

Cooperating with the International Criminal Court: Potential Implications for National Criminal Justice Personnel

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The International Centre for Criminal Law Reform & Criminal Justice Policy (ICCLR)

1822 East Mall,
Vancouver, British Columbia
V6T 1Z1 CANADA
Tel: + (604)-822-9875
Fax: + (604)-822-9317
E-Mail: icclr@law.ubc.ca
<http://www.icclr.law.ubc.ca>



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University of British Columbia, Canada

Roger McMeans, Senior Counsel, Extradition and MLA Section, British Columbia
Regional Office, Department of Justice Canada

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NOTES ON THE CONTRIBUTORS

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

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*, from which a 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 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.

Rod Jensen is a Legal Researcher with ICCLR and a doctoral candidate in the Faculty of Law at the University of British Columbia. His areas of research interest are International Criminal Law and the International Criminal Court. Prior to commencing his doctoral studies in Canada, he practised law in Australia for 12 years. Eight of those years were spent as a prosecutor with the Office of the Director of Public Prosecutions in Adelaide, South Australia and four as a lawyer in a private Adelaide firm specialising in complex litigation and criminal defence work. He has a Master of Laws from the University of Adelaide in South Australia, is admitted as a Barrister and Solicitor of the Supreme Court of South Australia and is on the register of legal practitioners for the High Court of Australia.

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GENERAL OVERVIEW

Background

The International Criminal Court (ICC) is a new, permanent international institution based in The Hague, in the Netherlands. It is capable of prosecuting crimes of genocide, crimes against humanity, and war crimes, but it is intended that the ICC will complement the efforts of national courts to investigate and prosecute these crimes themselves.

In those situations where the ICC does investigate and prosecute these crimes it will need to do so with the cooperation and assistance of national criminal justice personnel from all over the world because the ICC does not possess its own police force or long-term detention facilities. In this regard, national criminal justice personnel may be required to cooperate with requests from the ICC to undertake such practical tasks as identifying witnesses, arresting and detaining suspects, and tracing the financial assets of suspects. In addition, the ICC may be able to provide assistance to national criminal justice personnel involved in cases related to those the ICC has already started investigating by sharing certain types of evidence that the ICC has already obtained through the course of its investigation.

The crimes within the jurisdiction of the ICC do not happen often but when they do, it is important for the perpetrators to be brought to justice as quickly as possible. Therefore, national criminal justice personnel need to be prepared for the likelihood that they will be called upon to cooperate with and provide assistance to the ICC, either in the form of practical assistance offered to the ICC in the course of its investigation and prosecution, or by investigating and prosecuting the crimes at a national level.

In this regard, the ICC does not have jurisdiction over all international crimes committed anywhere in the world. Each government is free to decide what level of support, oversight and access it will give to the ICC and its officials. However, once a government becomes a Party to the *Rome Statute of the International Criminal Court (Rome Statute)*, which establishes the ICC, the government becomes legally obliged, in accordance with the provisions of the *Statute*, to provide cooperation to the ICC. Many governments that have already made a commitment to the *Rome Statute* are in the process of preparing laws to ensure that national criminal justice personnel can adequately cooperate with the ICC.

Introduction to the Guide

Cooperating with the International Criminal Court: Potential Implications for National Criminal Justice Personnel has been created to assist national criminal justice personnel:

- To understand the nature and extent of possible requests from the ICC for cooperation and assistance with investigations and prosecutions being undertaken by the ICC; and/or

- To understand the nature and extent of requests that can be made to the ICC for cooperation and assistance with national investigations and prosecutions involving crimes within the jurisdiction of the ICC, or other serious crimes under the national law of the requesting government, where the ICC has already collected evidence in the course of its own investigation or trial of a related case.

The guide is introductory in nature, in that it raises potential implications for national criminal justice personnel who will be involved in the process of cooperating with investigations and prosecutions with the ICC. This necessarily has to be the approach taken by the guide because the ICC is still in the earliest stages of its practical operation. In time, a body of experience will develop that will allow a more specific and detailed analysis to be undertaken of the process of cooperating with investigations and prosecutions involving the ICC but that is still a way off.

While targeted at national criminal justice personnel, the guide can be used as a resource for any person who is interested in the process of responding to or making a request for cooperation involving the ICC. In particular, it is hoped that the guide will assist senior policy makers involved in the administration of criminal justice at the national level to develop detailed national policies and guidelines allowing for cooperation with the ICC by their national criminal justice personnel. The term *national criminal justice personnel* includes:

- Law-makers and policy-makers at the national level;
- Judges;
- Prosecutors;
- Defence counsel;
- Legal representatives of victims, victims support groups and victim's representatives;
- Court administration officials;
- Police, correctional services personnel and other law enforcement officials;
- Officials of governmental departments dealing with criminal justice issues;
- Representatives of intergovernmental and non-governmental organizations.

The *Rome Statute* anticipates that governments will use normal procedures under national laws whenever they are interacting with the ICC. Therefore, all national criminal justice personnel involved in the administration of justice at the national level may be called upon, at one time or another, to provide assistance to the ICC.

This guide cannot examine the process of cooperating with the ICC from the point of view of every person involved in the administration of justice at a national level. To do so would be an overwhelming task. Rather, it aims to provide an introduction to the process of cooperating with investigations and prosecutions involving the ICC that is pertinent and accessible to all national criminal justice personnel.

In this regard, at various points in the commentary in sections 3 and 4, issues are raised for the consideration of national criminal justice personnel. The purpose of raising these issues is to highlight ancillary matters that may require the attention or consideration of national criminal justice personnel when dealing with or making requests for cooperation.

Structure of the Guide

The guide is divided into a number of sections. Each section introduces a different aspect of the process of cooperation and builds upon the section that precedes it. The content of each of the sections can be summarised as follows:

- Section 1 introduces the process of cooperation with the ICC by providing an overview of the ICC, the *Rome Statute* and the Rules of Procedure and Evidence that are an instrument for the application of the *Statute*. This analysis provides a strong foundation for understanding the mechanics of receiving or making requests for cooperation involving the ICC;
- Section 2 examines the complementary nature of the jurisdiction of the ICC and explains the impact this has upon requests for cooperation that might be sought from or provided to a government in the course of an investigation or prosecution involving the ICC;
- Section 3 addresses in detail the way in which the ICC can make requests for cooperation from governments with its investigations and prosecutions. The section examines the mandatory nature of requests for cooperation, the mechanics of making, receiving and responding to requests, the various forms of requests for cooperation and assistance that can be expected by States Parties, the consequences of failing to respond to a request and the allocation of costs incurred in complying with requests.

Section 3 also examines the process by which governments can make requests to the ICC for cooperation or assistance with national investigations;

- Section 4 divides the process of investigation and prosecution into specific stages and examines the nature and extent of requests for cooperation and assistance that might be made in relation to each of these stages. The stages are listed in a chronological sequence, beginning with the referral of a situation to the ICC and concluding with the sentencing stage of a proceeding before the ICC. This section builds upon the matters considered in section 3.

To assist national criminal justice personnel using the guide, any reference in the text to an article of the *Rome Statute* or a rule in the Rules of Procedure and Evidence is denoted by a reference to that article or rule contained in “()” at the conclusion of the relevant reference. In order to be faithful to the wording of both the *Rome Statute* and the Rules of Procedure and Evidence, this guide often uses the exact wording of the relevant article or rule that is being referred to.

1. INTRODUCTION

Section 1 provides a brief introduction to the International Criminal Court (ICC), the *Rome Statute of the International Criminal Court (Rome Statute)* and the Rules of Procedure and Evidence. It then examines the relevance of the *Rome Statute* and the Rules of Procedure and Evidence to national criminal justice personnel cooperating with investigations and prosecutions involving the ICC. The section ends by directing national criminal justice personnel to further resources that may be of interest if more detailed information on these topics is sought.

1.1 The International Criminal Court

The ICC is the first-ever permanent international criminal court. It was established by the *Rome Statute*, which came into force on 1 July 2002.

The ICC can exercise jurisdiction over the most serious crimes of international concern. These crimes are identified in article 5 of the *Rome Statute* as:

- The crime of genocide;
- Crimes against humanity;
- War crimes;
- The crime of aggression.¹

Collectively, these crimes are referred to in this guide as the *article 5 crimes*. The jurisdiction of the ICC in respect to the article 5 crimes is non-retroactive (article 24). Therefore, the ICC can only exercise jurisdiction over article 5 crimes committed after 1 July 2002 (the date the *Rome Statute* entered into force).

Under the *Rome Statute* and international law generally, governments have the primary responsibility to investigate and prosecute these crimes. However, history has shown that many governments have been unwilling to do so, even in the case of the most heinous crimes against humanity. Also, many of these crimes are committed where there has been a complete break-down of the rule of law in a country, and therefore no national courts are functioning well enough to be able to carry out prosecutions immediately afterwards. In order to address these kinds of situations, the ICC will have “complementary” jurisdiction, allowing it, in certain limited circumstances, to assume jurisdiction over a case that would otherwise be prosecuted in a national court. Therefore, in general terms, the ICC will only assume jurisdiction over a case involving an article 5 crime if a government with jurisdiction over the case is unwilling or unable genuinely to investigate and prosecute the case. This “principle of complementarity” is described in further detail in Section 2.

¹ The ICC will only be able to exercise jurisdiction over the crime of aggression when a provision is adopted by a majority of States Parties defining the crime and setting out the conditions under which the ICC shall exercise jurisdiction with respect to it (article 5, paragraph 2). The adoption of such a provision can only occur at least seven years after the entry into force of the *Rome Statute*, i.e. after 1 July 2009 (articles 121 and 123).

When a government becomes a State Party to the *Rome Statute* it thereby accepts the complementary jurisdiction of the ICC with respect to the article 5 crimes (article 12, paragraph 1). This jurisdiction covers both acts committed within the territory of the government (including ships, aeroplanes and overseas embassies) and the actions of nationals of that country, wherever they are in the world. At the same time, there may be occasions where, because of the unwillingness or inability of a government to investigate or prosecute a crime within the jurisdiction of the Court, the ICC will have to carry out the investigation and, perhaps, the prosecution of a matter that would otherwise have been carried out by that government. The United Nations Security Council can also refer to the ICC a “situation” occurring anywhere in the world, in which one or more of the article 5 crimes appears to have been committed (article 13, paragraph (b)).

In these situations, it may be necessary for the ICC to seek the cooperation and assistance of other national governments during the course of its investigation and prosecution. In addition, national governments may want to seek the cooperation of the ICC when investigating or prosecuting crimes that come within the jurisdiction of the ICC, or when investigating or prosecuting other serious crimes under their national laws where the ICC has already collected some evidence that may be relevant to their case. In each of these circumstances the *Rome Statute* provides for cooperation to take place. The Rules of procedure and Evidence, which have been created to assist in the practical operation of the *Rome Statute*, facilitate this process of cooperation.

1.2 The Rome Statute

The *Rome Statute* was finalised and adopted in July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, which met in Rome, Italy. It is a multilateral, international treaty.

The *Rome Statute* sets out the powers and functions of the ICC. It is divided into 13 parts and contains 128 articles. Each part deals with a different aspect of the Court. In order to give a brief insight into the nature and extent of the powers and functions of the ICC, the subject matter of each of the 13 parts is set out below:

- Part 1: deals with the establishment of the Court;
- Part 2: identifies the crimes over which the Court can exercise jurisdiction, the way in which the Court can exercise jurisdiction, the admissibility of cases before the Court and the laws applicable to the exercise of the Court’s jurisdiction;
- Part 3: outlines the general principles of criminal law that the Court will apply when exercising jurisdiction;
- Part 4: deals with the composition and administration of the Court, which includes the judges, the Office of the Prosecutor, the Registry;
- Part 5: covers investigations and prosecutions by the Court;
- Part 6: deals with the process of trial before the Court, including sentencing;
- Part 7: outlines the penalties that can be imposed by the Court;
- Part 8: deals with the appeal and revision of decisions of the Court;
- Part 9: explains the nature and extent of international cooperation and judicial assistance that can be requested by the Court or sought by States from the Court;

- Part 10: deals with the enforcement of sentences, fines and forfeiture measures imposed by the Court;
- Part 11: establishes the Assembly of States Parties and provides the mandate for the work of the Assembly;
- Part 12: deals with financing the Court;
- Part 13: sets out the final clauses, which include the process of making amendments to the *Rome Statute* and the process for reviews of the *Statute*.

In addition to detailing the functions and powers of the ICC, the provisions of the *Rome Statute* provide extensive detail for the practical operation of the ICC. The Rules of Procedure and Evidence supplement this detail and assist in the application of the various articles contained in the *Rome Statute*.

1.3 Rules of Procedure and Evidence

In order to ensure that the ICC would be operational as soon as the *Rome Statute* entered into force, the Rome Conference decided to establish a Preparatory Commission for the Establishment of the International Criminal Court. The mandate given to the Preparatory Commission was to prepare proposals for practical arrangements for the establishment and coming into operation of the Court (Final Act, Resolution F, paragraph 5). This included the preparation of a draft text of the Rules of Procedure and Evidence.

The Preparatory Commission finalised the draft text of the Rules of Procedure and Evidence on 30 June 2000 and in September 2002 the finalised draft text was presented to the first meeting of the Assembly of States Parties, which took place at the United Nations Headquarters in New York. Acting on the recommendation of the Working Group as a Whole, the Assembly of States Parties adopted, by consensus, the Rules of Procedure and Evidence (the Rules) and they consequently entered into force in accordance with article 51 of the *Rome Statute*.

The Rules of Procedure and Evidence are divided into 12 chapters and contain 225 rules. Each chapter deals with a separate aspect of the practical operation of the ICC. The content of the chapters are briefly set out below:

- Chapter 1: deals with general matters including the use of terms and the process to amend the Rules of Procedure and Evidence;
- Chapter 2: covers matters relating to the composition and administration of the Court;
- Chapter 3: deals with issues of jurisdiction and admissibility;
- Chapter 4: covers rules relating to various stages of proceedings before the ICC including evidence, disclosure, victims and witnesses and sittings of the Court in places other than the host State;
- Chapter 5: provides rules relating to the investigation and prosecution of matters involving the ICC;
- Chapter 6: deals with the trial procedure;
- Chapter 7: relates to penalties imposed by the Court;
- Chapter 8: covers the process of appeal and revision of the decisions of the Court;
- Chapter 9: deals with offences and misconduct against the Court;

- Chapter 10: outlines the process for providing compensation to a person who has been wrongfully arrested or convicted;
- Chapter 11: deals with requests for international cooperation and judicial assistance;
- Chapter 12: covers the enforcement of sentences, fines, forfeiture measures and reparations, as well as detailing the procedure to be followed in the event of the escape of a person sentenced by the ICC.

The Rules of Procedure and Evidence are an instrument for the application of the *Rome Statute*. In this regard, the Rules are subordinate to the *Rome Statute* in all cases (Explanatory Note, Rules of Procedure and Evidence). In the event of a conflict between the *Statute* and the Rules, the *Statute* will prevail (article 51, paragraph 5).

In addition, the Rules of Procedure and Evidence do not affect the procedural rules for any national court or legal system for the purpose of national proceedings (Explanatory Note, Rules of Procedure and Evidence). National courts or legal systems undertaking national proceedings must therefore be regulated first and foremost by the rules of procedure and evidence applicable in those courts or legal systems. This is consistent with the complementary nature of the ICC because it emphasises that governments retain the primary responsibility to regulate and administer the process of criminal justice within their own territory.

Within the context of the *Rome Statute* however the Rules of Procedure and Evidence assume great importance. They are to be applied, along with the provisions of the *Rome Statute*, in preference to other sources of law, including, where appropriate, applicable treaties, principles and rules of international law and general principles of law derived from the national laws of legal systems of the world (article 21).

1.4 Relevance of the *Rome Statute* and the Rules of Procedure and Evidence to national criminal justice personnel cooperating with investigations and prosecutions involving the ICC

National criminal justice personnel cooperating with the investigation or prosecution of matters involving the ICC will want to be familiar with the provisions of the *Rome Statute* and the Rules of Procedure and Evidence for the following reasons:

- The *Rome Statute* and the Rules of Procedure and Evidence provide a detailed code for the practical functioning of the ICC. Any cooperation with the ICC is regulated by this code and should take place in accordance with it;
- By complying with the requirements of the *Rome Statute* and the Rules of Procedure and Evidence, national governments will ensure that requests for cooperation either to or from the ICC will be carried out in an efficient manner and without undue delays caused by procedural errors or misunderstandings;

- If national governments seeking the cooperation of the ICC are not fully aware of the nature and extent of cooperation contemplated by the *Rome Statute* and the Rules of Procedure and Evidence they may miss out on opportunities for facilitating the investigation or prosecution of the most serious crimes in their own jurisdictions;
- The *Rome Statute* and the Rules of Procedure and Evidence set broadly-accepted international standards for the ICC's conduct in investigations and prosecutions. National governments will want to be alert to these standards in order to compare them with the applicable standards in their own criminal jurisdictions;
- If the criminal jurisdictions of States Parties are not compatible with the standards contained in the *Rome Statute* and the Rules of Procedure and Evidence, States Parties may not be able to take advantage of the complementary jurisdiction of the ICC, which gives priority to national prosecutions that are carried out in good faith.

1.5 Further resources

The purpose of Section 1 is to give a brief introduction to the ICC, the *Rome Statute* and the Rules of Procedure and Evidence.

The International Centre for Criminal Law Reform and Criminal Justice Policy (ICCLR) has developed other resources relating to the ICC that provide further detail on these topics and may therefore be of interest to national criminal justice personnel. These include:

- *ICC Manual for the Ratification and Implementation of the Rome Statute*: a complete guide to the *Rome Statute* for national legislators and policy-makers;
- *ICC Rules of Procedure and Evidence: Implementation Considerations*: a supplement to the *Manual for the Ratification and Implementation of the Rome Statute*, and a complete guide for national legislators and policy-makers to the Rules of Procedure and Evidence;
- *ICC Checklist of Implementation Considerations and Examples: Relating to the Rome Statute and the Rules of Procedure and Evidence*: a further supplement to the *Manual for the Ratification and Implementation of the Rome Statute*;
- *Annotated Rome Statute of the International Criminal Court*: an annotated text of the *Rome Statute* incorporating references to other important documents that relate to the *Statute*, including the Rules of Procedure and Evidence.

These guides are available at the ICCLR's website: <http://www.icclr.law.ubc.ca>

2. COMPLEMENTARITY

This section examines the complementary nature of the jurisdiction of the ICC, which is of fundamental importance to the relationship between the ICC and States.

In addition to describing what complementarity is and how it operates in the *Rome Statute*, the section explains the impact that complementarity has upon requests for cooperation that might be sought from or provided to a government in the course of an investigation or prosecution involving the ICC.

2.1 Description

The term *complementarity*, when used in connection with the *Rome Statute*, describes the relationship between the ICC and national criminal jurisdictions. Pursuant to this relationship, the ICC will only investigate and prosecute an allegation involving an article 5 crime if a national government, with jurisdiction over it, is unwilling or unable genuinely to carry out the investigation or prosecution. This means that States, rather than the ICC, bear the primary responsibility for investigating and prosecuting allegations relating to article 5 crimes.

The ICC therefore complements national criminal jurisdictions by providing a permanent international institution capable of investigating and prosecuting the most serious crimes of international concern when national governments are unwilling or unable to do so.

2.2 Practical effects of complementarity

The principle of complementarity strikes a balance between respecting the rights of States, under international law, to exercise police power and penal law through their own systems of law enforcement and national courts,² and ensuring that the ICC will be able to penetrate the shield of impunity that has often been used to protect the perpetrators of the most serious humanitarian and human rights violations. If a government is unwilling or unable to genuinely carry out an investigation or prosecution of an allegation involving one or more of the article 5 crimes, the ICC can instead carry out that investigation or prosecution.

Prior to the establishment of the ICC there was no permanent international institution capable of carrying out this function.

2.3 Mechanics of complementarity

Article 1 of the *Rome Statute* states:

“An International Criminal Court (“the Court”) is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international

² See generally, B.B. Brown, “Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals” (1998) 23 *Yale J. Int’l L.* 383 at 424.

concern, as referred to in this Statute, and *shall be complementary to national criminal jurisdictions*. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.” (Emphasis added)

Paragraph 10 of the Preamble to the *Rome Statute* also emphasises that “the International Criminal Court established under this Statute *shall be complementary to national criminal jurisdictions*.” (Emphasis added)

However, neither of these references gives practical effect to the operation of complementarity in the *Rome Statute*. This function is left to article 17 of the *Rome Statute*, titled *Issues of admissibility*.

2.3.1 Article 17: Issues of admissibility

Pursuant to article 17, the ICC will not assume jurisdiction over any case that it determines to be inadmissible. In order to make this determination, the Court undertakes an examination of the actions of the investigating or prosecuting State in relation to the investigation or prosecution of a particular case. The circumstances in which the Court undertakes this examination and determination are examined in Section 3.9.2 of this guide.

For the moment, it is sufficient to note that the ICC will determine that a case is inadmissible where:

- The case is being investigated or prosecuted by a government which has jurisdiction over it and there is no reason to doubt that the investigation or prosecution is being conducted in good faith (article 17, paragraph 1 (a));
- The case has been investigated by a national government which has jurisdiction over it and the government has decided not to prosecute the person concerned and there is no reason to doubt that the decision not to prosecute was made in good faith (article 17, paragraph 1 (b));
- The person concerned has already been tried for conduct which is the subject of the complaint and there is no reason to doubt that those proceedings were conducted in good faith (article 17, paragraph 1 (c));
- The case is not of sufficient gravity to justify further action by the ICC (article 17, paragraph 1 (d)).

In summary, the case will be inadmissible before the ICC if there is no reason to doubt that the investigation, prosecution, decision not to prosecute or prior trial proceedings are being or were carried out in good faith, or the case is not of sufficient gravity to justify further action by the ICC.

If, however, the ICC determines that there is some reason to doubt that these things were done in good faith, the case will be admissible. Such a determination will occur in the following circumstances:

- The case is being investigated or prosecuted by a national government with jurisdiction over it but the government is unwilling or unable genuinely to carry out the investigation or prosecution (article 17, paragraph 1 (a));
- The case has been investigated by a national government which has jurisdiction over it and the government has decided not to prosecute the person concerned but the decision resulted from the unwillingness or inability of the government genuinely to prosecute (article 17, paragraph 1 (b));
- The person concerned has already been tried for conduct which is the subject of the complaint, but the proceedings for that conduct were:
 - for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the ICC (article 20, paragraph 3 (a)), or
 - the proceedings were not conducted independently or impartially in accordance with the norms of due process recognised by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice (article 20, paragraph 3 (b)).

If the national government proceedings were conducted in either of these ways the ICC will permit the person to be tried again for the same conduct but this time before the ICC.

2.3.2 Unwillingness and inability

The criteria that the ICC must use in determining unwillingness and/or inability in a particular case are set out in the *Rome Statute*.

2.3.2.1 Unwillingness

In relation to unwillingness, the Court must consider, having regard to the principles of due process recognised by international law, whether one or more of the following exist:

- The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for one or more of the article 5 crimes (article 17, paragraph 2 (a));
- There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice (article 17, paragraph 2 (b));
- The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice (article 17, paragraph 2(c)).

If the ICC determines that one or more of these criteria exist, the case will be admissible before the Court. These criteria are designed to ensure that a government cannot use its national criminal jurisdiction to shield perpetrators of the most serious crimes of international concern from criminal responsibility. The criteria allow the ICC to look behind investigations and prosecutions undertaken by a government in relation to the article 5 crimes and to expose those investigations and prosecutions to review if they are being or have been conducted in a manner that is inconsistent with an intent to bring the person concerned to justice.

2.3.2.2 Inability

In relation to inability, the ICC must consider:

- Whether, due to total loss or substantial collapse or unavailability of its national judicial system, the government is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings (article 17, paragraph 3).

If these criteria are met, the ICC will determine that the case is admissible before the Court. These criteria recognise that the nature of the article 5 crimes is such that they might often be committed in situations involving war, civil unrest, or partial or complete state collapse. In such situations the national judicial system of the affected State may not be able to cope with or accommodate the responsibilities associated with criminal investigation and prosecution. Examples of such responsibilities include gathering evidence, locating witnesses, taking testimony and identifying, questioning and taking into custody suspects.

2.3.3 Challenges to the jurisdiction of the Court or the admissibility of the case

The ICC will always consult, at an early stage, with governments who also have jurisdiction over a particular case, to ensure that the ICC respects the principle of complementarity and is not duplicating the genuine efforts of national criminal justice personnel (article 18). The ICC Prosecutor may ask a government to periodically inform the Prosecutor of the progress of the national investigation and any subsequent prosecution (article 18, paragraph 5). If the Prosecutor decides not to continue with an investigation that a government is already investigating, the Prosecutor can ask the government to make available information on the proceedings (article 19, paragraph 11). Rule 51 also provides that governments can voluntarily provide information to the ICC, such as information on the independence and impartiality of their judicial processes. Ultimately, however, the ICC makes the decision whether the government is acting in good faith or not, in accordance with the provisions discussed previously.

Governments have a number of opportunities during the ICC proceedings to challenge a decision by the ICC to take jurisdiction over a case that is also within the jurisdiction of the particular government. This challenge may take place during the Pre-Trial proceedings, or prior to, or at the commencement of the trial. However, the government may only make one such challenge, unless the Court grants leave for another challenge to be brought, in exceptional circumstances (article 19, paragraph 4). A second challenge, or a challenge made at the commencement of a trial, may only be requested where the

basis for the challenge is that the person concerned has already been tried for conduct which is the subject of the complaint (see article 17, paragraph 1 (c)). The procedure for the hearing of such challenges is set out in rule 58, and includes the requirement that challenges must be made in writing. Other relevant rules are 52-62, 133, 144, and 185.

Governments can also appeal the decision of the ICC to dismiss their challenge to the admissibility of the case (article 82, paragraph 1(a)). Rule 154 sets out the requirements for such appeals. The Appeals Division of the ICC has five judges, including the President of the Court, and all of these judges must hear any appeal made to the Court's jurisdiction or the admissibility of the case (article 39). The decision of the Appeals Chamber must be agreed upon by a majority of the judges and delivered in open court, and the judgement must state the reasons on which it is based (article 83, paragraph 4, and rule 158). Given that the 18 judges of the ICC represent every region and principal legal system of the world, the various Chambers of the ICC will be able to take into account legitimate cultural differences and approaches to investigations and prosecutions, in order to satisfy itself that it is exercising its complementary jurisdiction appropriately in a particular case.

2.4 Why complementarity is important when cooperating with investigations and prosecutions involving the ICC

Complementarity is an essential feature of the *Rome Statute*. When cooperating with investigations and prosecutions involving the ICC, complementarity is relevant to national criminal justice personnel in the following ways:

- The *Rome Statute* encourages governments to investigate and prosecute allegations relating to article 5 crimes prior to referring the allegations to the ICC. States Parties should bear this in mind when assessing its responsibility to put in place mechanisms to ensure that such allegations can be investigated and prosecuted in a competent manner;
- States that ratify the *Rome Statute* are committing themselves to a system of international criminal justice that aims to bring an end to impunity for the perpetrators of article 5 crimes. Part of this system of international criminal justice is the recognition that it is the duty of every government to exercise its criminal jurisdiction over those responsible for these and other international crimes (*Rome Statute*, Preamble, Paragraph 6);
- National governments conducting an investigation or prosecution of a matter that involves conduct covered by the article 5 crimes or other serious crimes under national law can request cooperation from the ICC in relation to that investigation or prosecution, where the ICC has already collected evidence in the course of its own investigation or trial of a related case. This provides national criminal justice personnel with a useful tool when undertaking these types of investigations and prosecutions;
- Where States Parties receive requests for cooperation from the ICC, the complementary nature of the jurisdiction of the ICC makes it essential that these

requests are responded to with efficiency and diligence. If they are not, the investigation and prosecution of the most serious crimes of international concern may be compromised and frustrated;

- The ICC will not be able to function effectively without the extensive cooperation of governments and, in particular, States Parties. In this regard, the ICC is an international institution that relies upon the support of the international community for its continued existence. The Court must be provided with every assistance in this regard to ensure its successful operation.
- The complementary nature of the jurisdiction of the ICC respects the right of national criminal jurisdictions to exercise jurisdiction over the article 5 crimes. However, while the *Rome Statute* provides detailed definitions for three of these crimes, it does not create criminal liability for them at a national level.

Criminal liability at a national level resides in the laws of individual States and in the enforcement of those laws by domestic courts. Complementarity serves a useful function in this regard because it compels governments to examine their national laws to ensure that they are compatible with the scope of criminal liability contemplated by the *Rome Statute*. The comprehensive definitions of three of the article 5 crimes provided in the *Rome Statute* are therefore of enormous normative value to the international community because the definitions crystallise the nature and extent of the crimes to which they refer and can be utilised by governments wanting to incorporate the same definitions into their national laws.

- Failure on the part of governments to incorporate into their domestic penal legislation provisions that ensure compatibility with the definitions of the article 5 crimes may have ramifications at an international level. A government that does not have adequate laws may be considered unwilling or unable genuinely to carry out the investigation or prosecution of a case over which it has primary prosecutorial responsibility and this in turn could invite the intervention of the ICC.³ Many governments are therefore currently in the process of adopting detailed domestic penal legislation that incorporates the definitions of the article 5 crimes contained in the *Rome Statute*.
- The *Rome Statute* requires States Parties to put in place laws and procedures at a national level that reflect the procedures set out in the *Rome Statute*. The incorporation of such laws and procedures at a national level will facilitate the creation of a uniform standard of criminal justice at an international level and also ensure that the States Parties are better situated to cooperate with the ICC when required.
- The complementary nature of the jurisdiction of the ICC encourages States Parties to conduct domestic investigations and prosecutions involving article 5 crimes in a manner that respects the fundamental goal of the *Rome Statute*, which is to bring

³ See K. L. Doherty & T.L. McCormack, “ ‘Complementarity’ As A Catalyst For Comprehensive Domestic Penal Legislation” (1999) 5 U.C. Davis J. Int’l L. & Policy 147 at 152.

an end to impunity for the perpetrators of the most serious crimes of international concern.

- In this regard, if the ICC determines that a State Party is unwilling or unable genuinely to carry out the investigation or prosecution of a case at a national level, or that a State Party has supported the conduct of sham proceedings in order to protect a person from criminal responsibility in relation to an article 5 crime, it will be open to the ICC to assume jurisdiction over the matter.

3. REQUESTS FOR COOPERATION

The complementary nature of the jurisdiction of the ICC allows and encourages governments to investigate and prosecute article 5 crimes at a domestic level. However, it also assumes that the ICC may need to investigate or prosecute those crimes in certain circumstances. Where such a need arises the ICC will often require the cooperation and assistance of governments to ensure that it can carry out its investigation and prosecution in an effective and efficient manner.

The *Rome Statute* anticipates the need for such assistance by providing the ICC with the authority to make requests to States Parties for cooperation (article 87, paragraph 1). This means that the ICC can request national governments to contribute to or carry out various aspects of the investigative and prosecutorial process, including the enforcement of sentences.

Examples of such cooperation include:

- Locating and speaking with witnesses;
- Questioning a person being investigated or prosecuted by the ICC;
- Executing a search and seizure;
- Preserving a crime scene;
- Tracing the proceeds of article 5 crimes in order to make them available for subsequent forfeiture.

This section of the guide outlines the way in which the ICC makes requests for cooperation from States Parties and also from non-States Parties and intergovernmental organizations. It discusses the types of requests for cooperation that the ICC might make, the form those requests will take and the manner in which governments should deal with them pursuant to the *Rome Statute* and the Rules of Procedure and Evidence.

This section also outlines how government can make requests to the ICC for cooperation or assistance with national criminal investigations involving article 5 crimes or other serious crimes.

At various points in the commentary issues are raised for the consideration of national criminal justice personnel. The purpose of raising these issues is to highlight ancillary matters that may require the attention or consideration of national criminal justice personnel dealing with or making requests for cooperation.

3.1 Mandatory nature of cooperation

In order to ensure the effective functioning of the ICC, the *Rome Statute* makes it mandatory for all States Parties to cooperate fully with the ICC in its investigation and prosecution of article 5 crimes (article 86). This mandatory obligation exists regardless of whether the case is at the earliest stage of investigation or at the most advanced stage of prosecution.

Part 9 of the *Rome Statute*, titled *International Cooperation and Judicial Assistance*, sets out in detail the nature and extent of the cooperation expected from States Parties in the investigation and prosecution of matters before the ICC. States Parties must ensure that there are procedures available under their national law to facilitate all of the forms of cooperation specified in Part 9 (article 88).

Issues for consideration

- Given the mandatory nature of cooperation, governments should ensure that the required procedures are available under their national law to facilitate cooperation with the ICC;
- This may involve States in passing new, or amending existing, legislation, regulations, rules, and ordinances and publishing guidelines for the use of criminal justice personnel when participating in responses to requests for cooperation from the ICC;
- National criminal justice personnel will want to be aware of any developments in this regard so that they can deal promptly and effectively with any request received from the ICC. This may involve organizing and participating in educational sessions on the ICC designed to deal with the nature and extent of the requirement for cooperation and the procedures that have been made available to facilitate cooperation.

3.2 Transmitting a request for cooperation

A request for cooperation from the ICC to a State Party can be transmitted to the State Party in either of two ways.

- Through the channel of communication designated by each State Party upon ratification, acceptance, approval or accession to the *Rome Statute* (article 87, paragraph 1 (a)), or
- When appropriate, through the International Criminal Police Organization or any appropriate regional organization (article 87, paragraph 1 (b)).

If a Chamber of the Court (i.e. the Appeals Chamber, the Trial Chamber, or the Pre-Trial Chamber) makes the request for cooperation, the Registrar will transmit the request. If the ICC Prosecutor (herein after referred to as the Prosecutor) makes the request, the Office of the Prosecutor will transmit it (rule 176, sub-rule 2).

The request and any documents supporting it will either be in, or be accompanied by a translation into, the official language of the requested State or one of the working languages of the Court, depending on the choice made by the requested State upon ratification, acceptance, approval or accession (article 87, paragraph 2 and rule 178). The working languages of the ICC are English and French (article 50, paragraph 2).

Issues for consideration

- National criminal justice personnel of a State Party will want to be aware of the channel of communication designated by their government, in order that systems can be put in place to ensure effective communication between the designated agency and other agencies that may be required to assist in fulfilling requests for cooperation;
- It may be beneficial for governments to implement strategies targeted at streamlining the process of communication between agencies involved in responding to requests. For example, a centralised task force, comprising officials from the various national government agencies likely to be involved in responding to requests, could be established and meet regularly to ensure that if a request is received it can be met with efficiency.

3.3 Responding to requests for cooperation

Any response to the request for cooperation, or any information or documents relating to the request, should be directed by the requested government back to the organ of the ICC that made the request (rule 176, sub-rule 2).

Further, the requested State must keep the request for cooperation and any documents supporting the request confidential, except to the extent that disclosure is necessary for execution of the request (article 87, paragraph 3).

The ICC may request that any information that is made available in a request for cooperation be provided and handled in a manner that protects the safety and physical or psychological well-being of any alleged victims, potential witnesses and their families (article 87, paragraph 4).

Issues for consideration

- A request for cooperation may require the simultaneous assistance of a number of different national government agencies. In order to avoid duplication or confusion it would be beneficial for the responses of each agency to be directed to a centralised body, which can then ensure that a full response is returned through the designated channel of communication;
- National criminal justice personnel will want to be aware of the laws, rules and regulations in force in their own States dealing with disclosure and the protection of alleged victims, potential witnesses and their families, as it may be necessary to utilise these when responding to a request for cooperation;

- In addition, States Parties will want to ensure that laws, rules and regulations are in place that allow for the full extent of protective measures contemplated by the *Rome Statute*.

3.4 Requests to non-State Parties and inter-governmental organizations

In addition to making requests to States Parties for cooperation and assistance, the ICC can invite a State that is not a party to the *Rome Statute* to provide assistance under Part 9 (article 87, paragraph 5). Such cooperation or assistance could be provided by the State on the basis of an *ad hoc* arrangement, or agreement made with the ICC or on any other appropriate basis.

The ICC may also ask any intergovernmental organization to provide information or documents or other forms of cooperation and assistance within the competence or mandate of that organization (article 87, paragraph 6).

3.5 Forms of mandatory cooperation and assistance

While States Parties are under a general obligation to cooperate fully with the ICC in its investigations and prosecutions of article 5 crimes, article 93 directs that States must comply with requests from the ICC to provide the following forms of assistance:

3.5.1 The identification and whereabouts of persons or the location of items (article 93, paragraph 1 (a));

Issues for consideration

- States Parties may be required to identify and locate nationals of their own State or identify and locate nationals of other States. In either case, national criminal justice personnel may require access to government records and official documents. This could involve liaison between different national government agencies;
- National criminal justice personnel will need to be aware of and act in accordance with local requirements relating to issues such as privacy and the limits of search powers.

3.5.2 The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court (article 93, paragraph 1 (b));

Issues for consideration

- National criminal justice personnel should be alert to any local requirements associated with the taking of evidence, especially testimony under oath. It may be necessary to obtain orders from a

court or courts to facilitate requests of this type and also to enlist the services of translators.

- The ICC will cover the cost of translation, interpretation and transcription (article 100, paragraph (b));
- In order for States to comply quickly with requests to obtain expert opinions and reports, it may be beneficial for government to maintain a register of experts residing in the State, which would include the name of the expert, contact details and the area of his or her expertise;
- The ICC will cover the cost of any expert opinion or report requested by it (article 100, paragraph 1 (c)).

3.5.3 The questioning of any person being investigated or prosecuted (article 93, paragraph 1 (c));

Issues for consideration

- The *Rome Statute* and the Rules of Procedure and Evidence establish strict guidelines for the questioning of a person being investigated or prosecuted in relation to the article 5 crimes. These are dealt with in more detail at paragraph 4.5 of this guide. National criminal justice personnel should be aware of these guidelines and ensure that any action in response to a request for this type of assistance adheres to those guidelines. Failure to do so could result in the evidence being inadmissible in subsequent proceedings (article 69, paragraph 7).

3.5.4 The service of documents, including judicial documents (article 93, paragraph 1 (d));

Issues for consideration

- National criminal justice personnel may need to seek orders from their domestic courts in order to facilitate this form of cooperation. This may involve cooperation between different agencies. In addition, rules and regulations may be needed for courts to facilitate the service of documents and processes of the ICC.

3.5.5 Facilitating the voluntary appearance of persons as witnesses or experts before the ICC (article 93, paragraph 1 (e));

Issues for consideration

- A request of this nature should be accompanied by an instruction from the ICC, annexed to the request, concerning rule 74 relating to self-incrimination (rule 190));

- The ICC does not possess the power to compel victims and witnesses to appear before the Court, although it does have the power to compel a witness to provide testimony once that witness is before the Court (rule 63). This should not necessarily prevent governments from using devices such as a subpoena or summons to direct a person to appear before the ICC but the use of such devices must still comply with national law. It may therefore be necessary for national governments to revise their national laws to allow for this type of assistance;
- The ICC has authority to provide an assurance to a witness or expert that he or she will not be prosecuted, detained or subjected to any restriction of personal freedom by the Court in respect of any act or omission that preceded the departure of the witness or expert from the requested State (article 93 (2)). This assurance may be given by the Chamber dealing with the case on its own motion, or at the request of the Prosecutor, defence or witness or expert concerned (rule 191);
- The ICC will cover the costs associated with the travel and security of witnesses and experts (article 100, paragraph 1 (c)).

3.5.6. The temporary transfer of persons as provided in article 93, paragraph 7 (article 93, paragraph 1 (f));

Issues for consideration

- Article 93, paragraph 7 allows the ICC to request the temporary transfer of a person in the custody of a State, for purposes of identification or for obtaining testimony or other assistance;
- In order for the transfer to be effected the person must freely give his or her informed consent to the transfer, and the requested State must also agree to the transfer, subject to such conditions as the State and the ICC may agree. In these circumstances the national authorities concerned should arrange the transfer in liaison with the Registrar of the Court and the authorities of the host State (rule 192, sub-rule 1);
- When the purposes of the transfer have been fulfilled, the Registrar is responsible for arranging for the return of the person to the requested State without delay (article 93, paragraph 7 (b) and rule 192, sub-rule 4);
- Article 93, paragraph 7 does not apply to the temporary transfer of a person who has been sentenced by the ICC and is serving that sentence in the State of enforcement. If the testimony or other assistance of this person is necessary to the ICC, the Chamber considering the case has the power to order the transfer without reference to the provisions of article 93, paragraph 7 (rule 193, sub-rule 1);

- States Parties will want to ensure that laws are in place to allow for the transfer of prisoners to the ICC in these circumstances. In many instances States will already possess detailed mutual legal assistance legislation to accommodate the transfer of prisoners interstate. This legislation may require revision in order to ensure that it is capable of accommodating a request for transfer to the ICC;
- The ICC will cover the costs associated with the transfer under article 93 of persons in custody (article 100, paragraph 1 (c)).

3.5.8 The examination of places or sites, including the exhumation and examination of grave sites (article 93, paragraph 1 (g));

Issues for consideration

- National criminal justice personnel should be sensitive to any cultural or religious concerns that may arise in the course of examining such places or sites;
- It may be necessary for national criminal justice personnel to cooperate with or seek the cooperation of other agencies and organizations when carrying out this form of assistance;
- National criminal justice personnel may be assisted by considering the experiences of the International Criminal Tribunals in carrying out these forms of activities in the past.

3.5.9 The execution of searches and seizures (article 93, paragraph (h));

Issues for consideration

- National criminal justice personnel may need to liaise with different national government agencies when carrying out requests of this type;
- It may be necessary to seek additional orders from domestic courts in order to facilitate requests of this type.

3.5.10 The provision of records and documents, including official records and documents (article 93, paragraph 1 (i));

Issues for consideration

- Requests for this form of assistance may involve liaison between different national government agencies;
- National criminal justice personnel will need to be aware of and act in accordance with local requirements relating to issues such as privacy and confidentiality;

- If a State Party is requested by the Court to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a State, intergovernmental organization or international organization, it must seek the consent of the originator to disclose that document or information (article 73).
 - If the originator is a State Party, it must either consent to disclosure of the information or document, or undertake to resolve the issue of disclosure with the Court, subject to the provisions of article 72.
 - If the originator is not a State Party and refuses to consent to disclosure, the requested State must inform the Court that it is unable to provide the document or information because of a pre-existing obligation of confidentiality to the originator.

3.5.11 The protection of victims and witnesses and the preservation of evidence (article 93, paragraph 1 (j));

Issues for consideration

- Many States already have specific agencies dedicated to the protection of victims and witnesses. The mandate of these agencies may need to be expanded to accommodate requests for assistance from the ICC;
- States without specific agencies should ensure that measures to protect victims and witnesses can be put in place in a timely and efficient manner if a request from the ICC is received;
- Immigration authorities may need to assist national criminal justice personnel if requests for assistance involve the protection of non-nationals of the requested State. Such a circumstance could arise where the ICC seeks assistance in relation to a foreign victim or witness whose safety has been compromised in their own State;
- In relation to the preservation of evidence, national criminal justice personnel may have to consider seeking the assistance of other agencies and organizations to carry out requests for assistance from the ICC. For example, morgue facilities at hospitals may be required to preserve human remains, or storage facilities may need to be arranged to house gathered evidence. In such instances, national criminal justice personnel will have to be sensitive to the requirement of confidentiality associated with requests from the ICC.

3.5.12 The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture (article 93, paragraph 1 (k));**Issues for consideration**

- Many States already have detailed laws relating to the identification, tracing and freezing or seizure of the proceeds of crime. These laws may require revisiting to ensure that they can accommodate requests for assistance of this form from the ICC;
- Other States may need to ensure that such laws are put in place, to allow for effective cooperation with the ICC;
- Orders from national courts may be required to effectively carry out this form of cooperation;
- National criminal justice personnel may need to seek the assistance of private organizations, such as banks and credit unions, in carrying out requests for cooperation in this form. In such instances, national criminal justice personnel will have to be sensitive to the requirement of confidentiality associated with requests from the ICC.

3.5.13 Any other type of assistance that is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court (article 93, paragraph 1 (l)).**Issues for consideration**

- Under this sub-paragraph, the ICC can seek any type of assistance from a State Party that is not prohibited by the law of the requested State;
- However, if a requested State considers that a request from the ICC cannot be met because it is prohibited by the State's law, the requested State must first consider, before denying the request, whether the assistance can be provided:
 - Subject to specified conditions; or
 - At a later date; or
 - In an alternative manner (article 93, paragraph 5).

If the ICC or ICC Prosecutor accepts the assistance of the requested State subject to conditions, the Court or the Prosecutor must abide by them (article 93, paragraph 5).

3.6 The form of a request for assistance made pursuant to article 93

A request for assistance made by the ICC to a State Party pursuant to article 93 must be in the following form:

- The request must be in writing (article 96, paragraph 1). However, in urgent cases the ICC may make the request by any medium capable of delivering a written record (e.g. a facsimile or email), provided that the request is confirmed through that State's designated channel of communication (article 96, paragraph 1).
- The request must be forwarded to the State Party through either the designated channel of communication or the International Criminal Police Organization or any appropriate regional organization (article 87, paragraph 1).
- The request and any documents supporting it must either be in, or be accompanied by a translation into, an official language of the requested State or one of the working languages of the ICC (article 87, paragraph 2).
- The request must, as applicable, contain or be supported by the following (article 96, paragraph 2):
 - a) A concise statement of the purpose of the request and the assistance sought, including the legal basis and the grounds for the request;
 - b) As much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided;
 - c) A concise statement of the essential facts underlying the request;
 - d) The reasons for and details of any procedure or requirement to be followed;
 - e) Such information as may be required under the law of the requested State in order to execute the request; and
 - f) Any other information relevant in order for the assistance sought to be provided.

3.7 Executing a request made by the ICC pursuant to article 93

Upon receiving a request for assistance from the ICC pursuant to article 93, a State Party must execute it in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request, including:

- Following any procedures outlined by the Court in the request;
- Permitting any persons specified in the request to be present at and to assist in the execution of the process detailed in the request.

(Article 99, paragraph 1).

The requested State should transmit replies to the request back to the ICC in their original language and form (article 99, paragraph 3) and in the case of an urgent request, the documents or evidence produced in response to the request should, if the ICC requests it, be sent back to the Court urgently (article 99, paragraph 2).

In order to avoid potential difficulties in complying with the request, a State Party must, upon the request of the ICC, consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may affect the ability of the government to execute the request. During such consultations the State Party must advise the Court of the specific requirements of its national law (article 96, paragraph 3).

3.8 Denying requests for assistance made by the ICC pursuant to article 93

Consistent with the mandatory nature of compliance with requests for cooperation and assistance, there are very few circumstances in which a State Party can deny outright a request for assistance made by the ICC pursuant to article 93. On most occasions where a State Party might consider denying a request, the *Rome Statute* encourages the State Party first to consult with the ICC, with a view to arriving at a workable compromise. Set out below is a list of such occasions:

3.8.1 Execution of the request is prohibited in the requested State on the basis of an existing fundamental legal principle of general application

If the execution of a particular measure of assistance requested by the ICC is prohibited in the requested State, on the basis of an existing fundamental legal principle of general application, the requested State should not deny the request. Rather, the requested State has a duty to consult promptly with the Court to try to resolve the matter (article 93, paragraph 3).

In the consultations, consideration should be given to whether the assistance can be rendered in another manner or subject to conditions. If, after consultation, the matter cannot be resolved, the Court must modify the request as necessary.

This procedure suggests that denial is not an option for a State Party in such a circumstance. Rather, through a process of consultation, a compromise must be arrived at, or, in the alternative, the Court must modify its request so that it does not offend national law.

3.8.2 A State Party identifies problems with a request that may impede or prevent the execution of the request

If a State Party receives a request for cooperation or assistance and identifies a problem in relation to it that may impede or prevent the execution of the request, the State Party should not deny the request. Rather, the State Party has a duty to consult with the Court without delay in order to resolve the matter (article 97).

The sorts of problems that may arise in relation to a request that could be resolved in this manner include:

- a) Insufficient information to execute the request (article 97, paragraph (a));
- b) The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State (article 97, paragraph (c)).

3.8.3 The request for assistance, either in whole or in part, concerns the production of documents or the disclosure of evidence that relates to the requested State's national security

If a State Party receives a request for assistance that concerns the production of documents or the disclosure of evidence that relates to its national security, it may deny the request. However, before denying the request it must first consider whether the matter can be resolved by cooperative means in accordance with the procedure set out in article 72 (article 93 (4)).

Article 72 applies in any case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests. In such a case the State should seek to resolve the matter by cooperative means before denying the request. In this regard, all reasonable steps towards resolution should be taken by the State, acting in conjunction with the Prosecutor, the defence and the Pre-Trial Chamber or the Trial Chamber, as the case may be (article 72, paragraph 5).

Such steps may include:

- a) Modification or clarification of the request;
- b) A determination by the ICC regarding the relevance of the information or evidence sought, or a determination as to whether the evidence, though relevant, could be or has been obtained from a source other than the requested State;
- c) Obtaining the information or evidence from a different source or in a different form; or

- d) Agreement on conditions under which assistance could be provided including, among other things, providing summaries or redactions, limitations on disclosure, use of *in camera* (in private) or *ex parte* (on the application of one party only) proceedings, or other protective measures permissible under the *Rome Statute* and the Rules of Procedure and Evidence.

If, after all reasonable steps have been taken towards resolution, the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it must notify the Prosecutor or the ICC of the specific reasons for its decision, unless a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests (article 72, paragraph 6).

If, after such notification, the ICC determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused, the Court may request further consultations with the requested State for the purpose of considering the State's representations. These consultations may include, as appropriate, hearings held *in camera* (in private) and *ex parte* (on the application of one party only) (article 72, paragraph 7 (a) (i) and article 99, paragraph (5)).

If the ICC concludes that, by invoking the ground of refusal under article 93, paragraph 4, in the circumstances of the case, the requested State is not acting in accordance with its obligations under the *Rome Statute*, the Court may refer the matter, in accordance with article 87, paragraph 7, to the Assembly of States Parties, or the Security Council, if the Security Council made the referral, specifying the reasons for its conclusion (article 72, paragraph 7 (a) (ii)).

3.8.4 The request 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

Article 98 stipulates that the ICC may not proceed with a request for assistance that would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity (article 98, paragraph 1).

If the requested State believes that a request for assistance raises a problem with execution in respect to article 98, it must notify the ICC of its belief and provide to the Court any information relevant to assist the Court in the application of article 98. Further, the third State may provide additional information to assist the Court (rule 195, sub-rule 1).

Issues for consideration

- Article 98 applies only to concerns held by a State Party in relation to its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State.
- Under the *Rome Statute*, State Parties agree that immunities and special procedural rules that may attach to the official capacity of a person, whether under national or international law, shall not bar the ICC from exercising jurisdiction over such a person (article 27). When considered in the context of the general obligation on State Parties to cooperate fully with the ICC in its investigation and prosecution of crimes within the jurisdiction of the ICC (article 86), this would suggest that State Parties have, by participating in the *Rome Statute*, forfeited any claims to State or diplomatic immunity attached to their own nationals for the purposes of investigations or prosecutions before the Court.
- States Parties cannot therefore draw upon such a claim for the purposes of avoiding compliance with a request for assistance from the ICC.
- However, under international law and in particular the *Vienna Convention on Diplomatic Relations*, officials of States do enjoy certain immunities and privileges. Article 98 therefore recognises the existence of these immunities and privileges in situations where they might be claimed by a third State. Where that third State is a State Party it would follow, from the above observation, that the State Party would be obliged to facilitate the request for assistance.
- Where the third State is not a State Party, article 98 places the obligation upon the ICC to obtain the cooperation of the third State for the waiver of the immunity.
- National criminal justice personnel will want, in certain circumstances, to be alert to the potential for issues relating to State or diplomatic immunity of a person or property of a third State arising.

3.8.5 Informing the ICC of the denial of a request for assistance

- As indicated above, there are very few circumstances in which a request for assistance made by the ICC pursuant to article 93 can be denied outright by a State Party;
- However, if a State Party does deny the request for assistance, it must promptly inform the ICC or the Prosecutor of the reasons for such denial (article 93 (6)).

Issues for consideration

- Requests for assistance are an essential aspect of the cooperative relationship between the ICC and States Parties anticipated by the *Rome Statute*;
- National criminal justice personnel are an important part of the cooperative relationship because they will be intimately involved in responding to requests for assistance that are made to States Parties by the ICC;
- In order to foster that relationship it may be necessary for national criminal justice personnel to be creative and flexible in the way they approach requests for assistance, in order to ensure that such requests can be carried out with the minimum of difficulty;
- The *Rome Statute* encourages this approach by preferring a system of consultation to one of outright denial in most circumstances.

3.9 Postponing execution of a request for cooperation from the ICC

It is possible for a requested State to postpone the execution of a request for cooperation in two separate circumstances.

3.9.1 Immediate execution of the request would interfere with an ongoing investigation or prosecution of a case different from that to which the request relates

If the immediate execution of the request would interfere with an ongoing investigation or prosecution of a case different from that to which the request relates, the requested State may postpone execution of the request.

However:

- The postponement must not be any longer than is necessary to complete the relevant investigation or prosecution in the requested State; and
- The requested State should first consider whether the assistance could be provided immediately, subject to certain conditions.

(Article 94, paragraph 1)

If the request is postponed in these circumstances, the ICC Prosecutor may seek measures to preserve evidence, pursuant to article 93, paragraph 1 (j) (article 94, paragraph 2).

3.9.2 Execution of the request when an admissibility challenge is under consideration by the ICC

Consistent with the complementary nature of the jurisdiction of the ICC, the admissibility of a matter before the ICC can be challenged. The procedure for undertaking such a challenge is set out in articles 18 and 19 of the *Rome Statute*:

a) Article 18:

A State may request that the ICC Prosecutor defer to the State's investigation of a situation that has been referred to the ICC.

However, the Prosecutor may apply to the Pre-Trial Chamber of the ICC, for an order authorizing an investigation by the Prosecutor of the same situation despite the State's request (article 18, paragraph 2).

If the Pre-Trial Chamber grants the Prosecutor's application, the ruling of the Pre-Trial Chamber may be appealed to the Appeals Chamber, either by the State concerned or the Prosecutor (article 18, paragraph 4).

b) Article 19

The ICC may, on its own motion, determine the admissibility of a case in accordance with the criteria set out in article 17 (see section 2, on complementarity, above) (article 19, paragraph 1).

In addition, an accused person, a State Party, a non-State Party, or the Prosecutor may, in the certain circumstances outlined in article 19, challenge the admissibility of a case before the ICC (article 19, paragraphs 2 and 3).

Where the ICC is considering an admissibility challenge undertaken pursuant either to article 18 or 19, a requested State may postpone the execution of a request for cooperation or assistance, pending a determination by the Court.

An exception to this is an instance in which the ICC has ordered, pursuant to article 18, paragraph 6, or article 19, paragraph 8, that the Prosecutor pursues the collection of evidence despite the challenge. In such a circumstance, the requested State could not defer the request for cooperation or assistance.

Issues for consideration

- Prior to responding to a request for cooperation or assistance, national criminal justice personnel will want to be aware of any challenge that is being made by their State to the ICC in relation to the admissibility of the situation to which the request refers;

- Efficient channels of communication between agencies involved in responding to requests would be essential in this regard. If the requests and responses were channelled through a single agency, it would be possible to maintain an up to date register of situations of interest to the ICC and requests made by the ICC to the State in relation to those situations;
- Such a system could be considered and implemented at an early stage in the development of State's relationship with the ICC.

3.10 Competing requests from the ICC and from another State pursuant to an international obligation

If a State Party receives a competing request (other than for surrender or extradition, which are dealt with in accordance with article 90), from the ICC and from another State pursuant to an international obligation, the State Party must endeavour, in consultation with the Court and the other State, to meet both requests. If necessary, the requested State may need to postpone or attach conditions to one or the other request (article 93, paragraph 9 (a) (i)).

If the State Party cannot meet both requests, even by postponing or attaching conditions to one or the other request, the matter must be resolved in accordance with the principles established in article 90 (article 93, paragraph 9 (a) (ii)).

Where the other State is a State Party, article 90 requires the requested State to give priority to the request from the ICC, provided the ICC has made a determination that the case is admissible in accordance with article 18 or 19 (article 90, paragraph 2). If such a determination has not been made, the requested State may, at its discretion, pending a determination by the ICC, proceed to deal with the request from the other State (article 90, paragraph 3).

Where the other State is not a State Party to the *Rome Statute*, the requested State must assign priority to the one of the competing requests based on a consideration of all the relevant factors including, but not limited to: the respective dates of the requests, the interests of the other State, including, where relevant, whether the crime was committed on its territory, and the nationality of the victims and the accused (article 90, paragraph 6).

3.11 Executing requests directly on the territory of a State

In some circumstances, where it is necessary for the successful execution of a request for assistance, the ICC Prosecutor may execute the request directly on the territory of a State (article 99, paragraph 4).

Such a circumstance may include:

- Interviewing or taking evidence from a person on a voluntary basis, including doing so without the presence of the authorities of the requested State Party, if this is essential for the request to be executed;
- Examining, without modification, a public site or other public place.

However, certain conditions must be met before executing requests of these sorts. These are:

- The request must be capable of being executed without compulsory measures;
- Where the requested State Party is the State on the territory of which the crime is alleged to have been committed, and there has been a determination of admissibility pursuant to article 18 or 19, the ICC Prosecutor must undertake all possible consultations with the requested State Party prior to executing the request (article 99, paragraph 4 (a));
- In other cases, the ICC Prosecutor can only execute the request following consultations with the requested State Party and subject to any reasonable conditions or concerns raised by that State Party. Where the requested State Party identifies problems with the execution of a request in this instance, it must consult with the Court, without delay, to resolve the matter (article 99, paragraph 4 (b)).

3.12 Failure to comply with a request

If a State Party fails, contrary to the provisions of the *Rome Statute*, to comply with a request for cooperation made by the ICC and thereby prevents the Court from exercising its functions and powers under the *Statute*, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties. Alternatively, if the Security Council referred the matter to the ICC, the Court may refer the failure to the Security Council (article 87, paragraph 7).

Similarly, where a non-State Party has entered into an *ad hoc* arrangement or an agreement with the ICC and fails to cooperate with requests made pursuant to the arrangement or agreement, the Court may inform the Assembly of States Parties or, if the Security Council referred the matter to the Court, the Security Council (article 87, paragraph 5 (b)).

3.13 Executing a request without the consent of the State Party concerned

In a situation where a 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 a request for cooperation under Part 9, the ICC Prosecutor may make an application to the Pre-Trial Chamber to take specific investigative steps within the

territory of the State Party, without having secured the cooperation of the State under Part 9 (article 57, paragraph 3 (d)).

The ICC Prosecutor's application must be in writing and, where possible, the Pre-Trial Chamber must inform and invite views from the State Party concerned (rule 115, sub-rule 1). If necessary, a hearing can be held to fully articulate the views of the parties concerned (rule 115, sub-rule 2).

If the Prosecutor is given the authority to take specific investigative steps on the territory of the State Party, the order of the Pre-Trial Chamber must state the reasons for the order and may specify procedures to be followed in carrying out the collection of evidence (rule 115, sub-rule 3).

Issues for consideration

- This procedure contemplates a situation in which there has been a total or almost total collapse of a State's civil and legal infrastructure;
- In such a situation it is likely that most, if not all, national criminal justice personnel will be unavailable to assist with the execution of the Court's order. However, such cooperation is not completely discounted and may be sought, depending upon the circumstances.

3.14 Requests by States Parties and non-States Parties for cooperation and assistance from the ICC

States Parties can request the cooperation and assistance of the ICC in conducting an investigation into, or trial in respect of, conduct which constitutes one or more of the article 5 crimes or which constitutes a serious crime under the national law of the requesting State (article 93, paragraph 10).

A request for this type of cooperation or assistance should be forwarded to the Registrar of the ICC and the Registrar will then transmit it to either the Prosecutor or to the Chamber concerned (rule 194, sub-rule 2). The request should either be in, or be accompanied, by a translation into, one of the working languages of the Court (rule 194, sub-rule 1).

The request from the State Party should be in the same form as a request from the ICC to a State Party (article 96, paragraph 4). In this regard, the request must, as applicable, contain or be supported by the following (article 96, paragraph 2):

- a) A concise statement of the purpose of the request and the assistance sought, including the legal basis and the grounds for the request;
- b) As much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided;

- c) A concise statement of the essential facts underlying the request;
- d) The reasons for and details of any procedure or requirement to be followed;
- e) Such information as may be required under the law of the requested State in order to execute the request; and
- f) Any other information relevant in order for the assistance sought to be provided.

The ICC will consider whether to grant the request. If the Court decides to grant it, the request will be executed, insofar as possible, following any procedure outlined in the request by the requesting State and permitting persons specified in the request to be present (rule 194, sub-rule 5).

The types of assistance that could be offered to States Parties by the ICC include:

- The transmission of statements, documents or other types of evidence obtained in the course of an investigation or trial conducted by the Court (article 93, paragraph 10 (b) (i) (a)). However,
 - If the documents or other types of evidence have been obtained with the assistance of a State, such transmission requires the consent of that State (article 93, paragraph 10 (b) (ii) (a) and rule 194, sub-rule 4);
 - If the statements, documents or other types of evidence have been provided by a witness or expert, such transmission is subject to the provision of article 68, which protects the safety, physical and psychological well-being, dignity and privacy of witnesses (article 93, paragraph 10 (b) (ii) (b) and rule 194, sub-rule 4).
- The questioning of any person detained by order of the Court (article 93, paragraph 10 (b) (i) (b)).

The ICC may also consider and grant requests for assistance from States that are not a Party to the *Rome Statute* (article 93, paragraph 10 (c)). The same procedures as those set out above will apply.

3.15 Costs of executing requests

In general, the ordinary costs for the execution of requests in the territory of the requested State must be borne by that State (article 100, paragraph 1). However, article 100 identifies that the following costs will be borne by the ICC:

- a) Costs associated with the travel and security of witnesses and experts or the transfer under article 93 of persons in custody;
- b) Costs of translation, interpretation and transcription;

- c) Travel and subsistence costs of the judges, the Prosecutor, the Deputy Prosecutors, the Registrar, the Deputy Registrar and staff of any organ of the Court;
- d) Costs of any expert opinion or report requested by the Court;
- e) Costs associated with the transport of a person being surrendered to the Court by a custodial State; and
- f) Following consultations, any extraordinary costs that may result from the execution of a request.

In the case of requests for cooperation or assistance from States Parties to the ICC, the Court will bear the ordinary costs of execution (article 100, paragraph 2).

4. COOPERATION AT SPECIFIC STAGES OF THE PROCESS OF INVESTIGATION AND PROSECUTION

At various stages during the process of investigation and prosecution of a matter before the ICC, States Parties and States may be requested to cooperate with the ICC. The execution of such requests will likely involve national criminal justice personnel.

Section 3 dealt with the manner and form of such requests and identified a number of specific requests that might be made pursuant to article 93. It also examined how a State should respond to a request for cooperation and its options in relation to executing the request.

Section 3 also laid the foundation for understanding the process by which requests are made, responded to and executed. Section 4 builds upon that foundation by examining specific stages of the process of investigation and prosecution of a matter before the ICC, with a view to identifying further areas in which requests for cooperation may be made.

In this regard, section 4 is structured in a way that traces the progress of a matter through the ICC, from the initial referral of the matter to the ICC, to the conclusion of the matter with the enforcement of sentence after any relevant appeal. In the course of this commentary areas in which requests for cooperation might be made are identified.

By structuring section 4 in this way it is also possible to identify and discuss various obligations that the *Rome Statute* places upon national criminal justice personnel when executing requests. An example is the nature and extent of the rights to be accorded to suspects during the course of an investigation involving one or more of the article 5 crimes. If national criminal justice personnel have a thorough understanding of these issues, they will be better placed to execute requests received from the ICC effectively and efficiently.

The stages of the process of investigation and prosecution outlined in this section are as follows:

- 4.1 Referring situations to the ICC;
- 4.2 Initiating an investigation in the ICC;
- 4.3 Notifying States of the investigation;
- 4.4 Duties and powers of the ICC Prosecutor with respect to investigations and prosecutions;
- 4.5 Rights of a person during an investigation;
- 4.6 Arresting and surrendering a person to the ICC;
- 4.7 Protective measures for the purposes of forfeiture;

4.8 Trial stage; and

4.9 Offences against the ICC's administration of justice

4.10 Sentencing stage.

Consistent with the practice adopted in the last section, the commentary raises, at various points, issues for the consideration of national criminal justice personnel. This is done to highlight certain issues that may be of interest and to draw the attention of national criminal justice personnel to ancillary matters that may require attention or consideration when dealing with requests for cooperation.

4.1 Referring situations to the ICC

Situations involving allegations of the commission of article 5 crimes can be referred to the ICC in any one of three ways:

4.1.1 A State Party can refer to the ICC Prosecutor a situation in which one or more article 5 crimes appears to have been committed, requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes (articles 13, paragraph (a) and 14, paragraph 1);

- The referral must be in writing (rule 45) and should, as far as possible, specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation (article 14, paragraph 2).

4.1.2 The Security Council, acting under Chapter VII of the *Charter of the United Nations*, can refer a situation to the Prosecutor in which one or more of the article 5 crimes appears to have been committed (article 13, paragraph (b));

- 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 referral must be in writing (rule 45).

4.1.3 Information on crimes within the jurisdiction of the ICC can come to the attention of the Prosecutor and he or she can decide, *proprio motu* (on his or her own initiative), to initiate an investigation into those crimes (articles 13, paragraph (c) and 15)).

Issues for consideration

- In order to ensure that the information contained in and accompanying the referral is as accurate and complete as possible, it would be of great benefit for all agencies involved in the collection and preparation of the information to operate through a centralised contact point. This would minimise duplication and ensure that the information is collated in an ordered and sensible way;
- National criminal justice personnel should be alert to the nature and extent of the article 5 crimes, so that any investigation being conducted in relation to one or more of them can be brought to the attention of the ICC as early as possible. This will ensure that the ICC has a complete record of matters being investigated by States that involve crimes within the jurisdiction of the Court and also that States have the opportunity to liaise with the ICC on matters such as cooperation from the earliest time possible.

4.2 Initiating an investigation in the ICC

Once received, the ICC Prosecutor will undertake a preliminary examination of the information made available to him or her under 4.1.1, 4.1.2 and 4.1.3, above (article 53, paragraph 1 and rules 104-106 (in relation to 4.1.1 and 4.1.2, above), and article 15, paragraphs 1 and 2 and rule 46 (in relation to 4.1.3, above)).⁴

In this regard, the Prosecutor may, in order to analyze the seriousness of the information made available to him or her, seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that the Prosecutor deems appropriate and may receive written or oral testimony at the seat of the Court in The Hague (rule 104 (in relation to 4.1.1 and 4.1.2, above) and article 15, paragraph 2 (in relation to 4.1.3, above)).

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:

- a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed (article 53, paragraph 1 (a) and rule 48);
- b) The case is or would be admissible under article 17 (article 53, paragraph 1 (b) and rule 48);

⁴ See G. Turone, "Powers and Duties of the Prosecutor", in A. Cassese, P. Gaeta & J.R.W. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 2 (Oxford: Oxford University Press, 2002) 1137 at 1146.

- c) Taking into account the gravity of the crime and the interests of victims, there are, nonetheless, substantial reasons to believe that an investigation would not serve the interests of justice (article 53, paragraph 1 (c) and rule 48).

If, after such consideration, the Prosecutor concludes that there is a reasonable basis upon which to proceed with an investigation, he or she may initiate it. However, in the case of an investigation undertaken on the Prosecutor's own initiative (i.e. 4.1.3, above), the Prosecutor will not be permitted to commence the investigation without first obtaining the authorization of the Pre-Trial Chamber (article 15, paragraphs 3 and 4).⁵

Issues for consideration

- It is in the interests of States Parties referring situations to the ICC to ensure that the information supporting the referral is as complete as possible;
- National criminal justice personnel involved in the process of referring situations to the ICC will want to ensure that as much relevant information as possible is given to the ICC Prosecutor to assist the Prosecutor in the process of commencing an investigation. This may involve gathering information from a number of different national government agencies;
- In addition, national criminal justice personnel will want to be alert to the possibility that the ICC Prosecutor may request additional information, subsequent to the referral, to assist in his or her analysis of the seriousness of the information received.

4.3 Notifying States of the investigation

Having initiated an investigation in relation to one or more of the article 5 crimes, 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). This obligation does not extend to investigations initiated after consideration of a situation 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.

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 article 5 crimes (rule 52, sub-rule 1).

Within one month of the receipt of the Prosecutor's notification, a State may inform the Prosecutor that it is investigating or has investigated nationals or others within its

⁵ Ibid. at 1159.

jurisdiction with respect to criminal acts that may constitute article 5 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 article 5 crimes 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 the 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). 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).

Issues for consideration

- Where a State intends to make a request that the ICC defer to a State investigation, national criminal justice personnel may be called upon by agencies within their own State to provide information relating to investigations that are being or have been conducted with respect to criminal acts that may constitute article 5 crimes and which relate to the information provided in the Prosecutor's notification. If this occurs, national criminal justice personnel will want to be aware of the one-month time limit within which a State must respond to the Prosecutor's notification. This time limit cannot be modified to allow for the provision of additional information or clarification from the ICC.
- National criminal justice personnel will want to be aware that the Pre-Trial Chamber of the ICC will consider whether a State's investigation was undertaken in good faith when examining the Prosecutor's application to authorise an investigation. It is in the interests of national criminal justice personnel to ensure that any information provided to the ICC in response to a notification, or in relation to the Pre-Trial Chamber's examination, is as complete and thorough as possible.
- National criminal justice personnel should be alert to the possibility that even where the ICC Prosecutor has deferred to a State's investigation, it may still be necessary to respond to a request for cooperation from the ICC, pursuant to article 18, paragraph 6.

4.4 Duties and powers of the ICC Prosecutor with respect to investigations

When undertaking an investigation, the ICC Prosecutor has a duty to:

- Extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under the *Rome Statute*, and, in so doing, to investigate incriminating and exonerating circumstances equally (article 54, paragraph 1 (a));
- To take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the ICC, and, in so doing, respect the interests and personal circumstances of victims and witnesses, and take into account the nature of the crime, particularly where it involves sexual violence, gender violence or violence against children (article 54, paragraph 1 (b); and
- Fully respect the rights of persons arising under the *Rome Statute* (article 54, paragraph 1 (c)).

The powers of the ICC Prosecutor include the power to:

- Conduct investigations on the territory of a State in accordance with the provisions of Part 9 or as authorised by the Pre-Trial Chamber pursuant to article 57, paragraph 3 (d) (article 54, paragraph 2);
- Collect and examine evidence (article 54, paragraph 3 (a));
- Request the presence of, and question, persons being investigated, victims and witnesses (article 54, paragraph 3 (b));
- Seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate (article 54, paragraph 3 (c));
- Enter into such arrangements or agreements, not inconsistent with the *Rome Statute*, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person (article 54, paragraph 3 (d));
- Agree not to disclose, at any stage of the proceedings, documents or information that the ICC Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents (article 54, paragraph 3 (e)); and
- Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence (article 54, paragraph 3 (f)).

Issues for consideration

- National criminal justice personnel will want to be aware of the nature and extent of the duties and powers of the ICC Prosecutor in order to fully appreciate the extent of cooperation that might be required of States Parties under the *Rome Statute*;
- Further, national criminal justice personnel will appreciate the responsibility that accompanies the duty of the ICC Prosecutor to extend an investigation to cover all the facts and evidence relevant to an assessment of whether there is criminal responsibility under the *Rome Statute*, including any exonerating circumstances. This is an onerous nature to this responsibility and one that can only be carried out effectively with the cooperation of States Parties acting on the request of the ICC Prosecutor;
- An awareness of the ICC Prosecutor's duties and powers gives national criminal justice personnel a greater appreciation of the nature and extent of the conditions that may attach to requests for cooperation coming from

the Office of the Prosecutor, particularly in relation to measures designed to respect and protect the interests and personal circumstances of victims and witnesses.

- Understanding the duties and powers of the ICC Prosecutor may allow national criminal justice personnel to be more sympathetic to such conditions if they accompany a request for cooperation.

4.5 Rights of a person during an investigation

In carrying out an investigation under the *Rome Statute* the ICC Prosecutor, or any national authority acting pursuant to a request made under Part 9, must respect the rights of persons involved in or in any way associated with the investigation. This includes victims, witnesses and accused persons. The rights are set out in article 55 and are of a mandatory nature.

Article 55 provides that in respect of an investigation under the *Rome Statute* a person:

- Shall not be compelled to incriminate himself or herself or to confess guilt (article 55, paragraph 1 (a));
- 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 (article 55, paragraph 1 (b));
- 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 (article 55, paragraph 1 (c));
- 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* (article 55, paragraph 1 (d)).

In addition, where there are grounds to believe that a person has committed one or more of the article 5 crimes and that person is about to be questioned, either by the ICC Prosecutor, or by national authorities pursuant to a request made under Part 9, the person has a number of rights, which are set out in article 55, paragraph 2. The person must be informed of these rights prior to be questioned. The rights are:

- 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 ICC (article 55, paragraph 2 (a));
- To remain silent, without such silence being a consideration in the determination of guilt or innocence (article 55, paragraph 2 (b));

- 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 (article 55, paragraph 2 (c)); and
- To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel (article 55, paragraph 2 (d)).

Whenever the ICC Prosecutor or national authorities question a person in connection with an investigation or with proceedings involving a crime or crimes within the jurisdiction of the ICC, due regard must be given to all of the rights set out in article 55 (rule 111, sub-rule 2).

Issues for consideration

- Many national criminal justice personnel will already be familiar with the nature and extent of the rights set out in article 55 because the same or very similar rights will already be accorded to victims, witnesses and suspects in the course of a national criminal investigation;
- However, the exact extent of the similarity should be checked to ensure that all of the rights outlined in article 55 are respected when executing requests from the ICC involving this form of cooperation;
- It would be very beneficial if any national investigation involving an article 5 crime could be carried out in a way that respects the rights set out in article 55. This would ensure compatibility between the national investigation and any subsequent ICC investigation, with the result that information from the national investigation could be used in an effective manner by the ICC, without fear that it has been tainted by non-compliance with the procedures outlined in article 55;
- National criminal justice personnel should be aware that evidence obtained in violation of the *Rome Statute* may be inadmissible for the purpose of proceedings before the ICC (article 69, paragraph 7);
- In addition, when dealing with the relevance or admissibility of evidence collected by a State, the ICC will not rule on the application of the State's national law (article 69, paragraph 8). It follows from this that if a State has procedures for the collection of evidence that differ from those outlined in the *Rome Statute*, those different procedures could jeopardise the admissibility of the evidence before the ICC because the ICC will only look to the extent of compliance or lack of compliance with the procedures in the *Rome Statute* when determining admissibility. National criminal justice personnel will therefore want to ensure that their procedures for the collection of evidence are entirely compatible with those outlined in the *Rome Statute*.

A record should be made of any formal statement made by a person who is questioned in connection with an investigation or proceedings before the ICC (rule 111). This requirement applies to any person who is questioned, including victims and witnesses. The record should meet the following requirements:

- The record should be signed by the person who records and conducts the questioning, the person who is questioned and his or her counsel, if present, and where applicable, the ICC Prosecutor or ICC judge who is present (rule 111, sub-rule 1);
- A note should be made in the record of the date, time and place of the questioning, and all persons present during the questioning and if someone has not signed the record a note should be made of this fact as well as the reasons for that person not signing (rule 111, sub-rule 1);
- If, during the questioning, the person is informed of his or her rights under article 55, paragraph 2, the fact that this information has been provided should be noted in the record (rule 111, sub-rule 2).

Where there are grounds to believe that a person has committed a crime within the jurisdiction of the ICC and that person is questioned by the ICC Prosecutor, the Prosecutor must make every reasonable effort to record the questioning in accordance with the procedure set out in rule 112, sub-rule 1 (rule 112, sub-rule 2). If this is not possible because the circumstances prevent an audio- or video-recording then the procedure in rule 111(outlined above) must be followed and the reasons for not recording the questioning in the preferred format stated in the record (rule 112, sub-rule 2), in which case the person questioned must be provided with a copy of his or her statement (rule 112, sub-rule 3).

Rule 112, sub-rule 1 requires the ICC Prosecutor to make an audio- or video-recording when questioning a person suspected of having committed one or more of the article 5 crimes. In such a circumstance, the questioning must take place in accordance with the following procedure:

- The person questioned shall be informed, in a language he or she fully understands and speaks, that the questioning is to be audio- or video-recorded, and that the person concerned may object if he or she so wishes.

The fact that this information has been provided and the response given by the person concerned shall be noted in the record.

The person may, before replying, speak in private with his or her counsel, if present.

If the person questioned refuses to be audio- or video-recorded, the procedure in rule 111 shall be followed (rule 112, sub-rule 1 (a));

- A waiver of the right to be questioned in the presences of counsel shall be recorded in writing and, if possible, be audio- or video-recorded (rule 112, sub-rule 1 (b));
- In the event of an interruption in the course of questioning, the fact and the time of the interruption shall be recorded before the audio- or video-recording ends as well as the time of resumption of the questioning (rule 112, sub-rule 1 (c));
- At the conclusion of the questioning, the person questioned shall be offered the opportunity to clarify anything he or she has said and to add anything he or she may wish. The time of conclusion of the questioning shall be noted (rule 112, sub-rule 1 (d));
- The tape shall be transcribed as soon as practicable after the conclusion of the questioning and a copy of the transcript supplied to the person questioned together with a copy of the recorded tape or, if multiple recording apparatus was used, one of the original recorded tapes (rule 112, sub-rule 1 (e));
- The original tape or one of the original tapes shall be sealed in the presence of the person questioned and his or her counsel, if present, under the signature of the ICC Prosecutor and the person questioned and the counsel, if present (rule 112, sub-rule 1 (f)).

The ICC Prosecutor may also use this procedure when questioning other persons, particularly where the procedure could reduce any subsequent traumatization of a victim of sexual or gender violence, a child or a person with disabilities in providing their evidence (rule 112, sub-rule 4).

Issues for consideration

- The requirement that any formal statement made by a person be recorded in some form is familiar to many national criminal jurisdictions. Many national criminal justice personnel will therefore be comfortable with conducting interviews in accordance with this process;
- However, the specific requirements of rule 111 should be noted by national criminal justice personnel;
- Advances in technology have made audio- and video-recording a much more familiar and common practice. The preference for this type of record in relation to questioning of suspects by the ICC Prosecutor is noted in the *Rome Statute*. The Rules of Procedure and Evidence do not specifically mention this requirement in relation to the questioning of suspects by national criminal justice personnel. However, adherence to the requirement will, no doubt, be mentioned in the request itself. National criminal justice personnel should therefore consider whether such equipment is readily available in their jurisdiction. If it is not, it may be

necessary to ensure that the ICC provides the equipment at the time of the request.

4.6 Arresting and surrendering a person to the ICC

At any time after the initiation of an investigation the Prosecutor can apply to the Pre-Trial Chamber to issue a warrant of arrest of a person (article 58, paragraph 1).

The Pre-Trial Chamber will issue the requested warrant if:

- It is satisfied, on the evidence and other information submitted by the ICC Prosecutor, that there are reasonable grounds to believe that the person has committed one or more of the article 5 crimes (article 58, paragraph 1 (a)); and
- The arrest of the person appears necessary either to ensure the person's appearance at trial (article 58, paragraph 1 (b) (i)), or to ensure that the person does not obstruct or endanger the investigation or the court proceedings (article 58, paragraph 1 (b) (ii)), or to prevent the person from continuing with the commission of the article 5 crime or a related article 5 crime that arises out of the same circumstances (article 58, paragraph 1 (b) (iii)).

If the Pre-Trial Chamber issues the warrant of arrest, the ICC may request the cooperation of States in securing the provisional arrest or the arrest and surrender of the person under Part 9 (article 58, paragraph 5).

Part 9 and in particular articles 89, 90, 91, 92 and 98, detail the procedure by which a request for the arrest and surrender of a person is made and met.

4.6.1 Receiving a request for arrest and surrender

The ICC may transmit a request for the arrest and surrender of a person to any State on the territory of which the person named in the request may be found. States Parties are obliged to comply with the request, in accordance with the provisions of Part 9 and the procedure under their national law (article 89, paragraph 1).

A request for arrest and surrender must be in writing, although in urgent cases the request may be made by any medium capable of delivering a written record, provided that the request is confirmed through the designated channel for communication (article 91, paragraph 1).

Article 91 distinguishes between a request for the arrest and surrender of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber pursuant to article 58, and a request for the arrest and surrender of a person already convicted of an offence by the ICC.

4.6.1.1 Warrant of arrest issued pursuant to article 58

Where the request is for the arrest and surrender of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber pursuant to article 58, the request should contain or be supported by:

- Information describing the person sought, sufficient to identify the person, and information as to the person's probable location (article 91, paragraph 2 (a));
- A copy of the warrant of arrest, which should be accompanied, as appropriate, by a translation of the warrant of arrest and by a translation of the text of any relevant provisions of the *Rome Statute*, in a language that the person referred to in the warrant fully understands and speaks (rule 187) (article 91, paragraph 2 (b));
- Such documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State (article 91, paragraph 2 (c)).

In this regard, the State Party receiving the request must consult with the ICC regarding any requirements under its national law that may apply and advise the Court of the specific requirements of its national law (article 91, paragraph 4).

In addition, the requirements for the surrender process in the requested State should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the ICC (article 91, paragraph 2 (c)).

Issues for consideration

- Article 91 encourages States Parties to consider implementing streamlined procedures to deal with the arrest and surrender of persons to the ICC on the basis of the *distinct nature* of the Court. This might involve making amendments to national laws or implementing new rules and procedures to accommodate the arrest and transfer of persons to the ICC;
- National criminal justice personnel will want to be familiar with any changes that are made to national laws in this regard.

4.6.1.2 Arrest and surrender of a person already convicted of an offence by the ICC

Where the request is for the arrest and surrender of a person already convicted of an offence by the ICC, the request should contain or be supported by:

- A copy of any warrant of arrest for that person (article 91, paragraph 3 (a));
- A copy of the judgement of conviction (article 91, paragraph 3 (b));
- Information to demonstrate that the person sought is the one referred to in the judgement of conviction (article 91, paragraph 3 (c)); and
- If the person has been sentenced, a copy of the sentence imposed and, in the case of a sentence for imprisonment, a statement of any time already served and the time remaining to be served (article 91, paragraph 3 (d)), together with any translations required by rule 187.

4.6.2 Provisional Arrest

In urgent cases the ICC may request the provisional arrest of the person sought, pending presentation of the request for surrender and the documents supporting the request for arrest and surrender (article 92, paragraph 1).

The request for provisional arrest must be made by a medium capable of delivering a written record and contain:

- Information describing the person sought, sufficient to identify the person, and information as to that person's probable location (article 92, paragraph 2 (a));
- A concise statement of the crimes for which the person's arrest is sought and of the facts that are alleged to constitute those crimes (article 92, paragraph 2 (b));
- A statement of the existence of a warrant of arrest or a judgement of conviction against the person sought (article 92, paragraph 2 (c)); and
- A statement that a request for surrender of the person sought will follow (article 92, paragraph 2 (d)).

If the requested State does not receive the request for surrender and the documents supporting the request, as specified in article 91, within 60 days of the date of the provisional arrest (rule 188), the person arrested may be released from

custody, unless the person consents to surrender to the ICC before the expiration of the 60 day period, in which case the requested State should proceed to surrender the person to the Court as soon as possible (article 92, paragraph 2).

In the case of such a consensual surrender the ICC will not be required to provide the documents specified in article 91 unless the requested State indicates otherwise (rule 189). The release from custody of a person because of the expiration of the 60-day period does not act as a bar to the subsequent arrest and surrender of the person if the documents supporting the request are delivered at a later date (article 92, paragraph 4).

4.6.3 Acting on a request for provisional arrest or for arrest and surrender

When a State Party receives a request for provisional arrest or for arrest and surrender it must immediately take steps to arrest the person in question in accordance with its laws and with the provision of Part 9 (article 59, paragraph 1).

In the meantime, the ICC must take measures to ensure that it is informed of the arrest of the person and once so informed it must ensure that the person receives a copy of the arrest warrant issued by the Pre-Trial Chamber under article 58 and any relevant provisions of the *Rome Statute*, in a language that the person fully understands and speaks (rule 117, sub-rule 1).

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

- The warrant applies to that person (article 59, paragraph 2 (a));
- The person has been arrested in accordance with the proper process (article 59, paragraph 2 (b)); and
- The person's rights have been respected (article 59, paragraph 2 (c)).

If the competent judicial authority determines that these conditions have been met it can go on to hear any request the arrested person may have for interim release pending surrender to the ICC.

In addition, the arrested person may, at any time after arrest, 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 must make a decision on the request (rule 117, sub-rule 2).

The arrested person's right to apply for interim release in the custodial State is contained in article 59, paragraph 3, but the Pre-Trial Chamber must be notified of any request made by the person and can make recommendations to the competent authority, which must be given full consideration by the competent authority (article 59, paragraph 5).

The Pre-Trial Chamber must provide its recommendations within any time limit set by the custodial State (rule 117, sub-rule 4). In considering whether to grant an application for interim release the competent authority must consider whether, given the gravity of the crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the ICC.

However, the competent authority may not consider, during the course of this process, whether the warrant of arrest was properly issued in accordance with article 58 (article 59, paragraph 4). This is a matter for the Pre-Trial Chamber, which will hear a challenge as to whether the warrant of arrest was properly issued on the application of the person arrested (rule 117, sub-rule 3). If such an application is made the Pre-Trial Chamber will obtain the views of the ICC Prosecutor and decide on the application without delay.

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 and rule 117, sub-rule 5).

However, once there is an order that the arrested person be surrendered by the custodial State to the ICC, the person must be delivered to the Court as soon as possible (article 59, paragraph 7). In fact, the requested State must immediately inform the ICC Registrar when the person sought is available for surrender (rule 184, sub-rule 1). The person will then be surrendered to the Court by the date and in the manner agreed upon by the authorities of the requested State and the Registrar (rule 184, sub-rule 2), subject to any change that might occur (rule 184, sub-rule 3).

4.6.4 Challenging surrender

A person who has been sought for surrender may bring a challenge to that surrender before a national court on the basis of the principle of *ne bis in idem* provided for in article 20.

In such a case the requested State must immediately consult with the ICC to determine if there has been a relevant ruling on admissibility.

If the case is admissible the State must proceed with the execution of the request.

If an admissibility ruling is pending, the requested State may postpone the execution of the request for surrender of the person until the ICC makes a determination on admissibility (article 89, paragraph 2). In such a case 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 (rule 181).

4.6.5 Transporting a person being surrendered

It is possible that when surrendering a person to the ICC a State Party will have to transport the person through the territory of another State. The *Rome Statute* requires a State Party to authorise the transportation through its territory of a person being surrendered to the Court by another State, except where transit through that State would impede or delay the surrender (article 89, paragraph 3 (a)).

A request by the ICC for transit of this sort must be transmitted through the designated channel and must comply with the conditions set out in article 89, paragraph 3 (b). However, no authorization is required if the person is transported by air and no landing is scheduled in the territory of the transit State (article 89, paragraph 3 (d)).

In circumstances where an unscheduled landing occurs on the territory of the transit State, the State may require a request for transit from the ICC. If the transit State requires such a request it must detain the person being transported until the request for transit is received and the transit is effected, provided that the detention is no longer than 96 hours from the unscheduled landing (article 89, paragraph 3 (e)).

The request required by the transit State can be transmitted by the ICC by any medium capable of delivering a written record (rule 182, sub-rule 1) and if the time limit expires and the person concerned is released, the release is without prejudice to a subsequent arrest of the person in accordance with the provisions of article 89 or article 92 (rule 182, sub-rule 2).

4.6.6 Surrendering a person who is being proceeded against or serving a sentence in the requested State

In a situation where the person being surrendered is being proceeded against or is serving a sentence in the requested State for a crime different from that for which surrender to the ICC is sought, the requested State, after making its decision to grant the request, must consult with the Court (article 89, paragraph 4).

The consultation may result in the requested State temporarily surrendering the person sought to the ICC and the person will then be kept in custody by the Court until his or her presence at the Court is no longer required, at which time the person can be transferred back to the requested State (rule 183).

4.6.7 Competing requests

The *Rome Statute* draws a distinction between the terms *surrender* and *extradition* (article 102). *Surrender* means the delivering up of a person by a State to the Court, pursuant to the *Statute*. *Extradition* means the delivering up of a person by one State to another as provided by treaty, convention or national legislation.

Where a State Party receives a request from the Court for the surrender of a person under article 89 and also receives a request from another State for the extradition of the same person for the same conduct forming the basis of the crime for which the Court seeks the person's surrender, the State receiving the requests must notify the Court and the requesting State of that fact (article 90, paragraph 1). The priority of these competing requests is resolved pursuant to article 90, paragraphs 2, 3, 4, 5 and 6.

Essentially, where the requesting State is a State Party, the requested State must give priority to the Court's request unless the Court has not made a determination that the case is admissible, in which case the requested State may choose to proceed to deal with the request for extradition from the requesting State but hold off on the actual extradition until the Court has decided, on an expedited basis, whether the case is inadmissible (article 90, paragraph 3).

If the State requesting the extradition is not a Party to the *Rome Statute* and the requested State is under no international obligation to extradite the person to the requesting State, the requested State must give priority to the request for surrender from the Court, if the Court has determined that the case is admissible (article 90, paragraph 4). If the Court has not determined that the case is admissible, the requested State may, at its discretion, proceed to deal with the request for extradition from the requesting State (article 90, paragraph 5). However, if subsequent extradition to the requesting State is refused, the requested State must notify the ICC of this decision (article 90, paragraph 8).

Where the requested State is under an existing international obligation to extradite to a requesting State that is not Party to the *Rome Statute*, the requested State must consider all the relevant factors, including the those set out in article 90, paragraph 6 and make its decision accordingly. Those factors include:

- The respective dates of the requests (article 90, paragraph 6 (a));
- The interests of the requesting State including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought (article 90, paragraph 6 (b)); and
- The possibility of subsequent surrender between the ICC and the requesting State (article 90, paragraph 6 (c)).

Again, if the requested State decides to entertain the requesting State's extradition request and extradition to the requesting State is refused, the requested State must notify the ICC of this decision (article 90, paragraph 8).

Article 90 also applies to a situation in which a State Party receives a request from the ICC for the surrender of a person and a request from another State for the extradition of the same person, for conduct other than that which constitutes the crime for which the ICC seeks the person's surrender (article 90, paragraph 7).

In this instance, priority is assigned on the following basis:

- The requested State must, if it is not under an existing international obligation to extradite the person to the requesting State, give priority to the request from the Court (article 90, paragraph 7 (a)); or
- The requested State must, if it is under an existing international obligation to extradite the person to the requesting State, determine whether to surrender the person to the Court or to extradite the person to the requesting State. In making its decision, the requested State must consider all the relevant factors, including but not limited to:
 - The respective dates of the requests;
 - The interests of the requesting State including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought; and
 - The possibility of subsequent surrender between the Court and the requesting State.

In this circumstance, special consideration must be given by the requested State to the relative nature and gravity of the conduct in question (article 90, paragraph 7 (b)).

If the requested State decides to entertain the requesting State's extradition request and extradition to the requesting State is refused, the requested State must notify the ICC of this decision (article 90, paragraph 8).

4.6.8 Issuing a summons as an alternative to issuing a warrant of arrest

As an alternative to seeking a warrant for arrest, the ICC Prosecutor may submit an application to the Pre-Trial Chamber requesting that a summons be issued for the person to appear.

The Pre-Trial Chamber can issue the summons, with or without conditions restricting liberty, if it is satisfied that there are reasonable grounds to believe the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance (article 58, paragraph 7).

If the Pre-Trial Chamber intends to set conditions restricting liberty, it must ascertain the relevant provisions of national law of the State receiving the summons and proceed in a manner respecting those provisions (rule 119, sub-rule 5).

4.7 Protective measures for the purposes of forfeiture

When a warrant of arrest or a summons has been issued under article 58, the Pre-Trial Chamber may seek the cooperation of States to take protective measures for the purposes of forfeiture (article 57, paragraph 3 (e)).

This cooperation may extend to a request to assist with the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture (article 93, paragraph 1 (k)).

These measures are designed to assist the ICC in the carrying out of any subsequent order against a convicted person for reparation (article 75) and a State Party is obliged to give effect to the order, if made (articles 75, paragraph 5 and 109).

The ICC may, on its own motion or on the application of the ICC Prosecutor or at the request of the victims or their legal representatives, determine whether measures of the sort contemplated in articles 57 and 75, should be requested (rule 99, sub-rule 1).

4.8 Trial stage

Once a person is surrendered to the ICC, or appears before the ICC voluntarily or pursuant to a summons, the Pre-Trial Chamber assumes the conduct of the matter (article 60 and rule 121). The matter then moves through a confirmation hearing (article 61, rules 121, 122, 123, 124, 125 and 126) to the trial stage.

At the trial stage, States may be called upon to provide assistance to the ICC (article 64, paragraph 6 (b)). Such assistance could be in the form of many of the requests already considered in this section and section 3. In general, the trial proceedings will take place at the seat of the Court, in The Hague in the Netherlands. However, the Court may sit elsewhere whenever it considers it desirable to do so, as provided in the *Rome Statute* (article 3, paragraph 3).

Where the ICC sits outside The Hague in the territory of a State Party, it will enjoy such privileges and immunities as are necessary for the fulfilment of its purposes (article 48, paragraph 1). These privileges and immunities extend to the ICC judges, the Prosecutor, the Deputy Prosecutors and the Registrar and shall be the same as those accorded to the heads of diplomatic missions (article 48, paragraph 2). In addition, article 48, paragraph 3 notes that the Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the registry shall enjoy the privileges and immunities and facilities necessary for the performance of their functions, in accordance with the agreement on the privileges and immunities of the Court (article 48, paragraph 3).

The agreement on privileges and immunities of the Court is a separate international treaty to the *Rome Statute* and was adopted by the Assembly of States Parties to provide greater detail on the privileges and immunities to be enjoyed by the ICC and those appearing before it. Although the Assembly of States Parties adopted the Agreement, it is open to signature by all States and not only States Parties to the *Rome Statute*.

Issues for consideration

- The ICCLR has produced a comprehensive guide to the agreement on privileges and immunities. It is available at the ICCLR's website: <http://www.icclr.law.ubc.ca>

4.9 Offences against the ICC's administration of justice

Governments may be called upon to provide assistance to the ICC in relation to the investigation and prosecution of offences against the ICC's administration of justice (article 70 and Chapter 9 of the Rules of Procedure and Evidence).

In this regard, each State Party is obliged, by article 70, paragraph 4, to extend its criminal laws penalising offences against the integrity of its own investigative or judicial process, to offences against the administration of justice referred to in article 70, where those offences are committed on the State Party's territory, or by one of its nationals.

The ICC may, wherever it deems it proper, request a State Party to submit such a case to the State's competent authorities for the purpose of prosecution, and those authorities must treat such cases with diligence and devote sufficient resources to them to enable them to be conducted effectively (article 70, paragraph 4 (b)).

In addition, the ICC may request a State to provide any form of international cooperation or judicial assistance corresponding to those set out in Part 9, in respect of an alleged offence under article 70 (rule 167).

4.10 Sentencing stage

In the event of conviction, the Trial Chamber will sentence the convicted person.

Part 10 of the *Rome Statute* anticipates that States will have a role in the enforcement of any sentence passed and in particular, anticipates that any sentence of imprisonment will be served in the territory of a State that has indicated its willingness to accept sentenced persons (article 103, paragraph 1 (a) and Rules of Procedure and Evidence, Chapter 12).

The ICC will supervise the enforcement of the sentence (article 106, paragraph 1) and while the law of the State of enforcement will govern the conditions of imprisonment, those conditions must be consistent with widely accepted international treaty standards governing treatment of prisoners (article 106, paragraph 2).

In addition, States Parties are required to give effect to fines or forfeitures ordered by the ICC under Part 7, in accordance with their national law (article 109, paragraph 1). In this regard, the Presidency of the ICC will, as appropriate, seek cooperation and measures for enforcement in accordance with Part 9 (rules 217-221).

The ICC may also make orders for reparations to, or in respect of, victims, including restitution, compensation and rehabilitation (article 75, paragraph 1). In order to give adequate publicity to such reparation proceedings to other victims, interested persons and interested States, the ICC may seek the cooperation of States Parties in accordance with Part 9 (rule 96, sub-rule 2).