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# IBA International Criminal Court and International Criminal Law Programme



## Strengthening the International Criminal Court and the Rome Statute System: A Guide for States Parties

# About the programme

## About the International Bar Association

The International Bar Association (IBA) – the global voice of the legal profession – is the foremost organisation for international legal practitioners, bar associations and law societies. Established in 1947, shortly after the creation of the United Nations, it was born out of the conviction that an organisation made up of the world’s bar associations could contribute to global stability and peace through the administration of justice. In the ensuing 70 years since its creation, the organisation has evolved, from an association comprised exclusively of bar associations and law societies, to one that incorporates individual international lawyers and entire law firms. The present membership comprises more than 80,000 individual international lawyers from most of the world’s leading law firms and some 190 bar associations and law societies spanning more than 170 countries.

The IBA has considerable expertise in providing assistance to the global legal community, and through its global membership it influences the development of international law reform and shapes the future of the legal profession throughout the world.

## About the IBA International Criminal Court and International Criminal Law Programme

The IBA commenced the IBA International Criminal Court (ICC) Programme (the ‘Programme’) in 2005.

The Programme monitors issues related to fairness and equality of arms at the ICC and other Hague-based war crimes tribunals and encourages the legal community to engage with the work of these Courts. The IBA’s work includes thematic legal analysis of proceedings, and ad hoc evaluations of legal, administrative and institutional issues which could potentially affect the rights of defendants, the impartiality of proceedings and the development of international justice.

The Programme also acts as the interface between the Courts and the global legal community. As such, special focus is placed on monitoring emerging issues of particular relevance to lawyers and collaborating with key partners on specific activities to increase engagement of the legal community on ICC and international criminal law (ICL) issues.

Programme information is disseminated through regular reports, expert discussions, workshops and other events and expert legal analysis on issues relevant to our mandate.

The IBA’s ICC and ICL Programme consults and interacts with Courts’ officials, civil society organisations, academics and international lawyers.

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This Guide and the recommendations therein represent the views of the IBA ICC & ICL Programme, and any errors contained in the Guide are the IBA’s own.

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## Acronyms

ASP	Assembly of States Parties
CBF	Committee on Budget and Finance
ICC	International Criminal Court (or the ‘Court’)
ICL	international criminal law
ICRC	International Committee of the Red Cross
IER	Independent Expert Review of the ICC and the Rome Statute System
IOM	Assembly of States Parties’ Independent Oversight Mechanism
OTP	ICC Office of the Prosecutor
RPE	Rules of Procedure and Evidence
UNODC	United Nations Office of Drugs and Crime

## Foreword

In the Preamble to the Rome Statute of the International Criminal Court, States Parties ‘affirm that the most serious crimes of concern to the international community as a whole must not go unpunished, and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation’.

With this Guide, the International Bar Association ICC & ICL Programme offers a comprehensive set of recommendations for States Parties to strengthen the ICC and the Rome Statute System, and specifically to strengthen domestic legislation and cooperation with the ICC.

As the global voice of the legal profession, the IBA has supported the ICC since its inception, recognising the Court’s essential place at the centre of domestic and international efforts to ensure accountability for the most serious crimes. In 2021, with States Parties and the Court working to implement the recommendations of the Independent Expert Review, with a growing number of situations and cases within the Court’s jurisdiction and with the Court facing unprecedented political and logistical challenges, the role of States Parties has never been more important.

Simply put, the ICC was designed to function, and will only succeed, with State Parties’ conscientious and dedicated support and cooperation. In the Assembly of States Parties and in their own jurisdictions, there are numerous opportunities for States Parties to strengthen the performance of the Court and ensure the effectiveness of the Rome Statute system, and to exercise oversight, while respecting judicial and prosecutorial independence. States Parties also have obligations to provide the Court with necessary resources, ensure cooperation and enact domestic legislation regarding Rome Statute crimes and ICC procedures. The ICC’s limited resources and its foundational principle of complementarity require that States domesticate Rome Statute crimes and hold domestic prosecutions, reserving the ICC as the ‘court of last resort’. The aim of the Guide is to provide accessible and up-to-date recommendations for States to fulfil these obligations.

The Guide is part of the IBA’s Implementing Legislation Project, launched in 2020, which engages lawyers and legal actors to promote the adoption of implementing legislation at a national level, and seeks to broaden the group of countries that have adopted legislation. We are grateful to the IBA members who have engaged with this project to date and hope this Guide will serve as a valuable resource in the next phases of the project.

In drafting this Guide, the IBA invited broad consultation from key stakeholders, including the President, Prosecutor and Registrar of the Court and their respective organs, the Independent Offices of the Court and the Trust Fund for Victims, the President of the ASP and relevant Facilitators and Focal Points of the ASP, the Secretariat of the ASP, the ICC Bar Association and expert practitioners, academics and members of civil society. The IBA is grateful for the cooperation received during the writing of this Guide.

It has been almost a quarter of a century since the Rome Statute was created, with many achievements, lessons learned and new challenges ahead. The IBA’s support for the Court remains steadfast, and the IBA will continue to work with the Court and States Parties to strengthen the ICC and Rome Statute system, towards realising a truly global system of justice.

*Dr. Mark S Ellis, Executive Director, International Bar Association*

*London, October 2021*

# Recommendations

## 1. Ensuring the Assembly's effective oversight of the International Criminal Court

### 1.2 The role of individual States Parties

1. States Parties should attend each session of the Assembly and, if possible, make a voluntary contribution to the Assembly's trust fund to assist other States Parties to participate, especially when sessions are held in The Hague.
2. States should engage actively in the work and decision making of the Assembly during its annual session and between sessions.
3. States Parties should ensure that the Assembly performs its functions in good faith and in accordance with the Rome Statute, respecting the judicial and prosecutorial independence of the ICC.
4. States Parties should put themselves or their representatives forward as chairs of working groups, facilitators and focal points.
5. States Parties should support strengthening the Secretariat of the Assembly.
6. States Parties should consider joining the Group of Friends of the ICC and the Informal Ministerial Network for the ICC.

### 1.3 The Assembly's oversight of the ICC

#### 1.3.1 Management oversight of the Presidency, the Prosecutor and the Registrar regarding the administration of the Court and the ICC Review

7. States Parties should support Independent Experts Review recommendations that will succeed in strengthening the performance of the ICC, without infringing on the judicial and prosecutorial independence of the Court.
8. States Parties should support the establishment of a Judicial Audit Committee to provide oversight of the administration of justice, subject to safeguards that guarantee judicial and prosecutorial independence.
9. States Parties should support measures to enhance fair trials and strengthen the Court's systems to give effect to the rights of the accused, victims and witnesses.
10. States Parties should ensure that sustainable and adequate systems are put in place to fund a reasonable number of family visits for indigent detainees in ICC detention.

### *1.3.2 Deciding the ICC's budget*

11. States Parties should participate in the annual budget processes and proposed discussions on the ten-year strategic vision of the Court, seeking to achieve a balance of providing the Court with sufficient resources to function effectively, while maximising efficiency.
12. States Parties should support an increase in the level of the Contingency Fund to €10m and ensure that it is fully replenished each year.
13. States Parties should nominate highly qualified experts as candidates to the Committee on Budget and Finance.
14. States Parties should pay their assessed contributions on time.

### *1.3.3 Deciding the salaries, allowances and expenses of senior ICC officials*

15. States Parties should engage with regular reviews of salaries, allowances and expenses of all senior ICC officials.

### *1.3.4 Deciding whether to alter the number of ICC judges*

16. States Parties should support the further development of the procedure in Article 36(2) to increase or decrease the number of ICC judges, including a review of the Court's requests by independent experts on judicial management.

### *1.3.5 Ensuring effective inspection, evaluation and investigation of the Court*

17. States Parties should support providing the Independent Oversight Mechanism (IOM) with enhanced authority and resources to conduct inspections, evaluations and investigations of the Court and vetting of candidates for senior elected ICC officials.
18. States Parties should ensure that effective mechanisms are in place to investigate allegations of misconduct by elected officials.

### *1.3.6 Deciding whether to remove a judge, the Prosecutor or Deputy Prosecutor from office*

19. States Parties should support the establishment of a fully independent and impartial process to determine whether judges, the Prosecutor, Deputy Prosecutors and the Registrar should be removed from Office.

### *1.3.7 Ensuring equitable geographical representation and gender balance in the recruitment of staff of the ICC*

20. States Parties should support the ICC's development of a detailed strategy to improve geographical representation and gender balance of its staff, including an evaluation of the ICC's efforts by the IOM.
21. States Parties that are not represented or are under-represented in the staff of the Court should work with the ICC to disseminate vacancy announcements to qualified candidates in their countries.

22. States Parties should work with the ICC to disseminate vacancy announcements for senior roles to qualified female candidates in their countries.
23. States Parties should make regular voluntary contributions to the ICC's trust fund for the development of interns and visiting professionals.

## **1.4 Election of ICC Officials**

### *1.4.1 Vetting of all candidates*

24. States Parties should support a thorough vetting process of all candidates in ICC elections.

### *1.4.2 Election of ICC judges*

25. States Parties should support further strengthening the process of nominating and electing ICC judges and ensure a thorough vetting process for all candidates.
26. States Parties should establish a transparent national nomination process for ICC judges, focusing on putting forward the most qualified candidates, and submit information about their existing process to the Advisory Committee on Nominations of Judges of the ICC.
27. States Parties should ensure that national nomination processes are accessible to qualified women and incorporate the need for a fair representation of female and male judges set out in the Rome Statute.
28. States Parties should conduct a national search process for highly qualified candidates at least once every 10–15 years.
29. States Parties should reject vote trading and vote for the highest qualified candidates, giving high priority to the requirement of a fair representation of female and male judges and the need for ICC judges who are able to manage and conduct complex international criminal trials fairly and expeditiously.

### *1.4.3 Election of the Prosecutor and Deputy Prosecutor(s)*

30. States Parties should support a review of the procedures to nominate and elect the Prosecutor as soon as possible, including a thorough vetting process of all candidates under consideration.
31. States Parties should promote vacancies for the Prosecutor and Deputy Prosecutor nationally so that more highly qualified candidates, in particular women, can apply.

### *1.4.4 Provide recommendations to the ICC judges on the election of the Registrar*

32. States Parties should support measures to strengthen the process of electing the Registrar and Deputy Registrar that are consistent with the Rome Statute, including a thorough vetting process of all candidates under consideration.

## 1.5 The Assembly's legislative role

33. States Parties should only propose or support amendments to the Statute, Rules of Procedure and Evidence and Elements of Crimes that strengthen the ICC's ability to address impunity.

### 1.5.1 Amending the Statute

34. States Parties should ratify amendments to the Rome Statute that have been adopted by the Assembly so far.
35. States Parties should oppose provisions in future resolutions adopting new crimes that seek to preclude the ICC from investigating and prosecuting new or amended crimes committed by the nationals of states that are not parties to the Rome Statute.

### 1.5.2 Amending the Rules of Procedure and Evidence and Elements of Crimes

36. States Parties should support a thorough review of the Assembly's procedures for considering and deciding on proposals to amend the Rules of Procedure and Evidence.
37. States Parties should ensure that any amendments to the Rules of Procedure and Evidence are consistent with the Rome Statute and internationally recognised human rights.
38. States Parties should ensure that amendments to the Rules of Procedure and Evidence and the Elements of Crimes do not interfere with matters under consideration by the ICC (*sub judice*) and that amendments to the Elements of Crimes are consistent with the principle of *nullum crimen sine lege*.

### 1.5.3 Settling disputes or making recommendations to settle disputes between two or more States Parties relating to the interpretation or application of the Rome Statute

39. States Parties should ensure that all disputes concerning the judicial functions of the Court are decided by the Court.

## 1.6 Oversight of the Trust Fund for Victims

40. States Parties should support measures to strengthen the existing structure and, therefore, the performance of the Trust Fund for Victims, by ensuring it has the capacity to effectively implement all reparations orders, when so directed by the Court, and carry out assistance projects for the benefit of victims in all situations.
41. States Parties should make annual voluntary contributions to the Trust Fund for Victims and encourage all States Parties, as well as public and private actors, to do so.
42. States Parties should support the Trust Fund for Victims in establishing and implementing its fundraising strategy to secure donations from states, international organisations, corporations and other entities, including promoting the Trust Fund nationally.

## 2. Establishing effective national frameworks to fulfil Rome Statute obligations

### 2.1 The need for effective national frameworks

43. States Parties should review their national frameworks to ensure that they fulfil their obligations arising from the Rome Statute.

### 2.2 Establishing effective national frameworks for complementarity

#### 2.2.1 *The need for enacting or amending implementing legislation*

44. States Parties should review and amend their national criminal laws and/or enact new legislation to ensure that national authorities can investigate and prosecute Rome Statute crimes effectively in accordance with international law.

##### 2.2.1.1 DEFINING ROME STATUTE CRIMES IN NATIONAL LAW

45. States Parties should criminalise genocide in national law in accordance with the definition in Article 6 of the Rome Statute and consider expanding the protected groups and prohibited acts.

46. States Parties should criminalise crimes against humanity in national law in accordance with the definition in Article 7 of the Rome Statute, subject to some revisions.

47. States Parties should criminalise all war crimes in national law, including war crimes omitted from Article 8 of the Rome Statute.

48. States Parties should criminalise aggression in national law in accordance with the definition in Article 8 *bis* of the Rome Statute.

49. States Parties should extend their criminal laws penalising offences against the integrity of national investigations or judicial processes to include offences against the administration of justice in Article 70 of the Rome Statute.

50. States Parties should define or refer to the material and mental elements of Rome Statute crimes as far as possible.

51. States Parties should review national definitions of Rome Statute crimes at least every 10–15 years and adopt amendments as necessary to reflect evolutions in the definitions of genocide, crimes against humanity, war crimes and aggression or the addition of other crimes under the jurisdiction of the Court.

##### 2.2.1.2 JURISDICTION

52. States Parties should provide that national courts can prosecute Rome Statute crimes that at the time of their commission constituted crimes under international law.

53. States Parties should provide for universal jurisdiction over Rome Statute crimes.

### 2.2.1.3 MODES OF INDIVIDUAL CRIMINAL RESPONSIBILITY

54. States Parties should ensure that all modes of criminal responsibility listed in Article 25(3) are covered in national legislation and can be applied in prosecuting genocide, crimes against humanity, war crimes and aggression.
55. States Parties should ensure that national law provides for the responsibility of commanders and other superiors as set out in Article 28 of the Rome Statute.

### 2.2.1.4 DEFENCES

56. States Parties should ensure that defences, justifications and excuses available to persons accused of Rome Statute crimes in national proceedings are consistent with defences, justifications and excuses in international law.

### 2.2.1.5 REMOVING BARRIERS TO PROSECUTION

57. States Parties should eliminate any statute of limitations for genocide, crimes against humanity, war crimes and aggression.
58. States Parties should ensure that official capacity does not exempt a person from criminal responsibility for Rome Statute crimes.
59. States Parties should prohibit amnesties for Rome Statute crimes.
60. States Parties should ensure that national authorities prosecute accused persons under the age of 18 applying juvenile justice protections.

### 2.2.1.6 PENALTIES

61. States Parties should be guided by the Rome Statute penalties in setting national penalties for Rome Statute crimes, including prohibiting the application of the death penalty.

## 2.2.2 *Establishing or strengthening effective national justice mechanisms to address Rome Statute crimes*

### 2.2.2.1 INDEPENDENT, IMPARTIAL AND COMPETENT INVESTIGATION AND PROSECUTION MECHANISMS

62. States Parties should ensure that those conducting national investigations and prosecutions are independent of those suspected of committing the crimes, free from political interference and well-trained in international criminal law and conducting investigations of Rome Statute crimes. Where possible, States Parties should establish specialised investigation units.
63. States Parties should enact legislation and take measures to ensure that national authorities follow best practices in investigating and prosecuting sexual and gender-based crimes.

#### 2.2.2.2 EXTRADITION AND MUTUAL LEGAL ASSISTANCE

64. States Parties should seek to expand agreements providing for extradition and mutual legal assistance with other states and support the adoption of an effective Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes Against Humanity and War Crimes.

#### 2.2.2.3 FAIR TRIALS

65. States Parties should ensure that national trials of Rome Statute crimes are fair.

#### 2.2.2.4 JUVENILE JUSTICE PROTECTIONS

66. States Parties should ensure that any accused person under 18 is dealt with in a juvenile justice system in accordance with international standards.

#### 2.2.2.5 VICTIMS AND WITNESS PROTECTION AND ASSISTANCE

67. States Parties should ensure that victims and witnesses are provided with effective protection and support to participate in national criminal proceedings.

#### 2.2.2.6 NATIONAL REPARATIONS MECHANISMS

68. States Parties should ensure that victims are able to access full and effective reparations before national courts or administrative mechanisms.

### **2.3 Establishing effective national frameworks to cooperate with the ICC**

#### *2.3.1 The need for implementing legislation and cooperation agreements*

69. States Parties should develop and enact stand-alone legislation to ensure that their national authorities cooperate fully with the ICC.

70. States Parties that have enacted cooperation legislation should review it every 10–15 years taking into account the evolving experience and recommendations of the ICC.

##### 2.3.1.1 EXERCISE OF THE ICC'S FUNCTIONS AND POWERS ON THE TERRITORY OF A STATE PARTY

71. States Parties should ensure that the ICC can sit on its territory and exercise its functions and powers at all stages of the proceedings.

72. State Parties should ensure that ICC officials, staff and counsel may be present at or assist in the execution of requests for cooperation.

73. States Parties should ensure that the OTP and the defence can conduct investigations on its territory.

74. State Parties should ratify the ICC Agreement on Privileges and Immunities and incorporate it into national law to provide ICC officials, staff, counsel, experts, witnesses and other persons required to be

present at the seat of the Court with privileges and immunities necessary for the proper functioning of the Court.

#### 2.3.1.2 STATE PARTIES' GENERAL OBLIGATION TO COOPERATE FULLY WITH THE COURT

75. States Parties should reflect the general obligation to cooperate fully with the ICC in their implementing legislation, ensuring that it covers all stages of ICC proceedings.

#### 2.3.1.3 REQUESTS FOR COOPERATION: GENERAL PROVISIONS

76. States Parties should establish clear channels for receiving and processing ICC requests for cooperation.

77. States Parties should ensure a prompt response to all ICC cooperation requests.

78. States Parties should ensure that requests for cooperation and any documents supporting them be kept confidential, except to the extent that the disclosure is necessary for execution of the request.

79. States Parties should ensure that national authorities comply with the ICC's requests that any information relating to cooperation shall be provided and handled in a manner that protects the safety and physical or psychological wellbeing of victims, potential witnesses and their families.

#### 2.3.1.4 COOPERATION WITH ARREST AND SURRENDER

80. States Parties should establish national procedures to promptly arrest and surrender persons to the ICC, ensuring that the rights of the person who is the subject of the request are respected.

81. States Parties should establish national procedures to cooperate with the provisional arrest of suspects.

82. States Parties should establish procedures to cooperate with the transit of a person being surrendered to the Court by another state through its territory and enter into agreements with the Court to cooperate with air transportation.

83. States Parties should endeavour to grant requests to waive the rule of speciality and establish a procedure to determine requests by the Court.

#### 2.3.1.5 OTHER FORMS OF COOPERATION

84. States Parties should ensure that national authorities provide all forms of cooperation listed in Article 93(1), ensuring effective procedures are put in place to implement all Court requests.

85. States Parties should provide for other forms of cooperation not expressly listed in Article 93 that in practice have been requested by the Court.

86. States Parties should establish effective procedures that ensure full cooperation with defence requests.

### 2.3.1.6 COOPERATION AGREEMENTS

87. States Parties should enter into cooperation agreements with the ICC providing for cooperation with interim release and, where necessary, incorporate the provisions and procedures in national law.
88. States Parties should enter into cooperation agreements with the Court to cooperate with the release of persons if proceedings are terminated and, where necessary, incorporate the provisions and procedures of the agreement in national implementing legislation.
89. States Parties should enter into cooperation agreements with the ICC providing for cooperation with relocating victims and witnesses at serious risk to their territories and, where necessary, incorporate the provisions and procedures in national law.

### 2.3.1.7 OBSTACLES TO COOPERATION

90. States Parties should ensure that, where problems are identified that may impede or prevent the execution of a cooperation request, they consult with the Court without delay to resolve the matter.
91. States Parties should only postpone or deny cooperation in accordance with the grounds set out in the Rome Statute.
92. States Parties should ensure that they apply the procedure in Article 73, if they are requested to provide a document or information in their custody, possession or control, which was disclosed to them in confidence by a state, intergovernmental organisation or international organisation.
93. States Parties should adopt a procedure, including consultation with the ICC, if transit of a person being surrendered to the ICC through their territory would impede or delay the surrender.
94. States Parties should ensure that they apply the rules set out in Article 90 if, in addition to a request for surrender of a suspect to the ICC, they receive a competing request for extradition of the same person from another state.
95. States Parties should ensure that they only provide for the possibility of refusing requests for any other type of assistance pursuant to Article 93(1) (l) that are prohibited in national law on the basis of an existing fundamental legal principle of general application and follow the procedures set out in Article 93(3) and (5).
96. States Parties should ensure that they follow the procedures in Article 72, if a request for information by the ICC raises national security concerns.
97. States Parties should ensure that they follow the procedures in Article 94 for the postponement of a request for cooperation pursuant to Article 93(1) in respect of an ongoing investigation or prosecution.
98. States Parties should ensure that postponement of execution of a cooperation request pending the ICC's determination of an admissibility challenge pursuant to Article 95 ends, and that the request is promptly executed, if the ICC decides that a case is admissible or the Court orders that the Prosecutor may pursue the collection of evidence while the challenge is under consideration.

99. States Parties should ensure that any conflicts between requests for cooperation and their obligations with respect to state or diplomatic immunities or status of forces agreements are addressed in accordance with the Rome Statute.

#### **2.3.1.8 ENFORCEMENT OF COURT ORDERS FOR IMPRISONMENT, FINES, FORFEITURE AND REPARATIONS**

100. States Parties should cooperate with the enforcement of sentences of imprisonment imposed by the ICC, including by entering into agreements with the ICC indicating their willingness to accept convicted persons to serve sentences in their national prison facilities and, where necessary, incorporate the provisions and procedures set out in the agreement in national implementing legislation.

101. States Parties should ensure that they cooperate fully with the enforcement of fines, forfeiture and reparations orders.

#### **2.3.2 Establishing or strengthening national cooperation mechanisms**

102. States Parties should establish national focal points on cooperation.

103. States Parties should ensure national capacity and expertise of relevant agencies to ensure full cooperation with the ICC.

### **3. Promoting universality of the Rome Statute and ensuring that States Parties fulfil their obligations**

#### **3.1 Promoting universality and full implementation of the Rome Statute**

104. States Parties should support a review of the Plan of Action to achieve universality and full implementation of the Rome Statute to re-energise the Assembly's efforts.

105. States Parties should support the development of procedures of the Assembly and guidelines for States Parties to respond to threats and initiatives to withdraw from the Rome Statute.

#### **3.2 Promoting positive complementarity**

106. States Parties should support intensifying the Assembly's efforts to promote positive complementarity in order 'to put an end to impunity for the perpetrators' of 'the most serious crimes of concern to the international community', ensuring that the judicial and prosecutorial independence of the ICC is respected.

#### **3.3 Ensuring States Parties' cooperation with the ICC**

##### **3.3.1 Promoting cooperation**

107. States Parties should support and engage with initiatives to strengthen the Assembly's efforts to promote cooperation, including by implementing the Court's 44 recommendations to strengthen

cooperation; updating and implementing the Assembly's 66 recommendations on cooperation; and supporting implementation of the Independent Experts' recommendations for the Assembly to strengthen cooperation with the Court.

108. States Parties should support the establishment of a coordinating mechanism of national authorities.

### *3.3.2 Preventing and responding to non-cooperation*

109. States Parties should apply the Assembly's Toolkit for the implementation of the informal dimension of the Assembly procedures relating to non-cooperation.

110. States Parties should ensure that the Assembly consistently provides an appropriate formal response to referrals of non-cooperation.

## **3.4 Periodic review of national frameworks**

111. States Parties should support the establishment of a periodic review process to strengthen national cooperation and complementarity frameworks.

# Introduction

At its 18th session in December 2019, the Assembly of States Parties (the ‘Assembly’) to the Rome Statute of the International Criminal Court (the ‘Rome Statute’) decided ‘to establish a transparent, inclusive State-Party driven process for identifying and implementing measures to strengthen the (International Criminal) Court and improve its performance’.<sup>1</sup>

An Independent Expert Review of the International Criminal Court and the Rome Statute system (the ‘Independent Expert Review’ or IER) was conducted in 2020, resulting in a 350-page report containing 384 recommendations.<sup>2</sup>

At the same time, the Assembly’s working groups, facilitators and focal points have focused on addressing the following oversight issues:

- the election of ICC judges, the Prosecutor and the Registrar;
- the procedure for amending the Rules of Procedure and Evidence;
- improving gender and geographical balance of ICC staff;
- management of transitions in the judiciary;
- complementarity and the relationship between national jurisdictions and the Court;
- state cooperation;
- implementation of arrest warrants;
- non-cooperation; and
- reviewing Assembly working methods.<sup>3</sup>

At the time of publication in October 2021, the recommendations of the IER are being assessed by the International Criminal Court (the ‘Court’ or ICC) and the Assembly.<sup>4</sup> The Assembly is still considering how to strengthen its oversight functions.

This Guide seeks to contribute to the success of these important efforts by focusing in detail on the critical role that States Parties must play, individually and collectively, in strengthening the work of the ICC and the Rome Statute system.

As the Assembly reaffirmed in establishing the IER:

States Parties have an important role in ensuring the efficiency and effectiveness of the Court and shall assume their responsibility and obligations as provided for by the Rome Statute.<sup>5</sup>

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1 *Review of the International Criminal Court and the Rome Statute System*, ICC-ASP/18/Res 7, para 4.

2 *Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report* (‘IER Final Report’), 30 September 2020.

3 *Review of the International Criminal Court and the Rome Statute System*, (n 1) Annex I, Appendix II, para 5.

4 *Review of the International Criminal Court and the Rome Statute System*, ICC-ASP/19/Res 7.

5 *Review of the International Criminal Court and the Rome Statute System*, (n 1), para 16.

These responsibilities and obligations can be grouped into three categories:

- providing the ICC with effective oversight and support through the Assembly to achieve its mandate;<sup>6</sup>
- cooperating fully with the ICC's investigation and prosecution of Rome Statute crimes;<sup>7</sup> and
- investigating and prosecuting Rome Statute crimes domestically so that the ICC need step in only when states are genuinely unable or unwilling to do so (the principle of complementarity).<sup>8</sup>

States Parties' effective implementation of these responsibilities and obligations are fundamental to the success of the ICC and advancing the Rome Statute's system to end impunity. However, they are often overlooked in assessing the performance of the ICC, with attention often focused on the activities of the Court itself.<sup>9</sup>

Almost two decades since the establishment of the ICC, most States Parties have yet to put in place national frameworks to implement their obligations arising from the Rome Statute. The Court has struggled to obtain state cooperation and it is overwhelmed with demands for international justice because many States Parties are unwilling or unable genuinely to investigate and prosecute Rome Statute crimes nationally. The Assembly's oversight of the Court has often been criticised for falling short of reflecting the determination that States Parties expressed in adopting and ratifying the Rome Statute to put an end to impunity for the perpetrators of genocide, crimes against humanity, war crimes and aggression and thus to contribute to the prevention of such crimes.<sup>10</sup> These failures have impacted negatively on the performance of the ICC in its first two decades.

Some, but not all these issues, are addressed in the recommendations of the IER and the oversight issues under review by the Assembly. Although the current efforts to strengthen the ICC's performance are very welcome, if genuine progress is to be achieved, further attention must focus on strengthening the performance of States Parties and the Assembly of States Parties.

This Guide provides detailed guidance and recommendations for all existing and future States Parties to fulfil their responsibilities and obligations in the Rome Statute and guarantee a stronger and more effective ICC in the next decades.

Part 1 focuses on the role that all States Parties should play in ensuring the Assembly's effective oversight of the ICC, including considering the Assembly's current efforts to review its oversight and relevant recommendations of the IER.

Part 2 calls on all States Parties to establish comprehensive and effective national frameworks to implement their individual obligations to investigate and prosecute Rome Statute crimes nationally, in accordance with the principle of complementarity, and to cooperate fully with the ICC's investigations and prosecutions.

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6 Rome Statute, Article 112.

7 Rome Statute, Part 9.

8 Rome Statute, Article 17.

9 Renan Villacis, 'Working Methods of the Assembly of States Parties to the Rome Statute' (2018) 18 *International Criminal Law Review* 563, 564.

10 Rome Statute, Preamble.

Part 3 examines the role that States Parties should play individually and collectively through the Assembly to promote universality of the Rome Statute and ensure that all States Parties implement their responsibilities and obligations under the Rome Statute.

The Guide has been structured so that it can be used as a resource by representatives of States Parties to support the effective functioning of the ICC, including through the development and regular review of effective national implementing legislation.

It is not the first resource to be developed for States Parties. Numerous manuals, checklists and model legislations have been issued by non-governmental and intergovernmental organisations in recent decades to assist States Parties in implementing the Rome Statute. The Assembly has developed several important tools to support States Parties in fulfilling their responsibilities and obligations. The Assembly's oversight of the Court, state obligations to cooperate fully with the Court and the principle of complementarity have also received significant academic and civil society attention. To provide States Parties with comprehensive guidance and to avoid duplicating these important tools and resources, the IBA references them throughout the Guide.

# PART 1: Ensuring the Assembly's effective oversight of the International Criminal Court

## 1.1 The Assembly of States Parties and its working practices

All States that have ratified or acceded to the Rome Statute (States Parties) are members of the Assembly, which has an essential role to play in the Rome Statute system in terms of providing oversight and support to the Court.<sup>11</sup> At the time of publication, there are 123 States Parties.

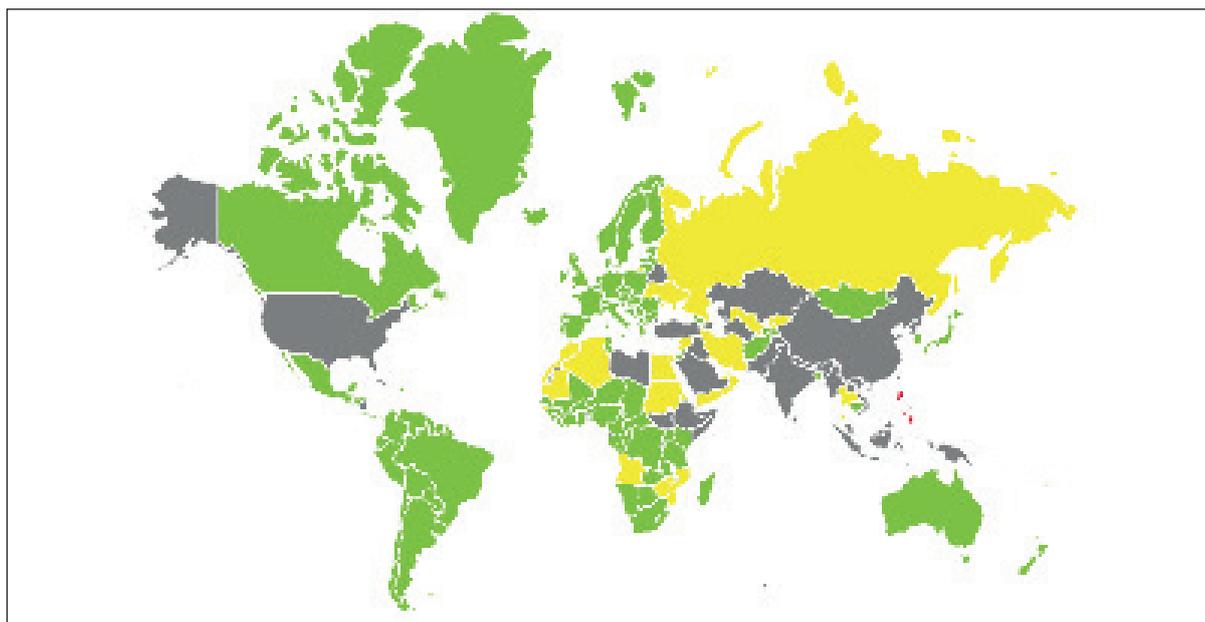


Figure 1: World map of States Parties to the Rome Statute (green), states that have signed but not ratified (yellow), states that have not signed or ratified or withdrew their signature (grey) and states that have withdrawn from the Statute (red)

The Assembly is mandated by the Rome Statute to perform numerous oversight functions:

- provide management oversight of the Presidency, the Prosecutor and the Registrar regarding the administration of the Court;<sup>12</sup>
- consider and decide the budget of the Court;<sup>13</sup>
- elect the judges,<sup>14</sup> the Prosecutor,<sup>15</sup> Deputy Prosecutors<sup>16</sup> and provide recommendations to the judges on the election of the Registrar of the Court;<sup>17</sup>

<sup>11</sup> Villacis (n 9) 563.

<sup>12</sup> Rome Statute, Article 112(2) (b).

<sup>13</sup> Rome Statute, Article 112(2) (d).

<sup>14</sup> Rome Statute, Article 36(6).

<sup>15</sup> Rome Statute, Article 42(4).

<sup>16</sup> Rome Statute, Article 42(4).

<sup>17</sup> Rome Statute, Article 43(4).

- decide on the salaries, allowances and expenses of the judges, the Prosecutor, Deputy Prosecutors, the Registrar and the Deputy Registrar;<sup>18</sup>
- decide whether to alter the number of judges;<sup>19</sup>
- decide whether to remove a judge, the Prosecutor or Deputy Prosecutor from office;<sup>20</sup>
- adopt amendments to the Statute,<sup>21</sup> the Rules of Procedure and Evidence;<sup>22</sup> the Elements of Crimes<sup>23</sup>; and Financial Regulations and Rules;<sup>24</sup>
- consider any questions relating to non-cooperation by states;<sup>25</sup>
- settle disputes between two or more States Parties relating to the interpretation or application of the Rome Statute or recommend further means of settlement of the dispute;<sup>26</sup> and
- perform any other functions consistent with the Rome Statute or the Rules of Procedure and Evidence.<sup>27</sup>

This work is conducted by the Assembly during its annual sessions, as well as by its Bureau and other subsidiary bodies of the Assembly between sessions in accordance with the Rules of Procedure of the Assembly of States Parties.<sup>28</sup> Over the course of its first 19 sessions, the working practices of the Assembly have evolved into a complex system of oversight.

### 1.1.1 The Assembly's annual session

The Assembly meets in regular session once a year.<sup>29</sup> In most years, this session has been held in November or December. Two out of every three sessions take place in The Hague. As more states have a diplomatic presence in New York than in The Hague, every third year the session takes place at the United Nations Headquarters in New York to facilitate the maximum participation of States Parties in the election of judges (every three years) and the Prosecutor (every nine years, coinciding with the election of six judges). In some years, the Assembly has held additional meetings to conduct elections and other work.<sup>30</sup>

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18 Rome Statute, Article 49.

19 Rome Statute, Article 112(2) (e).

20 Rome Statute, Article 46(2).

21 Rome Statute, Article 121 and 122.

22 Rome Statute, Article 51(2).

23 Rome Statute, Article 9(2).

24 Rome Statute, Article 113.

25 Rome Statute, Article 112(2) (f).

26 Rome Statute, Article 119.

27 Rome Statute, Article 112(2) (g).

28 Rules of Procedure of the Assembly of States Parties, Rule 2. Villacis (n 9) 575: 'The Rules of Procedure of the Assembly of States Parties are, to a large extent, likewise based on the UN General Assembly's Rules'.

29 Rules of Procedure of the Assembly of States Parties, Rule 4.

30 For example, between 2007 and 2010, the Assembly held resumed sessions to prepare for the 2010 Review Conference of the Rome Statute.

All States Parties, observer states and states not having observer status are encouraged to participate in the sessions of the Assembly to ensure the broadest visibility of the Court and the Assembly.<sup>31</sup> Civil society organisations also participate in the sessions (see 1.1.6 below).

Most annual sessions have a duration of seven days, with a possible extension of up to two additional days in election years.<sup>32</sup> A provisional agenda is circulated at least 60 days before the opening of the session and any State Party can propose supplementary agenda items up to 30 days before the session.<sup>33</sup> Agenda items of an important and urgent character can be added to the agenda less than 30 days before the session, subject to a decision by a majority of States Parties present and voting.<sup>34</sup> The agenda, all relevant documentation and other information for the session are posted on the Assembly of States Parties website: [www.asp.icc-cpi.int](http://www.asp.icc-cpi.int).

Traditionally, the Assembly's session opens with presentations from senior ICC officials (including the President of the ICC, the Prosecutor and the Registrar) and the Chair of the Board of Directors of the Trust Fund for Victims reporting on the work of the Court and the Trust Fund that year, followed by a General Debate involving statements by States Parties, observer states, intergovernmental and international organisations and civil society. In both formal and informal meetings, working groups of the Assembly then consider the ICC's budget proposal, an annual resolution on strengthening the ICC and the Assembly, any proposals for amendments to the legal framework and other oversight issues. Elections of ICC officials or members of subsidiary bodies of the Assembly (see 1.1.3 below) are held. At least one formal panel discussion is organised in plenary during each session focusing on cooperation and sometimes other issues relevant to the Assembly's oversight. For example, during the Assembly's 18th session in 2019, a panel discussion was organised on 'Inter-state and inter-institutional cooperation at the heart of cooperation issues.'

During the session, other plenary meetings are held to provide updates on the progress of the Assembly's session and to adopt decisions and resolutions. Every effort is taken to reach decisions, including adopting resolutions, by consensus.<sup>35</sup> In the event that consensus cannot be reached, the Rules of the Assembly provide that decisions shall be taken by vote.<sup>36</sup> In practice so far, except for elections, States Parties have sought to find compromises rather than resort to voting.

The working languages of formal meetings and any decisions taken by the Assembly are Arabic, Chinese, English, French, Russian and Spanish.<sup>37</sup>

Many side meetings are also organised by states, often involving civil society, on topical international justice issues.

The session is closed when the Assembly completes its programme of work.

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31 See, for example, *Strengthening the International Criminal Court and the Assembly of States Parties*, ICC-ASP/18/Res 6, 6 December 2019, preamble.

32 *Strengthening the International Criminal Court and the Assembly of States Parties*, ICC-ASP/15/Res 5, Annex I, para 11 (a).

33 Rules of Procedure of the Assembly of States Parties, Rules 10 and 12.

34 Rules of Procedure of the Assembly of States Parties, Rules 13.

35 Rules of Procedure of the Assembly of States Parties, Rule 61.

36 Rules of Procedure of the Assembly of States Parties, Rule 61.

37 Rules of Procedure of the Assembly of States Parties, Rules 38–40.

At the time of writing, the Assembly has requested the Bureau to assess the benefits and challenges regarding the current schedule, length and location of its annual sessions and to make recommendations to improve efficiency.<sup>38</sup> The Bureau has appointed a facilitator to lead the assessment.

### 1.1.2 Intersessional work by the Assembly's Bureau and its Hague and New York Working Groups

With the Assembly only meeting for seven to nine days during the final weeks of each year, a significant amount of work is assigned by the Assembly to its Bureau to be conducted throughout the rest of the year and in preparation for the next annual session.<sup>39</sup> The Bureau of the Assembly is made up of the President of the Assembly, two Vice-Presidents and 18 States Parties representing five regional groupings. They are elected by the Assembly for three-year terms to assist the Assembly in the discharge of its responsibilities.<sup>40</sup> The Bureau makes key decisions on the organisation of the annual Assembly session, including on how to advance mandates that the Assembly has assigned to it.<sup>41</sup>

The Bureau has created two working groups, located in The Hague and New York, that assist the Bureau with matters referred to them.<sup>42</sup> Each working group is chaired by a Vice-President of the Assembly and their meetings are open to all States Parties and, in most cases, observer states, invited states, as well as to the ICC and non-governmental organisations.

The mandates assigned by the Assembly to the Bureau and delegated to The Hague Working Group and the New York Working Group involve a range of issues, including standing items that arise each year (such as the ICC's Budget) and specific issues that may last for limited number of years (such as the activation of the jurisdiction of the Court over the crime of aggression).<sup>43</sup> Mandates are generally assigned to The Hague Working Group if the issue involves institutional questions and discussions that would benefit from close interaction with the Court. Questions relating to the United Nations or that require the fullest possible representation on the part of States Parties are designated to the New York Working Group. In many cases, the allocation of facilitations involves a trade-off between universality and the ability for involvement of the Court.<sup>44</sup> In practice, the centre of gravity of the work undertaken by the Bureau's working groups has shifted from New York to The Hague.<sup>45</sup>

For example, in 2021, The Hague Working Group has been tasked to consider and report to the Assembly on:

- budget of the ICC (including premises and budget management oversight);
- cooperation;

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38 *Strengthening the International Criminal Court and the Assembly of States Parties*, ICC-ASP/19/Res 6, Annex I, para 11 (i).

39 Villacis (n 9) 564.

40 Rome Statute, Article 112(3); Rules of Procedure of the Assembly of States Parties, Rule 29.

41 Villacis (n 9) 567.

42 *Terms of Reference for the Subsidiary Bodies of the Bureau of the Assembly of States Parties to the Rome Statute of the International Criminal Court*, [https://asp.icc-cpi.int/iccdocs/asp\\_docs/Bureau/Working%20Groups%20ToR\\_Eng.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/Bureau/Working%20Groups%20ToR_Eng.pdf).

43 Villacis (n 9) 567.

44 *Report of the Bureau: Evaluation and rationalisation of the working methods of the subsidiary bodies of the Bureau*, ICC-ASP/12/59, 20 November 2013, para 8.

45 Villacis (n 9) 567.

- legal aid;
- review of the work and mandate of the Independent Oversight Mechanism; and
- study group on governance.

The New York Working Group has been assigned:

- arrears in States Parties' financial contributions;
- geographical representation and gender balance in the recruitment of staff of the Court;
- developing a resolution to strengthen the ICC and the Assembly, to be adopted at the Assembly's session; and
- review of the procedure for the nomination and election of judges.

The following *ad country* mandates will also be conducted in The Hague or New York or both:

- complementarity;
- plan of action for achieving universality and full implementation of the Rome Statute; and
- non-cooperation.<sup>46</sup>

To advance the consideration of issues throughout the year, the Assembly and the Bureau have established a range of diplomatic mechanisms. In some cases, specific mechanisms and their terms of reference are designed for specific purposes. For example:

- In 2009, the Assembly established a *Working Group on Amendments* in New York, chaired by an ambassador appointed by the Bureau, to consider proposed amendments to the Rome Statute and the Rules of Procedure and Evidence.<sup>47</sup>
- In 2010, the Assembly established a *Study Group on Governance* within the Hague Working Group – chaired by an ambassador appointed by the Bureau – to consider, inter alia, matters pertaining to strengthening the institutional framework both within the Court and between the Court and the Assembly, as well as other relevant questions related to the operation of the Court.<sup>48</sup>
- In 2019, the Bureau established a *Committee on the Election of the Prosecutor* made up of one representative per regional group and a panel of five independent experts to assist the Committee in promoting the vacancy of the Prosecutor and shortlisting applicants.<sup>49</sup>
- In response to the 2020 Independent Expert Review, the Assembly has established a *Review Mechanism* led by two State Party Representatives dedicated to planning, coordinating, keeping track and regularly reporting to the Assembly's Presidency and the Bureau on the assessment of

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<sup>46</sup> *Decisions of the Bureau*, First meeting, 18 February 2021.

<sup>47</sup> *Review Conference*, ICC-ASP/8/Res 6, 26 November 2009, para 4.

<sup>48</sup> *Establishment of a study group on governance*, ICC-ASP/9/Res 2, 10 December 2010, para 2: 'Requests the Bureau to establish, for a period of one year, a study group within The Hague Working Group to facilitate the dialogue referred to in paragraph 1 with a view to identifying issues where further action is required, in consultation with the Court, and formulating recommendations to the Assembly through the Bureau.'

<sup>49</sup> *Bureau of the Assembly of States Parties, Election of the Prosecutor: Terms of Reference*, ICC-ASP/18/INF 2, 11 April 2019.

the recommendations contained in the Report of the Group of Independent Experts and further action, as appropriate.<sup>50</sup>

To advance the Assembly's consideration of most other issues, the Bureau has appointed either individual or a small group of representatives of States Parties (in many cases ambassadors) or States Parties as facilitators and focal points, who are invited to commit to perform the role for a period of up to three years.<sup>51</sup> Although the distinction between facilitators and focal points is not always clear, the Bureau has stated that 'facilitators' are mandated to shepherd a particular issue through inclusive consultations with delegations to a specific outcome, for example a resolution, whereas 'focal points' are mandated to serve as primary responders and coordinators for a particular issue, without expectations that there needs to be a specific result.<sup>52</sup>

Typically, new or replacement mandate holders are appointed at the beginning of the year and organise consultations with States Parties, the Court and civil society on their assigned topic throughout the year. In the lead up to the Assembly's annual session, consultations are conducted, and a report is prepared by the Chair/Facilitator/Focal Point on the topic, including recommendations, such as a draft resolution. After adoption of the report by The Hague or New York Working Group, it is conveyed for consideration by its parent body, the Bureau, which in most instances adopts it and thus makes it an official Assembly document for consideration at the forthcoming session of the Assembly.<sup>53</sup>

Although these mechanisms provide a sound structure to advance the Assembly's intersessional work, in some years it has generated a significant workload for States Parties.<sup>54</sup> In recent years, a range of measures have been employed by the Bureau to review its working methods to ensure that the number of mandates, meetings and length of documents are manageable.<sup>55</sup> Nonetheless, the number of formal reports of the Bureau prepared on an annual basis currently ranges from 17 to 30, with the total number of pages produced for those reports ranging from 265 to 592 pages.<sup>56</sup>

### 1.1.3 Subsidiary bodies

In addition to these diplomatic mechanisms, the Assembly has also established several subsidiary bodies to assist its work and inform its decision-making.<sup>57</sup>

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50 *Review of the International Criminal Court and the Rome Statute system* (n 4), para 4.

51 *Strengthening the International Criminal Court and the Assembly of States Parties*, ICC-ASP/15/Res 5, Annex I, para 11(d).

52 *Report of the Bureau: Evaluation and rationalisation of the working methods of the subsidiary bodies of the Bureau* (n 44), para 23.

53 *Ibid*, para 6; Villacis (n 9) 568.

54 *Report of the Bureau: Evaluation and rationalisation of the working methods of the subsidiary bodies of the Bureau* (n 44), para 7 noted: '...the eleventh session of the Assembly has been served with no less than forty reports for its consideration, and this does not include the proposed budget documentation and supplementary notes on elections and the like. The number of meetings and electronic communications are correspondingly much higher. In 2012, the two working groups and the Bureau met no less than 134 times, in 2011 even 171 times. In the first half of 2013 alone, the Secretariat of the Assembly brought no less than one thousand messages to the attention of States Parties, with the prospectus of a manifold increase in the second half of the year in preparation of the Assembly of States Parties.'

55 Villacis (n 9) 571–574.

56 Villacis (n 9) 568.

57 Rome Statute, Article 112 (4) states 'the Assembly may establish such subsidiary bodies as may be necessary...'

The *Committee on Budget and Finance* is made up of 12 independent experts of recognised standing and experience in financial matters at the international level elected by the Assembly.<sup>58</sup> It is responsible for reviewing the annual budget request of the ICC, as well as the technical examination of any other document submitted to the Assembly that contains financial or budgetary implications or any other matter of a financial, budgetary or administrative nature.<sup>59</sup>

The *Board of Directors of the Trust Fund for Victims* is made up of five members elected by the Assembly with competence in providing assistance to victims of serious crimes to establish and direct the activities and projects of the Trust Fund for the benefit of victims within the jurisdiction of the Court.<sup>60</sup> A Secretariat of the Trust Fund has been established to assist the Board in carrying out its tasks.<sup>61</sup>

The *Advisory Committee on the Nominations of Judges* is made up of nine eminent, interested and willing persons of a high moral character, who have established competence and experience in criminal or international law to facilitate that the highest-qualified individuals are appointed as judges of the ICC.<sup>62</sup> Members of the Advisory Committee are appointed by the Assembly by consensus on the recommendations of the Bureau.<sup>63</sup>

The *Independent Oversight Mechanism* is an operationally independent office (currently made up of five staff) that reports to the President of the Assembly of States Parties. It conducts internal Court inspections, evaluations and investigations to ensure the Assembly's effective and comprehensive oversight of the Court to enhance its efficiency and economy.<sup>64</sup>

#### 1.1.4 Secretariat of the Assembly

The Secretariat of the Assembly provides the Assembly, the Bureau and subsidiary bodies with independent substantive servicing, as well as administrative and technical assistance in the discharge of their responsibilities under the Rome Statute.<sup>65</sup> This includes conference services (including translations and documentation), legal advice and administrative functions.<sup>66</sup> It currently has 17 staff.<sup>67</sup>

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58 *Establishment of the Committee on Budget and Finance*, ICC-ASP/1/Res 4, Annex, 3 September 2002, para 2.

59 *Ibid*, para 3.

60 *Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court and of the families of such victims*, ICC-ASP/1/Res 6, 9 September 2002.

61 *Establishment of Secretariat of the Trust Fund for Victims*, ICC-ASP/3/Res 7, 10 September 2004.

62 Rome Statute, Article 36(4) (c); *Terms of Reference of the Advisory Committee on Nominations of Judges of the International Criminal Court*, [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP19/ASP.TOR.ACN.ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/ASP.TOR.ACN.ENG.pdf).

63 *Terms of Reference of the Advisory Committee on Nominations of Judges of the International Criminal Court*, (n 62), para 1.

64 Rome Statute, Article 112(4); *Independent Oversight Mechanism*, ICC-ASP/12/Res 6, 27 November 2013, Annex, para 3.

65 *Establishment of the Permanent Secretariat of the Assembly of States Parties to the International Criminal Court*, ICC-ASP/2/Res 3, 12 September 2003, Annex, para 4.

66 *Ibid*, para 5.

67 *Proposed Programme Budget for 2021 of the International Criminal Court*, ICC-ASP/19/10, 10 September 2020, para 632.

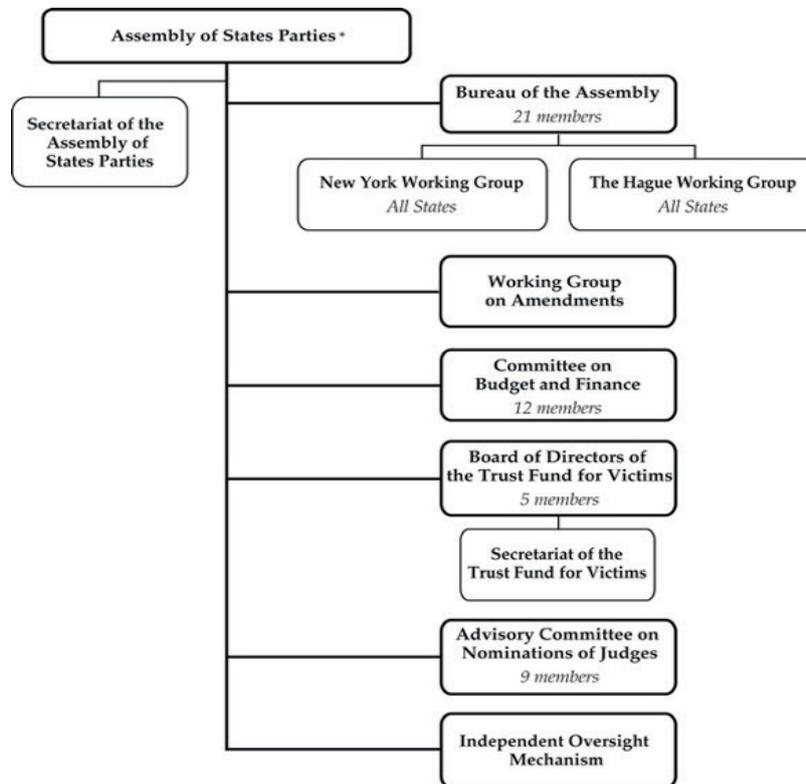


Figure 2: Organigram of the Assembly, Assembly of States Parties website

### 1.1.5 Participation of observer states

States that have either signed the Rome Statute or the Final Act of the Rome Conference may be observers in the Assembly.<sup>68</sup> This means that they can participate in the Assembly’s meetings and deliberations, including making statements or interventions, but not in the taking of decisions.<sup>69</sup> In 2017, the Assembly issued an understanding that the chairpersons or facilitators appointed by the Assembly may decide to hold meetings in private, without the participation of observer states.<sup>70</sup>

### 1.1.6 Participation of civil society

Civil society organisations, which played an important role in the adoption and entry into force of the Rome Statute and the establishment of the ICC, are actively engaged in the work of the Assembly. They participate in the annual session of the Assembly and its intersessional work, regularly providing submissions on issues of substance under consideration.<sup>71</sup> The role of non-governmental organisations conveying their expertise to governments has been expressly acknowledged in a resolution recognising the coordination and facilitation role of the NGO Coalition for the International Criminal Court,<sup>72</sup> which has included as many as 2,500 civil society organisations around the world, including the IBA. To maintain civil society’s important contribution, it is vital that the work of the Assembly is transparent and accessible.

68 Rules of Procedure of the Assembly of States Parties, Rule 1.

69 *Decision by the Bureau*, 18 October 2017, Annex: Understanding on the participation of observer states in meetings of the Assembly of States Parties.

70 *Ibid.*

71 Rules of Procedure of the Assembly of States Parties, Rule 93.

72 *Recognition of the coordinating and facilitating role of the NGO Coalition for the International Criminal Court*, ICC-ASP/2/Res 8, 11 September 2003.

## 1.2 The role of individual States Parties

The functions assigned to the Assembly are a shared responsibility of all States Parties. Each State Party should contribute to the Assembly's work, ensuring that its efforts and decisions support the effective functioning of the ICC and the Rome Statute system.

*Recommendation 1: States Parties should attend each session of the Assembly and, if possible, make a voluntary contribution to the Assembly's trust fund to assist other States Parties to participate, especially when sessions are held in The Hague.*

Each year, the Assembly encourages the full participation of States Parties in the sessions of the Assembly.<sup>73</sup> However, as the following chart demonstrates, while the number of registrations during sessions held in New York reflect close to full participation, less than 100 of the 123 States Parties register delegations when the Assembly's session is held in The Hague.



Figure 3: Number of States Parties that have registered to participate in recent sessions of the Assembly (data for 2018 and 2020 was not publically available)

Although the Rules of Procedure of the Assembly of States Parties foresees that not all States Parties will be present during the annual session, Article 112(1) of the Statute, which states that 'each States Party *shall* have one representative in the Assembly,' should not only be read as an entitlement to participate in the Assembly but an *obligation* to contribute to its oversight role and decision-making. Broad participation of States Parties from all regions of the world in the work of the Assembly is central to the legitimacy of the Court and the Rome Statute system.

States Parties should complete a registration form available on the Assembly's website or from the Secretariat (email: [asp@icc-cpi.int](mailto:asp@icc-cpi.int)) and submit original credentials of their representatives to the Secretariat no later than 24 hours after the opening of the session. Where possible, States Parties should consider the appropriate level of political representation and technical expertise, taking into account the agenda of the Assembly's session, in selecting their delegations. Further practical guidance on participation is available in the *Handbook for Participants* issued on the Assembly's website in advance of each session.

States Parties that lack resources to participate in the Assembly can seek financial assistance (flight tickets and a daily subsistence allowance) for one representative to participate in the annual session from a trust

<sup>73</sup> See, for example, *Strengthening the International Criminal Court and the Assembly of States Parties*, ICC-ASP/19/Res 6, preamble.

fund administered by the Secretariat of the Assembly. In advance of each session, the Secretariat sends a *note verbale* to State Parties with information on how to apply for financial assistance, which is posted on the website of the Assembly. Information on how to apply can also be obtained by emailing the Secretariat: [asp@icc-cpi.int](mailto:asp@icc-cpi.int).

Each year, the Assembly calls upon states to make voluntary contributions in a timely manner to the trust fund. However, between 2015–2020 only four State Parties have made voluntary contributions, in some cases in multiple years.



Figure 4: Voluntary contributions to the trust fund that assists States Parties to participate in the Assembly's annual sessions

To ensure that as many States Parties as possible can participate in the Assembly, States Parties that can afford to send a delegation to the session are encouraged to also make a voluntary contribution to the trust fund to assist other delegations, especially when sessions are held in The Hague. Details of how to make a voluntary contribution are provided in the *note verbale* or can be obtained by emailing the Secretariat: [asp@icc-cpi.int](mailto:asp@icc-cpi.int).

**Recommendation 2:** States should engage actively in the work and decision-making of the Assembly during its annual session and between sessions.

If States Parties are to advance their efforts to end impunity, the Assembly must be a dynamic body in which States Parties individually and collectively strive to support the effective functioning of the ICC and advance the aims of the Rome Statute. This can only be achieved if States Parties engage actively in all aspects of the Assembly's work. In particular, each State Party should participate fully in the Assembly's annual session by:

- subscribing to the Secretariat's ASP mailing list by sending their contact details to: [asp@icc-cpi.int](mailto:asp@icc-cpi.int);
- reviewing documentation submitted by the Bureau, subsidiary bodies and the ICC to the annual session (available on the Assembly's website: <https://asp.icc-cpi.int>);
- reviewing submissions of the IBA (available at: [www.ibanet.org/ICC\\_ICL\\_Programme/Programme\\_commentaries.aspx](http://www.ibanet.org/ICC_ICL_Programme/Programme_commentaries.aspx)) and other civil society organisations to the annual session (most of which are made available on the Coalition for the ICC's website: [www.coalitionfortheicc.org/assembly-states-parties](http://www.coalitionfortheicc.org/assembly-states-parties)); and

- delivering a strong statement of support for the effective functioning of the ICC and the Rome Statute system to the Assembly’s annual General Debate, including addressing key developments during the year and issues on the agenda of the session. As the chart below demonstrates, approximately 70 of the 123 States Parties have delivered statements in each of the last five years.<sup>74</sup> All States Parties can make statements of up to five minutes duration in the General Debate by sending an email to the Secretariat asking them to add them to the list of speakers: [asp@icc-cpi.int](mailto:asp@icc-cpi.int). Where possible, States Parties should consider organising for a high-level political representative to deliver the statement.

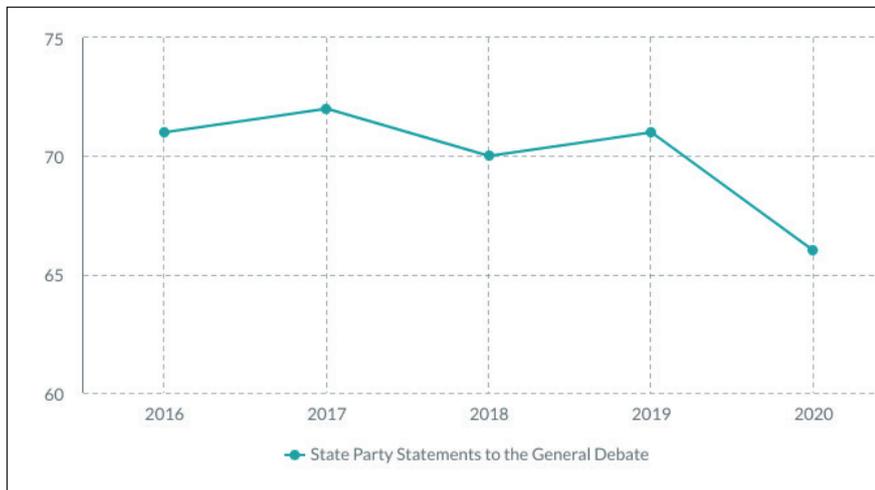


Figure 5: Number of States Parties that delivered statements to the Assembly's General Debate

- participating actively, to the extent possible, in the Assembly’s working groups, using their influence as equal members to ensure that the decisions taken by the Assembly strengthen the ICC and the Rome Statute system’s goals of ending impunity; and
- considering sponsoring or co-sponsoring side events during the session to promote awareness, discussion and debate on other important issues to strengthen the ICC and advance the fight against impunity. States Parties should schedule side events in coordination with the Secretariat.

For many issues, the annual session of the Assembly marks the culmination of almost a year’s intersessional work by the Bureau. To ensure that they are fully engaged on these issues and informed going into the annual session, States Parties should seek to participate actively in the work of the New York and Hague Working Groups throughout the year. Recognising that some States Parties do not have an embassy in The Hague, States Parties should consider assigning representatives based in Brussels or other nearby European capitals to participate in the Hague Working Group and/or request the Chair, Focal Point or Facilitator to allow them to participate remotely in the Working Group’s meetings through video conferencing.

<sup>74</sup> In some cases, States Parties have made statements on behalf of intergovernmental organisations, including the African Union and European Union. In some case, individual members of those organisations have also delivered separate statements.

*Recommendation 3: States Parties should ensure that the Assembly performs its functions in good faith and in accordance with the Rome Statute, respecting the judicial and prosecutorial independence of the ICC.*

The fundamental principle of international law – *pacta sunt servanda* – requires that all States Parties to the Rome Statute perform the functions of the Assembly in good faith consistent with the object and purpose of the Rome Statute to end impunity.

In the political environment of the Assembly, which involves the Assembly taking decisions that affect the ICC’s ability to conduct its work in relation to geo-politically complex situations, it is essential that States Parties do not compromise the effective operation of the ICC and the implementation of the Rome Statute for political expediency. Although the Statute requires that ‘every effort shall be made to reach decisions by consensus in the Assembly’,<sup>75</sup> each State Party’s primary obligation is to ensure that the Assembly performs its functions effectively.

States Parties must ensure that the Assembly’s decision-making is consistent with the Rome Statute. In particular, the Assembly must respect the judicial and prosecutorial independence of the Court. As the Independent Expert Review found:

‘Judicial and prosecutorial work (eg, judgments, deliberations by Judges, the Prosecutor’s decisions to initiate or pursue a case, investigations) require absolute independence. Judges and prosecutors must be able to carry out such activity free from any interference. States Parties shall not use their role [...] to influence judicial and prosecutorial activity, whether through budget decisions or appointments.’<sup>76</sup>

Similarly, the Rome Statute contains substantial provisions relating to fair trials, the rights of the accused and victims’ rights. Article 21 (3) of the Rome Statute further requires the Court to interpret and apply the law consistent with internationally recognised human rights and without adverse distinction. Decisions taken by the Assembly must not restrict the ability of the ICC to comply with human rights.

*Recommendation 4: States Parties should put themselves or their representatives forward as chairs of working groups, facilitators and focal points.*

As set out in Section 1.1.2, a significant amount of the Assembly’s work is advanced thanks to States Parties and representatives of States Parties chairing working groups or acting as facilitators or focal points on specific issues. Following the Assembly’s annual session, replacement or new mandate holders are sought and appointed by the Bureau. All States Parties are encouraged to share the responsibility of these roles, by putting themselves or their representatives forward for such roles.

*Recommendation 5: States Parties should support strengthening the Secretariat of the Assembly.*

The Secretariat of the Assembly provides a range of services that are vital to the effective functioning of the Assembly; the Bureau and its working groups, facilitators and focal points; and the Assembly’s subsidiary bodies. It also has the potential to provide important guidance to States Parties on fulfilling their obligations under the Rome Statute and to promote universality of the Rome Statute.

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75 Rome Statute, Article 112(7).

76 *IER Final Report* (n 2), para 29.

Although the Independent Expert Report has recommended that, in the long term, the Secretariat be wound up and its functions be absorbed by the Registry,<sup>77</sup> the Secretariat should be retained to ensure the judicial independence of the Court, dedicated support for the effective functioning of the Assembly and guidance to States Parties. Instead, States Parties should support strengthening the Secretariat, including expanding its roles and the resources available to it, to enhance the work of the Assembly.

*Recommendation 6: States Parties should consider joining the Group of Friends of the ICC and the Informal Ministerial Network for the ICC.*

The Group of Friends of the ICC is an informal gathering of states and civil society for the exchange of information in support of the International Criminal Court. There is no formal process to join the Group of Friends. States Parties interested in participating in the Group of Friends and receiving more information on its activities should contact the coordinator, whose contact details can be obtained from the Secretariat of the Assembly of States Parties: [asp@icc-cpi.int](mailto:asp@icc-cpi.int).

The Informal Ministerial Network for the ICC meets every year in September in the margins of the United Nations General Assembly in New York. It is a network of over 30 Ministers of Foreign Affairs, and other high officials, representing regional groupings of States Parties. The annual meeting provides an important platform for high-level engagement, including with the Court, during the United Nations High-Level week.<sup>78</sup> States Parties with Ministers interested in joining the Network may send a *note verbale* requesting to participate to the Mission of Liechtenstein in New York.<sup>79</sup>

## Useful resources on the working practices of the Assembly of States Parties



### Websites

- Assembly of States Parties website: [https://asp.icc-cpi.int/EN\\_Menu/asp/Pages/asp\\_home.aspx](https://asp.icc-cpi.int/EN_Menu/asp/Pages/asp_home.aspx).
- Coalition for the International Criminal Court's Annual Assembly page: [www.coalitionfortheicc.org/explore/assembly-states-parties/annual-assembly](http://www.coalitionfortheicc.org/explore/assembly-states-parties/annual-assembly).



### Official Documents

- Rules of Procedure of the Assembly of States Parties: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/library/asp/Rules\\_of\\_Procedure\\_of\\_the\\_ASP\\_English.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/library/asp/Rules_of_Procedure_of_the_ASP_English.pdf).
- Assembly of States Parties: Handbook for Participants (19th session – updated for each session and posted in the ASP's documentation webpage): [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP19/ASP19.Handbook.12Dec20.1930.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/ASP19.Handbook.12Dec20.1930.pdf).
- Bureau of the Assembly of States Parties: Guidelines for the preparation and conduct of sessions of the Assembly: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP17/Guidelines%20preparation%20and%20conduct%20of%20ASP%2029Nov2018.1200.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP17/Guidelines%20preparation%20and%20conduct%20of%20ASP%2029Nov2018.1200.pdf).

<sup>77</sup> *IER Final Report* (n 2), R369 and R370.

<sup>78</sup> See, for example: ICC Press Release: ICC Prosecutor briefs annual ministerial meeting, at the UN General Assembly High-Level Week, expresses gratitude for strong show of support, 24 September 2020, available at: [www.icc-cpi.int/Pages/item.aspx?name=pr1538](http://www.icc-cpi.int/Pages/item.aspx?name=pr1538).

<sup>79</sup> States Parties should email: [newyork@llv.li](mailto:newyork@llv.li).



## Commentaries

- Max Du Plessis and Christopher Gevers, ‘The Role of the Assembly of States Parties for the ICC’ in Richard H Steinberg (ed) *Contemporary Issues Facing the International Criminal Court* (Leiden: Brill Nijhoff, 2016) 159–172.
- Jonathan O’Donohue, ‘The International Criminal Court and the Assembly of States Parties’ in Carsten Stahn (ed) *The Law and Practice of the International Criminal Court* (Oxford: Oxford University Press, 2015), 105–138.
- S Rama Rao and Philipp Ambach, ‘Article 112’ in Otto Triffterer and Kai Ambos (eds) *The Rome Statute of the International Criminal Court* (C H Beck/Hart/Nomos 2016), 2215–2245.
- Jennifer Trahan, ‘The Assembly of States Parties’ in Margaret M Guzman and Valerie Oosterveld (eds) *The Elgar Companion to the International Criminal Court* (Edward Elgar Publishing 2020), 231–260.
- Renan Villacis, ‘Working Methods of the Assembly of States Parties to the Rome Statute’, 18 *International Criminal Law Review* (2018), 563–575.

## 1.3 The Assembly’s oversight of the ICC

The Rome Statute assigns the Assembly specific oversight tasks that are essential for good governance and the effective and efficient functioning of the ICC. However, the Assembly’s oversight is limited by the fact that the Court is a judicial institution with absolute judicial and prosecutorial independence. This Section examines the Assembly’s oversight functions of the ICC and provides recommendations for States Parties to ensure that the Assembly’s efforts and decisions support the effective and efficient functioning of the Court, while fully respecting its independence. In particular, it considers the ongoing ICC Review initiated by the Assembly in 2019 to strengthen the performance of the ICC and the Rome Statute system.

### 1.3.1 Management oversight of the Presidency, the Prosecutor and the Registrar regarding the administration of the Court and the ICC Review

The Rome Statute defines a complex management structure that ensures the prosecutorial independence of the OTP and the judicial independence of the chambers. The Presidency is responsible for the proper administration of the Court, with the exception of the OTP.<sup>80</sup> The Prosecutor has full authority over the management and administration of the OTP.<sup>81</sup> Although the Registry is responsible for the non-judicial aspects of the administration of the Court,<sup>82</sup> and the Registrar is recognised as the principal administrative officer of the Court, the Registrar exercises their functions under the authority of the President of the Court.<sup>83</sup>

Article 112(2)(b) provides that the Assembly shall provide management oversight of the Presidency, the Prosecutor and the Registrar ‘regarding the administration of the Court’. To protect the independence of

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80 Rome Statute, Article 38(3)(a).

81 Rome Statute, Article 42(2).

82 Rome Statute, Article 43(1).

83 Rome Statute, Article 43(2).

the Court, the Assembly's management oversight does not extend to the Court's judicial or prosecutorial functions.<sup>84</sup> Moreover, given that administration is often central to the performance of judicial and prosecutorial functions, the Assembly's management oversight of the administration of the Court must be understood as advisory. The Independent Experts state that 'States Parties cannot impose on the President or the Prosecutor how to manage the administration of the chambers or of the OTP'.<sup>85</sup> The former President of the ICC recently remarked in response to the Independent Experts Report: 'Oversight is just that. It does not import the takeover of governance.'<sup>86</sup>

In its first two decades, the Assembly has provided detailed management oversight of the administration of the Court, including establishing a range of oversight mechanisms and prompting the Court to put in place systems and policies to operate efficiently and effectively. For example:

- At the outset, the Assembly established the Committee on Budget and Finance,<sup>87</sup> an External Auditor<sup>88</sup> and an Office of Internal Audit<sup>89</sup> to conduct oversight of the finances of the Court, in accordance with the Financial Regulations and Rules.
- The Hague Working Group has addressed a number of strategy and policy related issues through its facilitations, including strategic planning, legal aid and victims.<sup>90</sup>
- Since its establishment in 2010, the Study Group on Governance has considered a range of governance matters, such as the relationship between the Court and the Assembly; the institutional framework within the Court; the Court's budgeting process; and efforts to increase the efficiency of the criminal process.<sup>91</sup>
- In 2009, the Assembly established the Independent Oversight Mechanism to conduct inspection, evaluation and investigation of the Court to enhance its efficiency and economy (see Section 1.3.5 below).<sup>92</sup> It became operational at the end of 2015.

In undoubtedly the Assembly's boldest oversight initiative, in 2019, it decided to establish a transparent, inclusive State-Party driven process for identifying and implementing measures to strengthen the Court and improve its performance – the ICC Review.<sup>93</sup> Citing grave concerns regarding multifaceted challenges facing the ICC and the Rome Statute system in ending impunity and preventing future crimes, the Assembly – with the support of the ICC – commissioned an Independent Expert Review in 2020 with a view to making concrete, achievable and actionable recommendations aimed at enhancing the performance,

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84 S Rama Rao and Philipp Ambach, 'Article 112' in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016), 2220.

85 *IER Final Report* (n 2), para 34.

86 *The ASP Bureau Working Groups' Online Meeting on the Report of the Independent Expert Review, Preliminary Reactions of the ICC President*, 7 October 2020, para 31.

87 Establishment of the Committee on Budget and Finance (n 58).

88 Financial Regulations and Rules, Regulation 12 and Annex: Additional terms of reference governing the audit of the International Criminal Court.

89 Financial Regulations and Rules, Rule 110.1.

90 Rama Rao and Ambach (n 84), 2221.

91 *Ibid*, 2224.

92 Establishment of an independent oversight mechanism, ICC-ASP/8/Res 1, 26 November 2009.

93 *Review of the International Criminal Court and the Rome Statute system* (n 1).

efficiency and effectiveness of the Court and the Rome Statute system as a whole.<sup>94</sup> The Experts issued their Report containing 384 recommendations in September 2020.<sup>95</sup> In April 2021, the ICC responded to the Experts' Report. At the time of publication, the Assembly has established a Plan of Action for assessing the recommendations.

Although many of the Assembly's management oversight efforts, including the ICC Review, promise to significantly strengthen the governance and performance of the ICC, it is essential that the Assembly respects the boundaries of its oversight role.

*Recommendation 7: States Parties should support Independent Expert Review recommendations that will succeed in strengthening the performance of the ICC, without infringing on the judicial and prosecutorial independence of the Court.*

The Independent Expert Review contains many recommendations to strengthen the performance of the ICC and the Rome Statute system that should be fully considered by the ICC and, where appropriate, by the Assembly. Many of its recommendations are addressed in this Guide.

However, it is important to note that the scope of the ICC Review goes well beyond the administration of the Court and, therefore, the management oversight role of the Assembly. The Assembly expressly mandated the Independent Expert Review to consider the working methods of the judiciary and the OTP.<sup>96</sup> Many of the Experts' recommendations relate directly to the exercise of prosecutorial and judicial powers. Given that the Court supported the Review, this is not necessarily problematic, providing that the decisions on whether to implement the recommendations relating to judicial and prosecutorial functions and administration of the chambers and the OTP are left to the Presidency and the OTP; and that the Assembly considers any concerns raised by the Court that other recommendations may infringe on its independence.

For example, the Court's response to the Independent Experts Review sets out significant concerns regarding the Experts' recommendations in relation to the governance structure of the Court, some of which the Court argues are not consistent with the governance roles set out in the Rome Statute and threaten the judicial and prosecutorial independence of the Court.<sup>97</sup>

Significantly, the Assembly underlined that the Review process must fully respect the statutory independence of the Court.<sup>98</sup> Nevertheless, all States Parties should participate in the Assembly's process to assess the Independent Experts' recommendations, being vigilant to protect the independence of the Court. States Parties should insist that all recommendations relating to the exercise of functions relating to prosecutorial or judicial independence and the administration of the chambers and OTP are addressed by the relevant organ of the Court. Taking into account the views of the Court and civil society, States Parties should only support the Court's implementation of other recommendations relating to the administration

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94 *Ibid*, preamble and para 4.

95 *IER Final Report* (n 2).

96 *Review of the International Criminal Court and the Rome Statute system* (n 1), Appendix II: List of legal and technical issues to be covered in each cluster.

97 *Overall Response of the International Criminal Court to the 'Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report': Preliminary Analysis of the Recommendations and information on relevant activities undertaken by the Court*, ('ICC's Response to the IER Report') 14 April 2021, paras 16–30 and Annex 1: Legal analysis aimed at clarifying the ICC's governance framework in light of issues raised by the IER Report.

98 *Review of the International Criminal Court and the Rome Statute system* (n 1), para 5.

of the ICC where there are strong grounds to consider they will both succeed in strengthening the Court and respect the judicial and prosecutorial independence of the Court.

*Recommendation 8: States Parties should support the establishment of a Judicial Audit Committee to provide oversight of the administration of justice, subject to safeguards that guarantee judicial and prosecutorial independence.*

Recognising that States Parties cannot impose on the President or Prosecutor how to manage the administration of the chambers or of the OTP, the Experts propose that judicial and prosecutorial auditing should be carried out as a form of accountability – by peers – to render the assessment objective.<sup>99</sup> The Experts recommended establishing a Judicial Audit Committee made up of current or former national or international judges and prosecutors with relevant experience to carry out audits of the administration of justice activities.<sup>100</sup> This recommendation has the potential to ensure effective oversight of the chambers and OTP, without infringing on their independence and notably has been welcomed by the ICC.<sup>101</sup> However, further consideration should be given to how the members of the Judicial Audit Committee would be appointed to ensure that they are highly qualified and fully independent. The Experts appear to recommend that the Committee could be appointed through a process of the Court appointing some members and the Presidency of the Assembly appointing others.<sup>102</sup> Given the judicial and prosecutorial nature of the oversight envisioned, a political process of appointment should be avoided. Moreover, the terms of reference of the Judicial Audit Committee should clarify that its role is purely advisory. It may make recommendations; however, the Presidency and the Prosecutor must retain full authority for the administration of chambers and the OTP respectively.

*Recommendation 9: States Parties should support measures to enhance fair trials and strengthen the Court's systems to give effect to the rights of the accused, victims and witnesses.*

Fairness should be the primary measure of any justice process.<sup>103</sup> Article 64(2) provides that trial chambers must ensure that trials are fair and expeditious and conducted with full respect for the rights of the accused<sup>104</sup> and due regard for the protection of victims and witnesses. Article 68 mandates the Court to protect the safety, physical and psychological wellbeing, dignity and privacy of victims and witnesses and to permit victims to present their views and concerns at appropriate stages of ICC proceedings. Article 75 provides that the Court may order a convicted person to provide reparations to victims. Moreover, Article 21(3) requires that the Court interpret and apply the law consistent with internationally recognised human rights and without adverse distinction.

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99 *IER Final Report* (n 2), para 34.

100 *IER Final Report* (n 2), R3.

101 ICC's Response to the IER Report (n 97), para 28.

102 *IER Final Report* (n 2), R3 recommends that the proposed Judicial Audit Committee should be appointed similarly to a proposed Ethics Committee. The Experts recommended in R113 that two national judges with experience in ethics be appointed to the Ethics Committee by the ASP Presidency based on the Bureau's recommendation and one former ICC Judge could be appointed by the Court President.

103 ICC, *Prosecutor v Germain Katanga*, ICC-01/04-01/07-3436-AnxI, Minority Opinion of Judge Christine Van Den Wyngaert, 7 March 2014, para 310: 'The Court's success or failure cannot be measured just in terms of "bad guys" being convicted and innocent victims receiving reparation. Success or failure is determined first and foremost by whether or not the proceedings, as a whole, have been fair and just ...'.

104 See also Rome Statute, Article 67.

Although the Court is primarily responsible for ensuring fair trials and respecting the rights of the accused, victims and witnesses, the Assembly should also be guided by these requirements in providing oversight of the Court and avoid taking any decisions that undermine the Court's ability to conduct fair trials and comply with human rights.

The Independent Experts' Report contains a number of recommendations to strengthen the Court's performance in relation to fair trials and the rights of victims and witnesses. Where appropriate, States Parties should consider these fully, taking into account the responses of the Court and submissions by civil society. In particular, States Parties should support the Experts' recommendations for the Court to establish a new functionally independent Defence Office<sup>105</sup> and to complete a full reform of its legal aid policy, which has been ongoing since 2012.<sup>106</sup> In light of the Court's request in response to the Experts' report for clarification from the Assembly regarding the criteria that should be applied in reviewing the legal aid policy,<sup>107</sup> States Parties should reject previous calls for reforms to be achieved within existing resources and instead request the Court to prepare a legal aid policy that fully accords to international standards relating to legal aid,<sup>108</sup> and gives full effect to the rights of the accused and victims in Articles 55, 67 and 68 of the Rome Statute.

In addition, pursuant to an expert report conducted in 2019 and in accordance with recommendations by the Independent Expert Review,<sup>109</sup> the Court has proposed the establishment of an ombudsperson to resolve disputes and conflicts in an informal, amicable and effective way as a preliminary, non-compulsory instance.<sup>110</sup> In the event that it is decided to establish the ombudsperson, the IBA recommends that its mandate should include conducting inquiries into complaints received from any person asserting a violation of his or her rights by the ICC, along the lines of the Ombudsperson for the Kosovo Specialist Chambers (KSC).<sup>111</sup> This would ensure that complaints of human rights violations are examined and, where possible, prompt solutions are identified through mediation.

Finally, States Parties are encouraged to support the proposal (not addressed in the Experts' Report) by the Office of Public Counsel for Defence and the Office of Public Counsel for Victims, with the support of the International Criminal Court Bar Association, for The Hague Working Group to establish a Focal Point for

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105 *IER Final Report* (n 2), R323.

106 *IER Final Report* (n 2), R328.

107 ICC Response to IER Report (n 97), para 631.

108 See in particular: *UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, UN General Assembly Resolution 67/187, 20 December 2012.

109 See ICC Response to IER Report (n 97), para 254 'the Court appointed an independent expert in 2019 to look into the establishment of an ombudsperson office'; *IER Final Report*, R118.

110 Proposed Programme Budget for 2022 of the International Criminal Court, ICC-ASP/20/10/AV, 30 July 2021, para 374.

111 Rule 29 of the KSC Rules of Procedure and Evidence lists the functions of the Ombudsperson to:

- (a) conduct inquiries into complaints received from any person asserting a violation of his or her rights by the Specialist Chambers or the Specialist Prosecutor's Office. If the complaint is made on behalf of someone whose rights have alleged to have been violated, their consent is needed before any inquiry is commenced;
- (b) enter and inspect at any time and without notice the Specialist Chambers' detention facilities to assess the conditions of detention;
- (c) propose or facilitate mediation and reconciliation in order to resolve a complaint; and
- (d) make recommendations to the President or Specialist Prosecutor on matters falling within their functions.

For further details of the IBA's recommendation, see Recommendations by the IBA ICC and ICL Programme to the Independent Expert Review of the International Criminal Court (April 2020), [www.ibanet.org/ICC\\_ICL\\_Programme/Programme\\_commentaries.aspx](http://www.ibanet.org/ICC_ICL_Programme/Programme_commentaries.aspx), 11.

Enhancing Fair Trials to ensure the highest respect for fair trial principles.<sup>112</sup> Indeed, the Focal Point could play a vital role in ensuring that States Parties are informed and take appropriate action to address fair trial concerns at the ICC. For example, the Focal Point could:

- promote the development of a new legal aid policy and increase the knowledge and understanding of States Parties about the requirements of the legal aid system;
- keep States Parties regularly informed of the ICC's needs in relation to interim and final release, as well as victim and witness relocation, and encourage more States Parties to enter into cooperation agreements;
- support defence teams in establishing contacts with national authorities and encourage those states to provide cooperation to the defence;
- monitor the level of resources of the Assembly's Voluntary Trust Fund for Family Visits and promote voluntary contributions (see Recommendation 10); and
- monitor proposals for amendments to the legal framework and draw any fair trial issues to the attention of the Assembly's Working Group on Amendments.

*Recommendation 10: States Parties should ensure that sustainable and adequate systems are put in place to fund a reasonable number of family visits for indigent detainees in ICC detention.*

The Assembly's approach to funding family visits of indigent detainees is a notable example where a decision taken by the Assembly has, unfortunately, resulted in undermining the independence, efficiency and effectiveness of the ICC. Although the issue has not been addressed in the Independent Expert Report, the matter should be resolved by the Assembly as a priority.

In 2009, the Assembly adopted a resolution establishing a trust fund to pay for family members to visit indigent accused persons in ICC detention. On the face of it, this was an administrative matter. However, the text of the resolution contradicted a decision by the Presidency that the ICC has a positive obligation to fund a limited number of family visits<sup>113</sup> and it sought to preclude the use of the ICC's budget for such visits to avoid setting any precedent for authorities funding family visits in national jurisdictions.<sup>114</sup> At the time, only one State Party had committed to make a contribution to the trust fund and, in the next ten years, only six States Parties have made inconsistent contributions.<sup>115</sup>

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112 Concept Note, 'Creation of a Hague Working Group Focal Point for Enhancing Fair Trials', 27 February 2018, 1.

113 ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-RoR217-02/08-8, Decision on 'Mr Mathieu Ngudjolo's Complaint under Regulation 22(1) of the Regulations of the Registry against the Registrar's Decision of 19 November 2008', Situation in the Democratic Republic of Congo, 10 March 2009.

114 *Family visits for indigent persons*, ICC-ASP/8/Res 4, para 2 stated: 'according to existing law and standards, the right to family visits does not comprise a co-relative legal right to have such visits paid for by the detaining authority or any other authority.'

115 Germany (2011 and 2019), Mali (2020), The Netherlands (2016, 2017, 2019 and 2020), Philippines (2016), Switzerland (2014, 2016 and 2020) and the UK (2018).

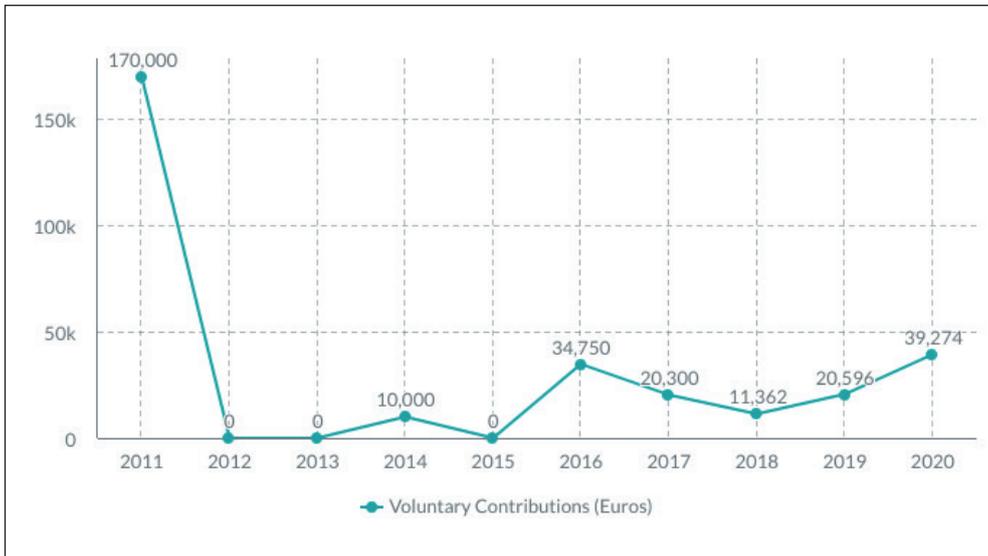


Figure 6: Voluntary contributions to the trust for family visits to indigent detainees

As a result, the fund has been depleted on some occasions, including at the end of 2019,<sup>116</sup> demonstrating that the system is inadequate to give effect to the rights of indigent accused persons to family visits. The Court’s inability to ensure a reasonable number of family visits for these detainees calls into question its human rights record. The approach is counterproductive as it threatens to undermine the efficiency of the judicial process. The Court has stated that funding family visits for indigent detainees contributes to the wellbeing of detainees, which can save the Court valuable time, as well as human and financial resources, for example, by preventing the delay of proceedings due to issues related to a detained person’s mental or physical health.<sup>117</sup>

States Parties should reconsider the Assembly’s approach to funding for family visits and allocate funds for this purpose, if required, from the regular budget of the Court.<sup>118</sup>

## Useful resources on the Assembly’s management oversight of the Court and the ICC Review



### Websites

- Assembly of States Parties Review of the Court webpage: [https://asp.icc-cpi.int/en\\_menus/asp/Review-Court/Pages/default.aspx](https://asp.icc-cpi.int/en_menus/asp/Review-Court/Pages/default.aspx).
- Coalition for the International Criminal Court’s Review of the ICC and Rome Statute system webpage: [www.coalitionfortheicc.org/review-icc-and-rome-statute-system](http://www.coalitionfortheicc.org/review-icc-and-rome-statute-system).



### Official Documents

- Trust Fund for Family Visits website: <https://www.icc-cpi.int/get-involved/Pages/Trust-Fund-for-family-visits.aspx>.
- Independent Expert Review: Final Report: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP19/IER-Final-Report-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf).

<sup>116</sup> *Report of the Court on Cooperation*, ICC-ASP/18/16, 21 October 2019, para 33.

<sup>117</sup> *Ibid*, para 32.

<sup>118</sup> See, for example, IBA, ‘Priorities and Recommendations for the 18th Session of the International Criminal Court Assembly of States Parties, December 2019, [www.ibanet.org/ICC\\_ICL\\_Programme/Programme\\_commentaries](http://www.ibanet.org/ICC_ICL_Programme/Programme_commentaries), 8–9.

- Overall Response of the ICC to the Independent Expert Review: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP20/Overall%20Response%20of%20the%20ICC%20to%20the%20IER%20Final%20Report%20-%20ENG%20-%202014April21.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP20/Overall%20Response%20of%20the%20ICC%20to%20the%20IER%20Final%20Report%20-%20ENG%20-%202014April21.pdf).
- Trust Fund for Family Visits: <https://www.icc-cpi.int/Publications/20190919-tffvisits-eng.pdf>.



### Commentaries

- Recommendations by the IBA ICC and ICL Programme to the Independent Expert Review of the International Criminal Court (April 2020): [https://www.ibanet.org/ICC\\_ICL\\_Programme/Programme\\_commentaries.aspx](https://www.ibanet.org/ICC_ICL_Programme/Programme_commentaries.aspx).
- Max Du Plessis and Christopher Gevers, ‘The Role of the Assembly of States Parties for the ICC’ in Richard H Steinberg (ed) *Contemporary Issues Facing the International Criminal Court* (Leiden: Brill Nijhoff, 2016) 159–172.
- Jonathan O’Donohue, ‘The International Criminal Court and the Assembly of States Parties’ in Carsten Stahn (ed) *The Law and Practice of the International Criminal Court* (Oxford: Oxford University Press, 2015), 105–138.
- S Rama Rao and Philipp Ambach, ‘Article 112’ in Otto Triffterer and Kai Ambos (eds) *The Rome Statute of the International Criminal Court* (CH Beck/Hart/Nomos 2016), 2215–2245.
- Jennifer Trahan, ‘The Assembly of States Parties’ in Margaret M Guzman and Valerie Oosterveld (eds) *The Elgar Companion to the International Criminal Court* (Edward Elgar Publishing 2020), 231–260.

### 1.3.2 Deciding the ICC’s budget

In July/August every year, the ICC submits its budget request for the following calendar year to the Assembly’s Committee on Budget and Finance.<sup>119</sup> The Committee reviews the proposal and provides comments and recommendations to the Assembly.<sup>120</sup> States Parties consider the recommendations of the Committee, initially in the Hague Working Group and then in a Working Group on the Budget during the Assembly’s annual session. The Working Group drafts a resolution setting the amount of the budget which is adopted by the Assembly.<sup>121</sup> Once the Assembly decides the budget, the Registrar informs States Parties individually within 30 days of their assessed contribution.<sup>122</sup> Each State Party’s individual contribution is calculated based on the scale of assessment adopted by the United Nations for its regular budget.<sup>123</sup> The assessed contribution is considered due and payable 30 days later.<sup>124</sup>

In practice, the budget of the ICC has been one of the most controversial aspects of the Assembly’s work. Although, as the graph below shows, the annual budget of the ICC has increased most years to reach its

119 Financial Regulations and Rules, Regulation 3.4.

120 Financial Regulations and Rules, Regulation 3.5.

121 Financial Regulations and Rules, Regulation 3.5; Rome Statute, Article 112(2)(d).

122 Financial Regulations and Rules, Regulation 5.5 and Rule 105.1.

123 Rome Statute, Article 117.

124 Financial Regulations and Rules, Regulation 5.6.

current level of €148m, these increases have not matched significant increases in the Court’s workload and have fallen well short of the resources that the Court has indicated it needs to function effectively.

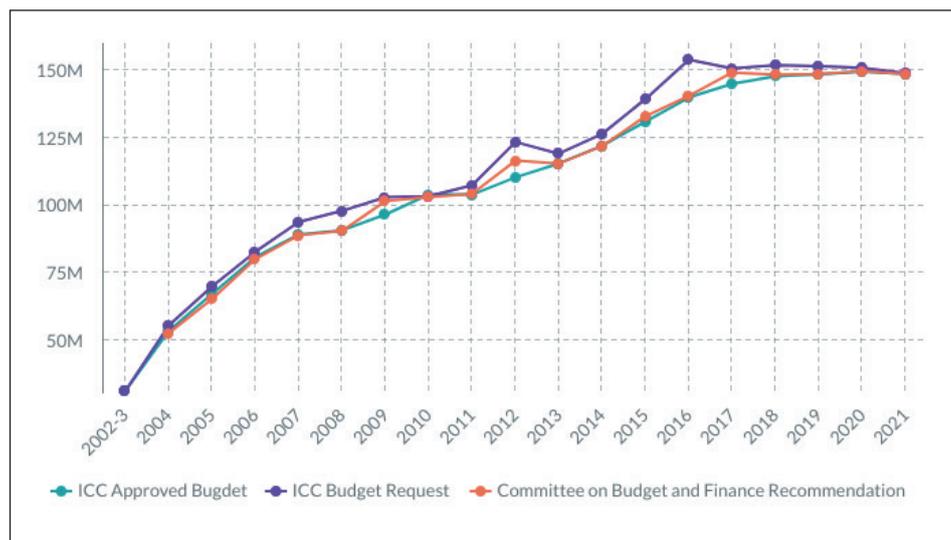


Figure 7: ICC budget 2002–2021

In particular, in 2016, the OTP adopted a new strategy seeking to improve its performance, which recognised that resources were insufficiently aligned with the demands of meeting its mandate.<sup>125</sup> The Office proposed a new ‘Basic Size’ for the Office, so that it may perform its functions with the required quality, effectiveness and efficiency.<sup>126</sup> A Court-wide exercise followed which estimated that, by 2021, the Court would require an annual budget of €206m to conduct a predicted workload of nine preliminary examinations, six active investigations, five pre-trial proceedings, five trials and two appeals.<sup>127</sup> In reality, the ICC’s proposed budget of €148m for 2021 shows that the ICC’s prediction of nine preliminary examinations was accurate. Its expected active investigations are much higher: nine instead of six. However, its assumed caseload in the Programme Budget proposal for 2021 was lower than predicted with one case (instead of five) in pre-trial proceedings, three cases (instead of five) at the trial stage and two cases (as predicted) at the appeals stage.<sup>128</sup> Despite the discrepancies in predicted and actual activities, the difference of almost €60m (without considering inflation) between the ICC’s Basic Size exercise and the current level of funding is significant.

The Independent Expert Review documents the Court’s concerns regarding its current lack of resources, which are further emphasised throughout the ICC’s Response to the Experts’ recommendations.

The Experts found that a lack of trust between the ICC and the Assembly is an underlying reason for this budgetary situation, observing:

‘On the one hand, some States Parties believe that the Court could and should be able to deliver more with the resources it has available. On the other hand, there seems to be a

<sup>125</sup> ICC OTP, *Strategic Plan 2016-2018*, para 3.

<sup>126</sup> *Ibid*, Strategic Goal 5.

<sup>127</sup> *Final Report of the Court on the Court-wide impact of the OTP Basic Size Model*, ICC-ASP/15/34, 14 November 2016.

<sup>128</sup> *Proposed Programme Budget for 2021*, ICC-ASP/19/10, 10 September 2020.

perception within some quarters of the Court that States Parties are using the budget process to interfere with the Court's cases.<sup>129</sup>

Accordingly, the Experts recommend a number of measures to increase the transparency, efficiency and enhanced dialogue between the ICC, the Committee on Budget and Finance and the Assembly of States Parties, including increasing consultations following the release of the budget proposal,<sup>130</sup> providing for the Court to respond formally to the Committee's recommendations<sup>131</sup> and for States Parties to reach consensus on the budget ahead of the Assembly's session.<sup>132</sup>

Although many of the Experts' recommendations would require additional resources to implement, they stopped short of recommending that the Assembly increase the resources of the Court. Instead, they recommended that 'the Court should accept the legitimate authority of the Assembly to decide its budget and should tailor its activities to match the resources available'.<sup>133</sup> However, in a separate recommendation, the Experts have proposed that a discussion be convened of stakeholders (Court, States Parties and civil society) on the strategic vision for the Court for the next ten years,<sup>134</sup> which may provide an opportunity for a constructive dialogue on the actual resource needs of the Court. The Experts proposed that the discussions should seek to agree the level of activity that the Court is expected and desired to reach in ten years' time and the steps (resources, cooperation and institutional development) that need to gradually occur for the ICC to reach that point. The Court has welcomed this recommendation, suggesting that the exercise could be planned for 2023, when the Rome Statute celebrates its 25th anniversary, and incorporated into the Court's strategic plan for 2025–2028.<sup>135</sup>

*Recommendation 11: States Parties should participate in annual budget processes and proposed discussions on the ten-year strategic vision of the Court, seeking to achieve a balance of providing the Court with sufficient resources to function effectively, while maximising efficiency.*

Although Article 112(2)(d) of the Rome Statute clearly states that it is the role of the Assembly to consider and decide the budget of the Court, such decisions must be made in good faith pursuant to the principle of *pacta sunt servanda*, ensuring that the ICC has sufficient resources to conduct its mandate in accordance with the requirements of the Rome Statute, including the judicial and prosecutorial independence of the Court.

In the first 19 budget processes of the Assembly, only a minority of States Parties – mostly those that contribute the highest percentage of the ICC's budget from Western European and other governments – have participated in the Hague Working Group's consideration of the annual budget and the Working Group on the Budget during the Assembly. Many of the highest contributing States Parties (Canada, France, Germany, Italy, Japan, Spain and the UK) have, at one time or another, supported zero nominal growth in the ICC's budget, regardless of increases in the ICC's workload.<sup>136</sup>

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129 *IER Final Report* (n 2), para 330.

130 *IER Final Report* (n 2), R137.

131 *IER Final Report* (n 2), R136.

132 *IER Final Report* (n 2), R139.

133 *IER Final Report* (n 2), R362.

134 *IER Final Report* (n 2), R363.

135 ICC's Response to IER Report (n 97), para 684.

136 See: Jonathan O'Donohue, 'Financing the International Criminal Court' (2013) 13 *International Criminal Law Review* 269.

Given that the Assembly's budget decisions are vital to the effective functioning of the ICC, States Parties should not defer to a subset of States Parties to conduct this process. The participation of more States Parties is required to elevate the importance and credibility of the budget process, strengthen decision-making through increased scrutiny of the Court's resource needs and preclude any bad faith initiatives to interfere in the prosecutorial or judicial functioning of the Court through the budget process.

If the Assembly follows the Experts' recommendation to reach consensus on the budget ahead of its annual session,<sup>137</sup> States Parties should ensure that the new process is accessible to all States Parties – not only those with a presence in The Hague – as well as civil society, who have traditionally been excluded from the Hague Working Group's budget discussions.

Given the Court's support for convening a discussion of stakeholders on a ten-year strategic vision for the Court, States Parties should support this initiative. The ICC Review process highlights that the process of strengthening the performance of the ICC will be a long-term initiative. Developing a way forward requires medium and long-term planning that is often not possible in the context of the Assembly's annual sessions. The process of discussing the strategic vision should, therefore, be held separate from the Assembly's annual sessions. To ensure that the judicial and prosecutorial independence of the ICC is respected, the Court should be responsible for preparing the strategic vision through a process of consultations with States Parties and civil society and for incorporating it into its three-year strategic plans.

*Recommendation 12: States Parties should support an increase in the level of the Contingency Fund to €10m and ensure that it is fully replenished each year.*

Recognising that the workload of the ICC cannot always be accurately predicted at the time of setting the budget, in 2004, the Assembly established a €10m contingency fund that the ICC could access during the financial year for:

- costs associated with an unforeseen investigation following a decision by the Prosecutor to open an investigation; or
- unavoidable expenses for developments in existing situations that could not be foreseen or could not be accurately estimated at the time of the adoption of the budget; or
- costs associated with an unforeseen meeting of the Assembly of States Parties.<sup>138</sup>

The contingency fund is a vital mechanism that allows the ICC to launch investigations promptly and respond effectively in existing situations when unforeseen circumstances arise. It is an important safeguard against any efforts to preclude the initiation of ICC investigations by imposing budget restrictions on the Court. However, since it was established, the fund has been reduced to €7m and, in some years, it has not been fully replenished.

In order for the ICC to make use of the Contingency Fund, the Independent Expert Review recommended that, at a minimum, the Assembly should ensure that the level of the Fund should be maintained at the

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137 *IER Final Report* (n 2), R139.

138 *Programme Budget for 2005, Contingency Fund, Working Capital Fund for 2005, scale of assessments for the apportionment of expenses of the International Criminal Court and financing of appropriations for the year 2005*, ICC-ASP/3/Res 4, 10 September 2004, Section B.

fixed level of €7m, if not increased.<sup>139</sup> To ensure that the Court has sufficient flexibility to respond to unforeseen circumstances, the initial amount of €10m should be re-implemented.

*Recommendation 13: States Parties should nominate highly qualified experts as candidates to the Committee on Budget and Finance.*

To achieve the vital balance of effectiveness and efficiency, it is essential that the Assembly be guided by the independent experts on the Committee on Budget and Finance. As illustrated in figure 7 above, in most years, the Assembly has followed the recommendations of the Committee to a large degree. The Experts appear to support this approach by suggesting that States Parties should defer to the CBF on technical budgetary details.<sup>140</sup> Nonetheless, the Statute requires that the Assembly consider and decide the ICC budget, not the Committee.

The effectiveness of the Assembly's decision-making therefore depends on electing highly qualified members of the Committee and the Assembly providing appropriate oversight of the Committee's recommendations.

It is particularly concerning that for most elections of the members of the Committee, the Assembly has struggled to obtain nominations from States Parties. In most instances, those nominated have been elected unopposed in clean slate elections. For example, only six candidates were nominated for the election of six members of the Committee in 2019.

More States Parties should search for and nominate candidates with expertise in financial matters at the international level, especially relating to the funding and operation of justice systems, to ensure that there is a competitive process for membership of this critical subsidiary body of the Assembly, as well as geographic representation and gender balance.

*Recommendation 14: States Parties should pay their assessed contributions on time.*

In recent years, the Committee on Budget and Finance has reported that a growing trend in arrears of assessed contributions threatens to seriously jeopardise the daily operations of the Court.<sup>141</sup> The Independent Expert Review also emphasised that the failure of States Parties to pay their assessed contributions on time represents an emerging liquidity crisis.<sup>142</sup> The chart in figure 8 below illustrates the significant increase in outstanding contributions.

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139 *IER Final Report* (n 2), R141.

140 *IER Final Report* (n 2), R139.

141 *Report of the Committee on Budget and Finance on the work of its thirty-third session*, ICC-ASP/18/15, 13 November 2019, para 68.

142 *IER Final Report* (n 2), para 350.

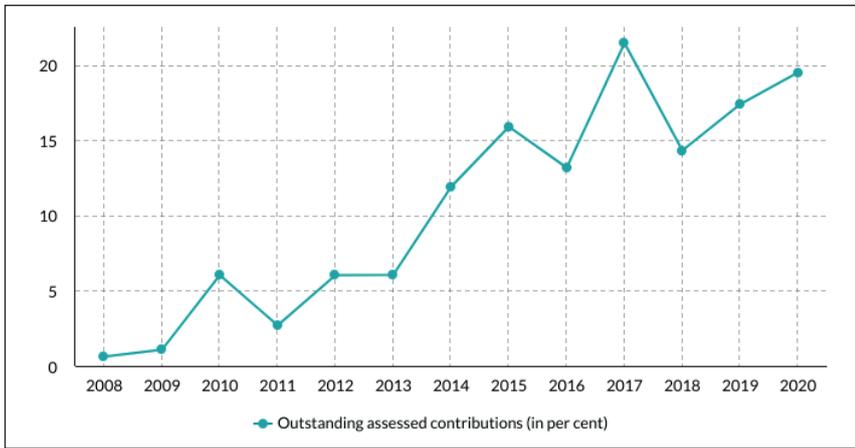


Figure 8: Percentage of outstanding contributions 2008–2019

The Experts recommended that the Assembly explore additional means to encourage timely and in full payment of contributions (eg, providing that States Parties in arrears are unable to present candidates for elected officials’ positions).<sup>143</sup> However, as the Court notes, this would require an amendment of Article 112(8).<sup>144</sup> This would necessitate adoption by two-thirds of the Assembly and ratification or acceptance by seven-eighths of the Assembly before it could enter into force.

The solution rests in States Parties reviewing their national procedures to ensure that they can pay their assessed contributions on time. States Parties – especially those that do not apply the calendar financial year like the ICC – should put in place mechanisms that anticipate the notification of assessed contributions in December/January each year and allocate resources so that payment can be made within 30 days of receipt.

### Useful resources on the ICC budget



Websites

- Assembly of States Parties ‘Committee on Budget and Finance’ webpage: [https://asp.icc-cpi.int/en\\_menus/asp/Review-Court/Pages/default.aspx](https://asp.icc-cpi.int/en_menus/asp/Review-Court/Pages/default.aspx).
- Final Report of the Court on the Court-wide impact of the OTP Basic Size Model, ICC-ASP/15/34, 14 November 2016: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP15/ICC-ASP-15-34-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ICC-ASP-15-34-ENG.pdf).



Official Documents

- Independent Expert Review: Final Report (Budget Process section at 106-113): [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP19/IER-Final-Report-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf).
- Overall Response of the ICC to the Independent Expert Review (Budget Process section at 61–65): [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP20/Overall%20Response%20of%20the%20ICC%20to%20the%20IER%20Final%20Report%20-%20ENG%20-%202014April21.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP20/Overall%20Response%20of%20the%20ICC%20to%20the%20IER%20Final%20Report%20-%20ENG%20-%202014April21.pdf).



Commentaries

- Stuart Ford, ‘What investigative resources does the International Criminal Court need to succeed?: A gravity-based approach’, 16 *Washington University Global Studies Law Review* (2017).

143 *IER Final Report* (n 2), R140.

144 ICC’s Response to IER Report (n 97), para 285.

- Stuart Ford, ‘How much money does the ICC need?’ in Carsten Stahn (ed) *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015), 84–104.
- Jonathan O’Donohue, ‘Financing the International Criminal Court’, 13 *International Criminal Law Review* (2013), 269–296.
- Osvaldo Zavala, ‘The Budgetary efficiency of the International Criminal Court’, 18 *International Criminal Law Review* (2018), 461–488.

### 1.3.3 Deciding the salaries, allowances and expenses of senior ICC officials

The Assembly’s role in deciding the salaries, allowances and expenses of senior officials has largely been automated following decisions by the Assembly to align the conditions of service and compensation with the United Nations system, including participation in the United Nations Joint Staff Pension Fund.

From the outset, the Assembly decided to appoint the Prosecutor at the Under-Secretary General level and the Deputy Prosecutor and the Registrar at the Assistant Secretary General level of the UN system.

The Assembly initially established unique conditions of employment and compensation for ICC judges.<sup>145</sup> However, a system was not put in place to regularly review the conditions of the ICC judges, until a mechanism was established in 2019 to review their remuneration.<sup>146</sup> In the meantime, a group of ICC judges filed a complaint at the International Labour Organization Administrative Tribunal,<sup>147</sup> which was dismissed in December 2020.<sup>148</sup>

At its 19th session in 2020, the Assembly decided to amend the conditions of service and compensation of full-time judges of the ICC by replacing them with those of the Under-Secretary General of the United Nations common system, including participation in the United Nations Joint Staff Pension Fund.<sup>149</sup>

*Recommendation 15: States Parties should engage with regular reviews of salaries, allowances and expenses of senior ICC officials.*

Although the current system of aligning the conditions of service and compensation of senior ICC officials to positions in the UN System and applying the UN Joint Staff Pension Fund provides a sustainable package that reduces the need for the Assembly to reconsider the issue in the future,<sup>150</sup> the Assembly will continue to keep this issue under regular review.

In 2019, the Assembly adopted terms of reference for reviewing the remuneration of judges.<sup>151</sup> Under this system, a panel consisting of the Vice-President and Coordinator of The Hague Working Group, the Bureau’s facilitator on the budget and one outgoing or former member of the Committee on Budget and Finance (to be appointed by the Bureau), will review judges’ remuneration in 2022 and every three

145 *Strengthening the International Criminal Court and the Assembly of States Parties*, ICC-ASP/3/Res 3, 10 September 2004, Annex: Conditions of service and compensation of judges of the International Criminal Court.

146 *Resolution on the remuneration of the judges of the International Criminal Court*, ICC-ASP/18/Res 2, 6 December 2019.

147 See, for example: ‘In The Hague’s Lofty Halls, Judges Wrangle Over Pay’, *New York Times*, 20 January 2019.

148 International Labour Organization Administrative Tribunal, *H and others v ICC*, Judgement No 4354, 7 December 2020.

149 *Resolution on the remuneration of judges of the International Criminal Court*, ICC-ASP/19/Res 3, 16 December 2020, para 1.

150 *Report of the Judicial Remuneration Panel*, ICC-ASP/19/18, 1 December 2020, para 14(c).

151 *Resolution on the remuneration of judges of the International Criminal Court* (n 146), Annex 1: Terms of Reference for the Review of the Judges’ Remuneration.

years thereafter and submit a report to the Assembly (via the Bureau) containing a recommendation for a possible adjustment.<sup>152</sup> In making their recommendation, the panel shall, in particular, take into account: (a) the ability of the Court to attract highly qualified candidates to the position as judges; (b) the cost of living in The Netherlands; and (c) the financial situation of the Court.<sup>153</sup> This system currently does not cover other senior ICC officials.

The Assembly will also need to review regularly the additional allowances of the President and Vice-President of the Court and the conditions of service and compensation for non-full-time judges, which were last revised in 2020.<sup>154</sup>

To ensure that the new procedures adopted to review the remuneration of judges are effective, they should be reviewed after a reasonable period considering whether it should be expanded to cover other senior ICC officials, including taking into account the views of the judges on the process.

## Useful resources on the salaries, allowances and expenses of senior ICC officials



Official Documents

- Resolution on the remuneration of the judges of the International Criminal Court, ICC-ASP/18/Res 2, 6 December 2019, Annex 1: Terms of Reference for the Review of the Judges' Remuneration: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP18/ICC-ASP-18-Res2-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-18-Res2-ENG.pdf).
- Resolution on the remuneration of the judges of the International Criminal Court, ICC-ASP/19/Res 3, 16 December 2020: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP19/ICC-ASP-19-Res3-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/ICC-ASP-19-Res3-ENG.pdf)

### 1.3.4 Deciding whether to alter the number of ICC judges

The Assembly has yet to receive a request to increase the number of ICC judges. However, with six judges allocated to two pre-trial chambers and a statutory requirement that three of the seven judges of the Trial Division constitute each trial chamber,<sup>155</sup> it is foreseeable that even a modest increase in the Court's case load may put the chambers under significant pressure. Indeed, already on several occasions when the workload of chambers has increased, some judges have requested to be unassigned from sitting on certain cases because of personal docket overload.<sup>156</sup> In light of recent policy decisions by the OTP to expand its

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152 *Ibid*, paras 1–3.

153 *Ibid*, para 5.

154 *Resolution on the remuneration of Judges of the International Criminal Court* (n 149), Annex I and Annex II.

155 Rome Statute, Article 39(2) (b) (ii).

156 Michael Bohlander, 'Article 36' in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016), 1218 citing: ICC, *Prosecutor v Uhuru Muigai Kenyatta*, ICC-01/09-02/11, Decision replacing a judge in Trial Chamber V(b), 30 January 2014; ICC, *Prosecutor v William Samoei Ruto and Joshua Arap Sang and Prosecutor v Uhuru Muigai Kenyatta*, ICC-01/09-01/11 and ICC-01/09-02/11, Decision replacing a judge in Trial Chamber V, 26 April 2013; ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision replacing judges in Trial Chamber III, 20 July 2010; ICC, *Prosecutor v German Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Decision replacing a judge in Trial Chamber II, 30 September 2009 and ICC-01/05-9-Anx2, Decision on the request to be excused from the exercise of judicial functions in Pre-Trial Chamber III, 22 April 2008.

case selection and prioritisation policy to focus on mid- and low-level perpetrators, an increase in cases should be expected in the next years.<sup>157</sup>

The Independent Expert Review has also recommended that the number of judges could be increased to allow for the prompt assignment of a substitute judge when the workload of the Court develops to the point where it no longer allows for a substitute judge to be assigned from the 18 regularly elected.<sup>158</sup>

Article 36(2) sets out that the Presidency may propose an increase in the number of judges, indicating the reasons why this is considered necessary and appropriate.<sup>159</sup> The proposal will be considered by the Assembly and approved if two-thirds or more of the members support the increase.<sup>160</sup> The Assembly will decide when the increase enters into force.<sup>161</sup> If an increase is adopted, an election shall be held at the next session of the Assembly in accordance with the provisions of the Rome Statute for the election of other judges.<sup>162</sup>

If at any time thereafter the workload of the Court justifies a reduction in the number of judges, a proposal can be made by the Presidency and the same procedure will be applied.<sup>163</sup> If approved by the Assembly, the number of judges shall be progressively decreased as the terms of serving judges expire, until the necessary number has been reached.<sup>164</sup>

*Recommendation 16: States Parties should support the further development of the procedure in Article 36(2) to increase or decrease the number of ICC judges, including a review of the Court's requests by independent experts on judicial management.*

Considering the current budgetary pressures and the high costs of new judges and elections, it is important that the Assembly makes informed good faith decisions on whether to increase or decrease the number of ICC judges. Although the wording of Article 112 is clear that this is a decision of the Assembly, a refusal of a well-justified request could cause significant delays that undermine the efficiency of the Court, the fairness of proceedings, the rights of the accused to be tried without delay and the rights of victims to prompt access to justice and reparations.

In advance of the first request for an increase in the number of judges, the Assembly should elaborate on the process in Article 36(2), to include an independent review of the ICC's requests to advise the Assembly of whether they have sufficient merit, taking into account the workload of the Court at the time. This review could be performed by the Advisory Committee on the Nomination of ICC Judges or another subsidiary body with expertise on judicial management.

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157 ICC OTP, Policy Paper on Case Selection and Prioritisation, 15 September 2016, para 43:

'In order to perform an objective and open-ended investigation, the Office will first focus on the crime base in order to identify the organisations (including their structures) and individuals allegedly responsible for the commission of the crimes. That may entail the need to consider the investigation and prosecution of a limited number of mid- and high-level perpetrators in order to ultimately build the evidentiary foundations for case(s) against those most responsible. The Office may also decide to prosecute lower level-perpetrators where their conduct has been particularly grave or notorious.'

158 *IER Final Report* (n 2), R215.

159 Rome Statute, Article 36(2) (a).

160 Rome Statute, Article 36(2) (b).

161 Rome Statute, Article 36(2) (b).

162 Rome Statute, Article 36(2) (c) (i).

163 Rome Statute, Article 36(2) (c) (ii).

164 Rome Statute, Article 36(2) (c) (ii).

## Useful resources on altering the number of ICC judges



### Commentaries

- Michael Bohlander, ‘Article 36’ in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016), 1218–1219.

### 1.3.5 Ensuring effective inspection, evaluation and investigation of the Court

Although Article 112(4) of the Statute foresaw the establishment of the Independent Oversight Mechanism to conduct inspection, evaluation and investigation of the Court in order to enhance its efficiency and economy, the IOM did not become operational until the end of 2015. So far, the IOM has focused primarily on the investigation of allegations of misconduct by ICC officials, staff members and other Court personnel.<sup>165</sup> However, the IOM has reported that some allegations could not be reviewed due to a lack of capacity.<sup>166</sup> It completed its first evaluations of Courtroom Audio-visual Equipment Practices and Procedures and the administration of Secretariat of the Trust Fund for Victims in 2019<sup>167</sup> and commenced an evaluation on interaction of victims with the Court in 2020.<sup>168</sup> To date, few inspections have been conducted by the IOM.

At its 19th session, the Assembly adopted important revisions to strengthen the operational mandate of the IOM,<sup>169</sup> including giving the IOM exclusive jurisdiction to investigate allegations of misconduct by elected officials,<sup>170</sup> and explicitly broadening the IOM’s mandate to investigate former elected officials and staff.<sup>171</sup> However, in light of findings and additional recommendations in the Independent Experts Report relating to the IOM, the revisions shall apply provisionally until, and without prejudice to, any decision of the Assembly to amend or replace the mandate after its consideration of the Experts’ recommendations.<sup>172</sup>

*Recommendation 17: States Parties should support providing the Independent Oversight Mechanism with enhanced authority and resources to conduct inspections, evaluations and investigations of the Court and vetting of candidates for senior elected ICC officials.*

The Experts found that the IOM and other internal oversight mechanisms (including the Office of Internal Audit) are not given the resources – or it seems the respect and authority – they need to carry out their mandates as well as they should.<sup>173</sup> The Experts reported that they were told concepts of independence and confidentiality are often and widely used by the OTP and the chambers as obstacles to the effective oversight of existing mechanisms.<sup>174</sup> This is particularly concerning in light of the Experts’ findings relating

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165 *Annual report of the Head of the Independent Oversight Mechanism*, ICC-ASP/19/26, 30 October 2020.

166 *Ibid.*, para 16.

167 *Annual report of the Head of the Independent Oversight Mechanism*, ICC-ASP/18/22, 11 November 2019.

168 *Annual report of the Head of the Independent Oversight Mechanism* (n 165), paras 33–36.

169 *Strengthening the International Criminal Court and the Assembly of States Parties*, ICC-ASP/19/Res 6, para 141.

170 *Ibid.*, Annex II: Operational Mandate of the Independent Oversight Mechanism, para 9.

171 *Ibid.*, Annex II: Operational Mandate of the Independent Oversight Mechanism, para 10.

172 *Ibid.*, para 141.

173 *IER Final Report* (n 2), para 954.

174 *IER Final Report* (n 2), para 954.

to the internal functioning of the Court, including the distrust between its organs,<sup>175</sup> strong perceptions of a lack of leadership and accountability,<sup>176</sup> gender inequality,<sup>177</sup> staff dissatisfaction<sup>178</sup> and accounts of bullying and harassment,<sup>179</sup> including by ICC judges.<sup>180</sup> The Experts recommended that the IOM should be given enhanced authority and resources to carry out its functions better.<sup>181</sup>

Especially considering the allegations of bullying and harassment raised in the Independent Expert Review, the Assembly should ensure that the IOM has sufficient resources to fully assess and, if necessary, investigate all complaints of misconduct it receives, to ensure accountability. Given the significant concerns regarding the ICC's performance that led to the Independent Expert Review, the IOM should have the capacity to conduct inspections, as well as timely and robust evaluations of many aspects of the ICC's work in the next years to ensure that the reforms implemented achieve the results intended.

In addition, the IOM should play an important role in the vetting of candidates for all elected officials at the ICC, including future elections of the Prosecutor, Deputy Prosecutors, the Registrar, the Deputy Registrar and the ICC judges. Significantly, in July 2021, the Bureau adopted a 'Proposal by the Presidency and Prosecutor-elect on due diligence process for candidates for Deputy Prosecutor'.<sup>182</sup> It includes 'an in-depth background check of criminal, academic and employment records of candidates' and 'an enquiry into any allegations of misconduct' to be handled by the IOM, which will prepare a report to the Prosecutor and the President of the Assembly.

The IOM must be provided with the sufficient resources and authority to conduct these vetting processes effectively.

*Recommendation 18: States Parties should ensure that effective mechanisms are in place to investigate allegations of misconduct by elected officials.*

Contrary to the Assembly's measures to affirm the IOM's exclusive jurisdiction to investigate allegations of misconduct by elected officials, the Independent Experts stated that involving the IOM in the accountability of judges (as well as elected officials, in general) presents a series of principled, structural and operational challenges and limitations.<sup>183</sup> In particular, the Independent Experts raised concerns about the Head of the IOM's status in the ICC's hierarchy, the IOM's status as a non-judicial and subsidiary body of the Assembly (which is a political body), as well as the potential for disputes between the IOM and chambers or the OTP relating to judicial and prosecutorial independence.<sup>184</sup> Instead, the Experts recommend that although all complaints against elected officials should continue to be initiated and lodged with the IOM and the IOM could conduct a preliminary assessment to determine whether the complaint is admissible or proper,<sup>185</sup> an ad hoc Judicial/Prosecutorial Investigation Panel should be commissioned by the IOM to fully investigate

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175 *IER Final Report* (n 2), para 62.

176 *IER Final Report* (n 2), para 63.

177 *IER Final Report* (n 2), para 64.

178 *IER Final Report* (n 2), para 202.

179 *IER Final Report* (n 2), para 209.

180 *IER Final Report* (n 2), paras 72 and 298.

181 *IER Final Report* (n 2), R364.

182 See Bureau, Agenda and Decisions, Fifth meeting, 7 July 2021, Annex.

183 *IER Final Report* (n 2), para 304.

184 *IER Final Report* (n 2), paras 305–308.

185 *IER Final Report* (n 2), paras 312–313.

the allegation and recommend whether a first instance panel should be convened to adjudicate the matter.<sup>186</sup> In the long term, the Experts recommend that a Judicial Council should be established with full mandate over the discipline and accountability of judges.<sup>187</sup> The Court appears to support this approach of peer-to-peer accountability.<sup>188</sup>

If, after considering the Experts' recommendations and the Court's response, the Assembly concludes that the current systems are inadequate to ensure the effective investigation of complaints against elected officials, then it should seek to adopt a new effective system as soon as possible, making further amendments to the operational mandate of the IOM as required. As indicated by the Experts, at a minimum, the IOM should remain the recipient of complaints and it should continue to conduct preliminary assessments of whether complaints are admissible and proper.

Although the Experts recommend the establishment of a Judicial Council as a long-term solution, apparently because it would require amendments to the Statute and the Rules of Procedure and Evidence (for further details of the Experts' recommendations see also 1.3.6 below),<sup>189</sup> similar changes to the legal framework are arguably required to establish the ad hoc systems proposed in the short term. If the establishment of a Judicial Council were to be prioritised by the Assembly, it may be possible to establish it promptly.

The Independent Experts suggest that the Judicial Council could be established either as a subsidiary body of the Assembly pursuant to Article 112(4) or through amendments to the Rome Statute.<sup>190</sup> Given the vital need to guarantee the independence and impartiality of the Judicial Council, including governing the appointment and conduct of its members, the amendment process should be preferred. Indeed, it should be possible to adopt amendments to the Rome Statute addressing the role of the Judicial Council in taking disciplinary measures and removal from office by a two-thirds majority of the Assembly, as Articles 46 and 47 are both listed in Article 122 as provisions of an institutional nature.

## Useful resources on the Independent Oversight Mechanism



### Official Documents

- Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/19/Res 6, 16 December 2020, Annex II: Operational Mandate of the Independent Oversight Mechanism: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP19/ICC-ASP-19-Res6-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/ICC-ASP-19-Res6-ENG.pdf).

- Annual report of the Head of the Independent Oversight Mechanism, ICC-ASP/19/26, 30 October 2020: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP19/ICC-ASP-19-26-ENG-IOM-%20Annual%20Report%20-%2030oct20-1730.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/ICC-ASP-19-26-ENG-IOM-%20Annual%20Report%20-%2030oct20-1730.pdf).



### Commentaries

- José E Alvarez, 'The Proposed Independent Oversight Mechanism for the International Criminal Court' in Richard H Steinberg (ed), *Contemporary Issues Facing the International Criminal Court* (BRILL, 2016) 143–153.

186 *IER Final Report* (n 2), para 315.

187 *IER Final Report* (n 2), R126.

188 ICC's Response to IER Report (n 97), para 264.

189 *IER Final Report* (n 2), para 268.

190 *IER Final Report* (n 2), para 322.

### 1.3.6 Deciding whether to remove a judge, the Prosecutor or Deputy Prosecutor from office

Article 46 of the Statute provides that the Assembly is responsible for making the final determination on whether to remove a judge, the Prosecutor or Deputy Prosecutor in response to complaints that they have committed serious misconduct or a serious breach of his or her professional duties under the Statute or they are unable to exercise the functions required by the Statute.<sup>191</sup>

All complaints are transmitted to the Presidency of the Court, which may decide to set aside complaints that are ‘anonymous or manifestly unfounded’ or transmit the complaint to the competent organ.

Complaints against judges will be transmitted to the plenary of ICC judges, which may decide by a two-thirds majority to recommend the removal of a judge from office.<sup>192</sup> The Assembly shall then hold a secret ballot and the judge will be removed from office if a two-thirds majority of the Assembly vote in favour of removal.<sup>193</sup>

Complaints against the Prosecutor are considered directly by the Assembly.<sup>194</sup> The Prosecutor will be removed from office if an absolute majority of States Parties vote in favour of removal.<sup>195</sup>

In the case of a Deputy Prosecutor, the complaint is transmitted by the Presidency to the Prosecutor. If the Prosecutor recommends that the Deputy Prosecutor be removed from office, the Assembly will conduct a secret ballot. The Deputy Prosecutor will be removed if an absolute majority of States Parties vote in favour of removal.<sup>196</sup>

The Registrar or Deputy Registrar can be removed from office by a decision of an absolute majority of the judges.<sup>197</sup>

These procedures have been the subject of some criticism. Schabas notes in relation to the procedure for removing judges:

‘When judges are left entirely on their own in decisions to remove their own colleagues they may be unacceptably tolerant of irregularities, given that the same standards will apply to themselves, but they may also profit from the occasion to indulge in pursuing disputes of a rather personal nature.’<sup>198</sup>

The same concern could apply to the Prosecutor’s discretion to recommend the removal of a Deputy Prosecutor, as well as the judges’ power to remove the Registrar or Deputy Registrar from office.<sup>199</sup>

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191 Rome Statute, Article 46(1).

192 Rome Statute, Article 46(2) (a).

193 Rome Statute, Article 46(2) (a).

194 Rome Statute, Article 46(2) (b).

195 Rome Statute, Article 46(2) (b).

196 Rome Statute, Article 46(2) (c).

197 Rome Statute, Article 46(3).

198 William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2016), 777.

199 Rome Statute, Article 46(3).

Karagiannakis notes that the lack of a decision by an official or body to propose the removal of the Prosecutor before the matter reaches the Assembly is a lacuna in the procedure, which provides less protections to the Prosecutor than the judges against removal for political reasons.<sup>200</sup>

In practice, no complaints have been publicly transmitted to the Assembly to consider complaints against judges, the Prosecutor or the Deputy Prosecutor. A complaint against the first ICC Prosecutor was set aside by the Presidency on the basis that it was ‘manifestly unfounded’.<sup>201</sup>

In the context of recent allegations of conflicts of interest, potential ethics violations or inappropriate behaviour from multiple organs of the Court,<sup>202</sup> including a number of alleged acts of bullying and harassment by “a slender number of judges past and present”,<sup>203</sup> the Independent Experts came to the conclusion that ‘[i]n the long term, the power to remove Judges, the Prosecutor, Deputy Prosecutor, Registrar, and Deputy Registrar from office and to apply disciplinary measures to them should not remain with either the plenary of ICC judges, the Presidency or the ASP.’<sup>204</sup>

The Experts recommended that the power to render decisions on complaints against elected officials should be trusted to a Judicial Council, composed of current and former national and international judges.<sup>205</sup> They stated that this would ensure impartiality and independence of disciplinary decisions.<sup>206</sup> Acknowledging that this would require an amendment to the Rome Statute and the Rules of Procedure and Evidence, they recommended that in the short term, the IOM should establish ad hoc investigative panels, on an as-needed basis, from a roster list made up of current and former national and international judges/prosecutors to investigate allegations of misconduct against judges, the Prosecutor or Deputy Prosecutor.<sup>207</sup>

*Recommendation 19: States Parties should support the establishment of a fully independent and impartial process to determine whether judges, the Prosecutor, Deputy Prosecutors and the Registrar should be removed from office.*

Procedures for removing senior officials from office should ensure that all complaints are fully investigated. To ensure that all complaints are addressed properly, the Assembly should review and reform the current system, giving full consideration to the Experts’ recommendations and the need for an independent and impartial process with sufficient safeguards to ensure that judges, the Prosecutor, Deputy Prosecutors and the Registrar are not removed from office solely for political reasons. Recognising that Article 46 is a provision of an institutional nature that can be amended by a two-thirds majority of the Assembly,<sup>208</sup> the Assembly should consider developing a permanent solution to this issue, minimising the duration of short term ad hoc procedures.

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200 Magda Karagiannakis, ‘Article 46’ in in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016), 1304.

201 *Ibid*, 1302.

202 *IER Final Report* (n 2), para 254.

203 *IER Final Report* (n 2), para 298.

204 *IER Final Report* (n 2), para 268.

205 *IER Final Report* (n 2), paras 267, 322–327, R109, R126 and R127.

206 *IER Final Report* (n 2), para 268.

207 *IER Final Report* (n 2), paras 267-268, 311–321 and R125.

208 Rome Statute, Article 122.

## Useful resources on the removal of senior ICC officials from office



### Commentaries

- Magda Karagiannakis, ‘Article 46’ in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary (3rd Edition)*, Munich: C H Beck, Hart Publishing and Nomos, 2016), 1299–1306.

### 1.3.7 Ensuring equitable geographical representation and gender balance in the recruitment of staff of the ICC

Article 44(2) of the Rome Statute requires that in the employment of staff, the Prosecutor and the Registrar shall have regard to the representation of principal legal systems of the world, equitable geographical representation and a fair representation of female and male staff. The Staff Regulations adopted by the Assembly in 2003 confirm that these requirements apply to the recruitment of the entire staff of the Court.<sup>209</sup> However, the system of desirable ranges established to guide the Court in ensuring geographical representation only relates to staff in professional categories.<sup>210</sup> The Bureau has stressed that a fair representation of male and female staff and equitable geographical distribution benefits the Court by ensuring diversity of perspective which, internally, increases the creativity in the work and environment and, externally, remains crucial to address perception challenges and advance the universality of the Rome Statute.<sup>211</sup>

The Assembly monitors the Court’s progress annually through a facilitator appointed by the Bureau in the New York Working Group. The facilitator’s most recent report states that while female staff comprised 49.2 per cent of the Court’s professional staff, they were severely under-represented at senior levels.<sup>212</sup> The Independent Experts’ Report found there is almost a complete absence of women in senior positions of the OTP – which is a general issue across the Court.<sup>213</sup>

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209 Staff Regulations, Annex, para 1.

210 Staff Regulations, Annex, paras 1 and 4.

211 *Report of the Bureau on equitable geographical representation and gender balance in the recruitment of staff of the International Criminal Court*, ASP/19/29, 13 December 2020, para 32.

212 *Ibid*, para 11.

213 *IER Final Report* (n 2), para 138.

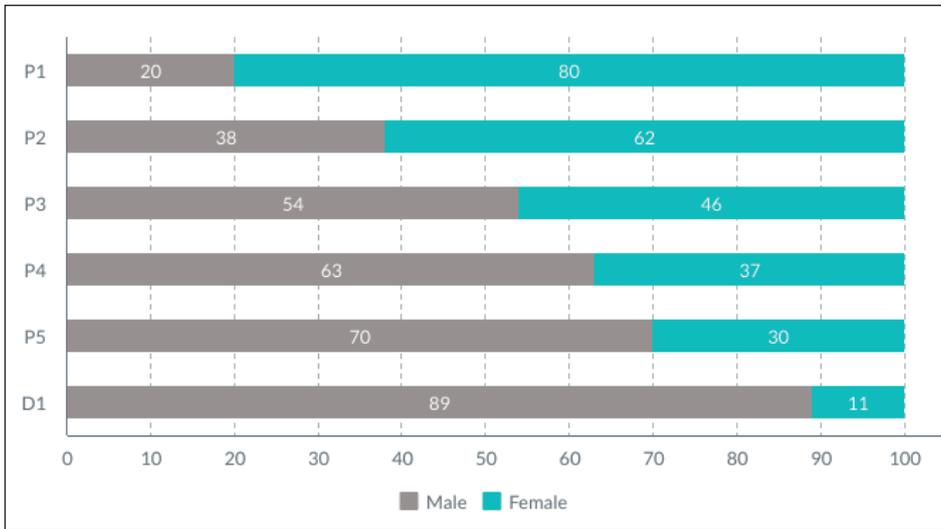


Figure 9: Percentage of male and female staff at different professional levels (2019)<sup>214</sup>

In terms of geographical distribution, the facilitator reported a chronic imbalance with Western European and other governments' nationals over-represented at all professional levels while other regions – in particular, Asia-Pacific, the Caribbean and Latin America – are under-represented.

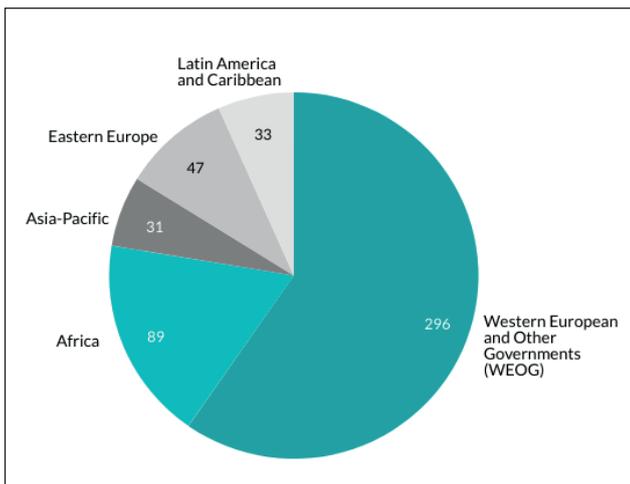


Figure 10: Geographical representation of professional staff (as at 30 September 2020)<sup>215</sup>

**Recommendation 20:** States Parties should support the ICC's development of a detailed strategy to improve geographical representation and gender balance of its staff, including an evaluation of the ICC's efforts by the IOM.

According to the latest Bureau report, the Court is taking a number of measures to improve gender balance and geographical representation of its staff.

Having identified that fewer women than men are applying for senior level posts,<sup>216</sup> the Court has established a Mentoring Programme for Women.<sup>217</sup> It also established in 2021 a Focal Point on Gender

<sup>214</sup> *Report of the Court on Human Resources Management*, ICC-ASP/19/4, 30 October 2020, para. 67

<sup>215</sup> *Report of the Bureau on equitable geographical representation and gender balance in the recruitment of staff of the International Criminal Court* (n 211), para 16.

<sup>216</sup> *Ibid*, para 12.

<sup>217</sup> *Ibid*, para 13.

Equality who will assist the Court's leadership in their efforts to strengthen gender-related policies across the Court and to address issues related to employment conditions of women in the institution, including gender balance at all levels of employment.<sup>218</sup> The IBA supports the ICC's broad definition of gender equality in the workplace, which recognises that 'gender equality is about equal rights, responsibilities and opportunities for all; it covers the relations in the context of our work environment between women and men and other groups, reflecting a wide understanding of gender identities and gender expressions.'<sup>219</sup>

To improve geographical representation, the Court intends to continue outreach activities specifically directed at non- and under-represented States Parties and a range of other measures.<sup>220</sup> The Committee on Budget and Finance has recommended that the Court further develop its efforts into a medium to long-term plan and well-defined objectives to address the situation of geographical representation.<sup>221</sup>

A detailed strategy should be developed to address both goals. Given that the ICC has endeavoured for many years to make progress on these issues, with only limited progress, States Parties should also support a detailed evaluation of the ICC's efforts by the IOM to inform the development of the strategy.<sup>222</sup>

*Recommendation 21: States Parties that are not represented or are under-represented in the staff of the Court should work with the ICC to disseminate vacancy announcements to qualified candidates in their countries.*

As the Bureau's recent report notes, beyond the measures taken by the Court, states still have a critical role in ensuring wider dissemination of vacancy announcements.<sup>223</sup> The Bureau has recommended that States Parties, especially those non- and under-represented, should develop targeted strategies to support the dissemination of Court vacancies to their national institutions and organisations, as appropriate, including universities, professional associations and chambers and judicial institutions.<sup>224</sup> To facilitate such efforts, the Assembly should request the Bureau to work with the ICC to develop more detailed guidance for States Parties that participate in such efforts.

*Recommendation 22: States Parties should work with the ICC to disseminate vacancy announcements for senior roles to qualified female candidates in their countries.*

To address the under representation of women in senior roles at the ICC, all States Parties should assist the ICC with disseminating vacancy announcements, particularly P-4 and above, to qualified female<sup>225</sup> candidates in their countries, including through relevant networks in universities, professional associations and chambers and judicial institutions. To facilitate such efforts, the Assembly should request the Bureau to work with the ICC to develop more detailed guidance for States Parties that participate in such efforts.

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218 ICC Press Release, 'International Women's Day: ICC appoints Focal Point for Gender Equality', 8 March 2021.

219 *High-Level Statement on Gender Equality of the International Criminal Court*, 30 April 2021.

220 *Report of the Bureau on equitable geographical representation and gender balance in the recruitment of staff of the International Criminal Court* (n 211), paras 23–24.

221 *Report of the Committee on Budget and Finance on the work of its 35th session*, ICC-ASP/19/15, 17 November 2020, para 208.

222 *Ibid*, para 209, the Committee urged the Court to evaluate the effectiveness of the measures and activities already taken to promote geographical representation and report to the Committee at its 36th session in 2021.

223 *Report of the Bureau on equitable geographical representation and gender balance in the recruitment of staff of the International Criminal Court* (n 211), para 25.

224 *Ibid*, para 46.

225 In supporting the ICC and ASP's efforts to ensure gender equality at all levels of the Court, the IBA intends our recommendations to be inclusive of gender-diverse people.

*Recommendation 23: States Parties should make regular voluntary contributions to the ICC's trust fund for the development of interns and visiting professionals.*

In 2016, the ICC established a trust fund for the development of interns and visiting professionals to provide funded internship and visiting professional opportunities to nationals from developing regions that are a State Party to the Rome Statute.<sup>226</sup> The Court has sought to address some of the geographical representation challenges through the internship and visiting professional programme since it is considered that a diverse group of qualified professionals in this programme will encourage more potentially eligible and interested candidates from those countries for the Court's staff positions, now and in the future.<sup>227</sup> The trust fund is intended to make the programme accessible to all. However, only two States Parties have made multiple voluntary contributions so far. Inconsistency in contributions threatens to undermine the initiative.



Figure 11: Voluntary contributions to the trust fund for the development of interns and visiting professionals

According to the most recent report of the Bureau, 23 individual interns and visiting professionals from Africa, Eastern Europe, the Caribbean and Latin America were funded in 2018. But no new positions were funded in 2019. The ICC states that it hopes new internships and visiting professions will be funded in 2021.<sup>228</sup>

## Useful resources on the geographical representation and gender balance of ICC staff



Official Documents

- *Report of the Bureau on equitable geographical representation and gender balance in the recruitment of staff of the International Criminal Court*, ASP/19/29, 13 December 2020: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP19/ICC-ASP-19-29-ENG-GRGB-report%2013dec20-1300.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/ICC-ASP-19-29-ENG-GRGB-report%2013dec20-1300.pdf).

<sup>226</sup> *Financial statements of the International Criminal Court for the year ended 31 December 2019*, ICC-ASP/19/12, 14 July 2020, Schedule 7, International Criminal Court – Status of trust funds as of 31 December 2019, para 6.

<sup>227</sup> *Report of the Bureau on equitable geographical representation and gender balance in the recruitment of staff of the International Criminal Court* (n 211), para 29.

<sup>228</sup> *Ibid*, para 30.

## 1.4 Election of ICC officials

The Rome Statute mandates the Assembly to elect the ICC judges, the Prosecutor and the Deputy Prosecutor. The Assembly also provides recommendations to the plenary of 18 judges who elect the Registrar of the Court. Ensuring the election of the highest qualified candidates to serve as these most senior officials of the Court is critical to the effective performance of the ICC.

### 1.4.1 Vetting of all candidates

All elected ICC officials are required to be of high moral character. Given the Independent Expert Review's findings relating to many accounts of bullying and harassment in the Court,<sup>229</sup> including by ICC judges,<sup>230</sup> it is especially important that the high moral character of all candidates for ICC elections is thoroughly tested.

*Recommendation 24: States Parties should support a thorough vetting process of all candidates in ICC elections.*

Vetting of all candidates should be a core component of all election proceedings. However, to date, vetting has either not occurred, or it has been inadequate. Vetting should be fair, independent, professional and thorough. It should include a mechanism for third parties to share information regarding inappropriate conduct (including bullying and sexual harassment), with full protection for the confidentiality of persons providing information and candidates, and procedures that reflect due process, including prior notice to all candidates that vetting will take place. States Parties should support the inclusion of such vetting processes in all elections, ensuring that sufficient resources and time for vetting are integrated into the Assembly's election budgets and timeframes.

### 1.4.2 Election of the ICC judges

Every three years the Assembly elects six ICC judges replacing one-third of the 18 judges who have completed their nine-year terms. An ad hoc election may also be held in the event of a judicial vacancy<sup>231</sup> or following a decision to increase the number of ICC judges.<sup>232</sup> To ensure a balanced bench of highly qualified judges, the Assembly has developed a procedure for the nomination and election of ICC judges that, in many respects, is innovative.<sup>233</sup> However, despite the procedure, the way elections are conducted is strongly criticised.<sup>234</sup>

The nomination period for the regular election of judges is opened on the first Monday of the calendar year when an election will take place and lasts for 12 weeks, although it may be extended.<sup>235</sup> In the event of

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229 *IER Final Report* (n 2), paras 209–214.

230 *IER Final Report* (n 2), paras 72 and 298.

231 *Procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court*, ICC-ASP/3/Res 6, as amended by ICC-ASP/5/Res 5; ICC-ASP/12/Res 8, Annex II; ICC-ASP/13/Res 5, Annex II; ICC-ASP/14/Res 4, Annex II; ICC-ASP/18/Res 4, Annex I.C, para 27(a) provides that a judicial vacancy should be filled no later than 20 weeks after the occurrence of the vacancy.

232 Rome Statute, Article 36(2)(c)(i). See Section 1.3.4 above.

233 *Procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court* (n 231).

234 See, for example, *IER Final Report* (n 2), paras 961–977.

235 *Procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court* (n 231), para 3.

a judicial vacancy, the nomination period starts 12 weeks before the date of the election set by the Bureau and lasts for six weeks.<sup>236</sup> States Parties are notified of the process by *note verbale* before the nomination period is opened.

Any State Party to the Rome Statute can nominate a candidate, who can be either a national of their state or the national of another State Party.<sup>237</sup> The national nomination procedure must follow either the procedure for the nomination of candidates for appointment to the highest judicial offices in their state or the procedure applied for the nomination of candidates for the International Court of Justice.<sup>238</sup>

After the nomination period closes, the Assembly's Advisory Committee on Nominations examines the nominations, including conducting interviews and questionnaires with candidates. It reports to the Assembly, including on the suitability of each candidate for a judicial role considering the requirements of Article 36 of the Rome Statute.<sup>239</sup>

The report of the Advisory Committee is made available to States Parties and observers at least 16 weeks before the election for thorough consideration.<sup>240</sup> Roundtable discussions are organised by the Bureau for all candidates to meet with States Parties and other relevant stakeholders.<sup>241</sup>

During the election, a complex system of minimum voting requirements is applied that aim to ensure a balance of geographical representation, legal expertise (between judges with established competence in criminal law and procedure (List A) and international law (List B)<sup>242</sup> and a fair representation of female and male judges.<sup>243</sup>

Despite the Assembly's development of this unique system of international judicial elections, it is still not considered sufficient to ensure the appointment of the highest qualified candidates.

A 2019 report by Open Society Justice Initiative – *Raising the Bar: Improving the Nomination and Election of Judges to the International Criminal Court*<sup>244</sup> – concluded that:

- too few States Parties nominate candidates for judges (almost half of the judges of the Court elected so far have been nominated by ten out of the 123 States Parties);

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236 *Ibid*, para 27(b).

237 Rome Statute, Article 36(4)(b).

238 Rome Statute, Article 36(4)(a).

239 Terms of Reference of the Advisory Committee on Nominations of Judges of the International Criminal Court (n 62), para 10 *bis*.

240 *Ibid*, para 11.

241 Procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court (n 231), para 12 *ter*.

242 Rome Statute, Article 36(3)(b)(i) requires that List A candidates shall 'have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings.' Article 36(3)(b)(ii) requires List B candidates shall 'have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court.' Article 36(5) requires that the equivalent of at least nine candidates shall be elected from List A and that at least five candidates from List B.

243 *Procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court* (n 231), paras 20–25. For a full explanation of the minimum voting requirements see the Assembly's *Informal guide and commentary to the procedure for the nomination and election of judges of the International Criminal Court*, ICC-ASP/16/INF.2, 5 May 2017.

244 Open Society Justice Initiative, *Raising the Bar: Improving the Nomination and Election of Judges to the International Criminal Court* (2019).

- most States Parties have not adopted a national framework to nominate candidates. Instead, candidates are selected in a largely ad hoc manner, frequently privileging personal or political connections at the expense of transparency, competitive opportunity, and merit;
- States Parties are failing to give sufficient attention to candidates' knowledge and experience in criminal law and procedure, as well as substantive experience of managing complex trials;
- vote trading and a toxic campaigning culture corrupt the judicial election process; and
- the Advisory Committee on the Nomination of Judges is failing to rigorously scrutinise and report on a candidate's suitability for judicial service.

The Independent Expert Review remarked that, while the process for nomination of candidates for judicial office and the election process of judges were not included among the topics remitted to them:

‘It has been impossible to ignore the comments made that suggest that the Court’s problems may be in part the result of the standard of some of the Judges, in particular that the ability and inexperience of some of the Judges who have been elected has not marked them out as Judges or jurists of the highest calibre sought by the Court. The belief persists that some Judges have owed their success in the ballot more to electoral horse-trading than competence.’<sup>245</sup>

*Recommendation 25: States Parties should support further strengthening the process of nominating and electing ICC judges and ensure a thorough vetting process for all candidates.*

Despite the Assembly’s adoption of a number of amendments to the Procedure and the Terms of Reference of the Advisory Committee at its 18th session in December 2019, which the Experts acknowledged as ‘cause for optimism’, the Experts recommend a number of additional revisions to the elections process, including:

- amending the procedure requiring that candidates attend an interview with the Advisory Committee and the roundtable discussions with States Parties and other relevant stakeholders, or be disqualified from the election, barring exceptional circumstances;<sup>246</sup>
- mandating the Advisory Committee to assess the ability of each candidate to manage and conduct complex international criminal trials fairly and expeditiously;<sup>247</sup>
- leading a process to harmonise the nomination procedures followed by States Parties<sup>248</sup> and compiling before the next election in 2023 a set of criteria which should be applied in national level nomination processes along with guidelines on the conduct of the nomination process;<sup>249</sup>
- requiring the nominating State Party to submit a certificate setting out the nomination procedure it followed;<sup>250</sup>

245 *IER Final Report* (n 2), para 961.

246 *IER Final Report* (n 2), R371.

247 *IER Final Report* (n 2), R374.

248 *IER Final Report* (n 2), R376.

249 *IER Final Report* (n 2), R377.

250 *IER Final Report* (n 2), R376.

- reviewing the criteria applicable to candidates from List B, having regard to the significance of criminal trial experience to the work of the Court;<sup>251</sup> and
- considering whether the presence of distinguished international judges should be a requirement of the membership of the Advisory Committee on Nominations.<sup>252</sup>

States Parties should support the implementation of these recommendations in advance of the next regular election of judges in 2023.

States Parties should also consider recommendations by the Advisory Committee on Nominations to strengthen its work, including extending the length of its sessions to review candidates and requiring criminal checks of candidates,<sup>253</sup> as well as recommendations by NGOs for the Committee to conduct and present a more rigorous examination of the character and qualifications of candidates.<sup>254</sup>

Moreover, to ensure that those elected meet the requirement of high moral character, the IBA additionally calls for the establishment of a thorough vetting process for each candidate and a mechanism for third parties to share information regarding inappropriate conduct (including bullying and sexual harassment), with full protection for the confidentiality of the information provider and candidates, and procedures that reflect due process (see Recommendation 24).

*Recommendation 26: States Parties should establish a transparent national nomination process for ICC judges, focusing on putting forward the most qualified candidates, and submit information about their existing process to the Advisory Committee on Nominations of Judges of the ICC.*

Ensuring that only the highest qualified candidates are elected to the ICC is a responsibility of all States Parties that starts with national nomination processes. If States Parties conduct independent, transparent and merit-based national nomination processes to search for, identify and put forward highly qualified candidates, the integrity and competence of nominees is much less likely to be at issue during elections. However, as the Open Society Justice Initiative notes, many States Parties lack a legal framework for nominating judicial candidates to the ICC or an independent selection body.<sup>255</sup>

States Parties should support the Experts' proposal to harmonise national nomination proceedings and develop guidelines for States Parties before the next election in 2023, including taking into account:

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251 *IER Final Report* (n 2), R379.

252 *IER Final Report* (n 2), R380. The Experts explained in para 977: 'it may be appropriate to consider whether the presence of distinguished international judges should be a requirement, possibly by adding to the requirements: [...] and of whom at least five members have established experience and competence as a judge of an international criminal court or tribunal.'

253 Report of the Advisory Committee on Nominations of Judges on the work of its seventh session, ICC-ASP/19/11, 30 September 2020, Annex III.

254 See, in particular, Open Society Justice Initiative, *Raising the Bar: Improving the Nomination and Election of Judges to the International Criminal Court*, at 7–8, sets out detailed recommendations for the Advisory Committee to: (1) Conduct a more rigorous assessment of candidates' qualifications; (2) For each candidate, document and assess the rigour of the national-level nomination practices as part of the Committee's overall report; (3) Develop a framework that clearly communicates which nominees meet the qualifications for judicial service and which nominees do not; (4) Prepare a more thorough and detailed report evaluating the candidates' background and fitness for judicial office.

Human Rights Watch, *Briefing Note for the nineteenth Session of the International Criminal Court Assembly of States Parties*, December 2020, recommended including the possibility of a written exam or situation-based interviews of candidates and formalising a process through which the committee can more thoroughly benefit from publicly available information about candidates, for example, a dedicated email address or online form.

255 *Raising the Bar: Improving the Nomination and Election of Judges to the International Criminal Court* (n 244), 33.

- recommendations contained in the Open Society Justice Initiatives *Raising the Bar* report;<sup>256</sup>
- Amnesty International’s *Checklist to ensure the nomination of the highest qualified candidates for judges*;<sup>257</sup> and
- *Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights*.

In particular, States Parties can support this process by responding to the Assembly’s request in 2019 to submit information about their respective national nomination and selection procedures to the Secretariat of the ASP.<sup>258</sup> As of September 2020, only 19 States Parties’ responses had been received.<sup>259</sup> The Advisory Committee on Nominations of Judges of the ICC will compile a compendium of submissions for the Assembly’s 20th session in 2021 and prepare a reference document for States Parties to use on an optional basis, which includes practices that could be taken into account when States Parties are establishing or utilising national nomination procedures.<sup>260</sup>

All States Parties should use these tools to establish effective national legal frameworks and independent selection bodies to be applied in nominating candidates for judges to the ICC.

*Recommendation 27: States Parties should ensure that national nomination processes are accessible to qualified women and incorporate the need for a fair representation of female and male judges set out in the Rome Statute.*

All national nomination processes should include targeted dissemination measures to inform qualified women of the process and encourage them to apply.<sup>261</sup> The Rome Statute’s recognition of the need for a fair representation of female and male judges should be reflected in the advertisement and the criteria for selecting candidates. Any minimum voting requirements that may apply in the ICC election for female candidates should be acknowledged in the advertisement and selection criteria. The decision-making body that decides the candidate for nomination should include an equal number of men and women.

*Recommendation 28: States Parties should conduct a national search process for highly qualified candidates at least once every 10–15 years.*

As the Open Society Justice Initiative notes, until 2019, ten States Parties have nominated half of all elected ICC judges.<sup>262</sup> To ensure that the highest qualified candidates from all 123 States Parties are put forward, more States Parties should conduct national nomination processes. While it may not be feasible for States Parties to conduct such a process every three years or when a vacancy arises, all States Parties should conduct a nomination process every 10–15 years. This will ensure that highly qualified candidates from

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256 Ibid, 5–6.

257 Amnesty International, *Checklist to ensure the nomination of the highest qualified candidates for judges*, IOR 40/023/2002.

258 *Resolution on the review of the procedure for the nomination and election of judges*, ICC-ASP/18/Res 4, 6 December 2019, para 6.

259 *Report of the Advisory Committee on Nominations of Judges on the work of its seventh session*, ICC-ASP/19/11, 30 September 2020, para 17.

260 *Resolution on the review of the procedure for the nomination and election of judges*, ICC-ASP/18/Res 4, 6 December 2019, para 6.

261 In supporting the ICC and ASP’s efforts to ensure gender equality at all levels of the Court, the IBA intends our recommendations to be inclusive of gender-diverse people.

262 *Raising the Bar: Improving the Nomination and Election of Judges to the International Criminal Court* (n 244), 5.

all States Parties have a reasonable opportunity of being nominated and that the Assembly has a wealth of choice during each election process.

*Recommendation 29: States Parties should reject vote trading and vote for the highest qualified candidates, giving high priority to the requirement of a fair representation of female and male judges and the need for ICC judges who are able to manage and conduct complex international criminal trials fairly and expeditiously.*

Although the practice of vote trading has been evident in all elections of ICC judges to date, the Independent Expert Review notes that the Assembly and States Parties have not done enough to outlaw the practice. Criticising the weak language of the Assembly's 2019 resolution *encouraging* States Parties to refrain from vote trading,<sup>263</sup> the Experts commented:

‘... it is disturbing to discover that the practice of trading votes out of political self-interest, unrelated to the calibre of the candidate for election to a leading, international judicial post, is so well-entrenched that some States Parties still to this day find it politically expedient and acceptable to adhere to it. The remainder appear to tolerate it at a time of widespread, grave concern that the Court is proving to be less effective and efficient in the global fight against impunity than was hoped by its many supporters.’<sup>264</sup>

All States Parties should reject vote trading as it undermines the Assembly's efforts to elect highly qualified ICC judges and the credibility of the ICC. The Assembly should consider establishing a public pledge, that States Parties can sign, committing not to trade votes.<sup>265</sup> Instead, States Parties should focus on voting for the highest qualified candidates, based on the candidates' applications, the assessment of Advisory Committee on Nominations and candidates' participation in the Bureau's roundtable discussion. States Parties should give high priority in deciding their votes on the need for a fair representation of female and male judges, as required in Article 36(8) (a) (iii), as well the ability of each candidate to manage and conduct complex international criminal trials fairly and expeditiously.

### 1.4.3 Election of the ICC Prosecutor and Deputy Prosecutor(s)

The Assembly elects the ICC Prosecutor and the Deputy Prosecutor(s) to serve for a term of nine years.<sup>266</sup> Following the election of Prosecutor Karim Khan in February 2021, the next election of the Prosecutor is expected to take place in 2029. With the completion of the current Deputy Prosecutor's term of office in 2022 and the proposal of the new Prosecutor to elect two Deputy Prosecutors, the election of the next Deputy Prosecutors is scheduled to take place at the Assembly's next session in December 2021.

With limited guidance in the Rome Statute and the election procedures adopted by the Assembly,<sup>267</sup> since 2002, the process for electing the ICC Prosecutor has proved problematic in each of the first

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263 *Resolution on the review of the procedure for the nomination and election of judges*, ICC-ASP/18/Res 4, 6 December 2019, para 10.

264 *IER Final Report* (n 2), para 963.

265 Human Rights Watch, *Briefing Note for the nineteenth Session of the International Criminal Court Assembly of States Parties, December 2020*, recommended that the Assembly formulate ‘a pledge to be endorsed by states parties that there will be no “vote swapping” or other exchange of promises between states parties, as well as no participation in campaigning activities.’

266 Rome Statute, Article 42(4). The provision also provides that the Assembly may decide on shorter term at the time of the election, but so far, all prosecutors and deputy prosecutors have been elected for full nine-year terms.

267 The procedures for electing the Prosecutor and the Deputy Prosecutor are vaguely defined in the Assembly's *Procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court* (n 231).

three elections. In particular, tensions have emerged between the requirement in the Statute that ‘the Prosecutor shall be elected by secret ballot by an absolute majority of the members of the Assembly’<sup>268</sup> and the requirement in the Assembly’s Procedures that ‘every effort must be made to elect the Prosecutor by consensus’.<sup>269</sup>

The first prosecutor was elected following a predominantly behind-the-scenes search process, which made it difficult to include all States Parties and for highly qualified candidates to put themselves forward.<sup>270</sup> Although a search committee was established before the second election, the initiative was criticised for lack of transparency and inadequate timelines.<sup>271</sup> Some States Parties complained that the process was inconsistent with the requirement in the Statute that the Prosecutor be elected by secret ballot.<sup>272</sup> This led to an evaluation of the process by the Bureau, but it merely noted the divergent views of States Parties and put off any further consideration of the process until the next election.<sup>273</sup>

Significant improvements were made in establishing a search process for the election of the third ICC Prosecutor. A Committee on the Election of the Prosecutor was established by the Bureau of the Assembly almost 18 months in advance of the planned December 2020 election. Its terms of reference set out in detail its working methods, timelines and requirements of transparency.<sup>274</sup> Five representatives covering each regional group of the Assembly were appointed to the Committee to serve in their individual and independent capacity.<sup>275</sup> The members were supported by a panel of five independent experts (Panel of Experts) who were appointed based on extensive national or international criminal investigation, prosecution or judicial experience.<sup>276</sup>

The Committee spent four months seeking applications until the end of November 2019, including extending the deadline once.<sup>277</sup> The Committee assessed all 89 applications it received. It established a list of 16 candidates for interview taking into account the recommendations of the Panel of Experts.<sup>278</sup> After two candidates dropped out, it interviewed the 14 remaining candidates.<sup>279</sup> In response to calls from civil society to ensure that shortlisted candidates did not have a record of workplace and/or sexual harassment, a vetting process was conducted of all 14 listed candidates, which consisted ‘inter alia of detailed reference checks, checks of publicly sourced information (including candidates’ own social media accounts), and security and criminal record checks.’<sup>280</sup> During interviews, the Committee also included a line of questions

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268 Rome Statute, Article 42(4).

269 *Procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court* (n 231), para 33.

270 Jonathan O’Donohue, ‘The International Criminal Court and the Assembly of States Parties’ in C. Stahn (ed) *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015), 129.

271 *Report of the Evaluation of the process on the election of the Prosecutor*, ICC-ASP/12/58, 15 November 2013, paras 11 and 13.

272 *Ibid*, para 12.

273 *Ibid*, para 20.

274 *Bureau of the Assembly of States Parties: Election of the Prosecutor – Terms of Reference*, ICC-ASP/18/INF.2, 11 April 2019, [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP18/ICC-ASP-18-INF2-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-18-INF2-ENG.pdf).

275 *Ibid*, para 4.

276 *Ibid*, para 7.

277 *Report of the Committee on the Election of the Prosecutor*, ICC-ASP/19/INF.2, 30 June 2020, para 19.

278 *Ibid*.

279 *Ibid*.

280 *Ibid*, para 30.

on the topic of workplace or sexual harassment.<sup>281</sup> However, the Committee acknowledged that the process ‘set in motion ex post facto and with limited scope, cannot lay claim to comprehensiveness, nor will it offer all desirable guarantees.’<sup>282</sup> On 30 June 2020, the Committee issued a shortlist of four candidates (three men and one woman) for the Assembly’s consideration.<sup>283</sup>

However, while the Assembly had strengthened the search process, during the subsequent process of consultations seeking to identify a consensus candidate,<sup>284</sup> some States Parties objected to the Committee’s shortlist arguing that other candidates should be considered. With no consensus on one of the four shortlisted by the Committee, the Bureau decided to expand the list of candidates to include all 14 of those interviewed by the Committee.<sup>285</sup> Five of those who had not been originally shortlisted withdrew their applications at this stage.<sup>286</sup>

Following intense consultations to reach consensus, on 8 February 2021, the President of the Assembly informed States Parties that despite best efforts, it had not been able to obtain consensus on one candidate.<sup>287</sup> Four of the candidates were nominated for an election held on 12 February 2021. Karim Khan was elected ICC Prosecutor in the second round having received 72 of the 122 votes cast.

By contrast, the process for electing Deputy Prosecutors, including the last election in 2012 has been relatively straightforward and less controversial. As the Prosecutor is mandated to nominate the three candidates for the position of Deputy Prosecutor, the advertisement, promotion, shortlisting and interviewing were all conducted by the Court. Notably the process of assessing the candidates was more rigorous than for the Prosecutor. In addition to being interviewed, candidates in 2012 were tested on their legal and managerial skills and capabilities, including providing written responses to questions and meeting individually for in-depth discussions with senior staff of the Office.<sup>288</sup> A shortlist of three candidates was presented to the Assembly and the Deputy Prosecutor was elected through a series of ballots.

*Recommendation 30: States Parties should support a review of the procedures to nominate and elect the Prosecutor as soon as possible, including a thorough vetting process of all candidates under consideration.*

The 2020/2021 election of the Prosecutor confirms that States Parties do not agree on the most effective procedure to elect the ICC Prosecutor. Without consensus on the procedure, efforts to find consensus on a candidate risks becoming a purely political process in which the merit of applications can be lost. Moreover, when disputes relating to procedure emerge during elections, it undermines the integrity of the election and risks damaging the credibility of the Court.

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281 *Ibid*, para 26.

282 *Ibid*, para 31.

283 *Ibid*, paras 46–54.

284 *Note verbale*, ICC-ASP/19/SP/38, 1 July 2020; *Letter from the President of the Assembly, Consultations on a consensus candidate for Prosecutor*, ASP/2020/31, 7 August 2020.

285 Bureau of the Assembly, *Election of the Prosecutor: Way forward*, 13 November 2020.

286 *Report of the Committee on the Election of the Prosecutor: Addendum: Appraisals of additional candidates*, ICC-ASP/19/INF.2/Add 3, 25 November 2020, para 6.

287 *Election of the Prosecutor of the International Criminal Court: Note by the Secretariat*, ICC-ASP/19/19, 11 February 2021, para 11.

288 *Election of the Deputy Prosecutor of the International Criminal Court*, ICC-ASP/11/17, 12 September 2012, Annex.

At its 19th session, the Assembly called on the Bureau to examine ways to continue strengthening the process by which the Prosecutor is elected<sup>289</sup> and the Bureau initiated a lessons learnt exercise of the Prosecutor's selection process in 2021.<sup>290</sup> Although the election of the next Prosecutor is not expected to take place for nine years, the Assembly should prioritise this review of existing procedures, in order to establish a detailed process that has the support of all States Parties well before the next election process starts.

Any procedure adopted should include a global search for highly qualified candidates, with an emphasis on identifying qualified female candidates.<sup>291</sup> Considering the inadequate vetting measures taken in elections to date, a robust examination of all candidates should be conducted in future elections. In particular, States Parties should support the Committee's recommendation:

'... that future processes for the election of candidates, including candidates nominated for a position by States Parties, include a provision for the vetting of candidates *ab initio*, with clearly outlined parameters and modalities as well as an indication at which point vetting would be triggered.'<sup>292</sup>

This should include a mechanism for third parties to share information regarding inappropriate conduct (including bullying and sexual harassment), with full protection for the confidentiality of the complainant and the candidate and procedures that reflect due process.

The process should include efforts to reach consensus on one candidate. However, if that does not prove possible, the Assembly should proceed to an election.

*Recommendation 31: States Parties should promote vacancies for the Prosecutor and Deputy Prosecutor nationally so that more highly qualified candidates, in particular women, can apply.*

Despite the Committee's efforts to promote the vacancy announcement for the Prosecutor in 2019, only 29 per cent of applicants were female and significantly fewer applications were received from Asia-Pacific, Eastern Europe, the Caribbean and Latin America than Africa, Western European and other states.<sup>293</sup> The Committee recommended that further efforts be undertaken by the Bureau and by States Parties to encourage applications from women and candidates from these regional groups in future selection and election processes.<sup>294</sup>

States Parties can play an important role in addressing this imbalance by assisting the Court in disseminating vacancy announcements for Prosecutor and Deputy Prosecutor nationally. Vacancy announcements are circulated to States Parties in advance of elections with a request to disseminate it through appropriate professional or institutional channels, with a view to reaching the widest possible and cross-regional audience of criminal justice professionals.<sup>295</sup>

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289 *Strengthening the International Criminal Court and the Assembly of States Parties*, ICC-ASP/19/Res 6, para 78.

290 See Bureau, Agenda and Decisions, Second Meeting, 8 April 2021 and Third Meeting, 12 May 2021.

291 In supporting the ICC and ASP's efforts to ensure gender equality at all levels of the Court, the IBA intends our recommendations to be inclusive of other groups including trans and non-binary people.

292 *Report of the Committee on the Election of the Prosecutor* (n 277), para 32.

293 *Ibid*, para 18.

294 *Ibid*, para 42.

295 *Ibid*, para 16.

#### 1.4.4 Provide recommendations to the ICC judges on the election of the Registrar

Article 43(4) of the Rome Statute provides that the judges shall elect the Registrar by an absolute majority by secret ballot, taking into account any recommendation by the Assembly. In practice, after advertising the position, the Presidency establishes a list of candidates who satisfy the criteria laid down in the Statute (high moral character, highly competent and excellent knowledge of English or French)<sup>296</sup> and transmits it to the Assembly with a request for any recommendations.<sup>297</sup> In the elections of registrars so far, the Assembly has not provided recommendations in relation to specific candidates. Instead, it has recommended specific additional criteria that should be considered in electing the Registrar.<sup>298</sup> The President then transmits the list, together with any recommendations from the Assembly to the judges for an election to be conducted during plenary.<sup>299</sup> The same procedure appears to apply to the election of a Deputy Registrar, although one has not been appointed since 2008.<sup>300</sup>

The Independent Expert Review noted concerns by Court officials and civil society that the current system for electing the Registrar is inadequate considering the high-level responsibilities of the role. The Experts considered the process ought to be more thorough and that States Parties should play a stronger role in the process, in line with the provisions of the Rome Statute. They recommended:

‘The ASP [...] should carry out a selection process with the assistance of an expert committee that would vet candidates, perform background checks, carry out interviews, and present a shortlist to the States Parties. The ASP would then vote to confirm a shortlist of candidates before it is transmitted to the Judges for their decision. The same procedure would be followed in the case of a Deputy Registrar, if one is to be elected.’<sup>301</sup>

They also recommended that, in the long term, States Parties should consider amending the Statute to limit the Registrar’s term to a seven to nine years non-renewable mandate.<sup>302</sup> Currently, the Registrar is elected for a term of five years and is eligible for re-election once.<sup>303</sup>

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296 Rome Statute, Article 43(3).

297 ICC Rules of Procedure and Evidence, Rule 12(1).

298 Magda Karagiannakis, ‘Article 42’ in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016), 1284. See, for example, *Recommendation concerning the election of the Registrar of the International Criminal Court*, ICC-ASP/16/Rec 1, 14 December 2017.

299 ICC Rules of Procedure and Evidence, Rule 12(1).

300 Rome Statute, Article 43(3) states: ‘If the need arises and upon the recommendation of the Registrar, the judges shall elect, in the same manner, a Deputy Registrar.’

301 *IER Final Report* (n 2), R76.

302 *IER Final Report* (n 2), R78.

303 Rome Statute, Article 43(5).

*Recommendation 32: States Parties should support measures to strengthen the process of electing the Registrar and Deputy Registrar that are consistent with the Rome Statute, including thorough vetting process of all candidates under consideration.*

While there are no doubt ways in which the election process can and should be strengthened, including encouraging more highly qualified women to apply,<sup>304</sup> as the Court has emphasised,<sup>305</sup> State Parties should ensure that any changes to the procedures are consistent with the Statute. Recognising that the procedures for electing the Registrar and Deputy Registrar in Article 43(4) and the provisions on the terms of office in Article 43(5) are not included in the list of provisions of an exclusively institutional nature in Article 122,<sup>306</sup> these provisions can only be amended by applying the onerous amendment procedure in Article 121(4).<sup>307</sup> However, the very broad criteria that candidates must meet to be appointed Registrar and Deputy Registrar in Article 43(3) is listed in Article 122 and could be further developed through an amendment, if there is sufficient support by States Parties.

Although the process proposed by the Experts for the Assembly to establish an expert committee to identify a short list of candidates has some advantages, the Assembly should consider whether that process would be more effective and transparent compared to the Court's current process of promoting the vacancy and shortlisting candidates.

Moreover, if the Experts' proposal is implemented, given that Article 43(4) clearly limits the Assembly's role to providing recommendations to judges who conduct the election, the procedure should recognise that any shortlist transmitted by the Assembly to the judges must be taken into account by the judges, but the judges are not bound by the shortlist.

To ensure that those elected meet the requirement of high moral character, the IBA additionally calls for the establishment of a thorough vetting process for each candidate and a mechanism for third parties to share information regarding inappropriate conduct (including bullying and sexual harassment), with full protection for the confidentiality of the information provider and candidates, and procedures that reflect due process (see Recommendation 24).

## Useful resources on ICC elections



### Websites

- Assembly of States Parties Election of Judges webpages: [https://asp.icc-cpi.int/EN\\_Menus/asp/elections/judges/2020/pages/default.aspx](https://asp.icc-cpi.int/EN_Menus/asp/elections/judges/2020/pages/default.aspx).
- Assembly of States Parties Election of the Prosecutor and Deputy Prosecutors webpages: [https://asp.icc-cpi.int/en\\_menus/asp/elections/prosecutor/Pages/default.aspx](https://asp.icc-cpi.int/en_menus/asp/elections/prosecutor/Pages/default.aspx).

<sup>304</sup> ICC's Response to the IER Report (n 97), para 179, the Court states: '[in recent elections] there has been a clear majority of male applicants. It is suggested that any reform to the election process could focus on encouraging a broader range of qualified applicants, particularly including nationals of all regional groups, as well as female applicants'.

<sup>305</sup> ICC's Response to the IER Report (n 97), para 176.

<sup>306</sup> Roger S Clark, 'Article 122', in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016), 2306: 'There is no room for argument about which features of the Statute can be amended by the streamlined procedure. The list is introduced by the word "namely" that makes it clear that it is an exclusive list, no more, no less.'

<sup>307</sup> Article 121(4) requires that the amendment be adopted by two-thirds of the Assembly and that it shall only enter into force one year after seven-eighths of States Parties deposit instruments of ratification or acceptance with the UN Secretary-General.



## Official Documents

- Assembly of States Parties Election of the Registrar webpages: [https://asp.icc-cpi.int/en\\_menus/asp/elections/Registrar/Pages/default.aspx](https://asp.icc-cpi.int/en_menus/asp/elections/Registrar/Pages/default.aspx).
- Procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP19/NV-Judges-elections2020-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/NV-Judges-elections2020-ENG.pdf).
- *Independent Expert Review: Final Report* (Election of Registrar and Deputy Registrar section at 59–61; Election of ICC Judges section at 316–325): [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP19/IER-Final-Report-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf).
- Overall Response of the ICC to the Independent Expert Review (Election of Registrar and Deputy Registrar section at 34–36): [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP20/Overall%20Response%20of%20the%20ICC%20to%20the%20IER%20Final%20Report%20-%20ENG%20-%202014April21.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP20/Overall%20Response%20of%20the%20ICC%20to%20the%20IER%20Final%20Report%20-%20ENG%20-%202014April21.pdf).
- Report of the Evaluation of the process on the election of the Prosecutor, ICC-ASP/12/58, 15 November 2013: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP12/ICC-ASP-12-58-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-58-ENG.pdf).



## Guides

- Informal Guide and Commentary to the Procedure for the nomination and election of judges of the International Criminal Court, ICC-ASP/16/INF.2: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP16/ICC-ASP-16-INF2-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ICC-ASP-16-INF2-ENG.pdf).
- Amnesty International’s Checklist to ensure the nomination of the highest qualified candidates for judges: [www.amnesty.org/download/Documents/120000/ior400232002en.pdf](http://www.amnesty.org/download/Documents/120000/ior400232002en.pdf).



## Reports

- Open Society Justice Initiative, *Raising the Bar: Improving the Nomination and Election of Judges to the International Criminal Court*: [www.justiceinitiative.org/uploads/7627a69c-dc69-43da-a58c-c66162f1c2b0/raising-the-bar-20191028.pdf](http://www.justiceinitiative.org/uploads/7627a69c-dc69-43da-a58c-c66162f1c2b0/raising-the-bar-20191028.pdf).



## Commentaries

- Ruth Mackenzie, Kate Malleson, Penny Martin, and Philippe Sands QC, *Selecting International Judges: Principle, Process, and Politics* (Oxford University Press, 2010).
- Rosemary Grey, Kcasey McLoughlin and Louise Chappell, ‘Gender and judging at the International Criminal Court: Lessons from ‘feminist judgment projects’, *34 Leiden Journal of International Law* (2021), 247–264.
- Magda Karagiannakis, ‘Article 42’ in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016), 1283–1284.

## 1.5 The Assembly's legislative role

The Assembly is responsible for deciding whether to amend the ICC's three primary sources of applicable law: the Rome Statute,<sup>308</sup> the Rules of Procedure and Evidence<sup>309</sup> and the Elements of Crimes.<sup>310</sup> Unlike previous international criminal tribunals, which permitted the judges to amend rules of procedure and evidence, Article 51 (2) reflects the view widely expressed in drafting the Statute that entrusting to the ICC judges the formulation of its Rules would be inappropriate in a treaty regime based on the consent of States Parties.<sup>311</sup>

In the lead up to the Review Conference of the Rome Statute in 2009, the Assembly established a Working Group on Amendments in New York to consider amendments to the Statute and the Rules of Procedure and Evidence.<sup>312</sup> The Working Group undertakes a preliminary examination of amendment proposals and makes recommendations to the Assembly as to whether there is sufficient support for them to be taken up by the Assembly at its forthcoming session.<sup>313</sup>

*Recommendation 33: States Parties should only propose or support amendments to the Statute, Rules of Procedure and Evidence and Elements of Crimes that strengthen the ICC's ability to address impunity.*

It is implicit, consistent with the principle of *pacta sunt servanda*, that, in deciding whether to adopt, ratify or accept proposals to amend the legal framework, States Parties should only propose or support amendments that will strengthen the ICC and the Rome Statute system's contribution towards ending impunity. This is reflected in the Working Group on Amendments' Terms of Reference, which state that the Working Group considers 'with special attention amendment proposals that aim to improve the effective and efficient functioning of the Court.'<sup>314</sup> In particular, amendments should be consistent with the rights of accused persons, victims and witnesses in the Rome Statute, as well as Article 21 (3) which requires that the ICC shall interpret and apply the law consistent with internationally recognised human rights and without adverse distinction.

### 1.5.1 Amending the Statute

Any State Party can propose amendments to the Rome Statute. However, the requirements for amending the Statute are deliberately restrictive.

- Amendments to Rome Statute crimes, including the addition of new crimes, require adoption by two-thirds of the Assembly and enter into force for each State Party one year after they ratify them.<sup>315</sup>

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308 Rome Statute, Article 121 and 122.

309 Rome Statute, Article 51 (2).

310 Rome Statute, Article 9(2).

311 Bruce Broomhall, 'Article 51' in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016), 1349.

312 *Review Conference*, ICC-ASP/8/Res 6, 26 November 2009.

313 *Terms of reference of the Working Group on Amendments*, paras 1 and 6.

314 *Ibid*, para 8.

315 Rome Statute, Article 121(5).

- A small number of specified Articles of the Statute of an ‘institutional nature’ may be amended by a two-thirds majority of the Assembly and enter into force six months later.<sup>316</sup>
- Amendments of all other Articles of the Statute must be adopted by two-thirds of the Assembly and will only enter into force if seven-eighths of the Assembly ratify or accept the amendment by depositing instruments of ratification or acceptance with the United Nations Secretary-General<sup>317</sup> – a threshold that is impossible to achieve without a coordinated and prioritised effort by the vast majority of States Parties.

These provisions balance the need for the Rome Statute to evolve but at the same time protect the compromises reached during the Rome negotiations.

*Recommendation 34: States Parties should ratify amendments to the Rome Statute that have been adopted by the Assembly so far.*

Since the Review Conference of the Rome Statute in 2010, amendments have been adopted expanding the crimes covered by the Rome Statute. However, as of July 2021, only a small number of States Parties have ratified or accepted them:

- the crime of aggression (41 States Parties);<sup>318</sup>
- the war crime in non-international armed conflict of employing poison or poisoned weapons (40 States Parties);<sup>319</sup>
- the war crime in non-international armed conflict of employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices (40 States Parties);<sup>320</sup>
- the war crime in non-international armed conflict of employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions (40 States Parties);<sup>321</sup>
- the war crime in both international and non-international armed conflict of employing weapons, which use microbial or other biological agents, or toxins, whatever their origin or method of production (nine States Parties);<sup>322</sup>
- the war crime in both international and non-international armed conflict of employing weapons the primary effect of which is to injure by fragments which in the human body escape detection by X-rays (nine States Parties);<sup>323</sup>

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316 Rome Statute, Article 122. This procedure applies only in relation to amendments to Articles 35, 36(8) and (9), 37, 38, 39(1) (first two sentences) (2) and (4), 42(4) – (9), 43(2) and (3), 44, 46, 47 and 49.

317 Rome Statute, Article 121(3) and (4).

318 *The Crime of Aggression*, Resolution RC/Res 6, 11 June 2010.

319 *Amendments to Article 8 of the Rome Statute*, Resolution RC/Res 5, 10 June 2020.

320 *Ibid.*

321 *Ibid.*

322 *Resolution on amendments to Article 8 of the Rome Statute of the International Criminal Court*, ICC-ASP/16/Res 4, 14 December 2017.

323 *Ibid.*

- the war crime in both international and non-international armed conflict of employing laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices (nine States Parties);<sup>324</sup> and
- the war crime in non-international armed conflict of intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies (six States Parties).<sup>325</sup>

Given that the provisions for amending Rome Statute crimes in Article 121(5) state that the Court shall not exercise jurisdiction over these crimes when they are committed by the nationals or on the territory of States Parties that have not accepted or ratified the amendments, lack of ratifications of these amendments means that the Court's ability to prosecute these heinous crimes is severely restricted.

The Assembly has also adopted an amendment deleting the transitional provision in Article 124, which allows a state on becoming a party to the Rome Statute to declare that it does not accept the jurisdiction of the Court with respect to war crimes for a period of seven years.<sup>326</sup> Despite this being the first time that the Assembly has adopted an amendment of a provision of the Rome Statute which requires that seven-eighths of States Parties ratify or accept the amendment for it to enter into force for all States Parties, five years later only 15 States Parties have done so.

Having adopted these amendments by consensus to strengthen the Rome Statute, all States Parties should proceed to ratify or accept them as soon as possible.

States ratifying or acceding to the Rome Statute should consider ratifying all amendments at the same time. The United Nations Treaty Section advises that states seeking to take this approach should clearly list each amendment they accept or ratify in their instrument ratifying or acceding to the Rome Statute.

*Recommendation 35: States Parties should oppose provisions in future resolutions adopting new crimes that seek to preclude the ICC from investigating and prosecuting new or amended crimes committed by the nationals of states that are not parties to the Rome Statute.*

So far, in each of its resolutions adopting amendments expanding the list of war crimes in the Rome Statute, the Assembly has noted that Article 121(5) states:

‘In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that States Party's nationals or on its territory.’

This means that States Parties that ratify or accept the amendment accept the Court's jurisdiction over such crimes that are committed on its territory by its nationals or the nationals of other States Parties that have accepted the amendment and crimes committed by its nationals on the territory of other States Parties that have accepted the amendment. They do not benefit from the same level of protection provided for Rome Statute crimes adopted in 1998, over which the ICC has jurisdiction if they are committed by a State Party's nationals anywhere or on the States Party's territory by the nationals of any state. While this

<sup>324</sup> *Ibid.*

<sup>325</sup> *Resolution on amendments to Article 8 of the Rome Statute of the International Criminal Court, ICC-ASP/18/Res 5, 6 December 2019.*

<sup>326</sup> *Resolution on Article 124, ICC-ASP/14/Res 2, 26 November 2015.*

narrow effect of accepting an amendment is regrettable, it is clearly provided for in the Rome Statute. This further demonstrates the importance of all States Parties ratifying or accepting amendments adopted by the Assembly adding new crimes (see Recommendation 34).

However, the Assembly's resolutions adopting amendments to date go further, 'confirming its understanding' that:

'... in respect of this amendment, the same principle that applies in respect of a State Party which has not accepted this amendment applies also in respect of States that are not Parties to the Statute...'

Although this arguably reflects the views of States Parties now, a plain reading of Article 121(5), which omits any reference to states that are not parties to the Rome Statute, means that the limitations of the ICC's jurisdiction only apply to States Parties that have not accepted the amendment. In any case, barring the Assembly's amendment of Article 121(5), it is ultimately up to the ICC to decide the matter should such circumstances arise.<sup>327</sup>

The Assembly's efforts in these resolutions to shield the nationals of states that are not parties to the Rome Statute who commit such serious crimes is concerning. Heller opines the Assembly's decision to include this understanding in the resolutions:

'...was a political choice, not a legal one. There is absolutely no legal reason why the ASP could not have applied the Court's normal territorial jurisdiction regime to the new crimes.'<sup>328</sup>

If the Assembly is truly determined to put an end to impunity for the most serious crimes of concern to the international community, it should seek to maximise the ICC's efforts to address crimes added to the Rome Statute, rather than curtail the Court's jurisdiction over such crimes. States Parties should oppose including similar statements of understanding in resolutions adopting new crimes in the future.

### 1.5.2 Amending the Rules of Procedure and Evidence and Elements of Crimes

The procedures for amending the Rules of Procedure and Evidence and the Elements of Crimes are less onerous. Amendments may be proposed by any State Party, the judges acting by an absolute majority or the Prosecutor.<sup>329</sup> All amendments must be adopted by a two-thirds majority of members of the Assembly.<sup>330</sup>

The Statute expressly requires that amendments to the Rules of Procedure and Evidence and the Elements of Crimes must be consistent with the Statute.<sup>331</sup> This reflects the primacy of the Statute over the Rules and the Elements and confirms that States Parties must not adopt amendments to the Rules and Elements, which would in effect amend or lead to a conflict with the Rome Statute.

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327 For further analysis see Kevin Jon Heller, *Why the New Weapons Amendments (Should) Apply to Non-States Parties*, *Opinio Juris*, 2 January 2018.

328 Kevin Jon Heller, 'The Rome Statute's Flawed Amendment Regime – Starvation in NIAC Edition', *Opinio Juris*, 7 December 2019.

329 Rome Statute, Articles 9(3) and 51(2).

330 Rome Statute, Articles 9(3) and 51(2).

331 Rome Statute, Articles 51(4) and 9(3).

To date, the Elements of Crimes have been amended only to define the elements of the new crimes adopted as amendments to the Statute. Eight amendments to the Rules of Procedure and Evidence have also been adopted.<sup>332</sup> However, other Rule amendments proposed by the Court have not been taken forward and have remained under consideration by the Working Group on Amendments without a decision for a number of years.

*Recommendation 36: States Parties should support a thorough review of the Assembly's procedures for considering and deciding on proposals to amend the Rules of Procedure and Evidence.*

The Independent Expert Review of the ICC and the Rome Statute system criticised the Assembly's handling of the outstanding proposals by the Court to amend the Rules of Procedure and Evidence, based largely on the Assembly's failure to vote on the amendments when consensus could not be achieved. Those proposals remain under consideration by the Working Group on Amendments indefinitely. The Experts concluded:

‘Bearing in mind the need for a reliable and readily accessible mechanism for amending the RPE to ensure the efficient, effective and fair conduct of Court proceedings, it is now appropriate for the power to amend the RPE to be transferred to the plenary of Judges, the body best-placed and best-qualified to know what amendments should be made in keeping with the aim of guaranteeing fair and expeditious proceedings.’<sup>333</sup>

To achieve this, the Experts recommended an amendment to Article 51 (2).<sup>334</sup> Although the ICC judiciary welcomes this recommendation,<sup>335</sup> such an amendment would require adoption by two-thirds of the Assembly followed by ratification or acceptance by seven-eighths of the Assembly, which may not be achievable.

Alternatively, consideration should be given to reviewing the Assembly's procedures for considering amendments proposed by the Court to ensure that they are given full and proper consideration and a decision is taken promptly on whether to adopt them or not. As the Experts note, the plenary of judges is well placed and qualified to propose amendments and their proposal should be given serious attention by the Assembly. While adopting amendments by consensus is always preferable, it is also important that if consensus cannot be achieved, a vote should be conducted, as foreseen in Article 51, to determine whether the amendment can be adopted with the support of two-thirds of States Parties.

*Recommendation 37: States Parties should ensure that any amendments to the Rules of Procedure and Evidence are consistent with the Rome Statute and internationally recognised human rights.*

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<sup>332</sup> Amendments to rule 4 of the Rules of Procedure and Evidence, ICC-ASP/10/Res 1, 20 December 2011; Amendment of the Rules of Procedure and Evidence [amending Rule 132], ICC-ASP/11/Res 2, 21 November 2012; Amendments to the Rules of Procedure and Evidence [amending Rules 100, 68 and 134], ICC-ASP/12/Res 7, 27 November 2013; Amendments to rule 101 and rule 144 (2) (b) of the Rules of Procedure and Evidence, ICC-ASP/15/Res.4, 26 November 2016; Resolution on amendments to rule 26 of the Rules of Procedure and Evidence, ICC-ASP/17/Res 2, 11 December 2018.

<sup>333</sup> *IER Final Report* (n 2), para 986.

<sup>334</sup> *IER Final Report* (n 2), R381.

<sup>335</sup> ICC's Response to the IER Report (n 97), para 691.

Recognising that some of the stalled amendment proposals raised fair trial concerns for some States Parties<sup>336</sup> and NGOs,<sup>337</sup> it is important that the procedure developed by the Assembly to review and decide amendments proposals, ensures that amendments adopted by the Assembly are consistent with the Statute. This includes the Statute's provisions on the rights of the accused, victims and witnesses and the rule in Article 21 (3) that the law must be interpreted and applied consistent with internationally recognised human rights and without adverse distinction.

Article 51 (4) expressly requires that all amendments to the Rules must be consistent with the Rome Statute. Article 51 (5) confirms that '[i]n the event of a conflict, between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail.'<sup>338</sup> Therefore, States Parties must be diligent to ensure that rule amendments do not seek to amend the Rome Statute, which would undermine the integrity of the Rome Statute, including the strict amendments procedure to amend it (see Section 1.5.1). Any amendments that weaken the application of the rights of accused persons, victims and witnesses in the Statute or which are inconsistent with internationally recognised human rights would undermine the credibility and legitimacy of the Court.

These requirements establish clear lines that the Assembly must not cross, which should be a primary consideration of States Parties in deciding whether to support amendments or not. However, the Assembly's current procedures for reviewing amendments only provide for translating proposals into the official languages of the Court and transmitting it to States Parties.<sup>339</sup> To inform their decision-making, States Parties should support the further development of this procedure to, at a minimum:

- require that each proposal includes an analysis and statement of compliance with the Rome Statute and internationally recognised human rights;
- provide for a reasonable time period for States Parties, civil society or other experts to review the proposal and submit any questions, concerns or suggested amendments to the proposal; and
- require the proposers of the amendment to review and respond to the consultation submissions raised before the Working Group on Amendments begins its formal consideration of the amendment.

*Recommendation 38: States Parties should ensure that amendments to the Rules of Procedure and Evidence and the Elements of Crimes do not interfere with matters under consideration by the ICC (sub judice) and that amendments to the Elements of Crimes are consistent with the principle of nullum crimen sine lege.*

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336 See, for example, *Report of the Working Group on Amendments*, ICC-ASP/15/24, 8 November 2016, at 4–7.

337 See, for example, Amnesty International, 'Amendments to Rule 165 of the International Criminal Court's Rules of Procedure and Evidence must ensure fair trials and the rights of the accused', 28 September 2016, available at: [www.amnesty.org/download/Documents/IOR5349102016ENGLISH.pdf](http://www.amnesty.org/download/Documents/IOR5349102016ENGLISH.pdf).

338 David Donat-Cattin, 'Decision-Making in the International Criminal Court: Functions of the Assembly of States Parties and Independence of the Court's Judicial organs', in Flavia Lattanzi and William Schabas (eds), *Essays on the Rome Statute of the ICC-Vol. II* (Il Sirente, Ripa di Fagnano Alto, 2004), page 76: '...the direct consequence of [the] prescription [of Article 51.5, Rome Statute] is that the [ICC] judges will have the authority to not apply the Rules that the Assembly would have adopted in contravention to the obligation of consistency with the Statute. The hierarchical relationship between the Statute and the Rules is therefore directly enforceable by the ICC judiciary, which may be seen as acting in the capacity of a modern 'constitutional-control' organ, even if the judges can not declare null and void a given rule that they have declared inapplicable to the single case. This power of the judges imposes on the Assembly stringent criteria of adherence with the Rome Statute when the Assembly exercises its rules-making authority.'

339 Rules of Procedure of the Assembly of States Parties, Rule 73.

To ensure that the Assembly respects the judicial independence of the Court, it should defer the consideration of any proposals for amendments that are related to matters under consideration by the Court until after the Court has made its determination.

Although amendments to the Elements of Crimes are clearly required when a new crime is added to the Rome Statute, States Parties should exercise caution in considering any proposals to amend existing elements of crimes. In particular, States Parties should ensure that any such proposals are consistent with the principle of *nullum crimen sine lege* in relation to persons currently being prosecuted by the Court for the crimes. They should also consider the impact of such changes in relation to cases previously adjudicated by the Court.<sup>340</sup>

### 1.5.3 Settling disputes or making recommendations to settle disputes between two or more States Parties relating to the interpretation or application of the Rome Statute

The role of the Assembly in settling disputes relating to the interpretation or application of the Rome Statute is extremely limited. Article 119(1) is clear that any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court. The Assembly only has a role in relation to disputes between States Parties relating to the interpretation or application of the Rome Statute that are not judicial and which have not been settled through negotiations.<sup>341</sup> To date, no such disputes have reached the Assembly.

*Recommendation 39: States Parties should ensure that all disputes concerning the judicial functions of the Court are decided by the Court.*

The line between disputes relating to judicial functions of the Court that must be decided by the Court and other disputes between States Parties regarding the interpretation and application of the Rome Statute which may be settled by the Assembly should be interpreted strictly, ensuring that the Assembly does not interfere with the judicial independence of the Court. As Clark opines:

‘My understanding from participating in the drafting process, is that, at the least, anything that could be said to have some relationship, however tenuous, to prosecution of an individual or group of individuals on the basis of a concrete complaint of a breach of the Statute, would be included in the notion of judicial functions.’<sup>342</sup>

### Useful Resources on the amendments to the legal framework



#### Websites

- Working Group on Amendments webpage: [https://asp.icc-cpi.int/en\\_menus/asp/WGA/Pages/default.aspx](https://asp.icc-cpi.int/en_menus/asp/WGA/Pages/default.aspx).

<sup>340</sup> Erkin Gadirov and Roger S Clark, ‘Article 9’ in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016), 641.

<sup>341</sup> Roger S Clark, ‘Article 119’ in Triffterer and Ambos (ed), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016), 2278 suggests the following brief list of disagreements might fit this category: disagreements about whether a particular candidate for election as a judge has the necessary qualifications; similar questions about potential prosecutors or registrars; decisions on removal from office of a judge, the Prosecutor or Deputy Prosecutor, the Registrar or Deputy Registrar; some questions of privileges and immunities; claims to protection of national security information where the State concerned and the Court have reached an impasse; disagreements concerning management of the Trust Fund which is to be created for the benefit of victims; a failure by a State to comply with a request to cooperate; and disagreements concerning the finances of the Court.

<sup>342</sup> *Ibid.*, 2276.



### Official Documents

- *Independent Expert Review: Final Report* (Development of the Rules of Procedure and Evidence section at 325–328): [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP19/IER-Final-Report-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf).
- Overall Response of the ICC to the Independent Expert Review (Development of the Rules of Procedure and Evidence section at 145–146): [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP20/Overall%20Response%20of%20the%20ICC%20to%20the%20IER%20Final%20Report%20-%20ENG%20-%202014April21.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP20/Overall%20Response%20of%20the%20ICC%20to%20the%20IER%20Final%20Report%20-%20ENG%20-%202014April21.pdf).



### Guides

- *Handbook on the Ratification and Implementation of the Kampala Amendments to the Rome Statute of the International Criminal Court*: <https://lisd.princeton.edu/publications/handbook-ratification-and-implementation-kampala-amendments-rome-statute-international>.



### Commentaries

- Erkin Gadirov and Roger Clark, ‘Article 9’ in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016), 641–643.
- Bruce Broomhall, ‘Article 51’ in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016), 1341–1344 and 1347–1348.
- Roger S Clark, ‘Article 121’ in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016), 2298–2304.
- Roger S Clark, ‘Article 122’ in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016), 2305–2307.
- Jonathan O’Donohue, ‘The International Criminal Court and the Assembly of States Parties’ in C Stahn (ed) *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015), 116–126.

## 1.6 Oversight of the Trust Fund for Victims

The Trust Fund for Victims was established in 2002 by the Assembly, in accordance with Article 79 of the Rome Statute, to benefit victims of crimes within the jurisdiction of the Court, and the families of such victims.<sup>343</sup> The activities and projects of the Trust Fund are directed by a pro bono Board of Directors made up of five members with competence in the assistance of victims of serious crimes, who are elected by the Assembly.<sup>344</sup> The Board is assisted by the Secretariat of the Trust Fund in carrying out its tasks.<sup>345</sup>

<sup>343</sup> *Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims*, ICC-ASP/1/Res 6, 9 September 2002.

<sup>344</sup> *Ibid*, Annex, para 3 and 7.

<sup>345</sup> *Establishment of the Secretariat of the Trust Fund for Victims*, ICC-ASP/3/Res 7, 10 September 2004.

Regulations of the Trust Fund adopted by the Assembly in 2005 mandate the Trust Fund: (1) to implement reparations orders of the Court, including when the convicted person lacks resources;<sup>346</sup> and (2) to provide projects of assistance involving physical and psychological rehabilitation or material support to victims of Rome Statute crimes in situations being investigated by the Court.<sup>347</sup> To fund these activities, the Trust Fund can solicit voluntary contributions from governments, international organisations, corporations and other entities.<sup>348</sup> The Court may also order money or other property collected through fines and forfeiture be transferred to the Trust Fund.<sup>349</sup>

At the time of publication, the Trust Fund is implementing three reparations orders in the *Lubanga*, *Katanga* and *Al Mahdi* cases. A further reparations order was issued in the *Ntaganda* case in March 2021; the Trust Fund is developing a draft implementation plan, due in September 2021, and an initial draft implementation plan based on existing projects, presented in June 2021, is awaiting approval by the Trial Chamber.<sup>350</sup> It has established projects of assistance for victims in Cote d'Ivoire, Democratic Republic of Congo and Uganda. In September 2020, it launched a pilot project to support victims and their families living in Bangui, Central African Republic (CAR) who are living in precarious conditions and suffering long-term harm as a result of sexual violence in conflict;<sup>351</sup> a full-fledged assistance programme in CAR was launched in February 2021. In November 2020, the Trust Fund announced that it approved starting assistance programmes for victims in Georgia, Kenya and Mali.<sup>352</sup> However, it has yet to fully fund reparations awards in the *Lubanga* and *Al Mahdi* cases or to launch projects of assistance to benefit victims in other ICC situations, citing both a lack of implementation capacity and financial resources.<sup>353</sup>

The Independent Expert Review raised concern about the expectations placed on the pro bono Board of Directors, the current level of oversight of the Trust Fund Secretariat, and the lack of an up-to-date strategic plan for the Trust Fund or a fundraising strategy.<sup>354</sup> The Experts concluded that, in its current set-up, the Trust Fund is overstretched and unable to carry out its reparations and assistance mandates effectively and meaningfully.<sup>355</sup> They recommended that the Trust Fund should focus on fundraising, administration of the funds and release of the funds as ordered by the Court,<sup>356</sup> and that its current responsibilities and resources related to implementing reparations orders and assistance projects should be gradually transferred to the Victims Participation and Reparations Section in the Registry.<sup>357</sup>

***Recommendation 40: States Parties should support measures to strengthen the existing structure and, therefore, the performance of the Trust Fund for Victims, by ensuring it has the capacity to implement all***

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346 *Regulations of the Trust Fund for Victims*, ICC-ASP/4/Res 3, Annex, para 50(b).

347 *Ibid*, para 50(a).

348 *Ibid*, para 23.

349 Rome Statute, Article 79(2).

350 ICC Press Release, 'Ntaganda case: ICC Trial Chamber VI orders reparations for victims', 8 March 2021.

351 'The Trust Fund for Victims Launches Assistance Pilot Project in Central African Republic', Press Release, 8 October 2020.

352 'Trust Fund for Victims to Open Assistance Programme in Georgia', Press Release, 1 December 2020; Decisions taken by the Board of Directors of the Trust Fund for Victims, September to December 2020, 4 March 2021.

353 *Report to the Assembly of States Parties on the projects and the activities of the Board of Directors of the Trust Fund for Victims for the period 1 July 2019 to 30 June 2020*, ICC-ASP/19/14, 16 September 2020, 3.

354 *IER Final Report* (n 2), paras 924–947.

355 *IER Final Report* (n 2), para 942.

356 *IER Final Report* (n 2), R354.

357 *IER Final Report* (n 2), R358.

*reparations orders effectively, when so directed by the Court, and carry out assistance projects for the benefit of victims in all situations.*

The Board of Directors of the Trust Fund have committed to implement a number of the Experts' recommendations, including: the adoption of a Trust Fund strategy document;<sup>358</sup> the development of a comprehensive and effective fundraising strategy;<sup>359</sup> and the development of a Policy on Working Methods of the Board and the Secretariat.<sup>360</sup> The Assembly should support these important developments, including engaging in the development of the fundraising strategy to consider what contributions national authorities can make (see Recommendations 41 and 42 below).

The Trust Fund has expressed that it is not in favour of the Experts' recommendation to transfer the role of implementing reparations orders and assistance projects to the Registry.<sup>361</sup> It considers that greater efficiency and effectiveness is being and can be further achieved within its existing structures.<sup>362</sup> Indeed, in making the recommendation, the Experts noted that such a change in structure carries risks of overwhelming the Registry and affecting ongoing reparations and assistance projects.<sup>363</sup> The Board of Directors also asks whether it might raise expectations of victims to receive reparations from the Court *as a judicial institution* while in fact they have a right to receive reparations *from the convicted person*.<sup>364</sup> These concerns and alternative options to strengthen the work of the Secretariat should be fully considered in assessing this recommendation to find the most effective and efficient solution. States Parties, therefore, should support the Board of Directors' suggestion that the Assembly, with the participation of the Board and all stakeholders may wish to hold serious and open discussions to find a common ground and clarity on the recommendations that relate to the Trust Fund for Victims' mandate.<sup>365</sup>

*Recommendation 41: States Parties should make annual voluntary contributions to the Trust Fund for Victims and encourage all States Parties, as well as public and private actors, to do so.*

To implement and complement the payment of all reparations orders and to expand assistance programmes to at least seven countries, the Trust Fund has set an ambitious goal to raise €40m by 2025.<sup>366</sup> As the following charts of voluntary contributions by states and individual institutions in the last five years demonstrate, this would require an almost fourfold increase in contributions.

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358 ICC's Response to the IER Report (n 97), Annex IV: Observations by the Board of Directors of the Trust Fund for Victims for the Attention of the Assembly of States Parties via the Review Mechanism, para 25(a), on implementing *IER Final Report*, R355.

359 *Ibid*, para 25(c), on implementing *IER Final Report*, R356.

360 *Ibid*, para 25(b), on partly implementing *IER Final Report*, R357. According to *Report to the Assembly of States Parties on the projects and the activities of the Board of Directors of the Trust Fund for Victims for the period 1 July 2020 to 30 June 2021*, ICC-ASP/20/14, 8 September 2021, para 22: on 6 July 2021, the Board provisionally adopted the Working Methods Policy and left it open for comments and views by the Registrar and States Parties before final adoption.

361 ICC's Response to the IER Report (n 97), para 676.

362 ICC's Response to the IER Report (n 97), para 676.

363 *IER Final Report* (n 2), para 947.

364 ICC Response to the IER Report (n 97), Annex IV, para 18.

365 *Ibid*, para 19.

366 *Report to the Assembly of States Parties on the projects and the activities of the Board of Directors of the Trust Fund for Victims for the period 1 July 2019 to 30 June 2020*, (n 353), para 6.

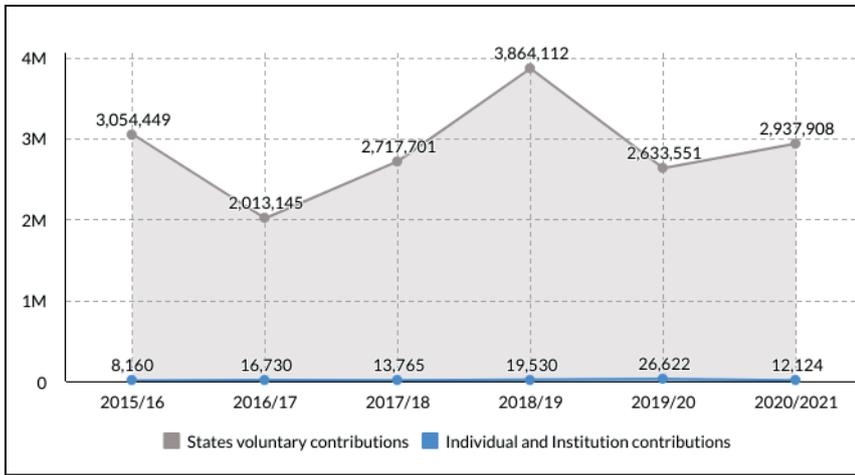


Figure 12: Voluntary contributions to the Trust Fund for Victims (2015-2021)

While the Trust Fund should enhance the development of its resources from other sources (see Recommendation 42 below), all States Parties should make voluntary contributions to ensure a strong, consistent and permanent resource base for the Trust Fund.

A total of 45 States Parties have made voluntary contributions to the Trust Fund since 2004<sup>367</sup> and the annual number of States Parties making contributions has increased in recent years.

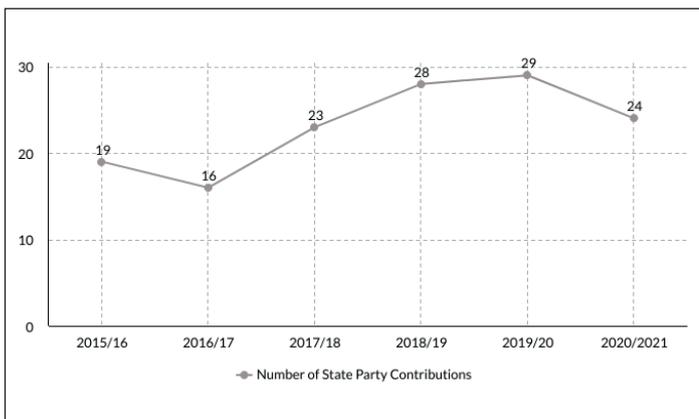


Figure 13: Number of State Parties that made voluntary contributions to the Trust Fund for Victims (2015-2021)

States Parties should support the development of further strategies to encourage regular annual contributions (regardless of their size) by as many States Parties as possible, to demonstrate their support for the Trust Fund. In particular, the Assembly should consider setting a target for annual contributions and suggesting that States Parties make a voluntary contribution equivalent to a percentage of their assessed contribution that should be included in the notice of assessed contributions sent to States Parties each year.

*Recommendation 42: States Parties should support the Trust Fund for Victims in establishing and implementing its fundraising strategy to secure donations from states, international organisations, corporations and other private entities, including promoting the Trust Fund nationally.*

<sup>367</sup> *Ibid*, 3.

States Parties should welcome and support the Trust Fund’s commitment to develop a fundraising strategy targeting other sources, as recommended in the Independent Expert Review.<sup>368</sup> Expanding the sources of contributions is essential if the Trust Fund is to achieve the resources necessary to fulfil its mandates effectively in all cases and situations.

Fundraising on a global scale is an intensive process and the current allocation of one Fundraising and Visibility Officer in the Trust Fund Secretariat alone is unlikely to make a significant impact in achieving the €40m target. States Parties should engage with the Trust Fund’s efforts to establish a fundraising strategy, ensuring that sufficient resources are allocated, and the necessary institutional support and practical assistance are provided to develop and implement this strategy effectively.

States Parties, therefore, should consider how they can support the development and delivery of an effective fundraising strategy. In particular, States Parties should consider facilitating contacts with national donors or fundraising initiatives (eg, national lotteries or telethons), ensure publicity to the Trust Fund’s fundraising initiatives and consider appropriate incentives for private donations to the Trust Fund (eg, tax-deductible donations). Initially, some States Parties could establish pilot projects aimed at promoting the Trust Fund nationally and develop guidelines based on their experience that other States Parties may follow.

## Useful Resources on the Trust Fund for Victims



### Websites

- Trust Fund for Victims website: [www.trustfundforvictims.org/en/home](http://www.trustfundforvictims.org/en/home).
- Regulations of the Trust Fund for Victims: [www.icc-cpi.int/NR/rdonlyres/0CE5967F-EADC-44C9-8CCA-7A7E9AC89C30/140126/ICCASP432Res3\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/0CE5967F-EADC-44C9-8CCA-7A7E9AC89C30/140126/ICCASP432Res3_English.pdf).



### Official Documents

- *Report to the Assembly of States Parties on the projects and the activities of the Board of Directors of the Trust Fund for Victims for the period 1 July 2020 to 30 June 2021*: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP20/ICC-ASP-20-14-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP20/ICC-ASP-20-14-ENG.pdf).
- Trust Fund for Victims Strategic Plan 2020-2021: [www.trustfundforvictims.org/sites/default/files/reports/TFV%20Strategic%20Plan%202020-2021.pdf](http://www.trustfundforvictims.org/sites/default/files/reports/TFV%20Strategic%20Plan%202020-2021.pdf).
- *Independent Expert Review: Final Report* (Trust Fund for Victims section at 305-311): [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP19/IER-Final-Report-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf).
- Overall Response of the ICC to the Independent Expert Review (Trust Fund for Victims section at 139-141; Observations of the Board of Directors at Annex IV): [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP20/Overall%20Response%20of%20the%20ICC%20to%20the%20IER%20Final%20Report%20-%20ENG%20-%2014April21.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP20/Overall%20Response%20of%20the%20ICC%20to%20the%20IER%20Final%20Report%20-%20ENG%20-%2014April21.pdf).



### Commentaries

- Anne Dutton and Fionnuala Ní Aoláin, ‘Between Reparations and Repair: Assessing the Work of the ICC Trust Fund for Victims Under Its Assistance Mandate’, (2019) *Chicago Journal of International Law* 490–547.

<sup>368</sup> *IER Final Report* (n 2), R356.

## PART 2: Establishing effective national frameworks to fulfil Rome Statute obligations

### 2.1 The need for effective national frameworks

The Assembly has emphasised that States Parties must fully and effectively implement the Rome Statute at the national level to comply with their obligations ‘if we are to end impunity for the perpetrators of the most serious crimes of international concern, contribute to the prevention of such crimes, and guarantee lasting respect for and enforcement of international justice.’<sup>369</sup>

National criminal laws and justice mechanisms should be reviewed and, where necessary, strengthened to ensure that national authorities can fulfil their primary obligation to investigate and prosecute Rome Statute crimes effectively in accordance with international law.<sup>370</sup> The principle of complementarity in the Rome Statute requires that the ICC may only step in when national authorities are genuinely unable or unwilling to do so. States Parties that establish strong legislation and national mechanisms ensure their contribution to the fight against impunity and allow the ICC to focus its limited resources on delivering justice in situations where impunity is entrenched.<sup>371</sup>

Implementation is also required to ensure that States Parties cooperate fully with the ICC when the Court investigates and prosecutes Rome Statute crimes. Indeed, the Court’s ability to fulfil its mandate is largely dependent on state cooperation with its investigations, the arrest and surrender of suspects, protection of victims and witnesses, ensuring that the rights of the accused are protected before, during and after trials, and implementing sentences and reparations orders. Article 88 requires States Parties to establish procedures in national law for providing all forms of cooperation set out in Part 9 of the Statute on international cooperation and judicial assistance.<sup>372</sup> Lack of implementing legislation is not, therefore, an acceptable excuse for non-cooperation. National implementing legislation must be developed by all States Parties providing a clear basis and procedures for prompt and effective national cooperation by national authorities. The Assembly has also adopted an Agreement on Privileges and Immunities and the Court has developed framework agreements for providing specific forms of cooperation (enforcement of sentences, victim and witness relocation and interim and final release) that all States Parties should enter into with the Court.

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369 *Strengthening the International Criminal Court and the Assembly of States Parties*, ICC-ASP/5/Res 3, Annex 1, Plan of Action of the Assembly of States Parties for achieving universality and full implementation of the Rome Statute of the International Criminal Court, paras 1–2.

370 In addition to states’ obligations to investigate crimes under international law arising from international human rights law, international humanitarian law and international criminal law, the Rome Statute Preamble recalls ‘that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes’; Article 1 states that the ICC ‘shall be complementary to national criminal jurisdictions’; Article 17 confirms that the ICC must only step in when a state is unwilling or unable genuinely to carry out the investigation or prosecution.

371 Mark S Ellis, ‘The International Criminal Court and Its Implication for Domestic Law and National Capacity Building’ (2002) 15 *Florida Journal of International Law* 215 at 223 stated:

‘states will likely aggressively and fairly pursue domestic prosecutions of international crimes so as not to trigger the jurisdiction of the ICC over the case and invite the glare of the eyes of the international community upon it.’

372 Rome Statute, Article 88 provides: ‘States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.’

The need for implementing legislation extends to all States Parties, including those with monist legal systems where the provision of international agreements ratified by that state are considered to apply directly in national law and to prevail over conflicting domestic provisions. Although the need for States Parties with such systems to enact implementing legislation in respect to international treaties is often questioned, Case Matrix Network notes, ‘most States are neither purely monist or purely dualist and, given that implementation is required in order to give effect to elements of procedure, such as specifying the competent national authority to execute cooperation requests, enacting legislation is both common and preferable.’<sup>373</sup>

The importance of full implementation by all States Parties has been emphasised by a number of actors:

- The Assembly has repeatedly urged States Parties to implement their obligations emanating from the Rome Statute, notably through implementing legislation, in particular in the areas of criminal law, criminal procedural law, and international cooperation and judicial assistance with the Court.<sup>374</sup> As examined in further detail in Part 3 below, the Assembly has also adopted a Plan of Action for achieving universality and full implementation of the Rome Statute, established 66 recommendations relating to cooperation and examined specific forms of cooperation.
- The ICC has repeatedly emphasised the challenges that it faces in obtaining cooperation, including highlighting key areas where state cooperation should be further developed. A report to the 19th session of the Assembly sets out 44 recommendations on the way forward to address many of the challenges the Court currently faces.<sup>375</sup>
- Some States Parties have actively promoted implementation of the Rome Statute as part of their efforts to contribute to the Assembly’s Plan of Action for achieving universality and full implementation of the Rome Statute, including offering technical assistance to other states.
- Some inter-governmental organisations, including the Organization of American States<sup>376</sup> and the European Union,<sup>377</sup> have called on their members to ratify and implement the Rome Statute.
- International and non-governmental organisations (including the IBA) have advocated for states to enact implementing legislation and enter into cooperation agreements with the Court, in some cases offering technical assistance.
- A number of implementation guides, manuals, checklists and model legislations have been developed by international and non-governmental organisations to assist states in reviewing national legislation and mechanisms (see Useful Resources on implementing the Rome Statute below).

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373 Case Matrix Network, *Implementing the Rome Statute of the International Criminal Court*, September 2017, 13.

374 See, for example, *Strengthening the International Criminal Court and the Assembly of States Parties*, ICC-ASP/19/Res 6, 16 December 2020, para 8.

375 *Report of the Court on Cooperation*, ICC-ASP/19/25, 28 October 2020.

376 See, for example AG/RES. 2364 (XXXVIII-O/08), *Promotion of the International Criminal Court*, (adopted at the fourth plenary session, held on June 3, 2008), paras 1–3.

377 See, for example Council of European Union, *Action Plan to follow-up on the Decision on the International Criminal Court*, 12 July 2011, <https://data.consilium.europa.eu/doc/document/ST-12080-2011-INIT/en/pdf>.

Despite these efforts, almost 20 years after the entry into force of the Rome Statute approximately only 54<sup>378</sup> of the 123 States Parties to the Rome Statute have amended their criminal laws so that national authorities can investigate and prosecute Rome Statute crimes and enacted legislation providing for cooperation with the ICC. A closer examination of many of those laws identifies flaws that could obstruct cooperation or prevent national prosecutions. Approximately another 17 States Parties have enacted legislation that only partly address their obligations in the Rome Statute.<sup>379</sup> Approximately 52 States Parties have no implementing legislation.<sup>380</sup> In recent years, the pace of implementation has slowed dramatically – only eight States Parties have enacted legislation since 2015.<sup>381</sup>

Of equal concern, only 77 States Parties and one state that has yet to accede to the Rome Statute<sup>382</sup> have ratified the Agreement on Privileges and Immunities of the ICC.<sup>383</sup> The vast majority of States Parties have yet to enter into cooperation agreements with the ICC regarding enforcement of sentences, victim and witness relocation, interim and final release.

*Recommendation 43: States Parties should review their national frameworks to ensure that they fulfil their obligations arising from the Rome Statute.*

The situation above highlights the urgent need for each State Party to review their national framework to ensure that they have fully implemented the Rome Statute. In particular:

- States Parties that have yet to review and amend their national criminal laws and enact legislation providing for cooperation should start the process without further delay, seeking technical assistance where required;<sup>384</sup>
- States Parties that have enacted legislation should conduct a periodic review of their legislation to ensure that it is as effective as possible, addressing any flaws in the original legislation, updating

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378 Albania; Argentina; Australia; Austria; Belgium; Benin; Bosnia and Herzegovina; Burkina Faso; Canada, Central African Republic; Comoros; Costa Rica; Croatia; Democratic Republic of Congo; Denmark; Ecuador; Estonia; Finland; France; Georgia; Germany; Greece; Guinea; Iceland; Ireland; Italy; Kenya; Latvia; Lithuania; Luxembourg; North Macedonia; Malta; Mauritius; Montenegro; The Netherlands; New Zealand; Norway; Paraguay; Poland; Republic of Korea; Romania; Samoa; Senegal; Serbia; Slovakia; Slovenia; South Africa; Spain; Sweden; Switzerland; Trinidad and Tobago; Uganda; UK; and Uruguay. This information has been gathered from publicly available sources. States Parties are encouraged to contact the IBA if any information is not accurate.

379 Afghanistan (complementarity); Bangladesh (complementarity); Bulgaria (cooperation); Cambodia (complementarity); Cape Verde (complementarity); Chile (complementarity); Colombia (complementarity); Côte d'Ivoire (complementarity); Czech Republic (complementarity); Dominican Republic (complementarity); Hungary (complementarity); Japan (cooperation); Liechtenstein (cooperation); Mali (complementarity); Panama (complementarity); Peru (cooperation); and Portugal (complementarity).

380 Andorra; Antigua and Barbuda; Barbados; Belize; Bolivia; Botswana; Brazil; Chad; Congo; Cook Islands; Cyprus; Djibouti; Dominica; El Salvador; Fiji; Gabon; Gambia; Ghana; Grenada; Guatemala; Guyana; Honduras; Jordan; Kiribati; Lesotho; Liberia; Madagascar; Malawi; Maldives; Marshall Islands; Mexico; Moldova; Mongolia; Namibia; Nauru; Niger; Nigeria; Palestine; San Marino; Seychelles; Sierra Leone; St. Kitts and Nevis; St. Lucia; St. Vincent and the Grenadines; Suriname; Tajikistan; Tanzania; Timor Leste; Tunisia; Vanuatu; Venezuela; and Zambia.

381 Austria; Benin; Cote d'Ivoire; Costa Rica; Democratic Republic of Congo; Dominican Republic; Guinea; and Paraguay.

382 Ukraine.

383 An up-to-date list of parties to the Agreement is available on the UN Treaty database: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-13&chapter=18&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-13&chapter=18&clang=_en).

384 As explained further in Part 3.1 below, the Assembly's Plan of Action for achieving universality and full implementation of the Rome Statute provides that the Secretariat can assist States Parties in identifying States Parties, international organisations or non-governmental organisations willing to provide technical assistance. For more information, States Parties should contact the ASP Secretariat: [asp@icc-cpi.int](mailto:asp@icc-cpi.int).

criminal laws to include amendments to Rome Statute crimes and enhancing cooperation legislation in line with the experience and recommendations of the ICC and the Assembly;<sup>385</sup>

- States Parties that have yet to ratify the Agreement on Privileges and Immunities of the ICC should do so without further delay; and
- States Parties that have yet to enter into cooperation agreements with the ICC should do so as soon as possible.

States Parties should additionally review national mechanisms that are responsible for investigating and prosecuting Rome Statute crimes and providing cooperation to the ICC to ensure that they can do so effectively. To ensure that national authorities cooperate fully with the Court, States Parties should review and implement the 66 recommendations of the Assembly and the 44 recommendations of the ICC on cooperation, and join or establish informal networks with national experts of other States Parties to share and learn from each other's experiences.

Guidelines issued by the Case Matrix Network note implementation is a complex process:

'Implementation takes time. Reviewing the compatibility of national provisions with international standards is not an easy task. Drafting and passing implementing legislation on substantive international criminal law and procedure is a complex and often protracted process. It requires expert knowledge and resources, which many States lack. International criminal law implementation is an unfamiliar and challenging process for most drafters of domestic legislation. These challenges are further exacerbated in less well-resourced jurisdictions, including post-conflict or transitioning States, where a lack of political will, legal expertise, institutional capacity, and a shortage of actors within the criminal justice system coupled with a potentially overwhelming number of crimes falling within the jurisdiction of the ICC, may be present.'<sup>386</sup>

Part 2 of this Guide examines the requirements of implementation in detail and seeks to provide detailed guidance to States Parties, drawing from and referring to existing resources and opportunities for technical assistance, where relevant.

## Useful resources on implementing the Rome Statute



### Websites

- National Implementing Legislation Database: <https://iccdb.hrlc.net/data>.
- Parliamentarians for Global Action: Rome Statute Implementation webpage: [www.pgaction.org/ilhr/rome-statute/implementation.html](http://www.pgaction.org/ilhr/rome-statute/implementation.html).

385 For example, a Rapporteur appointed by the Bureau has developed a draft Action Plan on arrest strategies, see: *Report of the Bureau on Cooperation*, ICC-ASP/14/26/Add 1, Annex IV: Report on the draft Action Plan on arrest strategies, submitted by the Rapporteur, Appendix: [Draft] Action Plan on arrest strategies submitted by the Rapporteur. The 2017 Declaration of Paris invited States Parties to the Rome Statute to consider the possibility of setting up, reviewing or strengthening the implementation of domestic cooperation laws, procedures and policies, to increase the ability of States Parties to cooperate fully with the ICC in the area of financial investigations and asset recovery, in accordance with the Rome Statute, see: *Resolution on Cooperation*, ICC-ASP/16/Res 2, 14 December 2017, Annex: Declaration of Paris. The Court has developed *Financial investigations and recovery of assets* (2017) as a guide for States Parties, including setting out best practices and areas for improvement: [www.icc-cpi.int/news/seminarBooks/Freezing\\_Assets\\_Eng\\_Web.pdf](http://www.icc-cpi.int/news/seminarBooks/Freezing_Assets_Eng_Web.pdf).

386 Case Matrix Network (n 373), 13.



Official Documents



Guides

- Plan of action of the Assembly of States Parties for achieving universality and full implementation of the Rome Statute of the International Criminal Court: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ICC-ASP-ASP5-Res-03-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP5-Res-03-ENG.pdf). (Annex I).
- Amnesty International – International Criminal Court: Updated Checklist for Effective Implementation (2010): [www.amnesty.org/en/documents/ior53/009/2010/en](http://www.amnesty.org/en/documents/ior53/009/2010/en).
- Arab League Model Law Project on Crimes within ICC Jurisdiction (2005): [www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/05/report/decreeregardingthe-arab-model-law-project-on-crimes-within-icc-jurisdiction/ArabLeague\\_ModelImplementationLaw\\_29Nov05\\_en.pdf](http://www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/05/report/decreeregardingthe-arab-model-law-project-on-crimes-within-icc-jurisdiction/ArabLeague_ModelImplementationLaw_29Nov05_en.pdf).
- Commonwealth Secretariat – *Revised Model Law: Rome Statute of the International Criminal Court* (2011): [https://thecommonwealth.org/sites/default/files/key\\_reform\\_pdfs/P15370\\_ROL\\_Model\\_Rome\\_Statute.pdf](https://thecommonwealth.org/sites/default/files/key_reform_pdfs/P15370_ROL_Model_Rome_Statute.pdf).
- Human Rights Watch – *Making the International Criminal Court Work: A handbook for implementing the Rome Statute* (2001): [www.hrw.org/legacy/campaigns/icc/docs/handbook\\_e.pdf](http://www.hrw.org/legacy/campaigns/icc/docs/handbook_e.pdf).
- International Centre for Criminal Law Reform and Criminal Justice Policy – *Manual for the Ratification and Implementation of the Rome Statute* (2008): version not available online.
- International Committee of the Red Cross – *The Domestic Implementation of International Humanitarian Law: A Manual* (2015): [www.icrc.org/en/doc/assets/files/publications/icrc-002-4028.pdf](http://www.icrc.org/en/doc/assets/files/publications/icrc-002-4028.pdf).
- Permanent Mission of the Principality of Liechtenstein, Global Institute for the Prevention of Aggression, Institute for International Peace and Security Law and Liechtenstein Institute on Self-Determination, *Handbook: Ratification and Implementation of the Kampala amendments to the Rome Statute of the ICC* (2019): <https://crimeofaggression.info/documents/1/handbook.pdf>.
- Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict – *Model Legislative Provisions and Guidance on Investigation and Prosecution of Conflict-Related Sexual Violence* (2021): <https://partnersinjustice.org/wp-content/uploads/2021/06/OSRSG-SVC-Model-Legislative-Provisions-ENG.pdf>.
- SADC *Model Enabling Law*: Not available online.
- Case Matrix Network – *Implementing the Rome Statute of the International Criminal Court* (2017): [www.legal-tools.org/doc/e05157/pdf](http://www.legal-tools.org/doc/e05157/pdf).
- Report of the Commonwealth Expert Group on *Implementing Legislation for the Rome Statute of the International Criminal Court* (2011): [https://thecommonwealth.org/sites/default/files/key\\_reform\\_pdfs/P15370\\_ROL\\_Model\\_Rome\\_Statute.pdf](https://thecommonwealth.org/sites/default/files/key_reform_pdfs/P15370_ROL_Model_Rome_Statute.pdf).
- Mark S Ellis, ‘The International Criminal Court and its implication for domestic law and national capacity building’ (2002) 15 *Florida Journal of International Law* 215.



Commentaries

## 2.2 Establishing effective national frameworks for complementarity

The Assembly has recalled in numerous resolutions:

‘... the primary responsibility of States to investigate and prosecute the most serious crimes of international concern and that, to this end, appropriate measures need to be adopted at the national level, and international cooperation and judicial assistance need to be strengthened, in order to ensure that national legal systems are willing and able genuinely to carry out investigations and prosecutions of such crimes.’<sup>387</sup>

Unless States Parties fulfil this primary responsibility, the fight against impunity is futile. Instead of performing its role as a Court of last resort, the ICC will be overwhelmed with situations and cases that it does not have the infrastructure or resources to address.

Bergsmo notes that implementing the principle of complementarity entails a two-fold requirement of national preparedness to deal with core international crimes: legislative capacity (see Section 2.2.1) and institutional capacity (see Section 2.2.2).<sup>388</sup>

### 2.2.1 The need for enacting or amending implementing legislation

Although Article 70 requires States Parties to extend their criminal laws to offences against the administration of justice (eg, corruptly influencing a witness), the Rome Statute is silent on whether States Parties have an obligation to implement the core crimes listed in Article 5 – genocide, crimes against humanity, war crimes and aggression. However, as the IBA (as well as other commentators) has previously argued:

‘...a purposive evaluation of the ICC Statute leads to the conclusion that unless States do implement the substantive law of the ICC Statute in their national legislation, the ICC will be unable to perform its complementary function effectively. The ICC will become a court of first (and only) instance for the prosecution of international crimes instead of the subsidiary court it is envisaged to be.’ Put succinctly, to interpret the provisions on complementarity so as to give them the fullest weight and effect consistent with the ICC’s functions therefore involves an obligation on States parties to establish their jurisdiction over the ICC crimes to the extent required for the purpose of national prosecution.<sup>389</sup>

This is further supported by resolutions of the Assembly which have stressed:

‘... that the proper functioning of the principle of complementarity entails that States incorporate the crimes set out in Articles 6, 7 and 8 of the Rome Statute as punishable offences under their national laws, to establish jurisdiction for these crimes and to ensure effective enforcement of those laws, and *urges* States to do so.’<sup>390</sup>

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387 See, for example, *Strengthening the International Criminal Court and the Assembly of States Parties*, ICC-ASP/19/Res 6, 16 December 2020, para 127.

388 Morten Bergsmo, ‘Preface by the Series Editor’ in Morten Bergsmo, Mads Harlem and Nobuo Hayashi (eds), *Importing Core International Crimes into National Law* (2nd Edition, Torkel Opsahl Academic EPublisher, Oslo 2010), iii–iv.

389 IBA, *International Criminal Law Manual*, 350. Quote attributed to Jann K Kleffner, ‘The Impact of Complementarity on National Implementation of Substantive International Criminal Law’ (2003) 1 J Int’l Crim Justice 86, 94.

390 See, for example, *Strengthening the International Criminal Court and the Assembly of States Parties*, ICC/ASP/19/Res 6, para 132.

*Recommendation 44: States Parties should review and amend their national criminal laws and/or enact new legislation to ensure that national authorities can investigate and prosecute Rome Statute crimes effectively in accordance with international law.*

In order to comply with the principle of complementarity, it is not sufficient for States Parties to rely on applying existing offences in military or ordinary criminal laws (such as murder, assault and criminal damage), which will not cover all conduct amounting to genocide, crimes against humanity, war crimes and aggression. Existing laws will in many instances also be silent regarding or inconsistent with defences and other principles of criminal responsibility that apply to these crimes in the Rome Statute and international law. States Parties, therefore, should define Rome Statute crimes, defences and other principles of criminal responsibility in national law in accordance with international law. They may do this by reviewing and amending existing criminal law and/or by establishing stand-alone legislation.<sup>391</sup> Both approaches can be effective, taking into account existing law and legal traditions. However, stand-alone legislation is preferable, where possible, to emphasise the gravity of crimes under international law and to clearly delineate defences and principles of criminal responsibility that apply to these crimes in accordance with international criminal law.

This process is complicated by the fact that some compromises reached during the drafting of the Rome Statute are not consistent with international law or appropriate for national jurisdictions. International criminal law also continues to evolve through conventional and customary international law. Therefore, merely referring to the provisions of the Rome Statute or transcribing them into national law should be considered a minimalist approach. The following Sections seek to assist States Parties in navigating these challenges (including identifying sources of assistance) in order to adopt national laws that reflect their determination to end impunity.

### *2.2.1.1 Defining Rome Statute crimes in national law*

Criminalising genocide, crimes against humanity, war crimes and aggression in national law is essential to ensure that the crimes are investigated and prosecuted by national authorities, in accordance with international law. Many aspects of the Rome Statute's definitions of these crimes reflect customary international law. However, as a result of political compromises during the drafting process, some of the definitions adopted in the Rome Statute are inconsistent with customary international law and a number of war crimes were omitted from the Rome Statute. In drafting their national implementing legislation, States Parties should seek to correct these flaws or omissions in the Rome Statute. The recommendations below highlight key issues that all States Parties should consider and address in defining the crimes.

*Recommendation 45: States Parties should criminalise genocide in national law in accordance with the definition in Article 6 of the Rome Statute and consider expanding the protected groups and prohibited acts.*

The definition of genocide in Article 6 of the Rome Statute follows the definition adopted 50 years earlier in the Convention on the Prevention and Punishment of the Crime of Genocide:

‘Genocide’ means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) killing members of the group;

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391 Ellis (n 371), 224.

- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group to another group.’

This remains the internationally accepted definition and is considered to reflect customary international law. States implementing the Rome Statute, therefore, should ensure that, at a minimum, they adopt the definition in Article 6 of the Rome Statute.

Drafting Recommendation	Explanation
Do not include a requirement that the crime took place ‘in the context of a manifest pattern of similar conduct or was conduct that could itself effect such destruction’.	Although the ICC Elements of Crimes include this contextual element of genocide, <sup>392</sup> the Court has recognised that this element is controversial. <sup>393</sup> While the inclusion of this element ensures that the ICC’s limited resources are directed towards the most serious crimes, rather than isolated or sporadic attacks, <sup>394</sup> it should not be applied at the national level. National courts should be able to address prohibited acts committed against protected groups with the intent to destroy them in whole or in part as genocide, without requiring proof that they form part of a broader genocidal policy or plan or that the action could cause the partial or full destruction of the group.

Although States Parties should not restrict the definition of genocide in the Rome Statute, they may consider expanding on the definition to include other protected groups and prohibited acts that may be committed with the intent to destroy a group as such. A recent study of national implementation of the crime of genocide shows that many states have adopted definitions expanding the protected groups (such as including political and social groups). Referring to national definitions adopted by some states that recognise a ‘broad form’ idea of groups based on ‘any arbitrary criterion’, the Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict’s *Model Legislative Provisions and Guidance on Investigation and Prosecution of Conflict-Related Sexual Violence* (UN Model Legislative Provisions on Conflict-Related Sexual Violence) includes ‘any identifiable group of persons’ in its definition of genocide.<sup>395</sup> Some states have also

392 ICC Elements of Crimes, Articles 6(a)4; 6(b)4; 6(c)5; 6(d)5; 6(e)7.

393 ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-3, ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’, 4 March 2009, para 125; William A Schabas, ‘Article 6’ in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016) 132–133.

394 Case Matrix Network (n 373), 28.

395 Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict’s *Model Legislative Provisions and Guidance on Investigation and Prosecution of Conflict-Related Sexual Violence*, Article 35.

amended or included additional prohibited acts.<sup>396</sup> Drawing from the International Criminal Tribunal for Rwanda's Judgement in the *Akayesu* case,<sup>397</sup> the African Union's *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* includes 'acts of rape or any other form of sexual violence' in its definition.<sup>398</sup> Such initiatives may contribute to the evolution of the definition of genocide in the future.

*Recommendation 46: States Parties should criminalise crimes against humanity in national law in accordance with the definition in Article 7 of the Rome Statute, subject to some revisions.*

Article 7 of the Rome Statute is the latest and most widely accepted definition of crimes against humanity. Article 7(1) states:

'For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;

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396 Tamás Hoffmann, 'The Crime of Genocide in Its (Nearly) Infinite Domestic Variety' in Marco Odello, Piotr Lubinski (ed) *The Concept of Genocide in International Criminal Law – Developments after Lemkin* (Routledge, 2020) 67–97, summarised by the author in *The Domestic Definitions of the Crime of Genocide: A Dizzying Diversity*, *Opinio Juris*, 17 June 2020, <http://opiniojuris.org/2020/06/17/the-domestic-definitions-of-the-crime-of-genocide-a-dizzying-diversity>. In relation to prohibited acts, Hoffman reports that 31 countries have removed the term 'deliberately' used in Article 6(c) and thus potentially expanded the applicability of the underlying offence to acts that are not calculated or intentional. He also reports: '10 countries have decided to expand the scope of actus reus by introducing new underlying offences of genocide in their domestic legislation, usually incorporating certain instances of crimes against humanity into genocide. For instance, Panama, Spain, and Uruguay created the underlying offence of "preventing a group's way of life" to complement preventing birth, while Italy and San Marino criminalised as genocide 'forcing members of the protected group to wear distinctive signs or emblems'. The most colourful deviation might possibly be found in the Criminal Code of Vietnam that prohibits "destroying sources of living, cultural or spiritual life of a nation or sovereign territory, upsetting the foundation of a society in order to sabotage it."'

397 ICTR, *Prosecutor v Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998.

398 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Article 28B.

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.’

This definition is built upon the formulations of crimes against humanity articulated in the Nuremberg and Tokyo Charters, the Nuremberg Principles, the 1954 draft Code of Offences against the Peace and Security of Mankind, the statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda, and the International Law Commission’s 1996 draft Code of Crimes against the Peace and Security of Mankind.<sup>399</sup> It has been adopted by the International Law Commission, with only minor technical changes and the deletion of the definition of gender, in its 2019 draft articles of a Convention on the Prevention and Punishment of Crimes against Humanity.<sup>400</sup>

Article 7, therefore, should serve as the basis for the definition of crimes against humanity in national legislation. However, there are a number of amendments to the definition that States Parties should make to ensure that all aspects are fully consistent with customary international law and that national courts can effectively prosecute those suspected of such crimes. In particular, States Parties should consider the following drafting recommendations:

Drafting Recommendation	Explanation
Include all chapeau elements.	The chapeau to Article 7(1) establishes the jurisdictional threshold which all courts should apply in prosecuting crimes against humanity. It captures the essence of such crimes, namely that they are acts which occur during a widespread or systematic attack on any civilian population in either times of war or peace. <sup>401</sup>

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399 International Law Commission, *First Report on Crimes Against Humanity by Sean Murphy*, Special Rapporteur, A/CN.4/680, 17 February 2015, para 121.

400 International Law Commission, ‘Texts and titles of the draft preamble, the draft articles and the draft annex provisionally adopted by the Drafting Committee on second reading’, A/CN.4/L.935, 15 May 2019, Article 2.

401 Christopher Keith Hall and Kai Ambos, ‘Article 7’ in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016), 155.

Drafting Recommendation	Explanation
<p>Further define ‘attack directed against any civilian population’ in Article 7(2) (a) in accordance with the Elements of Crimes and jurisprudence of the ICC.</p>	<p>Article 7(2)(a) defines this phrase in the chapeau to mean ‘a course of conduct involving the multiple commission of prohibited acts against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack.’ However, this definition, which had been introduced as part of the drafting compromise to include ‘widespread or systematic’ in the chapeau (instead of widespread and systematic, as advocated by some states),<sup>402</sup> raised controversial questions.<sup>403</sup> In particular:</p> <ul style="list-style-type: none"> <li>• how does the requirement of a State or organisational policy relate to the application of the widespread or systematic threshold? Concern was raised that it could be interpreted to essentially turn the disjunctive ‘widespread or systematic’ into the conjunctive ‘widespread and systematic’ given that a policy element had been considered a requirement of ‘systematic’, but not ‘widespread’;<sup>404</sup> and</li> <li>• whether the definition affects the <i>mens rea</i> requirements of crimes against humanity? Concerns were raised that the definition could be interpreted to narrow the scope of crimes against humanity by requiring that the perpetrator must have detailed knowledge of the policy behind the attack.<sup>405</sup></li> </ul> <p>These questions have since largely been resolved in the Elements of Crimes and the jurisprudence of the ICC.</p> <ul style="list-style-type: none"> <li>• The Elements of Crimes has clarified that ‘policy to commit such attack’ requires that the State or organisation actively promote or encourage such an attack against a civilian population.<sup>406</sup> In the Gbagbo confirmation of charges decision, the ICC Pre-Trial Chamber held that this policy requirement should not be conflated with ‘systematic’ in the chapeau, as the two concepts serve different purposes and imply different thresholds.<sup>407</sup></li> <li>• The Elements of Crimes also clarify that the intent requirement of crimes against humanity should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organisation.<sup>408</sup> The mental element is satisfied if the perpetrator intended to further such an attack.<sup>409</sup></li> </ul> <p>Although Case Matrix Network notes that some States Parties have incorporated Article 7(2)(a) by reference or duplication in their implementing legislation and others have omitted the provision,<sup>410</sup> States Parties that include the definition in Article 7(2)(a) in their implementing legislation, should also include the clarifications in the Elements of Crimes.</p>

402 Margaret McAuliffe deGuzman, ‘The Road from Rome: The Developing Law of Crimes against Humanity’, (2000) 22 *Human Rights Quarterly*, 335 at 372.

403 For further information see: Hall and Ambos (n 401), 244–245.

404 The International Law Commission’s commentary of its 1996 Draft Code of Crimes against the Peace and Security of Mankind, *Yearbook of the International Law Commission 1996*, Volume II, Part 2 at 47 defined ‘committed in a systematic manner’ as meaning pursuant to a preconceived plan or policy and ‘on a large scale’ as meaning that the acts are directed against a multiplicity of victims, without any requirement of a plan or a policy.

405 deGuzman (n 402), at 380–381.

406 ICC Elements of Crimes, Article 7, Introduction, para 3.

407 ICC, *Prosecutor v Laurent Gbagbo*, ICC-02/11-01/11-656-Red, ‘Decision on the confirmation of charges against Laurent Gbagbo’ 12 June 2014, para 216.

408 ICC Elements of Crimes, Article 7, Introduction, para 2.

409 *Ibid.*

410 Case Matrix Network (n 373), 38.

Drafting Recommendation	Explanation
Ensure that national definitions of crimes against humanity do not exclude crimes by non-state actors.	<p>Although Article 7(2)(a) refers to acts committed in the furtherance of a State or organisational policy, indicating that the Statute covers crimes by non-state actors, some commentators have proposed that the definition should be interpreted to apply only to state actors or state-like actors.<sup>411</sup> Some existing national legislation may also limit crimes against humanity to acts by state actors consistent with this traditional understanding of the crime.</p> <p>However, the jurisprudence of the ICC confirms, consistent with the case law of the ICTY<sup>412</sup> and reports of the International Law Commission,<sup>413</sup> that crimes against humanity can be committed by non-state actors where they have the capacity to commit a widespread or systematic attack directed against a civilian population.<sup>414</sup> The International Law Commission's commentary on the draft Articles on Crimes Against Humanity recognises:</p> <p style="padding-left: 40px;">'While an organised criminal group or gang normally does not commit the kind of widespread or systematic violations covered by draft Article 2, it might in certain circumstances.'<sup>415</sup></p>

411 See, for example, M Cherif Bassiouni and William A Schabas, *The Legislative History of the International Criminal Court* (2nd Edition Brill) (2005), Vol 1, 170:

'The words 'organisational policy' do not refer to the policy of an organisation, but the policy of a State. It does not refer to non-state actors, though it is entirely reasonable to consider non-state actors acting for and on behalf of a State as falling within the meaning of State actors under the agency theory recognised in the ILC's Principles of State Responsibility.'

412 See, for example, ICTY, *Prosecutor v Tadić*, 'Opinion and Judgment', 7 May 1997, para 654.

413 For example, Article 18 of the International Law Commission's 1996 Draft Code of Crimes against the Peace and Security of Mankind defines crimes against humanity as 'the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organisation or group'. The commentary of Article 18 (see: *Yearbook of the International Law Commission 1996*, Volume II, Part 2 at 47) states:

'The instigation or direction of a Government or any organisation or group, which may or may not be affiliated with a Government, gives the act its great dimension and makes it a crime against humanity imputable to private persons or agents of a State.'

414 See, for example, ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-717, 'Decision on the confirmation of charges', 30 September 2008, para 396:

'Such a policy may be made either by groups of persons who govern a specific territory or by any organisation with the capability to commit a widespread or systematic attack against a civilian population.'

ICC, *Prosecutor v Germain Katanga*, ICC-01/04-01/07-3436-tENG, 'Judgment pursuant to Article 74 of the Statute', ICC-01/04-01/07-3436-tENG, 7 March 2014, para 1119:

'It therefore suffices that the organisation have a set of structures or mechanisms, whatever those may be, that are sufficiently efficient to ensure the coordination necessary to carry out an attack directed against a civilian population. Accordingly, as aforementioned, the organisation concerned must have sufficient means to promote or encourage the attack, with no further requirement necessary. Indeed, by no means can it be ruled out, particularly in view of modern asymmetric warfare, that an attack against a civilian population may also be the doing of a private entity consisting of a group of persons pursuing the objective of attacking a civilian population; in other words, of a group not necessarily endowed with a well-developed structure that could be described as quasi-State.'

415 International Law Commission, *Draft Articles on Prevention and Punishment of Crimes Against Humanity, with commentaries 2019*, para 31.

Drafting Recommendation	Explanation
Include all prohibited acts in Article 7(1).	The list of crimes against humanity contained in Article 7 of the Statute and their definitions largely accord with the traditional conception of crimes against humanity under customary international law. <sup>416</sup> All of the prohibited acts should be included in national law definitions of crimes against humanity, including the qualified residual clause Article 7(1)(k) criminalising ‘other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health’. <sup>417</sup>
Omit ‘in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court’ from the definition of persecution.	Persecution should be a crime against humanity, independent of any other crime. Customary international law does not require any ‘connection’ to other prohibited acts, which is solely a jurisdictional threshold that should only be applied by the ICC. <sup>418</sup>
Omit ‘with the intention of removing them from the protection of the law for a prolonged period of time’ from the definition of enforced disappearance of persons.	This phrase in Article 7(2)(i) restricts the definition of enforced disappearance. Definitions in international human rights law require that the perpetrator need only have intended to refuse to acknowledge the deprivation of freedom or deny information on the fate or whereabouts of the victim. They need not have had an additional specific intention to remove the person from the protection of the law. Moreover, a temporal requirement of ‘prolonged period of time’ is not appropriate for this offence, as it is in the first few hours and days after the initial deprivation of liberty and the refusal to acknowledge or to give information that the victim is most at risk. <sup>419</sup>
Ensure that that rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and sexual violence are defined consistent with the Elements of Crimes.	While Article 7(1)(g) lists these prohibited acts of sexual and gender-based violence, only forced pregnancy is defined in Article 7(2)(f). However, definitions of the other prohibited acts in this provision are incorporated in the ICC Elements of Crimes, which include, inter alia, elements prohibiting the use of force, threat of force, or coercion. These definitions should be fully reflected in national law and any inconsistencies with existing national definitions (eg, national definitions of the crimes of rape) should be resolved applying the definitions in the Elements of Crimes. <sup>420</sup>  In its 2014 Policy Paper on Sexual and Gender-Based Crimes, the OTP called on States Parties to adopt ‘domestic legislation which incorporates the conduct proscribed under the Statute.’ <sup>421</sup>

416 Hall and Ambos (n 401), 158.

417 Although questions have been raised as to whether Article 7(1)(k) is consistent with the legality principle, which requires the strict definition of crimes (see, for example: Case Matrix Network (n 373) at 37), Hall and Stahn note that the provision was drafted more narrowly than ‘other inhuman acts’ in an effort to ensure that it is consistent with the principle of *nullum crimen sine lege* and that the provision is no more broadly worded than other prohibited acts (see: Christopher Keith Hall and Carsten Stahn, ‘Article 7’ in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016), 235–242.

418 For detailed arguments in support of this position, see: Amnesty International, ‘International Law Commission: The problematic formulation of persecution under the draft convention on crimes against humanity’ (2018) [www.amnesty.org/download/Documents/IOR4092482018ENGLISH.pdf](http://www.amnesty.org/download/Documents/IOR4092482018ENGLISH.pdf).

419 For further analysis of this intent element of enforced disappearance, see: Christopher Keith Hall and Larissa van den Herick, ‘Article 7’ in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016), 289–291.

420 For more information on the elements of these crimes see: International Protocol on the Documentation and Investigation of Sexual Violence in Conflict (second edition, March 2017), 43–56, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/598335/International\\_Protocol\\_2017\\_2nd\\_Edition.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/598335/International_Protocol_2017_2nd_Edition.pdf).

421 OTP, *Policy Paper on Sexual and Gender-Based Crimes*, para 105.

Drafting Recommendation	Explanation
<p>Consider expressly adding other prohibited acts of conflict-related sexual violence listed and defined in the UN Model Legislative Provisions on Conflict-Related Sexual Violence.</p>	<p>In the last decade, the UN Security Council has encouraged Member States 'to include the full range of crimes of sexual violence in national penal legislation to enable prosecutions for such acts'<sup>422</sup> and 'to strengthen legislation to foster accountability for sexual violence.'<sup>423</sup></p> <p>The 2021 UN Model Legislative Provisions on Conflict-Related Sexual Violence, that was created to assist states in developing their legislation, contains the most comprehensive list and definitions of offences of conflict-related sexual violence that amount to crimes under international law. This includes the following crimes against humanity and war crimes, which are not expressly listed in Article 7 or Article 8 of the Rome Statute, but could be conducted as part of a widespread or systematic attack against a civilian population or amount to serious violations of international humanitarian law:</p> <ul style="list-style-type: none"> <li>• aggravated sexual violence;<sup>424</sup></li> <li>• enforced impregnation;<sup>425</sup></li> <li>• enforced contraception;<sup>426</sup></li> <li>• enforced abortion;<sup>427</sup></li> <li>• mutilation;<sup>428</sup></li> <li>• slave trade;<sup>429</sup></li> <li>• trafficking in persons for the purpose of sexual violence and/or exploitation as a form of enslavement;<sup>430</sup></li> <li>• enforced marriage or enforced imposition of conjugal status as a form of enslavement.<sup>431</sup></li> </ul> <p>Although, in many instances, such acts may fall within the prohibited acts listed in Article 7 - including enslavement in Article 7(1)(c), torture in Article 7(1)(g), other forms of sexual violence in Article 7(1)(g), gender-based persecution in Article 7(1)(h), or other inhumane acts in Article 7(1)(k) - States Parties are encouraged to expressly list these prohibited acts in their national definitions of crimes against humanity.</p>

422 UN Security Council, Resolution 2106, 24 June 2013, para 2.

423 UN Security Council, Resolution 2467, 23 April 2019, para 3.

424 *UN Model Legislative Provisions on Conflict-Related Sexual Violence*, Article 19.

425 *Ibid*, Article 21.

426 *Ibid*, Article 23.

427 *Ibid*, Article 24.

428 *Ibid*, Article 25.

429 *Ibid*, Article 31.

430 *Ibid*, Article 32.

431 *Ibid*, Article 34.

Drafting Recommendation	Explanation
Ensure that gender is defined as a social construct.	<p>Article 7(3) of the Rome Statute defines gender as referring to ‘the two sexes, male and female, in the context of society. The term “gender” does not indicate any meaning different from the above.’ Although the language of this definition has been criticised for being ‘outdated and opaque’,<sup>432</sup> including because it could be misinterpreted as conflating gender with biological sex,<sup>433</sup> and it was deleted by the International Law Commission from its draft Articles of the Convention on the Prevention and Punishment of Crimes against Humanity,<sup>434</sup> the Rome Statute definition clearly acknowledges the social construction of gender, and the accompanying roles, behaviours, activities and attributes assigned to women and men, and to girls and boys.<sup>435</sup> To ensure that national authorities can effectively prosecute the crime against humanity of gender-based persecution, States Parties should ensure that it is defined as a social construct. States are encouraged to implement the following definition of gender in the UN Model Legislative Provisions on Conflict-Related Sexual Violence:</p> <p style="padding-left: 40px;">‘Gender’ means the social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys, as well as the relations between women and those between men. These attributes, opportunities and relationships are socially constructed and are learned through socialisation processes. They are context, time-specific, and changeable. Gender determines what is expected, allowed and valued in a woman or a man in a given context. In most societies there are differences and inequalities between women and men in responsibilities assigned, activities undertaken, access to and control over resources, as well as decision-making opportunities. Gender is part of the broader socio-cultural context, intersecting with other aspects of identity such as race, social class, ethnicity, sexual orientation, religion, and age as well as other forms of identity.’</p>

**Recommendation 47: States Parties should criminalise all war crimes in national law, including war crimes omitted from Article 8 of the Rome Statute.**

War crimes are serious violations of international humanitarian law that are criminalised under international law.<sup>436</sup> Article 8 of the Rome Statute separates war crimes in four categories drawing from international humanitarian law sources:

- grave breaches of the Geneva Conventions (Article 8(2) (a)), which apply to international armed conflicts;

<sup>432</sup> See, for example, 24 Special Rapporteurs, Working Groups and Independent Experts’ submission to the International Law Commission, ‘Re: Comments to the Draft Crimes Against Humanity Convention’, 30 November 2018, [www.ohchr.org/Documents/Issues/Executions/LetterGender.pdf](http://www.ohchr.org/Documents/Issues/Executions/LetterGender.pdf), at 2.

<sup>433</sup> L Davis et al, Submission to the International Law Commission ‘Re: The Definition of Gender in the Draft Crimes Against Humanity Convention’, 1 December 2018, [www.madre.org/international-crimes-against-humanity-treaty](http://www.madre.org/international-crimes-against-humanity-treaty), 2. As explained in the Report of the UN Secretary-General, *Implementation of the Outcome of the Fourth World Conference on Women*, UN Doc A/51/322, 3 December 1996, ‘the word “sex” is used to refer to physical and biological characteristics of women and men, while gender is used to refer to the explanations for observed differences between women and men based on socially assigned roles.’

<sup>434</sup> See International Law Commission, *Fourth Report on Crimes Against Humanity by Sean D Murphy*, Special Rapporteur, A/CN.4/725, 18 February 2019, paras 80–86.

<sup>435</sup> See OTP, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, at 3; Rosemary Grey, Jonathan O’Donohue, Indira Rosenthal, Lisa Davis and Dorine Llanta, ‘Gender-Based Persecution as a Crime Against Humanity: The Road Ahead’, 17 *Journal of International Criminal Justice* (2019), 957–979.

<sup>436</sup> Michael Cottier, ‘Article 8’ in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016), 304. See also: International Committee of the Red Cross, *Rules of Customary International Law, Rule 156: Definition of war crimes*, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule156](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule156).

- other serious violations of the laws and customs applicable in international armed conflict (Article 8(2) (b));
- serious violations of common Article 3 of the Geneva Conventions (Article 8(2) (c)), which apply to non-international armed conflicts; and
- other serious violations of the laws and customs applicable in armed conflict not of an international character (Article 8(2) (d)).

The International Committee of the Red Cross (ICRC) notes:

‘One very positive aspect of Article 8 is that for the first time it offers at the international level a quite comprehensive list of war crimes applicable to all types of armed conflicts, including, in particular, crimes such as sexual violence and using children under the age of 15 to participate actively in hostilities.’<sup>437</sup>

However, the ICRC also notes that the drafters omitted a number of war crimes from the definition, including grave breaches of Additional Protocol I and war crimes in customary international humanitarian law, some of which, but not all, have been addressed through amendments to Article 8.<sup>438</sup> Consistent with their shared determination to end impunity for the most serious crimes of concern to the international community, States Parties should criminalise all of the acts listed in Article 8, including amendments adopted by the Assembly, and, in addition, address other war crimes currently omitted from Article 8.

Drafting Recommendation	Explanation
Omit the threshold guideline ‘in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes’ contained in Article 8(1).	Article 8(1) applies specifically to the ICC, it provides a practical guideline for the ICC Prosecutor on what type of war crimes the ICC should primarily focus, given the limited resources of the Court, <sup>439</sup> to prevent the ICC from being overburdened with minor or isolated cases. <sup>440</sup> However, such guidance is not applicable or relevant at the national level, as national authorities have obligations under international humanitarian law treaties and customary international humanitarian law to investigate all allegations of war crimes, including isolated war crimes, and, where sufficient admissible evidence exists, prosecute those suspected of committing them. Cottier states:  ‘It does not seem recommendable for states providing domestic jurisdiction over war crimes such as those under Article 8 Rome Statute to establish a similar jurisdictional threshold. The considerations underlying Article 8 para 1 Rome Statute, that is, the limited resources and complementary function of the ICC in an international justice system, are not analogous in national jurisdictions.’ <sup>441</sup>

437 ICRC, *The Domestic Implementation of International Humanitarian Law: A Manual* (2015), [www.icrc.org/en/doc/assets/files/publications/icrc-002-4028.pdf](http://www.icrc.org/en/doc/assets/files/publications/icrc-002-4028.pdf), 122.

438 *Ibid.*, at 122.

439 Cottier (n 436), 321.

440 Mads Harlem, ‘Importing War Crimes into Norwegian Legislation’ in Morten Bergsmo, Mads Harlem and Nobuo Hayashi (eds), *Importing Core International Crimes into National Law* (n 388), 39.

441 Cottier (n 436), 321.

Drafting Recommendation	Explanation
<p>Ensure that all war crimes listed in Article 8, including amendments, are criminalised in national law.</p>	<p>As explained in the ICRC’s Rules of Customary International Humanitarian Law, the war crimes listed in Article 8 of the Rome Statute replicate or, if different wording is applied, cover war crimes in international humanitarian treaty law and/or customary international humanitarian law, especially taking into account the ICC Elements of Crimes.<sup>442</sup> States Parties, therefore, should ensure that all war crimes in Article 8 are defined as war crimes in national law either applying the definitions in Article 8 or relevant international humanitarian law treaties or customary international humanitarian law.<sup>443</sup> This should include the following war crimes added to Article 8 by the adoption of amendments by the Assembly:</p> <ul style="list-style-type: none"> <li>• the war crime in non-international armed conflict of employing poison or poisoned weapons;<sup>444</sup></li> <li>• the war crime in non-international armed conflict of employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;<sup>445</sup></li> <li>• the war crime in non-international armed conflict of employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;<sup>446</sup></li> <li>• the war crime in both international and non-international armed conflict of employing weapons, which use microbial or other biological agents, or toxins, whatever their origin or method of production;<sup>447</sup></li> <li>• the war crime in both international and non-international armed conflict of employing weapons the primary effect of which is to injure by fragments which in the human body escape detection by X-rays;<sup>448</sup></li> <li>• the war crime in both international and non-international armed conflict of employing laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices;<sup>449</sup></li> <li>• the war crime in non-international armed conflict of intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies.<sup>450</sup></li> </ul>

442 ICRC, *Rules of Customary International Law*, Rule 156: Definition of war crimes.

443 For a detailed analysis of international humanitarian law (IHL) sources of war crimes in the Rome Statute, see: ICRC, *The Domestic Implementation of International Humanitarian Law: A Manual*, Annex XIII: War crimes under the Rome Statute of the International Criminal Court and their sources in international humanitarian law: [www.icrc.org/en/doc/assets/files/publications/icrc-002-4028.pdf](http://www.icrc.org/en/doc/assets/files/publications/icrc-002-4028.pdf).

444 Amendments to Article 8 of the Rome Statute, Resolution RC/Res 5, 10 June 2020.

445 *Ibid.*

446 *Ibid.*

447 *Resolution on amendments to Article 8 of the Rome Statute of the International Criminal Court*, ICC-ASP/16/Res 4, 14 December 2017.

448 *Ibid.*

449 *Ibid.*

450 *Resolution on amendments to Article 8 of the Rome Statute of the International Criminal Court*, ICC-ASP/18/Res 5.

Drafting Recommendation	Explanation
Consider raising the age requirement of the war crime of ‘conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities’ to 18 years.	Although the drafters of the Rome Statute agreed that the crime would cover children under the age of 15 years, some international human rights treaties prohibit the conscription and use of child soldiers under 18 years of age, and restrict the voluntary recruitment of persons under the age of 18. <sup>451</sup> The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights – adopted by the African Union in 2014 to expand the jurisdiction of the African Court to prosecute crimes under international law – raised the age applicable to this war crime in both international and non-international armed conflict to 18. <sup>452</sup> Some states, including those that are party to relevant human rights treaties, have decided to raise the age requirement to 18 in their national implementing legislation. <sup>453</sup>
Ensure that rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and sexual violence are defined consistent with the Elements of Crimes.	See drafting recommendations in relation to these crimes in Recommendation 46 on crimes against humanity.
Consider expressly adding other prohibited acts of conflict-related sexual violence listed and defined in the UN Model Legislative Provisions on Conflict-Related Sexual Violence.	See drafting recommendations in relation to these crimes in Recommendation 46 on crimes against humanity.

451 African Charter on the Rights and Welfare of the Child, Article 22(2) provides that States Parties ‘shall take all necessary measures to ensure that no child [‘defined in its Article 2 as every human being below the age of 18 years’] shall take a direct part in hostilities and refrain in particular, from recruiting any child’. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, Article 1 requires that ‘States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.’; Article 2 requires that States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces; Article 3 requires that States Parties that permit the voluntary recruitment of persons under 18 shall maintain safeguards; Article 4 provides that ‘armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years’.

452 Article 28D(b) (xxvii) defines the war crime in international armed conflict of: ‘Conscripting or enlisting children under the age of eighteen years into the national armed forces or using them to participate actively in the hostilities.’ Article 28D(e) (vii) defines the war crime in non-international armed conflict of: ‘Conscripting or enlisting children under the age of eighteen years into armed forces or groups or using them to participate actively in the hostilities.’

453 For example, section 103(f) of Norway’s Penal Code provides: ‘Any person is liable to punishment for a war crime who in connection with an armed conflict: conscripts or recruits children under 18 years of age to armed forces or uses them actively as participants in hostilities.’

Drafting Recommendation	Explanation
<p>Consider criminalising war crimes omitted from the Rome Statute.</p>	<p>Article 8 of the Rome Statute omits a number of war crimes that States Parties should implement into national law in accordance with their obligations arising from international humanitarian law treaties that they are party to and customary international law, as well as to advance their determination to end impunity for war crimes. In particular, Rule 156 of the ICRC's Rules of Customary International Humanitarian Law lists the following war crimes that are not covered by Article 8:</p> <p>War crimes in international armed conflict:</p> <ul style="list-style-type: none"> <li>• slavery and deportation to slave labour;</li> <li>• collective punishments;</li> <li>• despoliation of the wounded, sick, shipwrecked or dead;</li> <li>• attacking or ill-treating a parlementaire or bearer of a flag of truce;</li> <li>• unjustifiable delay in the repatriation of prisoners of war or civilians;</li> <li>• the practice of apartheid or other inhuman or degrading practices involving outrages on personal dignity based on racial discrimination;</li> <li>• launching an indiscriminate attack resulting in loss of life or injury to civilians or damage to civilian objects; and</li> <li>• launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive incidental loss of civilian life, injury to civilians or damage to civilian objects.</li> </ul> <p>War crimes in non-international armed conflict</p> <ul style="list-style-type: none"> <li>• launching an indiscriminate attack resulting in death or injury to civilians, or an attack in the knowledge that it will cause excessive incidental civilian loss, injury or damage;</li> <li>• making non-defended localities and demilitarised zones the object of attack;</li> <li>• using human shields;</li> <li>• slavery; and</li> <li>• collective punishments.</li> </ul>

Drafting Recommendation	Explanation
<p>Consider criminalising employing weapons, projectiles and materials and methods of warfare which are of a nature to cause superfluous injury and unnecessary suffering or which are inherently indiscriminate in both international and non-international armed conflict.</p>	<p>Although the use of such weapons and methods of warfare are prohibited by international humanitarian law,<sup>454</sup> Article 8(b)(xx) of the Rome Statute acknowledges the rule but does not criminalise such conduct. Instead, it highlights that such crimes may fall under the jurisdiction of the ICC in the future, if the Assembly determines that they are the subject of a comprehensive prohibition and are included in an annex to the Rome Statute applying amendment procedures. Cottier and Krivánek note:</p> <p style="padding-left: 40px;">‘... subparagraph (xx) is essentially superfluous, since States Parties to the Rome Statute are free to add new crimes to the Rome Statute regardless of this specific provision. Nonetheless, it was adopted as a political signal that the current list of prohibited weapons is unsatisfactory and far from exhaustive.’<sup>455</sup></p> <p>In practice, instead of adding prohibited weapons to the annex referred to in Article 8(b)(xx), the Assembly has adopted amendments to Article 8 recognising that it is a war crime to use a number of specific weapons that cause superfluous injury and unnecessary suffering or are inherently indiscriminate (including weapons which use microbial or other biological agents or toxins), although this is far from comprehensive.</p> <p>States Parties should criminalise in national law the use of all weapons, materials and methods of warfare that are prohibited by international humanitarian law treaties, especially those that they are a party to or where the prohibition is recognised in customary international humanitarian law. In particular, States Parties should consult Chapter VI of the ICRC’s Manual on the Domestic Implementation of International Humanitarian Law, which sets out the ICRC’s recommendations for states to implement the following weapon treaties in national criminal law:</p> <ul style="list-style-type: none"> <li>• the 1925 Geneva Protocol;</li> <li>• the 1972 Biological Weapons Convention;</li> <li>• the 1976 Environmental Modification Convention;</li> <li>• the 1980 Convention on Certain Conventional Weapons and its five Protocols;</li> <li>• the 1993 Chemical Weapons Convention;</li> <li>• the 1997 Convention on the Prohibition of Anti-Personnel Mines and on their Destruction;</li> <li>• the 2008 Convention on Cluster Munitions.</li> </ul>

454 Additional Protocol I, Article 35(2); ICRC, *Rules of Customary International Humanitarian Law*, Rules 70 and 71.

455 Michael Cottier and David Krivánek, ‘Article 8’ in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016), 467.

Drafting Recommendation	Explanation
Consider defining war crimes without distinction between international and non-international armed conflict.	<p>The need for a distinction between war crimes in international and non-international armed conflict has increasingly been called into question, including by the ICTY Appeals Chamber in the Tadić case, which stated:</p> <p style="padding-left: 40px;">‘...in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign states are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted ‘only’ within the territory of a sovereign state?’<sup>456</sup></p> <p>Indeed, if, as recommended above, States Parties incorporate into national law the amendments to Article 8 and war crimes omitted from the Rome Statute definition, including taking a comprehensive approach to criminalising the use of weapons prohibited by international humanitarian law, the distinction between the definitions of war crimes in international and non-international armed conflict is largely limited to a small number of war crimes that relate specifically to the international armed conflict context (eg, transfers by occupying powers).<sup>457</sup></p> <p>The Case Matrix Network’s examination of how States Parties have implemented the Rome Statute in national law found ‘a notable trend towards affording war crimes the same coverage regardless of whether [they are] committed in non-international or international conflicts.’<sup>458</sup></p>

***Recommendation 48: States Parties should criminalise aggression in national law in accordance with the definition in Article 8 bis of the Rome Statute.***

The 2010 Review Conference of the Rome Statute adopted amendments to the Rome Statute that led to the activation of the Court’s jurisdiction over the crime of aggression on 17 July 2018. Article 8 *bis* defines the crime of aggression as follows:

1. For the purpose of this Statute, ‘crime of aggression’ means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.
2. For the purpose of paragraph 1, ‘act of aggression’ means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

<sup>456</sup> ICTY, *Prosecutor v Tadić*, Case No IT-94-1-AR72, ‘Decision on Defence Motion for Interlocutory Appeal on Jurisdiction’, 2 October 1995, para 97.

<sup>457</sup> For a detailed analysis on the distinction between the definitions of war crimes international and non-international armed conflict in the original text of the Rome Statute (prior to amendments), see Deidre Willmott, ‘Removing the distinction between international and non-international armed conflict in the Rome Statute of the International Criminal Court’, (2004) 5 *Melbourne Journal of International Law*.

<sup>458</sup> Case Matrix Network (n 373), 43–44, including specific examples of how states have removed the distinction in national law.

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

An understanding contained in an annex to the Review Conference's resolution states:

It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.<sup>459</sup>

This understanding confirms that the Rome Statute, while built on the principle of complementarity, does not regulate under what conditions states may or must exercise domestic jurisdiction over international crimes, but merely regulates under which conditions the ICC may exercise jurisdiction.<sup>460</sup> There is nothing to prevent States Parties from enacting legislation criminalising the crime of aggression. Indeed, a number of states had already done so before the adoption of the Kampala amendments<sup>461</sup> and a number of States Parties that have ratified the amendments have enacted legislation.<sup>462</sup>

*A Handbook: Ratification and Implementation of the Kampala amendments to the Rome Statute of the ICC* provides further guidance on implementing the crime of aggression into national law.<sup>463</sup>

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459 *The Crime of Aggression*, RC/Res 6, 11 June 2010, Annex III: Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression, Understanding 5.

460 Permanent Mission of the Principality of Liechtenstein, Global Institute for the Prevention of Aggression, Institute for International Peace and Security Law and Liechtenstein Institute on Self-Determination, *Handbook: Ratification and Implementation of the Kampala amendments to the Rome Statute of the ICC (2019)*, available at: <https://crimeofaggression.info/documents/1/handbook.pdf>, 12.

461 *Ibid.*, 3.

462 See Case Matrix Network (n 373), 45–46; *The Global Campaign for Ratification and Implementation of the Kampala Amendments on the Crime of Aggression*, Implementation documents, <https://crimeofaggression.info/resourcesearch/implementation-documents>.

463 *Handbook: Ratification and Implementation of the Kampala amendments to the Rome Statute of the ICC*, (n 460).

*Recommendation 49: States Parties should extend their criminal laws penalising offences against the integrity of national investigations or judicial processes to include offences against the administration of justice in Article 70 of the Rome Statute.*

Article 70 (1) defines six offences against the administration of justice applicable in proceedings before the ICC:

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

Although the ICC has jurisdiction over these offences, Article 70(4) provides that when the Court deems it proper, it may request States Parties to submit cases to the competent authorities for the purpose of prosecution.<sup>464</sup> It requires, therefore, each State Party to extend its criminal laws to address offences committed on its territory, or by one of its nationals.<sup>465</sup> Piragoff notes that the drafters were ‘mindful of the fact that the Court might have insufficient time and resources to pursue all such offences, or might have difficulty exercising jurisdiction, or that it might otherwise be more appropriate in a particular case for a prosecution to be carried out by the State.’<sup>466</sup>

Given that allegations of witness interference have emerged in almost all the ICC’s first cases,<sup>467</sup> it is important that all States Parties review and amend their laws, or enact new legislation if necessary, addressing these crimes.

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464 Rome Statute, Article 70(4) (b).

465 Rome Statute, Article 70(4) (a).

466 Donald K Piragoff, ‘Article 70’ in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016), 1758.

467 OTP *Strategic Plan 2016–2018*, 6 July 2015, para 27; Open Society Justice Initiative, ‘Witness Interference in Cases before the International Criminal Court’ (2016), [www.opensocietyfoundations.org/sites/default/files/factsheet-icc-witness-interference-20161116.pdf](http://www.opensocietyfoundations.org/sites/default/files/factsheet-icc-witness-interference-20161116.pdf), at 2–3.

Drafting Recommendation	Explanation
Ensure that all six offences against the administration of justice are covered by national law.	<p>Article 70 (4)(a) expressly requires every State Party to ‘extend its criminal laws penalising offences against the integrity of its own investigative or judicial process’ to include the six Article 70 offences. Piragoff notes:</p> <p>‘This formulation does not require States Parties to enact a law to penalise conduct in a manner as exactly described in Article 70, para 1. Rather, States Parties are obliged to extend their laws applicable to domestic violations to violations against the Court committed on their territory or by their nationals. Some States may decide to extend existing domestic offences, and some may enact new offences modelled on Article 70. The obligation on State Parties is that in some manner the conduct described in Article 70 be a criminal offence under its domestic law.’<sup>468</sup></p> <p>The Expert Group that drafted the Commonwealth Model Law noted: ‘each state would need to make a policy decision as to the most effective approach, which would depend very much on existing domestic law.’<sup>469</sup> The Case Matrix Network notes that different states have taken a range of approaches, including incorporating the offences by reference, replicating Article 70 in implementing legislation or extended pre-existing legislation.<sup>470</sup> To assist states, the Commonwealth Model Law proposes national provisions covering each of the six offences that states can compare to existing domestic law.<sup>471</sup></p>
Ensure that the offences apply to both offences committed in the context of ICC proceedings and national proceedings to investigate and prosecute genocide, crimes against humanity, war crimes and aggression.	While Article 70 clearly requires states to enact legislation so that they can respond to requests from the ICC to prosecute offences against the administration of justice committed in the context of ICC proceedings, such offences may also be committed in relation to national proceedings relating to Rome Statute crimes.

***Recommendation 50: States Parties should define or refer to the material and mental elements of Rome Statute crimes as far as possible.***

Beyond the definitions of genocide, crimes against humanity, war crimes and aggression in Articles 6, 7 and 8, which in some cases set out specific material and mental elements of certain crimes, elements of crimes are also addressed in other provisions of the Statute and in the ICC Elements of Crimes. The ICC Elements of Crimes, which were established to assist the ICC in the interpretation and application of Articles 6, 7 and 8,<sup>472</sup> elaborate on the material elements (conduct, consequence and circumstances) of the crimes, although the extent to which they are binding on the Court is not clear given that Article 9(1) states they ‘shall assist’ the Court in the interpretation and application of Articles 6, 7 and 8. Article 30 sets out the default mental elements of the crimes, requiring that the material elements must be committed with intent and knowledge. Some modes of liability also contain mental elements (eg, command responsibility requires that the superior ‘knew or owing to the circumstances at the time should have known’ that crimes were being committed by their subordinates).

<sup>468</sup> Piragoff (n 466), 1758.

<sup>469</sup> Report of the Commonwealth Expert Group on *Implementing Legislation for the Rome Statute of the International Criminal Court* (‘Commonwealth Expert Group’), para 36.

<sup>470</sup> Case Matrix Network (n 373), 69–70.

<sup>471</sup> *Commonwealth Model Law to Implement the Rome Statute of the International Criminal Court* (‘Commonwealth Model Law’), Sections 15A to 15G.

<sup>472</sup> Rome Statute, Article 9(1).

This raises complex issues for domestic implementation of the Rome Statute. Should the ICC Elements of Crimes be applied by national courts? Are the mental elements applied in national law consistent with Article 30 and other relevant provisions of the Rome Statute?

In line with the principle of *nullum crimen sine lege*, criminal offences should be defined clearly and strictly. Therefore, States Parties should ensure that national definitions of Rome Statute crimes provide as precise a definition of the elements of the crimes under international law as possible.

Drafting Recommendation	Explanation
<p>Incorporate the ICC Elements of Crimes into national legislation or provide that courts should consider the Elements of Crimes in interpreting and applying the crimes of genocide, crimes against humanity, war crimes and aggression.</p>	<p>The ICC Elements of Crimes is an invaluable resource for national authorities in interpreting and applying these crimes nationally, especially where the elements of crimes are not clearly reflected in Articles 6–8. For example, the elements of the crime against humanity and war crimes of rape sets out the material elements of the crime of rape in international law, including the actus reus and elements of force, threat of force and coercion, which should be applied by national courts.</p> <p>A majority of ICC Pre-Trial Chamber I has held that the Elements of Crimes must be applied by the ICC unless there is an irreconcilable contradiction with the Rome Statute. It argued that applying the Elements in this way ‘[furthers] the <i>nullum crimen sine lege</i> principle [...] by providing a priori legal certainty on the content of the definition of the crimes provided for in the Statute’.<sup>473</sup> National courts should apply the ICC Elements of Crimes unless there is a contradiction between the Elements and the Rome Statute or customary international law.</p> <p>States Parties should, therefore, either incorporate the Elements of Crimes into their national law definitions of genocide, crimes against humanity, war crimes and aggression, adapting them as necessary, taking into account recommendations in this Guide and other implementation tools, as well as developments in customary international law; or, alternatively, States Parties may consider including a general provision, along the lines of Article 9 of the Rome Statute, which states that the Elements of Crimes shall assist national courts in the interpretation and application of the crimes.<sup>474</sup></p>

<sup>473</sup> ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir*, Nr ICC-02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, paras 128 and 131.

<sup>474</sup> *Commonwealth Model Law* (n 471), s 8 states: ‘In interpreting and applying the provisions of Articles 6, 7, and 8 of the Statute, a court [may] [shall] take into account any elements of crimes adopted and amended under Article 9 of the Statute.’

Drafting Recommendation	Explanation
Apply the definition of the mental elements of intent and knowledge in Article 30.	<p>Article 30 sets out the default mental elements relating to all Rome Statute crimes, subject to elements set out in the definition of the crimes or the mode of criminal responsibility. It requires that a person can only be held criminally responsible for a crime ‘if the material elements are committed with intent and knowledge’. It goes on to clarify that a person has intent in relation to conduct where that person means to engage in the conduct.<sup>475</sup> A person has intent in relation to a consequence where they mean to cause that consequence or is aware that it will occur in the ordinary course of events.<sup>476</sup> Knowledge means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.<sup>477</sup></p> <p>As the Commonwealth Expert Group noted in its report on its model legislation, for most common law jurisdictions, the common law incorporates the necessary intent and was in fact likely to be broader.<sup>478</sup> The same situation may apply in the national criminal laws of other non-common law states. However, if a State Party determines that existing domestic law is not sufficient to capture the necessary intent and knowledge in Article 30, they should consider incorporating it in national law. In doing so, they should amend the opening phrase ‘Unless otherwise provided’ to ‘Unless otherwise provided in the Rome Statute or the Elements of Crimes’.<sup>479</sup></p>

*Recommendation 51: States Parties should review national definitions of Rome Statute crimes at least every 10–15 years and adopt amendments as necessary to reflect evolutions in the definitions of genocide, crimes against humanity, war crimes and aggression or the addition of other crimes under the jurisdiction of the Court.*

International criminal law is an evolving body of international law. The definitions of Rome Statute crimes will likely continue to expand in the future, including to respond to new and emerging methods of criminality and technologies. This may occur through the Assembly’s adoption of amendments to the Rome Statute, the adoption of new treaties that states may ratify or the crystallisation of new norms of customary international law or a combination of these developments.

To keep pace with these developments and advance the fight against impunity for the most serious crimes of concern to the international community, States Parties should commit to a regular review of their definitions of Rome Statute crimes in national law at least every 10–15 years, including to coincide with the proposed peer review of national frameworks by the Assembly, if it is established (see Section 3.4 below).

Some States Parties, including Canada and Samoa, foreseeing such developments, have adopted definitions of Rome Statute crimes that in addition to the definitions in Articles 6–8, criminalise any act or omission that, at the time and in the place of its commission, constitute a crime according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognised by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.<sup>480</sup> The Commonwealth’s Model Law provides

<sup>475</sup> Rome Statute, Article 30(2) (a).

<sup>476</sup> Rome Statute, Article 30(2) (b).

<sup>477</sup> Rome Statute, Article 30(3).

<sup>478</sup> Commonwealth Expert Group (n 469), paras 67–69.

<sup>479</sup> This approach was taken in the Commonwealth Model Law, see: Commonwealth Expert Group (n 469), para 69.

<sup>480</sup> Canada, Crimes against Humanity and War Crimes Act, s. 4(3), <https://laws-lois.justice.gc.ca/eng/acts/c-45.9/page-1.html#h-114641>; Samoa’s International Criminal Court Act 2007, s. 5(2), 6(2) and 7(2), [www.legal-tools.org/doc/306cc9/pdf](http://www.legal-tools.org/doc/306cc9/pdf).

states with the option of taking the same approach.<sup>481</sup> While this is a useful approach to keep pace with developments in international criminal law in the short term, it should not replace States Parties reviewing and updating their definitions regularly providing precise definitions of new crimes ensuring consistency with the principle of *nullum crimen sine lege*.

### 2.2.1.2 Jurisdiction

In addition to defining Rome Statute crimes in national law, national implementing legislation should also define the temporal and extraterritorial jurisdiction of national authorities to investigate and prosecute them.

*Recommendation 52: States Parties should provide that national courts can prosecute Rome Statute crimes that at the time of their commission constituted crimes under international law.*

To advance the fight against impunity, States Parties should grant national authorities with retrospective jurisdiction over Rome Statute crimes, so that they can address past, as well as future crimes. In most instances, this approach is consistent with the principle of legality, given that the vast majority of Rome Statute crimes are criminal according to conventional international law, customary international law and the general principles of law recognised by the community of nations, in most cases, for many decades.<sup>482</sup>

Although some States Parties have enacted legislation providing for retrospective national jurisdiction over Rome Statute crimes from 17 July 1998 (the adoption of the Rome Statute) or 1 July 2002 (the entry into force of the Rome Statute), many of the Rome Statute crimes were recognised as crimes under international law much earlier. Rather than imposing an arbitrary date in implementing legislation, which may entrench impunity in relation to some past crimes, States Parties are encouraged to adopt the approach taken by some States Parties, including Canada, to allow for the retrospective application of Rome Statute crimes that were recognised as crimes under international law according to customary international law or conventional international law or by virtue of being criminal according to the general principles of law recognised by the community of nations at the time of their commission.<sup>483</sup>

*Recommendation 53: States Parties should provide for universal jurisdiction over Rome Statute crimes.*

To advance their determination to end impunity, States Parties should provide national authorities with the broadest jurisdiction to prosecute Rome Statute crimes – universal jurisdiction.

To comply fully with the principle of complementarity, all States Parties must, at a minimum, provide their authorities with jurisdiction to prosecute crimes committed on their territory (territorial jurisdiction) or by their nationals whether on their territory or abroad (active personality extraterritorial jurisdiction). However, States Parties can and should go further. While some states have extended their jurisdiction to cover crimes committed against their nationals abroad (passive personality extraterritorial jurisdiction) or crimes committed by persons resident in their country, many states have provided for universal jurisdiction over Rome Statute crimes,<sup>484</sup> ensuring that their national authorities can investigate and prosecute the

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481 Commonwealth Model Law (n 471), s 5(2) Option 2; s 6(2) Option 2; and s 7(2) Option 2.

482 See Article 15(2) of the International Covenant on Civil and Political Rights.

483 See Canada, Crimes against Humanity and War Crimes Act, s.4.

484 See, for example, Amnesty International 2001 study of national legislation and state practice: *Universal Jurisdiction: The duty of states to enact and enforce legislation*.

crimes regardless of where they were committed, the nationality of the alleged perpetrator, the nationality of the victim or any other connection to the state exercising jurisdiction.<sup>485</sup>

States Parties that provide for universal jurisdiction ensure that their territories cannot be safe havens for persons accused of crimes under international law. Critically, it permits their national authorities to make a vital contribution to the fight against impunity, not only by addressing crimes under international law alongside or instead of the ICC, but also allowing national authorities to address crimes in situations where the ICC does not have jurisdiction. For example, in the absence of a UN Security Council referral of the situation in Syria to the ICC Prosecutor, a number of states are conducting national investigations and prosecutions applying universal jurisdiction, making an important contribution to addressing impunity.<sup>486</sup>

### 2.2.1.3 Modes of individual criminal responsibility

Modes of liability for crimes under international law are in many respects distinct from modes of liability for ordinary crimes under national law. Ambos notes:

‘It must not be overlooked, however, that criminal attribution in international criminal law has to be distinguished from attribution in national criminal law: while in the latter case normally a concrete criminal result caused by a person’s individual act is punished, international criminal law creates liability for acts committed in a collective context and systematic manner; consequently the individual’s own contribution to the harmful result is not always readily apparent.’<sup>487</sup>

The Rome Statute defines modes of criminal responsibility applicable to Rome Statute crimes in Article 25 (individual criminal responsibility) and Article 28 (responsibility of commanders and other superiors). The provisions demonstrate that, while some modes of liability in international criminal law are consistent with principles of criminal responsibility in many national jurisdictions for ordinary crimes (eg, direct commission, aiding and abetting), other modes of criminal responsibility are specific to international criminal law (eg, command responsibility).

*Recommendation 54: States Parties should ensure that all modes of criminal responsibility listed in Article 25(3) are covered in national legislation and can be applied in prosecuting genocide, crimes against humanity, war crimes and aggression.*

Werle and Jessberger note ‘Article 25(3) for the first time systematises the modalities of participation recognised under customary international law, while cautiously supplementing and modifying them.’<sup>488</sup> It lists the following ‘numerous and wide-ranging’<sup>489</sup> modes of criminal responsibility:

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485 *Princeton Principles on Universal Jurisdiction* (2001), [https://lapa.princeton.edu/hosteddocs/unive\\_jur.pdf](https://lapa.princeton.edu/hosteddocs/unive_jur.pdf), Principle 1(1).

486 See, for example, Human Rights Watch, ‘“These are the crimes we are fleeing” Justice for Syria in Swedish and German Courts’ (2017), [www.hrw.org/report/2017/10/04/these-are-crimes-we-are-fleeing/justice-syria-swedish-and-german-courts](http://www.hrw.org/report/2017/10/04/these-are-crimes-we-are-fleeing/justice-syria-swedish-and-german-courts); TRIAL International, FIDH, REDRESS, ECCHR, ‘Universal Jurisdiction Annual Review 2020’ <https://trialinternational.org/latest-post/universal-jurisdiction-annual-review-2020-atrocities-must-be-prosecuted-soundly-and-rigorously>.

487 Kai Ambos ‘Article 25’ in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016), 985.

488 Gerhard Werle, Florian Jessberger, *Principles of International Criminal Law* (4th Edition, Oxford: Oxford University Press 2020), 236.

489 Case Matrix Network (n 373), 55.

- ‘(a) commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
  - (b) orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
  - (c) for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
  - (d) in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. such contribution shall be intentional and shall either:
    - (i) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
    - (ii) be made in the knowledge of the intention of the group to commit the crime;
  - (e) in respect of the crime of genocide, directly and publicly incites others to commit genocide;
  - (f) attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person’s intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.
- (3 bis) In respect of the crime of aggression, the provisions of this Article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.’

The Commonwealth Expert Group stated: ‘[e]ach sub-paragraph needs to be considered carefully with reference to existing domestic law to ensure that the type of participation or conduct described would create individual criminal responsibility under domestic law.’<sup>490</sup> The Expert Group proposed optional legislative provisions covering each sub-paragraph of Article 25(3).<sup>491</sup> Case Matrix Network reports that some States Parties have implemented Article 25 by reference to the provision, in some cases also citing modes of criminal responsibility that apply in existing national law.<sup>492</sup> In other cases, States Parties have referred to the application of Article 25 in their implementing legislation, ‘with any necessary modifications’.<sup>493</sup> In other cases, States Parties have gone further than the modes listed in Article 25.<sup>494</sup> In particular, States Parties should consider the following drafting recommendations to ensure that national authorities are able to prosecute those responsible for the commission of Rome Statute crimes.

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490 Commonwealth Expert Group (n 469), para 58.

491 Commonwealth Expert Group (n 469), para 58; Commonwealth Model Law (n 471), section 17B.

492 Case Matrix Network (n 373), 55–56.

493 See, for example: New Zealand, International Crimes and International Criminal Court Act 2000, s12.

494 Case Matrix Network (n 373), 56–58.

Drafting Recommendation	Explanation
Ensure that national modes of individual criminal responsibility cover liability for omission.	Although Article 25(3) does not specifically refer to individual criminal responsibility arising from omission, Werle and Jessberger point out that this does not justify a conclusion that States Parties intended to exclude it. <sup>495</sup> They note that the use of the term ‘commits’ readily permits the inclusion of criminal liability for omission and argue that the drafters left the matter open for the Court to decide. <sup>496</sup> Case Matrix Network reports that a number of States Parties have expressly provided for liability for omission in their implementing legislation. <sup>497</sup>
Ensure that national modes of individual criminal responsibility cover conspiracy to commit genocide and, if necessary, consider extending modes of criminal responsibility to cover conspiracy to commit war crimes and crimes against humanity.	<p>The mode of liability of conspiracy – an agreement between two or more persons to commit a crime – is not fully reflected in Article 25(3). Although Article 25(3) (d) covers contributions to the commission or attempted commission of a crime by a group of persons acting with a common purpose, it does not refer specifically to conspiracy and the definition requires that a crime be actually committed or attempted. However, Article III of the Genocide Convention expressly requires that conspiracy to commit genocide shall be punishable. The drafting history of the Genocide Convention indicates the intent to cover the common law notion of conspiracy, which is perpetrated when two or more people agree to perpetrate the crime regardless of whether the crime itself is actually committed.<sup>498</sup> Schabas states: ‘exclusion from the Statute of the inchoate crime of conspiracy to commit genocide was almost certainly an oversight rather than an intentional omission.’<sup>499</sup></p> <p>Case Matrix Network states that extending conspiracy to war crimes and crimes against humanity ‘serves to strengthen the system by criminalising the commission of the three crimes presently under the ICC jurisdiction to the broadest possible extent possible at the national level’,<sup>500</sup> noting that several States Parties have adopted this approach. With due consideration to the different approaches domestic systems take with respect to conspiracy, criminalising conspiracy to commit core crimes should be considered.</p>

***Recommendation 55: States Parties should ensure that national law provides for the responsibility of commanders and other superiors as set out in Article 28 of the Rome Statute.***

In addition to the grounds of criminal responsibility in Article 25, Article 28 of the Rome Statute defines the responsibility of commanders and other superiors when they fail to take all necessary and reasonable measures within their power to prevent or repress the commission of Rome Statute crimes by their subordinates or to submit the matter to the competent authorities for investigation and prosecution.

Unlike previous definitions of superior responsibility in the ICTY and ICTR Statutes, Article 28 makes a distinction between the elements of the offence applicable to military commanders or persons effectively acting as military commanders and civilian superiors. For a military commander or person effectively acting as a military commander to be held criminally responsible, they must either know or, *owing to the circumstances at the time, should have known* that the forces were committing or about to commit such crime.<sup>501</sup> The ‘should have known’ element represented an advancement in international criminal law providing for the possibility of holding a superior criminally negligent for failing to monitor and supervise their forces or report crimes committed by them. Although some commentators have raised concerns about the

<sup>495</sup> Werle and Jessberger (n 488), 310.

<sup>496</sup> *Ibid*, 310.

<sup>497</sup> Case Matrix Network, (n 373), 57–58.

<sup>498</sup> Schabas (n 198), 584.

<sup>499</sup> *Ibid*.

<sup>500</sup> Case Matrix Network (n 373), 56.

<sup>501</sup> Rome Statute, Article 28(a) (i).

appropriateness of the possibility of imposing criminal responsibility for negligence,<sup>502</sup> Robinson argues convincingly that it is justified in light of the duties of such commanders:

‘Given the extraordinary danger of the activity, the historically demonstrated frequency of abuse, and the imbalance of power of vulnerability, the commander has a duty to try to monitor, prevent and respond to crimes. The baseline expected of a commander is diligence in monitoring and repressing crimes, and a failure to meet that baseline effectively facilitates and encourages crimes. Command responsibility rightly conveys that the commander defying this duty is indirectly responsible for the harms unleashed...’<sup>503</sup>

In contrast, Article 28 provides that civilian superiors can be held criminally responsible if it is proved that they know, *or consciously disregarded information which clearly indicated*, that the subordinates were committing or about to commit such crimes<sup>504</sup> – therefore excluding criminal responsibility for negligence but providing for the possibility of holding a superior responsible for a form of recklessness.<sup>505</sup> Several commentaries note that this is closely aligned with the norm under customary international law that the commander must have ‘reason to know’ about the risk or commission of crimes.<sup>506</sup>

Although some concerns have been raised by the bifurcation of superior responsibility in Article 28, it is important to note that ICC Pre-Trial Chamber II has interpreted a ‘person effectively acting as a military commander’ broadly to include ‘superiors who have authority and control over regular government forces such as armed police units or irregular forces (non-government forces) such as rebel groups, paramilitary units including, inter alia, armed resistance movements and militias that follow a structure of military hierarchy or a chain of command’.<sup>507</sup> Therefore, civilian superiors can be held to the same negligence standards as military commanders if, on the facts, it can be demonstrated that they are acting with the same authority and control as military commanders.

The concept of superior responsibility is ‘an original creation of international criminal law’ for which there are no paradigms in national legal systems.<sup>508</sup> Moreover, Article 28 of the Rome Statute advances the definition in international criminal law. States Parties, therefore, should enact legislation recognising command responsibility, as defined in Article 28, as a mode of liability for Rome Statute crimes.<sup>509</sup> Case Matrix Network reports that a number of States Parties have incorporated Article 28 into their national implementing legislation by referencing Article 28 or reproducing the text of the Article.<sup>510</sup>

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502 See, for example, Mirjan Damaska, ‘The Shadow Side of Command Responsibility’ (2001) 49 *Am J Comp L* 455, 463.

503 Darryl Robinson, ‘A justification of command responsibility’, 28 *Criminal Law Forum* (2017), 663–668 at 667.

504 Rome Statute, Article 28(b)(i).

505 Schabas (n 198), 617.

506 See, for example: Guénaël Mettraux, *The Law of Command Responsibility*, Oxford: Oxford University Press, 2009, 195, stating that the ‘consciously disregarding information’ standard in Article 28(b)(i) ‘does not diverge, in any significant manner, from the standard of *mens rea* applicable to all superiors under customary international law’.

507 ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424, ‘Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo’, 15 June 2009, para 410.

508 Werle and Jessberger (n 488), 264.

509 Commonwealth Expert Group (n 469), para 63 ‘This Article [28] involves new concepts that will not be found in existing laws of most common law states and therefore requires implementation through legislation.’

510 Case Matrix Network (n 373), 60–61.

## 2.2.1.4 Defences

The right of an accused person to raise defences is an essential element of a fair trial that is expressly recognised in Article 67(1) (e) of the Rome Statute. Schabas states: ‘[d]efences serve to ensure that an accused person benefits not only from a fair trial in the procedural sense, but also one that is fair in a substantive sense’.<sup>511</sup>

The Rome Statute provides that a broad range of defences may apply to Rome Statute crimes. Article 31 entitled ‘grounds for excluding criminal responsibility’ expressly lists and defines mental disease or defect, intoxication, self-defence, duress and necessity. However, this list of defences is far from exclusive. Other grounds for excluding criminal responsibility are included in other provisions of the Statute, including: abandonment of an attempted crime (Article 25(3) (f)); mistake of fact and mistake of law (Article 32); and superior orders – subject to strict conditions (Article 33). Moreover, Article 31(3) provides that the ICC may consider other grounds derived from applicable law as set forth in Article 21.

*Recommendation 56: States Parties should ensure that defences, justifications and excuses available to persons accused of Rome Statute crimes in national proceedings are consistent with defences, justifications and excuses.*

National legislation should provide that an accused person may rely on defences, justifications and excuses in national or international law. States Parties should, at a minimum, ensure that the defences applicable to Rome Statute crimes should be defined consistent with international law, including any restrictions.

Drafting Recommendation	Explanation
Ensure that the grounds for excluding criminal responsibility in Article 31 in national law are covered, excluding the defence of necessity for crimes of sexual violence and possibly other offences.	<p>States parties should ensure that the grounds for excluding criminal responsibility in Article 31 (mental disease or defect, intoxication, self-defence, duress and necessity)<sup>512</sup> are defined in national law to ensure that they are available to accused persons and that national courts apply the definitions in relation to national prosecutions of Rome Statute crimes. Case Management Network reports that several States Parties have either referred to or reproduced the definitions in their implementing legislation.<sup>513</sup></p> <p>In relation to the defence of necessity, the UN Model Legislative Provisions on Conflict-Related Sexual Violence recommends that States include a provision in national legislation stating: ‘[n]o interest, no necessity of a political, military or national nature, can justify, even as a reprisal, the offences’.<sup>514</sup> States Parties should adopt this provision and also consider excluding the defence of necessity for other grave crimes that are impossible to justify in any circumstances.</p>

<sup>511</sup> Schabas (n 198), 637.

<sup>512</sup> Although the ICTY Appeals Chamber ruled by a three to two majority that ‘duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings’ (ICTY, *Prosecutor v Erdemovic*, ‘Appeals Chamber Judgment’, IT-96-22-A, 7 October 1997, para 19), Kai Ambos makes a compelling case supporting the ICC drafter’s decision to depart from the ICTY’s approach (Kai Ambos, ‘Defences in International Criminal Law’, in Bertram S Brown (ed) *Research Handbook on International Criminal Law* (Edward Elgar Publishing, 2011), 299–329 at 314–317.

<sup>513</sup> Case Matrix Network (n 373), 60–61.

<sup>514</sup> UN Model Legislative Provisions on Conflict-Related Sexual Violence, Article 46(1).

Drafting Recommendation	Explanation
Refer to or reproduce the restrictions on the defences of mistake of fact or mistake of law in Article 32.	<p>To the extent that national law permits mistake of fact or mistake of law as a defence, the following restrictions of the application of these defences should be applied to Rome Statute crimes:</p> <p>Article 32(1) provides that a mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.</p> <p>Article 32(2) provides that a mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in Article 33.</p>
Refer to or reproduce the three-part test on the defence of superior orders and prescription of law in Article 33(1).	<p>Article 33 sets out that an order of a government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:</p> <ul style="list-style-type: none"> <li>(a) the person was under a legal obligation to obey orders of the government or the superior in question;</li> <li>(b) the person did not know that the order was unlawful;</li> <li>(c) the order was not manifestly unlawful.</li> </ul> <p>Other international criminal law statutes have included an absolute prohibition of the defence providing that '[t]he fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment'. However, as Schabas argues, the definition in the Rome Statute 'is consistent with customary international law.'<sup>515</sup> He asserts 'it is a specific affirmation of the general principle, set out in Article 30 of the Rome Statute, that a person cannot be convicted of a crime without knowledge and intent, or mens rea. A subordinate who commits a war crime acting under a mistaken belief that the act is lawful does not have a guilty mind, and should not be punished within a fair criminal justice system.'<sup>516</sup></p>
Civil law states that are required to define defences as justifications or excuses, should seek guidance from academic commentaries on the matter.	Civil law states regularly distinguish between justifications and excuses – a distinction that is not addressed in the Rome Statute. However, some academic commentaries consider this issue in relation Articles 31, 32 and 33, which may provide useful guidance to drafters in those states. <sup>517</sup>

### 2.2.1.5 Removing barriers to prosecution

Given the severity of Rome Statute crimes, implementing legislation should ensure certain barriers in national criminal laws – including statutes of limitations, immunities and amnesties – are not applied.

***Recommendation 57: States Parties should eliminate any statute of limitations for genocide, crimes against humanity, war crimes and aggression.***

Article 29 of the Rome Statute provides that '[t]he crimes within the jurisdiction of the Court shall not be subject to any statute of limitations'. This provision clarifies that the ICC shall not apply statutes of limitations in its cases. But, as Schabas notes, a literal reading of Article 29 also means that '[a] State Party to the *Statute* whose legislation allowed prosecutions of these crimes to become time barred would be in

<sup>515</sup> Schabas (n 198), 663–664 and 669.

<sup>516</sup> Schabas (n 198), 669.

<sup>517</sup> See, in particular, Ambos (n 512), 299–329.

breach of the instrument.<sup>518</sup> Indeed, national laws providing for prescription over Rome Statute crimes would render national authorities unable to prosecute the crimes and may trigger the jurisdiction of the ICC.

The Commonwealth Expert Groups have emphasised in proposing an optional provision of the Model Law based on Article 29 that ‘if any [statutes of limitations] exist, full complementarity would require that the implementing legislation override them’.<sup>519</sup> Case Matrix Network reports that several States Parties have sought to eliminate periods of prescription for crimes under the jurisdiction of the ICC in their implementing legislation, including with direct reference to Article 29.<sup>520</sup>

*Recommendation 58: States Parties should ensure that official capacity does not exempt a person from criminal responsibility for Rome Statute crimes.*

Article 27(1) sets out the well-established principle of international criminal law that official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility.<sup>521</sup> Essentially it precludes accused persons from claiming that their official capacity is a defence to Rome Statute crimes. As Schabas notes, ‘the purpose is to ensure that senior leaders do not evade responsibility by arguing that they were acting not as individuals, but on behalf of the State.’<sup>522</sup> It has been held by an ICTY Trial Chamber to reflect a rule of customary international law.<sup>523</sup>

To ensure that States Parties can exercise jurisdiction over Rome Statute crimes in accordance with the principle of complementarity, and to avoid the ICC exercising jurisdiction over cases involving national officials that authorities may wish to be dealt with nationally, it is important that States Parties preclude official capacity as a ground for excluding criminal responsibility under national law. The International Law Commission’s draft Articles for a Convention on the Prevention and Punishment of Crimes Against Humanity proposes that States Parties shall take the necessary measures to ensure that, under their criminal law, the fact that an offence was committed by a person holding an official position is not a ground for excluding criminal responsibility.<sup>524</sup>

The Commonwealth Expert Group notes that implementing this provision into national law may be challenging for states that include immunities for heads of state and other officials in their constitutions.<sup>525</sup> In these circumstances, they state that constitutional amendments may be the best solution.<sup>526</sup> However,

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518 Schabas (n 198), 624.

519 Commonwealth Expert Group (n 469), para 66.

520 Case Matrix Network (n 373), 61–62.

521 This principle is also reflected, inter alia, in: Article 7 of the Charter of the International Military Tribunal; Article 6 of the Tokyo Tribunal Charter; Principle III of the Nuremberg Principles; Article IV of the Genocide Convention; Article 7(2) of the ICTY Statute; Article 6(2) of the ICTR Statute; and Article 6(2) of the Statute of the Special Court for Sierra Leone.

522 Schabas (n 198), 599.

523 ICTY, *Prosecutor v Milošević* (IT-02-54-PT), ‘Decision on Preliminary Motions’, 8 November 2001, para 28.

524 International Law Commission, *Texts and titles of the draft preamble, the draft Articles and the draft annex provisionally adopted by the Drafting Committee on second reading*, A/CN.4/L.935, 15 May 2019, Draft Article 6(5).

525 Commonwealth Expert Group (n 469), para 164.

526 Commonwealth Expert Group (n 469), para 166.

if that is not an option, they explain how several countries have found acceptable solutions through constitutional interpretation.<sup>527</sup>

To ensure that States Parties cannot be safe havens for foreign officials accused of genocide, crimes against humanity and war crimes, national legislation should ensure that restrictions on the application of immunities for foreign officials are applied consistent with customary international law. In particular, in 2017, the International Law Commission reaffirmed the well-established principle that functional immunities – *ratione materiae* – do not apply in respect of these crimes.<sup>528</sup>

*Recommendation 59: States Parties should prohibit amnesties for Rome Statute crimes.*

Although the Rome Statute is silent on the issue of amnesties, the following text of the preamble confirms that they are inconsistent with the object and purpose of the Rome Statute and States Parties' determination to put an end to impunity:

‘Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level...’

Amnesties are inconsistent with States Parties' obligations to provide effective remedies to victims of gross violations of international human rights law and serious violations of international humanitarian law that amount to crimes under international law.<sup>529</sup>

Although the question of whether amnesties are prohibited by customary international law is disputed,<sup>530</sup> there is strong evidence in favour of the prohibition.<sup>531</sup> Regardless, there is nothing to prevent States Parties committed to the fight against impunity from enacting national legislation prohibiting amnesties at the national level for genocide, crimes against humanity, war crimes and aggression.

*Recommendation 60: States Parties should ensure that national authorities prosecute accused persons under the age of 18 applying juvenile justice protections.*

Although Article 26 of the Rome Statute provides that: ‘The court shall have no jurisdiction over any person under the age of 18 at the time of the alleged commission of a crime’, the restriction on the Court’s

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527 For further information see: Commonwealth Expert Group (n 469), paras 162–171.

528 International Law Commission, Immunity of State officials from foreign criminal jurisdiction, A/CN.4/L.893, 10 July 2017, draft Article 7 (1): ‘Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law: (a) crime of genocide; (b) crimes against humanity; (c) war crimes; (d) crime of apartheid; (e) torture; (f) enforced disappearance.’

529 See, for example, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Principle 4: ‘In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him.’

530 See, for example Amnesty International’s arguments that such a prohibition exists in its *Initial Recommendations for a Convention on Crimes Against Humanity*, [www.amnesty.org/download/Documents/IOR4012272015ENGLISH.pdf](http://www.amnesty.org/download/Documents/IOR4012272015ENGLISH.pdf), 15–23; and arguments against in the *Belfast Guidelines on Amnesty and Accountability*, [www.ulster.ac.uk/\\_\\_data/assets/pdf\\_file/0005/57839/TheBelfastGuidelinesFINAL\\_000.pdf](http://www.ulster.ac.uk/__data/assets/pdf_file/0005/57839/TheBelfastGuidelinesFINAL_000.pdf), 38–43.

531 See, for example, Amnesty International’s arguments for the International Law Commission to incorporate the prohibition of amnesties into the draft Articles of the convention on the prevention and punishment of crimes against humanity in Amnesty International, *Conditional Support to the Draft Articles on Crimes Against Humanity Adopted by the International Law Commission in First Reading* (2017), available at: [www.amnesty.org/download/Documents/IOR4073282017ENGLISH.pdf](http://www.amnesty.org/download/Documents/IOR4073282017ENGLISH.pdf).

jurisdiction was not intended to impose 18 as the minimum age of criminal responsibility for Rome Statute crimes at the national level. In fact, the consensus was that where the offences involved persons under the age of 18 it would be best for such cases to be prosecuted domestically.<sup>532</sup> Therefore, as the Commonwealth Expert Group notes, ‘[w]hile some states may choose to adopt new age limits, it is entirely consistent with the Statute to apply any existing rules regarding age of responsibility and the division between youth and adult offenders to those accused of these crimes.’<sup>533</sup> In accordance with international human rights law persons under the age of 18 years at the time of the alleged commission of an offence must be treated in accordance with the rules of juvenile justice<sup>534</sup> (see 2.2.2.4 below).

### 2.2.1.6 Penalties

The Rome Statute sets out penalties of imprisonment, fines and forfeiture that the ICC may impose in the event that a person is convicted of a Rome Statute crime.

Article 77 provides that the Court may impose a prison sentence of no more than 30 years for persons convicted of genocide, crimes against humanity, war crimes or aggression, unless a term of life imprisonment is justified by the extreme gravity of the crime and the individual circumstances of the convicted person. It also provides that the Court may order the convicted person to pay a fine or that the proceeds, property and assets they derived directly or indirectly from the crime may be forfeited, without prejudice to the rights of a bona fide third party.

Article 70(3) provides that, in the event of a conviction of offences against the administration of justice, the Court may impose a term of imprisonment not exceeding five years, or a fine, or both.

*Recommendation 61: States Parties should be guided by the Rome Statute penalties in setting national penalties for Rome Statute crimes, including prohibiting the application of the death penalty.*

The penalties set out in the Rome Statute apply only to persons convicted by the Court. Article 80, which was included as a political compromise not to include the death penalty as a punishment that could be imposed by the Court and to address concerns by some states that prohibit the punishment of life imprisonment nationally,<sup>535</sup> confirms:

‘... nothing in this Part [7 on penalties] affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed by the Court.’

Nevertheless, although States Parties are in no way bound by the penalties agreed at the Rome Conference, they provide useful guidance on which penalties are appropriate for Rome Statute crimes. In particular, considering the omission of the death penalty from the Rome Statute and the IBA’s long-standing recommendation that all states should take steps towards the complete prohibition of the death penalty,<sup>536</sup>

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<sup>532</sup> Commonwealth Expert Group (n 469), para 59.

<sup>533</sup> Commonwealth Expert Group (n 469), para 60.

<sup>534</sup> See, for example, Committee on the Rights of the Child, General Comment 10, para 37.

<sup>535</sup> See Rolf Einar Fife, ‘Article 80’ in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016), 1910–1912.

<sup>536</sup> See, for example, IBA Human Rights Institute Council, Resolution on the Abolition of the Death Penalty, adopted on 15 May 2008.

States Parties are urged not to provide for the possibility of imposing the death penalty on persons convicted of Rome Statute crimes before national courts.

## Useful resources on implementing Rome Statute offences

In addition to the resources for implementing the Rome Statute at the end of Section 2.1, States Parties may refer to the following resources in developing and enacting legislation to investigate and prosecute Rome Statute crimes nationally:



### Commentaries

- Olympia Bekou, ‘Crimes at crossroads: Incorporating international crimes at the national level’ (2012) *Journal of International Criminal Justice*, 677–691.
- Olympia Bekou, ‘National approaches to the ICC Statute crimes’ in Andraž Zidar and Olympia Bekou (eds), *Contemporary Challenges for the International Criminal Court (British Institute of International and Comparative Law 2014)*, 11–34.
- *Forum for International Criminal and Humanitarian Law – Importing Core International Crimes into National Law* (2010): [www.legal-tools.org/doc/398270/pdf](http://www.legal-tools.org/doc/398270/pdf).
- William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2016), Parts 2 and 3.
- Gerhard Werle, Florian Jessberger, *Principles of International Criminal Law* (4th Edition, Oxford: Oxford University Press 2020).
- William A Schabas, ‘Article 6’ in in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016).
- Tamás Hoffmann, ‘The Crime of Genocide in its (nearly) infinite domestic variety’ in Marco Odello, Piotr Lubiński (eds) *The Concept of Genocide in International Criminal Law – Developments after Lemkin* (Routledge, 2020).
- Christopher Keith Hall and Kai Ambos, ‘Article 7’ in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016).
- International Law Commission, *Draft Articles on Prevention and Punishment of Crimes Against Humanity*, with commentaries (2019).
- Michael Cottier et al, ‘Article 8’ in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016).
- Rosemary Grey, *Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court* (Cambridge: Cambridge University Press, 2019).
- Rosemary Grey, Jonathan O’Donohue, Indira Rosenthal, Lisa Davis and Dorine Llanta, ‘Gender-Based Persecution as a Crime Against Humanity: The Road Ahead’, 17 *Journal of International Criminal Justice* (2019), 957–979.

- Donald K Piragoff, 'Article 70' in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016).
- Amnesty International: *Universal Jurisdiction: The duty of states to enact and enforce legislation*: [www.amnesty.org/en/documents/ior53/003/2001/en](http://www.amnesty.org/en/documents/ior53/003/2001/en).
- *Princeton Principles on Universal Jurisdiction* (2001): [https://lapa.princeton.edu/hosteddocs/unive\\_jur.pdf](https://lapa.princeton.edu/hosteddocs/unive_jur.pdf).
- Kai Ambos, 'Article 25' in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016).
- Kai Ambos, 'Defences in International Criminal Law', in Bertram S Brown (ed) *Research Handbook on International Criminal Law* (Edward Elgar Publishing, 2011), 299–329.
- Rolf Einar Fife, 'Article 80' in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016).

## 2.2.2 Establishing or strengthening effective national justice mechanisms to address Rome Statute crimes

In addition to enacting implementing legislation, States Parties should take the opportunity of implementing the Rome Statute to review national justice mechanisms to ensure that Rome Statute crimes can be investigated and prosecuted effectively at the national level.

### 2.2.2.1 Independent, impartial and competent investigation and prosecution mechanisms

International human rights law requires that investigations into crimes under international law must be independent, impartial, competent, thorough and prompt.<sup>537</sup> These factors are also assessed by the OTP in determining whether any national investigations and prosecutions are genuine. If not, the ICC may decide to step in to investigate the crimes.

*Recommendation 62: States Parties should ensure that those conducting national investigations and prosecutions are independent of those suspected of committing the crimes, free from political interference and well-trained in international criminal law and conducting investigations of Rome Statute crimes. Where possible, States Parties should establish specialised investigation units.*

Those conducting investigations must be able to conduct an investigation without interference or influence by authorities other than those performing an investigative or judicial function, and without fear of reprisal

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<sup>537</sup> See, for example, *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add 1, 8 February 2005, Principle 19; Human Rights Committee, General Comment 31, 26 May 2004, UN Doc CCPR/C/21/Rev.1/Add 13, paras 15 and 18.

or expectation of favour for any finding, recommendation, or decision made.<sup>538</sup> In particular, any consents required to proceed with a prosecution should be vested in an authority that exercises independent judgement in the prosecution process<sup>539</sup> – not political officials or military commanders.

States Parties should ensure that Rome Statute crimes are investigated and prosecuted in the ordinary criminal justice system, which complies with minimum fair trial guarantees. To ensure the independence and impartiality of national proceedings to investigate and prosecute Rome Statute crimes, States Parties should not assign jurisdiction to military courts.<sup>540</sup>

Moreover, investigators and prosecutors must be adequately trained in international criminal law and conducting investigations into allegations of genocide, crimes against humanity, war crimes and aggression. A wealth of materials and training programmes are available to States Parties to build the capacity of national investigators and ensure effective investigations, including:

- IBA, International Criminal Law Manual (2010, updated in 2013): [www.ibanet.org/document?id=2010-International-Criminal-Law-Manual-HRI](http://www.ibanet.org/document?id=2010-International-Criminal-Law-Manual-HRI); [www.ibanet.org/document?id=2013-International-Criminal-Law-Manual-Updated-HRI](http://www.ibanet.org/document?id=2013-International-Criminal-Law-Manual-Updated-HRI); and
- Geneva Academy of International Humanitarian Law and Human Rights and International Committee of the Red Cross, *Guidelines in Investigating Violations on International Humanitarian Law: Law, Policy and Good Practice* (2019): [www.icrc.org/en/document/guidelines-investigating-violations-ihl-law-policy-and-good-practice](http://www.icrc.org/en/document/guidelines-investigating-violations-ihl-law-policy-and-good-practice).
- The Institute for International Criminal Investigations offers a range of training courses for national investigators: <https://iici.global>.

To date more than a dozen states (mostly in Europe, Canada and the United States) have established specialised investigation units, including to adopt a ‘no-safe-haven approach’ to persons suspected of committing serious international crimes prior to their arrival in their countries.<sup>541</sup>

Should States Parties require assistance with investigations of war crimes, genocide, crimes against humanity, and serious human rights violations, Justice Rapid Response ([www.justicerapidresponse.org](http://www.justicerapidresponse.org)) is a global facility that can provide rapidly deployable specialised justice experts – including international investigators, prosecutors, psychosocial counsellors, interpreters and forensic experts – to assist national authorities.

*Recommendation 63: States Parties should enact legislation and take measures to ensure that national authorities follow best practice in investigating and prosecuting sexual and gender-based crimes.*

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538 Geneva Academy of International Humanitarian Law and Human Rights and ICRC, *Guidelines in Investigating Violations on International Humanitarian Law: Law Policy and Good Practice*, September 2019, para 123.

539 Commonwealth Expert Group (n 469), para 32.

540 For detailed arguments against using military courts, see, Hugo Relva, ‘Three Propositions for a Future Convention on Crimes Against Humanity: The Prohibition of Amnesties, Military Courts, and Reservations’ 16 *Journal of International Criminal Justice* (2018), 857–875 at 868–871.

541 For more details of these units and the challenges they face, see, Elise Baker, Lara Hakki, Julia Jacovides, Kristina Steinmetz, Eric Stover, Victoria Tang & Fabian Unser-Nad, ‘Joining Forces: National War Crimes Units and the Pursuit of International Justice’, 42 *Human Rights Quarterly* (2020), 594–622.

In 2014, the ICC OTP developed a *Policy Paper on Sexual and Gender-Based Crimes* acknowledging that the investigation of such crimes presents specific challenges. According to the Policy Paper:

‘These include the under- or non-reporting owing to societal, cultural, or religious factors; stigma for victims; limited domestic investigations, and the associated lack of readily available evidence; lack of forensic or other documentary evidence, owing, inter alia, to the passage of time; and inadequate or limited support services at national level.’<sup>542</sup>

In addition to defining the OTP’s policy that pays particular attention to the commission of sexual and gender-based crimes and seeks to enhance the integration of a gender perspective and analysis at all stages of its work,<sup>543</sup> the Office has called on States Parties to support domestic investigations and prosecutions for these crimes.<sup>544</sup>

The *UN Model Legislative Provisions on Conflict-Related Sexual Violence* should be the starting point for all States Parties to ensure that their domestic frameworks address conflict-related sexual violence in all its forms in accordance with best practice. In addition to setting out a comprehensive list and definitions of crimes of conflict-related sexual violence, it contains substantial provisions to protect the safety, physical and psychological wellbeing, dignity and privacy of victims and witnesses.<sup>545</sup> States Parties should review their national laws and incorporate provisions to strengthen their frameworks to address conflict-related sexual violence. In particular, States Parties should implement the following ICC Rules of Procedure and Evidence - Rule 63(4) (no requirement of corroboration in cases of sexual violence); Rule 70 (principles of evidence on cases of sexual violence); Rule 71 (evidence of other sexual conduct); and Rule 72 (in camera procedures to consider relevance or admissibility of evidence) - as addressed in the Model Legislative Provisions.<sup>546</sup>

National authorities investigating conflict-related sexual violence should be further trained in and guided by existing law, minimum standards and best practices.<sup>547</sup> Police investigators, prosecutors, lawyers, investigative magistrates and judges should follow the detailed guidelines and best practices set out in the *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict*.<sup>548</sup> National authorities should also apply the *Draft Global Code of Conduct for Investigating and Documenting Conflict Related Sexual Violence* (the ‘Murad Code’) launched in 2020 in response to persistent and growing reports that some actors are unaware of or do not apply existing guidance.<sup>549</sup> The Draft Code’s key objective is ‘to respect and support survivors’ rights and to ensure work with survivors to investigate, document and record their experiences is safer, more ethical and more effective in upholding their human rights.’<sup>550</sup>

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542 OTP, *Policy Paper on Sexual and Gender-Based Crimes*, para 4.

543 *Ibid.*, para 14.

544 *Ibid.*, para 105.

545 *UN Model Legislative Provisions on Conflict-Related Sexual Violence*, see Articles 49–67.

546 *UN Model Legislative Provisions on Conflict-Related Sexual Violence*, see Articles 56 and 57.

547 *Background Paper and Draft Global Code of Conduct for Investigating and Documenting Conflict-Related Sexual Violence* (the ‘Murad Code’) June 2020, [www.muradcode.com](http://www.muradcode.com), para 5.

548 *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict* (2017), [www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/06/report/international-protocol-on-the-documentation-and-investigation-of-sexual-violence-in-conflict/International\\_Protocol\\_2017\\_2nd\\_Edition.pdf](http://www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/06/report/international-protocol-on-the-documentation-and-investigation-of-sexual-violence-in-conflict/International_Protocol_2017_2nd_Edition.pdf).

549 The Murad Code (n 547).

550 *Ibid.*

To ensure that national investigations effectively identify and prosecute sexual violence, States Parties should ensure that their national authorities apply *The Hague Principles on Sexual Violence* – <https://thehagueprinciples.org> – which were presented to the Assembly by civil society organisations in December 2019. The Hague Principles consist of:

- The Civil Society *Declaration on Sexual Violence* providing general guidance on what makes violence ‘sexual’, especially to survivors;
- International Criminal Law *Guidelines on Sexual Violence* – a tool for international criminal law practitioners explaining when acts of sexual violence amount to international crimes and providing practical elements to inform their prosecution; and
- *Key Principles for Policy Makers on Sexual Violence* – ten key principles derived from the Civil Society Declaration to incorporate in policy development, legislative strategies, and legal and judicial procedures.

The Institute for International Criminal Investigations offers training courses for national investigators on the investigation of cases of sexual and gender-based violence as international crimes: <https://iici.global/course/investigation-conflict-related-sexual-and-gender-based-violence-sgbv>.

Justice Rapid Response and UN Women have established a Sexual and Gender-Based Violence Justice Experts Roster made up of experts who can be rapidly deployed to national authorities to assist with the investigation and prosecution of these crimes.<sup>551</sup>

#### ***2.2.2.2 Extradition and mutual legal assistance***

Given that Rome Statute crimes may cross international borders, perpetrators may seek safe haven in other states, victims and witnesses may flee to other countries, and evidence may be located in other countries, it is important that states provide effective cooperation and mutual legal assistance to each other. Traditionally, extradition and mutual legal assistance relating to crimes under international law have been addressed through bilateral treaties between states. However, a recent initiative seeks to establish a new multilateral *Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes Against Humanity and War Crimes*.

***Recommendation 64: States Parties should seek to expand agreements providing for extradition and mutual legal assistance with other states and support the adoption of an effective Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes Against Humanity and War Crimes.***

States Parties should explore opportunities to enter into bilateral extradition or mutual legal assistance treaties with other states that cover Rome Statute crimes and provide for effective cooperation with the investigation and prosecution of these crimes. The United Nations Office of Drugs and Crime has recently announced that it is developing a model agreement on international cooperation in the area of witness protection that should be considered during negotiations.<sup>552</sup>

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551 For further information see: [www.justicerapidresponse.org](http://www.justicerapidresponse.org).

552 UNODC, *Protecting Witnesses*, 3 December 2020, [www.unodc.org/unodc/en/frontpage/protecting-witnesses.html](http://www.unodc.org/unodc/en/frontpage/protecting-witnesses.html).

A draft of the *Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes Against Humanity and War Crimes* was planned to be negotiated during a diplomatic conference in Slovenia in June 2020. However, the conference had to be postponed until further notice due to the pandemic. States Parties may however find further information about the initiative, including the draft Convention and how to participate in the conference when it is rescheduled at: [www.gov.si/en/registries/projects/mla-initiative](http://www.gov.si/en/registries/projects/mla-initiative). States Parties are encouraged to participate in the process of drafting the Convention, ensuring that it provides for effective mutual legal assistance and judicial cooperation between states to address crimes of genocide, crimes against humanity and war crimes, taking into account the input of civil society.<sup>553</sup>

### 2.2.2.3 Fair trials

All trials must be fair. As the UN Secretary-General noted in submitting the draft Statute of the ICTY to the UN Security Council ‘it is axiomatic that the International Tribunal must fully respect international recognised standards regarding the rights of the accused at all stages of its proceedings’.<sup>554</sup> The same principle of course applies to national authorities, which must comply with fair trial guarantees in international human rights law, including those set out in Articles 9, 14 and 15 of the *International Covenant on Civil and Political Rights* (ICCPR), which are reflected and further elaborated in Articles 20, 55 and 62 to 68 of the Rome Statute. Indeed, Article 20(3) (b) of the Rome Statute provides that the ICC may conduct another trial if national trials of genocide, crimes against humanity, war crimes and aggression ‘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’.

*Recommendation 65: States Parties should ensure that national trials of Rome Statute crimes are fair.*

States Parties should review their national laws and procedures to ensure that national criminal proceedings will be conducted consistent with fair trial rights in Articles 9, 14 and 15 of the ICCPR and Articles 20, 55 and 62 to 68 of the Rome Statute.<sup>555</sup>

### 2.2.2.4 Juvenile justice protections

Although Article 26 of the Rome Statute precludes the ICC from exercising jurisdiction over persons who were under the age of 18 at the time of the alleged commission of a crime, this jurisdictional limitation only applies to the ICC. Juveniles may be prosecuted for international crimes before national courts, just as they may be prosecuted for ordinary crimes, subject to national legislation governing the minimum age of responsibility and applicable norms of international human rights law.<sup>556</sup>

*Recommendation 66: States Parties should ensure that any accused person under 18 is dealt with in a juvenile justice system in accordance with international standards.*

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553 See, for example: Joint NGO letter to the Core-Group and Co-Sponsoring States to the Mutual Legal Assistance (MLA) Initiative, September 2020, available at: [www.amnesty.org/download/Documents/IOR5131232020ENGLISH.pdf](http://www.amnesty.org/download/Documents/IOR5131232020ENGLISH.pdf).

554 Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), UN Doc S/25704, 3 May 1993, s 106.

555 Ellis (n 371), 226–227.

556 Schabas (n 198), 592–593.

In the event that national authorities prosecute a person who was under 18 at the time of the alleged crime, international human rights law requires that they must be treated in a manner consistent with their dignity and needs.<sup>557</sup> Even those accused of the most serious crimes under international law, should not be tried as adults.<sup>558</sup> States must establish a separate ‘child-oriented’ juvenile justice system,<sup>559</sup> which must be consistent with international standards. States Parties can find detailed guidance on these issues in UNICEF’s *Justice for Children Manual*: [www.unicef.org/northmacedonia/media/2881/file/MK\\_JusticeChildrenManual\\_2010\\_EN.pdf](http://www.unicef.org/northmacedonia/media/2881/file/MK_JusticeChildrenManual_2010_EN.pdf).

States Parties should also review and implement recommendations relating to the administration of child justice contained in concluding observations provided by the Committee on the Rights of the Child relating to their most recent periodic report.

### *2.2.2.5 Victims and witness protection and assistance*

Victims and witnesses of genocide, crimes against humanity, war crimes and aggression, in many cases, will have suffered significant harms that may impair their ability and willingness to participate in the criminal justice process. Many may also be at risk of threats, intimidation and violence, if they do so. The Rome Statute requires the ICC to take appropriate measures to protect the safety, physical and psychological wellbeing, dignity and privacy of victims and witnesses.<sup>560</sup> It establishes a Victims and Witnesses Unit in the Registry to provide protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by witnesses.<sup>561</sup> Victims can also present their views and concerns at appropriate stages of the proceedings, which will be considered by the Court.<sup>562</sup> These systems are consistent with international human rights standards that apply to States Parties.<sup>563</sup>

*Recommendation 67: States Parties should ensure that victims and witnesses are provided with effective protection and support to participate in national criminal proceedings.*

The United Nations Office on Drugs and Crime notes:

‘[i]n addition to the strong human rights incentives for assisting and protecting people who have fallen victim to or witnessed serious crimes, there are criminal justice incentives for doing so. The cooperation of victims and witnesses is crucial to achieving successful prosecutions of criminal offenders...’<sup>564</sup>

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557 Human Rights Committee, General Comment 32, para 43.

558 Committee on the Rights of the Child, General Comment 10, para 37.

559 Human Rights Committee, General Comment 32, para 43; Committee on the Rights of the Child, General Comment 10, para 28; Guidelines for Action on Children in the Criminal Justice System, para 11(a).

560 Rome Statute, Article 68(1).

561 Rome Statute, Article 43(6).

562 Rome Statute, Article 68(3).

563 See, in particular, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Adopted by General Assembly resolution 40/34 of 29 November 1985, Principle 6.

564 UNODC, *Victims Assistance and Witness Protection* webpage: [www.unodc.org/unodc/en/organized-crime/witness-protection.html](http://www.unodc.org/unodc/en/organized-crime/witness-protection.html).

States Parties should review their national mechanisms and procedures to protect and support victims and witnesses during criminal trials, as well as ensuring that victims are able to participate in the proceedings and present their views at relevant stages if they wish, ensuring that they comply with international standards including:

- *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*: [www.ohchr.org/en/professionalinterest/pages/victimsofcrimeandabuseofpower.aspx](http://www.ohchr.org/en/professionalinterest/pages/victimsofcrimeandabuseofpower.aspx),<sup>565</sup>
- *Basic Principles and Guidelines on the Right to a Remedy for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*: [www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx](http://www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx); and
- *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*: [www.un.org/en/ecosoc/docs/2005/resolution%202005-20.pdf](http://www.un.org/en/ecosoc/docs/2005/resolution%202005-20.pdf).<sup>566</sup>

The Assembly has expressly called on States Parties where crimes under the jurisdiction of the Court have been committed to adopt and implement, as appropriate, victim-related provisions according to their respective contexts and needs, consistent with the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* and the *Basic Principles and Guidelines on the Right to a Remedy*.<sup>567</sup> This will also ensure that national authorities are able to cooperate fully with protecting and assisting victims and witnesses in ICC cases (see Recommendations 84 and 89).

The United Nations Office on Drugs and Crime have developed the following tools that can assist States Parties:

- *Handbook on Justice for Victims: On the use and application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1999): [www.unodc.org/pdf/criminal\\_justice/UNODC\\_Handbook\\_on\\_Justice\\_for\\_victims.pdf](http://www.unodc.org/pdf/criminal_justice/UNODC_Handbook_on_Justice_for_victims.pdf); and
- *Good Practices for the Protection of Witnesses in Criminal Proceedings involving Organised Crime*: [www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf](http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf).

UNODC reported in 2020 that it is developing a model witness protection law.<sup>568</sup> It also offers technical assistance to states to strengthen witness protection mechanisms and strategies, including: legal and institutional assessments; legislative assistance; training to judges, prosecutors, police and witness protection authorities; and specialised support and advice to assist in the establishment of witness protection units.<sup>569</sup>

### 2.2.2.6 National reparations mechanisms

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565 *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (n 563).

566 Adopted by the UN Economic and Social Council on 25 May 2005, [www.un.org/ruleoflaw/files/UNGuidelinesChildVictimsWitnesses.pdf](http://www.un.org/ruleoflaw/files/UNGuidelinesChildVictimsWitnesses.pdf).

567 See, for example, Resolution on Victims and affected communities, reparations and Trust Fund for Victims, ICC-ASP/13/Res 4, 17 December 2014, para 7.

568 UNODC, *Protecting Witnesses* (n 552).

569 UNODC, *Victims Assistance and Witness Protection* webpage (n 564).

All victims of gross violations of international human rights law and serious international humanitarian law have a right to an effective remedy, including reparations.<sup>570</sup> Although the Rome Statute provides that the ICC can order a convicted person to provide reparations to the victims of crimes they have been found guilty of committing and establishes a Trust Fund for Victims, states have the primary responsibility for ensuring that victims are provided with full and effective reparations to address the harms they have suffered.<sup>571</sup>

*Recommendation 68: States Parties should ensure that victims are able to access full and effective reparations before national courts or administrative mechanisms.*

States Parties should review their national laws and mechanisms to ensure that victims may seek remedies through criminal or civil judicial processes, without barriers (such as statutes of limitations for civil claims or inadequate legal aid). In some instances, particularly where violations have been committed on a large scale, states may meet their obligations by establishing administrative reparations mechanisms.

The Assembly has expressly called on States Parties where crimes under the jurisdiction of the Court have been committed to adopt and implement, as appropriate, victim-related provisions according to their respective contexts and needs with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the Basic Principles and Guidelines on the Right to a Remedy.<sup>572</sup> In addition, States Parties should consider:

- *Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence (2014):* [www.ohchr.org/Documents/Press/GuidanceNoteReparationsJune-2014.pdf](http://www.ohchr.org/Documents/Press/GuidanceNoteReparationsJune-2014.pdf).
- United Nations Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Reparations Programmes:* [www.ohchr.org/Documents/Publications/ReparationsProgrammes.pdf](http://www.ohchr.org/Documents/Publications/ReparationsProgrammes.pdf).

### 2.3 Establishing effective national frameworks to cooperate fully with the ICC

Cooperation of States Parties is essential for the effective functioning of the ICC. The Court's ability to fulfil its mandate hinges on (1) the ability of the ICC to perform its functions on the territory of State Parties and (2) cooperation by national authorities with its investigations and prosecutions, including arrest and surrender. The fairness of the Court depends on States Parties cooperating with the defence when requested and assisting the Court to protect victims and witnesses, give effect to the rights of accused persons (including cooperating with interim and final release), and enforce sentences and reparations orders. State cooperation goes to the heart of fair and expedient proceedings before the Court.<sup>573</sup>

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570 *UN Basic Principles on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted and proclaimed by General Assembly Resolution 60/147 of 16 December 2005.

571 *Ibid.*

572 See, for example, *Resolution on Victims and affected communities, reparations and Trust Fund for Victims*, ICC-ASP/13/Res 4, 17 December 2014, para 7.

573 Claus Kress and Kimberly Prost, 'Pre-Part 9' in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016), 2004.

All States Parties have an obligation to cooperate fully with the ICC in its investigation and prosecution of Rome Statute crimes.<sup>574</sup> Nonetheless, the Court's 2020 Report on Cooperation to the Assembly demonstrates that in most instances state cooperation has not been forthcoming. The Court reported that during a one-year period in 2019–2020 only 32 per cent of the OTP's requests for assistance relating to investigations, prosecutions and judicial proceedings had received responses.<sup>575</sup> Only 58 per cent of requests for cooperation sent by the Registry received positive replies.<sup>576</sup> Of particular concern, only 24.3 per cent of defence team requests for cooperation transmitted by the Registry received positive replies.<sup>577</sup> To date, the ICC has referred 16 instances of non-cooperation (mostly related to the failure of states to implement ICC requests for arrest and surrender) to the Assembly of States Parties and/or the UN Security Council – however, no action has been taken (see Section 3.3.2).

Schabas notes '[s]tate cooperation is the area where the Court is at its most vulnerable.'<sup>578</sup> In order to advance the Assembly's aims of strengthening the performance of the ICC, States Parties must prioritise improving their cooperation with the Court. The ICC's effectiveness and credibility depends in no small measure on enhanced state cooperation.<sup>579</sup>

### 2.3.1 *The need for implementing legislation and cooperation agreements*

Effective national frameworks of cooperation must recognise the legal status and powers of the ICC to perform its functions on the territories of States Parties, provide a basis in national law for all forms of cooperation set out in the Rome Statute and set out clear national procedures to ensure that national authorities provide prompt and effective cooperation.

Enacting implementing legislation is critical for establishing effective national frameworks of cooperation and to tackling the current lack of cooperation being provided to the Court.<sup>580</sup> The Court notes in its 2020 Report on Cooperation that implementing legislation 'greatly facilitates cooperation between the Court and States.'<sup>581</sup> According to the Court:

'Clear procedures and distribution of roles and responsibilities at the domestic level in the national implementing legislation will help governments ensure that they can expeditiously respond to requests for assistance coming from the Court without any undue delay....'

'[N]ational legislation regarding cooperation with the Court guarantees that the actors involved (governmental agencies, but also witnesses, victims and suspects) have legal certainty on the way different requests for assistance from the Court will be treated....'

'[T]he clear definition of a legal basis for cooperation between the Court and States Parties covering all relevant aspects of potential judicial cooperation requests helps to avoid instances

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574 Rome Statute, Article 86.

575 *Report of the Court on Cooperation*, ICC-ASP/19/25, 28 October 2020, 4.

576 *Ibid.*

577 *Ibid.*

578 Schabas (198), 1296.

579 Kress and Prost (n 573), 2004.

580 Case Matrix Network (n 373), 81: 'In order for a State to cooperate fully it must have implementing legislation that meets the requisite standards'.

581 *Report of the Court on Cooperation*, ICC-ASP/19/25, 28 October 2020, para 46.

where a country is not capable of addressing a specific request for assistance, thus hindering the execution of the mandate of the Court.<sup>582</sup>

In addition, the ICC has developed model bilateral cooperation agreements addressing several specific forms of cooperation, including the relocation of victims and witnesses, enforcement of sentences, interim release and final release of persons, that increase legal certainty both for States Parties and the Court.<sup>583</sup> States Parties should enter into these agreements with the Court and, where necessary, incorporate them into national law.

*Recommendation 69: States Parties should develop and enact stand-alone legislation to ensure that their national authorities cooperate fully with the ICC.*

The Assembly has repeatedly urged States Parties that have not yet done so:

‘... to adopt such [legislation] and to set up effective procedures and structures so as to ensure that they can fully meet their obligations under the Rome Statute regarding cooperation and judicial assistance.’<sup>584</sup>

States Parties, therefore, should enact legislation providing for full cooperation with the ICC, including specifying the competent national authority responsible for executing each cooperation request.<sup>585</sup>

States Parties’ obligations to cooperate with the ICC are distinct from cooperation with other states on criminal matters or with other international criminal tribunals. Therefore, where possible, States Parties should develop stand-alone legislation specifically implementing their obligations to cooperate with the ICC instead of relying on or apply any existing national laws relating to extradition, mutual legal assistance or judicial cooperation with other states or courts (unless those laws have been thoroughly reviewed and adapted to ensure full cooperation with the ICC). As lack of implementing legislation is not an excuse for not cooperating with the ICC, States Parties that have not enacted legislation specific to the ICC, should seek to provide full cooperation through existing legislation when requested, while continuing their efforts to implement the Rome Statute fully.

*Recommendation 70: States Parties that have enacted cooperation legislation should review it every 10–15 years taking into account the evolving experience and recommendations of the ICC.*

The ICC’s practice and experience of seeking cooperation from States Parties is still emerging and the Court continues to identify challenges that it faces in certain areas that may be addressed by States Parties strengthening their implementing legislation. For example, in the last decade, the Court has highlighted challenges that it faces in conducting effective financial investigations and made recommendations to States Parties to provide the Court with the assistance that it requires (see Section 2.3.1.5 below). To keep pace with these developments and provide the ICC with the fullest cooperation possible, States Parties should commit to a regular review of their cooperation legislation at least every 10–15 years, including to coincide with the proposed peer review of national frameworks by the Assembly, if established (see Section 3.4).

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582 *Ibid.*

583 ICC, Cooperation Agreements, [www.icc-cpi.int/news/seminarBooks/Cooperation\\_Agreements\\_Eng.pdf](http://www.icc-cpi.int/news/seminarBooks/Cooperation_Agreements_Eng.pdf).

584 Resolution on Cooperation, ICC-ASP/19/Res 2, para 7.

585 Case Matrix Network (n 373), 13: ‘... given that implementation is required in order to give effect to elements of procedure, such as specifying the competent national authority to execute cooperation requests, enacting legislation is both common and preferable.’

The Assembly's 66 recommendations on cooperation adopted in 2007 specifically recommend that '[a]ll States Parties should, where appropriate, review their implementing legislation, with a view to improving its functioning'.<sup>586</sup>

### 2.3.1.1 Exercise of the ICC's functions and powers on the territory of a State Party

Although much of the Rome Statute cooperation regime focuses on the Court submitting requests for cooperation to States Parties that are addressed by national authorities, Article 4(2) provides that the ICC may exercise certain functions and powers provided for in the Rome Statute, on the territory of any State Party. National implementing legislation should acknowledge these functions and powers, ensuring that the ICC can perform them without hindrance.

*Recommendation 71: States Parties should ensure that the ICC can sit on its territory and exercise its functions and powers at all stages of the proceedings.*

Article 3(3) states that, although the seat of the Court is in The Hague, '[t]he Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.' Although Article 62 provides the Court may decide that the place of *the trial* can be outside The Hague, Schabas argues that limiting this power only to the trial phase of proceedings would be an absurd result.<sup>587</sup> Rule 100 of the Rules of Procedure and Evidence indicates that such a narrow interpretation was not intended. It states that '[t]he Chamber, *at any time after the initiation of an investigation*, may *proprio motu* or at the request of the Prosecutor or the defence, decide to make a recommendation changing the place where the Chamber sits'. There may be advantages for the Court, States Parties and other actors to hold other proceedings, including confirmation of charges, appeals or reparations hearings either in or close to the territory where the crimes were committed. Rule 100(3) clarifies that a State Party shall be consulted and its agreement sought before a decision is taken to sit in its territory.

Recognising that the concept of the ICC 'sitting' in a States Party's jurisdiction may present constitutional or other problems, the Commonwealth Expert Group notes that different legislative options have been employed to address this issue.

'In many states the ICC has simply been granted a power to sit. In other states, an authority may be empowered to allow the ICC to sit on a case-by-case basis and in still others, the ICC may sit under the auspices of a "domestic court".'<sup>588</sup>

Given the general power of the ICC to sit in the State Party in Article 3(3) and the procedure set out in Rule 100(3), which provides for consultations with the State Party on each occasion, States Parties should recognise in national implementing legislation that the Court may sit on their territory at any stage of the proceedings and set out relevant procedures for consulting with the ICC in relation to specific requests. As a general rule, States Parties should agree to the ICC sitting in its territory, unless there are valid concerns relating to the security of the proceedings or the protection of victims and witnesses.

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586 Assembly of States Parties, Recommendations on Cooperation ('66 Recommendations on Cooperation'), *Strengthening the International Criminal Court and the Assembly of States Parties*, ICC-ASP/6/Res 2, Annex II, [www.icc-cpi.int/news/seminarBooks/66%20Recommendations-%20resolution%20ICC-ASP-ASP6-Res-02-ENG.PDF](http://www.icc-cpi.int/news/seminarBooks/66%20Recommendations-%20resolution%20ICC-ASP-ASP6-Res-02-ENG.PDF), Recommendation 3.

587 See, for example, Schabas (n 198), 952.

588 Commonwealth Expert Group (n 469), para 146.

Moreover, beyond providing for the ability of the ICC to sit in their territory, States Parties should ensure that the ICC is able to exercise functions and powers that are implicit in its power to sit in its territory. The Commonwealth Expert Group propose that States Parties consider enacting a general provision that the ICC may discharge and exercise any or all of its functions and powers while sitting in its country.<sup>589</sup> In addition, the Expert Group notes that ICC proceedings may involve administering oaths, detaining persons and requiring the attendance of witnesses and the production of documents.<sup>590</sup> Implementing legislation should provide for full cooperation with these procedural issues, including providing for domestic authorities to issue relevant orders when required.

*Recommendation 72: State Parties should ensure that ICC officials, staff and counsel may be present at or assist in the execution of requests for cooperation.*

Article 99(1) provides that requests from the ICC (other than for arrest and surrender) shall be executed in the manner specified in the ICC's request, including permitting persons specified in the request to be present at and assist in the execution process. Kress and Prost note that '[t]he Court will very often wish to make use of this option in order to ensure that the evidence collected by way of cooperation can subsequently be introduced into the trial.'<sup>591</sup> For example, in order to allow for the possibility that recordings of witness interviews conducted during investigations may be introduced at trial as prior recorded testimony, the ICC may request that the OTP and defence counsel be present and provided with the opportunity to examine the witness during the interview.<sup>592</sup>

Article 99(1) is clear that the State Party must comply with such procedural requests of the ICC, unless they are prohibited by national law. Therefore, States Parties should ensure that there is nothing in national law that could prevent the presence of ICC officials, staff and defence counsel from being present at and assisting with the execution of cooperation requests, including ensuring that they are provided with privileges and immunities (see Recommendation 74).

*Recommendation 73: States Parties should ensure that the OTP and the defence can conduct investigations on its territory.*

Although the majority of the ICC cooperation regime involves the participation of national authorities, there are two exceptions where the OTP is permitted by the Rome Statute to conduct its investigations directly on the territory of a State Party without having to secure the cooperation of the State Party.

Firstly, Article 57(3) (d) provides that the ICC Pre-Trial Chamber may:

‘Authorise the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State under Part 9 if, whenever possible having regard to the views of the State concerned, the Pre-Trial Chamber has determined in that case that the State is clearly unable to execute a request for cooperation due to the unavailability

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589 Commonwealth Model Law (n 471), s 93(1), option 1.

590 Commonwealth Expert Group (n 469) para 147.

591 Claus Kress and Kimberly Prost, 'Article 99' in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016), 2150. Schabas (n 198), 1356: '[Article 99(1)] may take on importance because the Court will need to ensure that evidence that is gathered will be admissible.'

592 Kress and Prost (n 591), 2150 referring to the requirements of admission of prior recorded testimony in Rule 68(2) (a).

of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9.’

This sets a high threshold that ensures the Prosecutor may conduct investigative steps on the territory of a State Party in exceptional circumstances when the national authorities have collapsed or are unable to cooperate otherwise. Moreover, Article 82(2) expressly provides that the state concerned may appeal a decision under Article 57(3)(d) with the leave of the Pre-Trial Chamber, which shall be heard on an expedited basis.

Secondly, Article 99(4) provides:

‘Without prejudice to other Articles in this Part, where it is necessary for the successful execution of a request which can be executed without any compulsory measures, including specifically the interview of or taking evidence from a person on a voluntary basis, including doing so without the presence of the authorities of the requested State Party if it is essential for the request to be executed, and the examination without modification of a public site or other public place, the Prosecutor may execute such request directly on the territory of a state as follows:

- (a) When the State Party requested is a State on the territory of which the crime is alleged to have been committed, and there has been a determination of admissibility pursuant to Article 18 or 19, the Prosecutor may directly execute such request following all possible consultations with the requested State Party;
- (b) In other cases, the Prosecutor may execute such request following consultations with the requested State Party and subject to any reasonable conditions or concerns raised by that State Party. Where the requested State Party identifies problems with the execution of a request pursuant to this subparagraph it shall, without delay, consult with the Court to resolve the matter.’

This should be distinguished from the authority to conduct investigative steps pursuant to Article 57(3)(d). Article 99(4) does not foresee that the national authorities are unable to cooperate. Instead, it recognises that in some instances a request may only be successfully executed if it is carried out by the OTP without the involvement of national authorities. This power is notably limited to non-compulsory measures. Compulsory measures, such as search and seizure or exhumation of a grave site, would require the participation of national authorities in accordance with national laws. However, the OTP’s ability to conduct certain non-compulsory measures directly may be useful in some circumstances, especially in allowing the OTP to interview witnesses and victims voluntarily. Kress and Prost note: ‘Witnesses, victims and experts may feel intimidated by the presence of judicial or police authorities of the requested State. In some instances, the presence of anyone outside of the Prosecutor may cause the witness to refuse to participate in the interview.’<sup>593</sup> Before taking such measures the OTP must consult with the State Party.<sup>594</sup> When the State Party is not the state where the crime is alleged to have been committed, the State Party may raise reasonable conditions or concerns.<sup>595</sup>

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593 *Ibid*, 2151.

594 Rome Statute, Articles 99(4)(a) and (b).

595 Rome Statute, Article 99(4)(b).

Neither Article 57(3)(d) nor Article 99(4) address the ability of the defence to conduct investigations. However, defence investigations in both scenarios are essential to ensure the equality of arms between the prosecution and the defence and to ensure that the rights of the accused are respected. A situation where only the prosecution is permitted to conduct investigations in circumstances where the national authorities have collapsed or are unable to cooperate pursuant to Article 57(3)(d) could undermine the rights of the accused to adequate time and facilities for the preparation of the defence in Article 67(1)(b) or to raise defences or to present evidence pursuant to Article 67(1)(e). Similarly, the defence must be able to interview witnesses that are willing to talk to them without the presence of judicial or police authorities, in order to realise their right to obtain the attendance and examination of witnesses on their behalf set out in Article 67(e).

The OTP and the defence's ability to conduct investigatory steps in both scenarios should be addressed in national implementing legislation. However, so far only a few States Parties have implemented the provisions recognising the ability of the OTP to conduct investigations on their territories in these circumstances. Kress and Prost's commentary of Article 99(4) notes that '[e]xcept for some positive examples, the initial implementing practice is not too encouraging in this respect'.<sup>596</sup> Case Matrix Network reports that '[f]ew States have opted to implement this provision'.<sup>597</sup> Although the Commonwealth Expert Group decided that it may not be necessary to mention the powers under Article 99(4) specifically in domestic law, they recommended that it would be advantageous to include a general provision recognising the ability of the Prosecutor to conduct investigations on the territory of the state in accordance with Part 9 of the Statute and Article 57(3)(d).<sup>598</sup> This recommendation should be adapted to also provide for defence investigations.

*Recommendation 74: State Parties should ratify the ICC Agreement on Privileges and Immunities and incorporate it into national law to provide ICC officials, staff, counsel, experts, witnesses and other persons required to be present at the seat of the Court with privileges and immunities necessary for the proper functioning of the Court.*

As an independent international court with international legal personality,<sup>599</sup> the ICC requires privileges and immunities to exercise its functions on the territories of States Parties, without hindrance. Schabas notes '[t]he protection given to the institution itself, but also to its officers and personnel, is of special importance given the sensitive nature of the work it is undertaking'.<sup>600</sup> Since the Court is separate from the United Nations, a system of privileges and immunities specifically for the ICC had to be developed.

Article 48 provides that the Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfilment of its purposes.<sup>601</sup> It requires that the judges, the Prosecutor, the Deputy Prosecutors and the Registrar shall, when engaged on or with respect to the business of the Court, enjoy the equivalent of diplomatic immunity.<sup>602</sup> The Deputy Prosecutor, the staff of the OTP and the Registry shall enjoy privileges and immunities and facilities necessary for the performance of their

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596 Kress and Prost (n 591), 2154.

597 Case Matrix Network (n 373), 102.

598 Commonwealth Expert Group (n 469), paras 117–118.

599 Rome Statute, Article 4(1).

600 Schabas (n 198), 785.

601 Rome Statute, Article 48(1).

602 Rome Statute, Article 48(2).

functions.<sup>603</sup> Counsel, experts, witnesses and any other person required to be present at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court.<sup>604</sup> All privileges and immunities may be waived by the Court subject to different procedures.<sup>605</sup>

The privileges and immunities contained in Article 48 are further defined in the Agreement on Privileges and Immunities of the ICC, which was adopted by the Assembly in 2002 and entered into force on 22 July 2004. Despite repeated calls by the Assembly<sup>606</sup> and the Court<sup>607</sup> for states to ratify or accede to the Agreement and incorporate it in national law, as of 1 January 2021, only 77 of the 123 States Parties to the Rome Statute and one state that has yet to ratify or accede to Statute<sup>608</sup> were parties to the Agreement. Although Case Matrix Network notes that some States Parties specifically require the application of the privileges and immunities in Article 48 and the Agreement in their implementing legislation,<sup>609</sup> not all States Parties to the Agreement have incorporated it into national law.

Acknowledging the challenges that this situation presents, the Court has reported that ‘given the current and potential future contexts of operation of the Court, as well as the liability issues that can be attached, the lack of these legal protections for staff and its work can have clear legal, financial and reputational consequences for the Court and States.’<sup>610</sup> In particular, it has emphasised the difficulties it has faced in relation to defence teams:

‘The Registry continues to deal with challenges it experiences regarding cooperation with the Defence teams, and most specifically linked to privileges and immunities; indeed, an important element of the assistance provided by the Registry to the Defence teams is to ensure that, whenever possible, the members of the teams enjoy privileges and immunities, which are fundamental for the performance of their duties in the territory of States where they operate. This assistance is however not always possible given the lack of internal mechanisms, including but not limited to appropriate legislation and procedures, in the relevant States to provide such privileges and immunities.’<sup>611</sup>

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603 Rome Statute, Article 48(3).

604 Rome Statute, Article 48(4).

605 Rome Statute, Article 48(5).

606 See, for example, *Resolution on cooperation*, ICC-ASP/19/Res 2, para 17:

‘Calls upon States Parties as well as non-States Parties that have not yet done so to become parties to the Agreement on Privileges and Immunities of the International Criminal Court as a matter of priority, and to incorporate it in their national legislation, as appropriate.’

607 See, for example, *Report of the Court on Cooperation*, ICC-ASP/19/25, Recommendation 40:

‘Accordingly, all States Parties are strongly urged to ratify or accede to APIC for their own as well as the Court’s benefit. States are also encouraged to implement the provisions relating to the Court’s privileges and immunities in their national legislation, and to take active steps to ensure that the relevant national authorities are aware of the Court’s privileges and immunities and their practical implications.’

608 Ukraine.

609 Case Matrix Network (n 373), 107–109.

610 *Report of the Court on Cooperation*, ICC-ASP/19/25, para 39.

611 *Ibid*, para 15.

The Court's 2020 Report on Cooperation recommends that states ratify the Agreement on Privileges and Immunities,<sup>612</sup> and 'consider having clear and agreed procedures at the domestic level regarding privileges and immunities; not only for ICC staff but also for Defence teams.'<sup>613</sup>

### *2.3.1.2 State Parties' general obligation to cooperate fully with the Court*

Article 86 of the Rome Statute sets out the general obligation of States Parties to cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court 'in accordance with the provisions of the Statute'. Part 9 of the Statute proceeds to define a broad range of forms of cooperation that, pursuant to the general obligation in Article 86, national authorities must provide to the Court.

*Recommendation 75: States Parties should reflect the general obligation to cooperate fully with the ICC in their implementing legislation, ensuring that it covers all stages of ICC proceedings.*

The general obligation to cooperate requires that States Parties must cooperate fully with the ICC. The wording of Article 86 – that full cooperation must be rendered 'in accordance with the provisions of the Rome Statute' – affords no refuge to non-cooperation.<sup>614</sup> Therefore, implementing legislation must reflect that all forms of cooperation set out in the Statute are mandatory. Some States Parties have also reflected the general obligation to cooperate in the 'purpose' sections of their legislation.<sup>615</sup>

Although Article 86 requires States Parties to cooperate fully with the Court's 'investigation and prosecution of crimes', they should ensure that their implementing legislation does not define 'investigation and prosecution' narrowly. States Parties should provide the Court with full cooperation at all stages of the process, including during preliminary examination (which is essentially a preliminary phase of an investigation) and during reparations proceedings (which is foreseen by Article 75(4))<sup>616</sup> and enforcing reparations orders (which is required by Article 75(5)).<sup>617</sup> For clarity, it would be preferable for national implementing legislation to confirm that the State Party's obligations to cooperate with the Court applies at all stages of its proceedings.

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612 *Ibid*, Recommendation 9.

613 *Ibid*, Recommendation 10.

614 Schabas (n 198), 1268.

615 For example, Australia's International Criminal Court Act 2002, s 3 states: 'The primary object of this Act is to facilitate compliance with Australia's obligations under the Statute'; The Commonwealth Model Law, s1 proposes listing among the purpose of national laws '[t]o enable (name of country) to cooperate fully with the International Criminal Court in the performance of its functions, including the investigation and prosecution of persons accused of having committed crimes within the jurisdiction of the International Criminal Court'.

616 Rome Statute, Article 75(4) states: 'In exercising its power under this Article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this Article, it is necessary to seek measures under Article 93, paragraph 1.'

617 Rome Statute, Article 75(5) states: 'A State Party shall give effect to a decision under this Article as if the provisions of Article 109 were applicable to this Article.'

### 2.3.1.3 Requests for cooperation: general provisions

Article 87 provides the ICC with the authority to make requests to States Parties for all forms of cooperation<sup>618</sup> and contains general provisions relating to cooperation procedure that should be reflected in implementing legislation.

*Recommendation 76: States Parties should establish clear channels for receiving and processing ICC requests for cooperation.*

Article 87(1) provides that ‘[ICC] requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession’. These formal channels of communication should be reflected in national implementing legislation clarifying the distribution of roles and responsibilities within national authorities to respond to requests for cooperation. In its 2020 *Report of the Court on Cooperation*, the Court recommends that:

‘Clear procedures and distribution of roles and responsibilities at the domestic level in the national implementing legislation will help governments ensure that they can expeditiously respond to requests for assistance coming from the Court without any undue delay...’<sup>619</sup>

Although, Article 87(1)(b) also provides that requests may be submitted through INTERPOL or any appropriate regional mechanism, direct channels of communication between the ICC and the national authorities of States Parties should be established where possible.

The Assembly has recommended that States Parties establish national focal points on cooperation (see Section 2.3.2).

*Recommendation 77: States Parties should ensure a prompt response to all ICC cooperation requests.*

A requirement that States Parties respond promptly to requests from the ICC is implicit in the general obligation in Article 86 to cooperate ‘fully’. Moreover, Article 97 requires that, when a State Party identifies problems with implementing a request for cooperation, it must consult with the Court *without delay* to resolve the matter (see Recommendation 90).

*Recommendation 78: States Parties should ensure that requests for cooperation and any documents supporting them be kept confidential, except to the extent that the disclosure is necessary for execution of the request.*

Such confidentiality, required by Article 87(3), may be vital in a number of contexts, including to prevent suspects from absconding and to protect victims and witnesses. Although the requirement of confidentiality is not absolute, States Parties must ensure that any disclosure is kept to a minimum only as necessary to execute the request and authorities must comply with the Court’s requests to handle information in a manner that protects the safety and physical or psychological wellbeing of victims, potential witnesses and their families (see Recommendation 79).

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618 Rome Statute, Article 87(1); Kress and Prost (n 573), 2021.

619 *Report of the Court on Cooperation*, ICC-ASP/19/25, Recommendation 37.

*Recommendation 79: States Parties should ensure that national authorities comply with the ICC's requests that any information relating to cooperation shall be provided and handled in a manner that protects the safety and physical or psychological wellbeing of victims, potential witnesses and their families.*

Article 87(4) requires the ICC in making requests for cooperation to take such measures, including measures relating to the protection of information, as may be necessary to ensure the safety and physical or psychological wellbeing of victims, potential witnesses and their families. This is consistent with the Court's general obligation to protect victims and witnesses in Article 68(1) and international human rights standards on the protection of victims and witnesses.<sup>620</sup> Kress and Prost note that this provision gives the Court significant flexibility in dealing with sensitive issues of witness or victim protection:

'It may choose not to include certain specific information in the request or ask for special steps with respect to confidentiality or choose to communicate information in a secure manner.'<sup>621</sup>

Although Article 87(4) does not expressly require States Parties to comply with the Court's request for such measures, Article 99(1) requires that requests for assistance be executed in a manner specified in the request unless prohibited by law. National implementing legislation, therefore, should ensure that national authorities comply with the Court's request or consult with the ICC in accordance with Article 97, if the Court's request is prohibited by national law. If States Parties are unable to give effect to the request without risking the safety and wellbeing of victims and witnesses, they should consult with the ICC before proceeding to implement the cooperation request.

#### **2.3.1.4 Cooperation with arrest and surrender**

The arrest and surrender of suspects to the ICC for trial is only possible with state cooperation. Article 89(1) confirms that States Parties must comply with requests for arrest and surrender. In its 2020 Report on Cooperation the Court emphasised that the existence of complete implementing legislation in the state of arrest is an important element of operational support with surrender.<sup>622</sup>

*Recommendation 80: States Parties should establish national procedures to promptly arrest and surrender persons to the ICC, ensuring that the rights of the person who is the subject of the request are respected.*

The Rome Statute does not set out a detailed procedure that States Parties must follow to execute requests for arrest and surrender. Instead, Article 89(1) requires that States Parties comply with requests 'in accordance with the provisions of this Part [9] and the procedure under national law'. Recognising that states have different procedures and requirements to conduct an arrest,<sup>623</sup> this allows a degree of procedural flexibility for States Parties to meet their obligations to arrest and surrender suspects to the Court.

However, it is important to emphasise, as confirmed in Article 102, that 'surrender' (delivering up a person by a state to the Court, pursuant to the Rome Statute) is distinct from 'extradition' (delivering up a person by one state to another as provided by treaty, convention or national legislation). Ellis further notes:

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620 See, for example, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (n 563).

621 Kress and Prost (n 573), 2027.

622 *Report of the Court on Cooperation*, ICC-ASP/19/25, 28 October 2020, para 29.

623 Case Matrix Network (n 373), 84.

‘... surrender proceedings from a state to the ICC do not have to take into account the unique sovereign right of states to extradite their own nationals. Since the ICC is not a foreign jurisdiction or foreign court, as is the court of another state, these state sovereign rights do not merit the same protection. This is because the treaty standards were established by the State Parties and thus are not concerned with protecting State Party nationals from the process.’<sup>624</sup>

Although, some commentaries suggested that there is no need to put extradition laws aside when cooperating with the ICC,<sup>625</sup> others highlight that the application of procedures in national extradition laws raises potential difficulties, especially in relation to numerous common grounds for refusing extradition that are neither permitted nor appropriate to be applied to surrender to the ICC (see Recommendation 91).<sup>626</sup> The drafters of the Rome Statute chose to use the term ‘surrender’ to govern the procedure of transfer of a suspect from a state to the Court so as to emphasise the *sui generis* nature of the process.<sup>627</sup> Therefore, where possible, States Parties should develop procedures specifically governing the arrest and surrender of suspects to the ICC, rather than relying on national extradition procedures (unless those laws are thoroughly reviewed and adapted to ensure full cooperation with the ICC).

Indeed, despite some flexibility in arrest processes, there are a number of procedural elements relating to arrest and surrender in the Rome Statute which should be addressed in national implementing legislation.

Firstly, Article 91(2) provides that, in addition to a copy of the arrest warrant and information describing the person sought and their probable location, the ICC shall provide other documents, statements or information as necessary to meet the requirements for the surrender process in the requested State. However, Article 91(2)(c) requires that ‘those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible be less burdensome, taking into account the distinct nature of the Court.’ National implementing legislation should set out these requirements for clarity and communicate them to the ICC.

Secondly, national legislation should reflect that the contents of the ICC’s request for arrest and surrender differs if the person sought has already been convicted by the ICC.<sup>628</sup> The contents of such requests, set out in Article 91(3), notably do not include documents, statements or information as necessary to meet the requirements for the surrender process in the requested State. Instead, it is sufficient for the Court to submit a copy of the warrant of arrest, a copy of the judgement of conviction, information to demonstrate that the person sought is the person in the judgment and, if relevant, a copy of the sentence imposed, as well as details of the time remaining to be served.

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624 Ellis (n 371), 232.

625 Case Matrix Network (n 373), 103.

626 See Amnesty International, *Updated Checklist for Effective Implementation* (2010): [www.amnesty.org/en/documents/ior53/009/2010/en](http://www.amnesty.org/en/documents/ior53/009/2010/en), 8.1.

627 Valerie Oosterveld, Mike Perry, and John McManus, ‘The Cooperation of States with the International Criminal Court’ (2002) 25 *Fordham Int’l LJ* 767, at 771:

‘[The ICC] is an international body created by multilateral agreement that provides detailed rights and protections for individuals accused of crimes, with clear procedures for their arrest and transfer that are known to all States. For this reason, States agreed to create a process for the ICC that is somewhat more streamlined than State-to-State extradition.’

628 Rome Statute, Article 91(3) states that a request shall contain or be supported by: (a) a copy of any warrant of arrest for that person; (b) a copy of the judgement of conviction; (c) information to demonstrate that the person sought is the one referred to in the judgment of conviction; (d) if the person sought has been sentenced, a copy of the sentence imposed and, in the case of a sentence for imprisonment, a statement of any time already served and the time remaining to be served.

Thirdly, Article 59 requires that a person arrested shall be brought promptly before a competent judicial authority in the custodial State, which shall determine, in accordance with the law of that State, that: (a) the warrant applies to that person; (b) the person has been arrested in accordance with the proper process; and (c) the person's rights have been respected.<sup>629</sup> The arrested person may at that time also apply to the competent authority for interim release pending surrender (see Recommendation 87).<sup>630</sup>

The national proceedings are limited to these four issues. Article 59 (4) confirms that it shall not be open to the competent national judicial authority to consider whether the warrant of arrest was properly issued. Such challenges should be addressed to the ICC Pre-Trial Chamber.<sup>631</sup>

In determining whether the person's rights have been respected, it is important that the competent judicial authority consider all relevant rights in international human rights law and the Rome Statute, including their:

- right to notify a third person of their arrest;<sup>632</sup>
- right to be informed of the reasons for arrest or detention, including the charges;<sup>633</sup>
- right to legal counsel;<sup>634</sup>
- right to be questioned in the presence of counsel;<sup>635</sup>
- right to remain silent, without such silence being a consideration in the determination of guilt or innocence;<sup>636</sup>
- right to medical assistance;<sup>637</sup> and
- right to humane detention conditions and freedom from torture and ill-treatment.<sup>638</sup>

Although the Rome Statute is silent on the powers of the competent judicial authority, it should be able to order measures to ensure that the rights of the accused are protected and to provide effective remedies for violations in accordance with international human rights law and standards. The Rome Statute is also silent regarding procedures in the event of violations. However, drawing from the procedure for ordering

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629 Rome Statute, Article 59(2).

630 Rome Statute, Article 59(3).

631 Christopher Keith Hall and Cedric Ryngaert, 'Article 59' in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016), 1468–1469.

632 See, for example, Committee against Torture, *General Comment 2*, para 13.

633 See, for example, Rome Statute, Articles 55(2) (a) and 67(1) (a); and *International Covenant on Civil and Political Rights*, Article 9(2). Rule 117(1) of the *ICC Rules of Procedure and Evidence* requires that, once the Court is informed that a person has been arrested, the Court shall ensure that the person received a copy of the arrest warrant.

634 See, for example, Rome Statute, Articles 55(2) (c) and 67(1) (d); Human Rights Committee, *General Comment 32*, paragraph 34; Committee against Torture, *General Comment 2*, para 13.

635 See, for example, Rome Statute, Article 55(2) (d); European Court of Human Rights, *Salduz v Turkey* (36391/02), Grand Chamber (2008), paras 54–55; Inter-American Court of Human Rights, *Barreto Leiva v Venezuela*, Judgment of 17 November 2009 (Merits, Reparations and Costs), IACHR Series C No 206, paras 62–64.

636 See, for example, Rome Statute, Article 55(2) (b) and 67(1) (g); Human Rights Committee, *Concluding Observations: France*, UN Doc CCPR/C/FRA/CO/4, para 14.

637 See, for example, Committee against Torture, *General Comment 2*, para 13.

638 See, for example, *International Covenant on Civil and Political Rights*, Articles 7 and 10; *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, Article 2.

interim release in Article 59(5), the competent national authority should promptly notify the ICC Pre-Trial Chamber of all allegations that the person's rights have been violated and its determination on whether violations occurred. In the event that the competent judicial authority determines that the rights of the person have been violated it should inform the Pre-Trial Chamber and seek its recommendations, which should be given full consideration by the competent national authority before rendering a decision on remedies.

Fourthly, Article 89(2) sets out a procedure that must be followed if a person sought for surrender brings a challenge before a national court on the basis of the principle of *ne bis in idem*, set out in Article 20 of the Rome Statute. Such a challenge can be made before arrest or surrender or after surrender during the Pre-Trial phase. The state must immediately consult with the Court to determine whether there has been a relevant ruling on admissibility of the case.

- If the ICC has determined that the case is *admissible*, the state shall proceed with the execution of the request for surrender.
- Although the Statute is silent on the matter, if the ICC has determined that the case is *inadmissible*, then presumably the ICC will withdraw the request.
- If a ruling on admissibility by the ICC is *pending*, the state may postpone the execution of the request for surrender until the Court makes a determination. Rule 181 of the Rules and Procedure of Evidence provides that in these circumstances, the Court shall request the state to provide it with all relevant information about the *ne bis in idem* challenge brought by the person.
- Article 89(2) does not address a situation where the accused person brings a challenge on the basis of the principle of *ne bis in idem* before a national court but has not filed an admissibility challenge at the ICC pursuant to Article 19(2) of the Statute and no other challenges to admissibility have been filed by states and the ICC has not decided to determine admissibility on its own motion. In this situation, admissibility has not been determined and is not under consideration by the ICC. As *ne bis in idem* is a matter of admissibility and the Statute is clear that challenges to admissibility must be determined by the ICC, the state requested to surrender the person should advise the accused person that they must direct any challenge to admissibility of their case directly with the ICC and proceed with the surrender process. At the same time, the state should notify the ICC of the *ne bis in idem* challenge, so that the ICC can ensure that the person has legal counsel and adequate facilities to file an admissibility challenge.

Fifthly, Article 59(3) requires that the arrested person must have a right to apply to the competent judicial authority for interim release pending surrender. In determining the request, the competent judicial authority must consider specific criteria and follow procedures set out in Article 59. Article 59(4) requires the competent judicial authority to consider 'whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial state can fulfil its duty to surrender the person to the Court.' Article 59(5) requires that the Pre-Trial Chamber must be notified of a request for interim release and that it can make recommendations to the competent judicial authority, which must be given full consideration before rendering a decision. Article 59(6) provides that if interim release is granted, the Pre-Trial Chamber may request periodic reports on the status of interim release.

Finally, national procedures must ensure that cooperation with arrest and surrender of persons is prompt. In addition to the general obligation to respond promptly to the Court's requests (see Recommendation 77), Article 59(1) requires that a State Party which has received a request for provisional arrest or for arrest and surrender 'shall immediately take steps to arrest the person in question.' Article 59(2) requires that a person must be brought 'promptly' before a competent judicial authority. Article 59(7) requires that '[o]nce ordered by the custodial State, the person shall be delivered to the Court as soon as possible.' Taken together these provisions suggest that all steps relating to arrest and surrender should be taken expeditiously.<sup>639</sup>

*Recommendation 81: States Parties should establish national procedures to cooperate with the provisional arrest of suspects.*

Article 92(1) provides that, in urgent cases, the Court may request the provisional arrest of a person, pending presentation of the request for surrender and supporting documents. Kress and Prost state that 'the most common [urgent circumstances] would be where the arrest of the person is necessary to ensure that they will be available for surrender or where they may pose a danger to the community.'<sup>640</sup> Article 59(1) confirms that States Parties must comply with a request for provisional arrest by immediately taking steps to arrest the person in accordance with its laws and the provisions of Part 9 of the Statute.

While the procedures for provisional arrest should be largely the same and regular requests for arrest and surrender, including that their rights must be respected (see Recommendation 80), there are three primary differences, which should be reflected in national implementing legislation:

1. Firstly, the contents of a request for provisional arrest are less demanding. Instead of the ICC having to provide the State Party with a copy of the arrest warrant or judgment of conviction (in the case that the person has already been convicted), it only has to include a statement of the existence of these documents, a concise statement of the crimes for which the person's arrest is sought and the facts which are alleged to constitute those crimes, as well as a statement that a request for surrender meeting the requirements of Article 91 will follow.<sup>641</sup> The ICC does not have to include in its request for provisional arrest documents, statements and information necessary to meet the requirements for the surrender process in the requested State.
2. Secondly, the ICC must submit to the State Party a complete request for surrender within 60 days of the date of the provisional arrest.<sup>642</sup> If, after 60 days, the ICC has not delivered a complete request, the State Party may release the person from custody,<sup>643</sup> without prejudice to the subsequent arrest and surrender of that person if the request is delivered later.<sup>644</sup>
3. Thirdly, the arrested person may consent to their surrender to the ICC before a request for surrender pursuant to Article 91 has been received, in which case the State Party must proceed to

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639 Hall and Ryngaert (n 631), 1462.

640 Kress and Prost, 'Article 92' in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016), 2075.

641 Rome Statute, Article 92(2).

642 Rome Statute, Article 92(3) and ICC Rules of Procedure and Evidence, Rule 188.

643 Rome Statute, Article 92(3).

644 Rome Statute, Article 92(4).

surrender them to the ICC as soon as possible.<sup>645</sup> In case an arrested person agrees to surrender, the Court should not be required to provide the documents required for surrender pursuant to Article 91.<sup>646</sup>

*Recommendation 82: States Parties should establish procedures to cooperate with the transit of a person being surrendered to the Court by another state through its territory and enter into agreements with the Court to cooperate with air transportation.*

Article 89(3) (a) provides that States Parties ‘shall authorise, in accordance with its national procedural law, transportation through its territory of a person being surrendered to the Court by another State, except where transit through that State would impede or delay the surrender’ (further analysis and recommendations relating to implementation of the exception are provided in Recommendation 93). As in many instances surrender of a person to the Court may not be possible without stopping in other states, it is important that all States Parties provide for transit through their territory to avoid practical problems with surrender.<sup>647</sup> The requirement that authorisation for transit be ‘in accordance with its national procedural law’ requires States Parties to enact or amend legislation to permit transit and incorporate national procedures that are consistent with those in Article 89(3). In particular:

- Article 89(3) (b) requires that a request for transit from the Court contain (a) a description of the person being transported; (b) a brief statement of the facts of the case and their legal characterisation; and (c) the warrant of arrest and surrender. States Parties should not require additional information in their national procedures.
- Article 89(3) (c) requires that the person be detained in custody during the period of transit. States Parties must therefore ensure that such detention is permitted by national law.<sup>648</sup>
- In accordance with Article 89(3) (d), national law should confirm that no authorisation is required if a person is transported by air and no landing is scheduled on their territory.
- Procedures should also foresee and respond to unscheduled landings of persons in transit on a States Party’s territory. Article 89(3) (e) requires a State Party in such circumstances to detain the person being transported for up to 96 hours from the unscheduled landing until a request for transit can be submitted by the Court and the transit is effected.
- The State Party must ensure that the rights of persons being surrendered are respected throughout the period of transit.

The provisions and procedure should also apply when the ICC transfers a convicted person to a State to enforce a sentence of imprisonment in its prison facilities (see Section 2.3.1.8 below).<sup>649</sup>

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645 Rome Statute, Article 92(3).

646 Although Rule 189 of the *Rules of Procedure and Evidence* provides that a State may still require these documents, it should not be included as a requirement of national procedures because it would delay surrender.

647 Claus Kress and Kimberly Prost, ‘Article 89’ in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016), 2055.

648 *Ibid*, 2056.

649 *ICC Rules of Procedure and Evidence*, Rule 207.

The Court's 2020 Report on Cooperation reports that the Registry has recently developed a model agreement for air transport, which would enable the ICC to tap into a States Party's air transport capacity to ensure the successful transfer of arrested persons to the ICC.<sup>650</sup> The Registry will shortly be approaching States Parties to enter into this agreement. States Parties that are able to provide such assistance to the Court are encouraged to sign agreements.

*Recommendation 83: States Parties should endeavour to grant requests to waive the rule of speciality and establish a procedure to determine requests by the Court.*

Article 101(1) provides that a person surrendered to the ICC 'shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered'. This wording is broad enough that the Court can amend the charges in relation to the facts that formed the basis for surrender.<sup>651</sup> However, there may be circumstances where further investigations or new evidence means that the Prosecutor wants to bring new charges in relation to additional facts.

In these circumstances, Article 101(2) provides that States shall have the authority to provide a waiver to the Court and 'should endeavour to do so'. Indeed, given that the Rome Statute addresses a limited set of crimes of similar nature and gravity and the Rome Statute requires that an accused person must be provided with adequate time and facilities to respond to new charges,<sup>652</sup> legitimate grounds for opposing a waiver are likely to be rare.

States Parties, therefore, should include a procedure in national implementing legislation to grant a request for a waiver, if requested, including the authority that will decide whether to grant the waiver. The Commonwealth Model Law provides expressly that the relevant authority 'shall endeavour to consent' to such waivers.<sup>653</sup>

In developing their procedures, States Parties should also consider that Rule 197 of the Rules of Procedure and Evidence provides that if a State Party is requested to provide a waiver, it may ask the Court to obtain and provide the views of the person surrendered to the Court.

### *2.3.1.5 Other forms of cooperation*

Part 9 of the Rome Statute divides cooperation in relation to the Court's investigations and prosecutions into (1) arrest and surrender (addressed above in 2.3.1.4) and (2) 'other forms of cooperation' which are defined in Article 93.

Article 93 expressly lists 11 forms of assistance that States Parties must provide to the ICC:

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<sup>650</sup> *Report of the Court on Cooperation*, ICC-ASP/19/25, 28 October 2020, Recommendation 22.

<sup>651</sup> ICC, *Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/10, Decision on the confirmation of charges, 16 December 2011, para 91:  
'the rule of speciality is not, in principle, violated by the inclusion in the DCC of one or more crimes, which were not explicitly described or legally characterised in the warrant of arrest, but are otherwise implicit in the description of the course of conduct underlying the crimes in relation to which a 'concise statement of the facts', in accordance with Article 58(2) (c) of the Statute, has been provided by the Prosecution'.

<sup>652</sup> Peter Wilkitzki, 'Article 101' in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016), 2160.

<sup>653</sup> Commonwealth Model Law (n 471), s 47.

- (a) the identification and whereabouts of persons or the location of items;
- (b) the taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;
- (c) the questioning of any person being investigated or prosecuted;
- (d) the service of documents, including judicial documents;
- (e) facilitating the voluntary appearance of persons as witnesses or experts before the Court;
- (f) the temporary transfer of persons as provided in paragraph 7;
- (g) the examination of places or sites, including the exhumation and examination of grave sites;
- (h) the execution of searches and seizures;
- (i) the provision of records and documents, including official records and documents;
- (j) the protection of victims and witnesses and the preservation of evidence; and
- (k) the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties.

However, this list is far from exhaustive. Article 93(1)(l) contains a catch-all provision that requires States Parties to cooperate with:

‘[a]ny other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.’

This has the potential to require States Parties to provide other forms of assistance in relation to the Court’s investigation and prosecution of Rome Statute crimes. Indeed, in the Court’s first decades, the need for additional forms of assistance have been identified, most of which are covered by States Parties’ obligations pursuant to Article 93(1)(l) (see Recommendation 85).

*Recommendation 84: States Parties should ensure that national authorities provide all forms of cooperation listed in Article 93(1), ensuring effective procedures are put in place to implement all Court requests.*

National implementation of Article 93(1) is crucial to the effectiveness of the ICC.<sup>654</sup> As the forms of cooperation cut across a range of tasks involving different national actors and mechanisms, and their implementation may be affected by existing national laws and procedures, States Parties should ensure that procedures are established in national law that ensure full cooperation with the ICC in all instances. In particular, States Parties should take into account the following observations and comments in developing provisions and procedures for each form of cooperation.

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<sup>654</sup> Case Matrix Network (n 373), 92.

Form of Cooperation	Observations/Comments
(a) The identification and whereabouts of persons or the location of items.	<p>Although ‘persons’ are not defined in this provision, it should be interpreted to include suspects, victims and witnesses. In some instances, the Court may require assistance in locating other persons, including intermediaries and Court staff.<sup>655</sup></p> <p>Given that Article 93(1)(k) addresses the tracing of proceeds, property and assets and instrumentalities of crime for the purpose of eventual forfeiture, which may also apply to implementing reparations orders, requests for the identification and location of items pursuant to Article 93(1)(a) in most cases will relate to evidence.</p> <p>Requests for cooperation with the identification and whereabouts of persons or the location of items may be made by both the OTP and the defence, which should be addressed through the same national procedures without distinction.</p>
(b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court.	<p>Article 93(1)(b) covers both the ‘taking’ and the ‘production’ of evidence. As Kress and Prost note, this is for very practical reasons:</p> <p style="padding-left: 40px;">‘There is no legal difference between the two notions used in the Statute. In practice, however, the distinction is between evidence already existing, such as bank or corporate records, which need only be produced and other evidence, such as a statement or the testimony of witness, which is not pre-existing and has to be ‘taken’. The two phrases make it clear that the Court can request both types of assistance.’<sup>656</sup></p> <p>The ICC Appeals Chamber has found that Article 93(1)(b) provides a legal basis for the Court to issue a request for a State Party to compel witnesses to appear before the Court either sitting in situ or by way of video-link.<sup>657</sup> States Parties should ensure that implementing legislation ensures cooperation with such requests. States Parties must ensure that, when any testimony is taken from a person, their rights in Article 55 and the rights of the accused in Article 67 are fully respected.<sup>658</sup></p> <p>Requests for the taking of evidence or production of evidence may be made by both the OTP and the defence, which should be addressed through the same national procedures without distinction.</p>
(c) The questioning of any person being investigated or prosecuted.	<p>In providing cooperation with the questioning of suspects, national procedures must ensure that the rights of persons during an investigation set out in Article 55 of the Rome Statute are fully respected.<sup>659</sup></p>
(d) The service of documents, including judicial documents.	<p>Kress and Prost state that the word ‘documents’ covers all forms of writs and judicial records, as well as any other documentation.<sup>660</sup> They also note that the subparagraph does not refer to the means of transmission of the documents:</p> <p style="padding-left: 40px;">‘Regarding current practice in legal assistance, the service may be effected either by simple transmission to the person to be served or in the manner provided for under the law of the requested State Party, for the service of analogous documents, including regular postal service.’<sup>661</sup></p>

655 Claus Kress and Kimberly Prost, ‘Article 93’ in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016), 2085.

656 *Ibid.*, 2086.

657 ICC, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-1598, Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled ‘Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation’, 9 October 2014, paras 128–131. Kress and Prost (n 656), 2086–2087.

658 Kress and Prost (n 655), 2085.

659 Schabas (n 198), 1317.

660 Kress and Prost (n 655), 2087.

661 *Ibid.*

Form of Cooperation	Observations/Comments
(e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court.	<p>Article 93(1)(e) provides that the Court may request a state to assist a witness or expert in travelling to the ICC to give evidence before the Court. In the event that a witness refuses to travel to The Hague, the State Party may be requested to cooperate with organising video-link evidence from its territory in accordance with Article 93(1)(b), including compelling witnesses that refuse to give evidence voluntarily.</p> <p>Although the costs associated with travel and security of witnesses and experts will be borne by the Court, States Parties should consider following the example of other States Parties and compensate witnesses (if necessary) for any losses incurred during their travel to and from the ICC.<sup>662</sup></p> <p>Requests for facilitating the voluntary appearance of witnesses or experts before the Court may relate to witnesses called by the prosecution, defence and legal representative for victims, which should be addressed through the same national procedures without distinction. States Parties should provide logistical assistance if requested by the Court to make video-link possible in accordance with the Rules of Procedure and Evidence.</p>
(f) The temporary transfer of persons as provided in paragraph 7.	<p>This provision only applies to the transfer of persons who are in custody in the State Party.<sup>663</sup> In such circumstances, the ICC may request their temporary transfer for the purposes of identification or for obtaining testimony or other assistance.<sup>664</sup> When they are transferred, they will be detained by the ICC and returned to the State Party without delay.<sup>665</sup> Article 93(7) requires that two conditions should be fulfilled before a temporary transfer takes place. Firstly, the person requested must freely give their informed consent to the transfer. This condition should be incorporated into national procedures. In particular, the requirement of 'informed consent' requires that they should have access to independent legal advice. Secondly, the requested states must agree to the transfer. Although Article 93(7) does not provide grounds for the denial of transfer, the general obligation to cooperate would mandate the need for clear and serious reasons for any such refusal.<sup>666</sup> Moreover, if the State Party has concerns, it must first consult with the ICC in accordance with Article 97, with a view to identifying and agreeing on conditions on which the transfer could proceed, ensuring that the rights of the person being transferred are fully respected.</p>
(g) The examination of places or sites, including the exhumation and examination of grave sites.	<p>States Parties are obligated to comply with ICC requests to examine places or sites on their territory, including suspected grave sites. National procedures should be put in place to execute such requests. In particular, legislation should provide for:</p> <ul style="list-style-type: none"> <li>• national courts to order the examination of places and sites, when required (including without the consent of the property owner);<sup>667</sup></li> <li>• authorities providing security to ensure that places or sites are not interfered with before or during the examination;<sup>668</sup></li> <li>• ICC investigators and/or the defence participating in the examination when requested by the Court in accordance with Article 99(1);</li> <li>• procedures for seizing evidence from the places or sites, including documenting evidence and chain of custody, and implementing measures requested by the ICC in accordance with Article 99(1);</li> <li>• preserving evidence, including storing and handling evidence appropriately and ensuring that it is secure from interference, including implementing any procedures requested by the ICC in accordance with Article 99(1); and</li> <li>• procedures for securely transferring such evidence to the ICC, if requested.</li> </ul>
	<p>Requests for examining places or sites may relate to requests originated by the OTP or the defence, which should be addressed through the same national procedures without distinction.</p>

662 *Ibid*, 2088.

663 Rome Statute, Article 93(7) (a).

664 Rome Statute, Article 93(7) (a).

665 Rome Statute, Article 93(7) (b).

666 Kress and Prost (n 655), 2095.

667 Amnesty International, *Updated Checklist for Effective Implementation* (n 626), 7.5.8.

668 *Ibid*, 7.5.8.

Form of Cooperation	Observations/Comments
(h) The execution of searches and seizures.	As searches and seizures overlap with requests for the examination of places and sites, comprehensive procedures, including the elements recommended above should be incorporated in national implementing legislation, ensuring that requests originating from the OTP and the defence are addressed through the same national procedures without distinction.
(i) The provision of records and documents, including official records and documents.	<p>States Parties must produce any records or documents requested by the ICC, including requests originating from the defence. Procedures must be put in place to ensure that all national authorities cooperate with such requests. If the records or documents requested raise national security concerns, then the State Party must follow the procedures set out in Article 72 (see Recommendation 96). If the request relates to documents provided to the State Party confidentially by another state, intergovernmental organisation or international organisation, the State Party must follow the procedure in Article 73 (see Recommendation 92).</p> <p>Although a State Party may transmit documents or information to the ICC Prosecutor on a confidential basis solely for the purpose of generating new evidence pursuant to Article 93(8), States Parties should only seek such confidentiality in exceptional circumstances. Such restrictions may hamper the Court's ability to conduct effective investigations or undermine the rights of the accused to be provided with exculpatory evidence. If the Court subsequently requests a State Party to consent to the disclosure of such documents, permission should be granted.<sup>669</sup></p>
(j) The protection of victims and witnesses and the preservation of evidence.	<p>Article 68(1) requires the Court to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.</p> <p>The Registry uses a variety of protection measures to ensure the safety of victims and witnesses. These measures vary. Protection may be as simple as providing those involved with training and establishing guidelines intended to avoid the unnecessary exposure of persons interacting with the Court. In instances of higher risk, the Victims and Witnesses Section may implement local protective measures in order to ensure additional security and greater peace of mind to victims and witnesses. Finally, victims and witnesses can enter into the Court's Protection Programme (ICCPP), which provides those at risk with semi-permanent or permanent relocation, either nationally or internationally.<sup>670</sup></p> <p>Although protection is a responsibility of the Court, Article 93(1)(j) recognises that any such protection measures may require the assistance of States Parties, in particular, if the victims and witnesses reside or have taken refuge in that State.<sup>671</sup></p> <p>States Parties should put in place effective systems (including independent national witness protection mechanisms – see Section 2.2.2.5) and procedures to cooperate promptly and effectively with the protection of victims and witnesses in ICC situations and cases. In particular, States Parties should provide cooperation with temporarily or permanently relocating victims and witnesses who are at serious risk on account of their interaction with the ICC (see Recommendation 89).</p> <p>To cooperate fully with requests to preserve evidence, States Parties should put in place procedures to properly document evidence, maintain the chain of custody, handle and store it appropriately and securely to avoid interference, including implementing any measures requested by the ICC in accordance with Article 99(1).</p> <p>Requests for protection may relate to prosecution or defence witnesses and requests for the preservation of evidence may originate from the OTP or the defence. All requests should be addressed through the same national procedures without distinction.</p>

<sup>669</sup> Kress and Prost (n 655), 2009: 'where the Requested State is a State Party, given the general obligation of States Parties to cooperate with the Court, it is expected that if the evidence is important, permission for disclosure would be given.'

<sup>670</sup> For further information on ICC witness protection, see ICC, *Understanding the International Criminal Court* (2020), 61, <https://www.icc-cpi.int/Publications/understanding-the-icc.pdf>.

<sup>671</sup> Kress and Prost (n 655).

Form of Cooperation	Observations/Comments
<p>(k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties.</p>	<p>State cooperation with the ICC's financial investigations involving the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes have been the subject of increasing attention by the Court and the Assembly in recent years.</p> <p>Although Article 93(1)(k) states that the purpose of a request is for eventual forfeiture, a guide on Financial Investigations and Recovery of Assets developed by the ICC in 2017 states that it conducts financial investigations to achieve four important objectives:</p> <p style="padding-left: 40px;">‘Firstly, financial investigations may provide significant and valuable information pertaining to cases before the Court. This information can serve as evidence and potentially contribute to demonstrating the elements of a crime or determining an individual’s criminal responsibility.</p> <p style="padding-left: 40px;">Secondly, financial investigations contribute to the responsible management of the funds provided to the Court by States Parties as they ensure that there is no undue payment of legal aid to the defence teams.</p> <p style="padding-left: 40px;">Thirdly, it is crucial for accountability and to ensure that ‘crime does not pay’, in the event that the person is sentenced to the payment of fines and/or the forfeiture of proceeds, property and assets derived directly or indirectly from the crime.</p> <p style="padding-left: 40px;">Finally, pursuant to the Rome Statute (“Statute”), the Court may order reparations to victims, for which the convicted person is personally liable.<sup>672</sup> Securing an accused’s assets may be crucial for a meaningful award of reparations to victims.<sup>673</sup></p> <p>States Parties, therefore, should ensure that national legislation provides for cooperation with the ICC’s financial investigations and recovery of assets in these contexts.</p> <p>The 2017 Declaration of Paris, endorsed by the Assembly, invited States Parties to the Rome Statute to consider the possibility of setting up, reviewing or strengthening the implementation of domestic cooperation laws, procedures and policies, to increase the ability of States Parties to cooperate fully with the ICC in the area of financial investigations and asset recovery, in accordance with the Rome Statute.<sup>674</sup></p> <p>The ICC has noted that, although most states have national procedures in place to facilitate cooperation in the field of financial investigations for transnational crimes and have developed expertise to face the challenges inherent in the concealing of criminal assets and assets in general, the Court faces challenges, with its specific legal parameters, to find its place in this general picture, taking advantage of existing mechanisms while stressing its specificity and constraints.<sup>675</sup></p> <p>The report of a 2015 workshop organised by the ICC on cooperation challenges faced by the Court with respect to financial investigations noted that, domestic cooperation laws may contain gaps and obstacles that are incompatible with the obligation under Article 93(1)(k) to provide assistance with the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes or they may not take into account the Court’s procedures.<sup>676</sup></p> <p>In particular, State Parties are encouraged to take the following measures to strengthen their cooperation:</p>

672 Article 75(4) provides that the ICC may seek these and other measures under Article 93(1) for the purpose of giving effect to reparations orders.

673 ICC, *Financial investigations and recovery of assets* (2017), [www.icc-cpi.int/news/seminarBooks/Freezing\\_Assets\\_Eng\\_Web.pdf](http://www.icc-cpi.int/news/seminarBooks/Freezing_Assets_Eng_Web.pdf).

674 Declaration of Paris (n 385).

675 *Report of the Court on Cooperation*, ICC-ASP/17/16, paras 48 and 50.

676 *Report on cooperation challenges faced by the Court with respect to financial investigations*, Workshop 26–27 October 2015, The Hague, Netherlands: Forward-looking conclusions, 3–4.

Form of Cooperation	Observations/Comments
(k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties.	<ul style="list-style-type: none"> <li>• Establish national focal points specifically on asset tracking and freezing of assets,<sup>677</sup> and facilitate access of the Court to relevant national authorities, such as financial investigation units and asset recovery offices.</li> <li>• Enact procedures to reply timely and effectively to requests of the ICC, noting that this is paramount to successfully retrace the complex asset recovery scheme of any given ICC suspect and/or accused.<sup>678</sup></li> <li>• Ensure that domestic investigations into possible financial crimes, can be opened on the basis of information received by the Court so that states can use the full arsenal offered by their national law.<sup>679</sup></li> <li>• Ensure that authorities can implement an order of contribution issued by the Court pursuant to Rule 21.5 of the Rules of Procedure and Evidence<sup>680</sup> to recover the cost of providing counsel, in cases where the suspect or accused is found indigent and subsequently it is found out that the person is not indigent.<sup>681</sup></li> <li>• Establish a procedure to directly enforce an order of the ICC for forfeiture or seizure, similar to that in Article 13(1)(b) of the United Nations Convention against Transnational Organized Crime.<sup>682</sup></li> <li>• Recognise that, for the purposes of recovery of assets for reparations, the ICC is not required to demonstrate a link between the assets and the crime. The Court, therefore, may ask for States to take conservatory measures concerning the entire patrimony of the accused person.<sup>683</sup> National procedures should not require that the Court includes evidence of such a link in its request.</li> <li>• Establish procedures to lift any freezing or other restrictions placed on assets, including in the event that ICC proceedings are terminated against the accused person (eg, when charges are not confirmed, or a decision is made that there is no case to answer) or the accused is acquitted.<sup>684</sup></li> </ul>

677 *Report of the Court on Cooperation*, ICC-ASP/19/25, Recommendation 25.

678 *Ibid*, Recommendation 23.

679 *Ibid*, Recommendation 25. See also Declaration of Paris (n 385), para 6.

680 Rule 21(5) states: 'Where a person claims to have insufficient means to pay for legal assistance and this is subsequently found not to be so, the Chamber dealing with the case at that time may make an order of contribution to recover the cost of providing counsel.'

681 *Report of the Bureau on Cooperation*, ICC-ASP/19/33, 8 December 2020, para 12(b).

682 United Nations Convention against Transnational Organized Crime, Article 13(1) requires that, on receipt of a request for confiscation from another state party, a state party to the Convention shall either:

'(a) Submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such an order is granted, give effect to it [indirect enforcement]; or

(b) Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by a court in the territory of the requesting State Party in accordance with Article 12, paragraph 1, of this Convention insofar as it relates to proceeds of crime, property, equipment or other instrumentalities referred to in Article 12, paragraph 1, situated in the territory of the requested State Party [direct enforcement].'

683 *Report of the Court on Cooperation*, ICC-ASP/17/16, para 53. In ICC, *Prosecutor v Uhuru Muigai Kenyatta*, ICC-01/09-02/11-931-Conf, Decision on the implementation of the request to freeze assets, 8 July 2014, para 16, (the) Trial Chamber V held: '[r]ead plainly, a request for protective measures in respect of property or assets does not require a nexus between the crimes for which the accused is summoned, charged or convicted'. Schabas (n 198), 1318, notes that Article 93(1)(k), taken together with Article 57(3)(e) and Rule 99(1) of the Rules of Procedure and Evidence:

'... confirm the authority of the Pre-Trial Chamber to take protective measures to identify, trace, freeze and seize property or assets of an accused person prior to the commencement of trial. Collectively, these provisions authorise the Pre-Trial Chamber, after the consideration of certain factors, to request cooperation from a State to implement such protective measures after the issuance of a warrant of arrest or a summons to appear and prior to the start of trial, both for the purposes of eventual forfeiture as an applicable penalty under Article 77(2)(b) of the Statute and for reparations under Article 75 of the Statute.'

684 In *Prosecutor v Jean Pierre Bemba*, 'Public redacted version of "Decision on Mr Bemba's preliminary application for reclassification of filings, disclosure, accounts, and partial unfreezing of Mr Bemba's assets and the Registry's Request for guidance"', 18 October 2018, ICC-01/05-01/08-3660-Red2, 20 November 2020, para 12, (the) Pre-Trial Chamber III confirmed that: 'the lifting of coercive measures, including the unfreezing of assets, must be done under domestic law.'

Form of Cooperation	Observations/Comments
	<p>In addition, considering the depreciation of assets frozen in the <i>Bemba</i> case,<sup>685</sup> States Parties should establish procedures to consult with the ICC to ensure the effective administration and management of seized or frozen assets that are not transferred to the possession of the Court, in accordance with established practice and existing guidelines. A study by the UN Office of Drugs and Crime on the effective management and disposal of seized and confiscated assets notes:</p> <p style="padding-left: 40px;">‘Failure to take adequate care of an asset to ensure that its economic value is preserved during this phase may well frustrate efforts to compensate victims for their loss and undermine efforts to repair the harm done by criminal conduct. It is therefore increasingly important to ensure that assets are preserved at minimum costs and that they yield maximum return when they are ultimately realised.’<sup>686</sup></p> <p>The Implementation Review Group of the Conference of States Parties to the Convention against Corruption has established non-binding guidelines on the management of frozen, seized and confiscated assets<sup>687</sup> and the Financial Action Task Force has issued best practices paper on confiscation,<sup>688</sup> which may provide useful guidance to States Parties to the Rome Statute in managing frozen or seized assets ordered by the Court.</p>
(l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.	<p>All States Parties should incorporate the catch-all provision in Article 93(1)(l) into national law to ensure cooperation with all other ICC requests for assistance in investigating and prosecuting Rome Statute crimes.</p> <p>States Parties must only provide for the possibility of refusing requests for any other types of assistance pursuant to Article 93(1)(l) that are prohibited in national law on the basis of an existing fundamental legal principle of general application and follow the procedures set out in Article 93(3) and (5) (see Recommendation 95).</p>

**Recommendation 85: States Parties should provide for other forms of cooperation not expressly listed in Article 93 that in practice may be requested by the Court.**

Although Article 93(1)(l) is an important catch-all provision that should be incorporated into national implementing legislation, Schabas notes that:

‘Compliance with a request under the residual or catch-all clause may not always be a simple matter, in practice, because the fact that something is “not prohibited” by national legislation does not necessarily mean that it is permitted. The Court could request a form of cooperation that is “not prohibited”, yet the State Party might have no legislation enabling it to effect compliance.’<sup>689</sup> (footnotes omitted)

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685 See Daley J Birkett, ‘Managing Frozen Assets at the International Criminal Court: The Fallout of the Bemba Acquittal’, 18 *Journal for International Criminal Justice* (2020), 765; IBA, ‘Provisional release, release at advanced stages of proceedings, and final release at international criminal courts and tribunals’ (October 2019), [www.ibanet.org/icc-icl-programme-reports](http://www.ibanet.org/icc-icl-programme-reports), 76–79 and 84.

686 UN Office of Drugs and Crime, ‘Study prepared by the Secretariat on effective management and disposal of seized and confiscated assets’, 23 August 2017 (Open-Ended Intergovernmental Working Group on Asset Recovery, Vienna, August 2017, CAC/COSP/WG.2/2017/CRP.1) [www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2017-August-24-25/V1705952e.pdf](http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2017-August-24-25/V1705952e.pdf).

687 Implementation Review Group, *Revised draft non-binding guidelines on the management of frozen, seized and confiscated assets*, CAC/COSP/IRG/2018/CRP14, 2 November 2018.

688 Financial Action Task Force, *Best practices on confiscation (Recommendations 4 and 38) and a framework for ongoing work on asset recovery* (2012), available at: [www.fatf-gafi.org/media/fatf/documents/reports/Best%20Practices%20on%20%20Confiscation%20and%20a%20Framework%20for%20Ongoing%20Work%20on%20Asset%20Recovery.pdf](http://www.fatf-gafi.org/media/fatf/documents/reports/Best%20Practices%20on%20%20Confiscation%20and%20a%20Framework%20for%20Ongoing%20Work%20on%20Asset%20Recovery.pdf).

689 Schabas (n 198), 1319.

To facilitate full cooperation with the Court’s investigations and prosecutions, it will always be preferable if States Parties expressly provide for specific forms of cooperation in their implementing legislation, including procedures to implement the Court’s requests. Of course, the absence of provisions in the Rome Statute and national law for specific forms of cooperation does not preclude the ICC from requesting cooperation pursuant to Article 93(1)(l) or change a State Party’s obligation to cooperate with all such requests. However, where specific forms of cooperation are foreseeable, States Parties should provide for them in national law.

Based on the practice of the ICC to date, the following forms of cooperation, which would fall within the scope of Article 93(1)(l), should be expressly provided for in national implementing legislation:

Task	Notes
Intercepts of communications.	Kress and Prost note that it was the agreed understanding during the Rome negotiations that modern intrusive measures such as telephone interception would fall under Article 93(1)(l). <sup>690</sup> As such intercepts interfere with the right to privacy, the Court has held that in determining their admissibility it will consider whether the intercepts were conducted ‘in accordance with the law’, which requires among other things that: (i) the measure or measures in question should have some basis in law; (ii) the law in question should be accessible to the person concerned and foreseeable as to its effects; and (iii) as regards foreseeability, the law must set forth with sufficient precision the conditions in which a measure may be applied, to enable the persons concerned – if need be, with appropriate advice – to regulate their conduct. <sup>691</sup>
Provision of forensic/DNA and other specialist expertise.	In some instances, the ICC may request the assistance of national forensic or other specialist authorities, including with the collection, handling or analysis of evidence. For some States Parties this may require a request for judicial cooperation from the ICC, or in others a request for a service or technical assistance. Legislation should clarify the appropriate procedures that the ICC should follow.
Freezing of assets for the specific purpose to secure the arrest of a person sought.	While Article 93(1)(k) provides specifically for the freezing of assets for the purpose of eventual forfeiture, the ICC may also request such measures to secure the arrest of a person sought, including by denying them the funds to abscond. A draft Action Plan for arrest strategies considered by the Assembly recommends that States Parties consider freezing monetary entitlements and allowances (eg, salaries and pensions) and assets of suspects at large, including bank accounts (both in the context of an international sanctions regime or in the state of nationality or residence). <sup>692</sup>

**Recommendation 86:** States Parties should establish effective procedures that ensure full cooperation with defence requests.

As emphasised in Recommendation 84, the defence may originate requests for state cooperation, including for:

- the identification and whereabouts of persons or the location of items (Article 93(1)(a));
- the taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court (Article 93(1)(b));

<sup>690</sup> Kress and Prost, (n 655), 2086.

<sup>691</sup> ICC, *Prosecutor v Jean-Pierre Bemba Gombo et al*, ICC-01/05-01/13-1855, Decision on Requests to Exclude Dutch Intercepts and Call Data Records, 29 April 2016, para 11.

<sup>692</sup> *Report of the Bureau on Cooperation*, Annex IV: Report on the draft Action Plan on arrest strategies, submitted by the Rapporteur, ICC-ASP/14/26/Add1, 16 November 2015, Appendix: [Draft] Action Plan on arrest strategies submitted by the Rapporteur, para 31.

- facilitating the voluntary appearance of persons as witnesses or experts before the Court (Article 93(1)(e));
- the examination of places or sites, including the exhumation and examination of grave sites (Article 93(1)(g));
- the execution of searches and seizures (Article 93(1)(h));
- the provision of records and documents, including official records and documents (Article 93(1)(i)); and
- the protection of victims and witnesses and the preservation of evidence (Article 93(1)(j)).

Such cooperation may be essential to ensure that the defence is able to conduct effective investigations to raise defences and present evidence during trial in accordance with the rights of the accused in Article 67.<sup>693</sup> The Registry notes that full cooperation with requests from the Defence ‘is fundamental to ensuring the rights of the accused and the fairness of proceedings before the Court.’<sup>694</sup>

However, the 2020 *Report of the Court on Cooperation* states that, while in many instances the Registry seeks to support the defence’s efforts to obtain state cooperation, it has been the Registry’s experience that cooperation with defence teams is not easily forthcoming, even though they do not often involve complex requests.<sup>695</sup> It reported that in the 12-month period between September 2019 and September 2020, only nine out of 37 (24.3 per cent) defence team requests for cooperation transmitted by the Registry received a positive reply.<sup>696</sup>

The Assembly of States Parties has on numerous occasions urged States Parties to cooperate with requests of the Court made in the interest of Defence teams, to ensure the fairness of proceedings before the Court.<sup>697</sup>

States Parties should ensure that national implementing legislation expressly requires full cooperation with the defence, as well as the OTP. In light of the current low levels of responses to defence requests for cooperation, States Parties should establish thorough national procedures and effective mechanisms to respond to them. In its 2020 *Report on Cooperation*, the Court recommends that States Parties also consider:

- informing the Registry on whether they would prefer to receive requests for cooperation from the Defence teams through the Registry or directly from the teams,<sup>698</sup>
- mainstreaming information within national judiciary and law enforcement on the legal framework of the Court and cooperation obligations with the Court as a whole, including defence teams;<sup>699</sup> and

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693 See, in particular, Rome Statute, Article 67(1)(e).

694 *Report of the Court on Cooperation*, ICC-ASP/19/25, para 16.

695 *Ibid.*

696 *Ibid.*, 4.

697 See, for example: *Resolution on Cooperation*, ICC-ASP/19/Res 2, 16 December 2020, para 16; *66 Recommendations on Cooperation* (n 586), Recommendation 28.

698 *Report of the Court on Cooperation*, ICC-ASP/19/25, Recommendation 4.

699 *Ibid.*, Recommendation 5.

- specific discussion among states and the ICC on the challenges and impediments (whether legal, technical, logistical or financial) faced by states to answer defence requests for cooperation.<sup>700</sup>

If it is determined that the rate of cooperation with defence requests could be improved by standardisation or creation of templates for defence requests or procedures that should be followed by defence counsel and States Parties, the Assembly and the Court should support the creation of such tools, in cooperation with defence counsel and the International Criminal Court Bar Association.

### 2.3.1.6 Cooperation agreements

In addition to the need for all States Parties to enact effective implementing legislation, the ICC has developed cooperation agreements, including on interim release, victim and witness relocation, final release and enforcement of sentences (see Section 2.3.1.8), which the Court states are essential for regulating successful cooperation.<sup>701</sup> According to the ICC, cooperation agreements:

- Increase legal certainty both for States Parties and for the Court. Without prejudice to Rome Statute provisions, they acknowledge where States Parties retain specific decision-making power, and establish clear procedures about how that power is exercised in relation to their obligations to the Court, including clear channels for communication on specific issues.
- Provide a vehicle for States to share knowledge, expertise, and good practices, thus contributing to capacity-building efforts and related initiatives both at the ICC and at the national level.
- Demonstrate States Parties' commitment to the Court and its mandate, and encourage other States Parties to make similar commitments, strengthening the legal and logistical network supporting successful investigations and prosecutions, and related Court activities.<sup>702</sup>

*Recommendation 87: States Parties should enter into cooperation agreements with the ICC providing for cooperation with interim release and, where necessary, incorporate the provisions and procedures in national law.*

Although cooperation with interim release of accused persons is not expressly listed as a form of cooperation in Article 93(1), the ICC is required by Article 60(2) to grant interim release to a suspect, with or without conditions, when it is not satisfied that the grounds for detention in Article 58(1) are met. To do so, it requires the cooperation of states to accept the person, ensure their compliance with any conditions for interim release set by the ICC, and cooperate with returning the person to the ICC, when required.

To ensure effective state cooperation with interim release, the ICC has developed a model cooperation agreement that it is calling on states to sign.<sup>703</sup> However, as of 1 January 2021, only two states have done so.<sup>704</sup> Although the agreement is sometimes referred to as a voluntary agreement, cooperation with interim release is essential to facilitating the ICC's investigation and prosecution of crimes within the

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700 *Ibid*, Recommendation 6.

701 ICC, *Cooperation Agreements* (n 583), 5.

702 *Ibid*.

703 *Ibid*.

704 Argentina and Belgium, *Report of the Court on Cooperation*, ICC-ASP/19/25, para 35.

jurisdiction of the Court. The ICC has emphasised that interim release is an essential right of the accused.<sup>705</sup> If States Parties are unwilling to cooperate, it could hamper the possibility of interim release or render it impossible,<sup>706</sup> with significant consequences for the ICC's ability to meet its obligations to conduct fair trials.<sup>707</sup> All States Parties, therefore, are under an obligation to cooperate with interim release in accordance with Article 86 and 93(1)(1).

*Recommendation 88: States Parties should enter into cooperation agreements with the Court to cooperate with the release of persons if proceedings are terminated and, where necessary, incorporate the provisions and procedures of the agreement in national implementing legislation.*

As acknowledged in Rule 185 of the Rules of Procedure and Evidence, a person who has been surrendered to the Court and is being detained may be released from the custody of the Court because:

- the Court rules that it does not have jurisdiction;
- the case is ruled to be inadmissible;
- the charges are not confirmed at the pre-trial phase under Article 61;
- the person has been acquitted at trial or on appeal; or
- for any other reason.

In these circumstances, the Court is required by Rule 185 to make arrangements to transfer the person to a state which is obliged to receive them (including their state of nationality); or to another state which agrees to receive them; or to a state which has requested their extradition with the consent of the state that originally surrendered the person to the ICC.

If the released person cannot be returned to their state of nationality (for example, because the state will not accept them or because they would be at risk of torture) and their extradition has not been requested, it is important that other states are willing to accept the released person on their territory. The Court has emphasised:

‘The consequences of the absence of States Parties willing to accept released persons are serious. For example, individuals who cannot be successfully relocated may remain de facto detained, despite having been released. In this respect, other international criminal tribunals such as the International Criminal Tribunal for Rwanda, have encountered difficulties finding States willing to accept acquitted persons on their territory. In addition to the egregious impact such a situation would have on the released person, it prevents the Court's system from functioning and runs counter to the Court's objective of applying the highest international standards.’<sup>708</sup>

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705 ICC, *Cooperation Agreements* (n 583), 12.

706 *Ibid*, 12.

707 For further information regarding the ICC's practice relating to interim release and fair trial considerations, see IBA, 'Provisional release, release at advanced stages of proceedings, and final release at international criminal courts and tribunals' (n 685).

708 ICC, *Cooperation Agreements* (n 583), 13.

To prevent such outcomes, the Court has developed a model cooperation agreement on release that it is asking States Parties to sign indicating their willingness to accept released persons.<sup>709</sup> However, as of 1 January 2021, only one State Party has entered into such an agreement with the ICC.<sup>710</sup>

*Recommendation 89: States Parties should enter into cooperation agreements with the ICC providing for cooperation with relocating victims and witnesses at serious risk to their territories and, where necessary, incorporate the provisions and procedures in national law.*

As explained in Recommendation 84, the obligation to cooperate with the protection of victims and witnesses in accordance with Article 93(1) (j) may involve requests from the ICC for States Parties to cooperate with relocating victims and witnesses at serious risk to their territory. The Court states that relocation is a measure of last resort, only to be considered when all other measures are deemed insufficient to ensure protection.<sup>711</sup>

To ensure effective state cooperation with relocations, the ICC has developed a model cooperation agreement that it is calling on States Parties to sign. As of 1 January 2021, 24 States Parties have entered into agreements with the Court.<sup>712</sup> However, considering that threats, intimidation and attacks against ICC victims and witnesses is common during ICC investigations and cases,<sup>713</sup> all States Parties should sign agreements to ensure that they can cooperate fully with such requests.

Although relocation is sometimes referred to as a voluntary form of cooperation, victim and witness protection is a central element of the Court's investigations and prosecutions, which States Parties are obliged to cooperate with, pursuant to Article 86. Indeed, a failure of States Parties to assist the Court in the protection of victims and witnesses who are at most risk not only has serious consequences for those individuals but will inevitably undermine the Court's ability to conduct effective investigations and prosecutions. As the ICC has recognised: 'without clear assurances that victims and witnesses will be protected, the appearance of witnesses may be delayed and the trial process may be disrupted.'<sup>714</sup>

The ICC depends upon States Parties to accept and host victims and witnesses in need of international relocation. To meet this obligation, all States Parties should enter into cooperation agreements with the ICC on victim and witness relocation and, when necessary, incorporate the provisions and procedures in national law. In particular, States Parties can demonstrate their support for this important aspect of the Court's work by including in their national legal framework provisions that allow specialised services (such as immigration agencies or a national witness protection programme) to accept ICC witnesses or victims based on direct approach by the ICC.

To ensure that relocations are successful, the Court has asked States Parties, as a minimum requirement, to ensure that permanently relocated victims and witnesses receive facilities, benefits and entitlements at least equal to those which are provided to refugees under Article 1 of the Convention and its Protocol relating

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709 The model agreement is available in ICC, *Cooperation Agreements* (n 583), 28.

710 Argentina. See *Report of the Court on Cooperation*, ICC-ASP/19/25, para 35.

711 ICC, *Cooperation Agreements* (n 583), 7.

712 *Report of the Court on Cooperation*, ICC-ASP/19/25, para 35.

713 OTP *Strategic Plan 2016–2018*, 6 July 2015, para 27; Open Society Justice Initiative, *Witness Interference in Cases before the International Criminal Court* (2016), [www.opensocietyfoundations.org/sites/default/files/factsheet-icc-witness-interference-20161116.pdf](http://www.opensocietyfoundations.org/sites/default/files/factsheet-icc-witness-interference-20161116.pdf), at 2–3.

714 ICC, *Cooperation Agreements* (n 583), 7.

to the Status of Refugees.<sup>715</sup> By providing relocated persons with legal residency status and the basic means to start a new life, States Parties can directly influence how successfully victims and witnesses integrate into national societies. By granting access to their facilities, cooperating States can help protected persons to resume their lives as peacefully, normally and securely as possible. With the assistance afforded to them by States Parties and their institutions, victims, witnesses and their families can find calm, stability and, ultimately, self-sustainability.

### 2.3.1.7 Obstacles to cooperation

Although States Parties have a general obligation to cooperate fully with the ICC's investigations and prosecutions, the Rome Statute acknowledges that problems may arise that impede the execution of a request. It establishes general procedures requiring the State Party to consult with the ICC in these circumstances to resolve the matter and for dealing with common obstacles that States Parties may face. Only in very limited circumstances does the Rome Statute provide that States Parties may postpone or deny the ICC's requests for cooperation. National implementing legislation should fully incorporate and not go beyond these provisions and procedures.

*Recommendation 90: States Parties should ensure that, where problems are identified that may impede or prevent the execution of a cooperation request, they consult with the Court without delay to resolve the matter.*

Article 97 requires that States Parties consult with the ICC in all instances where problems with giving effect to cooperation requests arise. It provides three examples of problems that would trigger a State Party's obligation to consult with the Court. However, these are clearly non-exhaustive:

- insufficient information to execute the request;
- in the case of a request for surrender, the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested state is clearly not the person named in the warrant; or
- the fact that execution of the request in its current form would require the requested state to breach a pre-existing treaty obligation undertaken in respect to another state.

Other provisions of the Rome Statute highlight additional examples of problems that require a State Party to consult with the Court:

- where the person sought for surrender brings a challenge before a national court on the basis of the principle of *ne bis in idem* as provided in Article 20, the requested state shall immediately consult with the Court to determine if there has been a relevant ruling on the request (Article 89(2)); and
- where execution of a particular measure of assistance detailed in a request presented under Article 93(1) (l) is prohibited in the requested state on the basis of an existing fundamental legal principle of general application, the requested state shall promptly consult with the Court to try to resolve the matter (Article 93(3)).

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<sup>715</sup> ICC, *Cooperation Agreements* (n 583), 10.

If these or any other problems arise, consulting with the Court to resolve the matter is an obvious good faith measure. Schabas notes that Article 97 ‘declares something that States Parties to the Rome Statute operating in good faith will do in any case.’<sup>716</sup> Indeed, it would be inconsistent with the Rome Statute for a State Party to simply delay implementation or ignore a request or to refuse to implement it, when such problems arise. The ICC Pre-Trial Chamber has confirmed that consultation does not trigger any suspension or stay of the obligation to cooperate.<sup>717</sup>

To guarantee good faith cooperation, it is imperative that national implementing legislation reflects the obligation to consult with the requestor of cooperation with a view to finding a solution that will result in prompt cooperation. Legislation should avoid pre-judging what the problems are or what the solutions may be, which should be considered on a case-by-case basis.<sup>718</sup>

*Recommendation 91: States Parties should only postpone or deny cooperation in accordance with the grounds set out in the Rome Statute.*

The cooperation regime under Part 9 is an essentially obligatory one which is underlined in Article 86.<sup>719</sup> Grounds for refusal of cooperation *stricto sensu* are virtually absent.<sup>720</sup> Kress and Prost observe that ‘Part 9 generally replaces the rather categorical instrument of grounds for refusals *stricto sensu* by more flexible and refined solutions, such as consultation and postponement clauses’ that may in limited circumstances result in a postponement or denial of cooperation (see Recommendations 92–99 below).<sup>721</sup>

Any decision by a State Party to postpone or refuse a request for cooperation must be grounded in the Rome Statute. Kress and Prost observe:

‘Part 9 does neither leave room for a refusal to cooperate based on political discretion nor does it retain traditional grounds to refuse cooperation such as, in particular, the double criminality requirement, a lack of reciprocity and the political nature of the offense.’<sup>722</sup>

Amnesty International also argues that the following grounds of refusal commonly found in extradition and mutual legal assistance treaties must not be applied to the ICC:

- the crime under investigation or prosecution is a political offence or connected to a political offence or a purely military disciplinary offence (genocide, crimes against humanity and war crimes are not political or purely military disciplinary offences);

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716 Schabas (n 198), 1339.

717 ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-242, Decision following the Prosecutor’s request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir, 13 June 2015, para 8.

718 For example, Commonwealth Model Legislation (n 471), s 26, limits consultations ‘to ascertain whether the assistance could be provided subject to conditions or at a later date or in an alternative manner’. Although the text is drawn from Article 93(5) in relation to rejecting a request for forms of cooperation in Article 93(1)(l) that are prohibited by national law, the section does not consider other barriers to cooperation and appears to assume that consultations may not identify other solutions, including to provide the cooperation requested.

719 Kress and Prost (n 573), 2009.

720 *Ibid.*

721 *Ibid.*

722 *Ibid.*

- danger of unfair trial (the Statute has stronger guarantees of the right to a fair trial than many states);
- danger of the death penalty (this penalty is excluded from the Statute);
- the crime is not a crime in the requested state (double criminality) – (genocide, crimes against humanity and war crimes are crimes which all states are obliged to punish);
- the person has already been acquitted or convicted of the conduct under investigation or prosecution (*ne bis in idem*) (it is for the Court to decide whether this principle applies under the Statute);
- statute of limitations (Article 29 provides that the crimes within the jurisdiction of the Court are not subject to any statute of limitations); and
- amnesties, pardons and similar measures of impunity designed to prevent a trial and the truth (applying such measures to Rome Statute crimes are contrary to international law).<sup>723</sup>

*Recommendation 92: States Parties should ensure that they apply the procedure in Article 73, if they are requested to provide a document or information in their custody, possession or control, which was disclosed to them in confidence by a state, intergovernmental organisation or international organisation.*

Article 73 requires that in this situation the State Party requested by the Court to cooperate shall seek the consent of the originator that disclosed the document or information to it. If the originator is a State Party, it shall either consent to disclosure or consult directly with the Court to resolve the issue. If the originator is not a State Party and refuses to consent to disclosure to the Court, the State Party that received the request from the Court must inform the Court that it is unable to provide the document or information.

*Recommendation 93: States Parties should adopt a procedure, including consultation with the ICC, in the event that transit of a person being surrendered to the ICC through their territory would impede or delay the surrender.*

As explained in Recommendation 82, Article 89(3) (a) requires a State Party, in accordance with its national procedural law, to authorise 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*. The exception was included to ensure that the States Parties could inform the Court if national legal protections available to a person in transit, even if transit is authorised, could result in significant delay in the process or perhaps even the release of the person during transit.<sup>724</sup> Thus, a State Party should only refuse cooperation with the transit of a person to the ICC where it would delay or undermine the surrender process.<sup>725</sup> In these circumstances, States Parties should first consult with the ICC as required by Article 97. If the ICC maintains that it has no other viable options to complete the surrender of the suspect to the Court, the State Party should proceed to cooperate with the Court.

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<sup>723</sup> Amnesty International, *Updated Checklist for Effective Implementation*, (n 626) 7.4.

<sup>724</sup> Kress and Prost (n 647), 2055.

<sup>725</sup> *Ibid.*

*Recommendation 94: States Parties should ensure that they apply the rules set out in Article 90 if, in addition to a request for surrender of a suspect to the ICC, they receive a competing request for extradition of the same person from another state.*

Article 90 sets out detailed rules that States Parties must apply in this situation, which should be reflected accurately in national law.

National legislation should recognise that where a request relates to the *same alleged conduct*, the Court must determine the admissibility of the case, bearing in mind the competing request.<sup>726</sup> If the competing request is made by another State Party to the Rome Statute, the decision on admissibility essentially determines whether the person must be surrendered to the ICC (in the event of an admissible decision) or extradited to that State Party (in the event of an inadmissible decision).

However, if the Court determines that a case is admissible and the competing request is made by a state that has not ratified or acceded to the Rome Statute, which the State Party is under an existing international obligation to cooperate with, the State Party must determine whether to surrender the person to the Court or to extradite/transfer that person to the requesting state considering all relevant factors, including:

- 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.<sup>727</sup>

When a competing request is received from any state in relation to *other alleged conduct* than that which constitutes the crime for which the Court seeks the person's surrender and the State Party is under an existing international obligation to extradite the person to that state, the State Party must determine whether to surrender the person to the Court or to extradite/transfer that person to the requesting state considering all relevant factors, including those listed above.<sup>728</sup> In addition, special consideration must be given to the relative nature and gravity of the conduct in question.

Case Matrix Network reports that, so far, States Parties have largely incorporated Article 90 in implementing legislation by replication or reference.<sup>729</sup> In the event that States Parties seek to replicate the rules in national law, they should ensure that all elements of the rules are incorporated.<sup>730</sup> Implementing legislation should also set out procedures to implement Article 90, including notifying the ICC and the requesting state, as soon as a competing request arises.

*Recommendation 95: States Parties should ensure that they only provide for the possibility of refusing requests for any other types of assistance pursuant to Article 93(1)(l) that are prohibited in national law on the basis of an existing fundamental legal principle of general application and follow the procedures set out in Article 93(3) and (5).*

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<sup>726</sup> Rome Statute, Article 90(2), (4) and (6).

<sup>727</sup> Rome Statute, Article 90(6).

<sup>728</sup> Rome Statute, Article 90(7).

<sup>729</sup> Case Matrix Network (n 373), 88.

<sup>730</sup> See, for example, the approach taken in the Commonwealth Model Law (n 471), s 32.

Article 93(1)(1) provides that, in addition to the forms of cooperation expressly listed in Article 93(1)(a)-(k), States Parties must also comply with requests from the ICC for ‘[a]ny other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.’ According to Article 93(3), prohibitions in the requested state may only be raised if they are based on an existing fundamental legal principle of general application.<sup>731</sup> If a State Party’s execution of a particular measure detailed in the request is prohibited by national law, the State Party must consult promptly with the Court to resolve the matter. In particular, Article 93(5) requires that the State Party must consider whether the assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later date or in an alternative manner.<sup>732</sup>

*Recommendation 96: States Parties should ensure that they follow the procedures in Article 72, if a request for information by the ICC raises national security concerns.*

Article 93(4) provides that ‘[i]n accordance with Article 72, a State Party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to national security.’ Article 72 of the Statute sets out a detailed procedure that must be followed in such cases, before States Parties may invoke national security as a ground of refusal. In particular, Article 72(5) requires that the State Party must take all reasonable steps, acting in conjunction with the Prosecutor, the defence or the Pre-Trial Chamber or Trial Chamber, as the case may be, to resolve the matter by cooperative means, including:

- modification or clarification of the request;
- a determination by the Court regarding the relevance of the information or evidence sought, or a determination as to whether the evidence, though relevant, could be or has been obtained from a source other than the requested state;
- obtaining the information or evidence from a different source or in a different form; and
- agreement on conditions under which the assistance could be provided including, among other things, providing summaries or redactions, limitations on disclosure, use of *in camera* or *ex parte* proceedings, or other protective measures permissible under the Rome Statute and the Rules of Procedure and Evidence.

It is only after all reasonable steps have been taken and 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 that it can notify the Prosecutor or the Court of its refusal.<sup>733</sup> Thereafter,

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731 *Commonwealth Model Law* (n 471), s 67(1)(c) and (d) interprets Articles 93(1)(1) and 93(3) as defining two separate grounds for refusal: (1) where the type of assistance is prohibited by law (as provided in Article 93(1)); and (2) where the execution of the request is prohibited by an existing fundamental legal principle of application (as provided in Article 93(3)). However, at least one ICC Trial Chamber has held that the provisions should be read together to cover measures of assistance that are prohibited by law on the basis of an existing fundamental legal principle of general application. ICC, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-1274-Corr2, Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation, 17 April 2014, para 115:

‘It is then up to the State on whom a request has been made to specify how national law prohibits – in good faith – the type of the request that was made. Notably, the prohibition must be seen to be in good faith, because Article 93(3) states that the prohibition needs to be “on the basis of an existing fundamental legal principle of general application”.’

732 Rome Statute, Article 93(5).

733 Rome Statute, Article 72(6).

if the Court determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused, the Court may request further consultations with the state and it may refer the matter to the Assembly of States Parties in accordance with Article 87(7), if the Court concludes that the state has not acted in good faith.<sup>734</sup>

States Parties should ensure that these detailed procedures and potential safeguards are fully incorporated into implementing legislation.

*Recommendation 97: States Parties should ensure that they follow the procedures in Article 94 for the postponement of a request for cooperation pursuant to Article 93(1) in respect of an ongoing investigation or prosecution.*

Article 94 provides that a state may postpone the execution of a request if its immediate execution would interfere with an ongoing investigation or prosecution of a case different from that to which the request relates. However, before deciding to postpone, the state should consider whether the assistance may be immediately provided subject to certain conditions. If not, the state must agree the period of time for postponement with the ICC which must be no longer than is necessary to complete the relevant national investigation or prosecution. It must also comply with requests from the OTP to preserve evidence.

It is important to note that, although it is not expressly stated in Article 94, the state's ability to postpone only applies to requests for cooperation pursuant to Article 93. It must not be applied to requests for arrest and surrender of suspects to the Court. Commentaries point out that, where a request for surrender relates to a person being proceeded against in the requested state for a crime different from that for which surrender to the Court is sought, Article 89(4) applies.<sup>735</sup> It states: 'the requested State, after making its decision to grant the request, shall consult with the Court'. Addressing the relationship between Article 89(4) and Article 94, the Court has held that Article 89(4) is a *lex specialis* provision that specifically relates to surrender requests and, without any mention of a possibility for postponement, requires the requested State to grant the request and then consult with the Court.<sup>736</sup>

*Recommendation 98: States Parties should ensure that postponement of execution of a cooperation request pending the ICC's determination of an admissibility challenge pursuant to Article 95 ends, and that the request is promptly executed, if the ICC decides that a case is admissible or the Court orders that the Prosecutor may pursue the collection of evidence while the challenge is under consideration.*

Article 95 provides that a state may postpone the execution of any request for cooperation (including requests for arrest and surrender) where an admissibility challenge is under consideration by the Court pursuant to Article 18 or 19. The postponement may only be made where an admissibility challenge has been properly filed and it may only last while the Court's determination of the challenge is pending, 'unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to Article 18 and 19.'

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734 Rome Statute, Article 72(7) (a).

735 Claus Kress/Kimberly Prost, 'Article 94' in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016), 2103; Schabas (n 198), 1329.

736 ICC, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-72, Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi, 7 March 2012, para 15. Also: ICC, *Prosecutor v Charles Blé Goudé*, ICC-02/11-02/11-41, Decision on Côte d'Ivoire's request to postpone the surrender of Charles Blé Goudé to the Court, 3 March 2014, para 7.

*Recommendation 99: States Parties should ensure that any conflicts between requests for cooperation and their obligations with respect to state or diplomatic immunities or status of forces agreements are addressed in accordance with the Rome Statute.*

Article 98 establishes a procedural rule that the ICC shall not make a request for surrender or assistance to a state that would require it to act inconsistently with its obligations: (1) with respect to the state or diplomatic immunity of a person or property of a third state; or (2) under status of forces agreements that require the consent of a sending state to surrender a person of that state to the Court; unless the Court obtains a waiver of immunity from the third state or a consent to surrender from the sending state. These procedural rules are aimed at avoiding conflicts between a State Party's obligation under the Statute and other obligations under international law.<sup>737</sup> Before making a request to a state, the Court should be satisfied that no immunities apply nor status of forces agreements prevent cooperation; if so, the Court should obtain a waiver or consent from the relevant state.

In light of the ICC Appeals Chamber's decision in the *Al-Bashir* case, grounds for a State Party to invoke immunities under Article 98 as a ground for not arresting and surrendering nationals of other states to the Court will be extremely narrow. The Appeals Chamber Decision confirmed that, as reflected in Article 27(2) which states 'immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising jurisdiction over such person', there is no rule of customary international law recognising immunity vis-à-vis an international court even for a head of state. The Appeals Chamber held:

'The absence of a rule of customary international law recognising Head of State immunity vis-à-vis international courts is relevant not only to the question of whether an international court may issue a warrant for the arrest of a Head of State and conduct proceedings against him or her, but also for the horizontal relationship between States when a State is requested by an international court to arrest and surrender the Head of State of another State. As further explained in the Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa and correctly found by the Pre-Trial Chamber in the Malawi Decision, no immunities under customary international law operate in such a situation to bar an international court in its exercise of its own jurisdiction.' (Footnotes omitted).

The Appeals Chamber also held the same legal effect may result from a UN Security Council resolution, finding in relation to the Darfur referral:

'Resolution 1593 gives the Court power to exercise its jurisdiction over the situation in Darfur, Sudan, which it must exercise "in accordance with [the] Statute". This includes Article 27(2), which provides that immunities are not a bar to the exercise of jurisdiction. As Sudan is obliged to "cooperate fully" with the Court, the effect of Article 27(2) arises also in the horizontal relationship – Sudan cannot invoke Head of State immunity if a State Party is requested to arrest and surrender Mr Al-Bashir.'<sup>738</sup>

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<sup>737</sup> See, for example, ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-397-Corr, Judgment in the Jordan referral Re: Al-Bashir appeal, 6 May 2010, paras 129-130.

<sup>738</sup> *Ibid*, paras 7 and 133-149.

Given that the rule relates to procedures applied by the Court *before* making a request, it has been suggested that not much is required in terms of its implementation.<sup>739</sup> Indeed, a state acting in good faith should normally be in a position to adhere to ICC requests without such a procedure, especially after the Bashir Appeals Chamber judgment.

Nonetheless, the Commonwealth Expert Group recommends that while implementation is not strictly necessary, States Parties should consider incorporating into national law relevant rules and a procedure to guide national authorities if they receive a request for arrest and surrender from the ICC which raises concerns.<sup>740</sup>

As Schabas points out, ‘if the Court proceeds with a request where an Article 98 issue arises, the State should apply to the Court seeking discontinuance, rather than simply defy the request.’<sup>741</sup> States Parties are under an obligation to consult with the ICC in accordance with Article 97, and Rule 195(1) of the ICC Rules of Procedure and Evidence requires that the requested state ‘shall provide any information relevant to assist the Court in the application of Article 98.’ In the event of a dispute that cannot be addressed through consultations, the Court is the arbiter of the application of Article 98 and its decisions must be respected by national authorities.<sup>742</sup>

The Commonwealth Model Law proposes a three-step process. Firstly, that the relevant Minister must form the opinion that a request would require the state to act inconsistently with its obligations under international law with respect to state or diplomatic immunity or an international agreement with a non-state party. In doing so, it must take into account the jurisprudence of the Court relating to Article 27(2) and its relationship to Article 98. Secondly, the Minister must consult with the ICC. Thirdly, the Minister must request a determination from the ICC as to whether Article 98 applies.<sup>743</sup> In addition, national legislation should ensure that the competence entrusted to the Court to decide on immunity conflicts is respected by national authorities.

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739 Case Matrix Network (n 373), 88.

740 Commonwealth Expert Group (n 469), paras 157–161.

741 Schabas (n 198), 1344.

742 Claus Kress/Kimberly Prost, ‘Article 98’ in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016), 2120 notes:

‘This competence was given to the Court in full recognition of the fact that the Court’s determination will not bind a State concerned that is not party to the Statute, and that for this reason, any determination by the Court, that no conflicting international obligation exists, will leave the requested State Party with the risk that the Court’s determination of the international legal obligation is wrong. It was felt, however, that this risk is a tolerable one to bear in light of both the judicial expertise united on the bench and the persuasive authority that any relevant determination by the Court is bound to carry with it.’

See also: Schabas (n 198), 1344. In at least two decisions, the Court has relied on Article 119(1), which states: ‘[a]ny dispute concerning the judicial functions of the Court shall be settled by the decision of the Court’ to find that the Court is the sole authority to determine whether immunities apply, see: ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-139-Corr, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, 13 December 2011, para 11; ICC, *Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-195, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court, 9 April 2014, para 16.

743 Commonwealth Model Law (n 471), s 25(3).

### 2.3.1.8 Enforcement of Court orders for imprisonment, fines, forfeiture and reparations

States Parties have a vital role in enforcing ICC sentences, penalties and reparations, which are largely addressed in Part 10 of the Statute. The ICC's detention facility in The Hague is only intended to detain accused persons (who have not been granted interim release) while their case is before the Court. Article 103 provides that sentences of imprisonment imposed following conviction by the ICC are to be implemented in the prison facilities of willing states. States Parties are required to give effect to Court orders of fines, forfeiture and reparations. Cooperation with these and other enforcement functions should be addressed in national implementing legislation.

*Recommendation 100: States Parties should cooperate with the enforcement of sentences of imprisonment imposed by the ICC, including by entering into agreements with the ICC indicating their willingness to accept convicted persons to serve sentences of imprisonment in their national prison facilities and, where necessary, incorporate the provisions and procedures set out in the agreement in national implementing legislation.*

Article 103(1)(a) states that '[a] sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.' States Parties can be added to the list by entering into a cooperation agreement developed by the ICC on enforcement of sentences.<sup>744</sup> As of 1 January 2021, 11 States Parties have done so.<sup>745</sup>

The wording of Article 103(1)(a) confirms that cooperation with the enforcement of sentences of imprisonment is voluntary. By entering into an agreement with the Court, States Parties are not bound to accept any sentenced person. The State Party must consent in each specific case concerning a specific individual.<sup>746</sup> Nonetheless, as many States Parties as possible should enter into agreements with the Court to share the responsibility of enforcing sentences of imprisonment and provide the Court with a broad choice of states of enforcement, taking into account the factors considered by the Court in designating a state of enforcement.<sup>747</sup> When requested, to enforce the sentence of a person convicted by the ICC, States Parties should make good faith efforts to accept the Court's requests.

Article 106 requires that the enforcement of a sentence of imprisonment shall be consistent with widely accepted international treaty standards governing the treatment of prisoners. These include:

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744 A model of the enforcement of sentence agreement is available in ICC, *Cooperation Agreements* (n 583), 34.

745 Argentina, Austria, Belgium, Denmark, Finland, Georgia, Mali, Norway, Serbia, Sweden and the UK. See *Report of the Court on Cooperation*, ICC-ASP/19/25, para 35.

746 Rome Statute, Article 103(1)(c) states: 'A State designated in a particular case shall promptly inform the Court whether it accepts the Court's designation.'

747 Rome Statute, Article 103(3) states that the Court shall take into account the following factors in exercising its discretion to designate a state of enforcement:

1. the principle that States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution, as provided in the Rules of Procedure and Evidence;
2. the application of widely accepted international treaty standards governing the treatment of prisoners;
3. the views of the sentenced person;
4. the nationality of the sentenced person; and
5. such other factors regarding the circumstances of the crime or the person sentenced, or the effective enforcement of the sentence, as may be appropriate in designating the state of enforcement.

- the *UN Standard Minimum Rules for the Treatment of Prisoners* (the ‘Nelson Mandela Rules’);<sup>748</sup>
- the *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*;<sup>749</sup>
- the *UN Basic Principles for the Treatment of Prisoners*;<sup>750</sup>
- the *UN Code of Conduct for Law Enforcement Officials*;<sup>751</sup>
- the *UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*;<sup>752</sup> and
- the *UN Basic Principles on the Role of Lawyers*.<sup>753</sup>

If a State Party’s national prison conditions do not meet international standards, the ICC has concluded a memorandum with the UNODC, which can provide technical assistance to states in improving the conditions of the prison system up to the required standard.<sup>754</sup>

States Parties may, at the time of entering into an agreement, attach conditions to its acceptance of persons. The Court must agree to the conditions before the state is included on the list of willing states.<sup>755</sup> To ensure maximum cooperation with the ICC, conditions should be kept to a minimum, including where legal or constitutional obstacles exist. For example, a State Party that prohibits sentences of life imprisonment in national law may attach conditions that it will not accept persons sentenced to life imprisonment by the ICC.

To ensure full cooperation with the ICC in the enforcement of prison sentences, States Parties must agree to give effect to the requirements of the Rome Statute and the Rules of Procedure and Evidence and, where necessary, incorporate them in national implementing legislation.

Drafting Recommendation	Explanation
States Parties must establish a procedure for responding promptly to requests for enforcement of sentences that are consistent with Article 103.	Article 103 provides that if a state is designated by the Court, it must promptly inform the Court whether it accepts the Court’s designation. <sup>756</sup>

748 UN General Assembly Resolution 70/175, A/Res/70/175, 17 December 2015, [www.unodc.org/documents/justice-and-prison-reform/Nelson\\_Mandela\\_Rules-E-ebook.pdf](http://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf).

749 UN General Assembly Resolution 43/173, A/Res/43/173, 9 December 1988, [www.ohchr.org/EN/ProfessionalInterest/Pages/DetentionOrImprisonment.aspx](http://www.ohchr.org/EN/ProfessionalInterest/Pages/DetentionOrImprisonment.aspx).

750 UN General Assembly Resolution 45/111, A/Res/45/111, 14 December 1990, [www.ohchr.org/en/professionalinterest/pages/basicprinciplestreatmentofprisoners.aspx](http://www.ohchr.org/en/professionalinterest/pages/basicprinciplestreatmentofprisoners.aspx).

751 UN General Assembly Resolution 34/169, A/Res/34/169, 17 December 1979, [www.ohchr.org/en/professionalinterest/pages/lawenforcementofficials.aspx](http://www.ohchr.org/en/professionalinterest/pages/lawenforcementofficials.aspx).

752 Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 Aug to 7 Sep, 1990, [www.ohchr.org/en/professionalinterest/pages/useofforceandfirearms.aspx](http://www.ohchr.org/en/professionalinterest/pages/useofforceandfirearms.aspx).

753 Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 Aug to 7 Sep, 1990, [www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx](http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx).

754 ICC, *Cooperation Agreements* (n 583), 19.

755 ICC Rules of Procedure and Evidence, Rule 200(2).

756 Rome Statute, Article 103(1)(c).

Drafting Recommendation	Explanation
The state of enforcement must not modify the sentence.	Article 105(1) provides that the sentence of imprisonment imposed by the ICC is binding on State Parties, which shall not modify it. Article 105(2) is clear that the ICC 'alone shall have the right to decide any application for appeal or revision.' Article 110(1) requires that the states of enforcement shall not release the person before expiry of sentence pronounced by the Court.
The state of enforcement must notify the Court of any circumstances which would materially affect the terms or extent of the imprisonment.	Article 103(2)(a) requires that the ICC must be given at least 45 days' notice of any such known or foreseeable circumstance, during which time, the state of enforcement must not take any action to release the person or modify their sentence.
States Parties should cooperate with a decision by the Court to transfer a sentenced person to the prison of another state.	<p>If the Court cannot agree to the circumstance it has been notified of by a state pursuant to Article 103(2)(a) (see above), it may decide to transfer the sentenced person to a prison of another state pursuant to Article 104(1). Article 104(2) also provides that a sentenced person may, at any time, apply to the Court to be transferred from the state of enforcement. In addition, Rule 209 of the Rules of Procedure and Evidence provides that the Presidency may decide to change the state of enforcement on its own motion or at the request of the Prosecutor.</p> <p>If the Court decides to change the state of enforcement, the State Party currently enforcing the sentence must cooperate fully with the transfer of the sentenced person.</p>
States Parties must allow the ICC to supervise the sentence of enforcement.	<p>Article 106 requires that the enforcement of a sentence of imprisonment shall be subject to the supervision of the Court, including to ensure that they are consistent with widely accepted international treaty standards governing treatment of prisoners.</p> <p>In supervising the enforcement of sentence and conditions of imprisonment, the Presidency of the ICC shall ensure that the sentenced person's right to communicate with the ICC about the conditions of imprisonment in Article 106(3) is respected. The state of enforcement should cooperate fully with the ICC's requests for information, reports or expert opinion; meetings with the sentenced person, without the presence of national authorities; and requests for its comments on the views expressed by the sentenced person.<sup>757</sup></p> <p>In addition, the ICC requires that state of enforcement must allow the ICRC to inspect the conditions of imprisonment and treatment of the sentenced person at any time and on a periodic basis, the frequency of visits to be determined by the ICRC.<sup>758</sup></p>
The sentenced person must be able to communicate confidentially with the ICC and without impediment.	<p>Article 106 (3) requires that a sentenced person must be able to communicate confidentially with the ICC without impediment, including regarding their conditions of imprisonment.</p> <p>Article 105(2) provides that they must be able to apply to the ICC without impediment to appeal or revise their sentence. They must be able to apply to the ICC at any time for a transfer from the state of enforcement to another state pursuant to Article 104(2).</p>

<sup>757</sup> ICC *Rules of Procedure and Evidence*, Rule 211.

<sup>758</sup> ICC, *Cooperation Agreements* (n 583), Model Agreement on the Enforcement of Sentence, Article 4(8).

Drafting Recommendation	Explanation
<p>Rehabilitation measures should be made available to the sentenced person.</p>	<p>Although it is not an express requirement of the Rome Statute, international standards emphasise that detention authorities should offer programmes, activities and services aimed at reintegrating sentenced persons into society so that they can lead a law-abiding and self-supporting life.<sup>759</sup> Rule 4 (2) of the Nelson Mandela Rules states:</p> <p style="padding-left: 40px;">‘To this end, prison administrations and other competent authorities should offer education, vocational training and work, as well as other forms of assistance that are appropriate and available, including those of a remedial, moral, spiritual, social and health- and sports-based nature. All such programmes, activities and services should be delivered in line with the individual treatment needs of prisoners.’</p> <p>Rehabilitation indicators appear to be a key factor in applying the ICC’s criteria for review concerning reduction in sentence set out in Article 110 and Rule 223 of the Rules of Procedure and Evidence.<sup>760</sup></p>
<p>States Parties must cooperate with the ICC’s review of a sentence.</p>	<p>Article 110(3) provides that when the person has served two-thirds of the sentence, or 25 years in the case of life imprisonment, a panel of three judges of the ICC Appeals Chamber shall review the sentence to determine whether it should be reduced, taking into account the factors in Article 110(4).<sup>761</sup> This review cannot be conducted before that time. If a decision is taken not to reduce the sentence, the ICC shall review the issue at least every three years, unless it establishes a shorter interval. If there is a significant change of circumstances, the sentenced person may be permitted to apply earlier.<sup>762</sup></p> <p>The review will include a hearing conducted at the ICC in the presence of the sentenced person. Under exceptional circumstances the hearing may be conducted by way of a video conference or in the state of enforcement.<sup>763</sup> This will require cooperation from the state of enforcement to either transfer the person to The Hague or organise a video conference or arrange for the ICC to conduct the hearing in its territory.</p> <p>The state of enforcement will be invited and should participate in the review hearing or submit written observations to assist the ICC’s application of the criteria for review of sentence.</p>

<sup>759</sup> Nelson Mandela Rules, Rule 4.

<sup>760</sup> For further analysis of these factors, see: IBA, ‘Provisional release, release at advanced stages of proceedings, and final release at international criminal courts and tribunals’ (n 685).

<sup>761</sup> Rome Statute, Article 110(4) provides that the ICC may reduce the sentence if it finds that one or more of the following factors are present:

1. the early and continuing willingness of the person to cooperate with the court in its investigations and prosecutions;
2. the voluntary assistance of the person in enabling the enforcement of the judgements and orders of the court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims; or
3. other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules of Procedure and Evidence.

Rule 223 provides that the panel shall additionally take into account:

1. the conduct of the sentenced person while in detention, which shows a genuine dissociation from his or her crime;
2. the prospect of the resocialisation and successful resettlement of the sentenced person;
3. whether the early release of the sentenced person would give rise to significant social instability;
4. any significant action taken by the sentenced person for the benefit of the victims as well as any impact on the victims and their families as a result of the early release; and
5. individual circumstances of the sentenced person, including a worsening state of physical or mental health or advanced age.

<sup>762</sup> ICC Rules of Procedure and Evidence, Rule 224(3).

<sup>763</sup> ICC Rules of Procedure and Evidence, Rule 224 (1) and (3).

Drafting Recommendation	Explanation
States Parties must notify the Court of any programme or benefit that may entail activity outside the prison facility.	Rule 211(2) provides that when a sentenced person is eligible for a prison programme or benefit available under the domestic law of the state of enforcement which may entail some activity outside the prison facility, the state of enforcement shall communicate the fact to the Presidency [of the ICC], together with any relevant information or observation, to enable the Court to exercise its supervisory function.
States Parties should put in place procedures in case of escape.	If a convicted person escapes from custody and flees the state of enforcement, Article 111 requires the state of enforcement to consult with the ICC. Following consultations, the state of enforcement may request the person's surrender from the state in which they are located pursuant to existing bilateral or multilateral arrangements or may request the Court to seek the person's surrender from that state.
States Parties must establish procedures to transfer or extradite the person upon the completion of their sentence.	<p>Following the completion of the sentence the convicted person must be released. If the person is a national of the state of enforcement, they should be released on its territory. If the person is a national of another state, Article 107(1) provides that the state of enforcement may:</p> <ol style="list-style-type: none"> <li>1. transfer the person to a state, which is obliged to receive them, or to another state which agrees to receive them, taking into account the wishes of the person who has completed their sentence;</li> <li>2. authorise the person to remain in its territory;</li> <li>3. extradite or otherwise surrender the person to a state which has requested the extradition or surrender of the person for purposes of trial or enforcement of a sentence.</li> </ol> <p>Article 108 provides that, if the state of enforcement seeks to prosecute or punish a sentenced person or extradite them to another state for any conduct engaged in prior to that person's delivery to the state of enforcement, it must request and obtain the approval of the ICC.<sup>764</sup> This rule ceases to apply if the sentenced person remains voluntarily for more than 30 days in the state of enforcement or returns to its territory after having left it.</p>

***Recommendation 101: States Parties should ensure that they cooperate fully with the enforcement of fines, forfeiture and reparations orders.***

Article 109(1) provides that States Parties shall give effect to fines and forfeiture ordered by the Court, without prejudice to the rights of bona fide third parties, and in accordance with the procedure of their national law. Article 75(5) provides that States Parties shall give effect to reparations orders of the ICC 'as if the provisions of Article 109 were applicable to this Article.'

The Court may transmit copies of the relevant orders<sup>765</sup> and seek cooperation from any state with which the sentenced person appears to have a direct connection by reason of their nationality, domicile or habitual residence or by virtue of the location of the sentenced person's assets and property or with which the victim has such connection.<sup>766</sup>

<sup>764</sup> *Rules of Procedure and Evidence*, Rule 214 sets out the contents of a request to the ICC to prosecute or enforce a sentence for prior conduct.

<sup>765</sup> *Rules of Procedure and Evidence*, Rule 218 sets out the required content of orders for forfeiture and reparations to enable States to give effect to them.

<sup>766</sup> *Rules of Procedure and Evidence*, Rule 217.

Unlike cooperation with enforcement of prison sentences which is voluntary, cooperation with enforcing ICC orders of fines, forfeiture and reparations is mandatory. States Parties, therefore, must ensure that they have in place effective procedures in national law to give effect to the orders. Schabas opines:

‘The reference to “in accordance with the procedure of their national law” supports the view that States need not adjust their domestic legislation to provide for execution of fines and forfeiture orders. It is possible to view an assumption implicit in Article 109 by which States generally have adequate systems within their own civil law for the execution of judgments. But the better view should be that States are required to ensure that fine and forfeiture orders be enforceable, and that they are accordingly compelled by the *Statute* to enact the appropriate legislative amendments, if necessary.’<sup>767</sup>

In particular, to ensure the prompt implementation of forfeiture for the purpose of enforcing ICC sentences and reparations orders, States Parties should establish a procedure for national authorities to directly enforce the Court’s orders (see Recommendation 84 relating to implementing Article 93(1)(k)).<sup>768</sup>

States Parties must not modify the ICC’s orders for fines and reparations.<sup>769</sup> However, Article 109(2) requires that if a State Party is unable to give effect to an order of forfeiture it shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties.

Article 109(3) confirms that property, or proceeds of sale of real property or, where appropriate, the sale of other property, which is obtained by a State Party as a result of its enforcement of a judgement of the Court shall be transferred to the Court.<sup>770</sup> Article 79(2) states that the Court ‘may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund [for Victims].’

### 2.3.2 *Establishing or strengthening national cooperation mechanisms*

In addition to enacting legislation and entering into cooperation agreements providing for full cooperation with the ICC and establishing detailed procedures to implement the Court’s requests, it is important that States Parties ensure that informed and effective mechanisms exist or are put in place to receive, process and coordinate prompt responses to ICC requests for cooperation. Recognising that a range of government agencies may be involved in providing cooperation, it is important that they have the capacity and relevant expertise to fulfil the Court’s requests.

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<sup>767</sup> Schabas (n 198), 1409.

<sup>768</sup> In particular, States Parties should consider a procedure similar to that set out in Article 13 (1)(b) of the United Nations Convention against Transnational Organized Crime. Article 13(1) requires that, on receipt of a request for confiscation from another state party, a State Party to the Convention shall either:

- ‘(a) Submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such an order is granted, give effect to it [indirect enforcement]; or
- (b) Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by a court in the territory of the requesting State Party in accordance with Article 12, paragraph 1, of this Convention insofar as it relates to proceeds of crime, property, equipment or other instrumentalities referred to in Article 12, paragraph 1, situated in the territory of the requested State Party [direct enforcement].’

<sup>769</sup> *ICC Rules of Procedure and Evidence*, Rules 219 and 220.

<sup>770</sup> Rome Statute, Article 109(3).

*Recommendation 102: States Parties should establish national focal points on cooperation.*

In 2007, the Assembly adopted 66 recommendations on cooperation, including calling on States Parties to consider designating a national focal point tasked with the coordination and mainstreaming of Court issues within and across government institutions, as well as contact points at relevant embassies (in The Hague, Brussels and/or New York) to act as an interface for the Court with the national focal point.<sup>771</sup> The Assembly also recommended that States Parties further consider establishing a more permanent coordinating mechanism, either through the focal point or through a working group or task force to deal with all Court-related issues.<sup>772</sup>

The Court regularly holds seminars on cooperation with the focal points from situation countries to keep them informed and up-to-date of the cooperation needs of the Court.<sup>773</sup>

While it is up to States Parties to determine whom to appoint as focal points or to coordinating mechanisms, it is important that those appointed have sufficient authority across government departments and agencies, as well as resources, to ensure that the ICC's requests for cooperation are dealt with promptly and effectively. Case Matrix Network notes that, States Parties regularly appoint Ministers of Justice or Ministers of Foreign Affairs as competent authorities.<sup>774</sup> The Commonwealth Expert Group also note that 'given the juridical nature of most requests from the ICC, some states have designated the director of public prosecutions as the central authority in charge of investigations and prosecutions or a similar independent authority that may issue directions to law enforcement agencies.'<sup>775</sup> Whichever authority is appointed, it is important that the national focal point has the capacity to respond promptly to requests and, where relevant, to attend the ICC's seminars on cooperation for focal points from situation countries. Therefore, if States Parties appoint Ministers or senior legal officials as focal points, it is important that clear lines of delegation exist to ensure that the ICC can easily communicate with focal points or their delegates on operational matters.

*Recommendation 103: States Parties should ensure national capacity and expertise of relevant agencies to ensure full cooperation with the ICC.*

While the appointment of a national focal point is important to ensure full cooperation with requests, it is also important that the relevant government agencies that may be asked to fulfil cooperation requests have the capacity and expertise to do so. In particular:

- National authorities, including the police, providing assistance with ICC investigations (including questioning witnesses and suspects) and arrest and surrender of suspects should be trained in human rights, including the requirements of Articles 55 and 67 of the Rome Statute.
- As requested by the ICC in its 2020 *Report on Cooperation*, States Parties should consider appointing additional focal points, including on freezing of assets.<sup>776</sup>

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<sup>771</sup> Assembly of States Parties, *66 Recommendations on Cooperation* (n 586), Recommendations 7 and 9.

<sup>772</sup> *Ibid*, Recommendation 8.

<sup>773</sup> See, for example: ICC holds sixth Seminar on Cooperation in The Hague with national focal points, 24 January 2019, [www.icc-cpi.int/Pages/item.aspx?name=pr1433](http://www.icc-cpi.int/Pages/item.aspx?name=pr1433).

<sup>774</sup> Case Matrix Network (n 373), 81.

<sup>775</sup> Commonwealth Expert Group (n 469), para 82.

<sup>776</sup> *Report of the Court on Cooperation*, ICC-ASP/19/25, Recommendation 26.

- Competent judicial authorities that conduct surrender proceedings or take other decisions relating to cooperation should be trained on the requirements of the Rome Statute and national implementing legislation.
- National victim and witness agencies should have the capacity and facilities to respond promptly and effectively to requests by the Court to provide cooperation with effective protection and support. They should be trained in best practices on protecting the physical and psychological wellbeing of victims and witnesses. Recommendation 67 contains recommendations and resources for States Parties to establish or strengthen existing victim and witness protection mechanisms.
- Detention authorities enforcing ICC sentences of imprisonment should be trained in the requirements of the Rome Statute.

## Useful resources on ICC cooperation

In addition to the resources for implementing the Rome Statute at the end of Section 2.1, States Parties may refer to the following resources to ensure full cooperation with the ICC:



Official Documents

- Assembly's 66 Recommendations on Cooperation: [www.icc-cpi.int/news/seminarBooks/66%20Recommendations-%20resolution%20ICC-ASP-ASP6-Res-02-ENG.PDF](http://www.icc-cpi.int/news/seminarBooks/66%20Recommendations-%20resolution%20ICC-ASP-ASP6-Res-02-ENG.PDF) (Annex II).
- Report of the Court on Cooperation (2020), including 44 recommendations for States Parties : [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP19/ICC-ASP-19-25-ENG-Cooperation-Report-%2028oct20-1830.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/ICC-ASP-19-25-ENG-Cooperation-Report-%2028oct20-1830.pdf).
- Declaration of Paris: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ASP16/ICC-ASP-16-Res2-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP16/ICC-ASP-16-Res2-ENG.pdf).
- ICC, *Arresting Suspects at Large: Why it matters, What the Court does, What States Parties can do* (2019): [www.icc-cpi.int/news/seminarBooks/bookletArrestsENG.pdf](http://www.icc-cpi.int/news/seminarBooks/bookletArrestsENG.pdf).
- *ICC Cooperation Agreements*: [www.icc-cpi.int/news/seminarBooks/Cooperation\\_Agreements\\_Eng.pdf](http://www.icc-cpi.int/news/seminarBooks/Cooperation_Agreements_Eng.pdf).
- *ICC Financial Investigations and Recovery of Assets*: [www.icc-cpi.int/news/seminarBooks/Freezing\\_Assets\\_Eng\\_Web.pdf](http://www.icc-cpi.int/news/seminarBooks/Freezing_Assets_Eng_Web.pdf).



Guides

- Claus Kress/Kimberly Prost, Commentaries on Part 9 (except Article 101), in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Hart Publishing and Nomos, 2016)
- William A Schabas, *Commentary on the Rome Statute of the International Criminal Court*, Part 9 and 10.
- Olympia Bekou and Daley Birkett (eds), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (Brill 2016).



Commentaries

- IBA, Provisional release, release at advanced stages of proceedings, and final release at international criminal courts and tribunals (October 2019): <https://www.ibanet.org/icc-icl-programme-reports>.
- Christopher Keith Hall and Cedric Ryngaert, 'Article 59' (Arrest proceedings in the custodial State) in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016).
- Peter Wilkitzki, 'Article 101' (Rule of speciality) in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016).
- Gerard A M Strijards and Robert O Harmsen, 'Article 103' (Role of States in enforcement of sentences of imprisonment) in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016).
- Gerard A M Strijards and Robert O Harmsen, 'Article 104' (Change in designation of State of enforcement) in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016).
- Roger S Clark, 'Article 105' (Enforcement of the Sentence) in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016).
- Roger S Clark, 'Article 106' (Supervision of enforcement of sentences and conditions of imprisonment) in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016).
- Roger S Clark, 'Article 107' (Transfer of the person on completion of sentence) in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016).
- William A Schabas, 'Article 108' (Limitation on the prosecution or punishment of other offences) in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016).
- William A Schabas, 'Article 109' (Enforcement of fines and forfeiture measures) in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016).
- Gerard A M Strijards and Robert O Harmsen, 'Article 110' (Review by the Court concerning reduction of sentence) in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016).

- Gerard A M Strijards and Robert O Harmsen, 'Article 111' (Escape) in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Munich: C H Beck, Hart Publishing and Nomos, 2016).

## PART 3: Promoting universality of the Rome Statute and ensuring that States Parties fulfil their obligations

As explained in Parts 1 and 2 of this Guide, the effective performance of the ICC and the success of the Rome Statute system depends in no small part on the efforts of all States Parties.

All States Parties have a vital role in ensuring that the Assembly provides effective oversight of the ICC, which supports the efficient and effective functioning of the Court. States Parties' aim of ending impunity can only advance if all States Parties put in place effective national frameworks to fulfil their obligations to exercise jurisdiction over Rome Statute crimes and to cooperate fully with the ICC.

Part 3 examines the role of States Parties and the Assembly in encouraging other states to accede to or ratify the Rome Statute, with the ultimate goal of achieving universal jurisdiction for the ICC and global participation in the Rome Statute system. It considers what States Parties can do, individually and through the Assembly, to ensure that all States Parties fulfil their obligations under the Rome Statute.

To its credit, the Assembly has already taken some measures to promote universality of the Rome Statute, complementarity and full cooperation with the ICC. However, these initiatives can and should be strengthened.

### 3.1 Promoting universality and full implementation of the Rome Statute

In 2007, the Assembly adopted a Plan of Action for achieving universality and full implementation of the Rome Statute, asserting that both objectives are 'imperative if we are to end impunity for the perpetrators of the most serious crimes of international concern, contribute to the prevention of such crimes, and guarantee lasting respect for and enforcement of international justice.'<sup>777</sup>

At the time of the Plan of Action's adoption, a number of inter-governmental organisations, governments and non-governmental organisations were promoting ratification and implementation through advocacy, conferences, and technical and other assistance. The Plan of Action sought to promote better information sharing among those actors and to encourage more States Parties to join the effort.

Regrettably, 14 years later, there is little evidence that the Plan of Action has significantly advanced either goal. Low numbers of responses by States Parties to a questionnaire circulated annually by the Secretariat of the Assembly indicate that few States Parties are actively promoting universality and implementation.<sup>778</sup> No States Parties responded to the questionnaire in 2020. Activities by inter-governmental and non-governmental organisations have declined. Only three States Parties have ratified or acceded to the Rome Statute since 2015.<sup>779</sup> Two States Parties have withdrawn from the Rome Statute.<sup>780</sup> Many States Parties

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<sup>777</sup> *Strengthening the International Criminal Court and the Assembly of States Parties*, ICC-ASP/5/Res 3, Annex I, Plan of Action of the Assembly of States Parties for achieving universality and full implementation of the Rome Statute of the International Criminal Court.

<sup>778</sup> All responses to the questionnaire are posted on the Assembly's website: [https://asp.icc-cpi.int/en\\_menus/asp/sessions/plan%20of%20action/Pages/plan%20of%20action.aspx](https://asp.icc-cpi.int/en_menus/asp/sessions/plan%20of%20action/Pages/plan%20of%20action.aspx).

<sup>779</sup> El Salvador, Kiribati and Palestine.

<sup>780</sup> Burundi and Philippines.

have yet to enact implementing legislation (see Section 2.1 above). Only eight States Parties have enacted legislation since 2015.<sup>781</sup> Many of the legislations enacted contain flaws.

The Bureau continues to appoint focal points to facilitate the implementation of the Plan of Action, but despite their efforts and the activities of the ICC and the President of the Assembly,<sup>782</sup> the level of activity by States Parties remains low.

*Recommendation 104: States Parties should support a review of the Plan of Action to achieve universality and full implementation of the Rome Statute to re-energise the Assembly's efforts.*

Considering the lack of progress and diminishing efforts to promote ratification and implementation of the Rome Statute, as well as changing perceptions of the ICC in light of criticism of its performance and the ongoing Review of the ICC, the Plan of Action should be urgently reviewed and updated so that it addresses the many challenges in promoting universality and full implementation that did not exist when it was originally drafted in 2007.

In particular, the Assembly should engage with states that have yet to ratify or accede to the Rome Statute and States Parties that have not implemented the Rome Statute to understand the reasons for the lack of progress and to adapt the Plan of Action to address the main obstacles identified.

The scope of the Plan should also be expanded to promote ratification of the Agreement on Privileges and Immunities of the ICC and cooperation agreements, which are essential to achieving the goal of full implementation. The Court's 2020 *Report on Cooperation* highlights the serious challenges it faces as a result of states not ratifying or entering into and implementing these agreements.<sup>783</sup>

In light of the diminishing donor interest in funding activities to promote ratification and implementation, the Assembly should also fund and/or encourage States Parties to invest in the implementation of the Plan of Action, including by directly funding activities, establishing a voluntary trust fund for universality and full implementation, and expanding the mandate and resources of the Secretariat of the Assembly to go beyond acting as a focal point for information exchange and to actively promote implementation of the Plan.

*Recommendation 105: States Parties should support the development of procedures of the Assembly and guidelines for States Parties to respond to threats and initiatives to withdraw from the Rome Statute.*

In light of recent withdrawals from the Rome Statute and other threats of withdrawal, the Assembly should consider, as part of the Plan of Action or separately, putting in place procedures to respond when a State Party threatens to withdraw or deposits a notification of withdrawal with the UN Secretary-General.

To date, the Assembly has responded to withdrawals in an ad hoc manner. However, recent experience indicates that withdrawals are likely to be a reality of the Rome Statute system. Some States Parties may threaten or decide to withdraw if the ICC steps in to investigate a situation or prosecute cases that the government is unwilling to address domestically.

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781 Austria, Benin, Cote d'Ivoire, Costa Rica, Democratic Republic of Congo, Dominican Republic, Guinea and Paraguay.

782 See *Report of the Bureau on the Plan of Action of the Assembly of States Parties for achieving universality and full implementation of the Rome Statute of the International Criminal Court*, ICC-ASP/19/30, 8 December 2020.

783 *Report of the Court on Cooperation*, ICC-ASP/19/25, 28 October 2020.

Every effort should be made to encourage States Parties not to withdraw. Clear and consistent procedures should be put in place to ensure that the grievances of the State Party are heard and discussed by the Assembly. However, it should also be clear that any solutions explored must not undermine the prosecutorial or judicial independence of the ICC or the integrity of the Rome Statute.

Procedures should also anticipate and prioritise efforts to ensure that other States Parties do not withdraw from the Rome Statute in solidarity of another State Party.

Similar to the procedures adopted by the Assembly to avoid instances of non-cooperation (see Section 3.3.2 below), the Assembly should also develop and promote informal measures (including guidance, such as model communications) for the Assembly and States Parties to engage with States Parties that are considering or seeking to withdraw.

## Useful resources on promoting universality and full implementation of the Rome Statute



### Websites

- *Assembly of States Parties, Plan of action webpage*: [https://asp.icc-cpi.int/en\\_menus/asp/sessions/plan%20of%20action/Pages/plan%20of%20action.aspx](https://asp.icc-cpi.int/en_menus/asp/sessions/plan%20of%20action/Pages/plan%20of%20action.aspx).
- *Plan of action for achieving universality and full implementation of the Rome Statute*: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ICC-ASP-ASP5-Res-03-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP5-Res-03-ENG.pdf) (Annex I).
- *Parliamentarians for Global Action*: [www.pgaction.org/ilhr/rome-statute](http://www.pgaction.org/ilhr/rome-statute).
- *The Coalition for the ICC*: [www.coalitionfortheicc.org/fight/global-justice-atrocities](http://www.coalitionfortheicc.org/fight/global-justice-atrocities).
- *Report of the Bureau on the Plan of Action of the Assembly of States Parties for achieving universality and full implementation of the Rome Statute of the International Criminal Court (2020)*: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP19/ICC-ASP-19-30-ENG-PoA-Report-08dec20-1500.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/ICC-ASP-19-30-ENG-PoA-Report-08dec20-1500.pdf).
- *ICC, Joining the ICC: Why does it matter?*: <https://www.icc-cpi.int/Publications/Joining-Rome-Statute-Matters.pdf>.



### Official Documents

## 3.2 Promoting positive complementarity

During the 2010 Review Conference, a stocktaking exercise was conducted on the issue of complementarity, during which States Parties affirmed the primary responsibility of states to investigate and prosecute Rome Statute crimes.<sup>784</sup> To this end, the Assembly has acknowledged that appropriate measures need to be adopted at the national level, and international cooperation and judicial assistance need to be strengthened, in order to ensure that national legal systems are willing and able genuinely to carry out investigations and prosecutions of such crimes.<sup>785</sup> Such concerted international and domestic efforts to strengthen and better enable national jurisdictions to conduct credible and effective national investigations and trials of Rome Statute crimes are commonly referred to as ‘positive complementarity’.<sup>786</sup>

<sup>784</sup> *Complementarity*, Resolution RC/Res 1, 8 June 2010, para 1.

<sup>785</sup> See, for example, *Strengthening the International Criminal Court and the Assembly of States Parties*, ICC-ASP/18/Res 6, para 126.

<sup>786</sup> Human Rights Watch, *Briefing Note for the Nineteenth Session of the International Criminal Court Assembly of States Parties*, 7 December 2020.

During and following the stocktaking exercise it was noted that, although the Assembly's role is limited, it still has an important role to play in promoting complementarity:

‘Clearly the Court and the Assembly are not development cooperation agencies, and hence their role in the practical aspects of strengthening national jurisdictions will be very limited. This must be the responsibility of dedicated rule-of-law actors. Nevertheless, States Parties are in a unique position not only to further the understanding of the Rome Statute system and the principle of complementarity, but also – together with the Court and through continued dialogue – to catalyse domestic prosecutions and provide a better understanding of the needs of domestic jurisdictions in this regard.’<sup>787</sup>

In the *Kampala Declaration*, States Parties resolved to enhance the capacity of national jurisdictions to prosecute the perpetrators of the most serious crimes of international concern in accordance with internationally recognised fair trial standards, pursuant to the principle of complementarity.<sup>788</sup>

Since then, at the Assembly's request, the Bureau through its focal points on complementarity has developed and maintained a dialogue between the Court and other stakeholders on complementarity-related capacity building activities by the international community to assist national jurisdictions.<sup>789</sup> The focal points have initiated dialogue on certain topics, including: witness and victims' protection; the prosecution of sexual and gender-based crimes; and possible situation specific completion strategies of the Court and the role of partnerships with national actors in this regard.<sup>790</sup>

The Secretariat of the Assembly has been mandated to facilitate the exchange of information between the Court, States Parties and other stakeholders. However, without additional resources to implement this role, the activities of the Secretariat have been limited. The Secretariat has established a platform for states to request technical assistance<sup>791</sup> and will work with States Parties seeking assistance to facilitate links with actors that may be in a position to assist.

Although the Assembly has emphasised that the ICC has a limited role to play in strengthening national jurisdictions, it has encouraged the Court to take some efforts in the field of complementarity, including by exchanging information between the Court and other relevant actors.<sup>792</sup>

*Recommendation 106: States Parties should support intensifying the Assembly's efforts to promote positive complementarity, in order 'to put an end to impunity for the perpetrators' of 'the most serious crimes of concern to the international community', ensuring that the judicial and prosecutorial independence of the ICC is respected.*

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787 *Report of the Bureau on complementarity*, ICC-ASP/9/26, 17 November 2010, para 13.

788 *Kampala Declaration*, RC/Dec 1, 1 June 2010, para 5.

789 See, for example, *Strengthening the International Criminal Court and the Assembly of States Parties*, ICC-ASP/18/Res 6, para 132.

790 For example, at the 14th session of the Assembly in 2015, a panel discussion was organised on ‘Strategic action to enhance national capacity to investigate and prosecute sexual and gender-based crimes that may amount to Rome Statute crimes.’

791 Assembly of States Parties, Platform for Technical Assistance: [https://asp.icc-cpi.int/en\\_menus/asp/complementarity/Platform/Pages/default.aspx](https://asp.icc-cpi.int/en_menus/asp/complementarity/Platform/Pages/default.aspx).

792 See, for example, *Strengthening the International Criminal Court and the Assembly of States Parties*, ICC-ASP/18/Res 6, para 135.

Although the Assembly's consideration of complementarity since the Review Conference is welcome, efforts to promote positive complementarity – which has been described as the cornerstone of the Rome Statute<sup>793</sup> – require more attention. Especially in light of the high demands on the ICC to deliver justice in many situations, the Assembly should further examine its role in encouraging national authorities to fulfil their obligations to investigate Rome Statute crimes and prosecute those suspected of responsibility in trials that meet international standards of fairness. Particular attention should be paid to strengthening the resources and activities of the Secretariat of the Assembly of States Parties to coordinate technical assistance to states.

In implementing the Assembly's efforts to promote positive complementarity, it is important that States Parties respect the prosecutorial and judicial independence of the Court to assess complementarity efforts in each situation. As Human Rights Watch has noted, a number of the Independent Expert Review's recommendations related to complementarity<sup>794</sup> touch on areas that go to the heart of prosecutorial independence, including the conduct of preliminary examinations and completion strategies.<sup>795</sup> While the Court may consult with States Parties, civil society and stakeholders on these issues, policy decisions must ultimately be taken independently by the Office of the Prosecutor.

Similarly, the Assembly's co-focal points on complementarity have proposed structured discussions, including a stocktaking exercise, on the principle of complementarity. The purported aim of these discussions is to achieve greater clarity and predictability in the interpretation and application of the principle of complementarity, particularly in respect of the relationship between national jurisdictions and the Court.<sup>796</sup> The focal points indicate that a possible outcome may be an Assembly or States Parties' position statement or resolution on the principle of complementarity.<sup>797</sup> However, the substance of the principle of complementarity are issues for the Office of the Prosecutor and the ICC judges to determine applying the Rome Statute. As Human Rights Watch notes, without sufficient safeguards this process could result in inappropriate pressure on Court actors.<sup>798</sup> States Parties should be vigilant to respect the independence of the Court during these processes.

## Useful resources on promoting complementarity



### Websites

- Assembly of States Parties, Complementarity Resources webpages: [https://asp.icc-cpi.int/en\\_menus/asp/complementarity/Pages/Resources.aspx](https://asp.icc-cpi.int/en_menus/asp/complementarity/Pages/Resources.aspx).
- Assembly of States Parties, Platform for Technical Assistance: [https://asp.icc-cpi.int/en\\_menus/asp/complementarity/Platform/Pages/default.aspx](https://asp.icc-cpi.int/en_menus/asp/complementarity/Platform/Pages/default.aspx).
- List of actors working in the field of complementarity: [https://asp.icc-cpi.int/en\\_menus/asp/complementarity/List-of-Actors/Pages/default.aspx](https://asp.icc-cpi.int/en_menus/asp/complementarity/List-of-Actors/Pages/default.aspx).

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793 See, for example, *ICC Judicial Seminar summary, Complementarity and Cooperation of Courts in an Interconnected Global Justice System*, 18 January 2018, [www.icc-cpi.int/news/seminars/Documents/180118-seminar-netherlands-summary\\_ENG.pdf](http://www.icc-cpi.int/news/seminars/Documents/180118-seminar-netherlands-summary_ENG.pdf).

794 See, in particular, *IER Final Report* (n 2), R262-R265.

795 Human Rights Watch, *Briefing Note for the Nineteenth Session of the International Criminal Court Assembly of States Parties*, 7 December 2020.

796 *Report of the Bureau on complementarity*, ICC-ASP/19/22, 8 December 2020, para 49.

797 *Ibid*, para 50.

798 Human Rights Watch, *Briefing Note for the Nineteenth Session of the International Criminal Court Assembly of States Parties*, 7 December 2020.



Official Documents



Guides

- Review Conference Stocktaking Informal Summary: Taking stock of the principle of complementarity: bridging the impunity gap: [https://asp.icc-cpi.int/en\\_menus/asp/complementarity/Documents/RC-11-Annex.V.c-ENG.pdf](https://asp.icc-cpi.int/en_menus/asp/complementarity/Documents/RC-11-Annex.V.c-ENG.pdf).
- Review Conference, Resolution RC/Res.1, Complementarity: [https://asp.icc-cpi.int/en\\_menus/asp/complementarity/Documents/RC-11-Annex.V.c-ENG.pdf](https://asp.icc-cpi.int/en_menus/asp/complementarity/Documents/RC-11-Annex.V.c-ENG.pdf).
- *Report of the Bureau on complementarity*, ICC-ASP/19/22, 8 December 2020: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP19/ICC-ASP-19-22-ENG-Complementarity-08dec20-1500.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/ICC-ASP-19-22-ENG-Complementarity-08dec20-1500.pdf).
- European Commission, *Toolkit for bridging the gap between international and national justice*: [https://asp.icc-cpi.int/en\\_menus/asp/complementarity/Documents/joint-working-%20complementarity-Toolkit-ENG.pdf](https://asp.icc-cpi.int/en_menus/asp/complementarity/Documents/joint-working-%20complementarity-Toolkit-ENG.pdf).
- International Centre for Transitional Justice, *Handbook on complementarity: An introduction to the role of national courts and the ICC in prosecuting international crimes*: [www.ictj.org/sites/default/files/ICTJ\\_Handbook\\_ICC\\_Complementarity\\_2016.pdf](http://www.ictj.org/sites/default/files/ICTJ_Handbook_ICC_Complementarity_2016.pdf).

### 3.3 Ensuring States Parties' cooperation with the ICC

As explained in Section 2.3 above, the Court has faced significant challenges in its first two decades in securing full cooperation from States Parties. In addition to strengthening their national frameworks to ensure their full cooperation with the ICC, it is also important that States Parties support the Assembly's efforts to promote cooperation by all States Parties and respond effectively to non-cooperation when it occurs.

#### 3.3.1 Promoting cooperation

So far, the Assembly has taken a number of steps to promote full cooperation by States Parties. In particular, the Bureau has established an ongoing facilitation to strengthen cooperation with the Court. Notably, in 2007, the facilitators established 66 recommendations on cooperation for States Parties, the Court and the Assembly.<sup>799</sup> The Assembly receives annual reports from the Court and regularly organises plenary sessions on topical issues of cooperation during its annual sessions. Each year the Assembly adopts a resolution on cooperation that seeks to strengthen cooperation with the Court.<sup>800</sup>

*Recommendation 107: States Parties should support and engage with initiatives to strengthen the Assembly's efforts to promote cooperation, including by implementing the Court's 44 recommendations to strengthen cooperation; updating and implementing the Assembly's 66 recommendations on cooperation; and supporting implementation of the Independent Experts' recommendations for the Assembly to strengthen cooperation with the Court.*

The 2020 Report of the Bureau on cooperation and the Assembly's Resolution on cooperation, outlines a number of initiatives that are being taken or planned by the facilitators to strengthen cooperation, including:

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<sup>799</sup> *Strengthening the International Criminal Court and the Assembly of States Parties*, ICC-ASP/6/Res 2, Annex II.

<sup>800</sup> See, for example, *Resolution on cooperation*, ICC-ASP/19/Res 2, 16 December 2020.

- following up on the implementation of the *Paris Declaration* on financial investigations and asset recovery;<sup>801</sup>
- developing a Secured Platform on Cooperation as a forum for States Parties to exchange information;<sup>802</sup>
- conducting a review of the implementation of the 66 recommendations;<sup>803</sup> and
- considering whether to create a permanent structure for a network of national practitioners and focal points on cooperation.<sup>804</sup>

The facilitators, together with the ICC and other Assembly mandates, will also consider the Independent Expert Review's recommendations that seek to improve cooperation with the Court, including:

- the Office of the Prosecutor and the Assembly should consider improvements in cooperation with the collection of evidence, including the development of a uniform cooperation framework for all States Parties, or for regional groups of states;<sup>805</sup>
- the Assembly should consider appointing focal points for arrests;<sup>806</sup> and
- the Assembly should consider setting up a working group to consider setting up and funding a rewards programme in order to facilitate access to information from the general public for the location and arrest of fugitives.<sup>807</sup>

States Parties should support and engage with these and other initiatives to strengthen cooperation. In particular, taking into account the outcomes of the review of the implementation of the 66 recommendations, States Parties should consider updating the recommendations to ensure that they fully address the cooperation needs of the Court.

In its 2020 Report on Cooperation, the Court has also highlighted the main challenges it is currently facing in securing cooperation and sets out 44 recommendations that States Parties should implement individually and through the Assembly.<sup>808</sup>

The Assembly should monitor and encourage States Parties to report regularly on their implementation of the Court and the Assembly's recommendations on cooperation. It should also support the Court in engaging in a long-term dialogue with all States Parties on cooperation matters, including convening regular regional workshops and seminars on cooperation.

***Recommendation 108: States Parties should support the establishment of a Coordinating Mechanism of national authorities dealing with cooperation.***

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801 *Report of the Bureau on cooperation*, ICC-ASP/19/33, 8 December 2020, paras 12–16.

802 *Ibid*, paras 13 and 22.

803 *Resolution on cooperation*, ICC-ASP/19/Res 2, 16 December 2020, para 31.

804 *Report of the Bureau on cooperation*, ICC-ASP/19/33, 8 December 2020, para 22.

805 *IER Final Report* (n 2), R274.

806 *IER Final Report* (n 2), R284.

807 *IER Final Report* (n 2), R289.

808 *Report of the Court on cooperation*, ICC-ASP/19/25.

To facilitate the work of the national focal points, States Parties should support the proposal by Belgium to establish a Coordinating Mechanism of national authorities dealing with ICC cooperation. The Coordinating Mechanism is recommended to meet once a year to discuss technical aspects relating to cooperation and judicial assistance, and to share knowledge and know-how in this area.<sup>809</sup> A feasibility study on the establishment of the Coordination Mechanism was considered by the Bureau before the 13th session of the Assembly.<sup>810</sup> However, despite provisions in the Assembly's annual cooperation resolutions encouraging States Parties to continue discussing the initiative,<sup>811</sup> six years later it does not appear to have progressed. States Parties should seek to establish the Coordinating Mechanism as soon as possible.

### 3.3.2 Preventing and responding to non-cooperation

Non-cooperation by States demands a political response from the Assembly in addition to judicial determinations by the Court.

Faced with non-cooperation from some states (including a number of States Parties) with the arrest and surrender of Omar Al-Bashir, in 2011 the Assembly adopted procedures to deploy political and diplomatic efforts in response to the failure of a State Party or a state which has entered into an ad hoc arrangement or an agreement with the Court to comply with a specific Court request for cooperation.<sup>812</sup>

The procedures provide for a formal response if a matter has been referred to the Assembly by the Court – including an open letter to the authorities of the state; inviting the state to discuss the matter at the next meeting of the Bureau; organising a public meeting of the New York Working Group and drafting a resolution containing concrete recommendations on the matter.<sup>813</sup>

They also provide for an informal response where the Court has yet to refer a matter of non-cooperation to the Assembly but there are reasons to believe that a specific and serious incident of non-cooperation is about to occur, or is currently ongoing, and urgent action by the Assembly may help bring about cooperation.<sup>814</sup> In these circumstances, the President and four regional focal points on non-cooperation will, after consulting with the Court, raise the matter informally and indirectly with officials from the requested state and other relevant stakeholders, with a view to promoting full cooperation.<sup>815</sup> Other States Parties may be requested to reach out to the requested State.<sup>816</sup>

Despite these efforts, to date, the Court has referred 16 instances of non-cooperation to the Assembly and/or the UN Security Council. Eleven of those instances of non-cooperation involved States Parties to the Rome Statute. The Assembly has stressed in a number of resolutions that 'the non-execution of cooperation

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809 See Report of the Bureau on cooperation, ICC-ASP/16/17, 22 November 2017, Annex III: Belgium presentation on the coordinating mechanism of national authorities dealing with cooperation.

810 Report of the Bureau on cooperation, ICC-ASP/13/29, 21 November 2014, Annex II: Report of the Feasibility study on the establishment of a coordinating mechanism of national authorities dealing with cooperation.

811 See, for example, Resolution on cooperation, ICC-ASP/19/Res 2, para 10: 'Recalls the report to the thirteenth session of the Assembly on the feasibility study of establishing a coordinating mechanism of national authorities, and encourages States Parties to continue the discussion'.

812 *Assembly Procedures relating to non-cooperation*, ICC-ASP/10/Res 5, as amended by ICC-ASP/17/Res 5, Annex II.

813 *Ibid*, para 14.

814 *Ibid*, paras 10–11.

815 *Ibid*, paras 16–23.

816 *Ibid*, para 22.

requests has a negative impact on the ability of the Court to execute its mandate, in particular when it concerns the arrest and surrender of individuals subject to arrest warrants'.<sup>817</sup> The Independent Expert Review found that '[t]he inability to secure arrests of fugitives is an inherent problem with the Rome Statute system'.<sup>818</sup>

*Recommendation 109: States Parties should apply the Assembly's Toolkit for the implementation of the informal dimension of the Assembly procedures relating to non-cooperation.*

The Toolkit developed by the Assembly's focal points on non-cooperation is a valuable resource (that includes model communications to states) that all States Parties should apply in implementing informal measures to prevent non-cooperation. Each State Party should share contact details with their regional focal point<sup>819</sup> so that they can be promptly informed when such action is required.

*Recommendation 110: States Parties should ensure that the Assembly provides an appropriate formal response to all referrals of non-cooperation.*

Despite the procedures adopted by the Assembly to formally respond to referrals of non-cooperation by the Court, the Assembly has taken note of referrals from the Court in most cases without taking any of the measures outlined in the procedures. Despite recommendations by the focal points for the procedures to be applied more consistently,<sup>820</sup> there is little evidence of any change in practice. Recommendations for the Assembly to adopt a standing agenda item to consider non-cooperation issues arising throughout the inter-sessional periods have not been implemented.<sup>821</sup> All States Parties should support the implementation of these basic steps.

## Useful resources on promoting cooperation



### Websites

- Assembly of States Parties, Non-cooperation webpage: [https://asp.icc-cpi.int/en\\_menus/asp/non-cooperation/Pages/default.aspx](https://asp.icc-cpi.int/en_menus/asp/non-cooperation/Pages/default.aspx).
- Assembly's 66 Recommendations on Cooperation: [www.icc-cpi.int/news/seminarBooks/66%20Recommendations-%20resolution%20ICC-ASP-ASP6-Res-02-ENG.PDF](http://www.icc-cpi.int/news/seminarBooks/66%20Recommendations-%20resolution%20ICC-ASP-ASP6-Res-02-ENG.PDF) (Annex II).



### Official Documents

- Report of the Court on Cooperation (2020), including 44 recommendations for States Parties : [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP19/ICC-ASP-19-25-ENG-Cooperation-Report-%2028oct20-1830.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/ICC-ASP-19-25-ENG-Cooperation-Report-%2028oct20-1830.pdf)
- Assembly of States Parties, *Resolution on cooperation* (2020): [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP19/ICC-ASP-19-Res2-ENG-cooperation-resolution-20apr21-1300%20cln.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/ICC-ASP-19-Res2-ENG-cooperation-resolution-20apr21-1300%20cln.pdf).

817 See, for example, *Resolution on cooperation*, ICC-ASP/19/Res 2, 16 December 2020, para 1.

818 *IER Final Report* (n 2), para 767.

819 On 6 February 2020, the Bureau appointed Colombia, Croatia, Liechtenstein, Republic of Korea and Senegal as *ad country* focal points on non-cooperation, see: *Report of the Bureau on non-cooperation*, ICC-ASP/19/23, 10 December 2020, para 11.

820 See, for example, *Report of the Bureau on non-cooperation*, ICC-ASP/18/23, 2 December 2019, para 38.

821 See, for example, *Report of the Bureau on non-cooperation*, ICC-ASP/18/23, 2 December 2019, para 39.



## Guides

- Assembly of States Parties, Procedures relating to non-cooperation: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP17/RES-5-ENG.pdf#page=24](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP17/RES-5-ENG.pdf#page=24).
- Recommendations on states' cooperation with the International Criminal Court: Experiences and priorities: [www.icc-cpi.int/news/seminarBooks/66%20Recommendations%20Flyer%20\(ENG\).pdf](http://www.icc-cpi.int/news/seminarBooks/66%20Recommendations%20Flyer%20(ENG).pdf).



## Commentaries

- Toolkit for the implementation of the informal dimension of the Assembly procedures relating to non-cooperation: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP17/ICC-ASP-17-31-ENG.pdf#page=14](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP17/ICC-ASP-17-31-ENG.pdf#page=14).
- Olympia Bekou, 'Dealing with non-cooperation at the ICC: Towards a more holistic approach' (2019) 19 *International Criminal Law Review*, 911–937.

### 3.4 Periodic review of national frameworks

In addition to the current measures being taken to promote complementarity and cooperation, States Parties should support civil society proposals for the Assembly to develop a structured peer review process to encourage all States Parties to put in place and implement effective national frameworks.<sup>822</sup>

*Recommendation 111: States Parties should support the establishment of a periodic review process to strengthen national cooperation and complementarity frameworks.*

Drawing from the UN Human Rights Council's Universal Periodic Review, the Assembly should develop a process that each year requests 8–12 States Parties to report to the Assembly on their national frameworks.

For example, the States Parties could be requested to submit written reports to the Assembly at least 90 days before the annual session, which would be circulated to all States Parties. During its annual session, the Assembly would review the States Parties' reports and other States Parties could, taking into account any comments by the Court and civil society, make recommendations to enhance the national frameworks under review and offer technical assistance. Within 90 days of the end of the Assembly's annual session, the States Parties under review should respond in writing to the recommendations, including indicating timeframes for any planned reforms measures and requests for technical assistance.

A suggested checklist for reviewing national frameworks, drawing from relevant recommendations of this Guide, is included in the Annex below.

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<sup>822</sup> See, for example, Matt Cannock, 'The ICC at 20: All roads lead away from Rome', 17 July 2018, available at: <https://hrij.amnesty.nl/the-icc-at-20-all-roads-lead-away-from-rome>.

## Annex: Checklist for reviewing national frameworks

### Ratification/acceptance of Rome Statute amendments

Checklist Question	IBA Guide Rec	Amendment	(Fully/Partially/ Not Implemented)	Notes
Has the State Party ratified amendments to the Rome Statute?	34	Aggression		
		Employing poison or poisoned weapons in non-international armed conflict (NIAC)		
		Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices in NIAC		
		Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions in NIAC		
		Employing weapons, which use microbial or other biological agents, or toxins, whatever their origin or method of production in international armed conflict (IAC) and NIAC		
		Employing weapons the primary effect of which is to injure by fragments which in the human body escape detection by X-rays in IAC and NIAC		
		Employing laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices in IAC and NIAC		
		Using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies in NIAC		
		Deletion of Article 124		

### Complementarity legislation

Checklist Question	IBA Guide Rec	Issue/Article of the Rome Statute	(Fully/Partially/ Not Implemented)	Notes
Has the State Party criminalised Rome Statute crimes effectively in national law?	45	Genocide (Art 6)		
	46	Crimes against humanity (Art 7)		
	47	War Crimes (Art 8)		
	48	Aggression (Art 8 bis)		
	49	Offences against the administration of justice (Art 70)		

Checklist Question	IBA Guide Rec	Issue/Article of the Rome Statute	(Fully/Partially/ Not Implemented)	Notes
Has the State Party provided national authorities with broad jurisdiction over Rome Statute crimes?	52	Temporal jurisdiction		
	53	Extraterritorial jurisdiction		
Has the State Party provided for appropriate modes of liability that are applicable to Rome Statute crimes?	54	Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible (Art 25(3)(a))		
		Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted (Art 25(3)(b))		
		For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission (Art 25(3)(c))		
		In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose (Art 25(3)(d))		
		In respect of the crime of genocide, directly and publicly incites others to commit genocide (Art 25(3)(e))		
		Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions (Article 25(3)(f))		
		Omission		
		Conspiracy		
	55	Superior responsibility (Art 28)		
Has the State Party applied appropriate defences to Rome Statute crimes?	56	Mental disease or defect (Art 31(1)(a))		
		Intoxication (Art. 31(1)(b))		
		Self-defence (Art 31(1)(c))		
		Duress and necessity (Art 31(1)(d))		
		Mistake of fact or law (Art 32)		
		Superior orders (Art 33)		
Has the State Party removed barriers to the prosecution of Rome Statute crimes?	57	Non-applicability of statutes of limitations (Art 29)		
	58	Irrelevance of official capacity (Art 27)		
	59	Non-applicability of amnesties		
	60	Prosecution of persons under the age of 18 (Art 26)		

Checklist Question	IBA Guide Rec	Issue/Article of the Rome Statute	(Fully/Partially/ Not Implemented)	Notes
Has the State Party established appropriate penalties for Rome Statute crimes?	61	Fines/forfeiture (Art 77)		
		Imprisonment (Art 77)		
		Prohibition of the death penalty		

## Complementarity mechanisms

Checklist Question	IBA Guide Rec	Notes
Are the national authorities responsible for investigating and prosecuting Rome Statute crimes independent, impartial and competent?	62	
Do national authorities have legislation, expertise and follow best practice to investigate and prosecute sexual and gender-based crimes?	63	
Are sufficient systems and guarantees in place to ensure that national trials comply with international fair trial standards?	65	
Do national systems of juvenile justice to address allegations against persons under 18 comply with international standards?	66	
Are effective systems in place to provide victims and witnesses with effective protection and support to participate in national criminal proceedings?	67	
Do victims have effective access to reparations before national courts or administrative mechanisms?	68	

## Cooperation agreements

Checklist Question	IBA Guide Rec	Issue/Article of the Rome Statute	(Fully/Partially/ Not Implemented)	Notes
Has the State Party ratified the Agreement on Privileges and Immunities of the ICC?	74	Privileges and Immunities (Art 48)		
Has the State Party entered into cooperation agreements with the ICC?	87	Interim release (Art 59)		
	88	Final release		
	89	Relocation of victims and witnesses		
	100	Enforcement of sentences (Art 103)		

## Cooperation legislation

Checklist Question	IBA Guide Rec	Issue/Article of the Rome Statute	(Fully/Partially/Not Implemented)	Notes
Has the State Party enacted stand-alone legislation to ensure fully cooperation with the ICC?	69	Availability of procedures under national law (Art 88)		
Has the State Party provided that the ICC can exercise its functions and powers on its territory?	71	Procedures allow the ICC to sit on its territory (Arts 3(3) and 62)		
	72	ICC officials, staff and counsel may be present at or assist with the execution of requests for cooperation (Art 99(1))		
	73	OTP and defence can conduct investigations on its territory when authorised pursuant to Article 57(3)(d)		
		OTP and defence can conduct investigations on its territory as provided in Article 99(4)		
	74	ICC officials, staff, counsel, experts, witnesses and other persons required to be present at the seat of the Court are provided with privileges and immunities (Art 48)		
Has the State Party put in place effective procedures to receive and respond to requests for cooperation?	76	Procedures provide clear channels for receiving and processing requests (Art 87(1))		
	77	Procedures ensure a prompt response to all requests		
	78	Procedures ensure the confidentiality of requests and supporting documents, except to the extent that disclosure is necessary for the execution of the request (Art 87(3))		
	79	Procedures require compliance with ICC requests that any information relating to cooperation shall be provided and handled in a manner that protects the safety and physical or psychological wellbeing of victims, potential witnesses and their families (Art 87(4))		

Checklist Question	IBA Guide Rec	Issue/Article of the Rome Statute	(Fully/ Partially/Not Implemented)	Notes
Has the State Party established national procedures to arrest and surrender suspects to the ICC?	80	Procedures provide for prompt cooperation with arrest and surrender (Article 59)		
		Procedures ensure that national requirements of documents, statements or information are no more burdensome than those applicable to treaties or arrangements between the State Party and other states (Art 91(2))		
		Procedures take into account the specific requirements of the ICC's request if the person sought has already been convicted by the ICC (Art 91(3))		
		Procedures require that the arrested person shall be brought promptly before a competent judicial authority, which shall determine, in accordance with the law of that State, that: (a) the warrant applies to that person; (b) the person has been arrested in accordance with the proper process; and (c) the person's rights have been respected (Art 59)		
		Procedures comply with fair trial guarantees provided to the suspect by the Rome Statute (Arts 55, 66 and 67)		
		Procedures address a situation if the person sought for surrender brings a challenge before a national court on the basis of the principle of <i>ne bis in idem</i> (Art 89(2))		
		Procedures ensure that the arrested person can exercise their right to apply to the competent national judicial authority for interim release (Art 59)		
	81	Procedures provide for cooperation with a request for the provisional arrest of a suspect (Art 92)		
Has the State Party permitted the transit of a person being surrendered by another state through its territory?	82	Procedures ensure that permission will be granted for a person being surrendered to the Court to transit through the State Party's territory (Art 89(3))		
		Procedures address a situation where a person being surrendered to the Court makes an unscheduled landing on the territory of the State Party (Art 89 (3)(e))		

<b>Checklist Question</b>	<b>IBA Guide Rec</b>	<b>Issue/Article of the Rome Statute</b>	<b>(Fully/ Partially/Not Implemented)</b>	<b>Notes</b>
Has the State Party provided that it will endeavour to grant ICC requests to waive the rule of speciality?	83	Rule of speciality (Art 101)		
Has the State Party provided for all other forms of cooperation in Article 93(1)?	84	The identification and whereabouts of persons or the location of items (Art 93(1)(a))		
		The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court (Art 93(1)(b))		
		The questioning of any person being investigated or prosecuted (Art 93(1)(c))		
		The service of documents, including judicial documents (Art 93(1)(d))		
		Facilitating the voluntary appearance of persons as witnesses or experts before the Court (Art 93(1)(e))		
		The temporary transfer of persons as provided in paragraph 7 (Art 93(1)(f))		
		The examination of places or sites, including the exhumation and examination of grave sites (Art 93(1)(g))		
		The execution of searches and seizures (Art 93(1)(h))		
		The provision of records and documents, including official records and documents (Art 93(1)(i))		
		The protection of victims and witnesses and the preservation of evidence (Art 93(1)(j))		
		The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties (Art 93(1)(k))		
		Any other type of assistance which is not prohibited by the law of the requested state, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court (Art 93(1)(l))		
Has the State Party expressly provided for other forms of cooperation that may be requested by the Court?	85	Intercepts of communications		

Checklist Question	IBA Guide Rec	Issue/Article of the Rome Statute	(Fully/ Partially/Not Implemented)	Notes
		Provision of forensic/DNA and other specialist expertise		
		Freezing of assets for the specific purpose to secure the arrest of a person sought		
Has the State Party established effective procedures that ensure full cooperation with defence requests for cooperation?	86	Cooperation with defence requests		
Has the State Party put in place effective rules and procedures to address obstacles to cooperation in accordance with the Rome Statute?	90	Procedures reflect the State Party's obligation to consult with the ICC if any problems are identified that may impede or prevent the execution of a request, as required by Article 97		
	92	Procedures address a situation if the State Party is requested to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a State, intergovernmental organisation or international organisation, in accordance with Article 73		
	93	Procedures address a situation if cooperation with the transit of a person being surrendered to the ICC through the State Party's territory would impede or delay the surrender, in accordance with Article 89(3)(a)		
	94	Procedures address a situation where, in addition to a request for surrender of a suspect to the ICC, the State Party receives a competing request for extradition of the same person from another state, in accordance with Article 90		
	95	Procedures address a situation where the State Party is requested to provide other types of assistance pursuant to Article 93(1)(l) that are prohibited in national law on the basis of an existing fundamental legal principle of general application, in accordance with Articles 93(3) and 93(5)		
	96	Procedures address a situation where a request for information raises national security concerns, in accordance with Articles 72 and 93(4)		
	97	Procedures provide that the State Party may postpone a request for cooperation pursuant to Article 93(1) in respect of an ongoing investigation or prosecution, in accordance with Article 94		

Checklist Question	IBA Guide Rec	Issue/Article of the Rome Statute	(Fully/ Partially/Not Implemented)	Notes
	98	Procedures provide that the State Party may postpone the execution of a request pending the ICC's determination of an admissibility challenge, in accordance with Article 95		
	99	Procedures address a situation where the State Party believes there is a conflict between the request and its obligations with respect to state or diplomatic immunities or status of forces agreements, in accordance with Article 98		
Has the State Party provided for enforcing ICC sentences of imprisonment in national prison facilities in accordance with the Rome Statute?	100	Procedures ensure that the State Party responds promptly to the ICC's requests for enforcement of sentences (Art 103)		
		Procedures reflect the rule that State Parties shall not modify the sentence imposed by the Court (Art 105(1))		
		Procedures provide that the Court must be notified of any circumstances which would materially affect the terms or extent of the imprisonment (Art 103(2)(a))		
		Procedures ensure cooperation with a decision of the Court to transfer a sentenced person to the prison of another state (Art 104)		
		Procedures ensure the ICC's supervision of the enforcement of sentences and conditions of imprisonment (Art 106)		
		Procedures ensure that communications between a sentenced person and the ICC must be unimpeded and confidential (Art 106(3))		
		Procedures require cooperation by the State Party with the ICC's review of a sentence (Art 110)		
		Procedures contemplate necessary rehabilitation measures that should be made available to the detained persons (Art 110, Rule 223)		
		Procedures provide that the ICC must be notified of any programme that may entail activity outside the prison facility (Rule 211(2))		
		Procedures address a situation if a person serving a sentence escape (Art 111)		

<b>Checklist Question</b>	<b>IBA Guide Rec</b>	<b>Issue/Article of the Rome Statute</b>	<b>(Fully/ Partially/Not Implemented)</b>	<b>Notes</b>
Has the State Party provided for cooperation with the enforcement of fines, forfeiture and reparations orders?	101	Cooperation with the enforcement of fines and forfeiture (Art 109)		
		Cooperation with the enforcement of reparations orders (Art 75(5))		

## Cooperation mechanisms

<b>Checklist Question</b>	<b>IBA Guide Rec</b>	<b>Issue/Article of the Rome Statute</b>	<b>(Fully/Partially/ Not Implemented)</b>	<b>Notes</b>
Has the State Party put in place effective national mechanisms to ensure full cooperation with the ICC?	102	Appointment of a national focal point(s) on cooperation		
	103	Measures to build capacity and expertise in relevant agencies to ensure full cooperation.		

## Nomination of ICC judges

<b>Checklist Question</b>	<b>IBA Guide Rec</b>	<b>Issue/Article of the Rome Statute</b>	<b>(Fully/ Partially/ Not Implemented)</b>	<b>Notes</b>
Has the State Party put in place effective procedures for nominating candidates for ICC judges?	26	Nomination procedures (Art 36(4))		