ii) where, in accordance with article 18, paragraph 6, and article 19, paragraph 8, the Prosecutor believes there is a unique opportunity to obtain important evidence, or there is a significant risk that such evidence may not subsequently be available, after the Prosecutor has deferred to a State investigation, or pending an admissibility ruling by the Pre-Trial Chamber;
- (iii) where, in accordance with article 56, the Prosecutor considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial; and
- (iv) where, in accordance with article 57, paragraph 3 (d), the Prosecutor is authorised by the Pre-Trial Chamber to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State under Part 9 and if, whenever possible having regard to the views of the State concerned, the Pre-Trial Chamber has determined in that case that the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9.

(i) Rules relating to provision of additional information under article 15, paragraph 2 -

Article 15, paragraph 1 authorises the Prosecutor to initiate investigations on his/her own initiative, on the basis of information provided to the Court on crimes within the jurisdiction of the Court. Under article 15, paragraph 2, the Prosecutor must conduct a preliminary examination of the information provided to the Court, to analyse the seriousness of the information. At this stage, s/he may seek additional information from States and from other sources, in order to be able to assess the seriousness of the information received initially. This additional information may include written or oral testimony provided at the seat of the Court.

Rules 46-47, 104, and 111-112 may all apply under these circumstances. Rule 46 now provides that the Prosecutor must protect the confidentiality of any additional information that may be provided, or any testimony that is received at the seat of the Court in accordance with article 15, paragraph 2. The scope of this rule clearly includes additional information that a State may be requested to provide.

Rule 47 now provides further detail on the procedures for giving testimony at the seat of the Court, in accordance with article 15, paragraph 2. Note that State officials may be requested to provide such testimony. Rule 47, sub-rule 1 clarifies that rules 111-112 on recording of questioning will apply *mutatis mutandis* to all testimony received by the Prosecutor under article 15, paragraph 2. Rule 111, sub-rule 1 provides that a record must be made of any formal statements made by persons who are questioned in connection with an ICC investigation. The record needs to be signed by the person who records and conducts the questioning and by the person who is questioned, as well as the following persons if they are present: the questioned person's counsel, the Prosecutor, and the attending judge. There are several other requirements under this sub-rule, with which State officials should be familiar before they undertake to provide such testimony. Note also rule 111, sub-rule 2, which highlights the fact that article 55 also protects all persons who are providing testimony to the Court, and thus the relevant rights of

the person being questioned must be protected (these rights are discussed in more detail below, in sections *c*) – *d*)).

Rule 112 sets out more detailed procedures that must be followed when the person to be questioned is suspected of having committed a crime within the jurisdiction of the ICC. This rule is discussed in detail below, in section *d*) *Rules relating to defence issues and evidence*.

Rule 104, sub-rule 1 clarifies the relationship between articles 15 and 53. The rule provides that the Prosecutor must analyse the seriousness of the information received, when determining whether there is a reasonable basis to proceed with an investigation under article 53, paragraph 1. In other words, when the Prosecutor is making such an evaluation under article 15, paragraph 2, s/he must also consider all the factors set out in article 53, paragraph 1. Under sub-rule 2 of rule 104, when the Prosecutor is deciding whether to initiate an investigation, s/he may also seek more information from States and other reliable sources, and receive written or oral testimony at the Court, to assist the Prosecutor in evaluating the information that has already been made available at the preliminary examination stage under article 15, paragraph 2. Note that the procedures set out above in relation to rules 47, 111 and 112, will all apply to the provision of testimony in such situations, but that rule 46 does not apply (protecting the confidentiality of the information). However, article 54, paragraph 3 (f) already provides that the Prosecutor may take necessary measures to ensure the confidentiality of information provided in relation to investigations. This article would apply to protect any information that a State may be requested to provide when the Prosecutor is deciding whether or not to commence an investigation under article 53, paragraph 1.

Note also that States may be requested to facilitate the voluntary appearance of witnesses before the Court at these early stages of the investigation, in accordance with article 54, paragraphs 3 (b) & (c), and article 93, paragraph 1 (e). However, it is not an obligation for a State to facilitate the voluntary appearance of witnesses providing testimony in accordance with article 15. This is because States Parties are only required to assist the Court with “its investigation and prosecution of crimes” (see article 86). Article 15 only refers to a “preliminary examination” (paragraph 6), prior to the Prosecutor’s request to the Pre-Trial Chamber for authorization of an investigation. However, once the Prosecutor has received this authorization from the Pre-Trial Chamber, there is no question that a State must respond to any requests made by the Prosecutor under article 54, paragraphs 3 (b) & (c), to facilitate the voluntary appearance of persons before the Court (note that this obligation is also discussed below, in section *c*) *Rules relating to victims and witnesses*). Clearly, it would greatly assist the work of the Prosecutor if States were willing to cooperate fully with the Prosecutor earlier in the process as well.

(ii) Rules relating to necessary investigative steps under article 18, paragraph 6 and article 19, paragraph 8 -

As described previously, the jurisdiction of the ICC is “complementary” to national jurisdictions, and therefore the ICC will defer to a State’s investigation or prosecution of an ICC crime in most instances (the exceptions are set out in article 17). Yet, the Prosecutor may still choose to apply to the Pre-Trial Chamber for authorisation to commence an investigation where a State has informed the Court that it is investigating persons within its jurisdiction with respect to criminal acts which may constitute crimes also within the jurisdiction of the ICC (article 18, paragraph 2). While the Pre-Trial Chamber is considering the Prosecutor’s application for authorisation to

commence an investigation, the Prosecutor may wish to preserve certain evidence, in case it turns out that the Pre-Trial Chamber authorises the Prosecutor to commence the investigation of the matter. Article 18, paragraph 6 allows the Prosecutor to seek authority on an exceptional basis from the Pre-Trial Chamber “to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available.”

Where the Pre-Trial Chamber makes the decision that the ICC will not defer to a particular State investigation or prosecution, the State that is already investigating or prosecuting the ICC crime, or a State whose acceptance of jurisdiction is required under article 12, or the accused person, may challenge the admissibility of the case before the ICC (see article 19, paragraph 2). Note that the Prosecutor may also seek a ruling from the Court regarding a question of jurisdiction or admissibility (article 19, paragraph 3). Where a State has made the admissibility challenge, the Prosecutor must suspend her/his investigation until the Court makes a determination in accordance with article 17 (see article 19, paragraph 7). While the Pre-Trial Chamber is considering any admissibility question, the Prosecutor may also need to collect and preserve certain evidence, for possible future use in the Prosecutor’s investigation. Article 19, paragraph 8 allows the Prosecutor to pursue necessary investigative steps of the kind referred to in article 18, paragraph 6, while the Pre-Trial Chamber is considering its decision on admissibility of the case. The Prosecutor may also “take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge” and, in cooperation with the relevant States, prevent the absconding of persons who are the subject of an ICC arrest warrant issued under article 58. Clearly, rules 111 and 112 apply to the taking of testimony in all situations.

Rules 57 and 61 add only one further clarification to this process – that applications to the Pre-Trial Chamber by the Prosecutor under either article 18, paragraph 6, or article 19, paragraph 8, will be considered *ex parte* and *in camera*. In other words, those who are challenging the admissibility of the case before the ICC will not be informed of the Prosecutor’s application to preserve evidence under either provision. The Pre-Trial Chamber must also rule on the application on an expedited basis. The objective of the Prosecutor’s applications under these provisions is to protect evidence while there is some uncertainty over the authority that will ultimately assume jurisdiction over a case. It is important that perpetrators and others cannot take advantage of such a lacunae, to destroy vital evidence or to escape to a jurisdiction that has no obligation to cooperate with the Court. Thus, an *ex parte* application process was considered appropriate in these circumstances, so that perpetrators and others would have no time to act before an order of the Pre-Trial Chamber takes effect.

These two rules clearly do not impose any obligations on States. However, in keeping with the spirit of these rules, they suggest that any State requested to assist the Prosecutor under such circumstances should act discreetly and swiftly in carrying out such requests.

(iii) Rules relating to a unique investigative opportunity under article 56 –

The Prosecutor must inform the Pre-Trial Chamber of any “unique investigative opportunity” to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial (article 56, paragraph 1 (a)). For example, the witness in question may be terminally ill and rapidly deteriorating, or certain

evidence may threaten to disappear quickly, such as footprints in mud or snow. Under article 56, paragraph 1 (b), the Pre-Trial Chamber may take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence. For example, where the arrested person is not yet represented by counsel, the Pre-Trial Chamber may appoint someone to observe the Prosecutor’s investigative steps and represent the interests of the defence. The Pre-Trial Chamber may also on its own initiative take measures to preserve evidence that it deems would be essential for the defence at trial (article 56, paragraph 3).

Rule 114, sub-rule 1 now sets out the procedures that the Pre-Trial Chamber must follow once the Prosecutor has advised the Chamber of a unique investigative opportunity. This provision is discussed further below, in section *d) Rules relating to the defence*. Rule 114, sub-rule 2 describes the requirements on the Pre-Trial Chamber when making a decision under article 56, paragraph 3, to act on its own initiative (see further below).

Where a person needs to be questioned in accordance with article 56, rule 112, sub-rule 5 now provides that the Pre-Trial Chamber may order the application of the procedure in rule 112 to the recording of the questioning. Rule 112 stipulates that in most cases an audio or video recording must be made, if the Prosecutor is questioning a person who is suspected of having committed a crime within the jurisdiction of the Court (this provision is discussed in more detail in section *d) Rules relating to defence issues and evidence*). Note that rule 112, sub-rule 4 also allows the Prosecutor to apply this procedure when questioning other persons.

While the onus will be on the Prosecutor to arrange for such a recording, where the person to be questioned cannot be transported to the Court from the territory of a State Party, the State may be asked to assist the Prosecutor by providing a suitable interview room and power supply for the equipment, or backup equipment in case the Prosecutor experiences technical difficulties. There may also be practical arrangements that a State could provide to facilitate the Prosecutor’s investigation, for example where the person to be questioned is being held in a correctional facility.

Note that the Prosecutor may only interview or take evidence on a voluntary basis from persons located in State Party territory, and in accordance with the procedures set out in article 99, paragraph 4, which allows the Prosecutor to execute certain requests directly on the territory of a State, where such requests may be executed without compulsory measures. The Prosecutor must follow the procedures outlined under that paragraph, including consultations with the relevant State. The RPE provides no further specific rules on this provision, although the Prosecutor will be obliged to observe all relevant rules relating to the execution of the particular request, such as recording any testimony given.

(iv) Rules relating to “specific investigative steps” under article 57, paragraph 3 (d) -

Where the Pre-Trial Chamber has determined that a State Party is “clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request”, the Chamber may authorise the Prosecutor to take “specific investigative steps” within the territory of that State Party, without having secured the cooperation of that State under Part 9, Rome Statute (see article 57, paragraph 3 (d)).

Note that the Pre-Trial Chamber must take into account the views of the State concerned, before making such a determination. Rule 115 now establishes a procedure for the Pre-Trial Chamber to follow for taking into account the views of the State in question. Where the Prosecutor considers that this article applies, s/he may submit a written request to the Pre-Trial Chamber for authorisation to take certain measures in the territory of the State Party in question. Once the Pre-Trial Chamber receives the request from the Prosecutor, the Chamber must make every effort to inform and invite views from the State Party concerned (rule 115, sub-rule 1). The Pre-Trial Chamber must then take into account any views expressed by the State Party, when determining whether the Prosecutor's request is well founded (rule 115, sub-rule 2).

The State Party or the Prosecutor may request the Pre-Trial Chamber to hold a hearing into the matter, or the Pre-Trial Chamber may decide on its own initiative to hold a hearing (rule 115, sub-rule 2). If the Pre-Trial Chamber decides to authorise the Prosecutor to proceed with specific investigative steps in accordance with article 57, paragraph 3 (d), the authorisation must be in the form of an order, and must state the reasons, based on the criteria set forth in that paragraph (rule 115, sub-rule 3). Note that the order of the Pre-Trial Chamber may specify procedures to be followed in carrying out such collection of evidence.

The situation envisaged by these provisions is the complete collapse of a State Party's judicial system and the unavailability of any other relevant authorities to respond to requests for assistance from the ICC. Nevertheless, these provisions recognise that an outsider may not fully appreciate certain aspects of State authority that may be able to operate under such circumstances. Therefore, the State Party in question is given every opportunity to convince the Pre-Trial Chamber that it is in a position to execute requests from the Court made under Part 9. It would be in the State's best interests to take advantage of these opportunities, if it is genuinely in a position to do so.

c) Rules relating to victims and witnesses

The testimony of victims and witnesses is often crucial to the successful prosecution of a case. Therefore, article 68 provides that the Court must protect the safety, well-being, dignity and privacy of victims and witnesses. In addition, article 68, paragraph 3 allows victims to present their views and concerns to the Court under certain circumstances. Article 43, paragraph 6, further provides that the ICC will have a Victims and Witnesses Unit within its Registry. This Unit will provide protective measures and security arrangements, counselling, and other appropriate assistance for witnesses and victims who appear before the Court, as well as others who are at risk on account of testimony given by such witnesses. Other provisions of the Rome Statute also deal with the issues relevant to reparations to victims. Which are discussed below in Chapter 2.6 Rules relating to enforcement of fines, forfeiture and reparations orders.

Different national jurisdictions may have a very different approach to the place of victims and witnesses in a criminal trial process. Therefore, the RPE elaborates in considerable detail on the role that victims and witnesses will play in all proceedings before the ICC, and the arrangements for protecting them adequately. Chapter 4 of the RPE, Section III, rules 85-99 deal exclusively with victims and witnesses, and there are other relevant rules on victims and witnesses throughout the RPE.

This section contains five sub-sections:

- (i) General rules on victims;
- (ii) Rules relating to protective measures;
- (iii) Rules relating to the testimony of victims and witnesses;
- (iv) Rules relating to facilitating the voluntary appearance of a person as a witness or expert before the Court; and
- (v) Rules relating to notification to victims.

Note also that several of the sub-topics covered previously in *a) General considerations relevant to collecting and preserving evidence for the ICC under the Rome Statute and RPE*, are relevant to the concerns of victims and witnesses and their interactions with the Court, especially (ii) Rules relating to principles of evidence in cases of sexual violence.

(i) General rules on victims

Rule 85 now provides a definition of victims for the purposes of both the Rome Statute and the RPE:

“(a) “Victims” means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;

(b) Victims may include organizations or institutions that have sustained direct harm to any of their property, which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.”

Rule 86 establishes a general principle in relation to victims, that all relevant organs of the Court must take into account the needs of all victims and witnesses in accordance with article 68, when they are carrying out their respective functions, in particular the needs of children, elderly persons, persons with disabilities and victims of sexual or gender violence. Rules 89-93 cover participation by victims and witnesses in proceedings. Note that victims may choose to have legal representation, and if a victim or a group of victims lacks the necessary means to pay for a common legal representative chosen by the Court, they may receive financial assistance from the Registry (rule 90, sub-rule 5).

Rules 16-19 provide more detail on the functioning and responsibilities of the Victims and Witnesses Unit, including the responsibilities of the ICC Registrar in relation to victims and witnesses. Note also rule 43, which obliges the Court to ensure that all documents subject to publication in accordance with the Statute and the RPE respect the duty to protect the confidentiality of the proceedings and the security of victims and witnesses. Restrictions on disclosure are also relevant to the Court’s protection of victims and witnesses – see rules 81 and 82.

Most of these rules are only directed to the Court. However, States may be requested to assist the Court with the protection of victims and witnesses, and with obtaining testimony from them, as well as facilitating the voluntary appearance of persons as witnesses or experts before the Court (see article 93, paragraphs 1 (a), (b), (e) & (j)). The remaining sub-sections highlight the

rules of particular relevance to States Parties who may be requested to assist the ICC in these ways.

(ii) Rules relating to protective measures -

Article 93, paragraph 1 (j) requires States Parties to protect victims and witnesses who are involved in ICC investigations or prosecutions, whenever requested to do so by the Court in accordance with Part 9. Article 54, paragraph 3 (f), article 64, paragraph 6 (e), and article 68 together provide that the Prosecutor and any of the Court's Chambers may request a State to provide such protective measures.

Rule 87 now sets out the procedures for the Court to follow when ordering protective measures for victims and witnesses, both before and during a trial. The Prosecutor, the defence, a witness, a victim, or his or her legal representative may all request the Court to order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness pursuant to article 68, paragraphs 1 and 2 (which describes special measures the Court may take to protect victims and witnesses when providing testimony to the Court, especially victims of sexual or gender violence or violence against children). The Prosecutor, the defence, and the witness or victim who is the subject of the request for protection must all be notified of the request, and be given the opportunity to respond (rule 87, sub-rule 2). The motion to the Court may be filed under seal, and the Chamber in question may decide to hold a hearing *in camera* to determine what protective measures are warranted (sub-rule 3). This procedure may lead to the Prosecutor or a Chamber of the Court requesting the cooperation of a State Party in providing some of those protective measures, either before, during, or after a trial. One such protective measure could be preventing the release to the public or to the national media of the identity or location of a victim (see rule 87, sub-rule 3). Victim and witness protection is covered in more detail in the Manual on implementation.

Where a State requests the cooperation from the Court under article 93, paragraph 10, in conducting its own investigation into a serious crime, the interests of victims and witnesses involved in any related ICC case are still relevant. Article 93, sub-paragraph 10 (b) (ii) b. provides that where the State is requesting statements, documents, or other types of evidence that have been provided to the ICC by a witness or expert, the transmission of such materials to the State will be subject to the provisions of article 68. Rule 194, sub-rule 3 now provides that if protective measures within the meaning of article 68 have been adopted by the Court, the relevant ICC authority must consider the views of the relevant victim or witness, as well as the views of the Chamber which ordered the measures, before deciding on the request from the State.

Note also rule 107, which is now relevant to the situation where the Prosecutor's decision not to initiate an investigation or not to prosecute is being reviewed in accordance with article 53, paragraph 3. Sub-rule 2 allows the Pre-Trial Chamber to request the Prosecutor to transmit relevant information and documents in the Prosecutor's possession to the relevant Chamber for review. Sub-rule 3 obliges the Pre-Trial Chamber to take such measures as are necessary under articles 54, 72 and 93 to protect the information and documents referred to in sub-rule 2 and, under article 68, paragraph 5, to protect the safety of witnesses and victims and members of their families. States Parties may be requested to implement related measures as well, for example where the information may reveal the location of a victim or witness within the State's territory, necessitating the implementation of protective measures for that victim or witness.

(iii) Rules relating to the testimony of victims and witnesses –

Article 55, paragraph 1 protects certain basic rights of all persons who are involved in ICC investigations, including victims and witnesses. All relevant national authorities are required to observe these rights, which include the right to a competent interpreter for the person being questioned, as well as the right to be free from coercion, torture, or any other form of cruel, inhuman or degrading treatment or punishment. Rule 111 also applies now, wherever such persons are questioned in connection with an investigation or proceedings before the ICC. Sub-rule 2 states that when the Prosecutor or national authorities question a person, “due regard” must be given to article 55.

Rule 111, sub-rule 1 requires that a record be made of formal statements made by any person who is questioned in connection with an investigation or with proceedings. The requirements for this record are set out under this sub-rule, including a list of all persons present during the questioning. Note that the procedure for electronically recording statements, which is elaborated under rule 112, may also be followed when the Prosecutor is questioning particularly vulnerable victims and witnesses, such as children (rule 112, sub-rule 4).

Article 69, paragraph 2 provides that witnesses at trial must give their testimony in person, except to the extent provided for by the measures set forth in article 68 or in the RPE. However, this provision also allows the giving of *viva voce* (oral) evidence or recorded testimony of a witness by means of audio or video technology, as well as the introduction of documents or written transcripts, in certain circumstances. Note that none of these measures are allowed to be prejudicial to, or inconsistent with, the rights of the accused.

Rule 67 now establishes the requirements for live testimony given by means of audio or video-link technology in accordance with article 69, paragraph 2. The technology being used must permit the witness to be examined by the Prosecutor, the defence, and by the Chamber itself, at the time that the witness testifies (sub-rule 1). The venue chosen for the witness to give such testimony must be conducive to the giving of truthful and open testimony and to the safety, physical and psychological well-being, dignity and privacy of the witness (sub-rule 3). Where such a witness is located in State Party territory, that State may be requested to make available such a venue, in accordance with its obligations relating to victims and witnesses under article 93.

Rule 68 elaborates the requirements for the submission of prior recorded testimony into evidence, where the Pre-Trial Chamber has not already taken measures under article 56 (see discussion above under sub-section (b) (iii) “Rules relating to a unique investigative opportunity under article 56”). Prior recorded testimony may be in the form of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony. If the witness is present before the Trial Chamber, s/he has the opportunity to object to the submission of the previously recorded testimony. If the witness consents to its submission, the Prosecutor, the defence and the Chamber must have the opportunity to examine the witness during the proceedings (rule 68, sub-rule (b)). If the witness is not present before the Trial Chamber, both the Prosecutor and the defence must have had the opportunity to examine the witness during the recording (paragraph (a)).

Where it is clear that a witness being questioned by national authorities is unlikely to be able to attend the ICC subsequently, those national authorities may be requested to record the testimony of the witness, in accordance with article 93, paragraph 1 (b) and rule 111. In such cases, those

national authorities should also familiarise themselves with rule 66, which describes the administration of a solemn undertaking in accordance with article 69, paragraph 1. National authorities should also cooperate with the Prosecutor and the defence, to ensure the latter's unimpeded access to the witness during the recording of the testimony.

Once a person appears before the Court, that person is compellable by the Court to provide testimony, unless otherwise provided for in the Statute and the RPE (see rule 65, sub-rule 1). Note that witnesses may be sanctioned by the Court for refusing to provide testimony (see rule 65, sub-rule 2 and rule 171). Rules 73, 74 and 75 are particularly relevant to the issue of compellability of witnesses (see rule 65, sub-rule 2). Rule 73 concerns privileged communications, which are also discussed above in section *a*) (i) Rules relating to privileged communications. Rule 75 provides that witnesses are not required to incriminate their spouses, children or parents, although they may choose to do so. Rule 74 addresses self-incrimination by a witness, and provides extensive procedural requirements where there is a possibility that a witness may incriminate herself or himself by providing answers to certain questions. The Court must notify a witness of the provisions of rule 74 before her or his testimony, unless the person has already been notified in accordance with rule 190 (see next paragraph). The Court may also provide an assurance with respect to self-incrimination to a particular witness (rule 74, sub-rules 2 and 3). In such cases, the Court must then follow the procedures in rule 74, sub-rule 7 for the disclosure of the self-incriminating testimony, including ordering protective measures to hide the identity of the witness.

All of these rules may have implications for national authorities who have been requested by the ICC to question a victim or witness, or to obtain formal testimony from a victim or witness, even though rules 73 to 75 are directed towards the Court. Clearly the Court would likely find inadmissible any evidence collected by national authorities in breach of these rules.

(iv) Rules relating to facilitating the voluntary appearance of a person as a witness or expert before the Court

Article 93, paragraph 1 (e) requires States Parties to facilitate the voluntary appearance of persons as witnesses or experts before the Court. Note that witnesses and experts cannot be forced to appear before the Court, but once they are in front of the Court they can be forced to testify, except in certain circumstances, as mentioned previously (see rule 65). The Court must provide an assurance with respect to self-incrimination before any witness attends the trial (rule 74, sub-rule 2). The Court may provide this assurance directly, or pursuant to the request for cooperation made to the State Party (rule 74, sub-rule 2). Whenever the Court is making a request under article 93, paragraph 1 (e) with respect to a witness, the request must have an instruction attached, which describes rule 74 in a language that the person fully understands and speaks (see rule 190). This instruction should be provided to the witness by the relevant national authority as soon as possible.

Article 93, paragraph 2 allows the Court to provide another type of assurance to a witness or an expert appearing before the Court, that s/he will not be prosecuted, detained or subjected to any restriction of personal freedom by the Court in respect of any act or omission that preceded the departure of the person from the requested State. Rule 191 clarifies that the Chamber dealing with the case may provide such an assurance on its own motion or at the request of the Prosecutor, defence or witness or expert concerned, and taking into account the views of the

Prosecutor and the witness or expert concerned. Although neither the Rome Statute nor the RPE specify that this type of assurance must be provided by the Court before the witness attends, it would be helpful if national authorities could assist the Court with the provision of the assurance to a witness who is still in their territory, in order to facilitate the voluntary appearance of the person before the Court.

Article 93, paragraph 7 is relevant to facilitating the voluntary appearance of a special type of witness before the Court – someone who is in custody in a State detention facility. Under this provision, the ICC may request the temporary transfer of a person in custody in a State, for the purposes of identification or for obtaining testimony or other assistance with respect to an ICC investigation or prosecution. The person in question and the custodial State must both consent to the transfer (see sub-paragraphs (a), (i) & (ii)). Rules 192-193 now provide further detail on the arrangements for transferring such a person to the ICC. These are discussed in detail in section *i*) *Rules relating to transferring persons in custody*, in **Chapter 2.4 Rules relating to arrest, surrender, transfer of accused persons, and summonses**.

The *Agreement on the Privileges and Immunities of the International Criminal Court*, when it enters into force, will also become relevant to facilitating the appearance of witnesses and experts before the Court. It contains several provisions relating to the privileges, immunities and facilities necessary for their appearance before the Court for the purposes of giving evidence. The Agreement must be ratified by States in addition to their ratification of the Rome Statute, since it provides for some additional obligations to those set out in the Statute. These additional obligations also need to be implemented into national laws, and the most convenient way to do this is at the same time as the State is implementing the Rome Statute, since there is so much in common in terms of the ICC's cooperation regime and the purpose of the two treaties. The Agreement will enter into force thirty days after the deposit with the Secretary-General of the tenth instrument of ratification, acceptance, approval or accession (see article 34, *Agreement on the Privileges and Immunities of the International Criminal Court*, available via the ICC website). At the time of writing, two States had become Parties to this Agreement, suggesting that the Agreement will most likely enter into force some time in 2003.

(v) Rules relating to notification to victims -

Article 68, paragraph 3 provides that the Court must permit the views and concerns of victims to be presented and considered at certain stages of the proceedings, wherever the personal interests of such victims are affected. The Court will determine when such interventions would be appropriate, taking into account the rights of the accused and the need for a fair and impartial trial. Note that the views and concerns of victims may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the RPE. Rules 89-91 establish procedures to allow victims and their legal representatives to participate in ICC proceedings. Rule 93 also allows the Court to seek the views of victims and their legal representatives on any issue, *inter alia*, in relation to issues referred to in rules 107, 109, 125, 128, 136, 139, and 191 (most of which pertain to decisions the Court needs to make on how and in what circumstances the next stage of a particular proceeding will go forward).

If victims are to be prepared adequately for such participation and presentations, they need to be kept informed of the progress of an investigation or trial that may affect their personal interests. Rules 50 and 59 now provide specific guidance to the Court in relation to notifying victims of

certain decisions and proceedings prior to the authorization of an investigation by the Pre-Trial Chamber, or when there is a challenge to the jurisdiction or admissibility of a case before the ICC. Rule 144 also stipulates that most of the decisions of the Trial Chamber must be pronounced in public, wherever possible in the presence of the accused, the Prosecutor, the victims, or the legal representatives of the victims participating in the proceedings pursuant to rules 89-91. Rule 151 obliges the Registrar to notify all parties who participated in the proceedings that an appeal has been filed. In the event of a conviction, rule 96, sub-rule 1 requires the Registrar to notify the victims or their legal representatives and the person or persons concerned, of the details of any hearings on reparations. The Registrar must also take all necessary measures to give adequate publicity of reparations proceedings before the Court to other victims, interested persons and interested States. Rule 143 also allows certain victims and their legal representatives to request postponement of an additional hearing on matters relating to reparations, where article 76, paragraphs 2 and 3 apply.

Rule 92 sets out some additional provisions on notification to victims, which are of particular relevance to States Parties, as they may require the cooperation of States Parties in accordance with Part 9, Rome Statute. Rule 92, sub-rule 2 requires the Court to notify victims concerning the decision of the Prosecutor not to initiate an investigation or not to prosecute pursuant to article 53. This notification must be given to victims or their legal representatives who have already participated in the proceedings or, as far as possible, to those who have communicated with the Court in respect of the situation or case in question. The notification is intended to allow victims to apply for participation in proceedings, such as any review by the Pre-Trial Chamber of the Prosecutor's decision under article 53. The sub-rule also allows the Court to order the Registrar to take "necessary measures" to give adequate publicity to the proceedings. Sub-rule 8 allows the Registrar to seek the cooperation of States Parties in publicising such proceedings at the request of one of the Court's Chambers, as well as any other proceedings, in accordance with article 93, paragraphs 1 (e) and (l).

Rule 92, sub-rule 3 provides that the Court must also notify victims regarding its decision to hold a hearing to confirm charges pursuant to article 61. Again, this notification is intended to allow victims to apply for participation in the proceedings. Sub-rule 8 provides that the Registrar must take necessary measures to give adequate publicity to the proceedings referred to in sub-rule 3. The Registrar may also seek the cooperation of relevant States Parties, in accordance with Part 9, in notifying victims of the proceedings. This notification must be given to victims or to their legal representatives who have already participated in the proceedings or, as far as possible, to those who have communicated with the Court in respect of the case in question.

Rule 92, sub-rule 5 details the information that the Registrar is required to provide to victims or to their legal representatives participating in proceedings, other than proceedings under Part 2. Sub-rule 7 provides that the Registrar may seek the cooperation of States Parties in providing such notification, in accordance with article 93, paragraphs 1 (d) and (l). The Registrar or the requested State Party must notify the victims or their legal representatives in a timely manner of relevant proceedings before the Court, including the date of hearings and any postponements thereof, and the date of delivery of the decision (see rule 92, sub-rule 5, paragraph (a)). The Registrar or requested State must also notify the victims or their legal representatives of any requests, submissions, motions, and other documents relating to such requests, submissions or motions, in a timely manner (see sub-rule 5, paragraph (b)).

Rule 92, sub-rule 6 provides that where victims or their legal representatives have participated in a certain stage of the proceedings, the Registrar shall notify them as soon as possible of the decisions of the Court in those proceedings. Again, sub-rule 7 provides that the Registrar may seek the cooperation of States Parties in providing such notification, in accordance with article 93. Sub-rule 7 also provides that notifications under sub-rules 5 and 6 shall be in writing or, where written notification is not possible, in any other form as appropriate. The Registry must also keep a record of all notifications.

Rule 92, sub-rule 4 applies where a notification for participation under sub-rules 2 and 3 has been given, including notification by a State Party as described above. The requirements for subsequent notification under sub-rules 5 and 6 only apply to victims or their legal representatives who have been authorised to participate in the proceedings in accordance with a ruling of the Chamber pursuant to rule 89 and any modification thereof. The Court and States requested to assist the Court's Registrar, are not required to notify all known victims of every proceeding, if the victims have not established their credentials to participate in the proceedings in accordance with rules 89-91.

Rule 96 addresses the requirements for publication by the Court of reparations proceedings. Without prejudice to any other rules on notification, and insofar as practicable, the Registrar must notify the victims or their legal representatives and the person or persons concerned (sub-rule 1). The Registrar must also take all necessary measures to give adequate publicity of the reparations proceedings before the Court, to the extent possible, to other victims, interested persons and interested States, having regard to any information provided by the Prosecutor. Rule 96, sub-rule 2 provides that the Court may seek the cooperation of relevant States Parties, in accordance with Part 9, in order to give publicity, as widely as possible and by all possible means, to the reparation proceedings before the Court. The Court may also seek the cooperation of intergovernmental organisations in publicising reparations proceedings.

d) Rules relating to defence issues and evidence

The ICC will generally take an "adversarial" approach to the trial of accused persons. In other words, the Prosecution and the defence will be allowed "equality of arms", in order to present to the Court both sides of the argument as to whether the accused is guilty of a particular crime or not, based upon the presumption of innocence of the accused. The Prosecutor has an onus to prove the guilt of the accused to the judges, who will then make the decision as to whether or not the person is guilty beyond reasonable doubt (see articles 66 and 67). The ICC also contains some features from the "inquisitorial" approach to criminal trials, such as the requirement on the Prosecutor to "investigate incriminating and exonerating circumstances equally" during the pre-trial phase (article 54, paragraph 1 (a)); the active participation of victims in the proceedings (article 68); and the power of the Court to "request the submission of all evidence that it considers necessary for the determination of the truth" (see article 69, paragraph 3).

However, the conduct of the trial will mostly have an adversarial character, with the accused having the right to be present at the trial, to examine witnesses brought against him/her, to bring his/her own witnesses before the Court, to remain silent without such silence being a consideration in the determination of guilt or innocence, and to raise defences provided for under the Rome Statute (these defences are outlined in Part 3, Rome Statute). During preparations for the trial, the defence is also entitled to request a wide range of assistance in preparing the defence

case, from the Prosecutor and from the Court, including orders for the cooperation of States Parties. This may be an unfamiliar approach in many jurisdictions, who will have to adopt special laws and procedures to ensure that persons accused by the ICC of committing ICC crimes have the full cooperation of national authorities who may have dealings with them, as well as with members of their defence team.

The general rights of the accused are set out in articles 55 and 67. Article 55 covers the situation where a suspect is about to be questioned by the Prosecutor or by national authorities acting pursuant to a request for cooperation made under Part 9. These rights are discussed in more detail in the sub-sections below. Article 67, paragraph 1 provides, *inter alia*, that all accused persons are entitled to a fair hearing conducted impartially, as well as certain minimum guarantees as set out in that paragraph. Article 67, paragraph 2 addresses the obligation on the Prosecutor to disclose all evidence relevance to the defence case. The RPE does not add any additional rights to these, but it does provide more detail on how these rights must be respected in practice.

Rule 20 now provides that the ICC Registrar will have special responsibilities relating to the rights of the defence, from the moment the person becomes a suspect. These responsibilities are set out under that rule, and include assisting arrested persons in obtaining legal advice, providing facilities to the defence for the direct performance of its duties, and cooperating with national defence and bar associations to promote the specialization and training of lawyers in the law of the Statute and the Rules. Other parts of the RPE also clarify the general requirements under articles 55, 66 and 67 for respecting and protecting the rights of the accused, which may have an impact upon States Parties who are cooperating with the ICC.

Note that several provisions in the Rome Statute also provide that the Court may order protective measures for the accused at various stages of the proceedings: article 54, paragraph 3 (f); article 57, paragraph 3 (c); and article 64, paragraph 6 (e). These protective measures may be necessary where the accused's life or health is seriously at risk, which may cause a serious miscarriage of justice, especially if the person turns out to be innocent of any crime. Protection of the accused's life, as well as his/her general health and well-being is implicit in the right to a fair trial. For example, rule 113 allows the Pre-Trial Chamber to order a medical, psychological or psychiatric examination of a suspect who is about to be questioned in relation to the alleged crime, in accordance with article 55, paragraph 2. Article 93 contains no explicit reference to requests to States Parties for the protection or medical examination of the accused, so this type of request would have to fall within sub-paragraph 1 (l) – “any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.” There appear to be no rules to elaborate further on these provisions, so this issue is not discussed further in this supplement. However, States Parties should be prepared to offer appropriate protection to an accused person, in the interests of a fair trial.

This section is organised into four sub-sections:

- (i) Rules relating to questioning of accused persons/suspects;
- (ii) Rules relating to counsel for the accused;
- (iii) Rules relating to collection of evidence for the defence;
- (iv) Other rules relating to the right to a fair trial.

(i) Rules relating to questioning of accused persons/suspects

Article 93, paragraph 1 (c) requires States Parties to comply with requests from the Court to provide assistance by questioning any person being investigated or prosecuted. Article 55, paragraph 2 sets out the rights of a person about to be questioned either by the ICC Prosecutor, or by national authorities pursuant to a request made under Part 9, where there are grounds to believe that the person has committed a crime within the jurisdiction of the ICC. The rights of the person must be respected by all national authorities involved in the questioning process, and must be communicated to the person before being questioned (article 55, paragraph 2). Otherwise the information provided by the person at this point may not be admissible later as evidence before the ICC (see article 69, paragraph 7).

The person's rights under article 55, paragraph 2 are: (a) to be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court; (b) to remain silent, without such silence being a consideration in the determination of guilt or innocence; (c) to have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and (d) to be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel. These rights reflect widely-recognised international human rights standards, and are discussed in more detail in the Manual on implementation, mentioned previously.

Rule 111 now stipulates an additional requirement: that a record must be made of any formal statements made by any person who is questioned in connection with an investigation or with proceedings, including a person who is suspected of having committed a crime within the jurisdiction of the ICC. Rule 111, sub-rule 1 provides that this record must be signed by the person who records and conducts the questioning and by the person who is questioned, as well as his or her counsel, if present. If applicable, any judge who is present, or the ICC Prosecutor, if present, must also sign the record of questioning. The record must also note the date, time, and place of all persons present during the questioning. It must also be noted when someone has not signed the record as well as the reasons why (rule 111, sub-rule 1). Where the person being questioned is suspected of having committed a crime within the jurisdiction of the ICC, it must be noted in the record when the person has been provided with the required information as to his or her rights under article 55, paragraph 2 (see rule 111, sub-rule 2).

In addition, rule 111, sub-rule 2 requires the ICC Prosecutor, and national authorities, when questioning the person, to give "due regard ... to article 55." This part of rule 111, sub-rule 2, does not specify that paragraph 2 of article 55 is the only relevant paragraph of that article. This means that the ICC Prosecutor and national authorities must also give "due regard" to paragraph 1 of article 55, when questioning a person who is suspected of committing an ICC crime. Article 55, paragraph 1 contains the following rights: (a) shall not be compelled to incriminate himself or herself or to confess guilt; (b) shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment; (c) shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and (d) shall not be subjected to arbitrary arrest or

detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in the Rome Statute.

This rule does not place any additional obligations on national authorities, although it strongly suggests that the onus is on national authorities, and the Prosecutor, when questioning suspects, to ensure that these minimal rights are protected as much as possible. These rights are drawn from international human rights norms and widely-supported multilateral treaties such as the Convention Against Torture, and the International Covenant on Civil & Political Rights. Therefore, most States will already have implemented these norms and standards into their criminal justice systems, and their national authorities will be trained already to ensure that they are aware of the need to protect these rights whenever they are questioning suspects. Note that the ICC is generally responsible for paying the costs of translation, interpretation and transcription where a State is executing a request from the Court (article 100, paragraph 1 (a)). However, national authorities may be requested to help identify suitably qualified translators, interpreters or transcription services within their territory.

Rule 112 additionally requires the Prosecutor to record the questioning of a suspect either by audio or video means, whenever the Prosecutor is questioning the suspect, or questioning a person for whom a warrant of arrest or a summons to appear has been issued under article 58, paragraph 7. The rule sets out in detail the appropriate procedure for the Prosecutor to follow in such cases, and only provides for very limited exceptions to the rule (sub-rules 1-3). National authorities may also wish to make audio- or video-recordings of the questioning of a suspect pursuant to a request from the ICC, in order to ensure that the Court has access to the most accurate reproduction of the questioning, a better sense of the demeanour and physical condition of the suspect, and the general atmosphere of the questioning session. All of this information could be very helpful to the Court in the course of the trial, when it is considering whether the information being provided by the suspect is true or not. If national authorities decide to make an audio- or video-recording of the questioning, they should also follow the procedure in rule 112, whenever possible, in order to provide a consistent standard of evidence to the Court.

Note also rule 112, sub-rule 5, which allows the Pre-Trial Chamber to order that the procedure set out in rule 112 must be applied to the questioning of any person, where there is a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial (see article 56, paragraph 2). This situation could arise where a suspect or a person who has already been arrested is gravely ill, and may not make it to the trial, but the testimony of that suspect may be helpful to another trial, as well as in the case that the person does recover and the original trial goes ahead. In such a situation, national authorities may be requested by the Pre-Trial Chamber, in accordance with article 56, paragraph 2, to make an audio- or video-recording of the questioning of a suspect, where there is this kind of unique investigative opportunity. Article 99, paragraph 1 requires a requested State to execute all requests for assistance “in the manner specified in the request, including following any procedure outlined therein” as long as this is not prohibited by State law. States must also follow “the relevant procedure under the law of the requested State”. Note also that the interests of the other accused person may be represented during the questioning by counsel (article 56, paragraph 2 (d)), and that States Parties must permit any person specified in the request to be present at the execution of that request (article 99, paragraph 1).

Rule 113 is also relevant to the situation where a person is about to be questioned either by the Prosecutor or by national authorities, and where there are grounds to believe that the person has committed a crime within the ICC’s jurisdiction (article 55, paragraph 2). Rule 113, sub-rule 1 allows the Pre-Trial Chamber to order that the person in question be given a medical, psychological or psychiatric examination, before or after the questioning begins. The Pre-Trial Chamber may make such an order on its own initiative, or the order may be made at the request of the Prosecutor, the person concerned, or his or her counsel. National authorities are not required to organise such an examination, and in fact only the Pre-Trial Chamber may appoint the expert to undertake the examination, who must be on a list of experts approved by the Registrar, or be an expert approved by the Pre-Trial Chamber at the request of a party. However, national authorities questioning a suspect must be sensitive to this rule, and not continue to question a person who has requested such an examination, unless the person consents. National authorities should also facilitate any application the suspect or the suspect’s counsel wishes to make under this rule. In addition, State officials may be required to organise an expedited visa for the relevant expert to be able to conduct the examination on the State’s territory, as soon as possible. As mentioned previously, ensuring the mental and physical well-being of a suspect is an important part of the fair trial process, which has now been emphasised further in this rule.

Rule 73 on privileged communications and information is also relevant to the questioning of an accused person or suspect, since such persons have the right under the Rome Statute to communicate freely with counsel in confidence (article 67, paragraph 1 (b) and article 69, paragraph 5). The provisions of rule 73 are discussed in detail in section *a) General considerations relevant to collecting and preserving evidence for the ICC under the Rome Statute and the RPE*, above.

Note also rule 75, which provides that no witness appearing before the Court who is a spouse, child or parent of an accused person can be required to make any statement that might tend to incriminate that accused person. This rule should be kept in mind if national authorities have been requested to take evidence from a spouse, child or parent of an accused person within their jurisdiction, in accordance with a request from the ICC under article 93, paragraph 1 (b). Any information gleaned from the relative of the accused person that may tend to incriminate that accused person will not be admissible before the ICC. Therefore, close relatives of accused persons, as specified in the RPE, should definitely not be forced by national authorities to provide information that may tend to incriminate the accused person to whom they are related.

(ii) Rules relating to counsel for the accused

One of the rights under article 55, paragraph 2 mentioned above, is the right of a suspect or accused person to have legal assistance of her or his choosing, or, if the person does not have legal assistance, to have legal assistance assigned to her/him. This issue is covered in detail above, in **Chapter 2.4 Rules relating to arrest, surrender, transfer of persons in custody, and summonses**, section *d) Rules relating to defence counsel*.

Rules 20 to 22 set out the ICC’s responsibilities in relation to accused persons and their counsel, including assisting persons “to whom article 55, paragraph 2, applies”, to obtain suitably qualified legal counsel. One issue that has yet to be clarified is the exact procedure for appointment of legal representation of a suspect where the person has not been arrested, but

needs to be questioned by national authorities on State territory, and article 55, paragraph 2 applies. There is a need to ensure timely coordination between national authorities and the ICC, so that the person's rights are protected from the very beginning of making the arrangements for the questioning.

Rule 117, sub-rule (2) is only relevant where the person has already been arrested, since it provides: "At any time after arrest, the person may make a request to the Pre-Trial Chamber for the appointment of counsel" (note that this sub-rule is discussed in detail in **Chapter 2.4**, section *d*), above). Where the person has not been arrested but is being questioned in the circumstances envisaged by article 55, paragraph 2, the procedures for assignment of legal assistance have yet to be worked out. Rule 21 provides that the "criteria and procedures for assignment of legal assistance [in such circumstances] shall be established in the Regulations, based on a proposal by the Registrar, following consultations with any independent representative body of counsel or legal associations, as referred to in rule 20, sub-rule 3." Rule 14 enables the Registrar to put in place regulations to govern the operation of the Registry, which must then be approved by the Presidency. Rule 14, sub-rule 2 specifically provides that the regulations must provide for defence counsel to have access to appropriate and reasonable administrative assistance from the Registry. This would include timely information as to the whereabouts of a suspect who has requested counsel, in the circumstances presently under discussion.

Presumably, if a person being questioned by national authorities under article 55, paragraph 2, has to make a request for legal assistance to the Pre-Trial Chamber in The Hague, under the forthcoming Regulations, this will take some time to process, given the geographical distances involved, unless the person is being questioned in The Netherlands. Thus, national authorities may be required to facilitate the appointment of local "interim" counsel, in situations where the questioning of the suspect needs to be carried out expeditiously. The Registrar's Regulations will clarify this, therefore national authorities of States Parties should ensure they have a copy of these Regulations once they have been adopted.

The international legal community has already taken up the challenge to establish a representative body to assist the ICC with the management of legal assistance and with developing a Professional Code of Conduct for counsel appearing before the ICC, as suggested in rule 20, sub-rule 3. At the time of writing, considerable progress has been made already towards the creation of an International Criminal Bar for the ICC, in accordance with rule 20, sub-rule 3, which would include both defence counsel and legal representatives of victims, as well as organisational membership. This new organisation will assist the Registrar with the development of efficient procedures for the assignment of legal counsel in the situations described previously, amongst other matters, as specified in the RPE. Those working to create the International Criminal Bar (ICB) are preparing a "Draft Code of Conduct for Counsel in the ICC", in consultation with all interested stakeholders, and will be applying for the ICB to become an Association under the law of The Netherlands. More information about the International Criminal Bar is available at its website (currently in French only): <http://www.bpi-icb.org>, and from the website of the International Criminal Defence Attorneys' Association (in French, English and Spanish): <http://www.hri.ca/partners/aiad-icdaa/>

Note also that on 20 February 2003, the International Bar Association (IBA) presented to the ICC a "Code of Practice for counsel appearing before the Court". This Code of Practice was prepared after extensive consultations with all interested stakeholders, and would apply to all defence lawyers before the Court, with a recommendation that victims' counsel, *amicus curiae*

and state counsel also fall within its jurisdiction. Among its key recommendations, the IBA believes the Code should be given prevalence over the national code, or any other code, by which counsel at the ICC is bound (the Code of Practice and an explanatory Press Release are available via the website of the International Bar Association: <http://www.ibanet.org/>).

Clearly the ICC Registrar will need to take into account the recommendations of both the IBA and the ICB when proposing to the Presidency a draft “Code of Professional Conduct” for all counsel appearing before the ICC, in accordance with rule 8 and rule 20, sub-rule 3. Note that the Assembly of States Parties must adopt the draft Code before it comes into effect (rule 8, sub-rule 2). Note also that the International Association of Prosecutors is preparing a separate “Code of Professional Conduct for Prosecutors of the International Criminal Court”, even though in many jurisdictions defence and prosecution lawyers are often under the supervision of the same “bar association” and/or “law society”, and adhere to exactly the same professional standards. Members of the ICC Office of the Prosecutor (OTP) are in a different category from many domestic prosecution services, as they are not allowed to “seek or act on instructions from any external source”, such as a bar association (article 42, paragraph 1). Therefore they need their own separate Code, which may or may not be included within the regulations that the Prosecutor must put in place to govern the operation of the OTP (see rule 9).

(iii) Rules relating to collection of evidence for the defence

Under article 54, paragraph 1 (a), in order to establish the truth, the ICC Prosecutor must extend the investigation of any crime to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under the Rome Statute, and in doing so, investigate incriminating and exonerating circumstances equally. In other words, the Prosecutor must not only collect evidence that would tend to prove the guilt of the accused, but must equally pay attention to any evidence that may tend to exonerate the accused. The Rome Statute also provides that the Prosecutor must disclose certain information and evidence to the defence during the pre-trial process, in the interests of justice (see article 61, paragraph 3 (b)). Rules 76-84 now provide more detail on the procedures and requirements for disclosure during all stages of the trial process, including certain restrictions on disclosure, such as where information has been provided in confidence (rules 81-82).

As soon as practicable before the trial begins, the Prosecutor is obliged to disclose to the defence all evidence in the Prosecutor’s possession or control which the Prosecutor believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence, and subject to the guidance of the Court if there is any doubt (article 67, paragraph 2, and rule 83; see also article 64, paragraphs 3 (c) and 6 (d), and rules 84, 132, and 134).

Thus, when States Parties are requested to assist the Prosecutor with the collection or preservation of evidence, in accordance with article 93, paragraph 1, this evidence may be for the benefit of the defence of the accused. Article 93 does not distinguish between “incriminating and exonerating” evidence, when it requires States Parties to collect and preserve evidence for the purposes of an ICC investigation or prosecution. National authorities collecting and preserving evidence for the ICC should not make any distinction either, in terms of the quality and thoroughness of their collection and preservation processes. Otherwise, the ICC may find that the trial of the accused was not a fair trial, and may overturn a conviction that turns out to

have been based on tainted, or an omission of, evidence collected by national authorities for the intended benefit of the defence.

Under article 56, paragraphs 1-2, which apply to a “unique investigative opportunity” that has been identified by the Prosecutor (discussed above), the rights of the defence must be protected at this point by the Pre-Trial Chamber (paragraph 1 (b)). Article 56, paragraph 3, further provides that the Pre-Trial Chamber may, on its own initiative, order such measures as are required to preserve evidence that it deems would be essential for the defence at trial, where it considers there is a “unique investigative opportunity” that the Prosecutor has not identified (see also rule 114, sub-rule 2). National authorities may be requested to assist the Pre-Trial Chamber in these respects, by facilitating various arrangements that may need to be made on the State’s territory. The Prosecutor must inform the person who has been arrested, or appeared in response to a summons, of the “unique investigative opportunity”, and give the person the opportunity to be heard on the matter, unless the Pre-Trial Chamber orders otherwise (paragraph 1 (c); see also rule 114, sub-rule 1). If the person has been arrested but not yet transferred to the Court from State territory, State authorities may have to facilitate communications between the person and the Prosecutor and Pre-Trial Chamber, as well as between the person and her/his counsel.

Where the person who has been arrested, or appeared before the Court in response to a summons, has obtained the assistance of counsel, the Pre-Trial Chamber may authorise that counsel to participate in the “unique investigative opportunity” (article 56, paragraph 2 (d)). If the person has not yet been arrested or has not yet appeared in response to a summons, or counsel has not yet been designated, the Pre-Trial Chamber may appoint another counsel to attend and represent the interests of the defence (*ibid*). Rule 114, sub-rule 1 specifically provides that the Pre-Trial Chamber may order measures to ensure protection of the right of the accused person to communicate with counsel under article 67, paragraph 1 (b), in these circumstances, which may require the assistance of States Parties. If the “unique investigative opportunity” arises on State Party territory, no matter where the accused person is at that stage of the investigation, that State will also need to facilitate the attendance of any counsel representing the interests of the defence, if the Pre-Trial Chamber so orders.

Several other provisions in the Rome Statute provide for the collection or preservation of evidence or other measures specifically for the defence, in order to ensure a full “equality of arms” when both parties are preparing for the trial. Article 67, paragraph 1 (b) gives the accused the right “to have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused’s choosing in confidence”. Some aspects of this right have been discussed in several sections of this guide already: section *d) Rules relating to defence counsel*, in **Chapter 2.4 Rules relating to arrest, surrender, transfer of persons in custody, and summonses**; and sub-section (ii) “Rules relating to counsel for the accused”, immediately above. Rule 73 is particularly relevant to this provision, as it establishes a presumption that communications made in the context of the professional relationship between a person and his/her legal counsel shall be regarded as privileged and consequently not subject to disclosure. The rest of that rule outlines the situations where this presumption will not apply, as well as discussing other instances where communications between people may be regarded as privileged, for the purposes of ICC proceedings. Rule 73 is discussed in detail in sub-section (ii) Rules relating to privileged communications, in section *(a) General considerations relevant to collecting and preserving evidence for the ICC under the Rome Statute and the RPE*, of this Chapter.

Article 57, paragraph (3)(b) provides that an accused person who has been arrested, or has appeared pursuant to a summons, may request the Pre-Trial Chamber to order measures such as those described in article 56 (in relation to a “unique investigative opportunity” - discussed above), “or seek such co-operation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence”. In other words, once an accused person has been arrested or has appeared pursuant to a summons, that person may request the ICC to order national authorities to provide assistance with any form of co-operation that is envisaged under Part 9 of the Rome Statute. This would include, for example, interviewing witnesses who could testify on behalf of the defence, and collecting evidence that would help exonerate the accused. The Office of the Prosecutor may not be involved at all in the execution of the request, and national authorities may have to take direction from the defence team – but this would have to be stipulated in the request from the Pre-Trial Chamber.

Rule 116 now sets out the considerations that the Pre-Trial Chamber must take into account when deciding whether to issue such an order: “(a) That such an order would facilitate the collection of evidence that may be material to the proper determination of the issues being adjudicated, or to the proper preparation of the person’s defence; and (b) In a case of co-operation under Part 9, that sufficient information to comply with article 96, paragraph 2, has been provided.” Therefore, the Pre-Trial Chamber would only make such an order where the evidence is important to the conduct of a fair trial, and where the defence is able to provide “as much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided”, as well as a sound legal basis and other requirements of requests for assistance under article 93 (see article 96, paragraphs 1 and 2). National authorities must treat such requests for assistance with the same diligence as a request from the Prosecutor, or from the Pre-Trial Chamber, for assistance in collecting evidence for the Prosecutor. Otherwise there will no “equality of arms” at the trial.

Note that the defence is required to permit the Prosecutor to inspect any books, documents, photographs and other tangible objects in the possession or control of the defence, which are intended for use by the defence as evidence for the purposes of the confirmation hearing or at trial (rule 78). This does not mean that the Prosecutor is entitled to question witnesses for the defence, or even to know the identity of all defence witnesses prior to the trial (see article 68, paragraph 5, and rule 81, sub-rules 3, 4 and 6). However, if the defence wishes to raise the existence of an alibi, or raise a ground for excluding criminal responsibility provided for under article 31, paragraph 1, the defence must disclose the names of witnesses relevant to the alibi or relevant to the grounds for excluding criminal responsibility (rule 79). The Court may also order the disclosure of other evidence held by the defence (rule 79, sub-rule 4 and rule 84).

It should also be noted that all of the rules pertaining to witnesses, discussed above, apply equally to defence witnesses. Where the Court has ordered protective measures for a defence witness, or ordered other measures to ensure the confidentiality of information required for the defence case, national authorities must respect the right of the defence to protect the safety of its witnesses and members of their families, and to keep confidential matters such as the identity of witnesses (article 68, paragraph 5, article 93, paragraph 1 (j), rule 81, paragraphs 3, 4 and 6, and rules 87 and 88). This includes not disclosing this kind of information to the Prosecutor (unless the Court orders otherwise).

(iv) Other rules relating to the right to a fair trial

The entire Rome Statute and all of the RPE are designed to ensure that an accused person receives a fair trial. From the initiation of an ICC investigation to the exhaustion of all final appeals, the rights of the defence are taken into account and protected. It is worth noting here some miscellaneous provisions relating to the defence that may have an impact on national authorities, and have not been discussed elsewhere in this context.

Article 3, paragraph 3, and article 62 provide that the Court may sit in a State other than the host State. Rule 100 now sets out the procedure for the Court to follow when making such a decision. One of the provisions is that the defence may apply or make a recommendation to change the place where the Court sits, at any time after the initiation of an investigation (rule 100, sub-rule 2). The ICC Presidency must consult the State where the Court intends to sit, and obtain the permission of that State to host the Court, before the judges can take the final decision whether or not to change the place where the Court sits (sub-rule 3). When a State is deciding whether to host the ICC, it should not make any difference that the defence may have requested that State to host the Court. The overriding principle should be the interests of justice, not the self-interest of a State in blocking any such application simply because it was made by the defence (see rule 100, sub-rule 1).

Rule 102 allows anyone to make a request, application, observation or communication to the Court in a form other than writing, where the person is unable, due to a disability or illiteracy, to prepare the relevant documentation in writing. This includes accused persons who may be in the custody of national authorities, and are unable to write a request to the Court for counsel, for example. National authorities may be requested to assist the person to make his/her request, application, observation or communication in audio, video or other electronic form.

Article 85 allows for an application for compensation to the ICC by anyone who has been the victim of unlawful arrest or detention on behalf of the Court, or a person convicted by the ICC of a criminal offence based upon a grave miscarriage of justice, in certain well-defined circumstances. Rules 173 to 175 provide further details on the criteria for awarding such compensation, and the procedures to be followed in such a case. The person who files the request is entitled to be notified of certain information, such as any observations the Prosecutor may make under rule 174, sub-rule 1. A State Party may wish to facilitate communications between the Court and a person claiming such compensation, where the person is a national of that State or is present on the State's territory at any time during such proceedings. These kinds of cases can often take years to resolve, and it would greatly assist all concerned if State authorities monitor the progress of relevant cases and assist the person claiming compensation as much as possible. Note that a person requesting compensation is also entitled to legal assistance (rule 173, sub-rule 4). While the ICC is obliged to ensure such assistance is provided, a State may be in a better position to provide such assistance where the person is a national of that State or is present on the territory of that State, and may wish to take on this responsibility in order to assist the ICC.

e) Rules relating to collecting evidence of the proceeds of crimes

One of the unique features of the ICC is that it has the power to seize the assets of perpetrators of ICC crimes, in order to provide financial redress to the victims of such crimes (article 57, paragraph 3 (e) and article 75). But first the Court must obtain evidence of these assets, which

may be located in various forms in many different countries at the same time, or even in cyberspace. This type of evidence is in a special category, as it may not necessarily be used to prove the ICC crime in question, unlike most of the other evidence required by the Court. Nevertheless, obtaining this type of evidence is equally important to the process of upholding international justice and deterring the commission of future crimes.

Many crimes are motivated by profit, including crimes within the jurisdiction of the ICC, and if authorities can take the profit out of such crimes, then this may help to reduce the number and scale of crimes committed. Experience has shown that an aggressive rebel group cannot be entirely self-sufficient if it is trying to achieve the overthrow of a government. The group needs significant funds from outside supporters to transport and feed its soldiers, to buy weapons, and so forth. In the same way, a despotic government also needs considerable resources to repress its population. Many despots and rebel leaders try to amass personal wealth at the same time, to allow themselves and their families to move freely and to live comfortably in the future, in case they are unsuccessful in the long run. This wealth is often well hidden, in a range of forms, to ensure that only the person who amassed it, or close family members and confidants of that person, can find it when they need it. International justice demands that this wealth is given back to the victims of crimes, no matter how difficult it is to try and identify where it has been hidden by the perpetrators.

State Parties may be requested to assist the Court in the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of *bona fide* third parties (article 93, paragraph 1 (k)). The Pre-Trial Chamber may make such a request to a State Party at any time after a warrant of arrest or a summons has been issued to an accused person (article 57, paragraph 3 (e)). Once the person has been convicted of an ICC crime, the Court may order a forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of *bona fide* third parties (article 77, paragraph 2 (b)). However, by the time a person has been convicted, there is usually little evidence available upon which to make such an order. This is why the Court can order protective measures for the purpose of eventual forfeiture before the person is convicted, to make sure that the evidence of proceeds, property and assets derived from ICC crimes is available after the person is convicted. This may be a new area of law and practice for many jurisdictions, which will require new laws and procedures for tracking down and obtaining custody over this type of evidence, especially prior to a person's conviction.

Rule 99 now provides further details on the co-operation and protective measures that may be required in order to secure this type of evidence. None of its provisions affect the general responsibilities of national authorities in assisting the Court with the identification of this type of evidence. However, States may be affected by the provisions relating to notification of an order that has been made under article 57, paragraph 3 (e) or article 75, paragraph 4. In order to ensure that an accused person does not attempt to hide or destroy his/her assets to try and protect them from seizure by the Court, the identification and seizure of the assets may need to be carried out secretly. State authorities may also wish to seize any assets within their jurisdiction and bypass the ICC in order to give preference to victims who are nationals of that State. This defeats the object of international justice, and therefore not all States who may be affected by such orders will necessarily be notified before the evidence is located and seized or frozen.

Only if the Court determines that notification could not jeopardise the effectiveness of the measures requested, must the Registrar provide notification to any interested persons or

interested States, “so far as is possible” (rule 99, sub-rule 2). Notification to the person against whom the order is made is not required from the ICC where notification could jeopardise the effectiveness of the measures requested. (*ibid*). If an order is made without prior notification, the Registrar will be requested to notify those against whom the order is made and, to the extent possible, any interested persons or any interested States, and invite them to make observations as to whether the order should be revoked or otherwise modified, as soon as is consistent with the effectiveness of the measures ordered (sub-rule 3). The Court is entitled to make orders as to the timing and conduct of any proceedings necessary to determine these issues (sub-rule 4).

States Parties who are requested to assist the ICC with obtaining such evidence must respect any confidentiality requirements that the Court imposes in relation to the collection of such evidence, as with all evidence collected for the Court (see article 54, paragraph 3 (f), article 57, paragraph 3 (c), and article 64, paragraphs 4 (a) and (c)).

Implementation Considerations

(a) General comments on implementing rules relating to the collection and preservation of evidence for the ICC

As mentioned in the introduction to this Chapter, the primary responsibility for collecting evidence for the ICC rests with the ICC Office of the Prosecutor (OTP). National authorities may be called in to assist the OTP’s team of investigators, for example when large scale atrocities have been committed and evidence is spread over a wide area, or where a small number of refugees have sought asylum far from the conflict. However, any evidence that is crucial to the particular case will most likely be handled by those working for the OTP, since they will be trained in all of the ICC’s rules of procedure and evidence, and therefore less likely to break one of these rules and thereby make crucial evidence inadmissible. It is unrealistic to think that all national authorities in all States Parties can be trained sufficiently in the very specific requirements of the Rome Statute and the RPE, just in case they may be called upon to assist the ICC with the collection and preservation of evidence at some future time.

At the same time, those States who have already implemented the International Convention on Civil and Political Rights and the other international human rights conventions, especially the Convention on the Rights of the Child, will be familiar with many of the requirements of the ICC regime. They may not require extensive re-training of national investigators and other relevant authorities.

In each State Party, the ideal would be to have at least a small team of around five national personnel who are suitably qualified at the national level and trained in ICC procedures and rules of evidence, who could be available for the situations where the ICC requires their assistance in collecting and preserving evidence, which are likely to be infrequent. This team could be attached to the national authority with overall responsibility for responding to requests from the Court, or comprise representatives from a range of backgrounds, who could be assembled on reasonably short notice. They would need to familiarise themselves with all of the rules discussed above, and the Rome Statute provisions to which those rules relate, as well as any additional rules that the judges may formulate in the future.

Many commentators believe that the Rome Statute and RPE represent the minimum standards under international law, in terms of rules of procedure and evidence for criminal trials that will ensure a fair trial. Therefore, every State should consider whether it should revise its own rules of procedure and evidence in criminal matters, in order to reflect international standards in these areas. In particular, protecting all the rights of accused persons, and all of the interests and concerns of victims and witnesses, in accordance with the Rome Statute and RPE, would make a great contribution to justice for all, and may even help prevent the commission of future atrocities that may otherwise come about as a reaction to injustices in the administration of criminal justice at the national level.

(b) Implementation of rules relating to protection of victims and witnesses

Protection of victims and witnesses is the most likely form of co-operation that will be requested of national authorities in the area of evidence collection and preservation, since the ICC will not have the resources to provide such protection to large groups of victims and witnesses. Adequate protection of victims and witnesses generally requires the establishment of a special national or regional programme with adequate resources. This programme must have the capacity to keep confidential information about the protected victims and witnesses and their families, including information that would normally be disclosed to other national authorities and agencies. Some of the measures required may include: establishing “safe houses”, permanently relocating victims and witnesses and their families, changing their identity, providing living expenses, and providing ongoing counselling, medical treatment and rehabilitation. There should also be strong sanctions against unauthorised disclosure of information, and any corruption or unethical practices. Note that witnesses for the defence may also need protection, including protection from other witnesses and victims in the same protection programme.

Many States have already set up national victim and witness protection programmes that could be adapted to apply to victims and witnesses involved in ICC proceedings, and used as models for other jurisdictions without such programmes. One example of a regional programme is found in the Caribbean Community (CARICOM), which has established its own regional “Justice Protection Programme”, which creates a co-operative arrangement between the Member States of the CARICOM, in order to prevent any interference in the administration of justice by the intimidation or elimination of witnesses, jurors, judicial and legal officers, and law enforcement personnel and their associates, by establishing, developing and maintaining “an appropriate and effective infrastructure at the national and regional levels in order to safeguard and enhance the credibility and integrity of the justice system in the Community”. The Agreement establishing this programme is available at the website of the CARICOM: <http://www.caricom.org/justiceprotection.htm> .

The rules discussed in this sub-section of the guide mostly relate to proceedings before the ICC that may result in a request to a State Party for protection of victims and/or witnesses. Therefore they are mainly included for the interest of States who may be called upon to provide such protection.

States also need to establish mechanisms for notifying victims of relevant information provided by the ICC, in accordance with rules 92 and 96.

(c) *Implementation of rules relating to the defence*

In addition to the rights of the accused set out in the Rome Statute and RPE, national authorities who are requested to question an accused person should take particular note of the rules pertaining to recording of questioning: rules 111 and 112. Note also rules 73 and 114, which emphasise the importance of allowing the accused person to consult with his/her counsel in confidence, which must be facilitated by national authorities if the accused person is in their custody.

The development of an International Criminal Bar will also have an impact on States Parties, who should assist with the dissemination of information about such developments to local and national bar associations and related organisations.

2.6 Rules Relating to Enforcement of Fines, Forfeiture and Reparations Orders

References: Article 75, paragraphs 4 and 5, article 77, paragraph 2, article 79, paragraph 2, article 109, and article 110, paragraphs 3 and 5, Rome Statute; and Rules 94-99, 145-148, 212, 217-222, and 224.

Description

Under article 77, paragraph 2, the ICC may impose a sentence on a convicted person that includes a fine or a forfeiture order. Article 109 provides that States Parties must give effect to fines and forfeitures ordered by the Court under Part 7, without prejudice to the rights of *bona fide* third parties, and in accordance with the procedure of their national law. If a State Party is unable to give effect to an order for forfeiture, it 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 (article 109, paragraph 2). Any property, or the proceeds of the sale of property, obtained by a State complying with such an order, must be transferred to the Court (paragraph 3). The Court may order money and other property collected through fines and forfeiture to be transferred, by order of the Court, to a special Trust Fund that has been established by the Assembly of States Parties for the benefit of victims of ICC crimes and their families (article 79, paragraph 2; see also the following resolutions adopted by the Assembly of States Parties at its first meeting: “Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims”, ICC-ASP/1/Res. 6, and “Procedure for the nomination and election of Members of the Board of Directors of the Trust Fund for the benefit of victims”, ASP-ICC/1/Res. 7).

The ICC may then dispense the proceeds of such orders to victims, in the form of reparations (article 75). The Court may request States Parties to enforce orders for reparations, under the same conditions as those provided for under article 109 (article 75, paragraph 5). The Court may also make an order directly against a convicted person specifying appropriate restitution to, or in respect of, victims, including restitution, compensation and rehabilitation (article 75, paragraph 2). If all the assets of the convicted person have yet to be identified, the Court may request a

State Party to provide assistance in identifying, tracing and freezing or seizing proceeds, property and assets and instrumentalities of crimes for the purposes of forfeiture, without prejudice to the rights of *bona fide* third parties (article 75, paragraph 4, and article 93, paragraph 1 (k)).

Rule 145 now establishes the principles that the Court must take into account when determining any sentence under article 77. Rule 146 sets out the principles and procedures for the Court to follow when ordering a fine under article 77, paragraph 2. Rule 147 provides guidance to the Court when it is considering an order for forfeiture. The Court must hear evidence as to the identification and location of specific proceeds, property or assets which have been derived directly or indirectly from the crime (sub-rule 1). This evidence may have been collected by States Parties pursuant to an order under article 57, paragraph 3 (e) and article 93, paragraph 1 (k). *Bona fide* third parties are entitled to submit evidence relevant to their interest in the issue (sub-rule 3). Rule 148 simply provides that the Court may seek the input of representatives of the Trust Fund before making an order that money and other property collected through fines and forfeiture be transferred, by order of the Court, to the Trust Fund (see article 79, paragraph 2).

Rule 217 now provides that the Presidency of the ICC will seek co-operation and measures for enforcement of fines, forfeiture or reparation orders, in accordance with Part 9, Rome Statute. In other words, all of the provisions on co-operation in Part 9 apply to requests for enforcement under article 109, including such provisions as the form of requests for cooperation (article 96), and the duty to consult where there are difficulties in executing a particular request (article 97). These provisions are discussed in detail in the “Manual for the Ratification and Implementation of the Rome Statute”, and the relevant rules are highlighted in **Chapter 2.3 Rules Relating to General Provisions on International Co-operation with the Court**. The Presidency must also transmit copies of relevant orders to any State with which the sentenced person appears to have direct connection by reason of either nationality, domicile or habitual residence or by virtue of the location of the sentenced person’s assets and property or with which the victim has such connection. The State must be informed of any third-party claims or of the fact that no claim was presented by a person who received notification of any proceedings conducted pursuant to article 75 (rule 217).

At the same time, rule 218 sets out specific requirements for orders for forfeiture and reparations, to allow States to give effect to such orders. Where the ICC transmits a copy of an order for reparations to a State Party under 217, rule 219 now provides that the ICC Presidency must inform the State that it must not modify the reparations specified by the Court, the scope or the extent of any damage, loss or injury determined by the Court or the principles stated in the order. The Presidency must also inform the State that it must facilitate the enforcement of such orders. In a similar vein, rule 220 requires the Presidency to inform States that they must not modify any fines that they are enforcing pursuant to a request from the Court under article 109 and rule 217. Rule 222 also requires the Presidency to assist States in the enforcement of fines, forfeiture or reparation orders, as requested, with the service of any relevant notification on the sentenced person or any other relevant persons, or the carrying out of any other measures necessary for the enforcement of the order under the procedure of the national law of the enforcement State.

Rule 221 establishes a procedure for the Presidency to follow when deciding on all matters related to the disposition or allocation of property or assets realised through enforcement of an order of the Court. The Presidency may consult, as appropriate, with the national authorities of the State of enforcement, as well as with the Prosecutor, the sentenced person, the victims or their legal representatives, national authorities of any relevant third party, or representatives of

the Trust Fund (sub-rule 1). The Presidency must give priority to the enforcement of measures concerning reparations to victims, when deciding how to dispose of or allocate property or assets belonging to the sentenced person (sub-rule 2).

Rule 212 envisages that tracing the assets of perpetrators may take some time, and may not even be completed by the time the trial is completed and the person is imprisoned. Where a convicted person is nearing the end of a prison sentence in a State, and the Court is still trying to enforce fines and forfeiture measures and reparations measures against the person, this rule allows the Court to request the State of enforcement to advise the Court whether the person will be remaining in the territory of that State once the term of imprisonment is finished, or where the person will be transferred upon completion of the sentence.

Rules 94-99 provide further details pertaining to the awarding of reparations to victims. Rule 99 also provides further guidance to the Court when it is requesting co-operation and protective measures from States Parties for the purpose of forfeiture. This rule is discussed in detail above, in **Chapter 2.5 Rules relating to collecting and preserving evidence**, section *e) Rules relating to collecting evidence of the proceeds of crimes*.

Article 110, paragraph 3 requires the ICC to review the sentence of a convicted person after the person has served two thirds of the sentence, or 25 years in the case of life imprisonment. Article 110, paragraph 4 sets out the factors that the Court must take into account when deciding whether to reduce the person's sentence or not. If the Court decides at that stage not to reduce the sentence, it must review the question of reduction of sentence at regular intervals and applying criteria provided for in the RPE (article 110, paragraph 5). Rule 223 now sets out the criteria for review concerning reduction of sentence (discussed in the next Chapter). Rule 224, sub-rule 1 now provides that the State of enforcement of any penalty under article 77 or any reparation order pursuant to article 75 must be invited to participate in the hearing under article 110, paragraph 3, or to submit written observations. Rule 224, sub-rule 4 establishes the same principle where the Court is reviewing the person's sentence under article 110, paragraph 5. Rule 224, sub-rule 5 provides that the Court must communicate any decisions and their reasons to all those who participated in the review proceedings, as soon as possible.

Rule 146, sub-rule 5 applies where the convicted person does not pay a fine imposed under article 77, paragraph 2 (a). It provides that the Court can take appropriate measures under article 109 and rules 217-222, to seek the cooperation of States Parties in enforcing the fine.

Implementation Considerations

Rule 217 now clarifies that requests for enforcement under article 109 must be made in accordance with Part 9 of the Rome Statute. This may require legislative implementation in some States, as Part 9 contains many general provisions on international cooperation which establish what a State can expect from requests for cooperation, as well as what is expected of a State once it receives a request. Note, however, rule 218, which specifies the form of requests for forfeiture and reparations. This rule may also require legislative implementation, to ensure that national authorities may only respond to such requests when received in the proper form.

Rules 219 and 220 may also require legislative implementation. They effectively prevent a State of enforcement from modifying orders for reparation or orders for fines, respectively.

Rule 222 allows States to seek assistance from the Presidency with enforcement of fines, forfeiture or reparation orders. In order to take advantage of such assistance, some States may have to adopt implementing laws that allow national authorities to rely on the Presidency for such matters as serving notification on a sentenced person or other relevant persons not necessarily on the territory of the State. Note that enforcement can take place in accordance with the procedure of the national law of the enforcement State. However, many States may not have laws allowing them to rely on an agent such as the ICC Presidency, or laws that could apply to bind the ICC Presidency to follow national laws and procedures.

Several of the rules discussed in this Chapter relate to communications between the ICC and the State of enforcement, including rules 212, 221, 223, and 224. As discussed throughout this guide, it is important that all States Parties establish efficient communication procedures to ensure that information flows quickly and effectively between the Court and relevant national authorities, in the interests of justice.

2.7 Rules Relating to Enforcement of Sentences of Imprisonment

References: Articles 103 – 111, Rome Statute; and

Rules 198 - 225.

Description

Under Part 10, Rome Statute, States may volunteer to accept sentenced persons from the ICC, either with or without conditions imposed by the State (article 103). The Court will decide which State will enforce a particular sentence of imprisonment, and may change the designation of the State of enforcement during the term of imprisonment (article 103, paragraph 1 and article 104). States of enforcement may not modify the sentence of imprisonment, under any circumstances (article 105). The Court will supervise the sentence and decide whether to reduce the sentence in accordance with article 110.

Chapter 12 of the RPE now elaborates on the various procedures and arrangements relating to the enforcement of sentences of imprisonment. Rule 198 provides that communications between a State of enforcement and the Court on matters relating to enforcement of sentences should generally be subject to article 87 and rules 176-180 (discussed in **Chapter 2.3 Rules Relating to General Provisions on International Cooperation with the Court**). Rule 199 establishes that the Presidency will exercise all the functions of the Court under Part 10, unless the Rules provide otherwise.

Rule 200 relates to the list of States of enforcement to be kept by the Court. The Registrar must establish and maintain a list of States that have indicated their willingness to accept sentenced persons (sub-rule 1). The Presidency cannot include a State on this list if the Presidency does not agree with the conditions that such a State attaches to its acceptance. The Presidency may request additional information from that State prior to taking a decision (sub-rule 2). A State that has attached conditions of acceptance may at any time withdraw such conditions, but any amendments or additions to such conditions will be subject to confirmation by the Presidency

(sub-rule 3). A State may also inform the Registrar of its withdrawal from the list at any time. Such withdrawal will not affect the enforcement of sentences in respect of persons that the State has already accepted (sub-rule 4). Sub-rule 5 provides that the Court may enter bilateral agreements with States with a view to establishing a framework for the acceptance of prisoners sentenced by the Court, but such arrangements must be consistent with the Rome Statute.

When the Court is determining which State to designate as the State of enforcement, the Court must take into account the principle that States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with the principles of equitable distribution. Rule 201 now elaborates on what is meant by “equitable distribution”. Rule 202 provides that the person cannot be delivered by the Court to the designated State until the decision on the conviction and the decision on the sentence have become final. The Court will have its own temporary detention facilities in The Hague, which can be used while a convicted person is exhausting all possible appeals.

The Court must also take into account the views of the sentenced person when deciding upon a State of enforcement for that person (article 103, paragraph 3 (c)). Rule 203 sets out the procedures for the Court to follow when ascertaining the views of the sentenced person.

Once the Court has chosen the designated State, it must notify that State and also transmit certain information and documents to the State, as specified in rule 204. This information includes the length and commencement date of the sentence and the time remaining to be served (sub-rule (c)). A State may choose not to accept a particular designation and must inform the Court as soon as possible either way (article 103, paragraph 1 (c)). Rule 205 clarifies that the Court may designate another State if the designated State chooses not to accept the designation. If the State chooses to accept the designation, the Registrar must inform the Prosecutor and the sentenced person of the State designated to enforce the sentence (rule 206, sub-rule 1). The sentenced person must be delivered to the State of enforcement as soon as possible after the State accepts (sub-rule 2). The Registrar is responsible for ensuring the proper conduct of the delivery of the person, in consultation with the authorities of the State of enforcement and the host State (sub-rule 3).

Rule 207 relates to the sentenced person being in transit in a third State. This rule is discussed in detail in **Chapter 2.4 Rules Relating to Arrest, Surrender, Transfer of Persons in Custody, and Summonses**, section *j) Rules relating to transportation through State territory of persons in custody*. Rule 208 specifies how the costs of enforcing the sentence will be divided between the Court and the State of enforcement. The State will bear the “ordinary costs for the enforcement of the sentence in the territory of the State” (sub-rule 1), while the ICC will bear all other costs, including those for the transport of the sentenced person (sub-rule 2).

Rules 209 and 210 address procedures for changes in designation of the State of enforcement. The Presidency may make this change at any time, in accordance with article 104, paragraph 1 (rule 209, sub-rule 1). Before deciding to change the designation of a State of enforcement, the Presidency may request views from the State of enforcement (rule 210, sub-rule 1 (a)). The sentenced person must also be allowed the opportunity to present her/his views (rule 210, sub-rule 2). If the Presidency refuses to change the designation of the State of enforcement, it must inform all relevant parties, including the sentenced person and the State of enforcement (rule 210, sub-rule 3).

Rule 211 describes the powers of the Presidency with respect to supervising enforcement of sentences and conditions of imprisonment. One of these powers is ensuring that the sentenced person can communicate freely and in confidence with the Court about the conditions of imprisonment, in accordance with article 106, paragraph 3 (rule 211, sub-rule 1 (a)). The Presidency may also request any information, report or expert opinion from the State of enforcement or from any reliable sources (sub-rule 1 (b)), and delegate a judge of the Court or a member of the staff of the Court who will be responsible for meeting the sentenced person and hearing her/his views, without the presence of national authorities (sub-rule 1 (c)). The State of enforcement must be notified of this arrangement, and may comment on the views expressed by the sentenced person under sub-rule 1 (c) (see sub-rule (d)). When a sentenced person is eligible for a prison programme or benefit available under the domestic law of the State of enforcement which may entail some activity outside the prison facility, the State of enforcement must communicate this fact to the Presidency, together with any relevant information or observation, to enable the Court to exercise its supervisory function (rule 211, sub-rule 2).

Articles 107 and 108 set out the various arrangements for the person once s/he has completed the sentence of imprisonment. The Court will decide whether the sentenced person may be prosecuted, punished or extradited to a third State, for any conduct engaged in prior to that person's delivery to the State of enforcement, after hearing the views of the sentenced person (article 108). Rules 212-216 are also relevant to the situation where a sentenced person is about to finish her/his sentence. Rule 212 allows the Court to ask the State of enforcement where to find the sentenced person after s/he has completed her/his sentence, in order to enforce any outstanding fines, forfeiture measures, and reparations measures. Rule 214 establishes the requirements where a State of enforcement wishes to prosecute or enforce a sentence against the sentenced person for any conduct engaged in prior to that person's transfer. If the person was surrendered to the Court by a State other than the State of enforcement or a State seeking extradition, the Presidency must consult with the State that surrendered the person and take into account any views expressed by that State (rule 214, sub-rule 4). The Presidency may decide to conduct a hearing into the matter (sub-rule 5), and in that case must communicate its decision to all those who have participated in the proceedings (rule 215, sub-rule 1). The procedure set out in rules 214 and 215 also applies with respect to article 107, paragraph 3, which allows a State to extradite or surrender the person to a State which has requested such extradition or surrender, subject to article 108 (rule 213). Ultimately the ICC has the authority over the sentenced person and where s/he will be sent, or remain, upon completion of the sentence. This ensures that the interests of international justice are served, and that sentenced persons are not subject to undue proceedings after they have served their sentence for the ICC.

Finally, the Presidency must request the State of enforcement to inform it of any "important event" concerning the sentenced person, and of any prosecution of that person for events subsequent to her or his transfer (rule 216).

Implementation Considerations

The overriding principle in Part 10, Rome Statute, is that the ICC is the supervisor of all its sentences of imprisonment, which includes supervising the way that the State of enforcement is performing its subsidiary function. The ICC Presidency is responsible for ensuring that the rights of the sentenced person are protected at all times, in accordance with widely accepted international treaty standards governing treatment of prisoners. States of enforcement must defer

to the ICC on all such issues, and should cooperate freely with the Court if the Presidency decides that the sentenced person should be moved to another State of enforcement. This relationship with the ICC will most likely require legislative implementation.

The ICC is unlikely to try, convict and sentence any person within its first year of operation. However, a person may plead guilty before the Court (article 65), and this would shorten significantly the period of time before the ICC would be requesting assistance in enforcing a sentence of imprisonment. Many States have already indicated their willingness to enforce sentences of imprisonment for the ICC. These States should review carefully the rules highlighted here, to ensure that appropriate arrangements can be put in place as soon as possible. Again, good communications are the key to ensuring that national authorities fulfil all of their obligations under the Rome Statute. All of those who are going to be involved in enforcing an ICC sentence of imprisonment should be well briefed beforehand, to ensure that they understand the particular requirements of the Rome Statute and RPE, and are sensitive to the unique relationship between them and the ICC.

3. RULES RELATING TO OTHER INTERACTIONS BETWEEN THE ICC AND STATES PARTIES

This Part of the Guide is designed to assist States that wish to take advantage of their various rights under the Rome Statute, and to understand other provisions that may affect them, apart from those involving State Party obligations under the Statute.

3.1 *Rules for Referring a ‘Situation’ to the ICC*

References: Articles 12-21, Rome Statute; and

Rules 11, 45-50, 107, 109, 111-112

Description

a) Rules relating to referring situations to the ICC

The Court may exercise its jurisdiction with respect to genocide, crimes against humanity and war crimes in accordance with Part 2 of the Rome Statute. There are three ways in which situations involving allegations of these crimes can be referred to the ICC:

- i) referral of a “situation” by a State Party (article 13, paragraph (a) and article 14);
- ii) referral of a “situation” by the Security Council (article 13, paragraph (b)); and
- iii) initiation of a *proprio motu* investigation by the Prosecutor (article 13, paragraph (c) and article 15).

In the case of State Party referrals, and Prosecutor-initiated investigations, the Court may only exercise its jurisdiction if the crime was committed by a national of a State Party to the Rome Statute, or was committed on the territory of a State Party (article 12, paragraph 2). Where the Security Council refers a “situation”, it may have arisen anywhere in the world. Articles 17, 19 and 20 further outline the Court’s complementary jurisdiction, and how the Court will determine whether cases referred to it are within its jurisdiction and otherwise admissible.

i) Referral of a situation by a State Party

States Parties have the right to refer a “situation” to the ICC, but not to refer specific individuals or acts (article 14, paragraph 1). The Prosecutor and Pre-Trial Chamber will determine which specific persons should be charged with the commission of crimes within the jurisdiction of the Court. Article 14, paragraph 2 provides that State Party referrals must specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

Rule 45 provides that such a referral must be in writing. Note that the working languages of the Court are English and French (article 50, paragraph 2, and rule 41). The Registrar must keep a

database containing all the particulars of each case brought before the Court, subject to any order of a judge or Chamber providing for the non-disclosure of any document or information, and to the protection of sensitive personal data (rule 15, sub-rule 1). Rule 43 places an obligation on the Court to ensure that all documents subject to publication in accordance with the Statute and the Rules respect the duty to protect the confidentiality of the proceedings and the security of victims and witnesses. States Parties referring matters to the ICC should also ensure that they have taken any appropriate measures at the national level, not to put anyone at risk by revealing certain information to the Court.

Having initiated an investigation in relation to one or more of the crimes within the jurisdiction of the Court, based upon a referral from a State Party, the Prosecutor must notify all States Parties of that fact, along with any other States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned (article 18, paragraph 1). If necessary, the Prosecutor may give the required notification to States Parties and other States on a confidential basis and may limit the scope of the information provided to States, if such limitation is necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons (article 18, paragraph 1). However, subject to these limitations, the Prosecutor's notification should contain information about the acts that may constitute crimes within the jurisdiction of the Court (rule 52, sub-rule 1).

ii) Referral of a situation by the Security Council

Chapter VII of the Charter of the United Nations gives the Security Council authority to make recommendations, or decide what measures shall be taken, to maintain or restore international peace and security. The Rome Statute recognises the mandate of the Security Council in expressly providing for the Security Council, in acting under Chapter VII, to refer a "situation" involving allegations of ICC crimes to the Prosecutor (article 13, paragraph (b)). Again, the Prosecutor and Pre-Trial Chamber will identify the specific individuals and crimes that will be investigated. All referrals of a situation to the Prosecutor by the Security Council must be in writing (rule 45).

iii) Initiation of *proprio motu* investigation by Prosecutor

The Prosecutor may initiate investigations on his or her own motion on the basis of information received involving allegations of crimes within the jurisdiction of the Court (article 15, paragraph 1). This is one function that the Prosecutor may not delegate to staff members of the Office of the Prosecutor (rule 11). States Parties may also provide information to the Prosecutor under this provision, and may be requested to provide additional information in any case, in order to assist the Prosecutor to analyse the seriousness of any information received (article 15, paragraph 2).

b) *Rules relating to initiating an investigation in the ICC*

When the Security Council refers a situation to the ICC, the Court must first determine whether it has jurisdiction over the case, and whether the case is admissible or not (articles 17, 19 and 20). If the Court is satisfied on these two issues, then the Prosecutor must initiate an

investigation unless s/he determines that there is no reasonable basis to proceed under the Statute (article 53, paragraph 1). If the Prosecutor decides not to proceed, s/he must promptly inform the Security Council (rule 105). The Prosecutor's decision not to proceed may be reviewed by the Pre-Trial Chamber, at the request of the Security Council (article 53, paragraph 3). Rule 107 now sets out the requirements for a request for reviewing the decision of the Prosecutor not to proceed and rule 108 sets out the requirements for a decision of the Pre-Trial Chamber under this proceeding. The Pre-Trial Chamber may also review the decision of the Prosecutor not to investigate a situation, on its own motion (article 53, paragraph 3 (b)). Rules 109 and 110 are relevant in this case.

Where a State Party has referred a situation to the ICC, the Prosecutor must determine whether there is a reasonable basis to proceed, and then request from the Pre-Trial Chamber authorization to commence an investigation (article 15, paragraphs 3 and 4). Rule 48 now provides further guidance to the Prosecutor when determining whether there is a reasonable basis to proceed. When the Pre-Trial Chamber assesses the Prosecutor's request for authorization of an investigation, it must determine whether the case appears to fall within the jurisdiction of the Court, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case (article 15, paragraph 4). A State Party that referred a situation may also request the Pre-Trial Chamber to review any subsequent decision by the Prosecutor not to proceed with the investigation (article 53, paragraph 3). Rules 107-110 are also relevant in these situations.

Before initiating a *proprio motu* investigation based on information received under article 15, paragraph 1, the Prosecutor undertakes a preliminary examination of the information made available to him or her and analyses the seriousness of the information received. In so doing, the Prosecutor may seek additional information from States, organs of the United Nations, intergovernmental or nongovernmental organisations or other reliable sources that the Prosecutor deems appropriate and may receive written or oral testimony at the seat of the Court (article 15, paragraph 2). Rule 46 provides that such information submitted under article 15, paragraph 1, or information from oral or written testimony received pursuant to article 15, paragraph 2, must be kept confidential. Rule 47 provides details as to how the Prosecutor is to receive testimony pursuant to article 15, paragraph 2. This rule provides that all formal statements made by persons being questioned in connection with an investigation or with proceedings must be recorded in accordance with rule 111, and that statements where a person is being questioned by the Prosecutor and there are grounds to believe the person has committed a crime within the jurisdiction of the Court must be recorded in accordance with rule 112. This may involve the cooperation of States Parties (these rules are discussed in detail in **Chapter 2.5 Rules relating to collecting and preserving evidence**).

After conducting a preliminary examination of the original information received and any additional information gathered, the Prosecutor must decide whether to initiate an investigation for the purpose of further investigating the allegations raised. In making this decision, the Prosecutor must consider whether:

- (i) the information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed (article 53, paragraph 1(a) and rule 48);

- (ii) the case is or would be admissible under article 17 (article 53, paragraph 1(b) and rule 48); or
- (iii) taking into account the gravity of the crime and the interests of victims, there are, nonetheless, substantial reasons to believe that an investigation would not serve the interests of justice (article 53, paragraph 1(c) and rule 48).

If, after such considerations, the Prosecutor concludes that there is a reasonable basis upon which to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected (article 15, paragraph 3). Rule 50 provides details for the procedure for authorization by the Pre-Trial Chamber, including notification to and participation of victims. Where the Prosecutor decides that there is no reasonable basis to proceed pursuant to article 15, paragraph 6, rule 49 requires that the Prosecutor provide notice of the decision to the informant, including State informants.

3.2 Rules Relating to Notification to States Parties

References: Article 18, Rome Statute; and

Rules 52-57

Description

All States Parties must be notified once the Prosecutor has initiated an investigation, along with any other States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned (article 18, paragraph 1). This obligation does not extend to investigations initiated after a situation has been referred to the Prosecutor by the Security Council. In this regard, it can perhaps be presumed that Member States of the United Nations will be kept aware of the status of such a referral through requirements set out in the Security Council resolution referring the situation to the ICC. Within one month of the receipt of the Prosecutor's notification, any State may inform the Prosecutor that it is investigating nationals or others within its jurisdiction with respect to criminal acts that may constitute these crimes and which relate to the information provided in the Prosecutor's notification (article 18, paragraph 2). A State may request additional information from the Prosecutor to assist in its consideration of the Prosecutor's notification and the Prosecutor must respond to such a request on an expedited basis. However, this does not affect the one-month time limit for the State's response (rule 52, sub-rule 2).

If a State informs the Prosecutor that it is investigating or has investigated nationals or others within its jurisdiction with respect to criminal acts that may constitute crimes within the jurisdiction of the Court and which relate to the information provided in the Prosecutor's notification, it may request that the Prosecutor defer to the State's investigation of those persons (article 18, paragraph 2). The State's request to the Prosecutor to defer must be in writing and provide information concerning its investigation. Also, the Prosecutor may request additional information from the State (rule 53).

If a State requests that the Prosecutor defer to the State's investigation, the Prosecutor must so defer, unless the Pre-Trial Chamber, on application of the Prosecutor, decides to authorise the investigation (article 18, paragraph 2). If the Prosecutor makes such an application to the Pre-Trial Chamber, the Prosecutor must inform the State in writing of his or her application and include a summary of the basis of the application (rule 54, sub-rule 2).

When dealing with the Prosecutor's application, the Pre-Trial Chamber will consider whether the State's investigation was undertaken in good faith, pursuant to article 17 (rule 55, sub-rule 2), and may conduct a hearing (rule 55, sub-rule 1). The decision of the Pre-Trial Chamber is subject to appeal (article 18, paragraphs 4 and 7).

When the Prosecutor defers to a State's investigation, the Prosecutor may request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions. Such requests must be responded to without undue delay (article 18, paragraph 5). Rule 56 is also relevant in this situation. In addition, the Prosecutor may review the deferral six months after the date of the deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation (article 18, paragraph 3).

Finally, if the Prosecutor has deferred to a State's investigation, or pending a ruling from the Pre-Trial Chamber on deferral, the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available (article 18, paragraph 6). Such an application by the Prosecutor will be considered *ex parte* (on the application of one party) and *in camera* (in private) (rule 57).

States Parties and other interested States may also receive notifications from the Court at various other stages during the proceedings. For example, rule 94 requires the Court to provide notification of a request for reparations to any interested States, to the extent possible. Where the Prosecutor decides that there is not a sufficient basis for prosecution under article 53, paragraph 2, the State or States that referred the situation under article 14, or the Security Council if it referred the situation, must be notified in accordance with rule 106.

3.3 Rules Relating to the Participation of States on ICC Proceedings

References: Articles 54, 57, and 64, Rome Statute; and

**Rules 100, 101, 103, 131, 132, 134, 135, 142, 144, 147, 151, 152, 156, 157, 159,
161.**

Description

The participation of States in ICC proceedings is reflected in a number of rules in the RPE. Section 3.1 has already discussed when States Parties can refer situations to the Prosecutor as

well as the State's involvement after the Prosecutor initiates an investigation. Section 3.2 discusses the rules dealing with the notification to States Parties during an investigation, including requests by the ICC to States to provide information and requests by States to receive more information from the Prosecutor.

The Rules provide for an *amicus curiae* role for States Parties. Rule 103 provides that at any stage of an ICC proceeding, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, or others, to submit in writing or orally, any observations on any issue that the Chamber deems appropriate.

Rule 101 provides that the Court must take into account "the need to facilitate fair and expeditious proceedings, bearing in mind in particular the rights of the defence and the victims", when setting any time limits (sub-rule 1). Sub-rule 2 specifies that all those participating in proceedings to whom any order is directed must endeavour to act as expeditiously as possible, within the time limit ordered by the Court, taking into account the rights of the accused, especially the right to have adequate time and facilities for the preparation of the defence. This would include orders directed to States who are participating in proceedings.

Chapter 6 of the RPE (rules 131-144) envisions representatives of States participating in the ICC proceedings. Representatives of States Parties participating in the proceedings have certain rights, including the rights: to be consulted in the record of trial proceedings being transmitted by the Pre-Trial Chamber (rule 131); to participate in the status conference (rule 132); to have service of motions relating to the trial proceedings and the right to response (rule 134); to be informed of the date of pronouncement of a decision of Trial Chamber (rule 142); and to be present at the delivery of the decisions of the Trial Chamber (rule 144).

When an appeal is made against the decision of the ICC by the Prosecutor or the accused, the Rules provide that notice of such appeals or leave to appeal are to be provided to all parties who participated in the proceedings, including the representatives of States who participate (rule 155). If there is a discontinuance of the appeal, rule 157 provides that all parties, including representative of States, must be informed that a notice of discontinuance has been filed. The rules further provide that notice of certain applications, such as revision of conviction or sentence, be sent to all parties, as far as possible (rule 159).

3.4 Rules Relating to ICC Judges

References: Article 34-36, Article 37, paragraph 1, article 38-41, Rome Statute; and

Rules 23-39, 4, 7, 8, 12,

Description

The ICC is 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). At the second Assembly of States Parties meeting held from 3-7 February 2003, the Assembly of States Parties elected eighteen judges. This first bench includes seven women and a balanced number of elected candidates by region and civil and common-law systems. The elected judges will

serve on the Court for a maximum of nine years (articles 36(9)). At this first election, one third of the judges were selected to serve for a three year term, another one-third of the judges are to serve for a six year term, while the remainder to serve for nine years.

Article 36(3) details the criteria for nominating judges: (i) high moral character, impartiality and integrity; (ii) possession of the qualifications required in their respective States for appointment to the highest judicial offices; (iii) established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings, or established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional capacity which is of relevance to the judicial work of the Court; and (iv) excellent knowledge of and fluency in at least one of the working languages of the Court, which are English and French (article 50(2)). No two judges may be nationals of the same State (article 36, paragraph 7). The international standard of the independence of the judiciary is recognised in article 40. Judges are not to engage in any activity, which is likely to interfere with their judicial functions or to affect confidence in their independence (article 40, paragraph 2). When required to serve on a full time basis at the seat of the Court, judges are not to engage in any other occupation of a professional nature (article 40, paragraph 3).

The Presidency of the Court is composed of the President (Mr. Philippe Kirsch of Canada) and First and Second Vice-Presidents (Mrs. Akua Kuenyehia of Ghana and Mrs. Elizabeth Odio Benito of Costa Rica) who were elected by an absolute majority of the judges during the inauguration proceedings in The Hague on March 11, 2003. The Presidency is responsible for the proper administration of the Court, not including the Office of the Prosecutor, and other functions conferred upon it in accordance with the Statute (article 38, paragraph 3). The Presidency may propose an increase in the number of judges, indicating the reasons why this is necessary and appropriate (article 36, paragraph 2(a)). Such a proposal will be discussed at an Assembly of States Parties meeting and will require approval by two-thirds of the members for adoption. The Presidency can also propose a decrease in the number of judges provided that there is a minimum number of 18 judges on the Court (article 36, paragraph 2(c)). Members of the Presidency shall serve for a term of three years or until the end of their respective terms of office as judges, whichever expires earlier. They can be re-elected for a second term.

The judges shall meet at least once a year in plenary session to exercise their functions under the Statutes, the Rules and the Regulations. In one such plenary session, judges will be assigned to divisions. This must be held no later than two months after their election (rule 4). The Appeals Divisions shall be composed of the President and four other judges. All five judges must be present when carry out the functions of the Appeal Division. The Trial Division and Pre-Trial Division shall have not less than six judges respectively (article 39). The Trial Chambers requires a panel of three judges sitting to carry out its functions. The Pre-Trial Chamber can carry out its functions either with a panel of three judges or may designate a single judge based on pre-established criteria (article 39, paragraph 2(b)(iii) and rule 7). Each Division should contain judges with an appropriate combination of expertise in criminal law and procedure and in international law.

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. The Rules of Procedure and Evidence provide further examples of situations in which a judge may be disqualified, such as: i) personal interest in the case, including personal or professional relationship (rule 34, sub-rule (1)(a)); involvement, in his or her private capacity, in any legal proceedings initiated prior to his or her involvement in the case, or initiated by him or her subsequently (rule 34, sub-rule (1)(b)); performance of functions, prior to taking office, during which he or she could be expected to have formed an opinion on the case in question, on the parties or on their legal representatives that, objectively, could adversely affect the required impartiality of the person concerned (rule 34, sub-rule (1)(c)); expressions of opinions, through the communications media, in writing or in public actions, that, objectively, could adversely affect the required impartiality of the person concerned (rule 34, sub-rule (1)(d)). States Parties should keep accurate records of the criminal trials that their judges are involved in, if they envisage nominating their judges to the ICC at some stage.

The Presidency may, at the request of a judge, excuse that judge from the exercise of a function (article 41). Such request must be made in writing, setting out the grounds upon which he or she should be excused and treated as confidential (rule 33). Rule 35 provides that it is the duty of the judge, where he or she has reason to believe that a ground for disqualification exists, to make a request to be excused and should not wait for a request for disqualification.

The Rules elaborate on situations where a judge may be replaced before the expiration of their term. A judge may be replaced for objective and justified reasons, including resignation, accepted excuse, disqualification, removal from office or death. In the case of death, the Presidency must inform, in writing, the President of the Bureau of the Assembly of States Parties (rule 36). In the event of a resignation, the judge who is resigning must communicate this in writing to the Presidency, who then informs, in writing, the President of the Bureau of the Assembly of States Parties (rule 37). In the event of a vacancy for any of the above reasons, an election is held in accordance with article 36. The judge elected to fill the vacancy shall serve for the remainder of the predecessor's term and, if that period is three years or less, shall be eligible for re-election for a full term.

The eighteen newly elected judges of the ICC have each made a solemn undertaking to perform his or her duties and exercise their powers as judges honorably, faithfully, impartially and conscientiously and to respect the confidentiality of investigations and prosecutions and the secrecy of deliberations (article 45 and rule 5). A judge can be removed from office or subject to disciplinary measures in cases where the judge is found to have committed serious misconduct or a serious breach of his or her duties or is unable to exercise his or her functions as required by the Statute (article 46). Rule 24 elaborates on the definition of serious misconduct and serious breach of duty. Serious misconduct can include conduct that if it occurs in the course of official duties could cause or likely to cause serious harm to the proper administration of justice before the Court or the proper internal functioning of the Court, such as disclosing facts or information acquired in the course of his or her duties, concealing information or circumstances of a nature sufficiently serious to have precluded him or her from holding office, or abuse of judicial office in order to obtain unwarranted favorable treatment from any authorities, officials or professionals. Serious misconduct can also occur outside the course of official duties and is considered serious if it is of a grave nature that causes or is likely to cause serious harm to the standing of the Court. A serious breach of duty occurs where a judge has been grossly negligent

in the performance of his or her duties or has knowingly acted in contravention of those duties, such as failing to comply with the duty to request to be excused, knowing that there are grounds to do so or repeatedly causes unwarranted delay in the initiation, prosecution or trial of cases.

All complaints regarding serious misconduct or serious breach of duty shall be transmitted to the Presidency in confidence, and must include the grounds on which it is based, the identity of the complainant and any relevant evidence (rule 26, subrule 1). The Presidency can also initiate complaint proceedings on its own motion as well as set aside anonymous or manifestly unfounded complaints (rule 26, subrule 2). The judge can be suspended from duty pending an investigation into the complaint (rule 28). The decision to remove a judge is made by the Assembly of States Parties, upon the recommendation by the judges (article 46, rule 29). A judge, whose conduct is challenged under article 46 (removal) and article 47 (disciplinary measures) has the common provisions on the rights of the defence (rule 27), which includes the opportunity to present and receive evidence. If the conduct is considered misconduct of a less serious nature, the judge may be subject to disciplinary measures (article 47, rule 29, and sub-rule 4).

Article 48 of the 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 are to 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. All States should ratify and implement this agreement as soon as possible, in order to ensure the smooth functioning of the Court in its early days.

4. TABLE: WHICH RULES RELATE TO EACH ARTICLE OF THE ROME STATUTE

Please note, the brief description of each rule in this table is meant as a guide only, and should not be relied upon as an accurate representation of the entirety of the rule in question. Readers should refer to the full text of each rule described here in order to ensure a full appreciation of the meaning of each rule. In the same way, the description of the subject matter of each Rome Statute provision is intended as a guide only, and should not be relied upon as a complete representation of the content of the provision in question.

*Rules marked with a double asterisk (**) relate directly to the obligations of States Parties under the Rome Statute. Rules marked with a single asterisk (*) are considered of possible relevance to the process of implementation of the Rome Statute, and thus of particular interest to States Parties.*

Article of Rome Statute	SUBJECT MATTER	Corresponding rule number and brief description
<u>Part 1 – Establishment of the Court</u>		
Article 1	The Court	No further rules
Article 2	Relationship of the Court with the United Nations	No further rules
Article 3, paragraph 3	Seat of the Court – Alternative place of proceedings	*Rule 100 – procedures for changing the place of proceedings to a State other than the host State
Article 4	Legal status and powers of Court	No further rules
<u>Part 2 - Jurisdiction, Admissibility and Applicable Law</u>		
Articles 5 to 9	Crimes within the jurisdiction of the Court, genocide, crimes against humanity, war crimes and elements of crimes	No further rules
Article 10	No influence on developing rules of international law	No further rules
Article 11	<i>Jurisdiction ratione temporis</i>	No further rules
Article 12, paragraph 3	Preconditions to the exercise of jurisdiction – declarations of acceptance of Court’s jurisdiction by non-States Parties	Rule 44 – Registrar’s responsibilities in relation to such declarations

Article of Rome Statute	SUBJECT MATTER	Corresponding rule number and brief description
Article 13	Exercise of jurisdiction	No further rules
Article 14	Referral of a situation by a State Party	*Rule 45 – referrals to be in writing
Article 15, paragraphs 1 and 2	Prosecutor –initiation of <i>proprio motu</i> investigation by Prosecutor and analysis of seriousness of information provided, including receiving written or oral testimony from “reliable sources”	<p>Rule 11 – Prosecutor may not delegate its powers under this article</p> <p>*Rule 46 – Prosecutor to protect confidentiality of all information provided in accordance with article 15, paragraph 1 and 2 (including information provided by States)</p> <p>*Rule 47 – procedures for testimony given in accordance with article 15, paragraph 2</p> <p>**Rule 111 – general requirements for the recording of all formal statements made by persons being questioned in connection with an investigation or with proceedings, which may involve the co-operation of States Parties, in accordance with Part 9, Rome Statute</p> <p>*Rule 112 (see especially sub-rule 5) – specific requirements for recording statements where a person is being questioned by the Prosecutor and there are grounds to believe the person has committed a crime within the jurisdiction of the Court</p>
Article 15, paragraphs 3–5	Prosecutor – request by Prosecutor to Pre-trial Chamber for authorization to proceed, and victims’ representations at this stage	<p>Rule 48 – guidance for Prosecutor when determining whether there is a reasonable basis to proceed</p> <p>Rule 50 – procedure for authorization by Pre-Trial Chamber of a <i>proprio motu</i> investigation, including notification to, and participation of, victims</p>

Article of Rome Statute	SUBJECT MATTER	Corresponding rule number and brief description
Article 15, paragraph 6	Prosecutor – where Prosecutor decides there is no reasonable basis to proceed	*Rule 49 – requirements for notice of decision to informant (including State informants)
Article 16	Deferral of investigation or prosecution - requested by Security Council	No further rules
Article 17	Issues of admissibility	*Rule 51 – States can provide information to the ICC on the independence and impartiality of their judicial processes **Rule 185 – where Court finds case inadmissible, arrangements for the transfer of the person to an appropriate State upon release from the Court, which may involve the co-operation of States Parties, in accordance with Part 9, Rome Statute
Article 18, paragraph 1	Preliminary rulings regarding admissibility - notification of Prosecutor’s decision there is a reasonable basis to proceed	Rule 52, sub-rule 1 – requirements for notification by the Prosecutor to States Parties and other States that would normally exercise jurisdiction over the matter
Article 18, paragraph 2	Preliminary rulings regarding admissibility – where State informs ICC that it is already investigating the same matter	*Rule 52, sub-rule 2 – State that is already investigating may request more information from Prosecutor **Rule 53 – requirements where the State requests deferral of ICC investigation Rule 54 – requirements where Prosecutor makes application not to have to defer to State’s investigation (including informing the investigating State) Rule 55 – requirements for proceedings and notification when Pre-trial Chamber considers Prosecutor’s application under article 18, paragraph 2 (including notification to investigating State)

Article of Rome Statute	SUBJECT MATTER	Corresponding rule number and brief description
Article 18, paragraph 3	Preliminary rulings regarding admissibility – where Prosecutor defers to State investigation	Rule 56, sub-rules 1 & 3 – procedure for review by Pre-trial Chamber of Prosecutor’s decision to defer
Article 18, paragraph 5	Preliminary rulings regarding admissibility – periodic reports to Prosecutor from investigating State	Rule 56, sub-rule 2 – Prosecutor must communicate to Pre-trial Chamber periodic reports received from investigating State under article 18, paragraph 5
Article 18, paragraph 6	Preliminary rulings regarding admissibility – request by Prosecutor for provisional investigative measures	*Rule 57 – Pre-trial Chamber hearing shall be <i>ex parte</i> and <i>in camera</i>
Article 19, paragraphs 1-6	Challenges to the jurisdiction of the Court or the admissibility of a case – procedures for dealing with jurisdictional or admissibility challenges	<p>*Rule 58 – procedure for hearing such challenges, including requirement that challenges be made in writing</p> <p>Rule 59 – Registrar must inform those who referred the situation to the Court (including States Parties), and those referees may provide written responses to the relevant Chamber</p> <p>*Rule 60 – competent organ to receive challenges prior to commencement of trial</p> <p>*Rule 133 – competent organ to receive challenges at commencement of trial or subsequently</p> <p>Rule 144 – decisions of Trial Chamber to be pronounced in public in presence of, inter alia, States that have participated in the proceedings</p> <p>**Rule 185 – where Court finds case inadmissible, arrangements for the transfer of the person to an appropriate State upon release from the Court, which may involve the co-operation of States Parties, in accordance with Part 9, Rome Statute</p>

Article of Rome Statute	SUBJECT MATTER	Corresponding rule number and brief description
Article 19, paragraph 8	Challenges to the jurisdiction of the Court or the admissibility of a case – request by Prosecutor for provisional investigative measures while jurisdiction or admissibility challenge pending	*Rule 61 – rule 57 applies (ie. Pre-trial Chamber hearing shall be <i>ex parte</i> and <i>in camera</i>)
Article 19, paragraph 10	Challenges to the jurisdiction of the Court or the admissibility of a case – where Prosecutor requests review of decision that a case is inadmissible	*Rule 62 – procedure for Prosecutor’s request, including requirement that State/s which made admissibility challenge be notified of Prosecutor’s request and may make representations
Article 20	<i>Ne bis in idem</i>	No further rules
Article 21	Applicable law	Rule 63, sub-rule 5 – national laws governing evidence can only be applied in accordance with article 21 **Rule 73 – communications that may be regarded as privileged, including having regard to rule 63, sub-rule 5
<u>Part 3 – General Principles of Criminal Law</u>		
Articles 22 to 30	Nullum crimen sine lege, nulla poena sine lege, non-retroactivity <i>ratione personae</i> , individual criminal responsibility, exclusion of jurisdiction over persons under eighteen, irrelevance of official capacity, responsibility of commanders and other superiors, non-applicability of statute of limitations and mental element	No further rules

Article of Rome Statute	SUBJECT MATTER	Corresponding rule number and brief description
Article 31	Grounds for excluding criminal responsibility	<p>Rule 79 – defence must notify Prosecutor if it intends to raise the existence of an alibi, or to raise a ground for excluding criminal responsibility under article 31, paragraph 1</p> <p>Rule 80 – procedures for raising a ground for excluding criminal responsibility under article 31, paragraph 3</p> <p>Rule 81, sub-rule 6 – restrictions on disclosure of information in the possession or control of the defence</p> <p>Rule 121, sub-rule 9 – time limit for raising such grounds prior to the confirmation hearing</p>
Articles 32 to 33	Mistake of fact or mistake of law; superior orders and prescription of law	No further rules
<u>Part 4 – Composition and Administration of the Court</u>		
Articles 34 to 36	Organs of the Court; service of judges; qualifications, nominations and election of judges	No further rules
Article 37, paragraph 1	Judicial vacancies	<p>Rule 36 – President of Court to inform President of Bureau of Assembly of States Parties of the death of a judge or Prosecutor <i>et al</i></p> <p>Rule 37 – procedure where a judge or Prosecutor <i>et al</i> wishes to resign</p> <p>Rule 38 – reasons why a judge may need to be replaced</p>

Article of Rome Statute	SUBJECT MATTER	Corresponding rule number and brief description
Article 38	The Presidency	<p>Rule 4 – provisions for plenary sessions of judges, including election of the President and Vice-Presidents at the first plenary session</p> <p>Rule 8 – Presidency to draw up a draft Code of Professional Conduct for counsel, in consultation with the Prosecutor and based on a proposal by the Registrar (see also rule 20, sub-rule 3); Code needs to be adopted by the Assembly of States Parties</p> <p>Rule 12 – selection of Registrar and Deputy Registrar, including procedures for Presidency to follow</p>
Article 39	Chambers	<p>Rule 4 – provisions for plenary sessions of judges, including assigning judges to divisions at the first plenary session</p> <p>Rule 7 – procedure where single judge is designated in accordance with article 39, paragraph 2 (b) (iii)</p>
Article 40	Independence of the judges	No further rules
Article 41	Excusing and disqualification of judges	<p>Rule 33 – requests to be excused by judges <i>et al</i> must be in writing and shall be kept confidential</p> <p>Rule 34 – additional grounds for disqualification of judges <i>et al</i>, and procedure for disqualification</p> <p>Rule 35 – duty of judge <i>et al</i> to request to be excused in certain circumstances</p>
Article 42, paragraph 1	The Office of the Prosecutor – responsibilities	<p>Rule 9 – Prosecutor to put in place regulations for managing and administering the Office of the Prosecutor, in consultation with the Registrar as appropriate</p> <p>Rule 10 – Prosecutor responsible for all information and physical evidence</p>

Article of Rome Statute	SUBJECT MATTER	Corresponding rule number and brief description
Article 42, paragraph 2	The Office of the Prosecutor – Prosecutor’s authority	Rule 11 – Prosecutor and Deputy Prosecutor may delegate certain functions to certain staff members
Article 42, paragraphs 6-8	The Office of the Prosecutor – excusing and disqualification of a Prosecutor or Deputy Prosecutor	<p>Rule 33 – requests to be excused must be in writing and shall be kept confidential</p> <p>Rule 34 – additional grounds for disqualification of a Prosecutor <i>et al</i>, and procedure for requesting disqualification</p> <p>Rule 35 – duty of Prosecutor <i>et al</i> to request to be excused in certain circumstances</p>
Article 43, paragraphs 1-2	The Registry –general responsibilities of Registrar and Deputy Registrar	<p>*Rule 13 – Registrar to serve as channel of communication of the Court and responsible for internal security of the Court</p> <p>Rule 14 – Registrar to put in place regulations for managing and administering the Registry, subject to the approval of the Presidency, and in consultation with the Prosecutor as appropriate</p> <p>Rule 15 – Registrar to maintain a database of information on cases, and all other records of the Court</p> <p>Rule 20 – responsibilities of the Registrar relating to the rights of the defence</p>
Article 43, paragraphs 3-4	The Registry – qualifications and election of Registrar and Deputy Registrar	Rule 12 – qualifications and procedure for election of the Registrar and Deputy Registrar

Article of Rome Statute	SUBJECT MATTER	Corresponding rule number and brief description
Article 43, paragraph 6	The Registry – Victims and Witnesses Unit	<p>Rule 16 – responsibilities of the Registrar relating to victims and witnesses</p> <p>Rule 17 – functions of the Victims and Witnesses Unit</p> <p>Rule 18 – responsibilities of the Victims and Witnesses Unit</p> <p>Rule 19 – expertise required in the Victims and Witnesses Unit</p> <p>Rule 43 – certain restrictions applicable to publication of documents of the Court</p>
Article 44	Staff	<p>Rule 6 – solemn undertakings to be made by staff of the Office of the Prosecutor, the Registry, interpreters, and translators</p> <p>Rule 11 – <i>gratis</i> personnel offered by States Parties <i>et al</i> in accordance with article 44, paragraph (4) may not represent the Prosecutor or Deputy Prosecutor in the exercise of the latter’s functions</p> <p>Rule 19 – article 44 governs the appointment of staff to the Victims and Witnesses Unit, including those with specific expertise listed under this rule</p> <p>Rule 43 – certain restrictions applicable to publication of documents of the Court</p>
Article 45	Solemn undertaking	<p>Rule 5 – solemn undertakings to be made by judges, Prosecutors, Deputy Prosecutors, Registrars, and Deputy Registrars</p> <p>Rule 43 – certain restrictions applicable to publication of documents of the Court</p>

Article of Rome Statute	SUBJECT MATTER	Corresponding rule number and brief description
Article 46, paragraph 1	Removal from office – grounds for removal of a judge, the Prosecutor, a Deputy Prosecutor, the Registrar, or the Deputy Registrar	<p>Rule 23 – general principle</p> <p>Rule 24 – definition of “serious misconduct” and “serious breach of duty”</p> <p>Rule 26 – procedure and requirements for receipt of complaints</p>
Article 46, paragraphs 2-3	Removal from office – where Assembly of States Parties is considering whether to remove a judge or Prosecutor <i>et al</i> from office, or where judges are considering whether to remove a Registrar or Deputy Registrar from office	<p>Rule 28 – person may be suspended from duty where allegation is of a sufficiently serious nature</p> <p>Rule 29 – procedures to be followed by relevant Court personnel (including Presidency informing President of Bureau of Assembly of States Parties)</p> <p>Rule 31 – decisions relating to removal from office shall take effect immediately</p>
Article 46, paragraph 4	Removal from office – opportunity to present defence	Rule 27 – provisions on the rights of the defence
Article 47	Disciplinary measures – where “misconduct of a less serious nature”	<p>Rule 25 – definition of “misconduct of a less serious nature”</p> <p>Rule 26 – procedure and requirements for receipt of complaints</p> <p>Rule 27 – provisions on the rights of the defence</p> <p>Rule 30 – procedure in the event of a request for disciplinary measures (absolute majority of Bureau of Assembly of States Parties responsible for certain decisions)</p> <p>Rule 32 – allowable disciplinary measures</p>

Article of Rome Statute	SUBJECT MATTER	Corresponding rule number and brief description
Articles 48 and 49	Privileges and immunities; salaries, allowances and expenses	No further rules
Article 50	Official and working languages	<p>Rule 3 – procedure for handling proposed amendments to the Rules (including translation into official languages of the Court)</p> <p>Rule 15 – information on the Registrar’s database to be available in the working languages of the Court</p> <p>Rule 40 – decisions that must be published in the official languages of the Court</p> <p>Rule 41 – situations where Presidency may authorise the use of an official language of the Court as a working language</p> <p>Rule 42 – Court to provide interpretation and translation services to ensure implementation of its obligations</p> <p>Rule 43 – certain restrictions applicable to publication of documents of the Court</p>
Article 51	Rules of Procedure and Evidence	<p>Rule 1 – use of terms in the Rules</p> <p>Rule 2 – Rules have been adopted in official languages of the Court and all texts are equally authentic</p> <p>*Rule 3 – procedure for handling proposed amendments to the Rules and any provisional rules (including transmission to States Parties)</p>
Article 52	Regulations of the Court	Rule 4, sub-rule 5 – The Regulations to be adopted as soon as possible in plenary sessions

Article of Rome Statute	SUBJECT MATTER	Corresponding rule number and brief description
<u>Part 5 – Investigation and Prosecution</u>		
Article 53, paragraph 1	Initiation of an investigation – determination by Prosecutor of a reasonable basis to proceed	<p>Rule 11 – Prosecutor may not delegate its powers under this article</p> <p>**Rule 92, sub-rules (2), (7) & (8) – victims to be notified if Prosecutor decides not to initiate an investigation, which may involve co-operation of States Parties, in accordance with article 68 and Part 9, Rome Statute</p> <p>*Rule 104 – evaluation of information by Prosecutor, including seeking additional information from States <i>et al</i>, with rules 47, 111 & 112 to apply to any testimony received by the Prosecutor</p> <p>Rule 105 – requirements for notification to referring State/s or Security Council of Prosecutor’s decision not to initiate an investigation</p>
Article 53, paragraph 2	Initiation of an investigation – insufficient basis for a prosecution	<p>**Rule 92, sub-rules 2, 7 & 8 – victims to be notified if Prosecutor decides insufficient basis for a prosecution, which may involve the co-operation of States Parties, in accordance with article 68 and Part 9, Rome Statute</p> <p>Rule 106 – requirements for notification to referring State or Security Council of Prosecutor’s decision not to prosecute</p>

Article of Rome Statute	SUBJECT MATTER	Corresponding rule number and brief description
Article 53, paragraph 3 (a)	Initiation of an investigation – requests to Pre-trial Chamber to review Prosecutor’s decision not to proceed	<p>**Rule 107 – requirements and procedure for requests for review of Prosecutor’s decision, including possibility that Pre-trial Chamber may order certain protective measures under article 54, article 68, paragraph 5, articles 72, and 93, which may involve the co-operation of States Parties</p> <p>Rule 108 – requirements for a decision by the Pre-trial Chamber, including notification to all those who participated in the review</p>
Article 53, paragraph 3 (b)	Initiation of an investigation – Where Pre-trial Chamber decides on its own initiative to review decision by Prosecutor not to proceed	<p>**Rule 92, sub-rules 7 & 8 – victims to be notified, which may involve co-operation of States Parties, in accordance with article 68 and Part 9, Rome Statute</p> <p>*Rule 109 – requirements for such review, including notification to a requesting State and possibility that Pre-trial Chamber may seek further observations from requesting State</p> <p>Rule 110 – requirements for a decision by the Pre-trial Chamber, including notification to all those who participated in the review</p>
Article 54	Duties and powers of the Prosecutor with respect to investigations	<p>Rule 81 – general restrictions on disclosure and procedures for Prosecutor to follow</p> <p>Rule 82 – restrictions on disclosure of material and information protected under article 54, paragraph 3 (e)</p>

Article of Rome Statute	SUBJECT MATTER	Corresponding rule number and brief description
Article 55, paragraph 1	Rights of persons during an investigation – General provisions	<p>**Rule 111 – general requirements for the recording of all formal statements made by persons being questioned in connection with an investigation or with proceedings, which may involve the co-operation of States Parties, in accordance with Part 9, Rome Statute</p> <p>**Rule 117, sub-rule 2 – person may apply to Pre-Trial Chamber for counsel at any time after arrest</p>
Article 55, paragraph 2	Rights of persons during an investigation - where there are grounds to believe the person about to be questioned has committed a crime within the jurisdiction of the Court	<p>Rule 20 - responsibilities of the Registrar relating to the rights of the defence</p> <p>Rule 21 - procedure for assignment of legal assistance</p> <p>Rule 22 - appointment and qualifications of Counsel for the defence</p> <p>**Rule 111 – general requirements for the recording of all formal statements made by persons being questioned in connection with an investigation or with proceedings, which may involve the co-operation of States Parties, in accordance with Part 9, Rome Statute</p> <p>*Rule 112 - specific requirements for recording statements where a person is being questioned by the Prosecutor and there are grounds to believe the person has committed a crime within the jurisdiction of the Court</p> <p>**Rule 113 - collection of information regarding the state of health of the person about to be questioned, including requests by a party for a particular expert to be appointed, which may involve co-</p>

Article of Rome Statute	SUBJECT MATTER	Corresponding rule number and brief description
		operation of States Parties, in accordance with Part 9, Rome Statute
Article 56, paragraph 1	Role of the Pre-trial Chamber in relation to a unique investigative opportunity - where the Prosecutor considers an investigation to present a unique opportunity to collect evidence, etc.	**Rule 114, sub-rule 1 - procedures for Pre-trial Chamber to follow, including consultations with the accused, which may involve co-operation of States Parties, in accordance with Part 9, Rome Statute
Article 56, paragraph 2	Role of the Pre-trial Chamber in relation to a unique investigative opportunity - measures that the Pre-trial Chamber may take in relation to a unique investigative opportunity	**Rule 112, sub-rule 5 - including requirements relating to recording of questioning, which may involve the cooperation of States Parties, in accordance with Part 9
Article 56, paragraph 3	Role of the Pre-trial Chamber in relation to a unique investigative opportunity - where the Pre-trial Chamber considers that measures are necessary to preserve similar evidence essential for the defence	Rule 114, sub-rule 2 - requirements on Pre-trial Chamber when taking a decision in this regard
Article 57	Functions and powers of the Pre-trial Chamber	<p>*Rule 76 - procedures for pre-trial disclosure relating to prosecution witnesses</p> <p>Rule 77 - general duty to allow defence to inspect relevant items in possession or control of the Prosecutor</p> <p>Rule 81 - general restrictions on disclosure and procedures for Prosecutor to follow</p> <p>**Rule 115 - procedures relevant to article 57, paragraph 3 (d), where Prosecutor requests authorization to take specific investigative steps within the territory of a State Party without having secured the co-operation of that State Party, including State Party being invited to express its views</p> <p>**Rule 116 - procedures relevant to</p>

Article of Rome Statute	SUBJECT MATTER	Corresponding rule number and brief description
		article 57, paragraph 3 (b), where defence requests measures to assist with preparation of defence, including co-operation by States Parties
Article 57, paragraph 3 (e)	Functions and powers of the Pre-trial Chamber - protective measures for the purpose of forfeiture	**Rule 99 - procedure for ordering such protective measures and for requesting State co-operation
Article 58	Issuance by the Pre-trial Chamber of a warrant of arrest or a summons to appear	<p>*Rule 112 - specific requirements for recording statements where a person is being questioned by the Prosecutor and a warrant or summons has been issued</p> <p>Rule 117, sub-rule 3 - requirements for challenges to arrest warrants</p> <p>**Rule 119, sub-rule 5 - procedures for Pre-Trial Chamber to follow when setting conditions restricting liberty under a summons, including ascertaining the relevant provisions of the law of the State</p> <p>*Rule 123, sub-rule 1 - person to be notified that Pre-trial Chamber may hold confirmation hearing in the absence of the accused, under certain circumstances (see also article 61, paragraph 2)</p>

Article of Rome Statute	SUBJECT MATTER	Corresponding rule number and brief description
Article 59	Arrest proceedings in the custodial State	<p>**Rule 117, sub-rule 4 - custodial State may set time limits upon Pre-trial Chamber in relation to it making recommendations on requests for interim release</p> <p>**Rule 117, sub-rule 5 - where person granted interim release, Pre-trial Chamber to inform State how and when it would like to receive periodic reports on the status of interim release, which may involve the co-operation of States Parties, in accordance with Part 9, Rome Statute</p> <p>**Rule 184 – arrangements for surrendering the person to the Court</p>
Article 60	Initial proceedings before the Court	<p>Rule 118 - procedures for Court to determine interim release pending trial</p> <p>*Rule 119 - conditions restricting liberty which the Pre-trial Chamber may impose and procedures for reviewing these, including seeking the views of any relevant State</p> <p>Rule 120 -restrictions on using instruments of restraint</p> <p>Rule 121, sub-rule 1 - procedure and requirements for first appearance before the Pre-trial Chamber (prior to confirmation hearing)</p>
Article 61, paragraph 1	Confirmation of the charges before trial – confirmation hearing in presence of accused	<p>**Rule 92, sub-rule 3 - Court to notify victims of such hearing, which may involve the co-operation of States Parties, in accordance with article 68 and Part 9, Rome Statute</p> <p>Rule 121 - procedures for disclosure prior to the confirmation hearing</p> <p>Rule 122 - conduct and requirements of such proceedings, including questions or challenges concerning</p>

Article of Rome Statute	SUBJECT MATTER	Corresponding rule number and brief description
		<p>jurisdiction or admissibility</p> <p>Rule 131 - Registrar to maintain record of all proceedings prior to confirmation hearing, and make it generally available including to participating States</p>
Article 61, paragraph 2	Confirmation of the charges before trial - confirmation hearing in the absence of the accused	<p>**Rule 123 - measures that may be taken to try and ensure the confirmation hearing will be held in the presence of the accused, including ensuring that all reasonable measures have been taken to locate and arrest the person, which may involve the co-operation of States Parties, in accordance with Part 9, Rome Statute</p> <p>Rule 124 - procedure and requirements where person wishes to waive right to be present at confirmation hearing</p> <p>Rule 125 - procedure for Pre-trial Chamber to follow when determining whether to hold confirmation hearing in absence of accused</p> <p>Rule 126 - procedures to be followed during preparation for and holding of a confirmation hearing in the absence of the accused (rule 121 and rule 122 apply)</p>
Article 61, paragraph 3	Confirmation of the charges before trial - information to be provided to person prior to confirmation hearing	<p>*Rule 76 - procedures for pre-trial disclosure relating to prosecution witnesses</p> <p>Rule 77 - general duty to allow defence to inspect relevant items in possession or control of the Prosecutor</p> <p>Rule 78 - defence to permit Prosecutor to inspect relevant items of evidence prior to confirmation hearing</p>

Article of Rome Statute	SUBJECT MATTER	Corresponding rule number and brief description
		Rule 121, sub-rule 2 - procedures for disclosure prior to the confirmation hearing
Article 61, paragraph 4	Confirmation of the charges before trial - amendment or withdrawal of charges by Prosecutor	Rule 121, sub-rule 4 - time limit for Prosecutor to notify Pre-trial Chamber and person
Article 61, paragraph 6	Confirmation of the charges before trial - person's rights during confirmation hearing	Rule 121, sub-rule 6 - requirements if person wants to present evidence
Article 61, paragraph 7	Confirmation of the charges before trial - Pre-trial Chamber's decision	Rule 127 - procedure in the event of different decisions on multiple charges Rule 129 - notification of the decision on confirmation of the charges
Article 61, paragraph 9	Confirmation of the charges before trial - amendment of the charges between the confirmation hearing and the trial	Rule 128 - procedures to be followed by Prosecutor and Pre-trial Chamber
Article 61, paragraph 10	Confirmation of the charges before trial - where the charges are not confirmed	**Rule 185 - arrangements for the transfer of the person to an appropriate State upon release from the Court, which may involve the co-operation of States Parties, in accordance with Part 9, Rome Statute
Article 61, paragraph 11	Confirmation of the charges before trial - where charges are confirmed and Trial Chamber constituted	*Rule 126, sub-rule 3 - procedures where person who had fled is arrested subsequent to confirmation hearing in their absence Rule 129 - notification of the decision on confirmation of the charges Rule 130 - transmission of relevant information between Pre-trial and Trial Chambers

Article of Rome Statute	SUBJECT MATTER	Corresponding rule number and brief description
<u>Part 6 – The Trial</u>		
Article 62	Place of trial	*Rule 100 - procedures for changing the place of proceedings to a State other than the host State
Article 63	Trial in the presence of the accused	Rule 170 - powers of the presiding judge when the accused is disrupting the proceedings
Article 64, paragraph 3	Functions and powers of the Trial Chamber - where case is assigned to Trial Chamber	<p>*Rule 76 - procedures for pre-trial disclosure relating to prosecution witnesses</p> <p>Rule 77 - general duty to allow defence to inspect relevant items in possession or control of the Prosecutor</p> <p>Rule 78 - defence to permit Prosecutor to inspect relevant items of evidence prior to trial</p> <p>Rule 79 - disclosure by the defence</p> <p>Rule 80 - procedures for raising a ground for excluding criminal responsibility under article 31, paragraph 3</p> <p>Rule 81 - general restrictions on disclosure and procedures for Prosecutor to follow</p> <p>Rule 82 - restrictions on disclosure of material and information protected under article 54, paragraph 3 (e)</p> <p>Rule 132 - requirement for Trial Chamber to hold status conference to set trial date</p> <p>Rule 134 - procedures for motions relating to the trial proceedings, including the right of all parties to file a response</p>

Article of Rome Statute	SUBJECT MATTER	Corresponding rule number and brief description
Article 64, paragraph 4	Functions and powers of the Trial Chamber - where Trial Chamber refers preliminary matters to Pre-trial Chamber <i>et al</i>	Rule 126, sub-rule 3 - person who fled before confirmation hearing may request referral of issues back to Pre-trial Chamber
Article 64, paragraph 5	Functions and powers of the Trial Chamber - joinder and severance of charges	Rule 136 - persons accused jointly to be tried jointly, unless otherwise decided
Article 64, paragraph 6	Functions and powers of the Trial Chamber - powers of Trial Chamber prior to and during trial	Rule 91, sub-rule 3 - procedures and restrictions where legal representatives of victims wish to question witnesses or have access to documents
Article 64, paragraph 8	Functions and powers of the Trial Chamber - Trial Chamber to satisfy itself that accused understands all charges	*Rule 135 - Trial Chamber may order medical examination of accused, including at request of any party Rule 140 - directions for the conduct of the proceedings and testimony Rule 141 - closure of evidence and closing statements
Article 64, paragraph 9	Functions and powers of the Trial Chamber - powers of Trial Chamber in relation to evidence and maintaining order	*Rule 63 - general provisions relating to evidence
Article 64, paragraph 10	Functions and powers of the Trial Chamber - record of the trial	Rule 137 - measures the Registrar should take to record the trial Rule 138 - Registrar to have custody of evidence
Article 65	Proceedings on an admission of guilt	Rule 139 - procedure where Trial Chamber desires a more complete presentation of the facts
Article 66	Presumption of innocence	Rule 63, sub-rule 4 - no legal requirement of corroboration of evidence
Article 67, paragraph 1	Rights of the accused – right to a fair hearing conducted impartially	Rule 20 - responsibilities of Registrar relating to the rights of the defence Rule 21 - assignment of legal assistance

Article of Rome Statute	SUBJECT MATTER	Corresponding rule number and brief description
		<p>Rule 22 - appointment and qualifications of Counsel for the defence</p> <p>*Rule 73 - communications between an accused and counsel must ordinarily be regarded as privileged</p> <p>**Rule 101 - Court must take into account rights of defence when setting any time limits, and all those participating in proceedings must endeavour to act as expeditiously as possible, within relevant time limits set by the Court</p> <p>Rule 114, sub-rule 2 - requirements on Pre-Trial Chamber when taking a decision whether measures are necessary to preserve unique evidence essential for the defence</p> <p>*Rule 117, sub-rule 1 – documents that an arrested person must receive from the Court</p> <p>Rule 121, sub-rule 1 - these rights apply from the time the person first appears before the Court</p> <p>*Rule 123, sub-rule 1 – arrested person entitled to be notified of provisions of article 61, paragraph 2</p> <p>*Rule 187 - requests for arrest and surrender must be accompanied by a translation in a language the person fully understands and speaks, in order to ensure that the person fully understands the charges</p>
Article 67, paragraph 2	Rights of the accused - right to disclosure	<p>*Rule 76 - procedures for pre-trial disclosure relating to prosecution witnesses</p> <p>Rule 77 - general duty to allow defence to inspect relevant items in possession or control of the</p>

Article of Rome Statute	SUBJECT MATTER	Corresponding rule number and brief description
		<p>Prosecutor</p> <p>Rule 83 - procedure for rulings on exculpatory evidence under article 67, paragraph 2</p> <p>*Rule 84 - where additional disclosure is considered necessary prior to trial</p>
Article 68, paragraphs 1-2	Protection of the victims and witnesses and their participation in the proceedings – protection of victims and witnesses	<p>Rules 16 to 19 - General responsibilities of the Registrar and the Victims and Witnesses Unit in relation to victims</p> <p>Rule 43 - Court to ensure that all documents subject to publication respect the security of victims and witnesses</p> <p>*Rule 85 - definition of victims</p> <p>Rule 86 - Court to take into account any special needs of victims when performing its functions</p> <p>**Rule 87 - any Chamber may order protective measures for victims and witnesses and other persons at risk</p> <p>**Rule 88 - any Chamber may order special measures to facilitate the testimony of a traumatised victim or witness <i>et al</i></p> <p>Rule 90, sub-rule 4 - distinct interests of victims to be taken into account by Chambers and the Registry in selection of common legal representatives</p> <p>**Rule 134 - requests for protective measures are subject to rule 134 on motions relating to the trial proceedings</p> <p>*Rule 194, sub-rule 3 - procedures where a State requests the co-operation of the Court</p>

Article of Rome Statute	SUBJECT MATTER	Corresponding rule number and brief description
Article 68, paragraph 3	Protection of the victims and witnesses and their participation in the proceedings - participation by victims and witnesses in proceedings	<p>Rule 89 - victims must apply to the Registrar to participate in any proceedings, then the relevant Chamber makes the decision as to whether or not the victim/s may participate</p> <p>Rule 90 - legal representatives of victims</p> <p>Rule 91 - participation of legal representatives in the proceedings</p> <p>**Rule 92 - notification to victims and their legal representatives, which may involve the co-operation of States Parties, in accordance with Part 9, Rome Statute</p> <p>Rule 93 - any Chamber may seek the views of victims or their legal representatives</p>
Article 68, paragraph 5	Protection of the victims and witnesses and their participation in the proceedings - Prosecutor may withhold certain evidence which may endanger a witness	Rule 81- restrictions on disclosure
Article 69, paragraph 1	Evidence - undertakings as to the truthfulness of evidence	*Rule 66 - solemn undertaking, exceptions, and relevant warnings
Article 69, paragraph 2	Evidence - testimony of witnesses to be provided in person	<p>Rule 65 - compellability of witnesses who appear before the Court</p> <p>**Rule 67 - procedure for provision of <i>viva voce</i> (oral) testimony by means of audio or video technology</p> <p>**Rule 68 -circumstances where Trial Chamber may admit prior recorded testimony</p>

Article of Rome Statute	SUBJECT MATTER	Corresponding rule number and brief description
Article 69, paragraph 3	Evidence - provision of evidence	<p>Rule 69 - Prosecutor and defence can agree as to certain evidence</p> <p>Rule 140, sub-rule 2 (a) - right to question one's own witness</p>
Article 69, paragraph 4	Evidence - rulings on the relevance or admissibility of evidence	<p>*Rule 47, sub-rule 2 - applicable to testimony taken in accordance with article 15(2)</p> <p>*Rule 63 - general provisions relating to evidence</p> <p>*Rule 64 - procedure relating to the relevance or admissibility of evidence</p> <p>*Rule 70 - principles of evidence in cases of sexual violence</p> <p>*Rule 71 - evidence of other sexual conduct</p> <p>Rule 72 - <i>in camera</i> procedures to consider relevance or admissibility</p>
Article 69, paragraph 5	Evidence - privileges on confidentiality	**Rule 73 - definitions and restrictions on privileged communications and information
Article 69, paragraph 7	Evidence - evidence obtained by means of violation of Statute or internationally recognised human rights	<p>**Rule 74 - procedures relating to self-incrimination by a witness, including potential requirement that witness be provided with an assurance before the witness attends, which may involve the co-operation of States Parties, in accordance with Part 9, Rome Statute (see rule 190)</p> <p>Rule 75 - incrimination by family members</p> <p>**Rule 190 - instruction on self-incrimination to accompany request for witness to appear before the Court, which may involve the co-operation of States Parties, in accordance with Part 9, Rome Statute</p> <p>Rule 191 - assurance may be</p>

Article of Rome Statute	SUBJECT MATTER	Corresponding rule number and brief description
		provided by the Court under article 93(2)
Article 70, paragraph 1	Offences against the administration of justice - offences against the administration of justice of the Court	Rule 168 - <i>ne bis in idem</i> applies Rule 169 - person accused of offence may be arrested immediately on basis of oral request by Prosecutor
Article 70, paragraph 2	Offences against the administration of justice - jurisdiction over offences against the administration of justice	*Rule 162 - procedures and considerations when Court decides whether to prosecute or to request a State Party to prosecute Rule 163 - application of the Statute and the rest of the Rules to such prosecutions *Rule 164 - periods of limitation Rule 165 - relevant provisions for investigation, prosecution and trial of such offences **Rule 167 - Court may request co-operation from States
Article 70, paragraph 3	Offences against the administration of justice - sanctions for such offences	**Rule 166 - considerations relevant to imposition of sanctions, including the possibility that the Court may request a State Party to enforce a fine in accordance with article 109
Article 71	Sanctions for misconduct before the Court	Rule 170 - disruption of proceedings Rule 171 - refusal to comply with a direction by the Court *Rule 172 - conduct covered by both articles 70 and 71
Article 72	Protection of national security information	Rule 81 - restrictions on disclosure
Article 73	Third party information or documents	No further rules
Article 74	Requirements for the decision	Rule 39 - exceptions for alternate judges Rule 142 - procedures relating to

Article of Rome Statute	SUBJECT MATTER	Corresponding rule number and brief description
		<p>deliberations, including requirement that Trial Chamber inform all participants of the date on which the decision will be announced</p> <p>Rule 144 - decisions of Trial Chamber to be pronounced in public in presence of, <i>inter alia</i>, States that have participated in the proceedings</p> <p>**Rule 185 - arrangements for the transfer of the person to an appropriate State upon release from the Court, which may involve the co-operation of States Parties, in accordance with Part 9, Rome Statute</p>
Article 75, paragraph 1	Reparations to victims - principles relating to reparations to victims	<p>Rule 91, sub-rule 4 - restrictions on questioning by legal representatives of victims do not apply</p> <p>*Rule 94 - requirements for requests for reparations, including notification to interested States</p> <p>*Rule 95 - procedure where Court wishes to proceed on its own motion, including notification to interested States</p> <p>**Rule 96 - requirements for publication of reparation proceedings, which may involve the co-operation of States Parties, in accordance with Part 9, Rome Statute</p> <p>*Rule 97 - guide to assessment of reparations, including provision for observations by States on the reports of experts</p> <p>*Rule 143 - procedure for holding additional hearings on matters related to sentence or reparations</p> <p>Rule 153 - appeals against reparations orders</p>

Article of Rome Statute	SUBJECT MATTER	Corresponding rule number and brief description
Article 75, paragraph 2	Reparations to victims - orders for reparations	<p>*Rule 98 - considerations as to whether reparations will be paid directly or through the Trust Fund, which may involve consultations with interested States</p> <p>Rule 144 - decisions of Trial Chamber to be pronounced in public in presence of, <i>inter alia</i>, States that have participated in the proceedings</p>
Article 75, paragraph 4	Reparations to victims - protective measures for the purposes of forfeiture	**Rule 99 - procedure for ordering such protective measures and for requesting State cooperation
Article 76	Sentencing	<p>Rule 63 - general provisions relating to evidence</p> <p>Rule 143 - procedure for holding additional hearings on matters related to sentence or reparations</p> <p>Rule 144 - decisions of Trial Chamber to be pronounced in public in presence of, <i>inter alia</i>, States that have participated in the proceedings</p> <p>*Rule 147 - Court may hear additional evidence or submissions relevant to orders of forfeiture</p>
<u>Part 7 – Penalties</u>		
Article 77	Applicable penalties	<p>Rule 145 - considerations relevant to sentencing overall</p> <p>**Rule 146 - considerations relevant to ordering a fine and enforcement of fines in accordance with article 109</p>
Article 78	Determination of the sentence	Rule 145 - considerations relevant to sentencing overall
Article 79	Trust Fund - for victims	*Rule 98 - considerations as to whether reparations will be paid directly or through the Trust Fund, which may involve consultations with

Article of Rome Statute	SUBJECT MATTER	Corresponding rule number and brief description
		interested States Rule 148 - Court may request observations from representatives of Trust Fund
Article 80	Non-prejudice to national application of penalties and national law	No further rules
<u>Part 8 – Appeal & Revision</u>		
Article 81	Appeal against decision of acquittal or conviction or against sentence	Rule 149 - rules governing proceedings *Rule 150 - requirements for lodging appeals **Rule 151 - procedure for filing of appeals, including notification to all parties who participated in proceedings including States and victims – which may involve the co-operation of States Parties, in accordance with article 68 and Part 9, Rome Statute Rule 152 - procedure for discontinuance of appeals, including notification to all parties
Article 82	Appeals against other decisions	*Rule 150, sub-rules 3 & 4 - appeals to be filed with Registrar *Rule 153 - appeals against reparations orders *Rule 154 - procedure for appeals that do not require leave of Court, including appeals by States against decisions relating to jurisdiction or admissibility **Rule 155 - procedure for appeals that require leave of Court, including appeals by States against decision to allow Prosecutor to take specific investigative steps within State

Article of Rome Statute	SUBJECT MATTER	Corresponding rule number and brief description
		territory without having secured co-operation of State (see article 57, paragraph 3 (d))
Article 83, paragraph (1)	Proceedings on appeal	<p>Rule 156 - Court procedures for managing and hearing appeals, including notification to all parties who participated in proceedings</p> <p>Rule 157 - parties entitled to discontinue appeal, and other parties must be notified</p> <p>Rule 158 - judgement on the appeal</p>
Article 84	Revision of conviction or sentence	<p>**Rule 159 - requirements for applications for revision, including notification to all parties who participated in the proceedings, which may involve the co-operation of States Parties, in accordance with Part 9, Rome Statute</p> <p>*Rule 160 - requirements for person to be transported to Court</p> <p>Rule 161 - procedure for determination on revision, including notification of date of hearing to all parties who participated in the proceedings</p> <p>**Rule 206, sub-rule 3 - Registrar to ensure proper conduct of delivery of person between State of enforcement and host State, which may involve the co-operation of States Parties, in accordance with Part 9, Rome Statute</p>
Article 85	Compensation to an arrested or convicted person	<p>Rule 20 - responsibilities of the Registrar relating to the rights of the defence</p> <p>Rule 21 - procedure for assignment of legal assistance</p> <p>Rule 22 - appointment and qualifications of Counsel for the</p>

Article of Rome Statute	SUBJECT MATTER	Corresponding rule number and brief description
		defence Rule 173 - requirements for requesting compensation Rule 174 - procedures for requesting compensation Rule 175 - considerations as to the amount of compensation to be awarded
<u>Part 9 – International Co-operation and Judicial Assistance</u>		
Article 86	General obligation to cooperate	No further rules
Article 87	Requests for cooperation - general provisions	**Rule 176 - role of Registrar in managing requests for co-operation and changes in designation of national channels for receiving requests, which may involve the co-operation of States Parties, in accordance with Part 9, Rome Statute **Rule 177 - requirements for providing information on channels of communication *Rule 178 - procedure for choosing language of communication with Court and requirements where no language has been chosen *Rule 179 - requirements where no language has been chosen by a non State Party which is co-operating with the Court **Rule 180 - procedures for changing channels of communication or language of requests
Article 88	Availability of procedures under national law	No further rules

Article of Rome Statute	SUBJECT MATTER	Corresponding rule number and brief description
Article 89, paragraph 1	Surrender of persons to the Court - requests for arrest and surrender	**Rule 117 - procedures where person is detained in the custodial State in response to a request from the Court, including provision for custodial State to stipulate time limit for receiving recommendations from Pre-trial Chamber as to interim release and Court to stipulate how and when it would like to receive periodic reports on interim release
Article 89, paragraph 2	Surrender of persons to the Court - <i>ne bis in idem</i> challenges in national court	**Rule 181 - Court to obtain all relevant information, which may involve the co-operation of States Parties, in accordance with Part 9, Rome Statute
Article 89, paragraph 3	Surrender of persons to the Court - transport through State territory of a person being surrendered to the Court	**Rule 182 - procedural requirements for State to follow
Article 89, paragraph 4	Surrender of persons to the Court - where person being sought is already being proceeded against or serving a sentence for a different crime	*Rule 183 - provision for temporary surrender of person **Rule 184 - arrangements for surrendering the person to the Court
Article 90	Competing requests	**Rule 186 - procedure where Court has determined case to be inadmissible (under article 90, paragraph 8), including requirement for notification to Prosecutor by requested State of its decision to refuse extradition to requesting State
Article 91	Contents of request – for arrest and surrender	*Rule 117, sub-rule 3 - procedure for challenges as to whether arrest warrant properly issued *Rule 187 - request must be accompanied by translation of relevant documents into a language that the person fully understands and speaks

Article of Rome Statute	SUBJECT MATTER	Corresponding rule number and brief description
Article 92	Provisional arrest	<p>**Rule 117 - where person is detained in custodial State</p> <p>*Rule 123, sub-rule 1 – provisionally arrested person entitled to receive notification of article 61, paragraph 2</p> <p>**Rule 188 - time limit for Court to submit documents to requested State after a provisional arrest</p> <p>*Rule 189 - where person consents to surrender, Court not required to transmit documents unless requested State indicates otherwise</p>
Article 93, paragraph 1	Other forms of cooperation - assisting the Court with its investigations and prosecutions	*Rule 81 - restrictions on disclosure where steps have been taken to ensure confidentiality of information
Article 93, paragraph 2	Other forms of cooperation - Court may provide certain assurances to witnesses or experts	<p>**Rule 74 - procedures relating to self-incrimination by a witness, including potential requirement that witness be provided with an assurance before the witness attends, which may involve the co-operation of States Parties, in accordance with Part 9, Rome Statute</p> <p>**Rule 190 - instruction on self-incrimination to accompany request for witness to appear before the Court, which may involve the co-operation of States Parties, in accordance with Part 9, Rome Statute</p> <p>Rule 191 - assurance may be provided by the Court under article 93, paragraph 2</p>
Article 93, paragraph 7	Other forms of cooperation - temporary transfer of person in custody	<p>**Rule 192 - requirements for transfer of person in custody of national authorities</p> <p>**Rule 193 - requirements for transfer of person in custody of State enforcing Court's sentence</p>

Article of Rome Statute	SUBJECT MATTER	Corresponding rule number and brief description
Article 93, paragraph 10	Other forms of cooperation - assistance of Court to States Parties	*Rule 194 - procedure where a State requests the co-operation of the Court
Article 94	Postponement of execution of a request in respect of ongoing investigation or prosecution	No further rules
Article 95	Postponement of execution of a request in respect of an admissibility challenge	No further rules
Article 96	Contents of requests for other forms of assistance under article 93	**Rule 116, sub-rule 1 (b) - procedure for collection of evidence at the request of the defence, in accordance with article 57, paragraph 3 (b) **Rule 194 - where a State requests the co-operation of the Court
Article 97	Consultations	No further rules
Article 98	Cooperation with respect to waiver of immunity and consent to surrender	**Rule 195 - requirements where a request for surrender or assistance raises a problem of execution under this article
Article 99	Execution of requests under articles 93 and 96	No further rules
Article 100	Costs	*Rule 208, sub-rule 2 - costs for enforcing sentences
Article 101	Rule of speciality	*Rule 196 - provision of views by person concerned *Rule 197 - where Court has requested waiver of rule of speciality
Article 102	Use of terms	No further rules

Article of Rome Statute	SUBJECT MATTER	Corresponding rule number and brief description
<u>Part 10 - Enforcement</u>		
Article 103, paragraph 1	Role of States in enforcement of sentences of imprisonment	<p>*Rule 198 - provisions relevant to communications between the Court and States</p> <p>Rule 199 - responsible organ (Presidency)</p> <p>Rule 200 - management of the list of States of enforcement</p> <p>*Rule 208 - State of enforcement to bear ordinary costs of enforcement</p>
Article 103, paragraph 3	Role of States in enforcement of sentences of imprisonment - considerations relevant to choosing a State of enforcement	<p>Rule 201 - principles of equitable distribution</p> <p>*Rule 202 - timing of delivery of sentenced person to State of enforcement</p> <p>Rule 203 - views of sentenced person to be taken into account by Court</p> <p>*Rule 204 - information to be provided to designated State</p> <p>*Rule 205 - where a State rejects its designation</p> <p>*Rule 206 - arrangements for delivery of sentenced person</p> <p>**Rule 207 - requirements for transit of sentenced person through State territory</p>
Article 104	Change in designation of State of enforcement	<p>Rule 203 - views of sentenced person to be taken into account by Court</p> <p>Rule 209 - when Presidency can decide to change the State of enforcement</p> <p>*Rule 210 - procedure for change in State of enforcement, including requesting views from State of enforcement</p>

Article of Rome Statute	SUBJECT MATTER	Corresponding rule number and brief description
Article 105	Enforcement of the sentence	No further rules
Article 106	Supervision of enforcement of sentences and conditions of imprisonment	<p>*Rule 211 - Presidency's role in supervising sentences of imprisonment, including seeking certain information from enforcing States</p> <p>*Rule 212 - information to be provided on location of person for enforcement of fines etc., which may involve the co-operation of States Parties, in accordance with Part 9, Rome Statute</p>
Article 107	Transfer of the person upon completion of sentence	*Rule 213 - procedure where State of enforcement wishes to extradite or surrender person to a requesting State, in accordance with article 107, paragraph 3
Article 108	Limitation on the prosecution or punishment of other offences	<p>*Rule 214 - requirements where State wishes to prosecute or enforce a sentence against the person</p> <p>*Rule 215 - Presidency's decision on request to prosecute or enforce a sentence, including <i>inter alia</i> temporary extradition to a third State</p> <p>*Rule 216 - information on enforcement to be requested</p>
Article 109, paragraph 1	Enforcement of fines and forfeiture measures	<p>*Rule 217 - role of Presidency in seeking co-operation and measures for enforcement</p> <p>**Rule 218 - contents of Court orders for forfeiture and reparations</p> <p>**Rule 219 - President to inform national authorities not to modify reparations orders</p> <p>**Rule 220 - President to inform national authorities not to modify orders for fines</p>

Article of Rome Statute	SUBJECT MATTER	Corresponding rule number and brief description
Article 109, paragraph 2	Enforcement of fines and forfeiture measures - where State Party unable to give effect to order for forfeiture	**Rule 222 - Presidency to assist State, as requested
Article 109, paragraph 3	Enforcement of fines and forfeiture measures - property to be transferred to Court	**Rule 221 - procedure for decision on disposition or allocation of property or assets, including consultations with the State of enforcement
Article 110	Review by the Court concerning reduction of sentence	*Rule 223 - criteria for review, some of which State of enforcement would have information on, *Rule 224 - procedure for review, including participation by State of enforcement
Article 111	Escape	**Rule 225 - measures to be taken in the event of escape, which may involve co-operation of States Parties, in accordance with Part 9, Rome Statute
<u>Part 11 – Assembly of States Parties</u>		
Article 112	Assembly of States Parties	No further rules
<u>Part 12 – Financing</u>		
Articles 113-118	Financial Regulations; Payment of expenses; Funds of the Court and of the Assembly of States Parties; Voluntary contributions; Assessment of contributions; Annual audit	No further rules
<u>Part 13 – Final Clauses</u>		
Articles 119-128	Settlement of disputes; Reservations; Amendments; Amendments to provisions of an institutional nature; Review of the Statute; Transitional Provision; Signature, ratification,	No further rules

Article of Rome Statute	SUBJECT MATTER	Corresponding rule number and brief description
	acceptance, approval or accession; Entry into force; Withdrawal; Authentic texts	
<u>Other</u>		
Various	Proceedings before all Chambers	<p>*Rule 63 - all evidentiary rules in Chapter 4 of the RPE (ie. rules 63-84) apply to proceedings before all Chambers</p> <p>*Rule 103 - <i>amicus curiae</i> and other forms of submission may be invited by the Court at any stage (including submissions by States)</p>
Various	Time limits	<p>Rule 101, sub-rule 1 - general principles for the Court on setting time limits</p> <p>**Rule 101, sub-rule 2 - requirement that all those participating in proceedings and subject to an order of the Court, shall endeavour to act as expeditiously as possible, within the time limit set by the Court</p>
Various	Written communications with the Court	*Rule 102 - provision for information to be communicated in other forms where informant unable to write

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