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**Commentary on the Law of the International Criminal Court:
The Statute
Volume 2**

Mark Klamberg, Jonas Nilsson and Antonio Angotti (editors)

Second Edition

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***Front cover:** A section of the beautiful stone wall around the compound of the Selimiye Mosque in Edirne (Adrianople), designed by the Ottoman architect Mimar Sinan (1489/1490–1588). Photograph: © CILRAP April 2014.*

***Back cover:** Morning light reflected in the pebble floor of a patio off Calle Judíos in the Judería neighbourhood in Córdoba old town. Many raised pebbles make up a useful and beautiful whole. This Commentary gathers contributions by experts from around the world. Put together, their texts offer a user-friendly guide to the understanding of the Statute and the Rules of Procedure and Evidence of the International Criminal Court, whether accessed in print, as an e-book, or online. Photograph: © CILRAP April 2017.*



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PREFACE BY THE EDITORS TO THE SECOND EDITION

The establishment of international criminal jurisdictions such as the International Criminal Court ('ICC') presents new challenges for legal practitioners as well as scholars in their legal research. High-quality legal commentaries can be of great assistance for both practitioners and scholars.

The *Commentary on the Law of the International Criminal Court* ('CLICC') has been designed with inspiration from commentaries on domestic law as well as international law. It now covers both the ICC Statute and Rules of Procedure and Evidence. Its basic idea is to address legal questions and issues in a clear and unconvoluted manner. It not only discusses ordinary and recurrent questions of interpretation and application of international criminal law. When legal issues are more complicated, CLICC informs on relevant preparatory works, case law, expert views and scholarship which may be consulted for further research.

Not all of the original contributors to the commentary were available for the completion of this second edition. Fortunately, we have found well-qualified replacement authors. Affected comments give due credit to the original authors where former contributions or considerations have been used.

The focus of CLICC is on case law and contentious issues already resolved or in need of resolution. Provisions that are deemed of greater importance have been covered in more detail.

If you wish to make a reference to the printed version of CLICC, please make the reference to the page and note in this way:

Nina H.B. Jørgensen, "Article 6", in Mark Klamberg, Jonas Nilsson and Antonio Angotti (eds.), *Commentary on the Law of the International Criminal Court: The Statute, Volume 1*, Torkel Opsahl Academic EPublisher, Brussels, 2023, p. z.

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Nina H.B. Jørgensen, "Article 6", in Mark Klamberg, Jonas Nilsson and Antonio Angotti (eds.), *Commentary on the Law of the International Criminal Court: The Statute*, Lexsit-

CLICC (<http://cilrap-lexsitus.org/en/clicc/6/6>, accessed on 1 November 2023).

Lexsitus-CLICC, the online version of CLICC (<https://cilrap-lexsitus.org/en/clicc>), is continuously updated and can as such be considered the ‘master’ version of the commentary. It has functionality which allows the user to seamlessly use other online resources in the Lexsitus platform, which is certified by the Digital Public Goods Alliance. As the second English book edition is being published, Arabic and French versions are already available in Lexsitus thanks to financial support by the Norwegian Ministry of Foreign Affairs and the International Nuremberg Principles Academy. We note with satisfaction that the online version of CLICC and the first printed edition have since several years provided utility to scholars and practitioners in the field.

The Faculty of Law at Stockholm University and CILRAP have provided excellent practical and technical facilities for our work. Since the early days of designing and developing CLICC, several persons have contributed with editorial assistance, including Josef Svantesson, Liu Sijia, Camilla Lind, Hanna Szabo, Nikola Hajdin, Valentina Barrios, Virginie Lefèbvre, Fathi M.A. Ahmed and Rohit Gupta. Others have contributed to developing earlier and present technical platforms or providing other forms of technical assistance, including Ralph Hecksteden, Devasheesh Bais, Saurabh Sachan, Rajan Zaveri and Shikha Bhattacharjee. Funding has been provided in different stages by the International Nuremberg Principles Academy, the Foundation SJF (Stiftelsen Juridisk Fakultetslitteratur), the Board of Human Science at Stockholm University, the Norwegian Ministry of Foreign Affairs and CILRAP.

Finally, we wish to thank Morten Bergsmo for having CLICC as a part of CILRAP’s network, the Lexsitus platform and his continuous support.

Mark Klamberg, Jonas Nilsson and Antonio Angotti

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LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights, 1 June 1981 (https://www.legal-tools.org/doc/f0db44/)
ACHR	American Convention on Human Rights, 22 November 1969 (https://www.legal-tools.org/doc/1152cf/)
Agreement on Privileges and Immunities of the Court	Agreement on the Privileges and Immunities of the International Criminal Court, 9 September 2002 (https://www.legal-tools.org/doc/6eefbc/)
AP I or Additional Protocol I	Additional Protocol I to the Geneva Conventions, 8 June 1977 (https://www.legal-tools.org/doc/d9328a/)
AP II or Additional Protocol II	Additional Protocol II to the Geneva Conventions, 7 December 1978 (https://www.legal-tools.org/doc/fd14c4/)
AP III or Additional Protocol III	Additional Protocol III to the Geneva Conventions, 8 December 2005 (https://www.legal-tools.org/doc/ddefae/)
ASP	Assembly of States Parties
Code of Conduct for the Office of the Prosecutor	Code of Conduct for the Office of the Prosecutor, 5 September 2013 (https://www.legal-tools.org/doc/3e11eb/)
Code of Crimes against International Law	Germany, Gesetz zur Einführung des Völkerstrafgesetzbuches [Code of Crimes against International Law], 26 June 2002 (https://www.legal-tools.org/doc/a56805/)
Code of Judicial Ethics	Code of Judicial Ethics, 7 October 2022 (https://www.legal-tools.org/doc/j78b15/)
Code of Professional Conduct for Counsel	Code of Professional Conduct for Counsel, 2 December 2005 (https://www.legal-tools.org/doc/f9ed33/)
Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity	Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 26 November 1968 (https://www.legal-tools.org/doc/4bd593/)

Convention on the Privileges and Immunities of the United Nations	Convention on the Privileges and Immunities of the United Nations, 13 February 1946 (https://www.legal-tools.org/doc/cc71a1/)
Convention on the Rights of the Child	Convention on the Rights of the Child, 20 November 1989 (https://www.legal-tools.org/doc/f48f9e/)
Convention on the Safety of United Nations and Associated Personnel	Convention on the Safety of United Nations and Associated Personnel, 9 December 1994 (https://www.legal-tools.org/doc/6bfa73/)
Convention Relating to the Status of Refugees	Convention Relating to the Status of Refugees, 28 June 1951 (https://www.legal-tools.org/doc/9b8e7a/)
ECCC ECCC Internal Rules	Extraordinary Chambers in the Courts of Cambodia Internal Rules of the Extraordinary Chambers in the Courts of Cambodia, 27 October 2022 (https://www.legal-tools.org/doc/z3ae4o/)
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 (https://www.legal-tools.org/doc/8267cb/)
ECtHR	European Court of Human Rights
French Penal Code	France, Code Pénal, 1 March 1994 (https://www.legal-tools.org/doc/392ede/)
Geneva Conventions or GC I–IV	Geneva Conventions I–IV, 12 August 1949 (Geneva Convention (I) for the amelioration of the condition of the wounded and sick in armed forces in the field: https://www.legal-tools.org/doc/baf8e7/ ; Geneva Convention (II) for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea: https://www.legal-tools.org/doc/0d0216/ ; Geneva Convention (III) relative to the treatment of prisoners of war: https://www.legal-tools.org/doc/365095/ ; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War: https://www.legal-tools.org/doc/d5e260/)
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948 (https://www.legal-tools.org/doc/498c38/)
German Criminal Code	Germany, Strafgesetzbuch – StGB [German Criminal Code], 13 November 1998 (https://www.legal-tools.org/doc/e71bdb/)
ICC	International Criminal Court

ICC Statute	Rome Statute of the International Criminal Court, 17 July 1998 (https://www.legal-tools.org/doc/7b9af9/)
ICC RPE	Rules of Procedure and Evidence of the International Criminal Court, 11 December 2018 (https://www.legal-tools.org/doc/l3a64k/)
ICCPR	International Covenant on Civil and Political Rights, 16 December 1966 (https://www.legal-tools.org/doc/2838f3/)
ICJ	International Court of Justice
ICJ Statute	Statute of the International Court of Justice, 26 June 1945 (https://www.legal-tools.org/doc/fdd2d2/)
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTR RPE	Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, 29 June 1995 (https://www.legal-tools.org/doc/c6a7c6/)
ICTR Statute	Statute of the International Criminal Tribunal for Rwanda, 8 November 1994 (https://www.legal-tools.org/doc/8732d6/)
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTY RPE	Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, 6 October 1995 (https://www.legal-tools.org/doc/30df50/)
ICTY Statute	Statute of the International Criminal Tribunal for the former Yugoslavia, 25 May 1993 (https://www.legal-tools.org/doc/b4f63b/)
ILC	International Law Commission
IMT	International Military Tribunal (Nuremberg tribunal)
IMT Charter	Charter of the International Military Tribunal, 8 August 1945 (https://www.legal-tools.org/doc/64ffdd/)
IMTFE	International Military Tribunal for the Far East
IMTFE Charter	Charter of the International Military Tribunal for the Far East, 19 January 1946 (https://www.legal-tools.org/doc/a3c41c/)
Indonesia Penal Code	Indonesia, Penal Code of Indonesia, 9 May 1999 (https://www.legal-tools.org/doc/de6031/)
IRMCT	International Residual Mechanism for Criminal Tribunals

IRMCT RPE	Rules of Procedure and Evidence of the International Residual Mechanism for Criminal Tribunals, 8 June 2012 (https://www.legal-tools.org/doc/cef176/)
IRMCT Statute	Statute of the International Residual Mechanism for Criminal Tribunals, 22 December 2010 (https://www.legal-tools.org/doc/30782d/)
OPCD	Office of Public Counsel for the Defence
OPCV	Office of Public Counsel for Victims
OTP	Office of the Prosecutor
OTP Regulations	Regulations of the Office of the Prosecutor, 23 April 2009 (https://www.legal-tools.org/doc/a97226/)
Portuguese Penal Code	Portugal, The Portuguese Penal Code, 23 September 1982 (https://www.legal-tools.org/doc/00d841/)
Regulations of the Court	Regulations of the International Criminal Court, 26 May 2004 (https://www.legal-tools.org/doc/2988d1/)
Regulations of the Registry	Regulations of the Registry of the International Criminal Court, 6 March 2006 (https://www.legal-tools.org/doc/429b80/)
Relationship Agreement between the International Criminal Court and the United Nations	Negotiated Relationship Agreement between the International Criminal Court and the United Nations, 4 October 2004 (https://www.legal-tools.org/doc/5edc7c/)
RSCSL	Residual Special Court for Sierra Leone
RPE	Rules of Procedure and Evidence
SCSL	Special Court for Sierra Leone
SCSL Statute	Statute of the Special Court for Sierra Leone, 14 August 2000 (https://www.legal-tools.org/doc/aa0e20/)
SCSL RPE	Rules of Procedure and Evidence of the Special Court for Sierra Leone, 31 May 2012 (https://www.legal-tools.org/doc/4c2a6b/)
STL	Special Tribunal for Lebanon
STL Statute	Statute of the Special Tribunal for Lebanon, 30 May 2007 (https://www.legal-tools.org/doc/da0bbb/)
TFV	Trust Fund for Victims
Timor-Leste Penal Code	Timor-Leste, Codigo Penal de Timor-Leste, 30 March 2009 (https://www.legal-tools.org/doc/d3d691/)

Torture Convention	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984 (https://www.legal-tools.org/doc/713f11/)
UDHR	Universal Declaration of Human Rights, 10 December 1948 (https://www.legal-tools.org/doc/de5d83/)
UN	United Nations
UN Charter	Charter of the United Nations, 26 June 1945 (https://www.legal-tools.org/doc/6b3cd5/)
UNAMSIL	United Nations Mission in Sierra Leone
UNAMID	United Nations – African Union Hybrid Operation in Darfur
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNSC	United Nations Security Council
UNTAET	United Nations Transitional Administration in East Timor
VCLT	Vienna Convention on the Law of Treaties, 23 May 1969 (https://www.legal-tools.org/doc/6bfcd4/)
VPRS	Victims Participation and Reparations Section
VWU	Victims and Witnesses Unit

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PART 5. INVESTIGATION AND PROSECUTION

Article 53

Initiation of an Investigation

General Remarks:

Article 53 ICC Statute becomes relevant once a situation has been triggered, be it on the basis of a referral by the Security Council or a State Party, or on the basis of the proprio motu powers of the Prosecutor. While the title suggests otherwise, Article 53 ICC Statute is not only relevant to the ‘initiation of the investigation’, but also governs the Prosecutor’s decision not to proceed with a prosecution. Furthermore, it provides for the possibility of judicial review of a prosecutorial decision not to proceed and authorises the Prosecutor to review decisions whether to initiate an investigation or prosecution, on the basis of new facts or information.

It seems to follow from the wording of the first sentence of Article 53 that a principle of legality (*Legalitätsprinzip*) is incumbent on the ICC Prosecutor (“shall [...] initiate an investigation”). This provision seems to be drafted in mandatory terms, ruling out any arbitrary decision making by the Prosecutor regarding the appropriateness of an investigation.¹ However, the ICC’s procedural design does not offer a conclusive answer to the question whether the Prosecutor is to be guided by a principle of legality or by a principle of opportunity. Rather does the principle that guides the Prosecutor depend on the factors the Prosecutor should consider in deciding whether or not to initiate investigations into a certain situation or in deciding whether or not to prosecute a certain case.² The ICC Statute provides for at least some discretion and the Prosecutor is not under an obligation to

¹ Morten Bergsmo, Pieter Kruger and Olympia Bekou, “Article 53”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1368 (<https://www.legal-tools.org/doc/040751/>).

² Héctor Olásolo, “The Prosecutor of the ICC before the Initiation of Investigations: A Quasi-Judicial or Political Body?”, in *International Criminal Law Review*, 2003, vol. 3, p. 132; Geert-Jan Alexander Knoops, *Theory and Practice of International and Internationalized Criminal Proceedings*, Kluwer Law International, The Hague, 2005, p. 377 (<https://www.legal-tools.org/doc/7318c6/>).

investigate and prosecute all crimes within the Court’s jurisdiction.³ Such discretion can, for example, be found in Article 13 ICC Statute: “The Court may exercise its jurisdiction with respect to a crime referred to in Article 5 in accordance with the provisions of this Statute if [...]”.

Provided that Article 53(1) sets forth the factors the Prosecutor should consider in deciding whether or not to open an investigation, it follows that the investigation ‘proper’ is preceded by a ‘pre-investigation phase’, which serves the purpose of determining whether or not to proceed with an investigation. Likewise, the existence of a phase immediately preceding the investigation proper follows from the existence, under Article 53(1) of a minimum threshold for the commencement of the investigation proper, as will be discussed below. Furthermore, Article 15 (1) (2) (3) and (6) as well as Rules 48 and 104 ICC RPE confirm the existence of such phase. Meanwhile, only Article 15(6) explicitly refers to the existence of a ‘preliminary examination’. The preliminary examination commences once the dormant jurisdiction of the Court is triggered and irrespective of the manner in which the jurisdiction of the Court is triggered: either on the basis of information received on crimes or upon a referral.⁴ Therefore, while the ICC Statute uses the term ‘preliminary examination’ only if the Prosecutor proceeds on the basis of his or her proprio motu powers, a formal investigation does also not follow automatically in case of a referral. In all instances, the Prosecutor should assess the seriousness of the information received (Rule 104(1) ICC RPE, Article 15(2) ICC Statute). Moreover, irrespective of the triggering mechanism, in assessing whether to proceed with an investigation, the Prosecutor considers the same factors (Article 15(3) ICC Statute with Rule 48 ICC RPE and Article 53(1) ICC Statute; Policy Paper on Preliminary Examinations, 2013, para. 76). What differs is the procedural presumption.⁵ With regard to referrals, it follows from the

³ Carsten Stahn, “Judicial Review of Prosecutorial Discretion: Five Years on”, in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Brill, Leiden, 2009, pp. 249, 257 (<https://www.legal-tools.org/doc/5d1db6/>).

⁴ For example, ICC OTP, “Policy Paper on Preliminary Examinations”, November 2013, para. 85 (‘Policy Paper on Preliminary Examinations, 2013’) (<https://www.legal-tools.org/doc/acb906/>); ICC OTP, “Policy Paper on Case Selection and Prioritization”, September 2016, para. 10 (<https://www.legal-tools.org/doc/182205/>).

⁵ Karel De Meester *et al.*, “Investigation, Coercive Measures, Arrest and Surrender”, in Göran Sluiter, Håkan Friman, Suzannah Linton, Salvatore Zappalà and Sergey Vasiliev (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, p. 182 (<https://www.legal-tools.org/doc/bcad4c/>).

ICC Statute that the Prosecutor “shall [...] initiate an investigation unless he or she determines that there is no reasonable basis to proceed”. Judicial review by the Pre-Trial Chamber is limited to a determination not to proceed, not of an affirmative decision to proceed (Article 53(1) ICC Statute *chapeau* and *in fine*). Hence, in such a case, there is a strong presumption in favour of the finding of a ‘reasonable basis’, thereby limiting prosecutorial discretion in case of a referral. In contrast, when the Prosecutor assesses information received, the starting point is that there will be no initiation of the investigation: The Prosecutor needs authorisation by the Pre-Trial Chamber to proceed with an investigation (Article 15(3) ICC Statute). It emerges that irrespective of the triggering mechanism, the pre-investigative phase is -at least in theory- almost identical.⁶

Neither the Statute nor the RPE regulate in detail the method for the conduct of the preliminary examination. However, Rule 104(2) ICC RPE, which details the evaluation of information by the Prosecutor under Article 53(1), provides the Prosecutor with some limited investigative powers (as does Article 15(2) ICC Statute). The Prosecutor may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organisations, or other reliable sources and he or she may receive written or oral testimony at the seat of the Court. It is stipulated that the procedural rules on the recording of the questioning during the investigation apply *mutatis mutandis* (Rules 47, 104(2), 111 and 112 ICC RPE). Other investigative powers are not mentioned and are only at the Prosecutor’s disposal after the start of the investigation proper. Furthermore, no time frame has been included in the ICC Statute for the conduct of the preliminary examination. Nevertheless, Pre-Trial Chamber III held that a ‘reasonable time’ criterion applies to the preliminary examination of a situation pursuant to Article 53 (1) ICC Statute and Rule 104 ICC RPE.⁷ This criterion derives from Rule 105(1) ICC RPE, according to which the Prosecutor should ‘promptly’ inform in writing the State which referred the

⁶ ICC, *Situation in the Republic of Côte d’Ivoire*, Pre-Trial Chamber III, Corrigendum to “Judge Fernandez de Gurmendi’s separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire, 5 October 2011, ICC-02/11-15-Corr, para. 24 (<https://www.legal-tools.org/doc/eb8724/>).

⁷ ICC, *Situation in the Central African Republic*, Pre-Trial Chamber III, Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, 30 November 2006, ICC-01/05-6, p. 4 (<https://www.legal-tools.org/doc/76e607/>).

situation, when deciding not to commence an investigation. However, “the timing and length of preliminary examination activities will necessarily vary based on the situation”. For example, since the preliminary examination process with regard to the situation in Columbia included the monitoring of national proceedings, the preliminary examination process will necessarily be longer. Consequently, some flexibility should be built into the timeframe (Policy Paper on Preliminary Examinations, 2013, para. 89).

Doctrine: For the bibliography, see the final comment on Article 53.

Author: Karel De Meester.

Article 53(1)

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute.

‘Reasonable Basis to Proceed’:

It follows from the wording of the chapeau of Article 53 that the threshold to start an investigation is the presence of a ‘reasonable basis to proceed’. The same threshold is to be found in Article 15 (3), (4) and (6) ICC Statute and in Rule 48 ICC RPE, with regard to proprio motu investigations. A contextual interpretation clarifies that similar considerations underlie the ‘reasonable basis to proceed’ standard in Articles 15 and 53. More precisely, it follows from Rule 48 ICC RPE that in determining whether there exists a ‘reasonable basis to proceed’ under Article 15(3) ICC Statute, ‘the Prosecutor shall consider the factors set out in Article 53, paragraph 1 (a) to (c)’.

This was acknowledged by Pre-Trial Chamber II, when it held that it would be illogical to dissociate the ‘reasonable basis to proceed’ standard in Article 15(3) and Article 53(1) (with respect to the Prosecutor) from the threshold provided for under Article 15(4) ICC Statute (with respect to the Pre-Trial Chamber).¹ The Pre-Trial Chamber emphasised that these standards are used in the same or related Articles and that they share the same purpose: the opening of an investigation (*Situation in the Republic of Kenya*, 31 March 2010, para. 21). Furthermore, the *travaux préparatoires* reveal that the drafters intended to use the same standard in the different provisions and wanted to establish the link between Article 15 and 53 (paras. 22–23). Among other, this is evidenced by the nota bene which was included in draft Article 12 ICC Statute (“The terms “sufficient basis” used in this

¹ ICC, *Situation in the Republic of Kenya*, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19, para. 21 (<https://www.legal-tools.org/doc/338a6f/>) (*Situation in the Republic of Kenya*, 31 March 2010’).

Article (if retained) and “reasonable basis” in Article 54, paragraph 1, should be harmonized”).²

A contextual interpretation of the ‘reasonable basis to proceed’ standard further clarifies that the ‘reasonable basis to proceed’ standard in the chapeau of Article 53(1) requires less certainty than the ‘sufficient basis for a prosecution’ standard, which is found in Article 53(2) ICC Statute. Likewise, the standard is lower than the ‘reasonable grounds to believe’ prerequisite for the issuance of a warrant of arrest or the existence of ‘substantial grounds to believe’ as required for the confirmation of the charges. For the fulfilment of the two latter standards, evidence or information is required that is directed to the individual, rather than to a situation or to events.³ One commentator refers to “the first step of a stairway which becomes stricter with every step taken towards trial and requires more profound evidence with each level”.⁴

With regard to Article 15(4) ICC Statute, ICC Pre-Trial Chamber III observed that the purpose of the ‘reasonable basis to proceed’ standard lies where it prevents “unwarranted, frivolous, or politically motivated investigations”.⁵ On the basis of the *travaux préparatoires*, it has been argued that the identical standard in Article 53(1) serves the same purpose and was inserted “to prevent any abuse of the process not only by the Prosecutor but also by any of the other triggering parties”.⁶

² See Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, UN Doc. A/CONF.183/2/Add.1, 14 April 1998, p. 25 (<https://www.legal-tools.org/doc/816405>).

³ See Manuel J. Ventura, “The ‘Reasonable Basis to Proceed’ Threshold in the Kenya and Côte d’Ivoire Proprio Motu Investigation Decisions: The International Criminal Court’s Lowest Evidentiary Standard?”, in *The Law and Practice of International Courts and Tribunals*, 2013, vol. 12, p. 67.

⁴ Ignaz Stegmiller, “The Pre-Investigation Stage of the ICTY and the ICC Compared”, in Thomas Kreussmann (ed.), *ICTY: Towards a Fair Trial?*, Neuer Wissenschaftlicher Verlag, Wien-Graz, 2008, p. 322; Ignaz Stegmiller, *The Pre-Investigation Stage of the ICC, Criteria for Situation Selection*, Duncker and Humblot, Berlin, 2011, p. 253 (<https://www.legal-tools.org/doc/b10182/>).

⁵ ICC, *Situation in the Republic of Côte d’Ivoire*, Corrigendum to “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire”, 15 November 2011, ICC-02/11-14-Corr, para. 21 (<https://www.legal-tools.org/doc/e0c0eb/>).

⁶ Silvia A. Fernández de Gurmendi, “The Role of the International Prosecutor”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results*, Kluwer Law International, The Hague, 1999, p. 182 (<https://www.legal-tools.org/doc/d71078/>).

Under Article 53 (1), the Prosecutor is under an obligation not to disregard any available information other than when that information is manifestly false.⁷

Cross-reference:

Regulation 38.

Doctrine: For the bibliography, see the final comment on Article 53.

Author: Karel De Meester.

⁷ ICC, *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Pre-Trial Chamber I, Decision on the Request of the Union of the Comoros to Review the Prosecutor's Decision not to Initiate an Investigation, 16 July 2015, ICC-01/13-34, para. 25 (<https://www.legal-tools.org/doc/2f876c/>).

Article 53(1)(a): Reasonable Basis to Believe

(a) The information available to the Prosecutor provides a reasonable basis to believe that

Subparagraph (1)(a) is concerned with jurisdiction. On the basis of the parameters included in this first subparagraph the ICC Prosecutor decided not to proceed with an investigation in the Venezuela situation and the Palestine situation.¹

In subparagraph (1)(a), an additional threshold is included, ‘reasonable basis to believe’. It is unclear how the ‘reasonable basis to proceed’ requirement in the chapeau of Article 53(1) ICC Statute and the ‘reasonable basis to believe’ threshold under Article 53 (1)(a) mutually relate. A textual interpretation of Article 53(1) hints that a ‘reasonable basis to proceed’ exists once the different criteria of subparagraphs (a)-(c) are met. Such understanding has been confirmed by Pre-Trial Chamber II, which held that the ‘reasonable basis to believe’ test in Article 53 (1)(a) is subsumed by the ‘reasonable basis to proceed’ standard referred to in the opening clause of Article 53 (1) of the Statute, since the former is only one element of the latter.² Hence, the ‘reasonable basis to proceed’ requirement will be met when the requirements under Article 53 (1)(a) – (c) ICC Statute are fulfilled. This conclusion is supported by the *travaux préparatoires*.³ Pre-Trial Chamber II further held that any definition of the ‘reasonable basis to believe’ standard should reflect “the specific purpose underlying this procedure” (Report of the Preparatory Committee, 14 April 1998, para. 32, 35). Similar to the purpose of the ‘reasonable basis to proceed’ threshold in the chapeau of Article 53 (1), its purpose is “to prevent the Court from proceeding with unwarranted, frivolous, or politically motivated investigations that could have a negative effect on [the Court’s] credibility” (para. 32).

¹ ICC OTP, Reply to “communication concerning the situation in Venezuela”, Annex, 9 February 2006, p. 4 (<https://www.legal-tools.org/doc/c90d25/>); ICC OTP, “Situation in Palestine”, 3 April 2012 (<https://www.legal-tools.org/doc/f5d6d7/>).

² ICC, *Situation in the Republic of Kenya*, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19, para. 26 (<https://www.legal-tools.org/doc/338a6f/>).

³ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum”, UN Doc. A/CONF.183/2/Add.1, 14 April 1998, p. 75 (‘Report of the Preparatory Committee, 14 April 1998’) (<https://www.legal-tools.org/doc/dbb600/>).

Bearing in mind that this threshold is the lowest to be found in the ICC Statute, “the information available to the Prosecutor does not have to be ‘comprehensive’ or ‘conclusive’” (para. 27). This is to be understood in light of the limited powers of the Prosecutor, prior to the start of the investigation proper. Furthermore, the Pre-Trial Chamber observed that the European Court of Human Rights’ ‘reasonable suspicion’ threshold, upon which the Court’s case law relies for the interpretation of the ‘reasonable grounds to believe’ standard for the issuance of an arrest warrant under Article 58, is not suitable for the interpretation of Article 53 (1)(a) ICC Statute. The standard under Article 53 (1)(a) “was not designed to determine whether a particular person was involved in the commission of a crime within the jurisdiction of the Court, which may justify his arrest” (para. 32). Information “need not point towards only one conclusion” (para. 34). The standard implies that “the Chamber must be satisfied that there is a sensible or reasonable justification for a belief that a crime falling within the Court’s jurisdiction ‘has been or is being committed’” (para. 35).⁴ However, the Pre-Trial Chamber failed to clarify what the difference between a reasonable basis to proceed in the chapeau of Article 53 (1) and a reasonable basis to believe in Article 53 (1)(a) actually is. The OTP Draft Regulations defined this standard as necessitating that “the information available to the Chief Prosecutor contains indications that make it seem possible that crimes within the jurisdiction of the Court have been or are being committed”. This will be the case “if there is a realistic prospect that the investigation will produce evidence that will lead to a prima facie case against the potential accused” or “if there is a clear indication that a person has participated in a crime within the jurisdiction of the Court” (Regulation 12.3 of the Draft Regulations of the OTP, fn. 80). However, this interpretation was not included in the final version of the Regulations of the OTP.⁵

Doctrine: For the bibliography, see the final comment on Article 53.

Author: Karel De Meester.

⁴ ICC, *Situation in Georgia*, Pre-Trial Chamber I, Decision on the Prosecutor’s Request for Authorization of an Investigation, 27 January 2016, ICC-01/15-12, para. 25 (<https://www.legal-tools.org/doc/a3d07e/>).

⁵ See also ICC, *Situation in the Republic of Côte d’Ivoire*, Trial Chamber, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d’Ivoire, 3 October 2011, ICC-02/11-14, paras. 23 *et seq.* (<https://www.legal-tools.org/doc/7a6c19/>).

Article 53(1)(a): Crime Within the Jurisdiction of the Court

a crime within the jurisdiction of the Court

The following part of the wording of this subparagraph does not cause a great deal of difficulty. It implies an examination of all necessary jurisdictional requirements (subject-matter, temporal, personal and territorial) and is devoid of any discretionary traits.

Doctrine: For the bibliography, see the final comment on Article 53.

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Article 53(1)(a): Commission

has been or is being committed;

The last part of this provision seems to exclude any basis for proactive investigations by the Court. Proactive investigative efforts precede the commission of the crime. Hence, as an example, the situation when a crime ‘is about to be committed’ seems excluded from the realm of the provision. Prior to the moment in time when a crime within the jurisdiction of the Court is or is being committed, there is no possibility to proceed to the investigation proper.

Doctrine: For the bibliography, see the final comment on Article 53.

Author: Karel De Meester.

Article 53(1)(b)

(b) The case is or would be admissible under Article 17

The second subparagraph of Article 53 (1) refers to admissibility. It encompasses both complementarity and gravity.¹ The admissibility assessment mainly refers to “the scenarios or conditions on the basis of which the court shall refrain from exercising its recognized jurisdiction over a given situation or case” (*Situation in the Republic of Kenya*, 31 March 2010, para. 40). Under the ICC Statute, admissibility attaches to different stages, starting with a ‘situation’ up to a concrete ‘case’ (para. 41). While the wording of Article 53 (1)(b) suggests that the admissibility assessment under this subparagraph relates to ‘cases’, it is evident from a contextual reading that this assessment, in principle, relates to ‘situations’, rather than specific ‘cases’ (paras. 44–46). This interpretation is confirmed by the plain reading of Article 13(a), 14(1), 15(5) and (6) and 18(1) ICC Statute. In particular, the wording of Article 53 (1)(b) ICC Statute points to an assessment at a more general level than that of a particular ‘case’ (‘or would be admissible’).

Pre-Trial Chamber II offered several explanations for the peculiar wording of Article 53 (1)(b) ICC Statute. Firstly, on the basis of the *travaux préparatoires* of the ICC Statute, it appears that ‘case’ was used in all drafts of Article 17 at the Preparatory Committee. At the Rome Conference, there was a ‘prevailing trend’ to not reopen the ‘substance’ of the admissibility provisions drafted by the Preparatory Committee. Changing the terminology in Article 53 would have required revisiting the terminology of Article 17; hence, it was left unaltered. However, Pre-Trial Chamber II preferred a different explanation and held that the reference to ‘case’ was advertently left in all provisions on admissibility, leaving it up to the Court “to harmonize the meaning according to the different stages of the proceedings” (paras. 46–47). Thus, it is for the Chamber to construe the meaning of

¹ ICC, *Situation in the Republic of Kenya*, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19, para. 52 (‘*Situation in the Republic of Kenya*, 31 March 2010’) (<https://www.legal-tools.org/doc/338a6f/>); *Situation in the Republic of Côte d’Ivoire*, Pre-Trial Chamber III, Corrigendum to “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire”, 15 November 2011, ICC-02/11-14-Corr, paras. 192–206 (‘*Situation in the Republic of Côte d’Ivoire*, 15 November 2011’) (<https://www.legal-tools.org/doc/e0c0eb/>).

a ‘case’ within the context where it is applied. In doing so, the Pre-Trial Chamber held that since “it is not possible to have a concrete case involving an identified suspect for the purpose of prosecution, prior to the commencement of the investigation, the admissibility assessment at this stage actually refers to the admissibility of one or more potential cases within the context of a situation” (para. 48; *Situation in the Republic of Côte d’Ivoire*, 15 November 2011, para. 190). The “admissibility at the situation phase should be assessed against certain criteria defining a “potential case” such as (i) the groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s)”.² This selection is preliminary and not binding for future admissibility assessments (*Situation in the Republic of Kenya*, 31 March 2010, para. 50).

Admissibility encompasses the three grounds of inadmissibility under Article 17(1) (complementarity, gravity and *ne bis in idem*), which are exhaustive in nature. At this stage, the admissibility assessment firstly entails “an examination as to whether the relevant State(s) is/are conducting or has/have conducted national proceedings in relation to the groups of persons and the crimes allegedly committed during those incidents, which together would likely form the object of the Court’s investigation”. Secondly, if the answer to this question is negative, it includes an assessment of whether the gravity threshold is met or not (*Situation in the Republic of Kenya*, 31 March 2010, para. 52). It is clear that the admissibility determination for the purpose of proceedings relating to the initiation of an investigation (at the ‘situation stage’) differs from the admissibility determination of a concrete case (at the ‘case stage’). At the case stage, the Court’s jurisprudence has held that national proceedings must encompass both the same person and the same conduct (specificity test).³ Contrarily, at the moment of the commencement of the investigation into a situation, “the

² *Situation in the Republic of Côte d’Ivoire*, 15 November 2011, para. 191; *Situation in the Republic of Kenya*, 31 March 2010, paras. 50 and 182; *Situation in Georgia*, Pre-Trial Chamber I, Decision on the Prosecutor’s Request for Authorization of an Investigation, 27 January 2016, ICC-01/15-12, para. 37 (<https://www.legal-tools.org/doc/a3d07e/>).

³ Consider, for example, ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Annex I: Decision on the Prosecutor’s Application for a warrant of arrest, Article 58, 10 February 2006, ICC-01/04-01//06-1-Corr-Red, para. 37 (<https://www.legal-tools.org/doc/af6679/>).

contours of the likely case will often be relatively vague because the investigations of the Prosecutor are at their initial stages”.⁴ “Often, no individual suspects will have been identified at this stage, nor will the exact conduct nor its legal classification be clear” (*Kenyatta et al.*, 30 August 2011, para. 38). Overall, the admissibility check is more general in nature and relates to the overall conduct. For example, in its decision authorising a proprio motu investigation in Kenya, Pre-Trial Chamber II concluded that there were no national investigations regarding senior business and political leaders on the serious criminal incidents which are likely to be the focus of the Prosecutor’s investigation (*Situation in the Republic of Kenya*, 31 March 2010, para. 187). In a similar vein, in authorising a proprio motu investigation in the Republic of Côte d’Ivoire, Pre-Trial Chamber III found that Côte d’Ivoire nor any other State having jurisdiction was conducting or had conducted national proceedings against individuals or crimes that are likely to constitute the Court’s future case(s) (*Situation in the Republic of Côte d’Ivoire*, 15 November 2011, para. 206).

On the basis of the second part of the admissibility assessment, gravity, the Prosecutor decided not to proceed with an investigation into the situation in Iraq and decided not to proceed with an investigation into the situation with respect to the 31 May 2010 Israeli raid on the Humanitarian Aid Flotilla bound for the Gaza Strip.⁵ It was also on the basis of this parameter that the LRA, and not the UPDF, was selected for investigation in the situation in Uganda.⁶ Also gravity should be assessed in a general

⁴ ICC, *Prosecutor v. Ruto et al.*, Appeals Chamber, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, 30 August 2011, ICC-01/09-01/11-307, para. 39 (<https://www.legal-tools.org/doc/ac5d46/>); *Prosecutor v. Kenyatta et al.*, Appeals Chamber, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, 30 August 2011, ICC-01/09-02/11-274, para. 38 (*Kenyatta et al.*, 30 August 2011’) (<https://www.legal-tools.org/doc/c21f06/>).

⁵ ICC OTP, “Annex to Update on Communications Received by the Office of the Prosecutor: Iraq Response”, 9 February 2006 (<https://www.legal-tools.org/doc/315cbd/>); ICC OTP, *Situation on Registered Vessels of Comoros, Greece and Cambodia*, Article 53(1) Report, 6 November 2014 (<https://www.legal-tools.org/doc/43e636/>).

⁶ ICC, *Prosecutor v. Kony et al.*, OTP, Statement by Luis Moreno-Ocampo, 14 October 2005, ICC-OTP-20051014-109, p. 3 (*Kony et al.*, 14 October 2005’) (<https://www.legal-tools.org/doc/d9b3cb/>).

sense, on the basis of ‘potential cases’ (*Situation in the Republic of Kenya*, 31 March 2010, para. 58; *Situation in the Republic of Côte d’Ivoire*, 15 November 2011, para. 202). Such assessment should be general in nature and compatible with the pre-investigative stage (*Situation in the Republic of Côte d’Ivoire*, 15 November 2011, para. 203; *Situation in the Republic of Kenya*, 31 March 2010, para. 60).

According to Pre-Trial Chambers II and III, at the Article 53(1) stage of proceedings, the gravity assessment entails a generic assessment of whether the individuals or groups of persons that are likely to be the object of an investigation capture those who may bear the greatest responsibility for the alleged crimes committed (*Situation in the Republic of Kenya*, 31 March 2010, para. 60; *Situation in the Republic of Côte d’Ivoire*, 15 November 2011, para. 204). Besides, with regard to the crimes committed during the incidents that are likely to be the focus of an investigation for the purpose of future cases, the jurisprudence refers to the interplay between crimes and their context, entailing that the gravity of the crimes will be assessed in the context of the incidents that are likely to be the object of the investigation (*Situation in the Republic of Kenya*, 31 March 2010, para. 61). This assessment may include quantitative and qualitative parameters, including factors such as (i) the scale of the alleged crimes (including geographic and temporal intensity), (ii) the nature of the unlawful behaviour or of the crimes allegedly committed, (iii) the means employed for executing the crimes (manner of their commission) and (iv) the impact of the crimes and the harm caused to victims and their families (para. 62). Also, any aggravating circumstances may be considered (*Situation in the Republic of Côte d’Ivoire*, 15 November 2011, para. 204).

Several commentators have suggested that situational gravity in Article 53(1)(b), encompasses a statutory threshold, below which the Court cannot initiate an investigation into a situation. Hence, this term is to be construed strictly legally.⁷ It follows that the gravity assessment under Article 53 (1) (b) is limited to the question whether the gravity threshold is met, according to clear and pre-set criteria. So construed, it does not allow the Prosecutor to select between different situations (deGuzman, 2009, p. 1432). Nevertheless, the Prosecutor interpreted the gravity consideration in

⁷ Consider, for example, Margaret M. deGuzman, “Gravity and the Legitimacy of the International Criminal Court”, in *Fordham International Law Journal*, 2009, vol. 32, p. 1403; Ignaz Stegmiller, *The Pre-Investigation Stage of the ICC, Criteria for Situation Selection*, Duncker and Humblot, Berlin, 2011, p. 332 (<https://www.legal-tools.org/doc/b10182/>).

Article 53 (1)(b) as allowing it to compare different situations and not to *proprio motu* initiate an investigation into the situation of British war crimes in Iraq.⁸ Similarly, in deciding to pursue crimes committed by the Lord's Resistance Army and not those allegedly committed by government forces in the situation in Uganda, the ICC Prosecutor compared the gravity of the crimes committed (*Kony et al.*, 14 October 2005, p. 3).

Doctrine: For the bibliography, see the final comment on Article 53.

Author: Karel De Meester.

⁸ ICC OTP, "Annex to Update on Communications Received by the Office of the Prosecutor: Iraq Response", 9 February 2006, pp. 8–9 (<https://www.legal-tools.org/doc/315cbd/>).

Article 53(1)(c)

(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice

While the first two subparagraphs of Article 53 (1) encompass requirements which should be satisfied for the Prosecutor to proceed with an investigation, subparagraph (c) encompasses considerations which may lead the Prosecutor not to proceed with the investigation of a situation. Hence, this subparagraph does not require the Prosecutor to determine that the investigation is in the interests of justice in order to proceed with an investigation.¹ Unlike Article 53(1)(a) and (b), which require the application of exacting legal requirements, Article 53(1)(c) ICC Statute leaves discretion with the Prosecutor to open an investigation.² The most problematic feature of subparagraph (c) is that the term ‘interests of justice’ has been left undefined. It is unclear as to whether the drafters envisaged a narrower conception of justice (as referring only to ‘criminal justice’) or a broader one (including ‘restorative justice’ interests). While this lack of clarity leaves considerable discretion with the Prosecutor, this discretion is not unchecked. The Prosecutor should inform the Pre-Trial Chamber if a decision to not initiate investigations or prosecutions was solely gauged on the ‘interests of justice’. Furthermore, arbitrariness is avoided by the condition of ‘substantial reasons’, which requires the Prosecutor to produce convincing reasons not to open an investigation. The Prosecutor labelled this concept “one of the most complex aspects of the Treaty”.³ It raises difficult issues, such as whether the reliance on alternative justice mechanisms qualifies as ‘unwilliness’ in the sense of Article 17 ICC Statute.

¹ ICC, *Situation in the Republic of Kenya*, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19, para. 63 (*‘Situation in the Republic of Kenya, 31 March 2010’*) (<https://www.legal-tools.org/doc/338a6f/>).

² ICC, *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Pre-Trial Chamber I, Decision on the Request of the Union of the Comoros to Review the Prosecutor’s Decision not to Initiate an Investigation, 16 July 2015, ICC-01/13-34, para. 14 (<https://www.legal-tools.org/doc/2f876c/>).

³ ICC OTP, “Policy Paper on the Interests of Justice“, ICC-OTP-2007, September 2007, p. 2 (*‘Policy Paper on the Interests of Justice, September 2007’*) (<https://www.legal-tools.org/doc/bb02e5/>).

The Prosecution's understanding of the 'interests of justice' concept is to be found in its Policy Paper on the Interests of Justice. The Prosecution considers the interests of justice to be a "course of last resort" (Policy Paper on the Interests of Justice, September 2007, p. 9). The paper emphasises the exceptional nature of the 'interests of justice' criterion but does not engage in a detailed discussion of the factors that underlie it. Nevertheless, it sets out the four main considerations underlying the OTP's interpretation. Firstly, (i) the paper stresses the exceptional nature of the 'interests of justice' criterion and sets out a general presumption in favour of investigations and prosecutions. This implies that there is no precondition that an investigation is in the interests of justice. Besides, (ii) criteria are to be guided by the object and purpose of the ICC Statute (prevention of serious crimes of concern to the international community through ending impunity) and (iii) a distinction should be drawn between 'interests of justice' and 'interests of peace'. Lastly, (iv) the Prosecution is under a duty to notify the Pre-Trial Chamber of any decision not to investigate or prosecute in the interests of justice (p. 1). The OTP policy paper does not detail all of the factors to be considered when a situation arises, provided that "each situation is different" (pp. 1, 9).

The OTP's policy paper goes some way in clarifying the meaning of some of the other terms used in Article 53 (1)(c) ICC Statute. With regard to the understanding of the 'gravity of the crime' factor, the paper refers (at the situations stage) to the same considerations as with regard to Article 53 (1)(b) and 17 (1)(d) ICC Statute (to know the scale of the crimes, the nature of the crimes, the manner of their commission and their impact) (Policy Paper on the Interests of Justice, September 2007, p. 5). This overlap is understandable, insofar that the reference was seemingly only inserted to satisfy the concern of delegations "that the interests underlying the complementarity principle sufficiently permeate the Statute".⁴

Nevertheless, the inclusion of gravity considerations into Article 53 (1)(b) would not make much sense if the criterion would be identical to the gravity requirement found in Article 53 (1)(c) ICC Statute. The wording of

⁴ Morten Bergsmo, Pieter Kruger and Olympia Bekou, "Article 53", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1373 (<https://www.legal-tools.org/doc/040751/>); Philippa Webb, "The ICC Prosecutor's Discretion not to Proceed in the 'Interests of Justice'", in *Criminal Law Quarterly*, 2005, vol. 50, p. 327.

paragraph (c) ‘gravity of the crime’ suggests that its meaning should be different from subparagraph (b). So far, however, the jurisprudence has not addressed the distinction between these two notions.

As far as the ‘interests of victims’ are concerned, the OTP’s policy paper notes that victims have the interest ‘to see justice done’ but acknowledges that other considerations, such as the safety of witnesses, should be measured in (Policy Paper on the Interests of Justice, September 2007, p. 5). Hence, while this factor will normally weigh in favour of investigation or prosecution, this will not always be the case.

Cross-references:

Rules 104 and 105.

Doctrine: For the bibliography, see the final comment on Article 53.

Author: Karel De Meester.

Article 53(1)(c): Decision Not to Proceed

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

It follows from the last subparagraph of Article 53(1) that in case of a decision not to proceed, solely on the basis that continuing with an investigation is not in the interests of justice, the Prosecutor should inform the Chamber of the reasons thereof. He or she shall inform the Pre-Trial Chamber in writing and promptly after taking that decision (Rule 105(4) ICC RPE).

Doctrine: For the bibliography, see the final comment on Article 53.

Author: Karel De Meester.

Article 53(2)

2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

The second paragraph of Article 53 concerns the situation where the Prosecutor, on the basis of information and evidence gathered during the investigation, decides whether or not there is a “sufficient basis” to continue with a prosecution. The evaluation under Article 53(2) resembles the evaluation under Article 53 (1). Like Article 53 (1), the test for prosecution consists of three prongs. It follows from Regulation 29(5) of the Regulations of the OTP that in selecting potential cases for prosecution within a situation, the Prosecution will *mutatis mutandis* apply the same steps as for the selection of situations and will analyse issues of jurisdiction, admissibility (including gravity) and the interests of justice. This is not to say that there are no differences between the two paragraphs. Overall, the parameters which are found in paragraph (2) are stricter than those for the commencement of an investigation. At this stage, the contours of the likely cases will have been shaped further. The threshold of ‘a sufficient basis for a prosecution’ is stricter than the ‘reasonable basis to proceed’ threshold in Article 53(1). The threshold differs from the ‘reasonable basis’ test in Article 53(1) ICC Statute, insofar that it applies at a different stage. It follows from the travaux préparatoires that such different formulation was a deliberate choice.¹ The threshold has not yet been further defined in the jurisprudence. The negative formulation of the standard under Article 53(2) (“If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution”) betrays that it is presumed that one or more prosecutions will follow from an investigation into a situation.

Cross-reference:

Regulation 38.

Doctrine: For the bibliography, see the final comment on Article 53.

Author: Karel De Meester.

¹ United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court, UN Doc. A/CONF.183/13 (Vol. III), 15 June-17 July 1998, p. 292 (<https://www.legal-tools.org/doc/656f32/>): “in Article 54, the words “reasonable basis” and “sufficient basis” are used intentionally in different paragraphs”.

Article 53(2)(a)

(a) There is not a sufficient legal or factual basis to seek a warrant or summons under Article 58

Rather than requiring a ‘reasonable basis to believe’ that a crime within the jurisdiction of the Court has been or is being committed, Article 53(2)(a) ICC Statute refers to a stricter ‘sufficient basis to seek a warrant or summons under Article 58’ as the threshold for proceeding with a prosecution. It is recalled that the standard for the issuance of a warrant of arrest or a summons to appear, ‘reasonable grounds to believe that the person has committed a crime within the jurisdiction of the court’, has been equated by the Court’s case law with the ‘reasonable suspicion’ standard, which can be traced back to Article 5(1)(c) of the European Convention on Human Rights.¹

Doctrine: For the bibliography, see the final comment on Article 53.

Author: Karel De Meester.

¹ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Annex I: Decision on the Prosecutor’s Application for a warrant of arrest, Article 58, 10 February 2006, ICC-01/04-01//06-1-Corr-Red, para. 12 (<https://www.legal-tools.org/doc/af6679/>).

Article 53(2)(b)

(b) The case is inadmissible under Article 17

Likewise, the consideration of admissibility under Article 53(2)(a) is more specific in nature than under Article 53(1)(b) (“the case is or would be admissible”). Pre-Trial Chamber II confirmed that while the admissibility check at the situation stage encompasses ‘potential cases’, “the test is more specific when it comes to an admissibility determination at the ‘case’ stage”.¹ Nevertheless, although Article 53(2) is concerned with specific cases, it follows from the Court’s case law that the ‘case’ stage only “starts with an application by the Prosecutor under Article 58 of the Statute for the issuance of a warrant of arrest or summons to appear, where one or more suspects has or have been identified” (*Kenyatta et al.*, 30 May 2011, para. 50; *Ruto et al.*, 30 May 2011, para. 54). That said, it is not clear why a case only exists with the ‘Article 58 stage’ of proceedings. It is recalled that Pre-Trial Chamber I defined a ‘case’ in *Lubanga* as including “specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects”.² Its parameters are defined by the suspect under investigation and the conduct that gives rise to criminal liability under the Statute.³ Individuals will most likely already be the focus of investigations before the issuance of a war-

¹ ICC, *Prosecutor v. Ruto et al.*, Pre-Trial Chamber II, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, 30 May 2011, ICC-01/09-01/11-101, para. 54 (*Ruto et al.*, 30 May 2011’) (<https://www.legal-tools.org/doc/dbb0ed/>); *Prosecutor v. Kenyatta et al.*, Pre-Trial Chamber II, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, 30 May 2011, ICC-01/09-02/11-96, para. 50 (*Kenyatta et al.*, 30 May 2011’) (<https://www.legal-tools.org/doc/bb4591/>).

² ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 January 2006, ICC-01/04-101, para. 65 (<https://www.legal-tools.org/doc/2fe2fc/>); *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Annex I: Decision on the Prosecutor’s Application for a warrant of arrest, Article 58, 10 February 2006, ICC-01/04-01//06-1-Corr-Red, para. 21 (*Lubanga*, 10 February 2006’) (<https://www.legal-tools.org/doc/af6679/>).

³ ICC, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Appeals Chamber, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled “Decision on the admissibility of the case against Saif Al-Islam Gaddafi”, 21 May 2014, ICC-01/11-01/11-574, para. 61 (<https://www.legal-tools.org/doc/0499fd/>).

rant of arrest or a summons to appear.⁴ Because of this apparent inconsistency, it has been suggested to introduce an additional distinction between ‘cases in a narrower sense’ and ‘cases in a broader sense’. This entails that a case *stricto sensu* only exists after the issuance of a warrant or summons. However, a case considered in the broader sense (or ‘case hypothesis’) exists already earlier during investigations.⁵

With regard to the admissibility determination at the ‘case’ stage, the Appeals Chamber determined that a case ‘being investigated’ must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court.⁶ The test was first adopted by Pre-Trial Chamber I in the *Lubanga* case.⁷ While, for the reasons explained above, it remains uncertain whether the admissibility determination at the ‘case’ stage also applies at the Article 53(2) stage, the test will in any case be stricter than under Article 53(1)(b).

Doctrine: For the bibliography, see the final comment on Article 53.

Author: Karel De Meester.

⁴ Christoph Safferling, *International Criminal Procedure*, Oxford University Press, 2012, p. 94 (<https://www.legal-tools.org/doc/50a9f2/>) (arguing that the situation becomes a case somewhere between the identification of individuals and the decision to prosecute a case); Ignaz Stegmiller, *The Pre-Investigation Stage of the ICC, Criteria for Situation Selection*, Duncker and Humblot, Berlin, 2011, pp. 119–120, 419 (<https://www.legal-tools.org/doc/b10182/>).

⁵ Stegmiller, 2011, p. 419; compare ICC OTP, “Policy Paper on Case Selection and Prioritisation”, 15 September 2016, paras. 10–11 (<https://www.legal-tools.org/doc/182205/>), referring to “potential cases”.

⁶ ICC, *Prosecutor v. Kenyatta et al.*, Appeals Chamber, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, 30 August 2011, ICC-01/09-02/11-274, para. 39 (<https://www.legal-tools.org/doc/c21f06/>); *Prosecutor v. Ruto et al.*, Appeals Chamber, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, 30 August 2011, ICC-01/09-01/11-307, para. 40 (<https://www.legal-tools.org/doc/ac5d46/>).

⁷ *Lubanga*, 10 February 2006, para. 37; see also ICC, *Prosecutor v. Harun and Kushayb*, Pre-Trial Chamber I, Decision on the Prosecution application under Article 58(7) of the Statute, 27 April 2007, ICC-02-05-01/07, paras. 24–25 (<https://www.legal-tools.org/doc/0b8412/>).

Article 53(2)(c)

(c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime;

Finally, also the formulation of the ‘interests of justice’ requirement differs slightly from the formulation in Article 53(1)(c). In line with Article 53(1), discretion regarding what cases to prosecute mainly enters through the consideration of this requirement.¹ The ‘interests of justice’ criterion in Article 53 (2) (c) is formulated broader than Article 53(1)(c). From the formulation ‘taking into consideration all circumstances’ clearly follows the non-exhaustive nature of the enumeration of factors to be considered. Criteria expressly listed are: (1) the gravity of the crime, (2) the interests of victims, (3) the age or the infirmity of the alleged perpetrator and (4) his or her role in the alleged crime. These two latter criteria, which refer to the particular circumstances of the accused, are not included under Article 53(1)(c) given that, at that stage, the accused will often not be known yet. With regard to these ‘particular circumstances of the accused’ (Article 53(2)(c) ICC Statute), the OTP’s strategy is to focus on those bearing the greatest degree of responsibility, and to consider factors including “the alleged status or hierarchical level of the accused or alleged implication in particularly serious or notorious crimes”, or “the significance of the role of the accused in the overall commission of the crimes and the degree of the accused’s involvement”.² In some instances however, these ‘particular circumstances of the accused’ will prevent the accused from being prosecuted; for example, if the accused were to be terminally ill or if a suspect is the victim of serious human rights abuses (Policy Paper on the Interests of Justice, September 2007, p. 7). Furthermore, depending on the facts of the case or the situation under consideration, the Prosecutor’s strategy is to also consider (i) other justice mechanisms and (ii) peace processes (pp. 7–9).

¹ See, for example, Giuliano Turone, “Powers and Duties of the Prosecutor”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 1173 (<https://www.legal-tools.org/doc/01addc/>).

² ICC OTP, “Policy Paper on the Interests of Justice”, ICC-OTP-2007, September 2007, p. 2 (‘Policy Paper on the Interests of Justice, September 2007’) (<https://www.legal-tools.org/doc/bb02e5/>).

Cross-reference:

Rule 106.

Doctrine: For the bibliography, see the final comment on Article 53.

Author: Karel De Meester.

Article 53(3)

3. (a) At the request of the State making a referral under Article 14 or the Security Council under Article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.

(b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.

Subparagraph (3) includes an important check, in the form of judicial control, over prosecutorial discretion. Two scenarios are included. Firstly, (a) in case of a referral, the Pre-Trial Chamber may review the Prosecutor's decision to not proceed with an investigation or prosecution. The Pre-Trial Chamber may do so upon request within 90 days following notification of the decision (Rule 107(1) ICC RPE). The Pre-Trial Chamber's powers under Article 53 (3) (a) of the Statute are triggered by a request for review from the referring State or the Security Council.¹ On this basis, Pre-Trial Chamber I reviewed the Prosecutor's decision not to initiate an investigation in the situation with respect to the 31 May 2010 Israeli raid on the Humanitarian Aid Flotilla bound for the Gaza Strip.² The Pre-Trial Chamber clarified that its power under Article 53(3)(a) differs fundamentally from the competence it possesses pursuant to Article 15 ICC Statute – which serves as a check on the powers of an independent prosecutor – in that it presupposes the existence of a disagreement between the Prosecutor and the referring entity. Hence, the review is limited to the parameters of

¹ ICC, *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Appeal Chamber, Decision on the Admissibility of the Prosecutor's Appeal against the "Decision on the Request of the Union of the Comoros to Review the Prosecutor's Decision not to Initiate an Investigation", 6 November 2015, ICC-01/13-51, para. 56 (<https://www.legal-tools.org/doc/a43856/>).

² ICC, *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Pre-Trial Chamber I, Decision on the Request of the Union of the Comoros to Review the Prosecutor's Decision not to Initiate an Investigation, 16 July 2015, ICC-01/13-34 ('*Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, 16 July 2015') (<https://www.legal-tools.org/doc/2f876c/>).

the disagreement and does not imply a review *de novo* of the Prosecutor's assessment pursuant to Article 53(1)(a) ICC Statute (*Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, 16 July 2015, paras. 9–10). Secondly, if a decision not to proceed is solely based on the interests of justice, the Pre-Trial Chamber may itself review a decision to not proceed within 180 days following notification (Rule 109 ICC RPE). Evidently, this review power requires that a decision not to proceed was taken by the Prosecutor.³

This review mechanism presupposes that the referring State or the Security Council (53(3)(a)) or the Pre-Trial Chamber (53(3)(b)) be informed of any prosecutorial decision taken to not investigate or to not prosecute. In this respect, a duty of notification has been included in Rules 105 and 106 ICC RPE respectively. It is in the discretionary nature of this review obligation ("the Pre-Trial Chamber may review") that potentially lays its most important limitation. No obligation is incumbent on the Pre-Trial Chamber to act upon a request. To meaningfully exercise its task, the Pre-Trial Chamber may request the Prosecutor to transmit the necessary information or documents in his or her possession or the summaries thereof. In case the Pre-Trial Chamber decides to exercise its review function upon a request by the referring State or the Security Council (Article 53(3)(a)), this power is provided for under Rule 107 (2) and (3) ICC RPE. If the Pre-Trial Chamber exercises its power to *proprio motu* review a decision by the Prosecutor not to proceed, Regulation 48(1) of the Regulations of the Court encompasses the Pre-Trial Chamber's power to 'request the Prosecutor to provide specific or additional information or documents in his or her possession, or summaries thereof, that the Pre-Trial Chamber considers necessary in order to exercise the functions and responsibilities set forth in Article 53(3)(b)'. However, the existence of such a power, in the absence of any express decision not to proceed, has occasionally been contested by the Prosecutor. In the Uganda situation, Pre-Trial Chamber II convened a status conference in order to seek further information from the Prosecutor confirming that the Prosecution did not intend to further investigate past crimes and that the investigation was nearing completion.⁴ The

³ ICC, *Situation in the Republic of Kenya*, Pre-Trial Chamber II, Decision on the "Victims' Request for Review of the Prosecution's Decision to Cease active Investigations", 5 November 2015, ICC-01/09-159, para. 21 (<https://www.legal-tools.org/doc/18b367/>).

⁴ ICC, *Prosecutor v. Kony et al.*, Pre-Trial Chamber II, Decision to Convene a Status Conference on the Investigation in the Situation in Uganda in Relation to the Application of Article

Prosecution subsequently denied that a decision not to prosecute further crimes had been taken.⁵ Whenever the Pre-Trial Chamber requests additional information from the Prosecutor, it should take measures to protect the documents and the safety of the victims, witnesses and family members (Rule 107(3) ICC RPE and Regulation 48(2) of the Regulations of the Court).

In the scenario of a request for review by a State or by the Security Council, the Pre-Trial Chamber may either confirm the decision by the Prosecutor or request the reconsideration of that determination, an obligation which the Prosecutor should fulfil as soon as possible. The Pre-Trial Chamber will request the Prosecutor to reconsider the decision “if it concludes that the validity of the decision is materially affected by an error, whether it is an error of procedure, an error of law, or an error of fact” (*Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, 16 July 2015, para. 12). Nothing prevents the Prosecutor from reaching the same conclusion upon reconsideration. While Article 53(3)(a) only speaks of referrals, nothing seems to prevent the information provider (other than a State Party or the Security Council) from filing a motion to the Chamber prospecting the reasons for which a judicial review on its own initiative could be desirable and practicable.⁶

If a negative decision is solely based on Article 53(1)(c) or Article 53(2)(c) the Prosecution’s decision may only become effective if the Pre-Trial Chamber confirms it. It follows that the Pre-Trial Chamber’s revision may lead to a judicial order to investigate or prosecute (“shall”) (Rule 110(2) ICC RPE). Such a possibility is known to some civil law jurisdictions. However, the term ‘investigation on judicial command’ only makes sense in case of a *notitia criminis* referred by another source. Besides, the possibility of an investigation on judicial command may be problematic

53, 2 December 2005, ICC-02/04-01/05-68, paras. 8–9 (<https://www.legal-tools.org/doc/1adafl/>).

⁵ ICC, *Prosecutor v. Kony et al.*, Pre-Trial Chamber II, OTP Submission Providing Information on Status of the Investigation In Anticipation of the Status Conference To Be Held on 13 January 2006, 11 January 2006, ICC-02/04-01/05-76, para. 8 (<https://www.legal-tools.org/doc/5d9c37/>).

⁶ Giuliano Turone, “Powers and Duties of the Prosecutor”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 1158 (<https://www.legal-tools.org/doc/01addc/>).

insofar that nothing prevents the Prosecutor from conducting a “perfunctory and superficial” investigation.⁷

Some commentators have suggested there exists a duty to review the Prosecutor’s decision (“In order to be valid such decisions must be confirmed by the PTC”).⁸ Others have interpreted this provision as implying that the decision not to proceed with an investigation or prosecution only becomes effective if the Pre-Trial Chamber reviews the Prosecutor’s decision.⁹ However, a textual interpretation suggests that judicial review is not a prerequisite for the Prosecutor’s decision to be effective in case a decision not to proceed is solely based on the ‘interests of justice’. Logically, the second sentence of paragraph (b) of Article 53(3) ICC Statute (“[i]n such a case”) refers to the situation outlined in the previous sentence, and leaves discretion to the Pre-Trial Chamber whether or not to review such a decision. Overall, however, the structure of Article 53(3) suggests that closer scrutiny is provided for in case of a decision not to investigate or prosecute, solely based on the interests of justice.

In the *Situation in the Democratic Republic of the Congo*, the Prosecutor submitted that no decision not to proceed against Mr. Bemba on the basis of ‘the interests of justice’ with respect to crimes allegedly committed in Ituri had been taken. Hence, Pre-Trial Chamber I concluded that there was no basis for it to exercise its review powers under Article 53(3)(b).¹⁰

Cross-references:

Rules 107, 108, 109 and 110.

Regulation 38.

⁷ William A. Schabas, *An Introduction to International Criminal Court*, 6th. ed., Cambridge University Press, 2020, pp. 258–259 (<https://www.legal-tools.org/doc/8ef137/>).

⁸ Morten Bergsmo, Pieter Kruger and Olympia Bekou, “Article 53”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1378–1379 (<https://www.legal-tools.org/doc/040751/>).

⁹ Florian Razesberger, *The International Criminal Court: The Principle of Complementarity*, Peter Lang, Frankfurt am Main, 2006, p. 108 (<https://www.legal-tools.org/doc/830501/>); Bruno Demeyere, Sten Verhoeven and Jan Wouters, “The International Criminal Court’s Office of the Prosecutor: Navigating between Independence and Accountability?”, in *International Criminal Law Review*, 2008, vol. 8, pp. 297, 302.

¹⁰ ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the request of the legal representative of victims VPRS 3 and VPRS 6 to review an alleged decision of the Prosecutor not to proceed, 25 October 2010, ICC-01/04-582, p. 4 (<https://www.legal-tools.org/doc/6897f0/>).

Doctrine: For the bibliography, see the final comment on Article 53.

Author: Karel De Meester.

Article 53(4)

4. The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.

Pursuant to final subparagraph Article 53(4), the Prosecutor possesses the discretionary power to review a decision not to proceed. The consequence of this provision is that, based on “new facts or information”, a referral may “at any time” be reactivated. For that purpose, the Prosecutor will first re-activate the preliminary examination. For example, the ICC Prosecutor has re-opened the preliminary examination in the situation in Iraq on the basis of new information. This entails that the Prosecutor will reconsider, in light of the new information, whether the criteria under Article 53(1) ICC Statute for initiating an investigation are met.¹

Cross-reference:

Rule 92.

Doctrine:

1. Morten Bergsmo, Pieter Kruger and Olympia Bekou, “Article 53”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1365–1380 (<https://www.legal-tools.org/doc/040751/>).
2. Karel De Meester *et al.*, “Investigation, Coercive Measures, Arrest and Surrender”, in Göran Sluiter, Håkan Friman, Suzannah Linton, Salvatore Zappalà and Sergey Vasiliev (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, pp. 171–380 (<https://www.legal-tools.org/doc/bcad4c/>).
3. Margaret M. deGuzman, “Gravity and the Legitimacy of the International Criminal Court”, in *Fordham International Law Journal*, 2009, vol. 32, pp. 1403, 1432 (<https://www.legal-tools.org/doc/7130d7/>).
4. Silvia A. Fernández de Gurmendi, “The Role of the International Prosecutor”, in Roy S. Lee (ed.), *The International Criminal Court: The Mak-*

¹ ICC, “Prosecutor of the International Criminal Court, Fatou Bensouda, Re-opens the preliminary examination of the situation in Iraq”, Press Release, 13 May 2014 (<https://www.legal-tools.org/doc/d9d9c5/>).

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- ing of the Rome Statute, Issues, Negotiations, Results*, Kluwer Law International, The Hague, 1999, p. 182 (<https://www.legal-tools.org/doc/d71078/>).
5. Geert-Jan Alexander Knoops, “Challenging the Legitimacy of Initiating Contemporary International Criminal Proceedings: Rethinking Prosecutorial Discretionary Powers from a Legal, Ethical and Political Perspective”, in *Criminal Law Forum*, 2005, vol. 15, p. 377 (<https://www.legal-tools.org/doc/bddf8b/>).
 6. Héctor Olásolo, “The Prosecutor of the ICC before the Initiation of Investigations: a Quasi-Judicial or Political Body?”, in *International Criminal Law Review*, 2003, vol. 3, p. 132.
 7. Florian Razesberger, *The International Criminal Court: The Principle of Complementarity*, Peter Lang, Frankfurt am Main, 2006, p. 108 (<https://www.legal-tools.org/doc/830501/>).
 8. Christopher Safferling, *International Criminal Procedure*, Oxford University Press, 2012, p. 94 (<https://www.legal-tools.org/doc/50a9f2/>).
 9. William A. Schabas, *An Introduction to the International Criminal Court*, 6th. ed., Cambridge University Press, 2020 (<https://www.legal-tools.org/doc/8ef137/>).
 10. Carsten Stahn, “Judicial Review of Prosecutorial Discretion: Five Years on”, in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Koninklijke Brill, Leiden, 2009, pp. 247–279; 249, 257 (<https://www.legal-tools.org/doc/5d1db6/>).
 11. Ignaz Stegmiller, *The Pre-Investigation Stage of the ICC*, Duncker & Humblot, Berlin, 2011, pp. 119–120; 253, 332, 419 (<https://www.legal-tools.org/doc/b10182/>).
 12. Ignaz Stegmiller, “The Pre-Investigation Stage of the ICTY and the ICC Compared”, in Thomas Kreussmann (ed.), *ICTY: Towards a Fair Trial?*, Neuer Wissenschaftlicher Verlag, Wien/Graz, 2008, pp. 311–40 (<https://www.legal-tools.org/doc/d98302/>).
 13. Giuliano Turone, “Powers and Duties of the Prosecutor”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 1137–80 (<https://www.legal-tools.org/doc/01addc/>).
 14. Manuel J. Ventura, “The ‘Reasonable Basis to Proceed’ Threshold in the Kenya and Côte d’Ivoire Proprio Motu Investigation Decisions:
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The International Criminal Court’s Lowest Evidentiary Standard?”, in *The Law and Practice of International Courts and Tribunals*, 2013, vol. 12, p. 67 (<https://www.legal-tools.org/doc/2679a6/>).

15. Philippa Webb, “The ICC Prosecutor’s Discretion not to Proceed in the ‘Interests of Justice’“, in *Criminal Law Quarterly*, 2005, vol. 50, p. 327 (<https://www.legal-tools.org/doc/4103c9/>).
16. Bruno Demeyere, Sten Verhoeven and Jan Wouters, “The International Criminal Court’s Office of the Prosecutor: Navigating between Independence and Accountability?”, in *International Criminal Law Review*, 2008, vol. 8, pp. 297, 302 (<https://www.legal-tools.org/doc/58bd4a/>).

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Article 54

Duties and Powers of the Prosecutor with Respect to Investigations

General Remarks:

Article 54 is the general provision detailing the duties and powers of the Prosecutor in the conduct of investigations. These duties and powers are relevant to the investigation ‘proper’, which follows the preliminary examination and the initiation of the investigation under Article 53(1) ICC Statute. The duties incumbent on the Prosecutor are outlined in the first paragraph of Article 54 (“The Prosecutor shall”), whereas the powers are outlined in paragraphs 2 and 3 (“The Prosecutor may”).

Doctrine: For the bibliography, see the final comment on Article 54.

Author: Karel De Meester.

Article 54(1)(a)

1. The Prosecutor shall:

(a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;

The first subparagraph of Article 54 posits the central objective of the Prosecutor’s investigative efforts, namely “to establish the truth”. Therefore, the Prosecutor should not solely collect evidence with the aim of securing a conviction. Moreover, it follows from the first subparagraph of Article 54(1) that all investigative activities should be directed towards the identification of evidence that can eventually be presented in open court.¹ According to Trial Chamber V, Article 54(1)(a) obligates the Prosecutor to “make reasonable efforts to obtain exculpatory evidence” once it is determined that there are reasonable grounds to believe that information not in the Prosecutor’s possession is potentially exculpatory.²

In placing an obligation on the Prosecutor to “investigate incriminating and exonerating circumstances equally”, the ICC Statute departs from how the Prosecutor’s role is conceived at the *ad hoc* tribunals. This principle of objectivity entails that the Prosecutor is expected to act as an ‘officer of justice’, rather than as a partisan actor. Although the jurisprudence of the *ad hoc* tribunals, the SCSL or the STL has also occasionally referred to the Prosecutor’s role in terms of an ‘organ of justice’, this falls short of an active duty incumbent on the Prosecutor to go out and gather exonerating evidence, over and above the disclosure obligations that pertain to (potentially) exonerating information and evidence in the Prosecution’s possession.³

¹ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008”, 21 October 2008, ICC-01/04-01/06-1486, para. 41 (<https://www.legal-tools.org/doc/485c2d/>).

² ICC, *Prosecutor v. Ruto et al.*, Trial Chamber V, Decision on Joint Defence Application for Further Prosecution Investigation Concerning [REDACTED] of Certain Prosecution Witnesses, 12 January 2015, ICC-01/09-01/11-1655, para. 32 (<https://www.legal-tools.org/doc/8a5544/>).

³ Compare ICTY, *Prosecutor v. Kupreškić et al.*, Trial Chamber II, Decision on Communication between the Parties and their Witnesses, 21 September 1998, IT-95-16, p. 3

This principle of objectivity is typically associated with civil law criminal justice systems. It was included in the Statute “to build a bridge between the adversarial common law approach to the role of the Prosecutor and the role of the Investigating Judge in certain civil law systems”.⁴ It has also been incorporated in Article 49 (b) and (c) of the Code of Conduct for the Office of the Prosecutor.

The Prosecution has understood its duty to investigate into potentially exonerating information and evidence to be a ‘continuous’ and ‘simultaneous’ process. Therefore, the search for such information or evidence is not the task of a separate investigative team. In the event that the Prosecutor encounters potentially exonerating information by questioning witnesses, the Prosecution will actively pursue such leads and try to identify new witnesses and evidence.⁵ The principle of objectivity may not always be easy to reconcile with the more adversarial nature of proceedings before the Court. A certain tension exists between the role of the Prosecutor in pursuing criminal conduct on the one hand, and to act as an officer of justice on the other hand. The difficulties for the Prosecutor to effectively realise a non-partisan attitude in the conduct of the investigation came to the front in a number of cases before the Court. In *Mbarushimana*, for example, the Prosecution was reprimanded by Pre-Trial Chamber II, which found the confrontational questioning methods used by some investigators to be inappropriate in light of their duty of objectivity and held that such

(<https://www.legal-tools.org/doc/6e80ec/>); ICTR, *Prosecutor v. Barayagwiza*, Appeals Chamber, Decision, Separate Opinion of Judge Shahabuddeen, 31 March 2003, ICTR-99-52, paras. 67–68 (<https://www.legal-tools.org/doc/1c0fe7/>); SCSL, *Prosecutor v. Sesay*, Presidency, Decision on Complaint Pursuant to Article 32 of the Code of Professional Conduct for Counsel With the Right of Audience before the Special Court for Sierra Leone, 20 February 2006, SCSL-2004-15, para. 30 (<https://www.legal-tools.org/doc/b04446/>); STL, *El Sayed*, Order Regarding the Detention of Persons Detained in Lebanon in Connection with the Case of the Attack against Prime Minister Rafiq Hariri and Others, 29 April 2009, CH/PTJ/2009/06, para. 25 (<https://www.legal-tools.org/doc/c4a54b/>).

- ⁴ Morten Bergsmo and Pieter Kruger, “Article 54”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2nd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2008, p. 1078 (<https://www.legal-tools.org/doc/a9e9f7/>).
- ⁵ ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, Transcript of hearing, 25 November 2009, ICC-01/04-01/07-T-81-Red, pp. 16–17, 34 (*Katanga and Ngudjolo*, 25 November 2009’) (<https://www.legal-tools.org/doc/fd1869/>).

techniques may significantly weaken the probative value of evidence so obtained.⁶ More precisely, the Pre-Trial Chamber held that:

[t]he reader of the transcripts of interviews [of insider witnesses] is repeatedly left with the impression that the investigator is so attached to his or her theory or assumption that he or she does not refrain from putting questions in leading terms and from showing resentment, impatience or disappointment whenever the witness replies in terms which are not entirely in line with his or her expectations. Suggesting that the witness may not be “really remembering exactly what was said”, complaining about having “to milk out” from the witness details which are of relevance to the investigation, lamenting that the witness does not “really understand what is important” to the investigators in the case, or hinting at the fact that the witness may be “trying to cover” for the suspect, seem hardly reconcilable with a professional and impartial technique of witness questioning (*Mbarushimana*, 16 December 2011, para. 51).

Reference may also be made to the reliance, in the Prosecutor’s investigation into the situation in the DRC, on an intermediary who previously worked for the Congolese intelligence services and who was assisted by at least one other person who, at the time being, was employed by the Congolese intelligence services. The intermediary (‘P-0316’) testified that he had always remained loyal to his government.⁷ The Trial Chamber raised its concern “that the prosecution used an individual as an intermediary with such close ties to the government that had originally referred the situation in the DRC to the Court” (*Lubanga*, 14 March 2012, para. 368).

Another feature often associated with a Prosecutor bound by a principle of objectivity, to know the possibility for the Defence to request the Prosecutor to conduct certain investigative actions, is not provided for under the ICC Statute. However, it seems that the Prosecution is willing to entertain such requests (*Katanga and Ngudjolo*, 25 November 2009, p. 72).

⁶ ICC, *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 16 December 2011, ICC-01/04-01/10-465-Red, para. 51 (‘*Mbarushimana*, 16 December 2011’) (<https://www.legal-tools.org/doc/63028f/>).

⁷ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, para. 367 (‘*Lubanga*, 14 March 2012’) (<https://www.legal-tools.org/doc/677866/>).

In the *Lubanga* case, the Appeals Chamber clarified that the obligation “to establish the truth” is not limited to the period of time prior to the confirmation of charges.⁸ In *Kenyatta*, Trial Chamber V interpreted (Judge Chile Eboe-Osuji dissenting on this point) the prosecutorial duties to “establish the truth” and to “extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally” under Article 54(1)(a) as imposing an obligation to properly investigate the case against the accused prior to confirmation. These obligations entail that “[t]he Prosecutor is not responsible for establishing the truth only at the trial stage by presenting a complete evidentiary record, but is also expected to present a reliable version of events at the confirmation hearing”. Therefore, “[t]he Prosecutor should not seek to have the charges against a suspect confirmed before having conducted a full and thorough investigation in order to have a sufficient overview of the evidence available and the theory of the case”.⁹ *In casu*, the Trial Chamber was concerned about “the considerable volume of evidence collected by the Prosecution post-confirmation” (*ibid.*, para. 118). According to the Trial Chamber, the possibility to continue investigations post-confirmation “is not an unlimited prerogative” (*Kenyatta*, 26 April 2013, para. 119). This is in line with the holding of the Appeals Chamber in the *Mbarushimana* case that the Prosecutor should largely have completed the investigations prior to the confirmation hearing.¹⁰ While this does not prohibit the Prosecutor from conducting investigations post-confirmation in exceptional circumstances, for example when it concerns evidence the Prosecutor could not have obtained prior to confirmation “with reasonable diligence”, the Prose-

⁸ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence”, 13 October 2006, ICC-01/04-01/06-568, para. 52 (*Lubanga*, 13 October 2006’) (<https://www.legal-tools.org/doc/7813d4/>).

⁹ ICC, *Prosecutor v. Kenyatta*, Trial Chamber V, Decision on defence application pursuant to Article 64(4) and related requests, 26 April 2013, ICC-01/09-02/11-728, para. 119 (*Kenyatta*, 26 April 2013’) (<https://www.legal-tools.org/doc/da5089/>).

¹⁰ ICC, *Prosecutor v. Mbarushimana*, Appeals Chamber, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I of 16 December 2011 Entitled “Decision on the Confirmation of Charges”, 30 May 2012, ICC-01/04-01/10-514, para. 44 (<https://www.legal-tools.org/doc/6ead30/>); consider also *Lubanga*, 13 October 2006, para. 54: “ideally, it would be desirable for the investigation to be complete by the time of the confirmation hearing”.

cution should not continue with gathering evidence it could reasonably have been expected to have collected prior to confirmation (*Kenyatta*, 26 April 2013, para. 121). Moreover, post confirmation hearing investigations should be finished as soon as possible.¹¹

The underlying problem is the silence of the ICC Statute on the temporal limitation of the investigation phase. There is no requirement in the Statute for the Prosecutor to have all investigations concluded before the confirmation of charges. The risks inherent in allowing the Prosecutor to continue with investigations post-confirmation were explained by Judge Kaul in his dissenting opinion to the Decision on the Confirmation of Charges in *Muthaura, Muigai Kenyatta and Hussein Ali*. He referred to “the possibility, if not the risk, that [the] limited permission of post-confirmation investigations in practice might be too broadly interpreted by the Prosecutor, possibly as some kind of license to investigate whenever, even after confirmation, thus enabling the Prosecutor also to allow a phased approach for the gathering of evidence”.¹²

Not provided for is judicial oversight of the Prosecutor’s compliance with its obligations under Article 54(1)(a). This prevents the Pre-Trial Chamber from intervening into the Prosecutor’s activities. That said, the Prosecutor’s conduct during investigations may be taken into account, as an issue of fact, when the Pre-Trial Chamber exercises its powers under the ICC Statute.¹³

Doctrine: For the bibliography, see the final comment on Article 54.

Author: Karel De Meester.

¹¹ ICC, *Prosecutor v. Banda and Jerbo*, Trial Chamber IV, Decision on the re-interviews of six witnesses by the prosecution, 6 June 2011, ICC-02/05-03/09-158, para. 13 (<https://www.legal-tools.org/doc/d97e04/>).

¹² ICC, *Prosecutor v. Muthaura and Kenyatta*, Pre-Trial Chamber I, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute: Dissenting Opinion by Judge Hans-Peter Kaul, 23 January 2012, ICC-01/09-02/11-382-Red, para. 56 (<https://www.legal-tools.org/doc/4972c0/>); *Prosecutor v. Ruto et al.*, Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute: Dissenting Opinion by Judge Hans-Peter Kaul, 23 January 2012, ICC-01/09-01/11-373, para. 51 (<https://www.legal-tools.org/doc/96c3c2/>).

¹³ ICC, *Situation in the Republic of Kenya*, Pre-Trial Chamber II, Decision on the “Victims’ Request for Review of the Prosecution’s Decision to Cease active Investigations”, 5 November 2015, ICC-01/09-159, para. 13 (<https://www.legal-tools.org/doc/18b367/>).

Article 54(1)(b)

(b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in Article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children; and

Subparagraph (b) of the first paragraph provides the Prosecutor with the authority to determine the measures he or she considers ‘appropriate’. Clearly, this provision is to be read together with the Prosecutor’s obligation ‘to establish the truth’ which is found under subparagraph (a).¹ Unlike subparagraph (a), subparagraph (b) concerns both the ‘investigation’ and the ‘prosecution’. The second part of the sentence expressly charges the Prosecutor with respecting the interests and personal circumstances of victims and witnesses. Several of such personal circumstances are included, such as age, gender, and the nature of the crime. Reference is also made to sexual violence, gender violence and violence against children. Article 54(1)(b) is not to be interpreted as to require the prior consent of a parent or guardian for the testimony of a child.²

The Prosecution’s understanding of its obligation to ensure “effective investigation and prosecution” under Article 54(1)(b) is further detailed in Article 51 of the Prosecutor’s Code of Conduct. According to the Prosecutor, this provision also provides for a legal basis allowing the Prosecutor to prioritise between cases.³

Doctrine: For the bibliography, see the final comment on Article 54.

Author: Karel De Meester.

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- ¹ Morten Bergsmo and Pieter Kruger, “Article 54”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2nd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2008, p. 1078 (<https://www.legal-tools.org/doc/a9e9f7/>).
 - ² ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, paras. 144–148 (<https://www.legal-tools.org/doc/67a9ec/>).
 - ³ See ICC OTP, “Policy Paper on Case Selection and Prioritisation”, 15 September 2016, para. 49 (<https://www.legal-tools.org/doc/182205/>).

Article 54(1)(c)

(c) Fully respect the rights of persons arising under this Statute.

Finally, under paragraph (1), the Prosecutor is to respect the rights of all persons under the ICC Statute. In the Kenyatta case, Trial Chamber V found that the Prosecutor failed to fully respect the rights of persons under the Statute, insofar as it failed to conduct a full and thorough investigation of the case against the accused during its pre-confirmation investigation.¹ Likewise, Article 54(1)(c) will be breached in case confidentiality agreements concluded by the Prosecution under Article 54(3)(e) prevent it from honouring its disclosure obligations under Article 67(2) ICC Statute and Rule 77 of the RPE.²

Doctrine: For the bibliography, see the final comment on Article 54.

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¹ ICC, *Prosecutor v. Kenyatta*, Trial Chamber V, Decision on defence application pursuant to Article 64(4) and related requests, 26 April 2013, ICC-01/09-02/11-728, para. 123 (<https://www.legal-tools.org/doc/da5089/>); and the Concurring Opinion of Judge Christine Van den Wyngaert, para. 5 (<https://www.legal-tools.org/doc/917ec7/>).

² ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008”, 21 October 2008, ICC-01/04-01/06-1486, paras. 43 ff. (<https://www.legal-tools.org/doc/485c2d/>).

Article 54(2)

- 2. The Prosecutor may conduct investigations on the territory of a State:**
- (a) In accordance with the provisions of Part 9; or**
 - (b) As authorized by the Pre-Trial Chamber under Article 57, paragraph 3 (d).**

The second paragraph of Article 54 sets out the requirements for the Prosecutor to conduct investigations directly on the territory of a State. The importance of this possibility for the Prosecutor to independently gather evidence on the territory of States is easily understood. Nevertheless, both limbs of this paragraph put significant limitations on the ability of the Prosecutor to gather evidence and information autonomously and independently on the territory of States. Article 54(2) of the Statute only allows the Prosecutor to conduct on-site investigations in two scenarios, to know ‘in accordance with Part 9’ or ‘under Article 57, paragraph 3 (d)’. Firstly, Article 99(1) of the ICC Statute on the execution of requests for assistance provides for the general rule that the Prosecutor will have to ensure cooperation of the State concerned and that a request for assistance will be sent to the requested State. This provision allows the requested State to determine whether or not the Prosecutor can be present and assist in the execution of the investigative act on its territory. An exception is provided for under Article 99(4), which allows the Prosecutor to exceptionally execute such requests directly on the territory of a State. However, this course of action is limited to situations where it is “without prejudice to other Articles in Part 9”, where it “is necessary for the successful execution of a request”, and where the request “can be executed without any compulsory measures”. Several examples of such non-compulsory measures are provided for: the interview of or taking evidence from a person on a voluntary basis and the examination without modification of a public site or other public place. It is clear that the above requirements substantially limit the prospects for the Prosecutor to conduct on-site investigations. For example, Article 99(4) does not allow the Prosecutor to conduct search and seizure operations directly on the territory of a State, because these operations qualify as coercive measures. This contrasts with the jurisprudence of the *ad hoc* tribunals, which allows for the direct enforcement of coercive acts on the territory of States, without directing a request for legal assistance to the national authorities concerned. For example, an ICTY Trial Chamber

held in the *Kordić and Čerkez* case that the execution of coercive measures by the Prosecutor, encompassing the taking of enforcement action, directly on the territory of Bosnia Herzegovina, was “perfectly within the powers of the Prosecution provided for in the Statute”.¹

The second limb allows for the conduct of investigative acts directly on the territory of a State, when this has been authorised by the Pre-Trial Chamber under Article 57(3)(d). However, this avenue is limited to ‘failed State’ scenarios. Prior to authorising the conduct of investigations directly under Article 57(3)(d), the Pre-Trial Chamber should determine that “the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9”. In contrast to Article 99(4), under Article 57(3)(d) the Pre-Trial Chamber may authorise the Prosecutor to execute coercive measures directly on the territory of a State. In such a case, the discharge of the Court’s mandate and effective prosecution justify the power of the Prosecutor to exercise on-site investigations including forcible measures.²

Doctrine: For the bibliography, see the final comment on Article 54.

Author: Karel De Meester.

¹ ICTY, *Prosecutor v. Kordić and Čerkez*, Trial Chamber III, Decision stating Reasons for Trial Chamber’s Ruling of 1 June 1999 Rejecting Defence Motion to Suppress Evidence, 25 June 1999, IT-95-14/2, p. 6 (<https://www.legal-tools.org/doc/557f1c/>); consider also *Prosecutor v. Kordić and Čerkez*, Trial Chamber III, Transcript, 31 May 1999, IT-95-14/2, pp. 2975–3045 (<https://www.legal-tools.org/doc/09b157/>); *Prosecutor v. Naletilić and Martić*, Appeals Chamber, Judgement, 3 May 2006, IT-98-34-A, para. 238 (<https://www.legal-tools.org/doc/94b2f8/>).

² Göran Sluiter, *International Criminal Adjudication and the Collection of Evidence*, Intersentia, Antwerp, 2002, p. 309 (<https://www.legal-tools.org/doc/86d97b/>); Fabricio Guariglia, “Article 57”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2nd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2008, pp. 1128–1129 (<https://www.legal-tools.org/doc/a9e9f7/>).

Article 54(3)

3. The Prosecutor may:

The third paragraph of Article 54 contains six subparagraphs. They detail the necessary powers for the Prosecutor to fulfil its responsibility, under Article 42(1) ICC Statute, to conduct investigations as well as the measures he or she can take to guarantee their efficacy.

Doctrine: For the bibliography, see the final comment on Article 54.

Author: Karel De Meester.

Article 54(3)(a)

(a) Collect and examine evidence;

The power to “collect and examine evidence” is broadly formulated. It may include a wide array of possible investigative measures. Nevertheless, these powers should be understood in light of the limitations under paragraph 2 to the possibility for the Prosecutor to directly execute investigative acts on the territory of States.

Doctrine: For the bibliography, see the final comment on Article 54.

Author: Karel De Meester.

Article 54(3)(b)

(b) Request the presence of and question persons being investigated, victims and witnesses;

Under subparagraph (b), the Prosecutor is allowed to “request the presence of and question persons being investigated, victims and witnesses” in the course of the investigation. It follows from the wording of Article 54(3)(b) (“request the presence”) that this prosecutorial power is limited to taking statements on a voluntary basis. Hence, it does not offer a basis for a witness to be compelled to be interviewed by the Prosecutor in the course of the investigation. While the ICTY and the ICTR Prosecutor also lack the power to compel an unwilling party to submit to a pre-trial interview, the Trial Chamber may subpoena an unwilling person to attend at a nominated place and time in order to be interviewed.¹ Trial Chamber I held that Article 54(3)(a) does not provide a basis for the substantive preparation of witnesses prior to trial.²

A detailed regulation on the recording of suspect interviews and of interviews with victims and witnesses is laid down in Rules 112 and 111 of the ICC RPE respectively. Pursuant to Article 93 (1)(b) and (c) of the ICC Statute, States Parties are under an obligation to comply with requests from the ICC to provide assistance to the taking of evidence, including testimony under oath and to the questioning of persons investigated or prosecuted. In such a case, Article 99(1) ICC Statute leaves broad discretion for the Prosecution to participate in the questioning of the suspect or accused person by the requested State. Moreover, in case this is necessary for the successful execution of the request and where the suspect participates in the interview on a voluntary basis, the Prosecutor may him or herself interview a suspect on the territory of a State party without further state assistance.

¹ Consider, for example, ICTY, *Prosecutor v. Krstić*, Appeals Chamber, Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party, 30 July 2003, IT-95-13/1, para. 15 (<https://www.legal-tools.org/doc/2a2d62/>); *Prosecutor v. Krstić*, Appeals Chamber, Decision on Application for Subpoenas, 1 July 2003, IT-98-33, para. 10 (Judge Shahabuddeen dissenting) (<https://www.legal-tools.org/doc/f828ae/>); *Prosecutor v. Halilović*, Appeals Chamber, Decision on the Issuance of Subpoenas, 21 June 2004, IT-01-48, para. 5 (<https://www.legal-tools.org/doc/a78f7c/>).

² ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, 30 November 2007, ICC-01/04-01/06-1049, para. 36 (<https://www.legal-tools.org/doc/ac1329/>).

The power of the Prosecutor to receive written or oral testimony at the seat of the Court in the course of the preliminary examination, is provided for under Article 15(2) ICC Statute and Rule 104(2) ICC RPE.

Doctrine: For the bibliography, see the final comment on Article 54.

Author: Karel De Meester.

Article 54(3)(c)

(c) Seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate;

Article 54(3)(c) vests the Prosecutor with the necessary power to seek cooperation from States and other international actors.

Doctrine: For the bibliography, see the final comment on Article 54.

Author: Karel De Meester.

Article 54(3)(d)

(d) Enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person;

Additionally, the Prosecutor may “[e]nter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person” (Article 54(3)(d)). This allows States Parties to supplement and go beyond their obligations under Part 9 and for States and international actors to cooperate with the Prosecutor on a voluntary basis. On this basis, the Office of the Prosecutor has concluded agreements with a number of States, including arrangements of modalities for the conduct of operations in territories where the Office of the Prosecutor is carrying out its investigative activities.¹ Within the Office of the Prosecutor, the Jurisdiction, Complementarity and Cooperation Division is charged with building a network for international co-operation, while the Investigation Division is responsible for the implementation.² It follows from Regulation 107(2) of the Regulations of the Court that the Prosecutor has to inform the Presidency of any arrangement or agreement it intends to negotiate, except when this would be “inappropriate for reasons of confidentiality”. Moreover, according to Regulation 107(1), the Prosecutor does not have the authority to negotiate arrangements or agreements with a State not party or any international organisation, when these set out a framework regarding matters which fall within the competency of more than one organ of the Court. In such a case, it is only for the President to conclude such agreements.

Cross-reference:

Regulation 107.

¹ See Report of the International Criminal Court, UN Doc. A/61/217, 3 August 2006, para. 52 (<https://www.legal-tools.org/doc/11ef2c/>); ICC OTP, “Report on the Activities Performed During the first three Years (June 2003 – June 2006)”, 12 September 2006, p. 5 (<https://www.legal-tools.org/doc/c7a850/>).

² ICC OTP, “Strategic Plan June 2012–2015”, 11 October 2013, pp. 6, 16 (<https://www.legal-tools.org/doc/954beb/>).

Doctrine: For the bibliography, see the final comment on Article 54.

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Article 54(3)(e)

(e) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and

More controversial than is Article 54(3)(e), which allows the Prosecutor to conclude confidentiality agreements and to “[a]gree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents”. The provision is to be read together with Rule 82 of the RPE. Among others, it prevents the Prosecutor from subsequently introducing materials or information received under Article 54(3)(e) into evidence without the prior consent of the provider of the material or information and adequate prior disclosure to the accused. It is clear that such arrangements or agreements constitute an exception to the Prosecutor’s disclosure obligations. When the Prosecutor accepts material on the condition of confidentiality pursuant to Article 54(3)(e), this may create tensions with the Prosecutor’s disclosure obligations. The Prosecutor may be caught in a position where he either is unable to disclose materials he has to disclose, or breaches the agreement with the information provider.¹

In its investigations into the situation in the Democratic Republic of the Congo (‘DRC’), the Prosecutor made broad use of confidentiality agreements pursuant to Article 54 (3) (e) ICC Statute (around fifty percent of the documents gathered in the DRC).² This posed challenges to the conduct of several cases before the Court, including the *Lubanga* case, the *Katanga and Ndjolo* case as well as the *Ntaganda* case. This even led the Trial Chamber to stay the proceedings in *Lubanga* after the Prosecutor appeared unable to disclose more than 200 documents containing potentially

¹ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008”, 21 October 2008, ICC-01/04-01/06-1486, para. 43 (‘*Lubanga*, 21 October 2008’) (<https://www.legal-tools.org/doc/485c2d/>).

² See ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Transcript, 1 October 2007, ICC-01/04-01/06-T-52, p. 13 (<https://www.legal-tools.org/doc/e1873b/>).

exculpatory materials or information that is potentially material to the preparation of the Defence.³ The Prosecutor was unable to disclose these documents to the Defence because they were received on condition of confidentiality and the information providers did not subsequently agree to have confidentiality lifted. The Prosecutor was also unable to supply the majority of these documents to the Trial Chamber, while others were only supplied in redacted form. Most of this confidential information had been obtained from the United Nations. These materials included evidence that tended to suggest that the accused had acted in self-defence, that he was acting under duress or compulsion, that he had made efforts to demobilise child soldiers and that he had insufficient control over the persons who allegedly perpetrated the crimes he was charged for (*Lubanga*, 13 June 2008, para. 22). The Appeals Chamber held that it follows from a textual and a contextual interpretation of Article 54(3)(e) that this provision may only be used for the purpose of generating new evidence (*Lubanga*, 21 October 2008, paras. 41, 55; consider also *Lubanga*, 13 June 2008, paras. 71 – 72). It can only be used as a stepping stone for gathering further evidence. Hence, “whenever the Prosecutor relies on Article 54(3)(e) of the Statute he must bear in mind his obligations under the Statute and apply that provision in a manner that will allow the Court to resolve the potential tension between the confidentiality to which the Prosecutor has agreed and the requirements of a fair trial” (*Lubanga*, 21 October 2008, paras. 44, 55). In particular, the Appeals Chamber expressed its concern that at the time the material was accepted, the Prosecutor agreed that he would also not disclose the materials to the Chambers, thereby preventing the Chamber from assessing whether a fair trial was still possible notwithstanding the non-disclosure of certain documents. The final assessment whether or not material gathered pursuant to Article 54(3)(e) has to be disclosed pursuant to Article 67(2) ICC Statute, had it not been obtained on the condition of confidentiality, will have to be carried out by the Trial Chamber. Therefore, the Trial Chamber should receive the material (para. 3).

Whenever a conflict arises between the Prosecutor’s disclosure obligations under Article 67(2) and Article 54(3)(e) the Trial Chamber has to

³ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, ICC-01/04-01/06-1401 (*‘Lubanga*, 13 June 2008’) (<https://www.legal-tools.org/doc/e6a054/>).

respect the confidentiality agreement concluded by the Prosecutor and cannot order disclosure without first obtaining the prior consent by the information provider (Article 64(6)(c) ICC Statute; Rule 81(3) ICC RPE). Rather will the Chamber have to decide whether the Prosecutor would have had to disclose the material, had it not been obtained under a confidentiality arrangement. If this is the case, the Prosecutor should seek the consent of the information provider. If the provider still does not consent to disclosure, it is for the Trial Chamber to determine whether, and which counterbalancing measures can be taken to ensure that the rights of the accused are protected and the trial is fair.⁴ The Appeals Chamber held that, “in particular if only small numbers of documents are concerned”, the tension between confidentiality and the right to a fair trial may be resolved by other means, such as identifying new, similar exculpatory material, providing the material in summarised form, stipulating the relevant facts, or amending or withdrawing the charges.⁵

From the foregoing, it follows that the Prosecutor should “conduct itself with extreme care” in relying on Article 54(3)(e).⁶ The Prosecutor has since October 2006 sought to reduce its extensive reliance on confidentiality agreements under Article 54(3)(e) ICC Statute to gather evidence.⁷

Cross-reference:

Rule 82.

⁴ *Lubanga*, 21 October 2008, para. 48; see, for example, ICC, *Prosecutor v. Ongwen*, Pre-Trial Chamber II, Decision on the “Prosecution’s Application under Article 53(3)(f) to Apply Redactions to Documents Obtained under Article 53(3)(e)”, 2 March 2016, ICC-02/04-01/15-410, para. 5 (<https://www.legal-tools.org/doc/3d58b6/>).

⁵ *Lubanga*, 21 October 2008, paras. 44 and 28; consider also, for example, ICC, *Prosecutor v. Ntaganda*, Pre-Trial Chamber II, Decision on the “Prosecution’s provision of 56 documents collected under article 54(3)(e)”, 6 February 2014, ICC-01/04-02/06-247, paras. 14–15 (<https://www.legal-tools.org/doc/085b93/>); *Prosecutor v. Banda and Jerbo*, Trial Chamber IV, Public Redacted Version of the “Third Decision on Article 54(3)(e) Documents”, 21 June 2013, ICC-02/05-03/09-442-Red2, para. 12 (*Banda and Jerbo*) (<https://www.legal-tools.org/doc/69c09c/>).

⁶ ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material for the Defence’s Preparation for the Confirmation Hearing, 20 June 2008, ICC-01/04-01/07-621, paras. 36, 38 – 39 (*Katanga and Ngudjolo*, 20 June 2008’) (<https://www.legal-tools.org/doc/0d8508/>).

⁷ See *Katanga and Ngudjolo*, 20 June 2008, para. 51; ICC OTP, “Prosecutorial Strategy 2009–2012”, 1 February 2010, para. 34(b) (<https://www.legal-tools.org/doc/6ed914/>).

Doctrine: For the bibliography, see the final comment on Article 54.

Author: Karel De Meester.

Article 54(3)(f)

(f) Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.

The final subparagraph of Article 54(3) sets forth the prosecutorial power to “[t]ake necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence”. The latter part of this sentence reflects the need to preserve evidence, which is also found in Rule 10 ICC RPE. This Rule details the Prosecutor’s responsibility for the retention, storage and security of information or evidence obtained in the course of investigations by his or her Office. The need to preserve evidence is also reflected by several other provisions of the ICC Statute, including Article 56 (on ‘unique investigative opportunities’ to gather evidence), Article 18(6) (on the possibility for the Prosecutor to request the Pre-Trial Chamber ‘on an exceptional basis’ to authorise it to take investigative steps when the Prosecutor has deferred an investigation or pending a preliminary ruling on admissibility), or Article 19(8) (on the necessity to preserve evidence pending a ruling on admissibility or on jurisdiction).

The power to take measures “to ensure the confidentiality of information” is the corollary of the Prosecutor’s power to conclude confidentiality agreements pursuant to Article 54(3)(e) and ensures its efficacy. From Rule 81(3) ICC RPE, which deals with disclosure, it follows that in case steps to ensure the confidentiality of information have been taken pursuant to Article 54, this information will not be disclosed, except in accordance with Article 54. Moreover, according to the first part of Rule 81(4) the Chamber should, *proprio motu* or at the request of the Prosecutor, the accused or any State, take the necessary steps to ensure the confidentiality of information, in accordance with Article 54. Finally, as far as measures for the ‘the protection of any person’ are concerned, it is clear from the wording (“any person”) that it aims at protecting “anyone put at risk by the investigations of the Prosecutor”.¹ In turn, this provision is complemented by

¹ ICC, *Prosecutor v. Katanga*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, 13 May 2008, ICC-01/04-01/07-475, para. 44 (*‘Katanga*, 13 May 2008’) (<https://www.legal-tools.org/doc/a76f99/>).

the second part of the aforementioned Rule 81(4) ICC RPE, which authorises the Pre-Trial Chamber to restrict disclosure and take the necessary steps to protect the safety of witnesses and victims and members of their families. While this provision seems more restrictive than Article 54(3)(f), the Appeals Chamber held (Judge Pikis dissenting) that Rule 81(4) ICC PRE should, when read together with Article 54(3)(f), be understood as to also allow restrictions on disclosure for the protection of “other persons at risk on account of the activities of the Court” (*Katanga*, 13 May 2008, paras. 55–56). Furthermore, the Appeals Chamber held (Judge Pikis and Judge Nsereko dissenting), that no prosecutorial power to preventively relocate witnesses can be deduced from Article 54(3)(f) ICC Statute in isolation. Rather should this provision be read in light of the Statute as a whole, which assigns the responsibility to provide protective measures to victims and witnesses specifically to the Victims and Witnesses United within the Registry.² The Appeals Chamber added, obiter dictum, that it interprets Article 54(3)(f) (and Article 68(1)) as to ensure “that the Prosecutor takes general measures that ordinarily might be expected to arise on a day-to-day basis during the course of an investigation or prosecution with the aim of preventing harm from occurring to victims and witnesses”. These measures may include “meeting witnesses in discrete locations rather than in public and keeping their identities confidential” (*Katanga and Ngudjolo*, 26 November 2008, para. 98).

Doctrine:

1. Morten Bergsmo, Pieter Kruger and Olympia Bekou, “Article 54”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1381–93 (<https://www.legal-tools.org/doc/040751/>).
2. Fabricio Guariglia, “Article 57”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2nd. ed., C.H. Beck/Hart/Nomos, Mu-

² ICC, *Prosecutor v. Katanga and Ngudjolo*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the “Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules” of Pre-Trial Chamber I, 26 November 2008, ICC-01/04-01/07-776, paras. 69–80 (“*Katanga and Ngudjolo*, 26 November 2008”) (<https://www.legal-tools.org/doc/7c6b2d/>).

nich/Oxford/Baden-Baden, 2008, pp. 1128–29 (<https://www.legal-tools.org/doc/a9e9f7/>).

3. Göran Sluiter, *International Criminal Adjudication and the Collection of Evidence*, Intersentia, Antwerp, 2002, p. 309 (<https://www.legal-tools.org/doc/86d97b/>).

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Article 55

Rights of Persons During an Investigation

General Remarks:

Article 55 complements Article 67(1) on rights of the accused during the trial by already guaranteeing certain rights during investigation. While all rights contained in Article 67(1) apply only to accused, Article 55 is not limited to those suspected of having committed crimes, but also includes, in its paragraph (1), some rights granted to all persons during an investigation, that is, particularly also to victims and witnesses.¹

Article 55 binds not only organs of the Court, but also state authorities conducting investigative steps under their obligation to co-operate with the court – this is explicitly stated in the chapeau of paragraph (2), but must also be true for the rights under paragraph (1) if this provision is to be effective in deterring violations (Hall, 1999, p. 729; and Hall and Jacobs, 2016, p. 1397). Additional procedural rules concerning questioning of suspects and others are contained in rules 111–113 of the Rules of Procedure and Evidence.

As an example of the ICC practice, regarding the initial Darfur investigation, Pre-Trial Chamber III referred to individuals being interviewed in Khartoum under Article 55 of the ICC Statute. The initial co-operation received from the Government of Sudan was interrupted after arrest warrants were issued against President Al Bashir.²

¹ On rights of witnesses and suspects not expressly recognized in Article 55, see Christopher K. Hall, “Article 55 – Rights of Persons During an Investigation”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, C.H. Nomos, Baden Baden, 1999, p. 734 (<https://www.legal-tools.org/doc/434159/>); Christopher K. Hall and Dov L. Jacobs, “Article 55 – Rights of Persons During an Investigation”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1409–1410 (<https://www.legal-tools.org/doc/040751/>) and Salvatore Zappalà, “The Rights of Persons During an Investigation”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 2nd. ed., Oxford University Press, 2002, p. 1196 (<https://www.legal-tools.org/doc/01addc/>).

² ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber II, Prosecution’s request for a finding of non-compliance against the Republic of the Sudan in the case of The Prosecutor v Omar Hassan Ahmad Al Bashir pursuant to Article 87 (7) of the Rome Statute, 19 December 2014, ICC-02/05-01/09-219, para. 23 (<https://www.legal-tools.org/doc/c8042e/>).

In *Blé Goudé*, the defence did not argue that alleged violations were a violation of the rights of the suspect under Article 55 or a breach of other rights which may be attributed to the ICC. Accordingly, it was determined that “absent any involvement of the Court, chambers cannot proceed to make determinations of violations of the rights of a suspect while detained on the territory of a State and, therefore, such violations may not be invoked in order to halt proceedings before this Court”.³ Not every violation of Article 55 would per se cause that the ICC be required to decline to exercise its jurisdiction but only “violations that would amount, by themselves or in combination with other circumstances, to an abuse of process”.⁴ If the alleged infringement is not a mere breach of Article 55 but is in itself extremely significant, it may warrant a permanent stay of proceedings (*Gbagbo*, 15 August 2012, paras. 93–94).

The ICC’s practice has mainly so far indicated the reluctance of the ICC to act as a supervisor of national legislation and practice, which involves not only human rights of the defendant but also the principle of complementarity.⁵ Paying attention to some alleged flawed interpretation and application of two provisions fundamental for the protection of human rights in the pre-trial phase, namely, Articles 21(3) and 59 of the ICC Statute, it has been suggested that the ICC should “strengthen its grip on national activities which are an indispensable and inextricable part of the ICC proceedings” (Sluiter, 2009, p. 475).

Preparatory Works:

The text proposed by the Working Group at the 1993 session of the International Law Commission, which contained a single paragraph on the suspect’s rights, was adopted in the Commission’s final version in 1994. In the Preparatory Committee, the most important issues were related to expan-

³ ICC, *Prosecutor v. Blé Goudé*, Pre-Trial Chamber I, Decision on Second Defence Request for State Party Cooperation, 17 June 2014, ICC-02/11-02/11-85, para. 12 (<https://www.legal-tools.org/doc/c9294a/>).

⁴ ICC, *Prosecutor v. Gbagbo*, Pre-Trial Chamber I, Decision on the “Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo (ICC-02/11-01/11-129)”, 15 August 2012, ICC-02/11-01/11-212, para. 93 (*Gbagbo*, 15 August 2012’) (<https://www.legal-tools.org/doc/0d14c3/>).

⁵ See Göran Sluiter, “Human Rights Protection in the ICC Pre-trial Phase”, in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Brill/Martinus Nijhoff, Leiden, 2009, p. 474.

sion of the guarantees proposed by the International Law Commission. In turn, during the Rome Conference, the provisions concerning the suspect's rights became a single Article as they were separated from the *omnibus* provision on investigation and the text was substantially reworked. A Working Paper, which was distributed during the first week of the Rome Conference, changed the title of the provision. This provision contained two paragraphs each with several subparagraphs and, thus, resembled the final text of Article 55—excepted the inversed order of the two paragraphs. The final text adopted by the Working Group and then the Committee of the Whole was substantially reworked by the Drafting Committee that changed both the title and the order of the main paragraphs.⁶

Cross-references:

Article 67(1).

Rules 111–113.

Doctrine: For the bibliography, see the final comment on Article 55.

Authors: Juan Pablo Pérez-León-Acevedo and Björn Elberling.

⁶ See William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 862 (<https://www.legal-tools.org/doc/b7432e/>).

Article 55(1)

- 1. In respect of an investigation under this Statute, a person:***
- (a) Shall not be compelled to incriminate himself or herself or to confess guilt;***
 - (b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;***
 - (c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and***
 - (d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.***

Article 55(1) contains certain rights granted to all persons during an investigation. As stated above, it binds not only organs of the Court, but also state authorities co-operating with the court. This safeguards procedural uniformity and should be broadly interpreted to include interviewers of peacekeeping operations and international organizations.¹ Thus, the RPE and the case-law suggest that the rights of all persons should be respected independently from who is conducting the investigation. Accordingly, Rule 111(2) of the RPE requires that “[w]hen the Prosecutor or national authorities question a person, due regard shall be given to Article 55”. In turn, in *Lubanga*, the Trial Chamber determined that a witness’s right to privacy is an internationally recognized human right applicable to investigations undertaken by national authorities.²

¹ See Karel De Meester et al., “Investigation, Coercive Measures, Arrest and Surrender”, in Göran Sluiter, Håkan Friman, Suzannah Linton, Salvatore Zappalà and Sergey Vasiliev (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, p. 23 (<https://www.legal-tools.org/doc/bcad4c/>); Christopher K. Hall and Dov L. Jacobs, “Article 55 – Rights of Persons During an Investigation”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1401 (<https://www.legal-tools.org/doc/040751/>).

² ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06-803-tEN, paras. 62–90 (<https://www.legal-tools.org/doc/b7ac4f/>). See also Amal Alamuddin, “Collection of Evidence”, in Karim Khan, Caroline Buisman and Chris Gosnell (eds.), *Principles of Evidence in International Criminal Justice*, Oxford University Press, 2010, pp. 235–236.

With regard to the scope of application of Article 55(1), Pre-Trial Chamber I interpreted the expression applicable “[i]n respect of an investigation under this Statute” as encompassing “any investigative steps that are taken either by the Prosecutor or by national authorities at his or her behest” and, thus, an investigation conducted by an entity other than the Prosecutor and not related to the proceedings at the ICC “does not trigger the rights under Article 55 of the Statute”.³ In *Gbagbo*, it was stated that Article 55(1) was inapplicable as violations thereof were committed neither by the Prosecutor nor by the Ivorian authorities on behalf of the Prosecutor or any ICC organ. There was no relevant evidence indicating that the adoption of measures by the Ivorian authorities was on behalf of the ICC Prosecutor and, thus, the defence allegations were found to be purely speculative in nature (*Gbagbo*, 15 August 2012, paras. 97–98). Recent ICC jurisprudence has indeed reaffirmed that: (i) the expression “[i]n respect of an investigation under this Statute” contained in Article 55(1) needs to be understood to include investigative steps adopted by the Prosecutor or by national authorities at his/her behest; and (ii) investigations conducted by entities other than the ICC Prosecutor and unrelated to the ICC proceedings do not trigger the rights laid down under Article 55.⁴

There is no express provision that persons have to be informed of their rights under Article 55(1), such information is, however, probably required in the interest of fairness.⁵ Indeed, in practice, non-suspects are routinely informed of their rights by the ICC investigators (OTP Regulations, regulation 40).⁶ Additional procedural rules concerning questionings are contained in Rules 111–113.

³ ICC, *Prosecutor v. Gbagbo*, Pre-Trial Chamber I, Decision on the “Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo (ICC-02/11-01/11-129)”, 15 August 2012, ICC-02/11-01/11-212, para. 96 (*Gbagbo*, 15 August 2012’) (<https://www.legal-tools.org/doc/0d14c3/>).

⁴ ICC, *Prosecutor v. Al Hassan*, Pre-Trial Chamber I, Public Redacted Version of ‘Decision on the Defence request to terminate the proceedings and related requests’, 24 August 2020, ICC-01/12-01/18-1009-Red, para. 63 (invoking the above-referred *Gbagbo*, 15 August 2012 decision) (<https://www.legal-tools.org/doc/39jsjg/>).

⁵ Christopher K. Hall, “Article 55 – Rights of Persons During an Investigation”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, C.H. Nomos, Baden Baden, 1999, p. 729 (<https://www.legal-tools.org/doc/434159/>); and Hall and Jacobs, 2016, p. 1398.

⁶ ICC, *Prosecutor v. Katanga and Ngudjolo*, OTP, Prosecution’s Observations regarding Admission for the Confirmation Hearing of the Transcripts of Interview of Deceased Witness

Article 55(1)(a) contains the right against self-incrimination, based on Article 14(3)(g) of the ICCPR. Contrary to the equivalent right to silence of suspects (Article 55(1)(b)) and accused (Article 67(1)(g)), Article 55(1) does not contain a right to silence, showing that, for example, witnesses may not generally refuse to answer questions if the answer is not (potentially) self-incriminating. When evaluating whether the right against self-incrimination was violated, the European Court of Human Rights has considered the following factors: (i) nature and degree of coercion employed to obtain the evidence; (ii) the weight of the public interest in the specific investigation and punishment of the crime; (iii) the existence of any relevant procedural safeguards; and (iv) the use given to any material so obtained.⁷

Article 55(1)(b) contains the prohibition of torture and other forms of coercive treatment. The prohibition of “duress” particularly may not be unlimited – forcing a witness to testify before the court or before national authorities may well put that person in duress, especially if he or she fears repercussions from supporters of the accused, nonetheless it is hard to imagine that the court would find such an obligation to be in violation of Article 55 (cf. Hall, 1999, pp. 729–730; and Hall and Jacobs, 2016, pp. 1398–1399). The main aim of this provision is seemingly to protect individuals during an investigation conducted by state authorities who assist the ICC Prosecutor’s investigation (see Hall, 1999, p. 730; and Hall and Jacobs, 2016, pp. 1398–1399).

Paragraph (1)(c) of Article 55 contains the right to translation and interpretation. The wording of this provision, including the manners in which it goes beyond human rights provisions, is largely identical to Article 67(1)(f) and for details see commentary thereto. At this point, it is however mentioned that the Appeals Chamber considered that the word “fully” refers to the intent to “raise the standard of understanding to higher than plain understanding”, which consists in a level higher “than simply a language the accused understands or speaks”.⁸ Thus, translation into a person’s na-

12 pursuant to Articles 61 and 69 of the Statute, 20 March 2008, ICC-01/04-01/07-336, para. 21 (<https://www.legal-tools.org/doc/5c5024/>). See also Alamuddin, 2010, p. 234.

⁷ European Court of Human Rights, *Jalloh v. Germany*, Judgment, 11 July 2007, Application No. 548100/00, para. 117 (<https://www.legal-tools.org/doc/d25f34/>). See also, William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 864 (<https://www.legal-tools.org/doc/1435ae/>).

⁸ ICC, *Prosecutor v. Katanga*, Appeals Chamber, Judgment on the appeal of Mr. Germain Katanga against the decision of the Pre-Trial Chamber I entitled ‘Decision on the defence

tive language is not required as far as he or she fully understands the language being employed (see Hall and Jacobs, 2016, p. 1399).

Finally, paragraph (1)(d) sets limits to acceptable deprivations of liberty in connection with Court proceedings. It largely mirrors the language of Article 9(1) of the ICCPR. The fact that it not only refers to arrest or detention, but also to deprivation of liberty generally, shows that also limited restrictions on freedom of movement, such as, for example, house arrest or the duty to attend court proceedings, must be in conformity with the Statute.⁹ The prohibition in the first part of this paragraph is independent of the one contained in the second part and this paragraph should be jointly read with Article 85(1) which reads as follows: “[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation” (see also Hall and Jacobs, 2016, p. 1401). Thus, there “should be some mechanism of redress in case of violations”.¹⁰ In *Bemba*, the dissenting opinion of Judge Georghios M. Pikiş to the Appeals Chamber’s judgment on Pre-Trial Chamber III’s Decision on application for interim release, appealed by Mr. Bemba, recalled that every person “has the right to effectively contest the deprivation of liberty”.¹¹

Cross-references:

Articles 67(1) and 85(1).

Rule 111.

OTP Regulation 40.

Doctrine: For the bibliography, see the final comment on Article 55.

Authors: Juan Pablo Pérez-León-Acevedo and Björn Elberling.

request concerning languages’, 27 May 2008, ICC-01/04-01/07-522, paras. 56–57 (<https://www.legal-tools.org/doc/62dbba/>).

⁹ For a criticism of the unclear wording “on such grounds and in accordance with such procedures”, see Salvatore Zappalà, “The Rights of Persons During an Investigation”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 2nd. ed., Oxford University Press, 2002, pp. 1197–1198 (<https://www.legal-tools.org/doc/01addc/>).

¹⁰ Salvatore Zappalà, “The Rights of Victims v. the Rights of the Accused”, in *Journal of International Criminal Justice*, 2010, vol. 8, no. 1, p. 140.

¹¹ ICC, *Prosecutor v. Bemba*, Appeals Chamber, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled “Decision on application for interim release”, Dissenting opinion of Judge Georghios M. Pikiş, 16 December 2008, ICC-01/05-01/08-323, para. 31 (<https://www.legal-tools.org/doc/5a1931/>).

Article 55(2)

2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:

(a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;

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

(c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and

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

Article 55(2) contains certain rights granted to suspects, that is, persons of whom “there are grounds to believe that [they have] committed a crime within the jurisdiction of the Court”, being questioned by the prosecution or by national authorities co-operating with the Court.¹ The provision in principle applies to those suspected of having committed crimes referenced in Article 5, rather than offences under Article 70, as shown by the reference to a “crime” as well as to state co-operation under part 9 of the Statute (cf. Article 70(2) on co-operation in proceedings concerning Article 70-offences). However, it is foreseeable that the court will find that most or all of these rights also apply to Article 70-suspects under general international law. Indeed, as seen below, for example, the ICC found that the right to legal aid (Article 55(1)(c)) applies to both crimes and offences.²

¹ The term suspect is not used in the Statute, see Salvatore Zappalà, “The Rights of Persons During an Investigation”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 2nd. ed., Oxford University Press, Oxford, 2002, pp. 1195–1196, 1200 (<https://www.legal-tools.org/doc/01addc/>).

² ICC, *Prosecutor v. Bemba et al.*, Trial Chamber VII, Decision on the Defence applications for judicial review of the decision of the Registrar on the allocation of resources during the

The application of Article 55(2) constitutes the most remarkable distinction between the suspect and a witness as it provides the former with certain specific rights such as the right to be informed of being a suspect, the right to remain silent, the right to have legal assistance and be questioned in presence of his or her counsel.³

With regard to the steps adopted by the ICC organs to put Article 55(2) into practice, *Ntaganda* may be mentioned as an example. As part of the investigation, the ICC Prosecution met persons who had rights under Article 55(2) which include the right to have the interviews audio and/or video recorded. Then, the Prosecutor prepared transcripts of these interviews, which were time-intensive and generally ran on average up to 10–15 hours each. Even though the disclosure obligation solely concerns the original form of the interview (the audio-video recording), the Prosecutor prepared and disclosed the interview transcript as an assistance mechanism to review the material.⁴

Those individuals who are subject to a warrant of arrest or a summons to appear, not yet surrendered to the ICC, “enjoy rights guaranteed elsewhere in the Statute, such as the rights relating to investigations (Article 55(2))”.⁵

Paragraph (2)(a) grants the person the right to be informed prior to questioning of his or her status as a suspect. Such information is necessary in order to allow the person to adequately exercise the other rights under Article 55(2) which attach to this status. The “grounds to believe” is an objective test which facilitates its enforcement.⁶ Under regulation 41(2) of the

trial phase, 21 May 2015, ICC-01/05-01/13-955, para. 35 (*Bemba et al.*, 21 May 2015’) (<https://www.legal-tools.org/doc/d3fff6/>).

³ See Karel De Meester *et al.*, “Investigation, Coercive Measures, Arrest and Surrender”, in Göran Sluiter, Håkan Friman, Suzannah Linton, Salvatore Zappalà and Sergey Vasiliev (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, p. 233 (<https://www.legal-tools.org/doc/bcad4c/>).

⁴ ICC, *Prosecutor v. Ntaganda*, Pre-Trial Chamber II, Prosecution’s Urgent Request to Postpone the Date of the Confirmation Hearing, 23 May 2013, ICC-01/04-02/06-65, para. 18 (<https://www.legal-tools.org/doc/3fc08c/>).

⁵ ICC, *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the Defence Request for an Order to Preserve the Impartiality of the Proceedings, 31 January 2011, ICC-01/04-01/10-51, para. 8, fn. 15 (<https://www.legal-tools.org/doc/49a9ff/>).

⁶ See William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 865 (<https://www.legal-tools.org/doc/b7432e/>).

Regulations of the OTP, should information conveyed during the interview of a witness raise grounds to believe that the witness in question has committed a crime(s) within the ICC jurisdiction, he or she shall immediately be informed of his or her rights under Article 55(2). In the ICC Prosecutor's practice, 'screening interviews' precede interviews and aim inter alia to establish whether the interviewee is a suspect.⁷ Concerning how a confirmation hearing *in absentia* may potentially affect Article 55(2)(a), former ICC Judge Ekaterina Trendafilova has considered it as not conflicting with the "right to be properly informed of the charge", which "is made clear by a number of provisions".⁸

Paragraphs (2)(b) and (2)(c), whose wording is materially identical to those of Article 67(1)(d) and (g), grant suspects the rights to silence and to legal assistance. For details, see commentary to Article 67(1)(d) and (g). At this point, however, some precisions are given. First, although paragraph (2)(b) contains no explicit requirement that the suspect or the accused should be warned that his or her statement may be used as evidence in trial, Rules 74 and 75 of the RPE regulate the witness's right not to incriminate himself or certain family members.⁹ Indeed, the OTP's practice has consisted in a "policy of informing all persons questioned-including under Article 55(2)-that their evidence may be used in subsequent proceedings".¹⁰ This approach has been later regulated under the Regulations of the OTP (Regulation 40(f) (see also Karel de Meester *et al.*, 2013, p. 234). Second, concerning paragraph (2)(c), the Registrar is required to provide assistance to persons to whom Article 55(2)(c) applies in obtaining legal counsel assistance and legal advice (Rule 20(c)). Third, Trial Chamber VII found no

⁷ ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, Transcripts, 25 November 2009, ICC-01/04-01/07-T-81, p. 11 (<https://www.legal-tools.org/doc/fd1869/>). See also De Meester *et al.*, 2013, p. 233.

⁸ Ekaterina Trendafilova, "Fairness and Expediency in the International Criminal Court's Pre-trial Proceedings", Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Brill/Martinus Nijhoff Publishers, Leiden, 2009, p. 456 (<https://www.legal-tools.org/doc/5d1db6/>).

⁹ Christopher K. Hall and Dov L. Jacobs, "Article 55 – Rights of Persons During an Investigation", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1402–1403 (<https://www.legal-tools.org/doc/040751/>).

¹⁰ ICC, *Prosecutor v. Katanga and Ngudjolo*, OTP, Prosecution's Observations regarding Admission for the Confirmation Hearing of the Transcripts of Interview of Deceased Witness 12 pursuant to Articles 61 and 69 of the Statute, 20 March 2008, ICC-01/04-01/07-336, para. 21 (<https://www.legal-tools.org/doc/5c5024/>).

distinction between the offences under Article 70 (offences against the administration of justice) and the crimes under Article 5 (genocide, crimes against humanity, war crimes and crime of aggression) concerning the entitlement to legal aid as Article 55(2)(c) “contemplates legal aid ‘[w]here there are grounds to believe that a person has committed a crime within the jurisdiction of the Court.’” (*Bemba et al.*, 21 May 2015, para. 35).

Paragraph (2)(d) complements paragraph (2)(c) by laying down that suspects must be questioned in the presence of counsel unless they have waived this right (while the exception refers to suspects having “waived their right to counsel”, it must probably also be read to cover suspects who have retained the assistance of counsel, but who consent to being questioned in the absence of said counsel). Contrary to the rules applicable to the *ad hoc* Tribunals, Article 55(2)(d) does not explicitly refer to cases where the suspect first waives the right to counsel and later withdraws this waiver; it would seem that the general rule contained in the provision also covers such cases and thus requires that questioning only continue in the presence of counsel following such withdrawal.¹¹ Under Article 55(2), questioning of a person must be audio or video recorded and the recording shall be transcribed and then given to the person concerned. According to the chapeau, suspects must be informed of these rights prior to being questioned. Rules 112 and 113 of the RPE contain additional procedural rules concerning questioning of suspects, including the possibility of a medical examination of the suspect (see, for further details, see Hall and Jacobs, 2016, pp. 1407–1409).

In *Bemba*, Pre-Trial Chamber III found that an interview for determining the suspect’s identity does not probably fall within the scope of Article 55(2)(d) as were Article 55(2)(d) be applicable, the claimed “unlawful absence of the counsel would only entail a potential exclusion pursuant to Article 69(7) of the Statute of evidence obtained in the interview”.¹² The Appeals Chamber in *Banda and Jerbo* determined that the ICC Prosecutor cannot be requested, under Rule 112 (recording of questioning in particular

¹¹ Christopher K. Hall and Dov L. Jacobs, “Article 55 – Rights of Persons During an Investigation”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1407–1409 (<https://www.legal-tools.org/doc/040751/>).

¹² ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber III, Decision on application for interim release, 20 August 2008, ICC-01/05-01/08-73, para. 45 (<https://www.legal-tools.org/doc/9956eb/>).

cases), to produce organized and signed statements of a witness's interview. In accordance with Article 55(2), Rule 112 provides for that interviews of persons about whom the ICC Prosecutor has ground to believe committed a crime within the ICC jurisdiction shall be audio or video recorded.¹³

In *Al Hassan*, Trial Chamber X in assessing whether the Prosecution put in place the safeguards required by Article 55(2) and Rule 112 of the Rules, noted that:

Specifically in this regard, the record indicates that the accused [REDACTED] repeatedly informed of the voluntary nature of [REDACTED] interviews and [REDACTED] rights in this context, and notably the right of the accused to remain silent, to have legal assistance and to be questioned in the presence of counsel. In particular, the Chamber notes that Mr Al Hassan confirmed that he understood all the questions of procedure and his rights as explained by the investigators and that he decided to proceed with the interview. The record also shows that Prosecution investigators consistently reminded Mr Al Hassan of his right to consult with his lawyer and that Mr Al Hassan regularly consulted with his counsel throughout the course of the days of interviews by the Prosecution. In addition, the Chamber notes that Mr Al Hassan also consistently confirmed that he answered the questions of his own free will, was given the opportunity to exercise his right to clarify or add to his statements, and stated in his last interview session that he was treated very well.¹⁴

Cross-references:

Article 67(1) and 70.

Rules 21, 22, 112 and 113.

Regulation 73.

OTP Regulation 41(2).

¹³ ICC, *Prosecutor v. Banda and Jerbo*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled "Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation", 17 February 2012, ICC-02/05-03/09-295, paras. 26–28 (<https://www.legal-tools.org/doc/c5440f/>).

¹⁴ ICC, *Prosecutor v. Al Hassan*, Pre-Trial Chamber I, Public Redacted Version of 'Decision on the Defence request to terminate the proceedings and related requests', 24 August 2020, ICC-01/12-01/18-1009-Red, para. 98 (<https://www.legal-tools.org/doc/39jsjg/>).

Doctrine:

1. Amal Alamuddin, “Collection of Evidence”, in Karim Khan, Caroline Buisman and Chris Gosnell (eds.), *Principles of Evidence in International Criminal Justice*, Oxford University Press, 2010, pp. 231–305.
2. Christopher K. Hall, “Article 55 – Rights of Persons During an Investigation”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, C.H. Nomos, Baden Baden, 1999, pp. 727–734 (<https://www.legal-tools.org/doc/434159/>).
3. Christopher K. Hall and Dov L. Jacobs, “Article 55 – Rights of Persons During an Investigation”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1394–1410 (<https://www.legal-tools.org/doc/040751/>).
4. Karel de Meester, “Investigation, Coercive Measures, Arrest and Surrender”, Göran Sluiter, Håkan Friman, Suzannah Linton, Sergey Vasiliiev and Salvatore Zappalà (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, Oxford, 2013, pp. 177–380.
5. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 860–868 (<https://www.legal-tools.org/doc/b7432e/>).
6. Göran Sluiter, “Human Rights Protection in the ICC Pre-trial Phase”, in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Brill/Martinus Nijhoff, Leiden, 2009, pp. 459–75.
7. Ekaterina Trendafilova, “Fairness and Expediousness in the International Criminal Court’s Pre-trial Proceedings”, in Carsten Stahn and Göran Sluiter (eds.), 2009, pp. 441–57.
8. Salvatore Zappalà, “The Rights of Persons During an Investigation”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 2nd. ed., Oxford University Press, Oxford, 2002, pp. 1181–1203.
9. Salvatore Zappalà, “The Rights of the Accused”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), 2002, pp. 1319–54.

10. Salvatore Zappalà, “The Rights of Victims v. the Rights of the Accused”, in *Journal of International Criminal Justice*, 2010, vol. 8, no. 1, pp. 137–64.

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Article 56

Role of the Pre-Trial Chamber in Relation to a Unique Investigative Opportunity

General Remarks:

Article 56 represents an exception from the general rule that evidence must be presented at trial. This provision allows collection of evidence under the oversight of the Pre-Trial Chamber which later is made available at trial. The rationale is that some evidence cannot be fully reproduced at trial, for example mass-grave exhumation.

The purpose of the provision is to counter potential prejudice to the accused that may result from the particular nature of ICC proceedings. An accused may have difficulties to collect evidence in the country where the alleged crimes were committed when detained by the Court. Article 56 allows judicial intervention at the investigative stage.

Doctrine: For the bibliography, see the final comment on Article 56.

Author: Mark Klamberg.

Article 56(1)(a)

1. (a) Where the Prosecutor considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial, the Prosecutor shall so inform the Pre-Trial Chamber.

This subparagraph grants the Pre-Trial Chamber a role where the Prosecution intends to perform a ‘unique investigative opportunity’, that is, collect and test evidence that may not be available at trial.

The provision appears to focus on a scenario in which the case stage has already been reached, as evidenced in particular by the reference to the Prosecutor’s obligation to provide relevant information to “the person who has been arrested or has appeared in response to a summons” in connection with the relevant investigation (Article 56, paragraph 1(c)). However, the possibility that in special circumstances Article 56 may also be applied prior to the case stage, as recognised by the jurisprudence of Pre-Trial Chamber I.¹ Further, participation of victims in the context of the procedure set out in the said Article during the investigation of a situation may therefore be permitted.²

In the *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I considered that there is a unique investigative opportunity within the terms of Article 56 1(a) of the Statute and decided to convene an *ex parte* consultation with the Prosecutor in order to determine the measures to be taken and the modalities of their implementation.³

Rule 114 provides that upon being informed by the Prosecutor, the Pre-Trial Chamber shall hold consultations with the Prosecutor and with the person who has been arrested or who has appeared before the Court

¹ ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber, Decision on the Prosecutor’s Request for Measures under Article 56, 26 April 2005, ICC-01/04-21 (<https://www.legal-tools.org/doc/e9b0f4/>).

² See ICC, *Prosecutor v. Kony et al.*, Pre-Trial Chamber II, Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 10 August 2007, ICC-02/04-01/05-252, para. 100 (<https://www.legal-tools.org/doc/d25664/>).

³ ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber, Public Redacted version of the Decision to hold Consultation under Rule 114, 21 April 2005, ICC-01/04-19 (<https://www.legal-tools.org/doc/f21a15/>).

pursuant to summons and his or her counsel, in order to determine the measures to be taken and the modalities of their implementation.

Cross-reference:

Rule 114.

Doctrine: For the bibliography, see the final comment on Article 56.

Author: Mark Klamberg.

Article 56(1)(b)

(b) In that case, the Pre-Trial Chamber may, upon request of the Prosecutor, take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence.

It is for the Prosecution to decide which investigative acts ought to be carried out which makes Article 56 different from an investigative judge.

The Pre-Trial Chamber's role pursuant to this paragraph is to "take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence" for example the production of records of forensic examinations and the appointment of an *ad hoc* counsel for the defence.¹

Doctrine: For the bibliography, see the final comment on Article 56.

Author: Mark Klamberg.

¹ See, ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber, Decision on the Prosecutor's Request for Measures under Article 56, 26 April 2005, ICC-01/04-21 (<https://www.legal-tools.org/doc/e9b0f4/>); see also *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the Prosecutor's Communication to the Pre-Trial Chamber, 1 June 2005, ICC-01/04-35 (<https://www.legal-tools.org/doc/93a7a7/>), where Pre-Trial Chamber I decided to approve the Netherlands Forensic Institute's Investigation Plan.

Article 56(1)(c)

(c) Unless the Pre-Trial Chamber orders otherwise, the Prosecutor shall provide the relevant information to the person who has been arrested or appeared in response to a summons in connection with the investigation referred to in subparagraph (a), in order that he or she may be heard on the matter.

Since the purpose of Article 56 is to protect the rights of the person who has been arrested or who appeared before the Court in response to a summons it follows that the Prosecution to provide relevant information regarding investigative acts taken.

The paragraph allows the Pre-Trial Chamber to order otherwise, but this should only happen on an exceptional basis taking the interests of the defence into account.

Doctrine: For the bibliography, see the final comment on Article 56.

Author: Mark Klamberg.

Article 56(2)

- 2. The measures referred to in paragraph 1 (b) may include:**
- (a) Making recommendations or orders regarding procedures to be followed;**
 - (b) Directing that a record be made of the proceedings;**
 - (c) Appointing an expert to assist;**
 - (d) Authorizing counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance or counsel has not been designated, appointing another counsel to attend and represent the interests of the defence;**
 - (e) Naming one of its members or, if necessary, another available judge of the Pre-Trial or Trial Division to observe and make recommendations or orders regarding the collection and preservation of evidence and the questioning of persons;**
 - (f) Taking such other action as may be necessary to collect or preserve evidence.**

Paragraph 2 contains a non-exhaustive list of measures that the Pre-Trial Chamber may take in relation to a unique investigative opportunity. Other potential measures are added in Rule 114(1) which allows the Pre-Trial Chamber to determine on measures to ensure the right of the “suspect” under Article 67(1)(b) to communicate with counsel is protected.

Rule 112(5) provides that the Pre-Trial Chamber may, in pursuance of Article 56(2), order that the questioning of persons shall be audio- or video-recorded in accordance with the procedure set out in Rule 112.

The decision of the Pre-Trial Chamber in the *Situation in the Democratic Republic of the Congo* illustrates which measures can be taken, including the production of records of forensic examinations and the appointment of an *ad hoc* counsel for the defence.¹

The catch-all clause in sub-paragraph (f) uses the words “such other action” which would suggest that these measures are similar to the measures listed under (a)-(e). Guariglia and Hochmayr argue that the sub-

¹ ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber, Decision on the Prosecutor’s Request for Measures under Article 56, 26 April 2005, ICC-01/04-21 (<https://www.legal-tools.org/doc/e9b0f4/>).

paragraph can not be used to expand the powers of the Pre-Trial Chamber, for example to collect evidence itself.²

Cross-reference:

Rule 114.

Doctrine: For the bibliography, see the final comment on Article 56.

Author: Mark Klamberg.

² Fabricio Guarglia and Gudrun Hochmayr, “Article 56 – Role of the Pre-Trial Chamber in Relation to a Unique Investigative Opportunity”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1417 (<https://www.legal-tools.org/doc/040751/>).

Article 56(3)

3. (a) Where the Prosecutor has not sought measures pursuant to this Article but the Pre-Trial Chamber considers that such measures are required to preserve evidence that it deems would be essential for the defence at trial, it shall consult with the Prosecutor as to whether there is good reason for the Prosecutor's failure to request the measures. If upon consultation, the Pre-Trial Chamber concludes that the Prosecutor's failure to request such measures is unjustified, the Pre-Trial Chamber may take such measures on its own initiative.

(b) A decision of the Pre-Trial Chamber to act on its own initiative under this paragraph may be appealed by the Prosecutor. The appeal shall be heard on an expedited basis.

In case the Prosecution has failed to request measures under Article 56, the Pre-Trial Chamber is empowered to take such measures on its own initiative or at the request of the defence (pursuant to Article 57(3)(b)).

Pre-Trial Chamber II suggests that pursuant to Article 56(3)(a) and Article 57(3)(c), “the Chamber may even preserve evidence in favour of the defence”.¹ This is a measure that goes beyond “take measures to preserve evidence”. Guariglia and Hocmayr argue that Article 56(3), on its face, does not empower the Chamber to take evidence itself.²

Regulation 48 provides that the Pre-Trial Chamber may request the Prosecutor to provide specific or additional information or documents in his or her possession, or summaries thereof, that the Pre-Trial Chamber considers necessary in order to exercise the functions and responsibilities set forth in Article 56(3)(a).

Cross-reference:

Regulation 48.

¹ ICC, *Prosecutor v. Kony et al.*, Pre-Trial Chamber, Decision on Prosecutor's applications for leave to appeal dated 15th day of March 2006 and to suspend or stay consideration of leave to appeal dated the 11th day of May 2006, 10 July 2006, ICC-02/04-01/05-90, para. 35 (<https://www.legal-tools.org/doc/cee556/>).

² Fabricio Guariglia and Gudrun Hochmayr, “Article 56 – Role of the Pre-Trial Chamber in Relation to a Unique Investigative Opportunity”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1418–1420 (<https://www.legal-tools.org/doc/040751/>).

Doctrine: For the bibliography, see the final comment on Article 56.

Author: Mark Klamberg.

Article 56(4)

4. The admissibility of evidence preserved or collected for trial pursuant to this Article, or the record thereof, shall be governed at trial by Article 69, and given such weight as determined by the Trial Chamber.

The use of Article 56 neither affords any weight to evidence nor guarantee admissibility of the evidence. This is left for the determination of the Trial Chamber.

Doctrine:

1. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 869–876 (<https://www.legal-tools.org/doc/b7432e/>).
2. Fabricio Guariglia and Gudrun Hochmayr, “Article 56 – Role of the Pre-Trial Chamber in Relation to a Unique Investigative Opportunity”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1411–1420 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Article 57

Functions and Powers of the Pre-Trial Chamber

General Remarks:

The Pre-Trial Chamber is established by Article 39. The Pre-Trial Chamber is a compromise between different legal traditions. Judicial overview at the investigatory stage is a feature of the civil tradition, but the Pre-Trial Chamber is not an investigative chamber. It is not responsible for directing the investigations of the Prosecutor. In *Ruto et al.*, Decision on the “Request by the Victims’ Representative for authorisation to make a further written submission on the views and concerns of the victims”, the Pre-Trial Chamber stated that “the power to conduct investigations concerning the commission of crimes and/or to direct the Prosecutor to investigate certain offences or persons do not fall among the prerogatives of the Pre-Trial Chamber as reflected in the said provision of the Statute. Pursuant to the law the power of the Pre-Trial Chamber is to evaluate, in light of the standards of proof envisaged in the Statute, the results of such investigations, namely the evidence collected and placed before the Chamber”.¹

In addition to Article 57, there are several other provisions in the Rome Statute that concern the powers of the Pre-Trial Chamber: Articles 15(3), 18(2), 19(6), 53(3), 56, 58, 59, 60, 61, 64(4) and 72. Further, Regulation 46(2) provides that The Pre-Trial Chamber shall be responsible for any matter, request or information arising out of the situation assigned to it, save that, at the request of a Presiding Judge of a Pre-Trial Chamber, the President of the Pre-Trial Division may decide to assign a matter, request or information arising out of that situation to another Pre-Trial Chamber in the interests of the administration of justice.

Doctrine: For the bibliography, see the final comment on Article 57.

Author: Mark Klamberg.

¹ ICC, *Prosecutor v. Ruto et al.*, Pre-Trial Chamber, Decision on the “Request by the Victims’ Representative for authorisation to make a further written submission on the views and concerns of the victims”, 9 December 2011, ICC-01/09-01/11-371, para. 16 (<https://www.legal-tools.org/doc/c092ce/>).

Article 57(1)

1. Unless otherwise provided in this Statute, the Pre-Trial Chamber shall exercise its functions in accordance with the provisions of this Article.

The purpose of this paragraph is to avoid any inconsistencies in the ICC Statute by providing that if any other Articles contains a conflicting provision concerning pre-trial proceedings, that provision shall prevail.

Doctrine: For the bibliography, see the final comment on Article 57.

Author: Mark Klamberg.

Article 57(2)

2. (a) Orders or rulings of the Pre-Trial Chamber issued under Articles 15, 18, 19, 54, paragraph 2, 61, paragraph 7, and 72 must be concurred in by a majority of its judges.

(b) In all other cases, a single judge of the Pre-Trial Chamber may exercise the functions provided for in this Statute, unless otherwise provided for in the Rules of Procedure and Evidence or by a majority of the Pre-Trial Chamber.

As provided for in Article 39(2)(b)(iii) the functions of the Pre-Trial Chamber shall be carried out either in plenary by three judges of the Pre-Trial Division or by a single judge.

Following this bifurcated standard for the decision-making of the Pre-Trial Chamber, Article 57(2)(a) contains a list the functions where it is required that at least two of the three judges of the Pre-Trial Chamber concur. It includes *proprio motu* investigations of the Prosecutor (Article 15), rulings on admissibility and jurisdiction (Articles 18 and 19), investigations by the Prosecutor on the territory of a State (Article 54(2)), confirmation of charges (Article 61(7)), evidence that could harm the national security of a State (Article 72).

Pursuant to Article 57(2)(b) that more routine functions may be carried out by a single judge, unless otherwise provided for in the Rules of Procedure and Evidence. This includes review of the decision of the Prosecutor not to proceed with an investigation under Article 53 (Rule 108(1) and Rule 110(1)) and decisions in respect of a unique investigative opportunity under Article 56(3) (Rule 114(2)). Further, Rule 7(3) provides that The Pre-Trial Chamber, on its own motion or, if appropriate, at the request of a party, may decide that the functions of the single judge be exercised by the full Chamber. Regulation 47 states that the single judge designated by the Pre-Trial Chamber shall, as far as possible, act for the duration of a case.

Cross-reference:

Regulation 47.

Doctrine: For the bibliography, see the final comment on Article 57.

Author: Mark Klamberg.

Article 57(3)(a)

3. In addition to its other functions under this Statute, the Pre-Trial Chamber may:

(a) At the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation;

Sub-paragraph 3(a) concerns the power of the Pre-Trial Chamber to issue orders and warrants.

It may be noted that the paragraph does not use the word ‘subpoena’. If ‘subpoena’ is considered to be covered by ‘order’, this omission may appear irrelevant. However, it becomes more relevant subpoena is understood in the manner taken by the ICTY Appeals Chamber in *Blaškić* where subpoena meant “binding orders [...] under threat of penalty”.¹

The process of making witnesses appear at the ICC is to be conducted through the Part 9 procedure concerning state co-operation. Under Article 93 there is no explicit requirement that the ICC can compel witnesses to testify, even less that the ICC can issue penalties. It has thus been unclear whether witnesses can be compelled to appear before the Court. However, the majority of the Trial Chamber in *Ruto and Sang* issued a decision in which they stated that the ICC had the power to summon witnesses, and a State Party had a legal obligation to compel the witnesses concerned to appear before the Court.² The Trial Chamber stated that “when Article 64(6)(b) says that the Chamber may ‘require the attendance of witnesses’, the provision means that the Chamber may – as a compulsory measure – order or subpoena the appearance of witnesses” (*Ruto et al.*, 17 April 2014, para. 100). It would appear logical that the Pre-Trial Chamber has the same power.

Doctrine: For the bibliography, see the final comment on Article 57.

Author: Mark Klamberg.

¹ See ICTY, *Prosecutor v. Blaškić*, Appeals Chamber, Judgment on the request of the Republic of Croatia for the review of decision of Trial Chamber II of 18 July 1997, 29 October 1997, IT-95-14, para. 21 (<https://www.legal-tools.org/doc/c5e5ab/>).

² ICC, *Prosecutor v. Ruto et al.*, Trial Chamber, Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation, 17 April 2014, ICC-01/09-01/11-1274-Corr2, para. 193 (‘*Ruto et al.*, 17 April 2014’) (<https://www.legal-tools.org/doc/e28d64/>).

Article 57(3)(b)

(b) Upon the request of a person who has been arrested or has appeared pursuant to a summons under Article 58, issue such orders, including measures such as those described in Article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence;

Pursuant to this paragraph the Pre-Trial Chamber may issue the orders necessary to assist the person in the preparation of his or her defence, thereby giving effect to the rights granted to the accused under Article 67(1)(b). Rule 116 clarifies the threshold for an order under Article 57(3)(b), it specifies that the Pre-Trial Chamber must be “satisfied [t]hat such an order would facilitate the collection of evidence that may be material to the proper determination of the issues being adjudicated, or to the proper preparation of the person’s defence”. There is no requirement that the evidence is exculpatory or incriminatory.

In *Katanga and Ngudjolo*, Pre-Trial Chamber I ruled that the Defence must first request documents and information which are likely to be in the possession or control of the Prosecution in accordance with Rule 77 of the Rules before seeking an order under Article 57(3)(b).¹

In *Banda and Jerbo*, the Defence aimed at obtaining from the Pre-Trial Chamber a request addressed to the Republic of Sudan to provide various forms of assistance to the Defence team, with a view to allowing them to “properly prepare their case”.² The Single Judge observed that the Defence had stated that it (i) “does not contest any of the material facts alleged in the DCC for the purposes of confirmation”; (ii) that, at the confirmation hearing, the Defence “shall not ‘object to the charges’ contained in the DCC, ‘challenge the evidence presented by the Prosecutor’ or otherwise ‘present evidence’“. As a consequence, the Single Judge found that defence

¹ ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the “Defence Application pursuant to Article 57(3)(b) of the Statute to Seek the Cooperation of the Democratic Republic of Congo (DRC)”, 25 April 2008, ICC-01/04-01/07 (<https://www.legal-tools.org/doc/d7e664/>).

² ICC, *Prosecutor v. Banda and Jerbo*, Pre-Trial Chamber, Decision on the “Defence Application pursuant to Article 57(3)(b) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of Sudan”, 17 November 2010, ICC-02/05-03/09-102, para. 1 (*Banda and Jerbo*, 15 November 2010) (<https://www.legal-tools.org/doc/3af3bf/>).

statements “clarify that any investigative step which might be taken, as well as any evidentiary material which might be collected, following an order issued pursuant to Article 57(3)(b) would serve no purpose for the pre-trial phase of the case, namely in respect of the confirmation hearing which will conclude it” (*Banda and Jerbo*, 15 November 2010, paras. 3–4). The application was thus rejected. The Single Judge also rejected the defence application for leave of appeal.³ In *Katanga and Ngudjolo*, the Defence requested the assistance of the Pre-Trial Chamber in order to obtain an audio clip. The Pre-Trial Chamber considered that it is for the defence, not the Registry, to take all necessary steps to get the audio recording of the statement made by Mr Thomas Lubanga. Indeed, the Defence did not show how assistance from the Registry would be required to achieve this recording.⁴

In *Banda and Jerbo*, the Trial Chamber stated that “the Chamber may seek cooperation under Part 9 when the requirements of (i) specificity (ii) relevance and (iii) necessity are met”.⁵ The Trial Chamber found that the Defence required permission to undertake an “open-ended expedition” to the Sudan and that there was “insufficient specificity” of the application (*Banda and Jerbo*, 1 July 2011, paras. 22, 30 and 33).⁶

Cross-reference:

Rule 116.

³ ICC, *Prosecutor v. Banda and Jerbo*, Pre-Trial Chamber, Decision on the “Defence Application for leave to Appeal the ‘Decision on the Defence Application pursuant to article 57(3)(b) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic’”, 30 November 2010, ICC-02/05-03/09-109 (<https://www.legal-tools.org/doc/d58d8f/>).

⁴ ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber, Ordonnance relative à la «Requête de la Défense de Mathieu Ngudjolo sollicitant l’assistance de la Chambre en vue d’obtenir de la Voice of America (VOA) la bande d’enregistrement de la déclaration de M. Thomas Lubanga à la suite et au sujet de l’attaque de Bogoro du 24 février 2003», 15 July 2011, ICC-01/04-01/07-3076, para. 9 (<https://www.legal-tools.org/doc/9fe5ee/>).

⁵ ICC, *Prosecutor v. Banda and Jerbo*, Trial Chamber IV, Decision on “Defence Application pursuant to article 57 (3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan”, 1 July 2011, ICC-02/05-03/09-169, para. 17 (*Banda and Jerbo*, 1 July 2011’) (<https://www.legal-tools.org/doc/891c96/>).

⁶ This was repeated in ICC, *Prosecutor v. Banda and Jerbo*, Trial Chamber, Public Redacted Decision on the second defence’s application pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute, 21 December 2011, ICC-02/05-03/09-268-Red, para. 13 (<https://www.legal-tools.org/doc/f856b9/>).

Doctrine: For the bibliography, see the final comment on Article 57.

Author: Mark Klamberg.

Article 57(3)(c)

(c) Where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information;

Paragraph (c) empowers the Pre-Trial Chamber to enforce a number of other provisions in the ICC Statute and the Rules of Procedure and Evidence, including the protection and privacy of victims and witnesses (Article 68), the preservation of evidence (Article 18(6)), the protection of persons who have been arrested or appeared in response to a summons (Rules 117–120), protection of national security information (Article 72). There are a number of decisions where Article 57(3)(c) have been invoked.

In *Kony et al.*, Pre-Trial Chamber II, *inter alia*, rejected the Office of Public Counsel for Victims’ (‘OPCV’) request to have access to the index of the record of the situation and of the case.¹ In the Decision of 25 November 2005, Pre-Trial Chamber II decided to hold a status conference by way of a hearing in closed session.² In *Lubanga*, Pre-Trial Chamber I decided to reclassify certain documents as public.³

In the same case, Pre-Trial Chamber I rejected the Defence Request unrestricted access to the entire file of the situation in the Democratic Republic of the Congo.⁴

In the Decision of 24 February 2006, Pre-Trial Chamber I decided, *inter alia*, that Mr. Thomas Lubanga Dyilo shall have access to redacted index of the record and to any public document contained therein.⁵

¹ ICC, *Prosecutor v. Kony et al.*, Pre-Trial Chamber II, Decision on “Request to access documents and material”, and to hold a hearing in camera and ex parte, 7 February 2007, ICC-02/04-01/05-152 (<https://www.legal-tools.org/doc/1bb7a1/>).

² ICC, *Prosecutor v. Kony et al.*, Pre-Trial Chamber II, Decision to convene a status conference on matters related to safety and security in Uganda, 25 November 2005, ICC-02/04-01/05-64 (<https://www.legal-tools.org/doc/af2784/>).

³ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision Concerning the Reclassification of the Redacted Versions of Documents ICC-01/04-01/06-32-US-Exp and ICC-01/04-01/06-32-Conf-AnxC as Public, 19 April 2006, ICC-01/04-01/06-80 (<https://www.legal-tools.org/doc/02840a/>).

⁴ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Defence Request for Unrestricted Access to the Entire File of the Situation in the Democratic Republic of the Congo, 17 May 2006, ICC-01/04-01/06-103 (<https://www.legal-tools.org/doc/59fb84/>).

In *the Democratic Republic of the Congo*, the OPCV requested “(i) access to the index of the Situation record, which lists the confidential, ex parte, and under seal documents in the Situation record; (ii) the right to thereafter request any documents which the Principal Counsel believes are necessary for the fulfilment of her mandate, and (iii) two confidential documents filed in the record of the Situation in the DRC”. The Single Judge rejected the request in its entirety.⁶

Cross-reference:

Regulation 48.

Doctrine: For the bibliography, see the final comment on Article 57.

Author: Mark Klamberg.

⁵ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, 24 February 2006, ICC-01/04-01/06-8-Corr, (<https://www.legal-tools.org/doc/c60aaa/>).

⁶ ICC, *Democratic Republic of the Congo*, Pre-Trial Chamber, Decision on the Requests of the OPCV, 10 December 2007, ICC-01/04-418 (<https://www.legal-tools.org/doc/637670/>).

Article 57(3)(d)

(d) Authorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the co-operation of that State under Part 9 if, whenever possible having regard to the views of the State concerned, the Pre-Trial Chamber has determined in that case that the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9.

Pursuant to paragraph (d) the prosecutor may through a request trigger the power of the Pre-Trial Chamber to authorize the prosecutor to take specific investigative steps within the territory of a State Party without having secured the co-operation of that State. This enables investigations when dealing with a ‘failed State’ and includes on-site investigations. The requirement on prior consultation and restrictions to non-coercive measures set in Article 99(4) does not apply to investigations authorized by the Pre-Trial Chamber.

Cross-references:

Rule 115.

Regulation 38.

Doctrine: For the bibliography, see the final comment on Article 57.

Author: Mark Klamberg.

Article 57(3)(e)

(e) Where a warrant of arrest or a summons has been issued under Article 58, and having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in this Statute and the Rules of Procedure and Evidence, seek the cooperation of States pursuant to Article 93, paragraph 1 (k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims.

The purpose of this provision is to ensure the right of reparations of the victims (Article 75) and the applicability of forfeiture (Article 77(2)(b)). States Parties have an obligation under Article 93(1)(k) to comply with requests by the Court to provide assistance in relation the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture.

Cross-reference:

Rule 99.

Doctrine:

1. Håkan Friman, in Roy S. Lee, (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 509–12.
2. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 877–885 (<https://www.legal-tools.org/doc/b7432e/>).
3. Fabricio Guariglia and Gudrun Hochmayr, “Article 57 – Functions and powers of the Pre-Trial Chamber”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1421–1436 (<https://www.legal-tools.org/doc/040751/>).
4. Mark Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Martinus Nijhoff Publishers, Leiden, 2013, pp. 208, 254 (<https://www.legal-tools.org/doc/0d524b/>).

Author: Mark Klamberg.

Article 58

Issuance by the Pre-Trial Chamber of a Warrant of Arrest or a Summons to Appear

General Remarks:

Article 58 concerns warrant of arrest or a summons to appear vis-à-vis the suspect which corresponds to the ‘indictment’ in common law jurisdictions. It applies to persons who are ‘suspected’, but not yet ‘accused’ to have committed a crime under the jurisdiction of the Court. The status of ‘accused’ is reserved to the stage where the Pre-Trial Chamber has confirmed the charges. The provision does not apply to offences against the administration of justice under Article 70 or witnesses.

Doctrine: For the bibliography, see the final comment on Article 58.

Author: Mark Klamberg.

Article 58(1)

1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

The application of an arrest warrant occurs at the start of the investigation of a case. In the *Situation in Kenya*, the Pre-Trial Chamber stated that a “case” starts after the issuance of an arrest warrant or a summons to appear pursuant to Article 58 of the Statute.¹

If the requirements of paragraph 1 are fulfilled, the Pre-Trial Chamber is obliged to issue the warrant of arrest, there is no discretion.

Article 58 does not preclude the use of sealed arrest warrants in order to increase the chances of being able to arrest suspects. In the *Situation in Uganda*, Pre-Trial Chamber II decided to hold a hearing regarding the Prosecutor’s request for the transmission of warrants of arrest and requests for arrest and surrender, in closed session to be attended only by the Prosecutor and his representatives.² In *Kony et al.*, Pre-Trial Chamber II decided, *inter alia*, authorized the Prosecutor, on a confidential basis and in situations where the Prosecutor deems it necessary to disclose information relating to the warrant of arrest.³ In the *Situation in Kenya*, the Pre-Trial Chamber found that since the proceedings under Article 58 of the Statute are to be conducted with the exclusive participation of the Prosecutor, the person named in the Prosecutor’s application pursuant to Article 58 of the Statute is not entitled to submit observations in these proceedings.⁴ The application

¹ ICC, *Situation in Republic of Kenya*, Pre-Trial Chamber, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19, para. 44 (<https://www.legal-tools.org/doc/338a6f/>).

² ICC, *Situation in Uganda*, Pre-Trial Chamber II, Decision to Hold a Hearing on the Request under Rule 176 made in the Prosecutor’s Application for Warrants of Arrest Under Article 58, 9 June 2005, ICC-02/04-10 (<https://www.legal-tools.org/doc/641636/>).

³ ICC, *Prosecutor v. Kony et al.*, Pre-Trial Chamber II, Decision on the Prosecutor’s Urgent Application dated 26 September 2005, 27 September 2005, ICC-02/04-01/05-27 (<https://www.legal-tools.org/doc/a03b21/>).

⁴ ICC, *Situation in Kenya*, Pre-Trial Chamber II, Decision on the “Application for Leave to Participate in the Proceedings before the Pre-Trial Chamber relating to the Prosecutor’s Ap-

submitted by Mohammed Hussein Ali requesting leave to participate in the proceedings related to the Prosecutor's application under Article 58 was thus rejected.

Doctrine: For the bibliography, see the final comment on Article 58.

Author: Mark Klamberg.

Article 58(1)(a)

(a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and

The threshold “reasonable grounds” is the least demanding evidentiary requirement used in the ICC Statute.

In *Bemba*, the Pre-Trial Chamber observed “that, under Article 21(3) of the Statute, the expression ‘reasonable grounds to believe’ must be interpreted in a manner consistent with internationally recognized human rights”. Thus, in interpreting and applying this concept, the Chamber was specifically guided by the “reasonable suspicion” standard under Article 5(1)(c) of the ECHR, which, as interpreted by the ECtHR, “requires the existence of some facts or information which would satisfy an objective observer that the person concerned may have committed the offence”. The Chamber was also guided by the jurisprudence of the Inter-American Court of Human Rights (‘IACHR’) on the fundamental right to liberty, as enshrined in Article 7 of the American Convention on Human Rights.¹

In *al-Bashir* the majority of the Pre-Trial Chamber declined to issue an arrest warrant in relation to the counts concerning genocide. The background to the case is that the alleged crimes were committed as part of a counter-insurgency campaign launched by the Government of Sudan (‘GoS’). The majority of the Pre-Trial Chamber stated that the “reasonable grounds” standard would be met (and a warrant would be issued) if the evidence provided by the prosecutor “show[s] that the only reasonable conclusion to be drawn therefrom is the existence of reasonable grounds to believe in the existence” of the perpetrator’s *dolus specialis*-specific intent to destroy in whole or in part the protected groups.² Considering that the existence of a GoS’s genocidal intent is only one of several reasonable conclusions available on the materials provided by the Prosecution, the Pre-Trial Chamber rejected the prosecutor’s application in relation to geno-

¹ ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber III, Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, 10 June 2008, ICC-01/05-01/08-14-tENG, para. 24 (<https://www.legal-tools.org/doc/fb80c6/>).

² ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber I, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, with Separate and Partly Dissenting Opinion of Judge Anita Ušacka, 4 March 2009, ICC-02/05-01/09-3, para. 158 (‘*Al Bashir*, 4 March 2009’) (<https://www.legal-tools.org/doc/e26cf4/>).

cide because the evidentiary standard provided for in Article 58 of the Statute was not met (*Al Bashir*, 4 March 2009, paras. 153–159).

To require the prosecutor to show that it is the only reasonable conclusion in order to have an arrest warrant issued would arguably be the wrong standard of proof to use because it amounts to the higher ‘beyond reasonable doubt’ standard. The partly dissenting Judge Ušacka noted that “[t]he Statute proscribes progressively higher evidentiary thresholds which must be met at each stage of the proceedings” and that at the arrest warrant/summons stage the Pre-Trial Chamber need only be “satisfied that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court. She held that “the Prosecution need not demonstrate that [...] an inference [of genocidal intent] is the only reasonable one at the arrest warrant stage”. She was satisfied that there were reasonable grounds to issue an arrest warrant on the basis of the existence of reasonable grounds to believe that Omar Al Bashir has committed the crime of genocide (*Al Bashir*, 4 March 2009, Separate and Partly Dissenting Opinion of Judge Anita Ušacka, paras. 8, 27–34, 84 and 105).

The Appeals Chamber accordingly reversed the decision of the Pre-Trial Chamber because it had applied an erroneous standard of proof. In the view of the Appeals Chamber, requiring that the existence of genocidal intent must be the only reasonable conclusion amounted to requiring the prosecutor to disprove any other reasonable conclusions and to eliminate any reasonable doubt. If the only reasonable conclusion based on the evidence was the existence of genocidal intent, then it could not be said that such a finding established merely “reasonable grounds to believe”. The Pre-Trial Chamber was directed to decide anew, on the basis of the correct standard of proof, whether a warrant of arrest in respect of the crime of genocide should be issued.³

Following the Appeals Chamber, the Pre-Trial Chamber stated in *Mudacumura* that “[t]he evidence need only establish a reasonable conclusion that the person committed a crime within the jurisdiction of the Court,

³ ICC, *Prosecutor v. Al Bashir*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, 3 February 2010, ICC-02/05-01/09-73, paras. 33, 41 (<https://www.legal-tools.org/doc/9ada8e/>).

and it is not required that this be the only reasonable conclusion that can be drawn from the evidence”.⁴

Doctrine: For the bibliography, see the final comment on Article 58.

Author: Mark Klamberg.

⁴ ICC, *Prosecutor v. Mudacumura*, Pre-Trial Chamber, Decision on the Prosecutor’s Application under Article 58, 13 July 2012, ICC-01/04-01/12-1-Red, para. 19 (<https://www.legal-tools.org/doc/ecfae0/>).

Article 58(1)(b)(i)

(b) The arrest of the person appears necessary:

(i) To ensure the person's appearance at trial

Sub-paragraph 1(b) lists three grounds for issuing an arrest warrant. The first ground concerns the interest to ensure the suspects appearance at trial. In *Lubanga*, the Appeals Chamber upheld the finding of the single judge that the following factors should be taken into account for the purpose of Article 58(1)(b)(i) of the ICC Statute: (i) the gravity of the crimes; (ii) the international contacts of the person, and (iii) his or her hypothetical voluntary surrender to the Court.¹

This is the main reason to detain suspects, there are several decisions where arrest warrants have been based on this ground. In *Lubanga*, Trial Chamber I concluded that the defendant was highly unlikely to attend his trial voluntarily.² For these reasons Trial Chamber I found it necessary to continue to detain the defendant. In *Katanga*, Pre-Trial Chamber I issued an arrest warrant on two grounds, namely Article 58(1)(b)(i) and (ii).³ The Pre-Trial Chamber also considered that it would state “the analysis of the evidence and other information submitted by the Prosecution will be set out in a decision to be filed subsequently” (*Katanga*, 2 July 2007, p. 3). Subsequently, Pre-Trial Chamber stated that “on the basis of the evidence and information contained in the Prosecution Application, the Prosecution Supporting Materials and the Prosecution Response, and without prejudice to any subsequent determination under Article 60 of the Statute and Rule 119 of the Rules of Procedure and Evidence, the arrest of Germain Katanga appears necessary pursuant to Article 58(1)(b)(i) and (ii) of the Statute, both

¹ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”, 13 February 2007, ICC-01/04-01/06-824-tCMN, paras. 136–138 (<https://www.legal-tools.org/doc/ff3bd8/>); see also *Katanga and Ngudjolo*, Pre-Trial Chamber II, Decision on the Application for Interim Release of Mathieu Ngudjolo Chui, 27 March 2008, ICC-01/04-01/07-345, p. 7 (<https://www.legal-tools.org/doc/0754ec/>).

² ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision reviewing the “Decision on the Application for the Interim Release of Thomas Lubanga Dyilo”, 8 October 2007, ICC-01/04-01/06-976 (<https://www.legal-tools.org/doc/a508ec/>).

³ ICC, *Prosecutor v. Katanga*, Pre-Trial Chamber I, Warrant of arrest for Germain Katanga, 2 July 2007, ICC-01/04-01/07-1-tENG (“*Katanga*, 2 July 2007”) (<https://www.legal-tools.org/doc/4a8301/>).

to ensure his appearance at trial and to ensure that he does not obstruct or endanger the investigation or the court proceedings”.⁴ In *Ngudjolo*, Pre-Trial Chamber I issued an arrest warrant on two grounds, namely Article 58(1)(b)(i) and (ii).⁵

Doctrine: For the bibliography, see the final comment on Article 58.

Author: Mark Klamberg.

⁴ ICC, *Prosecutor v. Katanga*, Pre-Trial Chamber, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, 5 November 2007, ICC-01/04-01/07-55, para. 64 (<https://www.legal-tools.org/doc/37fdf3/>).

⁵ ICC, *Prosecutor v. Ngudjolo*, Pre-Trial Chamber, Warrant of Arrest for Mathieu Ngudjolo Chui, 6 July 2007, ICC-01/04-01/07-260-tENG, p. 7 (<https://www.legal-tools.org/doc/d03d7a/>); see also *Prosecutor v. Ngudjolo*, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui, 6 July 2007, ICC-01/04-01/07-262, paras. 62–68 (<https://www.legal-tools.org/doc/91ce10/>).

Article 58(1)(b)(ii)

(ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or

The second ground for issuing an arrest warrant provides that if there is reason to believe that a suspect would interfere with the investigations of the Prosecution, he or she can be detained.

In *Katanga*, Pre-Trial Chamber I issued an arrest warrant on two grounds, namely Articles 58(1)(b)(i) and (ii).¹ The Pre-Trial Chamber also considered that it would state “the analysis of the evidence and other information submitted by the Prosecution will be set out in a decision to be filed subsequently” (*Katanga*, 2 July 2007, p. 3). Subsequently, the Pre-Trial Chamber stated that “on the basis of the evidence and information contained in the Prosecution Application, the Prosecution Supporting Materials and the Prosecution Response, and without prejudice to any subsequent determination under Article 60 of the Statute and Rule 119 of the Rules of Procedure and Evidence, the arrest of Germain Katanga appears necessary pursuant to Articles 58(1)(b)(i) and (ii) of the Statute, both to ensure his appearance at trial and to ensure that he does not obstruct or endanger the investigation or the court proceedings”.²

Doctrine: For the bibliography, see the final comment on Article 58.

Author: Mark Klamberg.

¹ ICC, *Prosecutor v. Katanga*, Pre-Trial Chamber I, Warrant of arrest for Germain Katanga, 2 July 2007, ICC-01/04-01/07-1-tENG (‘*Katanga*, 2 July 2007’) (<https://www.legal-tools.org/doc/4a8301/>).

² ICC, *Prosecutor v. Katanga*, Pre-Trial Chamber, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, 5 November 2007, ICC-01/04-01/07-55, para. 64 (<https://www.legal-tools.org/doc/37fdf3/>).

Article 58(1)(b)(iii)

(iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

The third ground for issuing an arrest warrant aims to prevent the suspect from continuing committing crimes. In the *Situation in Uganda*, the Pre-Trial Chamber stated “that attacks by the LRA are still occurring and that there is therefore a likelihood that failure to arrest [...] will result in the continuation of crimes of the kind described in the Prosecutor’s application.”¹

Doctrine: For the bibliography, see the final comment on Article 58.

Author: Mark Klamberg.

¹ ICC, *Prosecutor v. Kony et al.*, Pre-Trial Chamber, Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005, ICC-02/04-01/05-53, para. 45 (<https://www.legal-tools.org/doc/b1010a/>); *Prosecutor v. Kony et al.*, Pre-Trial Chamber, Warrant of Arrest for Okot Odhiambo, 8 July 2005, ICC-02/04-01/05-56 (<https://www.legal-tools.org/doc/313f9b/>); *Prosecutor v. Otti*, Pre-Trial Chamber, Warrant of Arrest for Vincent Otti, 8 July 2005, ICC-02/04-01/05-54, para. 45 (<https://www.legal-tools.org/doc/f7c78c/>); *Prosecutor v. Lukwiya*, Pre-Trial Chamber, Warrant of Arrest for Raska Lukwiya, 8 July 2005, ICC-02/04-01/05-55, para. 33 (<https://www.legal-tools.org/doc/97466a/>); *Prosecutor v. Ongwen*, Pre-Trial Chamber, Warrant of Arrest for Dominic Ongwen, 8 July 2005, ICC-02/04-01/15-6, para. 33 (<https://www.legal-tools.org/doc/8bf236/>).

Article 58(2)

2. The application of the Prosecutor shall contain:

- (a) The name of the person and any other relevant identifying information;**
- (b) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed;**
- (c) A concise statement of the facts which are alleged to constitute those crimes;**
- (d) A summary of the evidence and any other information which establish reasonable grounds to believe that the person committed those crimes; and**
- (e) The reason why the Prosecutor believes that the arrest of the person is necessary.**

Paragraph 2 lists what needs to be in the Prosecutor's application for an arrest warrant. In the *Situation in the Democratic Republic of Congo*, the Pre-Trial Chamber dismissed the application of the Prosecutor for the lack of specificity.¹ The Appeals Chamber has stated that the list in paragraph 2 is exhaustive.²

Doctrine: For the bibliography, see the final comment on Article 58.

Author: Mark Klamberg.

¹ ICC, *Situation in the Democratic Republic of Congo*, Pre-Trial Chamber, Decision on the Prosecutor's Application under Article 58, 31 May 2012, ICC-01/04-613, paras. 5–6 (<https://www.legal-tools.org/doc/618206/>).

² ICC, *Situation in the Democratic Republic of Congo*, Appeals Chamber, Judgment on the Prosecutor's appeal against the decision of the Pre-Trial chamber I entitled "Decision on the Prosecutor's Application for warrants of arrest, Article 58", 13 July 2006, ICC-01/04-169, para. 45 (<https://www.legal-tools.org/doc/8c20eb/>).

Article 58(3)

3. The warrant of arrest shall contain:

- (a) The name of the person and any other relevant identifying information;**
- (b) A specific reference to the crimes within the jurisdiction of the Court for which the person's arrest is sought; and**
- (c) A concise statement of the facts which are alleged to constitute those crimes.**

Paragraph 3 lists what needs to be in the warrant of arrest. It shall encompass the information contained in the application of the Prosecutor except of the summary of evidence and the reasons why the Prosecutor considers an arrest necessary.

Doctrine: For the bibliography, see the final comment on Article 58.

Author: Mark Klamberg.

Article 58(4)

4. The warrant of arrest shall remain in effect until otherwise ordered by the Court.

This paragraph clarifies that only the Court has the power to lift the arrest warrant. The arrest warrant against *Lukwiya* was cancelled when convincing evidence submitted to the Pre-Trial Chamber showed that the suspect was dead.¹

Doctrine: For the bibliography, see the final comment on Article 58.

Author: Mark Klamberg.

¹ ICC, *Prosecutor v. Lukwiya*, Pre-Trial Chamber, Decision to Terminate the Proceedings against Raska Lukwiya, 11 July 2007, ICC-02/04-01/05-248 (<https://www.legal-tools.org/doc/3e6d25/>).

Article 58(5)

5. On the basis of the warrant of arrest, the Court may request the provisional arrest or the arrest and surrender of the person under Part 9.

This paragraph provides that the Pre-Trial Chamber may request the provisional arrest or the arrest and surrender of the suspect. Article 92 governs provisional arrest.

Doctrine: For the bibliography, see the final comment on Article 58.

Author: Mark Klamberg.

Article 58(6)

6. The Prosecutor may request the Pre-Trial Chamber to amend the warrant of arrest by modifying or adding to the crimes specified therein. The Pre-Trial Chamber shall so amend the warrant if it is satisfied that there are reasonable grounds to believe that the person committed the modified or additional crimes.

The Prosecutor may request the Pre-Trial Chamber to amend the warrant of arrest which refers to the information listed in paragraph 3.

Doctrine: For the bibliography, see the final comment on Article 58.

Author: Mark Klamberg.

Article 58(7)

7. As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear. The summons shall contain:

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

As an alternative to a warrant of arrest, a suspect may be summoned to appear. The ICC Statute does not specify what is required in the Prosecutor's application for summons. Presumably it is the same as in an application for warrant of arrest, with the exception that there is no need to specify the reasons why an arrest is necessary.

In the *Situation in Darfur, Sudan*, the Prosecutor requested that summons to appear be issued.¹ In *Harun and Kushayb*, Pre-Trial Chamber I was not satisfied that the requirements of Article 58(7) of the Statute were met and instead it issued arrest warrants.² In *Banda and Jerbo*, the Pre-Trial Chamber issued summons to appear.³ In *Abu Garda*, the Prosecutor applied for a warrant of arrest, but changed his position when the suspect agreed to surrender voluntarily. In *Abu Garda*, the Pre-Trial Chamber stated that it was "satisfied that there are reasonable grounds to believe that a summons

¹ ICC, *Situation in Darfur*, OTP, Prosecutor's Application under Article 58 (7), 27 February 2007, ICC-02/05-56 (<https://www.legal-tools.org/doc/f085c1/>).

² ICC, *Prosecutor v. Harun and Kushayb*, Pre-Trial Chamber I, Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007, ICC-02/05-01/07-1-Corr, para. 125 (<https://www.legal-tools.org/doc/e2469d/>).

³ ICC, *Prosecutor v. Banda and Jerbo*, Pre-Trial Chamber, Second Decision on the Prosecutor's Application under Article 58, 27 August 2009, ICC-02/05-03/09-1-RSC (<https://www.legal-tools.org/doc/b3438d/>).

to appear is sufficient to ensure the appearance of Abu Garda before the Court within the meaning of Article 58(7) of the Statute”.⁴ However, the Pre-Trial Chamber reserved “its right to review this finding either *proprio motu* or at the request of the Prosecutor, however, particularly if the suspect fails to appear on the date specified in the summons or fails to comply with the orders contained in the summons to appear issued by the Chamber” (*Abu Garda*, 7 May 2009, para. 38).

Cross-references:

Rules 119, 121, 122 and 123.

Doctrine:

1. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 886–901 (<https://www.legal-tools.org/doc/b7432e/>).
2. Christopher K. Hall and Cedric Ryngaert, “Article 58 – Issuance by the Pre-Trial Chamber of a Warrant of Arrest or a Summons to Appear”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1437–57 (<https://www.legal-tools.org/doc/040751/>).
3. Mark Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Martinus Nijhoff Publishers, Leiden, 2013, pp. 136–39.

Author: Mark Klamberg.

⁴ ICC, *Prosecutor v. Abu Garda*, Pre-Trial Chamber I, Decision on the Prosecutor’s application under Article 58, 7 May 2009, ICC-02/05-02/09-1, para. 37 (*‘Abu Garda*, 7 May 2009’) (<https://www.legal-tools.org/doc/126792/>).

Article 59

Arrest Proceedings in the Custodial State

General Remarks:

Article 59 concerns arrest proceedings in the custodial state to be distinguished from the initial proceedings before the Court, regulated by Article 60. The assumption is that a suspect as a rule will be located and detained by national authorities in the territory of a State Party. This is not necessary in cases where the suspect is expected to present voluntarily in the Hague.

Article 59 imposes obligations on States Parties and is likely to be interpreted and applied by national judges.

Rule 165 exempts Article 59 from applying to proceedings concerning offences against the administration of justice. It is unclear from the provisions of Article 59 why it was exempted from such proceedings. An arrest warrant would fall under Article 70(2) of the Statute and in accordance with Rule 167(2) would be governed by the laws of the custodial State, see comment on Rule 165(2).

Doctrine: For the bibliography, see the final comment on Article 59.

Author: Mark Klamberg.

Article 59(1)

1. A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9.

The reference to Part 9 which concerns several obligations, including Article 88 that provides that States Parties shall ensure that there are procedures available under their national law. Moreover, Article 86 requires that States Parties shall co-operate fully with the Court. The requirement “immediately” should be read together with the paragraph 2 which instructs that the arrested person be brought “promptly” and paragraph 7 that the person shall be delivered to the Court “as soon as possible”.

Doctrine: For the bibliography, see the final comment on Article 59.

Author: Mark Klamberg.

Article 59(2)

2. A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:

(a) The warrant applies to that person;

(b) The person has been arrested in accordance with the proper process; and

(c) The person's rights have been respected.

Paragraph 2 is based on the assumption that the warrant of arrest by the Court is effected by a State Party rather than by an organ of the Court.

The competent judicial authority shall, in accordance with its own law, that the warrant applies to the suspect; that the arrest has followed the proper process; and that the suspect's rights have been respected. This means that the judicial authority must verify that the person arrested is the same as the person sought under the arrest warrant. Article 59 does not specify what the "proper process" is, this is to be governed by the law of the custodial state. The rights to be respected would include both rights under national and international law, including the rights recognized under Article 55.

The jurisdiction of the Court in *Lubanga* was challenged by reference to the "doctrine of abuse of process".¹ The defence argued that Lubanga's rights under Article 59(2) were infringed. Pre-Trial Chamber I considered that there is no evidence indicating that the arrest and detention of Thomas Lubanga Dyilo prior to the Court's co-operation request for the arrest and surrender was the result of any concerted action between the Court and the custodial State; and the Court did therefore not examine the lawfulness of the arrest and detention of Thomas Lubanga Dyilo by the custodial State prior to Court's co-operation request. Thus, Pre-Trial Chamber I dismissed the challenge to the jurisdiction of the Court raised by Thomas Lubanga Dyilo pursuant to Article 19(2)(a) of the Statute and therefore rejected the request for release (*Lubanga*, 3 October 2006, pp. 11–12). In *Lubanga*, the Appeals Chamber ruled that Article 21(3) of the Statute makes the interpretation as well as the application of the law appli-

¹ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber, Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute, 3 October 2006, ICC-01/04-01/06-512 ('*Lubanga*, 3 October 2006') (<https://www.legal-tools.org/doc/bedbe7/>).

cable under the Statute subject to internationally recognised human rights.² It requires the exercise of the jurisdiction of the Court in accordance with internationally recognized human rights norms. The Appeals Chamber continued stating that where the breaches of the rights of the accused are such as to make it impossible for him or her to make his or her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed. The Appeals Chamber found no error in the Pre-Trial Chamber's findings (*Lubanga*, 14 December 2006, para. 42). The Pre-Trial Chamber in *Bemba* “found no indication of any irregularity or arbitrariness in the procedure followed by the competent Belgian authorities that would constitute a material breach of Article 59(2) of the Statute affecting the proceedings before the Court or render the detention of Mr Jean-Pierre Bemba on the authority of the Court otherwise unacceptable”.³

Article 59 does not indicate what a national court should do if it finds that the “proper process” has not been respected. Article 85(1) provides that “[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation”. Hall argues that “neither the determination by the national judicial authority that the suspect’s right was violated nor the remedies it adopted could prevent surrender to the Court”.⁴

Doctrine: For the bibliography, see the final comment on Article 59.

Author: Mark Klamberg.

² ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, para. 39 (*Lubanga*, 14 December 2006’) (<https://www.legal-tools.org/doc/1505f7/>).

³ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber, Decision on application for interim release, 20 August 2008, ICC-01/05-01/08-73, para. 49 (<https://www.legal-tools.org/doc/9956eb/>).

⁴ Christopher K. Hall and Cedric Ryngaert, “Article 59: Arrest Proceedings in the Custodial State”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1465 (<https://www.legal-tools.org/doc/040751/>).

Article 59(3)

3. The person arrested shall have the right to apply to the competent authority in the custodial State for interim release pending surrender.

Paragraph 3 grants the suspect the right to apply for interim release pending surrender. This is determined by the “competent authority”, there is no requirement that this should be a ‘judicial authority’. This may be contrasted with the vertical order of the ICTY and ICTR where nothing in their statutes or rules permits national courts to order interim release. This feature of the ICC regime makes it more horizontal. However, the competent authorities of the custodial State cannot lift the arrest warrant issued by the Court. Paragraphs 4–6 develop the process of interim release.

Doctrine: For the bibliography, see the final comment on Article 59.

Author: Mark Klamberg.

Article 59(4)

4. In reaching a decision on any such application, the competent authority in the custodial State shall consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the Court. It shall not be open to the competent authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with Article 58, paragraph 1 (a) and (b).

When considering an application for interim release, the competent authority of the Custodial state shall consider factors such as: the gravity of the crimes; urgent and exceptional circumstances and there must be necessary safeguards to ensure the transfer of the arrested person to the Court. However, the competent authority of the Custodial state shall not rule on challenges to the grounds of the issuance of the warrant of arrest. Such challenges should instead be made to the Pre-Trial Chamber. Since Rule 117(3) is not restricted to challenges made after surrender to the court, the arrested person could make such challenges to the Pre-Trial Chamber while still in the custodial state.

Doctrine: For the bibliography, see the final comment on Article 59.

Author: Mark Klamberg.

Article 59(5)

5. The Pre-Trial Chamber shall be notified of any request for interim release and shall make recommendations to the competent authority in the custodial State. The competent authority in the custodial State shall give full consideration to such recommendations, including any recommendations on measures to prevent the escape of the person, before rendering its decision.

Paragraph 5 requires that the custodial State to inform the Pre-Trial Chamber of any request for interim release. The Pre-Trial Chamber is required to make recommendations to the competent authority of the Custodial state. This reflects the assumption that the organs of the Court and the States Parties should work closely together on all issues of co-operation. Rule 117(4) provides that the Pre-Trial Chamber shall provide its recommendations within any time limit set by the custodial State.

Doctrine: For the bibliography, see the final comment on Article 59.

Author: Mark Klamberg.

Article 59(6)

6. If the person is granted interim release, the Pre-Trial Chamber may request periodic reports on the status of the interim release.

In case interim release is granted, the Pre-Trial Chamber can through periodic reports control the progress of the investigation and ensure that the proceedings before the Court are secure.

Doctrine: For the bibliography, see the final comment on Article 59.

Author: Mark Klamberg.

Article 59(7)

7. *Once ordered to be surrendered by the custodial State, the person shall be delivered to the Court as soon as possible.*

Paragraph 7 declares that the arrested person shall be delivered to the Court as soon as possible.

Doctrine:

1. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 902–909 (<https://www.legal-tools.org/doc/b7432e/>).
2. Christopher K. Hall and Cedric Ryngaert, “Article 59: Arrest Proceedings in the Custodial State”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1458–71 (<https://www.legal-tools.org/doc/040751/>).
3. Karel De Meester, “Article 59: Arrest proceedings in the custodial State”, in Paul De Hert, Jean Flamme, Mathias Holvoet and Olivia Stuyven (eds.), *Code of International Criminal Law and Procedure, Annotated*, Larcier, Ghent, 2013, pp. 247–52 (<https://www.legal-tools.org/doc/3f10e0/>).

Author: Mark Klamberg.

Article 60

Initial Proceedings before the Court

General Remarks:

Article 60 concerns the initial proceedings before the Court, including pre-trial release and detention. Human rights law creates a presumption that the suspect should be released pending trial, see Article 9(3) of the International Covenant on Civil and Political Rights. However, in international criminal proceedings the general rule is rather that accused are detained throughout the proceedings. There are no provisions in the ICTY and ICTR statutes on pre-trial release. This may be justified by the seriousness of the crimes in international criminal proceedings.

However, in *Bemba*, the Pre-Trial Chamber clarified that deprivation of liberty should be an exception and not a rule is a fundamental principle, a corollary of the presumption of innocence provided in Article 66 of the Statute and the guiding principle upon which the review should be based.¹

Doctrine: For the bibliography, see the final comment on Article 60.

Author: Mark Klamberg.

¹ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber, Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa, 14 August 2009, ICC-01/05-01/08-475, paras. 36–37 (<https://www.legal-tools.org/doc/25353d/>).

Article 60(1)

1. Upon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under this Statute, including the right to apply for interim release pending trial.

Regardless of how a suspect was brought to the Court, the Pre-Trial Chamber must satisfy itself that the person is informed of the charges against him or her and his or her rights. This is consistent with human rights law which provides that an arrested or detained person “shall be brought promptly before a judge or other office authorized by law to exercise judicial power” (see International Covenant on Civil and Political Rights, Article 9(3)).

At this stage the Pre-Trial Chamber is required to notify the person the charges and accusations made under Article 58. The Pre-Trial Chamber may authorize that initial appearance is made in public.¹

As indicated above, the scope and purpose of the initial appearance is limited to informing the suspect of the charges against him or her and his or her rights. Thus, the Single Judge ruled in *Ruto et. al* that victims' intervention at this stage is not appropriate, and held the view that victims' intervention at the stage of initial appearance is not appropriate.² In the same case, the Pre-Trial Chamber held the view that to consider issues related to Article 19 proceedings during the initial appearance hearing would certainly go beyond the scope of an initial appearance hearing as defined by the Statute and Rules thereto.³

¹ See ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Order Scheduling the First Appearance of Mr Thomas Lubanga Dyilo, 17 March 2006, ICC-01/04-01/06-38 (<https://www.legal-tools.org/doc/9fbfee/>), in which Pre-Trial Chamber I decided to hold a public hearing.

² See ICC, *Prosecutor v. Ruto et. al*, Pre-Trial Chamber, Decision on the Motion by Legal Representative of Victim Applicants to Participate in Initial Appearance Proceedings, 30 March 2011, ICC-01/09-01/11-14, para. 6 (<https://www.legal-tools.org/doc/83dd8a/>).

³ See also ICC, *Prosecutor v. Ruto et. al*, Pre-Trial Chamber, Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute, 4 April 2011, ICC-01/09-01/11-31, para. 11 (<https://www.legal-tools.org/doc/c6286c/>).

Cross-reference:

Regulation 51.

Doctrine: For the bibliography, see the final comment on Article 60.

Author: Mark Klamberg.

Article 60(2)

2. A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in Article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.

Paragraph 2 specifies the considerations for determining the issue of interim release. These considerations are set out in Article 58(1), if they continue to exist the person shall be continued to be detained.

There are several decisions concerning interim release. In the *Lubanga* case the Appeals Chamber confirmed the decision of the Chamber on the application for the interim release of Thomas Lubanga Dyilo.¹

During the pre-trial proceedings some information may be withheld from the defence. This has to be balanced against the ability of the defence to challenge detention. In the *Bemba* case, the Appeals Chamber ruled that defence has the right of access to documents that are essential for the purposes of applying for interim release.²

The right for the parties under Article 82(1)(b) to appeal decisions granting or denying release is wide in the sense that there is no requirement on leave to appeal. One question is what the scope of the Appeals Chamber's review is. In the *Bemba* case, the Appeals Chamber stated that it "will not review the findings of the Pre-Trial Chamber *de novo*, instead it will intervene in the findings of the Pre-Trial Chamber only where clear

¹ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber, Decision on the Application for the interim release of Thomas Lubanga Dyilo, 18 October 2006, ICC-01/04-01/06-586-tEN (<https://www.legal-tools.org/doc/6c297f/>), Pre-Trial Chamber I rejected the Defence request for interim release. In ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo", 13 February 2007, ICC-01/04-01/06-824-tCMN (<https://www.legal-tools.org/doc/ff3bd8/>).

² ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release, 16 December 2008, ICC-01/05-01/08-323, para. 32 (<https://www.legal-tools.org/doc/5a1931/>). See also ICC, *Prosecutor v. Mbarushimana*, Pre-Trial Chamber, Decision on the Defence Request for Disclosure, 27 January 2011, ICC-01/04-01/10-47, para. 10 (<https://www.legal-tools.org/doc/929443/>).

errors of law, fact or procedure are shown to exist and vitiate the Impugned Decision”.³

When considering conditional release, one relevant factor is the ability and willingness of the state – where accused will reside – to enforce the conditions for the release. In the *Bemba* case, the Appeals Chamber found that “[i]f a Chamber is considering conditional release and a State has indicated its general willingness and ability to accept a detained person and enforce conditions, the Chamber must seek observations from that State as to its ability to enforce specific conditions identified by the Chamber”.⁴ The issues were remanded to the Trial Chamber for new consideration. As a consequence, the Trial Chamber considered the matter again.⁵

In *Bemba*, the Pre-Trial Chamber first granted the suspect conditional release.⁶ This was motivated, *inter alia*, with Mr Bemba’s good behaviour in detention (*Bemba*, 14 August 2009, para. 64).

On 3 September 2009 the Appeals Chamber issued in *Bemba* the Decision on the Request of the Prosecutor for Suspensive Effect, in which it decided to grant suspensive effect in respect of operative paragraph (a) of

³ ICC, *Prosecutor v. Bemba*, Appeals Chamber, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II’s “Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa”, 2 December 2009, ICC-01/05-01/08-631-Red, para. 62 (*‘Bemba*, 2 December 2009’) (<https://www.legal-tools.org/doc/5bc6b2/>). See also ICC, *Prosecutor v. Mbarushimana*, Appeals Chamber, Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled “Decision on the ‘Defence Request for Interim Release’”, 14 July 2011, ICC-01/04-01/10-283, para. 15 (<https://www.legal-tools.org/doc/64a283/>).

⁴ ICC, *Prosecutor v. Bemba*, Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled “Decision on Applications for Provisional Release”, 19 August 2011, ICC-01/05-01/08-1626-Red, para. 1 (<https://www.legal-tools.org/doc/64dc49/>).

⁵ ICC, *Prosecutor v. Bemba*, Trial Chamber, Public Redacted Version of the 26 September 2011 Decision on the accused’s application for provisional release in light of the Appeals Chamber’s judgment of 19 August 2011, 27 September 2011, ICC-01/05-01/08-1789-Red (<https://www.legal-tools.org/doc/efc5ad/>).

⁶ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber I, Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa, 14 August 2009, ICC-01/05-01/08-475 (*‘Bemba*, 14 August 2009’) (<https://www.legal-tools.org/doc/25353d/>).

the 14 August 2009 Decision.⁷ Subsequently, the Appeals Chamber reversed the decision of Pre-Trial Chamber II. The Appeals Chamber found that “[i]n granting conditional release it is necessary to specify the appropriate conditions that make conditional release feasible, identify the State to which Mr. Bemba would be released and whether that State would be able to enforce the conditions imposed by the Court” (*Bemba*, 2 December 2009). The Appeals Chamber determined that the Pre-Trial Chamber erred in finding that there existed a change in circumstances that necessitated the conditional release of Mr Bemba (para. 64).

Doctrine: For the bibliography, see the final comment on Article 60.

Author: Mark Klamberg.

⁷ ICC, *Prosecutor v. Bemba*, Appeals Chamber, Decision on the Request of the Prosecutor for Suspensive Effect, 3 September 2009, ICC-01/05-01/08-499 (<https://www.legal-tools.org/doc/2feebc/>).

Article 60(3)

3. The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.

Paragraph 3 provides that the Pre-Trial Chamber periodically reviews its ruling on release or detention.

No time period for the timings of these periodic reviews is stipulated in the Statute. However, Rule 118(2) requires that the Pre-Trial Chamber reviews its decision at least every 120 days.¹ The Pre-Trial Chamber has the power to review the detention of a suspect even in the absence of an application for interim release. In the *Katanga* case, the Single Judge decided that she, acting on behalf of the Chamber, “has the power to undertake a proprio motu review to determine whether the conditions for the pre-trial detention of Germain Katanga continue to be met”.²

In *Bemba*, the Appeals Chamber clarified that while the Prosecutor does not have to re-establish circumstances that have already been established, he must show that there has been no change in those circumstances.³ In light of the above, a Chamber carrying out a periodic review of a ruling on detention under Article 60 (3) of the Statute must satisfy itself that the conditions under Article 58 (1) of the Statute, as required by Article 60 (2) of the Statute, continue to be met (*Bemba*, 19 November 2010, para. 52). The Appeals Chamber observed that the Trial Chamber did not refer to the circumstances underpinning the ruling on detention and indicate whether

¹ See for example ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Review of the “Decision on the Application for the Interim Release of Thomas Lubanga Dyilo”, 14 February 2007, ICC-01/04-01/06-826 (<https://www.legal-tools.org/doc/25fe6d/>), where Pre-Trial Chamber I, after 120 days, reviewed its ruling and decided that Thomas Lubanga Dyilo shall continue to be detained.

² ICC, *Prosecutor v. Katanga*, Pre-Trial Chamber, Decision on the powers of the Pre-Trial chamber to review proprio motu the pre-trial detention of Germain Katanga, 18 March 2008, ICC-01/04-01/07-330, p. 12 (<https://www.legal-tools.org/doc/609b3b/>).

³ ICC, *Prosecutor v. Bemba*, Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled “Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence”, 19 November 2010, ICC-01/05-01/08-1019, para. 51 (*Bemba*, 19 November 2010’) (<https://www.legal-tools.org/doc/f5c41c/>).

these circumstances persist or whether there has been a change (para. 55). For the reasons stated above, the Appeals Chamber concluded that the Trial Chamber erred when, in carrying out a periodic review under Article 60 (3) of the Statute, it failed to revert to the ruling on detention in the manner outlined above at paragraph 52 and, instead, restricted itself to only assessing the alleged new circumstances presented by Mr Bemba (para. 57). As a consequence, the Appeals Chamber reversed the impugned Decision. The matter was remanded to the Trial Chamber for a new review in light of paragraphs 40 to 56 of the judgment. Until, and subject to, that review, Mr Bemba was ordered to remain in detention (para. 95).

Cross-references:

Rules 118, 119, 120, and 185.

Doctrine: For the bibliography, see the final comment on Article 60.

Author: Mark Klamberg.

Article 60(4)

4. The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions.

Article 60(4) is independent of Article 60(2) in the sense that even if the ground for pre-trial detention set out in Article 58(1) are met, the Pre-Trial Chamber shall consider the release of the detained if the person is detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor.

There are several decisions concerning Article 60(4). In *Lubanga*, Pre-Trial Chamber I considered that the period of detention was reasonable and that there was no inexcusable delay caused by the Prosecution according to Article 60(4) of the Statute.¹

In the same case, Trial Chamber I concluded that the detention of the accused had not been for an unreasonable period due to inexcusable delay by the prosecution and decided that Thomas Lubanga Dyilo was to stay in detention.²

However, the Appeals Chamber found that “[i]f a Chamber imposes a conditional stay of the proceedings, the unconditional release of the accused person is not the “inevitable” consequence and “the only correct course” to take.³ Instead, the Chamber will have to consider all relevant circumstances and base its decision on release or detention on the criteria in Articles 60 and 58(1) of the Statute”.

Cross-reference:

Rule 185.

¹ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Second Review of the “Decision on the Application for Interim Release of Thomas Lubanga Dyilo”, 11 June 2007, ICC-01/04-01/06-924, (<https://www.legal-tools.org/doc/09a887/>).

² ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision reviewing the “Decision on the Application for the Interim Release of Thomas Lubanga Dyilo”, 8 October 2007, ICC-01/04-01/06-976, (<https://www.legal-tools.org/doc/a508ec/>).

³ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the release of Thomas Lubanga Dyilo”, 21 October 2008, ICC-01/04-01/06-1487 (<https://www.legal-tools.org/doc/55e587/>).

Doctrine: For the bibliography, see the final comment on Article 60.

Author: Mark Klamberg.

Article 60(5)

5. If necessary, the Pre-Trial Chamber may issue a warrant of arrest to secure the presence of a person who has been released.

Paragraph 5 allows the Pre-Trial Chamber to issue a warrant of arrest to secure the presence of a person who has been released.

Doctrine:

1. William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 910–922 (<https://www.legal-tools.org/doc/b7432e/>).
2. Karim A.A Khan, “Article 60 – Initial Proceedings before the Court”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1472–1783 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Article 61

Confirmation of the Charges before Trial

General Remarks:

Unique Feature of the International Criminal Court:

The holding of a confirmation hearing before the opening of the trial is a unique feature of the Court. No other international criminal tribunal contemplates this proceeding. Before other international criminal tribunals, the Prosecutor submits an indictment to a judge, who decides *ex parte* whether to confirm it and if so, issues an arrest warrant. The trial eventually follows on the confirmed indictment, after the remaining pre-trial proceedings have been completed. By contrast, at the Court a hearing pursuant to Article 61 of the Statute is held before three judges to confirm the charges against the person concerned, after a warrant of arrest or a summons to appear under Article 58 of the Statute has been issued *ex parte*. The person concerned may challenge those charges during the confirmation hearing and, if successful, prevent the opening of a trial against him or her. Article 61 marks the boundaries between the pre-trial and trial stages before the Court.

Purpose of the Confirmation Hearing:

The purpose of the confirmation hearing is not to find the truth in relation to the guilt or innocence of the person against whom a warrant of arrest or a summons to appear has been issued, but to confirm the charges on which the Prosecutor intends to seek trial. The word ‘confirm’ means to ‘make valid by formal authoritative assent; to ratify, sanction’. Accordingly, the Pre-Trial Chamber validates the charges as formulated by the prosecution by determining whether the evidence presented is sufficient to commit said person for trial, and, in the event that the charges are confirmed, it demarcates the subject-matter of the case, designs the legal and factual framework for the subsequent trial proceedings and facilitates the preparation for trial.¹ In short, the confirmation of charges hearing exists to separate those

¹ ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V, Decision on the content of the updated document containing the charges, 28 December 2012, ICC-01/09-01/11-522, para. 14 (<https://www.legal-tools.org/doc/63df93/>); *Kenyatta and Muthaura*, Trial Chamber V, Decision on the content of the updated document containing the charges, 28 December 2012, ICC-01/09-02/11-584, para. 18 (<https://www.legal-tools.org/doc/30206e/>); *Prosecutor v. Ruto and Sang*, Pre-Trial Chamber II, Decision on the “Prosecution’s Request to Amend the

cases and charges which should go to trial from those which should not. It serves to ensure the efficiency of judicial proceedings and to protect the rights of persons by ensuring that cases and charges go to trial only when justified by sufficient evidence.²

The confirmation hearing is therefore not a ‘trial before the trial’ or a ‘mini-trial’, but a procedure designed to protect the suspect against unfounded accusations and to ensure judicial economy.³

Moreover, the confirmation hearing is not intended to revisit the ‘reasonable grounds to believe’ determination for the issuance of a warrant of arrest or to assess the manner in which the Prosecutor has conducted the

Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute”, 16 August 2013, ICC-01/09-01/11-859, para. 25 (<https://www.legal-tools.org/doc/692463/>).

- ² ICC, *Prosecutor v. Mbarushimana*, Appeals Chamber, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I of 16 December 2011 Entitled “Decision on the Confirmation of Charges”, 30 May 2012, ICC-01/04-01/10-514, paras. 39 and 47 (‘*Mbarushimana*, 30 May 2012’) (<https://www.legal-tools.org/doc/6ead30/>).
- ³ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, ICC-01/04-01/06-803, para. 37 (<https://www.legal-tools.org/doc/b7ac4f/>); *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, 21 April 2008, ICC-01/04-01/07-428, paras. 5–6 (<https://www.legal-tools.org/doc/595408/>); *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, ICC-01/04-01/07-717, paras. 63 and 64 (<https://www.legal-tools.org/doc/67a9ec/>); *Prosecutor v. Bemba*, Pre-Trial Chamber II, 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, ICC-01/05-01/08-424, para. 28 (<https://www.legal-tools.org/doc/07965c/>); *Prosecutor v. Abu Garda*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red, para. 39 (‘*Abu Garda*, 8 February 2010’) (<https://www.legal-tools.org/doc/cb3614/>); *Prosecutor v. Banda and Jerbo*, Pre-Trial Chamber I, Corrigendum of the “Decision on the Confirmation of Charges”, 7 March 2011, ICC-02/05-03/09-121-Corr-Red, para. 31 (‘*Banda and Jerbo*, 7 March 2011’) (<https://www.legal-tools.org/doc/5ac9eb/>); *Prosecutor v. Muthaura et al.*, Decision on the Schedule for the Confirmation of Charges Hearing, 13 September 2011, ICC-01/09-02/11-321, para. 8 (<https://www.legal-tools.org/doc/8e9c84/>); *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 16 December 2011, ICC-01/04-01/10-465-Red, para. 41 (<https://www.legal-tools.org/doc/63028f/>); *Prosecutor v. Ruto et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-01/11, para. 40 (‘*Ruto et al.*, 23 January 2012’) (<https://www.legal-tools.org/doc/96c3c2/>); *Prosecutor v. Kenyatta et al.*, Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red, para. 52 (‘*Kenyatta et al.*, 23 January 2012’) (<https://www.legal-tools.org/doc/4972c0/>).

investigation.⁴ The confirmation hearing is only meant to assess the sufficiency of the results of the investigation to proceed to trial (*Abu Garda*, 8 February 2010, para. 48; *Ruto et al.*, 23 January 2012, paras. 51–53; *Kenyatta et al.*, 23 January 2012, paras. 63–65), regardless of whether the suspect agrees to consider as proven the facts alleged by the Prosecutor (*Banda and Jerbo*, 7 March 2011, para. 46).

The Court has ruled that confirmation hearings are justified by the need to provide for the early dismissal of cases lacking a substantive evidentiary basis⁵ and to identify clearly and in detail the facts of those cases deserving a trial.⁶

Sequence of the Confirmation Hearing:

Article 61 of the Statute describes the sequence of events in relation to the confirmation of the charges. The proceedings leading to the confirmation of charges hearing pursuant to Article 61(7) of the Statute commence with the initial appearance of the suspect.⁷ Thereafter, pursuant to Article 61(3)(a) of the Statute, the Prosecutor must provide the suspect with a copy of the document containing the charges within a reasonable time before the confirmation hearing. Article 61(4) of the Statute clarifies that the provision of the document containing the charges alone does not limit the Prosecutor’s flexibility with respect to the charges brought. Before the confirmation hearing, the Prosecutor may continue his investigation, amend or withdraw charges without the permission of the Pre-Trial Chamber. This flexibility of the Prosecutor is more limited after the confirmation of the charges with respect to the amendment, addition or withdrawal of charges. The Pre-Trial

⁴ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the final system of disclosure and the establishment of a timetable, Annex I, 15 May 2006, ICC-01/04-01/06-102, paras. 55–56 (<https://www.legal-tools.org/doc/052848/>); *Abu Garda*, 8 February 2010, para. 48.

⁵ ICC, *Prosecutor v. Abu Garda*, Pre-Trial Chamber I, Separate opinion of Judge Cuno Tarfusser, 8 February 2010, ICC-02/05-02/09-243-Red, para. 4 (<https://www.legal-tools.org/doc/cb3614/>).

⁶ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgement on the Appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 Entitled “Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts May be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court”, 8 December 2009, ICC-01/04-01/06-2205, para. 90, fn. 163 (<https://www.legal-tools.org/doc/40d015/>).

⁷ ICC, *Prosecutor v. Gaddafi and Al-Senussi*, Pre-Trial Chamber I, Decision on “Request for review of Registrar’s decision” by the Defence of Saif Al-Islam Gaddafi, 30 July 2013, ICC-01/11-01/11-390-Red, para. 34 (<https://www.legal-tools.org/doc/6d9956/>).

Chamber may confirm, decline to confirm or request the Prosecution to consider amending its charges (Article 61(7) of the Statute), but it may not add or modify the charges, which is the responsibility of the Prosecution.⁸ If further investigations lead the Prosecutor to reassess his theory about the suspect's liability for the crimes charged, he may seek, within the limits of Article 61(9) of the Statute, an amendment or withdrawal of the charges, as necessary. The amendment of the charges after their confirmation is only possible with the permission of the Pre-Trial Chamber. In order to add additional charges or substitute charges with more serious charges, a new confirmation hearing must be held. Withdrawal of charges after the commencement of the trial is only possible with the permission of the Trial Chamber.⁹

Preparatory Works:

The drafters of the Statute did not import the ICTY-ICTR procedures. The drafters of Article 61 specifically rejected the idea of an indictment procedure which had appeared in earlier drafts of the Statute and replaced it with a new confirmation of charges hearing, which constituted part of a new “single, straightforward procedural approach, acceptable to delegations representing different national legal systems”. The confirmation of an indictment at the ICTY-ICTR is an *ex parte* procedure, conducted in the absence of the defence by one judge. The confirmation of charges hearing, in comparison, was deliberately established as a hearing before a Pre-Trial Chamber of three judges at which the person charged has the right to be present and to contest the evidence and following which the Pre-Trial Chamber must assess the evidence. This process requires the Pre-Trial Chamber to go beyond looking at the Prosecutor's allegations “on their face” as is done in confirming an indictment at the ICTY-ICTR (*Mbarushimana*, 30 May 2012, para. 43).

⁸ ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V, Order regarding the content of the charges, 20 November 2012, ICC-01/09-01/11-475, para. 4 (<https://www.legal-tools.org/doc/556b3c/>); *Prosecutor v. Kenyatta and Muthaura*, Trial Chamber V, Decision appointing a common legal representative of victims, 20 November 2012, ICC-01/09-02/11, para. 7 (<https://www.legal-tools.org/doc/124ca4/>).

⁹ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence”, 13 October 2006, ICC-01/04-01/06-568, paras. 53 and 56 (<https://www.legal-tools.org/doc/7813d4/>).

Doctrine: For the bibliography, see the final comment on Article 61.

Author: Enrique Carnero Rojo.

Article 61(1)

1. Subject to the provisions of paragraph 2, within a reasonable time after the person's surrender or voluntary appearance before the Court the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel.

The presence of the suspect at the confirmation of charges hearing is envisaged in Article 61(1) of the Statute, which provides that the hearing “shall be held in the presence of the Prosecutor and the person charged” unless one of the conditions set forth in paragraph 2 of that provision is met.¹ Some judges have emphasized the importance of the personal attendance of suspect at the confirmation of charges hearing, expecting the suspect’s presence throughout the sessions, unless exceptional circumstances arise.²

The Court does not provide the person named in the Prosecutor’s application under Article 58 with any procedural instrument before the Pre-Trial Chamber allowing him or her to challenge the evidence presented by the Prosecutor other than, if and when the issuance of a warrant of arrest or a summons to appear has set in motion the process leading to the confirmation hearing, through the procedural remedies expressly provided for and within the context and for the purposes of the hearing on the confirmation of charges pursuant to Article 61(1) of the Statute.³

Doctrine: For the bibliography, see the final comment on Article 61.

Author: Enrique Carnero Rojo.

¹ ICC, *Prosecutor v. Gbagbo*, Pre-Trial Chamber I, Public redacted version of the Second decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute, 12 March 2013, ICC-02/11-01/11-417-Red, para. 29 (<https://www.legal-tools.org/doc/e76044/>).

² ICC, *Prosecutor v. Gbagbo*, Pre-Trial Chamber I, Decision on the OPCV’s “Requests to receive information and access documents for the effective participation of victims at the confirmation of charges hearing”, 13 February 2013, ICC-02/11-01/11-400, para. 9 (<https://www.legal-tools.org/doc/3609fd/>).

³ ICC, *Situation in Kenya*, Pre-Trial Chamber II, Decision on the “Application for Leave to Participate in the Proceedings before the Pre-Trial Chamber relating to the Prosecutor’s Application under Article 58(7)”, 11 February 2011, ICC-01/09-42, para. 19 (<https://www.legal-tools.org/doc/5579bd/>).

Article 61(2)

2. The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has:

(a) Waived his or her right to be present; or

(b) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held.

In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice.

Article 61(2) deals with a hearing to confirm charges against a person who has not yet become an accused person. In that scenario, the Statute contemplates that the proceedings may be held in his absence, if the person so chooses, considering that no judicial decision would as yet have confirmed as realistic the probability that he has a case to answer. In the absence of such a judicial decision, there would have been no appreciable juridical link that tied the suspect to the Court and its processes in a substantial way. That context is different as compared to the trial of a person who is an accused person, by virtue of a decision of a Pre-Trial Chamber following an appraisal of some evidence establishing substantial grounds to believe that the accused committed the crime charged.¹

A person who wishes to waive the right to be present at the hearing must either decide to be present during the whole proceeding or may waive his right to be present throughout the entirety of the hearing.²

Doctrine: For the bibliography, see the final comment on Article 61.

Author: Enrique Carnero Rojo.

¹ ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V(A), Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial, 18 June 2013, ICC-01/09-01/11-777, para. 60 (<https://www.legal-tools.org/doc/b0bc35/>).

² ICC, *Prosecutor v. Ruto et. al*, Pre-Trial Chamber II, Decision on the “Defence Request pursuant to Rule 124(1) for Mr. William Ruto to Waive his Right to be Present for part of the Confirmation of charges Hearing”, 29 August 2011, ICC-01/09-01/11-302, para. 12 (<https://www.legal-tools.org/doc/51a288/>).

Article 61(3)

3. Within a reasonable time before the hearing, the person shall:

By contrast with the procedure before the ICTY and ICTR, the charging document is filed by the Prosecution with the Pre-Trial Chamber for the purpose of the confirmation hearing after the suspect has voluntarily appeared, or has been surrendered to the Court, except for those exceptional situations in which the confirmation hearing is held *in absentia*.¹ The time limits of the Prosecution's disclosure obligations under Article 61(3) of the Statute are elaborated on by Rules 121(3), (4) and (5) of the Rules, which sets specific time limits (no later than 30 days and no later than 15 days before the date of the confirmation hearing) for the Prosecution to provide the document containing the charges and the list of evidence.²

Doctrine: For the bibliography, see the final comment on Article 61.

Author: Enrique Carnero Rojo.

¹ ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the Three Defences' Requests Regarding the Prosecution's Amended Charging Document, 25 June 2008, ICC-01/04-01/07-648, paras. 8–9 (<https://www.legal-tools.org/doc/a1d5d8/>).

² ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the final system of disclosure and the establishment of a timetable, Annex I, 15 May 2006, ICC-01/04-01/06-102, para. 92 (<https://www.legal-tools.org/doc/052848/>); *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the Prosecution requests for redactions pursuant to rule 81(2) and 81(4) of the Rules and for an Extension of Time pursuant to regulation 35 of the Regulations of the Court, 10 March 2008, ICC-01/04-01/07-312, p. 6 (<https://www.legal-tools.org/doc/cdaa87/>).

Article 61(3)(a)

(a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial;(v) and

Purpose of the Document Containing the Charges:

The document containing the charges is to be understood as the document which frames the confirmation hearing. This is the document which, in accordance with Article 67(1) of the Statute and Rule 121 of the Rules, must establish in detail the nature, cause and content of the charges brought against the suspect and which forms the basis for preparation for the confirmation hearing.¹ Accordingly, the Chambers have limited themselves to the charges specified in the Prosecutor’s document containing the charges, referring allegations concerning other crimes brought to the Chambers’ attention by third parties to the scope of the ‘situation’ within which a given case has arisen.² Similarly, words such as “including but not limited to” have been found to be meaningless in the document containing the charges, noting that pursuant to Articles 61(3)(a) and 67(1)(a) of the Statute, Rule 121(3) of the Rules and regulation 52 of the Regulations the suspect must be informed in detail of the facts underlying the charges against him or her before the commencement of the confirmation hearing, and that the Prosecution must know the scope of its case as well as the material facts underlying the charges that it seeks to prove, and must be in possession of the evidence necessary to prove those charges to the requisite level in advance of the confirmation hearing.³

¹ ICC, *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 16 December 2011, ICC-01/04-01/10-465-Red, para. 90 (*‘Mbarushimana*, 16 December 2011’) (<https://www.legal-tools.org/doc/63028f/>).

² ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on Request pursuant to Rule 103 (1) of the Statute, 26 September 2006, ICC-01/04-01/06-480 (<https://www.legal-tools.org/doc/826ac5/>).

³ *Mbarushimana*, 16 December 2011, paras. 81–83; *Prosecutor v. Ruto et al.*, Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-01/11, para. 99 (*‘Ruto et al.*, 23 January 2012’) (<https://www.legal-tools.org/doc/96c3e2/>).

Content of the Document Containing the Charges:

A “charge” is composed of the facts and circumstances underlying the alleged crime as well as of their legal characterisation.⁴ Pursuant to Article 67(1)(a) of the Statute, the accused has the right to be informed “in detail” of the content of the charges. This enables him to meaningfully prepare his defence. The required level of specificity of the content of the charge depends on the specific circumstances of the case.⁵ Pursuant to regulation 52 of the Regulations of the Court, the document containing the charges must include (i) the full name of the person and any other relevant identifying information; (ii) a statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court; and (iii) a legal characterisation of the facts to accord both with the crimes under Articles 6, 7 or 8 and the precise form of participation under Articles 25 and 28. Consequently, the Prosecution is under no obligation to articulate in the document containing the charges its legal understanding of the various modes of liability and the alleged crimes, and it may mention events which occurred before or during the commission of the acts or omission with which the suspect is charged, especially if that would be helpful in better understanding the context in which the conduct charged occurred.⁶ Moreover, the document containing the charges may not be exhaustive in all the information in support of the charges. However, it has to provide the Defence with a sufficiently clear picture of the facts underpinning the charges against the suspect and in particular in relation to the crimes, the dates and locations of their alleged commission (*Ruto et al.*, 23 January 2012, para. 98). The document containing the charges transmitted by the Prosecution is to be read in conjunc-

⁴ *Ruto et al.*, 23 January 2012, para. 44; ICC, *Prosecutor v. Kenyatta et al.*, Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red, para. 56 (<https://www.legal-tools.org/doc/4972c0/>).

⁵ ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V, Decision on the content of the updated document containing the charges, 28 December 2012, ICC-01/09-01/11-522, para. 35 (<https://www.legal-tools.org/doc/63df93/>).

⁶ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, ICC-01/04-01/06-803, paras. 151–152 (*‘Lubanga*, 29 January 2007’) (<https://www.legal-tools.org/doc/b7ac4f/>); *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the Three Defences’ Requests Regarding the Prosecution’s Amended Charging Document, 25 June 2008, ICC-01/04-01/07-648, para. 21 (*‘Katanga and Ngudjolo*, 25 June 2008’) (<https://www.legal-tools.org/doc/a1d5d8/>).

tion with the Prosecution's list of evidence (*Lubanga*, 29 January 2007, para. 150; *Katanga and Ngudjolo*, 25 June 2008, para. 21).

Language of the Document Containing the Charges:

The Prosecution is usually ordered, for the purpose of its disclosure obligations to the Defence, to file its charging document in a language that the person fully understands and speaks, pursuant to Article 67(1)(a) of the Statute.⁷

Role of the Pre-Trial Chamber:

The Pre-Trial Chambers are in particular mandated to ensure the protection of the rights of the arrested person provided for in Articles 61(3) and 67 of the Statute and Rule 121 of the Rules, including the right to have adequate time and facilities for the preparation of his or her defence and the right to be tried without undue delay.⁸ The Pre-Trial Chambers have a general competence under Article 61(3) of the Statute to issue orders regarding disclosure of evidence for the purposes of the confirmation of charges hearing.⁹

Doctrine: For the bibliography, see the final comment on Article 61.

Author: Enrique Carnero Rojo.

⁷ ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision Implementing the Appeals Chamber Judgement concerning Languages, 2 June 2008, ICC-01/04-01/07-539, p. 6 (<https://www.legal-tools.org/doc/12d7b1/>).

⁸ ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the Joinder of the Cases against Germain Katanga and Mathieu Ngudjolo Chui, 10 March 2008, ICC-01/04-01/07-307, p. 6 (<https://www.legal-tools.org/doc/eeaeb9/>).

⁹ ICC, *Prosecutor v. Blé Goudé*, Pre-Trial Chamber I, Second decision on issues related to disclosure of evidence, 6 May 2014, ICC-02/11-02/11-67, para. 6 (<https://www.legal-tools.org/doc/62fa3c/>).

Article 61(3)(b)

(b) Be informed of the evidence on which the Prosecutor intends to rely at the hearing.

The Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of the hearing.

Scope of evidence disclosed to the Defence:

The Defence is not entitled to full access to the entire Prosecution file of the investigation of the situation and the case because Article 61(3), together with Articles 67(1)(a) and (b), 67(2), and Rules 76, 77 and 121(3) do not oblige the Prosecution to disclose to the Defence or to permit the Defence to inspect any material which the Prosecution does not intend to present at the confirmation hearing and which is neither potentially exculpatory nor material to Defence preparations for the confirmation hearing. These provisions regulate the extent, time, and manner in which the Defence can access some of the materials contained in the Prosecution record to adequately prepare for the confirmation hearing.¹ The intention of these provisions is that the Defence should be in a position to prepare adequately for the confirmation hearing as soon as practicable, including the decision on the scope of its defence and the selection of the evidence on which it intends to rely at the hearing (*Lubanga*, 15 May 2006, para. 128). In accordance with these provisions, the Prosecution is usually ordered, for the purpose of its disclosure obligations to the Defence, to file a list of evidence in the case, to disclose all evidence on which it intends to rely at the confirmation hearing, including potentially exculpatory materials, and to allow the system of pre-inspection and inspection to be put in place.²

Doctrine: For the bibliography, see the final comment on Article 61.

Author: Enrique Carnero Rojo.

¹ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the final system of disclosure and the establishment of a timetable, Annex I, 15 May 2006, ICC-01/04-01/06-102, paras. 7–15 (*‘Lubanga, 15 May 2006’*) (<https://www.legal-tools.org/doc/052848/>).

² ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber. I, Decision Establishing a Calendar in the Case against Germain Katanga and Mathieu Ngudjolo Chui, 10 March 2008, ICC-01/04-01/07-259, pp. 11–14 (<https://www.legal-tools.org/doc/2fc5ef/>).

Article 61(4)

4. Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any charges. The person shall be given reasonable notice before the hearing of any amendment to or withdrawal of charges. In case of a withdrawal of charges, the Prosecutor shall notify the Pre-Trial Chamber of the reasons for the withdrawal.

Temporal Limit for the Prosecution’s Investigation:

Article 61(4) of the Statute was initially found to provide that the Prosecution may continue its investigation until the start of the confirmation hearing and that, since the Prosecution was not expressly conferred the right to continue with its investigation after the confirmation hearing, said investigation must be completed by the time the confirmation hearing starts, barring exceptional circumstances that might justify later isolated acts of investigation.¹ However, the Appeals Chamber later clarified that there is no temporal limit for the Prosecutor’s investigations. In fact, the Prosecutor’s flexibility with respect to the investigation that is acknowledged by Article 61(4) of the Statute remains unaffected by the confirmation of the charges, and the Prosecutor does not need to seek permission from the Pre-Trial Chamber to continue the investigation.² Ideally, although it is not a requirement of the Statute, it would be desirable for the investigation to be complete by the time of the confirmation hearing.³ This finding has been relied upon to inquire about the reasons behind the Prosecution’s apparent

¹ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the final system of disclosure and the establishment of a timetable, Annex I, 15 May 2006, ICC-01/04-01/06-102, paras. 130–131 (<https://www.legal-tools.org/doc/052848/>); *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Statute, 19 May 2006, ICC-01/04-01/06-108, para. 39 (<https://www.legal-tools.org/doc/c1ca24/>).

² ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence”, 13 October 2006, ICC-01/04-01/06-568, para. 53 (*‘Lubanga, 13 October 2006’*) (<https://www.legal-tools.org/doc/7813d4/>).

³ *Lubanga*, 13 October 2006, para. 54; *Prosecutor v. Mbarushimana*, Appeals Chamber, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I of 16 December 2011 Entitled “Decision on the Confirmation of Charges”, 30 May 2012, ICC-01/04-01/10-514, para. 44 (<https://www.legal-tools.org/doc/6ead30/>).

delays in conducting some investigations.⁴ In other occasions, this finding has been found not to exclude the possibility that the Prosecution may conduct further investigation thereafter only in certain circumstances, namely if it shows that it is necessary in order to establish the truth or certain circumstances exist that justify doing so.⁵ In any event, the Court's statutory documents do not oblige the Prosecutor to complete the entirety of her investigation at the beginning of the pre-trial proceedings.⁶

No Judicial Authorisation Required:

Article 61(4) of the Statute clarifies that the provision of the document containing the charges alone does not limit the Prosecutor's flexibility with respect to the charges brought. Before the confirmation hearing, the Prosecutor may continue the investigation, and amend or withdraw charges without the permission of the Pre-Trial Chamber.⁷

Doctrine: For the bibliography, see the final comment on Article 61.

Author: Enrique Carnero Rojo.

⁴ ICC, *Prosecutor v. Kenyatta and Muthaura*, Pre-Trial Chamber II, Decision Requesting Observations on the "Prosecution's Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute", 29 January 2013, ICC-01/09-02/11-614, para. 9 (<https://www.legal-tools.org/doc/3f752a/>).

⁵ ICC, *Prosecutor v. Kenyatta*, Pre-Trial Chamber II, Decision on prosecution application for a variation of the time limit to submit agreed facts, 22 March 2013, ICC-01/09-02/11-702, para. 36 (<https://www.legal-tools.org/doc/421827/>); *Prosecutor v. Ruto and Sang*, Pre-Trial Chamber II, Decision on the "Prosecution's Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute", 16 August 2013, ICC-01/09-01/11-859, para. 34 (<https://www.legal-tools.org/doc/692463/>).

⁶ ICC, *Prosecutor v. Ntaganda*, Pre-Trial Chamber II, Decision on the "Prosecution's Urgent Request to Postpone the Date of the Confirmation Hearing" and Setting a New Calendar for the Disclosure of Evidence Between the Parties, 18 June 2013, ICC-01/04-02/06-73, para. 31 (<https://www.legal-tools.org/doc/f65c8a/>).

⁷ *Lubanga*, 13 October 2006, para. 53; *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 16 December 2011, ICC-01/04-01/10-465-Red, para. 88 (<https://www.legal-tools.org/doc/63028f/>).

Article 61(5)

5. At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.

Difference Between Evidence and Facts:

In the view of the Appeals Chamber, the evidence put forward by the Prosecutor at the confirmation hearing to support a charge pursuant to Article 61(5) of the Statute must be distinguished from the factual allegations which support each of the legal elements of the crime(s) charged. In the confirmation process, the facts must be identified with sufficient clarity and detail, meeting the standard in Article 67(1)(a) of the Statute.¹

Incriminating Evidence:

By contrast, the Prosecution need not present at the confirmation of charges hearing all incriminating evidence that might be in its possession, particularly that on which the Prosecution states that it places lesser reliance.² The limited purpose of the confirmation hearing is reflected in the fact that the Prosecutor may rely on documentary and summary evidence and need not call the witnesses who will testify at trial. The use of such summaries, even where the identities of witnesses are unknown to the defence and their underlying statements are not fully disclosed, is not necessarily prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. However, in such circumstances, the Pre-Trial Chamber will need to consider on a case-by-case basis, bearing in mind the character of the confir-

¹ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgement on the Appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 Entitled “Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts May be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court”, 8 December 2009, ICC-01/04-01/06-2205, fn. 163 (<https://www.legal-tools.org/doc/40d015/>); *Prosecutor v. Lubanga*, Trial Chamber I, Decision on the Legal Representatives’ Joint Submissions concerning the Appeals Chamber’s Decision on 8 December 2009 on Regulation 55 of the Regulations of the Court, 8 January 2010, ICC-01/04-01/06-2223, paras. 29–30 (<https://www.legal-tools.org/doc/54fbac/>).

² ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Statute, 19 May 2006, ICC-01/04-01/06-108, para. 34 (<https://www.legal-tools.org/doc/c1ca24/>).

mation of charges hearing, whether and what steps may need to be taken to ensure that the use of such statements is consistent with the rights of the accused and a fair and impartial trial.³ In fact, the Court has ruled on occasion that the limited scope of the confirmation hearing, and its object and purpose within the criminal procedure embraced by the Statute and the Rules, require from the Prosecution a particular effort to limit the number of witnesses on whom it intends to rely at the confirmation hearing to the very core witnesses, and in general the debate of the Prosecution evidence is required to be limited to analysing the core evidence supporting the charges against the suspect.⁴

Potential Witnesses:

It is important to highlight that those individuals who have given a statement or have been interviewed by the Prosecution are regarded as potential witnesses due to the Prosecution's choice not to rely on them for the purpose of the confirmation hearing. Consequently, their statements, interview notes and/or interview transcripts, whether in an unredacted, redacted or summary format, are not, in principle, part of the evidentiary debate held at the confirmation hearing, nor can be used to meet the evidentiary standard provided for in Article 61(2) of the Statute, unless the Defence decides to introduce them into evidence upon the *inter partes* disclosure by the Prosecution (*Katanga and Ngudjolo*, 21 April 2008, paras. 100–101).

Use of Summaries:

Moreover, pursuant to Article 61(5) of the Statute, the Prosecution can rely on summaries of the statements, interview notes and interview transcripts of the relevant witnesses as long as the information provided by the witnesses is such that a summary of their statements, interview notes or interview transcripts will not identify them. The use of summaries is not only consistent with the limited scope, the object and the purpose of the confirmation hearing, but also satisfies the right of the suspects to have the con-

³ ICC, *Prosecutor v. Mbarushimana*, Appeals Chamber, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I of 16 December 2011 Entitled “Decision on the Confirmation of Charges”, 30 May 2012, ICC-01/04-01/10-514, para. 47 (*Mbarushimana*, 30 May 2012’) (<https://www.legal-tools.org/doc/6ead30/>).

⁴ ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, 21 April 2008, ICC-01/04-01/07-428, paras. 78–79 (*Katanga and Ngudjolo*, 21 April 2008’) (<https://www.legal-tools.org/doc/595408/>).

firmation hearing held within a reasonable time, without being prejudicial to or inconsistent with their other rights and with a fair and impartial trial, and, in the event that the charges are confirmed, it will also facilitate the preparation of the trial (*Katanga and Ngudjolo*, 21 April 2008, paras. 137–138).

Probative Value of Documentary and Summary Evidence:

The Appeals Chamber has ruled that the Pre-Trial Chamber can evaluate the credibility of witnesses without their in-person testimony and has recognised that rules regarding orality in the pre-trial phase are more relaxed than at trial (*Mbarushimana*, 30 May 2012, para. 45). However, the summaries of witnesses' statements have a lesser probative value than unredacted parts of redacted statements, interview notes or interview transcripts; and the difference in probative value between a summary and the unredacted parts of heavily redacted statements, interview notes or interview transcripts is minimal.⁵ Accordingly, the use of a summary by the Prosecution diminishes, as a general rule, the probative value of such evidence (*Katanga and Ngudjolo*, 21 April 2008, para. 133). As a consequence, the Prosecutor's reliance on documentary or summary evidence *in lieu* of in-person testimony will limit the Pre-Trial Chamber's ability to evaluate the credibility of witnesses. While it may evaluate their credibility, the Pre-Trial Chamber's determinations will necessarily be presumptive, and it should take great care in finding that a witness is or is not credible. The Prosecutor's reliance on summary evidence may also mean that the Pre-Trial Chamber will not be presented with all details of the evidence in the possession of the Prosecutor.⁶ Moreover, given the fact that the Defence shall not have access for the purpose of the confirmation hearing to redacted or unredacted versions of the relevant statements, interview notes and interview transcripts summaries by the Prosecution, the probative value of said summaries when relied upon by the Defence shall only be subject to the principle of free assessment of evidence provided for in Article 69 of

⁵ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Prosecution Application of 5 October 2006, 5 October 2006, ICC-01/04-01/06-524, pp. 4 and 6 (<https://www.legal-tools.org/doc/8dc93c/>); *Katanga and Ngudjolo*, 21 April 2008, paras. 88–89.

⁶ *Mbarushimana*, 30 May 2012, para. 48; ICC, *Prosecutor v. Gbagbo*, Pre-Trial Chamber I, Decision on the Confirmation of Charges against Laurent Gbagbo, 12 June 2014, ICC-02/11-01/11-656-Red, para. 21 (<https://www.legal-tools.org/doc/5b41bc/>); *Prosecutor v. Blé Goudé*, Pre-Trial Chamber I, Decision on the confirmation of charges, 11 December 2014, ICC-02/11-02/11, para. 14 (<https://www.legal-tools.org/doc/0536d5/>).

the Statute and Rule 63 of the Rules (*Katanga and Ngudjolo*, 21 April 2008, para. 135).

Probative Value of Anonymous Witnesses:

Although anonymous witnesses' statements and summaries thereof are permitted at the pre-trial stage, this evidence may be taken to have a lower probative value in order to counterbalance the disadvantage that it might cause to the Defence and have to be evaluated on a case-by-case basis, depending on whether the information contained therein is corroborated or supported by other evidence presented into the case file.⁷ Furthermore, anonymous hearsay contained in witness statements will be used only for the purposes of corroborating other evidence, while second degree and more remote anonymous hearsay contained in witness statements will be used with caution, even as a means of corroborating other evidence.⁸

Probative Value of Hearsay Evidence:

Hearsay from a known source will be analysed on a case-by-case basis, taking into account factors such as the consistency of the information itself and its consistency with the evidence as a whole, the reliability of the

⁷ ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, ICC-01/04-01/07-717, paras. 159–60 (*Katanga and Ngudjolo*, 30 September 2008') (<https://www.legal-tools.org/doc/67a9ec/>); *Prosecutor v. Bemba*, Pre-Trial Chamber II, 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, ICC-01/05-01/08-424, para. 50 (<https://www.legal-tools.org/doc/07965c/>); *Prosecutor v. Abu Garda*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red, paras. 49–52 (<https://www.legal-tools.org/doc/cb3614/>); *Prosecutor v. Banda and Jerbo*, Pre-Trial Chamber I, Corrigendum of the "Decision on the Confirmation of Charges", 7 March 2011, ICC-02/05-03/09-121-Corr-Red, para. 41 (<https://www.legal-tools.org/doc/5ac9eb/>); *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 16 December 2011, ICC-01/04-01/10-465-Red, para. 49 (*Mbarushimana*, 16 December 2011') (<https://www.legal-tools.org/doc/63028f/>); *Prosecutor v. Ruto et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-01/11, para. 78 (*Ruto et al.*, 23 January 2012') (<https://www.legal-tools.org/doc/96c3c2/>); *Prosecutor v. Kenyatta et al.*, Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red, para. 9 (*Kenyatta et al.*, 23 January 2012') (<https://www.legal-tools.org/doc/4972c0/>).

⁸ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, ICC-01/04-01/06-803, paras. 101–106 (<https://www.legal-tools.org/doc/b7ac4f/>); *Katanga and Ngudjolo*, 30 September 2008, paras. 118–120, 137–140; *Mbarushimana*, 16 December 2011, para. 49; *Ruto et al.*, 23 January 2012, para. 78; *Kenyatta et al.*, 23 January 2012, para. 90.

source and the possibility for the Defence to challenge the source (*Katanga and Ngudjolo*, 30 September 2008, para. 141; *Mbarushimana*, 16 December 2011, para. 49).

Use of Summaries Instead of Redactions:

In any event, the use by the Prosecution of summaries rather than redactions of the relevant statements, interview notes and interview transcripts is the appropriate procedural mechanism for the Prosecution to discharge its disclosure obligations because (i) the redactions authorised at the confirmation hearing stage would, for the most part, be useless at the trial stage, and (ii) the time required for the analysis and decision on requests for redactions would lead to a delay in the confirmation proceedings (*Katanga and Ngudjolo*, 21 April 2008, paras. 106–110). The Prosecution summaries must include all information of a potentially exculpatory nature or otherwise material for the Defence’s preparation of the confirmation hearing (para. 111), and need not be judicially approved if they only aim at complying with the Prosecution’s disclosure obligations under Article 67(2) and Rule 77 (paras. 113–114, 118).

Doctrine: For the bibliography, see the final comment on Article 61.

Author: Enrique Carnero Rojo.

Article 61(6)

6. At the hearing, the person may:

(a) Object to the charges;

(b) Challenge the evidence presented by the Prosecutor; and

(c) Present evidence.

Rights of the Person Charged:

Article 61(6) of the Statute enshrines the rights of the person charged to challenge the evidence presented by the Prosecutor and to present his or her own evidence. If these rights are availed of, the evidence inevitably will be contested. For these rights to have any meaning, the Pre-Trial Chamber must evaluate the contested evidence and resolve any ambiguities, contradictions, inconsistencies or doubts as to credibility introduced by the contestation of the evidence.¹ In other words, the appropriate venue for discussing questions regarding the relevance of such factual allegations, and the relevance, admissibility and probative value of evidence is the confirmation of charges hearing which gives the Defence the opportunity to raise any apposite challenges and objections pursuant to Article 61(6) of the Statute.²

Scope of Challenges Available to the Defence:

Pursuant to Article 61(6), the Defence enjoys a broad scope of action, since under this provision a suspect may contest at the confirmation hearing both matters of statutory interpretation and evidential aspects of the Prosecutor's case.³

¹ ICC, *Prosecutor v. Mbarushimana*, Appeals Chamber, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I of 16 December 2011 Entitled "Decision on the Confirmation of Charges", 30 May 2012, ICC-01/04-01/10-514, para. 40 (<https://www.legal-tools.org/doc/6ead30/>).

² ICC, *Prosecutor v. Blé Goudé*, Pre-Trial Chamber I, Decision on the "Defence request to amend the document containing the charges to exclude prejudicial facts", 11 September 2014, ICC-02/11-02/11-150, para. 8 (<https://www.legal-tools.org/doc/c68dbd/>).

³ ICC, *Prosecutor v. Ruto et al.*, Appeals Chamber, Decision on the Appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the Decision of Pre-Trial Chamber II of 23 January 2012 Entitled "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", 24 May 2012, ICC-01/09-01/11-414, para. 27 (<https://www.legal-tools.org/doc/8f555e/>); *Prosecutor v. Kenyatta and Muthaura*, Appeals Chamber, Decision on the appeal of Mr Francis Kirimi Muthaura and Mr Uhuru Muigai Kenyatta against the decision of Pre-Trial Chamber II of 23 January 2012 entitled "Decision

Connection with Disclosure and other Defence Rights:

The effective exercise of the right to challenge the evidence depends on the disclosure “as soon as practicable” of any potentially exculpatory excerpts in the statements of witnesses on whose written or oral testimony the Prosecution intends to rely on at the confirmation hearing (Article 67(2) of the Statute). In turn, this right is also linked to the right of the person to have adequate time and facilities for the preparation of the defence and to communicate freely and in confidence with counsel of his or her own choice.⁴

Limitations in the Challenges Available to the Defence:

It is an inherent consequence of protective measures under Rule 81(4) of the Rules that in individually justified cases, the Defence’s ability to raise, and the Chamber’s ability to address in its decision, certain questions pertaining to the reliability of witnesses are limited.⁵

Doctrine: For the bibliography, see the final comment on Article 61.

Author: Enrique Carnero Rojo.

on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, 24 May 2012, ICC-01/09-02/11-425, para. 33 (<https://www.legal-tools.org/doc/b6aad9/>).

⁴ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Statute, 19 May 2006, ICC-01/04-01/06-108, para. 36 (<https://www.legal-tools.org/doc/c1ca24/>).

⁵ ICC, *Prosecutor v. Kenyatta et al.*, Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red, para. 94 (<https://www.legal-tools.org/doc/4972c0/>).

Article 61(7)

7. The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.

Purpose of the Determination:

According to Article 61(7) of the Statute, at the confirmation hearing the Pre-Trial Chamber must determine “whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged”. On this basis, the Pre-Trial Chamber is not a finder of truth in relation to the guilt or innocence of the person against whom a warrant of arrest or a summons to appear has been issued.¹ However, the Pre-Trial Chamber is required to evaluate the evidence in order to make a determination as to the sufficiency of the evidence. Accordingly, the Pre-Trial Chamber must necessarily draw conclusions from the evidence where there are ambiguities, contradictions, inconsistencies or doubts as to credibility arising from the evidence and enjoys a general authority to assess the evidence pursuant to Articles 61(6) and 69(4), and Rules 63(2) and 122(9).² Moreover, the Pre-Trial Chamber may, pursuant to Rule 58(2), consider jurisdictional issues at the confirmation hearing, deciding on them during its determination of whether the Prosecutor has submitted sufficient evidence to establish substantial grounds to believe that the charged crimes were committed.³

¹ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the final system of disclosure and the establishment of a timetable, Annex I, 15 May 2006, ICC-01/04-01/06-102, para. 55 (<https://www.legal-tools.org/doc/052848/>)

² ICC, *Prosecutor v. Mbarushimana*, Appeals Chamber, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I of 16 December 2011 Entitled “Decision on the Confirmation of Charges”, 30 May 2012, ICC-01/04-01/10-514, paras. 39–41 (*‘Mbarushimana*, 30 May 2012’) (<https://www.legal-tools.org/doc/6ead30/>).

³ ICC, *Prosecutor v. Ruto et al.*, Appeals Chamber, Decision on the Appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the Decision of Pre-Trial Chamber II of 23 January 2012 Entitled “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, 24 May 2012, ICC-01/09-01/11-414, para. 28 (<https://www.legal-tools.org/doc/8f555e/>); *Prosecutor v. Kenyatta and Muthaura*, Appeals Chamber, Decision on the appeal of Mr Francis Kirimi Muthaura and Mr Uhuru Muigai Kenyatta against the decision of Pre-Trial Chamber II of 23 January 2012 entitled “Decision

Definition of the Evidentiary Standard:

The limited purpose of the confirmation of charges proceedings is reflected in the fact that the Prosecutor must only produce sufficient evidence to establish substantial grounds to believe the person committed the crimes charged. The Pre-Trial Chamber need not be convinced beyond a reasonable doubt, and the Prosecutor need not submit more evidence than is necessary to meet the threshold of substantial grounds to believe.⁴ Similarly, the prerequisites to issue of a warrant of arrest and to confirm the charges are different. Whereas the test for the issuance of a warrant of arrest under Article 58(1)(a) and (b) of the Statute is the presence of “reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court” coupled with the existence of grounds warranting detention, the higher standard for the confirmation of the charges is the existence of “sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged” (Article 61(7) of the Statute).⁵ This standard imposes a higher evidentiary threshold than the ICTY and ICTR’s lower “reasonable grounds” standard (Rule 98 *bis* of the ICTY Rules of Procedure and Evidence), which is used in the context of the issuance of a warrant of arrest under Article 58 of the Statute.⁶ The standard in Article

on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, 24 May 2012, ICC-01/09-02/11-425, para. 34 (<https://www.legal-tools.org/doc/b6aad9/>).

- ⁴ ICC, *Prosecutor v. Abu Garda*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red, para. 40 (*Abu Garda*, 8 February 2010) (<https://www.legal-tools.org/doc/cb3614/>); *Prosecutor v. Ruto et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-01/11, para. 40 (*Ruto et al.*, 23 January 2012’) (<https://www.legal-tools.org/doc/96c3c2/>); *Prosecutor v. Kenyatta et al.*, Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red, para. 52 (*Kenyatta et al.*, 23 January 2012’) (<https://www.legal-tools.org/doc/4972c0/>); *Mbarushimana*, 30 May 2012, para. 47; *Prosecutor v. Gbagbo*, Pre-Trial Chamber I, Decision adjourning the hearing on the confirmation of charges pursuant to Article 61(7)(c)(i) of the Rome Statute, 3 June 2013, ICC-02/11-01/11-432, para. 17 (*Gbagbo*, 3 June 2013’) (<https://www.legal-tools.org/doc/2682d8/>).
- ⁵ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the “Directions and Decision of the Appeals Chamber” of 2 February 2007, 13 June 2007, ICC-01/04-01/06-925, para. 14 (<https://www.legal-tools.org/doc/b3dad9/>); *Gbagbo*, 3 June 2013, para. 17; *Prosecutor v. Gbagbo*, Pre-Trial Chamber I, Third decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute, 12 July 2013, ICC-02/11-01/11-454, para. 35 (<https://www.legal-tools.org/doc/572800/>).
- ⁶ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gom-

61(7) of the Statute has therefore been defined as an “intermediate evidentiary threshold”.⁷

Scope of Application of the Evidentiary Standard:

The evidentiary threshold under Article 61(7) applies to all facts and circumstances of the case and is the same for all factual allegations, whether they pertain to the individual crimes charged, contextual elements of the crimes or the criminal responsibility of the suspect (*Gbagbo*, 3 June 2013, paras. 19–20). By contrast, the scope of determination under Article 61(7) of the Statute does not relate to the manner in which the Prosecutor conducted his investigations, since under no circumstances will a failure on the part of the Prosecutor to properly investigate automatically justify a decision of the Chamber to decline to confirm the charges, without having examined the evidence presented (*Abu Garda*, 8 February 2010, para. 48; *Ruto et al.*, 23 January 2012, para. 51; *Kenyatta et al.*, 23 January 2012, para. 63).

Application of the Evidentiary Standard by the Prosecution:

In order to meet this evidentiary threshold (substantial grounds to believe), the Prosecution must offer “concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations”.⁸ At this stage

bo, 15 June 2009, ICC-01/05-01/08-424, para. 28 (*Bemba*, 15 June 2009’) (<https://www.legal-tools.org/doc/07965c/>); *Prosecutor v. Al Bashir*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the “Decision on the Prosecutor’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, 3 February 2010, ICC-02/05-01/09-73, para. 30 (<https://www.legal-tools.org/doc/9ada8e/>); *Ruto et al.*, 23 January 2012, para. 40; *Kenyatta et al.*, 23 January 2012, para. 52; *Mbarushimana*, 30 May 2012, para. 43; *Gbagbo*, 3 June 2013, para. 17; *Prosecutor v. Bemba*, Pre-Trial Chamber II, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, 11 November 2014, ICC-01/05-01/13-749, para. 25 (*Bemba et al.*, 11 November 2014’) (<https://www.legal-tools.org/doc/a44d44/>).

⁷ ICC, *Prosecutor v. Ntaganda*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014, ICC-01/04-02/06-309, para. 9 (*Ntaganda*, 9 June 2014’) (<https://www.legal-tools.org/doc/5686c6/>).

⁸ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, ICC-01/04-01/06-803, para. 39 (*Lubanga*, 29 January 2007’) (<https://www.legal-tools.org/doc/b7ac4f/>); *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, ICC-01/04-01/07-717, para. 65 (<https://www.legal-tools.org/doc/67a9ec/>); *Bemba*, 15 June 2009, para. 29; *Abu Garda*, 8 February 2010, para. 37; *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 16 December 2011, ICC-01/04-01/10-465-Red,

the Prosecutor is requested to substantiate his allegations that the crimes charged were committed with as precise as possible data (*Ruto et al.*, 23 January 2012, para. 103).

Application of the Evidentiary Standard by the Pre-Trial Chamber:

When it comes to the Pre-Trial Chamber, the Chamber must “be thoroughly satisfied that the Prosecutor’s allegations are sufficiently strong to commit [the person] for trial” (*Lubanga*, 29 January 2007, para. 39; *Gbagbo*, 3 June 2013, para. 17; *Ntaganda*, 9 June 2014, para. 9; *Bemba et al.*, 11 November 2014, para. 25). It must also be noted that the Statute and the Rules of Procedure and Evidence do not limit the Pre-Trial Chamber to determine only the relevance or admissibility of evidence but not its weight. Indeed, no provision precludes the Chamber from evaluating the evidence as is required by Article 61(7) of the Statute or otherwise limits the Chamber’s authority to freely assess evidence (*Mbarushimana*, 30 May 2012, para. 42). In fact, in determining whether to confirm charges under Article 61 of the Statute, the Pre-Trial Chamber may evaluate ambiguities, inconsistencies and contradictions in the evidence or doubts as to the credibility of witnesses (*Mbarushimana*, 30 May 2012, para. 46; *Ntaganda*, 9 June 2014, para. 10). Any other interpretation would carry the risk of cases proceeding to trial although the evidence is so riddled with ambiguities, inconsistencies, contradictions or doubts as to credibility that it is insufficient to establish substantial grounds to believe the person committed the crimes charged. This is not to say that the Pre-Trial Chamber’s ability to evaluate the evidence is unlimited or that its function in evaluating the evidence is identical to that of the Trial Chamber (*Mbarushimana*, 30 May 2012, paras. 46–47). A wholesale assessment as to the admissibility of each item of evidence at this stage would unjustifiably delay the proceedings and give rise to an inappropriate pre-determination of evidentiary matters which should be properly decided in light of the whole of the evidence presented at trial. Such an approach would be incompatible with the fair trial rights of the suspect guaranteed under Article 67 of the Statute, and in particular, the

para. 40 (<https://www.legal-tools.org/doc/63028f/>); *Ruto et al.*, 23 January 2012, para. 40; *Kenyatta et al.*, 23 January 2012, para. 52; *Gbagbo*, 3 June 2013, para. 17; *Ntaganda*, 9 June 2014, para. 9; *Prosecutor v. L. Gbagbo*, ICC PT. Ch. I, 12 June 2014, para. 19; *Bemba et al.*, 11 November 2014, para. 25; *Prosecutor v. Blé Goudé*, Pre-Trial Chamber I, Decision on the confirmation of charges, 11 December 2014, ICC-02/11-02/11, para. 12 (<https://www.legal-tools.org/doc/0536d5/>).

right to be tried without undue delay under Article 67(1)(c) of the Statute (*Mbarushimana*, 16 December 2011, para. 44).

Assessment of the Admissibility of the Evidence by the Pre-Trial Chamber:

Accordingly, unless a party provides information which can reasonably cast doubt on the authenticity of items presented by the opposing party, such items must be considered authentic in the context of the confirmation hearing. This principle is equally applicable to challenges raised to the admissibility of evidence under Article 69(7) of the Statute (*Lubanga*, 29 January 2007, para. 97; *Mbarushimana*, 16 December 2011, para. 59; *Bemba et al.*, 11 November 2014, para. 14). Moreover, even if it were to be accepted that there were procedural shortcomings in the investigative procedures complained of, Article 69(7) of the Statute does not mandate automatic exclusion of evidence thus obtained. In each case, the striking of an appropriate balance between the Statute’s fundamental values is at the discretion of the Chamber and items of evidence obtained in violation of the Statute or internationally recognised human rights will be found to be inadmissible only in circumstances where a) the violation casts substantial doubt on the reliability of the evidence, or b) the admissibility of the evidence would be antithetical to and would seriously damage the integrity of the proceedings (*Lubanga*, 29 January 2007, para. 84; *Mbarushimana*, 16 December 2011, para. 61). Moreover, neither the Statute nor the Rules provide that a certain type of evidence is *per se* inadmissible. Depending on the circumstances, the Pre-Trial Chamber is vested with discretion or statutorily mandated to rule on the admissibility of the evidence pursuant to Articles 69(4) and (7) of the Statute, and Rule 63(3) of the Rules (*Ruto et al.*, 23 January 2012, para. 62; *Kenyatta et al.*, 23 January 2012, para. 76).

Assessment of the Relevance and Probative Value of the Evidence by the Pre-Trial Chamber:

In practical terms, the “substantial grounds to believe” standard must enable all the evidence admitted for the purposes of the confirmation hearing to be assessed as a whole (*Lubanga*, 29 January 2007, para. 39). In this regard, items and documents included in the parties’ lists of evidence cease to be separate pieces of evidence presented by the parties and become evidence on the record. Consequently, permitting the parties to withdraw evidence initially included in their lists will prevent the Pre-Trial Chamber

from being able to make their determinations under Article 61(7) (paras. 141–142).

The Appeals Chamber has held that it is not required, as a matter of principle, to fully test the reliability of every piece of evidence relied upon by the Prosecutor for the purpose of the confirmation of charges hearing.⁹ The Pre-Trial Chamber enjoys discretion in this regard in line with the principle of free assessment of evidence, which is limited to determining, pursuant to Article 69(4) and (7) of the Statute, the admissibility, relevance and probative value of the evidence placed before it (*Bemba*, 15 June 2009, paras. 61–62; *Ruto et al.*, 23 January 2012, paras. 59–60; *Kenyatta et al.*, 23 January 2012, paras. 73–74). Thus, in determining whether there are substantial grounds to believe that the suspect committed each of the crimes charged, the Chamber is not bound by the parties’ characterization of the evidence. Rather, the Chamber makes its own independent assessment of each piece of evidence. Moreover, the Chamber will assess the relevance and probative value of the evidence, regardless of its kind or which party relied upon it (*Bemba*, 15 June 2009, para. 42; *Ruto et al.*, 23 January 2012, para. 61; *Kenyatta et al.*, 23 January 2012, para. 75).

In assessing the relevance of the evidence, the Pre-Trial Chamber must establish the extent to which this evidence is rationally linked to the fact that it tends to prove or to disprove (*Ruto et al.*, 23 January 2012, para. 66; *Kenyatta et al.*, 23 January 2012, para. 79). The determination of the probative value of a piece of evidence requires a qualitative assessment. Pursuant to the principle of free assessment of evidence enshrined in Article 69(4) of the Statute and Rule 63(2) of the Rules, the Pre-Trial Chamber will give each piece of evidence the weight that it considers appropriate (*Ruto et al.*, 23 January 2012, para. 67; *Kenyatta et al.*, 23 January 2012, para. 80).

The Pre-Trial Chambers take a case-by-case approach in assessing the relevance and probative value of each piece of evidence. In doing so, they are guided by various factors, such as the nature of the evidence, its credibility, reliability, and source as well as the context in which it was obtained and its nexus to the charges of the case or the alleged perpetrator.

⁹ ICC, *Prosecutor v. Lubanga*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”, Appeals Chamber, 14 December 2006, ICC-01/04-01/06-773, para. 47 (<https://www.legal-tools.org/doc/883722/>); *Kenyatta et al.*, 23 January 2012, para. 94.

Indicia of reliability such as voluntariness, truthfulness, and trustworthiness are considered (*Bemba*, 15 June 2009, para. 58; *Ruto et al.*, 23 January 2012, para. 68; *Kenyatta et al.*, 23 January 2012, para. 81). Accordingly, inconsistencies do not lead to an automatic rejection of the particular piece of evidence and do not bar the Chamber from using it (*Ruto et al.*, 23 January 2012, para. 86; *Kenyatta et al.*, 23 January 2012, para. 92). Likewise, the suspects or Defence witnesses who are allegedly implicated in one way or another in the crimes are not automatically considered unreliable and/or not credible nor is their evidence granted a lower probative value as a matter of principle. Rather, their final assessment and weight depend on a case-by-case basis (*Ruto et al.*, 23 January 2012, paras. 91–92). Eventually, it is not the amount of evidence presented but its probative value that is essential for the Pre-Trial Chamber’s final determination on the charges presented by the Prosecutor (*Bemba*, 15 June 2009, para. 60; *Ruto et al.*, 23 January 2012, para. 68; *Kenyatta et al.*, 23 January 2012, para. 81).

Moreover, some Chambers have found that they are guided in their assessment by the principle of *in dubio pro reo* as a component of the presumption of innocence, which as a general principle in criminal procedure applies, *mutatis mutandis*, to all stages of the proceedings, including the pre-trial stage (*Ruto et al.*, 23 January 2012, para. 41; *Kenyatta et al.*, 23 January 2012, para. 53). By contrast, other Chambers have ruled that the principle of *in dubio pro reo* is not applicable to the assessment of the probative value of the evidence presented by the Prosecution at this stage of the proceedings (*Abu Garda*, 8 February 2010, para. 43).

Decision by the Pre-Trial Chamber:

As a result of the evidentiary debate held at the confirmation hearing, the Pre-Trial Chamber must issue, pursuant to Article 61(7) of the Statute, a decision providing the reasons for the confirmation or not of the charges, and such a decision may be particularly detailed on the factual and legal basis for the confirmation of the charges, or some of them, contained in the Prosecution’s charging document.¹⁰

¹⁰ ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the Three Defences’ Requests Regarding the Prosecution’s Amended Charging Document, 25 June 2008, ICC-01/04-01/07-648, para. 11 (<https://www.legal-tools.org/doc/a1d5d8/>).

Time of the Decision:

Pursuant to Article 61(7), the decision on confirmation of charges should be delivered within 60 days following the confirmation hearing. The 60-day time limit shall commence from the date the Defence final written submissions have been filed.¹¹ This time limit may be extended or reduced as set out in regulation 35 of the Regulations of the Court if exceptional circumstances so warrant and when the participants have been given an opportunity to be heard (*Ruto et al.*, 26 October 2011, para. 10).

Doctrine: For the bibliography, see the final comment on Article 61.

Author: Enrique Carnero Rojo.

¹¹ ICC, *Prosecutor v. Ruto et al.*, Pre-Trial Chamber II, Decision on the Issuance of the Decision Pursuant to Article 61(7) of the Rome Statute, 26 October 2011, ICC-01/09-01/11-357, para. 9 (*'Ruto et al., 26 October 2011'*) (<https://www.legal-tools.org/doc/7605f5/>).

Article 61(7)(a)

Based on its determination, the Pre-Trial Chamber shall:

(a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;

Charges Confirmed for Trial:

Article 61(7)(a) states that, where appropriate, the Pre-Trial Chamber shall commit the person to a Trial Chamber for trial on the charges it has confirmed. Article 64(8)(a) of the Statute further states that at the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber. Consequently, some Trial Chambers have found that the decision on the confirmation of the charges is the only document which can serve as a reference during trial proceedings and is the authoritative document for all trial proceedings.¹ Nonetheless, when the confirmation decision does not provide a readily accessible statement of the facts that underlie each confirmed charge, the confirmed document containing the charges must be provided for the purposes of the trial (*Bemba*, 21 June 2010, para. 30) or a summary of the charges confirmed prepared by the Prosecution (*Katanga and Ngudjolo*, 21 October 2009, paras. 12–13 and 17). Moreover, the same Trial Chambers have suggested that an annex to the confirmation decision framed in this way by the relevant Pre-Trial Chamber, including footnotes with appropriate references to paragraphs of the confirmation decision, would be of very considerable assistance during the trial (*Katanga and Ngudjolo*, 21 October 2009, para. 31; *Bemba*, 21 June 2010, para. 30). In this regard, other Trial Chambers have ordered the Prosecution to articulate the confirmed charges in a clearer way² and, more importantly, have found that the confirmation

¹ ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, Decision on the Filing of a Summary of the Charges by the Prosecutor, 21 October 2009, ICC-01/04-01/07-1547-tENG, para. 16 (*'Katanga and Ngudjolo*, 21 October 2009') (<https://www.legal-tools.org/doc/7e906f/>); *Prosecutor v. Bemba*, Trial Chamber III, Decision on the defence application for corrections to the Document Containing the Charges and for the prosecution to file a Second Amended Document Containing the Charges, 21 June 2010, ICC-01/05-01/08-836, para. 37 (*'Bemba*, 21 June 2010') (<https://www.legal-tools.org/doc/670c33/>).

² ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V, Order regarding the content of the charges, 20 November 2012, ICC-01/09-01/11-475, para. 4 (*'Ruto and Sang*, 20 November 2012') (<https://www.legal-tools.org/doc/556b3c/>); *Prosecutor v. Kenyatta and Muthaura*, Trial Chamber V, Decision appointing a common legal representative of victims, 20 No-

decision cannot be expected to serve as the only authoritative statement of the charges for the trial. In their view, the description of the charges in the document containing the charges, amended to harmonise it with the findings made in the confirmation decision, rather than the confirmation decision itself, provides a sufficiently authoritative statement of the charges relevant to the trial proceedings. As a result, the Pre-Trial Chamber's silence on relevant statements of fact made in the document containing the charges should not result in their removal from the post-confirmation document containing the charges.³ In this scenario, whenever the Prosecution refers to the charges confirmed against the accused, this should be by way of the exact language of the confirmation decision, and with specific reference to the relevant paragraph(s) (*Bemba*, 21 June 2010, para. 37). In any event, it must be noted that the Pre-Trial Chambers have streamlined the confirmed charges in their latest decisions.⁴

Binding Character of the Confirmed Charges for the Trial Chamber

The “facts and circumstances” appearing in the confirmed charges, and in the confirmed charges alone, determine the factual ambit of the case for the purposes of the trial and circumscribe it by preventing the Trial Chamber from exceeding that factual ambit.⁵ The “facts described in the charges”

vember 2012, ICC-01/09-02/11, para. 7 (*Kenyatta and Muthaura*, 20 November 2012') (<https://www.legal-tools.org/doc/124ca4/>).

- ³ ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V, Decision on the content of the updated document containing the charges, 28 December 2012, ICC-01/09-01/11-522, paras. 18–19 (*Ruto and Sang*, 28 December 2012') (<https://www.legal-tools.org/doc/63df93/>); *Prosecutor v. Kenyatta and Muthaura*, Trial Chamber V, Decision on the content of the updated document containing the charges, 28 December 2012, ICC-01/09-02/11-584, paras. 21–22 (<https://www.legal-tools.org/doc/30206e/>).
- ⁴ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber II, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, 11 November 2014, ICC-01/05-01/13-749, pp. 47–55 (<https://www.legal-tools.org/doc/a44d44/>).
- ⁵ ICC, *Prosecutor v. Banda and Jerbo*, Pre-Trial Chamber I, Corrigendum of the “Decision on the Confirmation of Charges”, 7 March 2011, ICC-02/05-03/09-121-Corr-Red, para. 34 (*Banda and Jerbo*, 7 March 2011') (<https://www.legal-tools.org/doc/5ac9eb/>); *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 16 December 2011, ICC-01/04-01/10-465-Red, para. 81 (<https://www.legal-tools.org/doc/63028f/>); *Prosecutor v. Ruto et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-01/11, para. 44 (*Ruto et al.*, 23 January 2012') (<https://www.legal-tools.org/doc/96c3c2/>); *Prosecutor v. Kenyatta et al.*, Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red, para. 56 (*Kenyatta et al.*, 23 January 2012') (<https://www.legal-tools.org/doc/4972c0/>).

have been defined by the Appeals Chamber as those “factual allegations which support each of the legal elements of the crime charged”.⁶ These refer to the essential facts constituting the elements of the crimes charged and have been denominated “material facts and circumstances” by some Trial Chambers (*Ruto and Sang*, 20 November 2012, para. 9; *Kenyatta and Muthaura*, 20 November 2012, para. 12). Furthermore, according to the Appeals Chamber, the facts described in the charges are to be distinguished from “the evidence put forward by the Prosecutor at the confirmation hearing to support a charge (Article 61(5) of the Statute), as well as from background or other information that, although contained in the document containing the charges or the confirmation decision does not support the legal elements of the crime charged” (*Lubanga*, 8 December 2009, footnote 163). On this basis, all the facts and circumstances that are referred to in the document containing the charges or in the decision on the confirmation of charges but do not appear in the confirmed charge (“facts underlying the charges”) have no delimiting or constraining power as such on the Trial Chamber (“subsidiary facts”), such as facts that are referred to in the document containing the charges or in the decision on the confirmation of charges serving the purpose of demonstrating or supporting the material facts and providing background information (*Banda and Jerbo*, 7 March 2011, para. 36; *Ruto et al.*, 23 January 2012, para. 47; *Kenyatta et al.*, 23 January 2012, para. 59). However useful these “other” facts and circumstances might have been to the Pre-Trial Chamber in determining whether the Prosecution has presented evidence demonstrating a clear line of reasoning underpinning its specific allegations, and thus meeting the requisite standard of proof under Article 61(7) of the Statute, they are, in principle, to be considered only as background information or as indirect proof of the material facts, and as such, are deprived of any limiting power *vis-à-vis* the Trial Chamber pursuant to Article 74(2) of the Statute and regulation 55(1) of the Regulations (*Banda and Jerbo*, 8 March 2011, para. 37; *Ruto and Sang*, 20 November 2012, para. 10; *Kenyatta and Muthaura*, 20 November 2012, para. 13). Consequently, the Pre-Trial Chamber does not engage in an examination of each and every subsidiary fact which is mentioned in the

⁶ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgement on the Appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 Entitled “Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts May be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court”, 8 December 2009, ICC-01/04-01/06-2205, fn. 163 (*Lubanga*, 8 December 2009’) (<https://www.legal-tools.org/doc/40d015/>).

document containing the charges and upon which the Prosecutor relies to prove the existence of one or more facts described in the charges (*Ruto et al.*, 23 January 2012, para. 48; *Kenyatta et al.*, 23 January 2012, para. 60). Consequently, any delimiting effect can only be ascribed to the facts and circumstances which underlie the confirmed charges and must be described therein, as opposed to the factual allegations which are presented by the Prosecutor with a view to demonstrating or supporting the existence of the material facts.⁷ Moreover, in conducting the trial and rendering its final decision, the Trial Chamber cannot exceed the facts and circumstances described in the charges confirmed by the Pre-Trial Chamber and framed in any eventual document containing the charges, but is not bound by the Pre-Trial Chamber's evidentiary assessments or its interpretation of the relevant provisions of the Statute.⁸

Binding Character of the Confirmed Charges for the Parties and Participants:

Parties and participants in a case are expected to prepare on the basis of the charges as confirmed which shape the subject-matter of the case, and thus, to take into consideration the evidence that is only relevant to the charges confirmed.⁹ The charges as confirmed by the Pre-Trial Chamber (eventually set out in a subsequently updated document containing the charges) serve as the basis for the trial, and not the information contained in the Prosecution's pre-trial brief (*Kenyatta*, 26 April 2013, paras. 107 and 109). Likewise, the temporal scope set out in the confirmation decision is binding *vis-à-vis* the Prosecution because the charges are to be formulated by the Prosecution in the document containing the charges, but as confirmed by the confirmation decision (*Ruto and Sang*, 28 December 2012, para. 28). Similarly, regarding the geographic scope of the charges, the use of the term "including" by the Prosecution suggests that the locations specified by

⁷ ICC, *Prosecutor v. Blé Goudé*, Pre-Trial Chamber I, Decision on the "Defence request to amend the document containing the charges to exclude prejudicial facts", 11 September 2014, ICC-02/11-02/11-150, para. 6 (<https://www.legal-tools.org/doc/c68dbd/>).

⁸ ICC, *Prosecutor v. Kenyatta*, Trial Chamber V, Decision on defence application pursuant to Article 64(4) and related requests, ICC-01/09-02/11-728, 26 April 2013, para. 107 ('*Kenyatta*, 26 April 2013') (<https://www.legal-tools.org/doc/da5089/>).

⁹ ICC, *Prosecutor v. Ruto and Sang*, Pre-Trial Chamber II, Decision on the "Prosecution's Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute", 16 August 2013, ICC-01/09-01/11-859, para. 25 (<https://www.legal-tools.org/doc/692463/>).

the Prosecution are exemplary and not exhaustive and might therefore have an impact on expanding the parameters of the case confirmed by the Pre-Trial Chamber (paras. 32–33). In this regard, whereas the Prosecution is not necessarily required to rely on entirely the same evidence at trial as it did at the confirmation of charges stage, it cannot seek to rely at trial on facts and circumstances going beyond the confirmed charges (*Kenyatta*, 26 April 2013, para. 107).

Doctrine: For the bibliography, see the final comment on Article 61.

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Article 61(7)(b)

(b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence;

Effects of a Decision not to Confirm the Charges:

If in the exercise of its filtering function the Pre-Trial Chamber decides not to confirm the charges, this decision ends the prosecution of the suspect, thus avoiding superfluous proceedings as any warrant of arrest and other restrictive measures cease to have effect in accordance with Article 61(10) of the Statute.¹ If the Pre-Trial Chamber has confirmed some allegations but dismissed others based on the lack of sufficient evidence establishing substantial grounds to believe, within the meaning of Article 61(7) of the Statute, the Prosecution should not include the discarded allegations in its subsequent, if any, formulation of the confirmed charges.²

Doctrine: For the bibliography, see the final comment on Article 61.

Author: Enrique Carnero Rojo.

¹ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber III, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, 31 July 2008, ICC-01/05-01/08-55, para. 15 (<https://www.legal-tools.org/doc/15c802/>).

² ICC, *Prosecutor v. Kenyatta and Muthaura*, Trial Chamber V, Decision on the content of the updated document containing the charges, 28 December 2012, ICC-01/09-02/11-584, para. 75 (<https://www.legal-tools.org/doc/30206e/>).

Article 61(7)(c)(i)

***(c) Adjourn the hearing and request the Prosecutor to consider:
(i) Providing further evidence or conducting further investigation
with respect to a particular charge***

Request for Further Evidence:

The Pre-Trial Chamber may elect to adjourn the hearing on the confirmation of charges rather than making a final determination on the merits pursuant to Article 61(7) of the Statute where the Prosecutor's evidence, viewed as a whole, although apparently insufficient, does not appear to be so lacking in relevance and probative value that it leaves the Chamber with no choice but to decline to confirm the charges, that is, where the Prosecutor's evidence in relation to the charges is inadequate, but remains a degree of suspicion in relation to the alleged commission of crimes and the Chamber does not exclude that the Prosecutor might be able to present or collect further evidence in relation to the alleged crimes.¹ In these scenarios, Article 61(7) of the Statute limits the intervention of the Pre-Trial Chamber to the possibility of requesting the Prosecution to consider the opportunity to provide additional evidence, whereas Article 69(3) of the Statute gives the competent Chamber "the authority to request the submission of all evidence that it considers necessary for the determination of the truth". Article 69(3) of the Statute is not applicable during the pre-trial proceedings conducted before the Pre-Trial Chamber because (i) the Pre-Trial Chamber is not a truth-finder, and (ii) according to the literal interpretation of Article 69(3) of the Statute, its application is subject to consideration of the competent Chamber that evidence other than that introduced by the Prosecution and the Defence is "necessary for the determination of the truth".² Similarly, pursuant to the Appeals Chamber, where the Pre-Trial Chamber finds the evidence insufficient because of its summary or documentary nature,

¹ ICC, *Prosecutor v. Gbagbo*, Pre-Trial Chamber I, Decision adjourning the hearing on the confirmation of charges pursuant to Article 61(7)(c)(i) of the Rome Statute, 3 June 2013, ICC-02/11-01/11-432, paras. 15 and 37 (<https://www.legal-tools.org/doc/2682d8/>).

² ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, 13 May 2008, ICC-01/04-01/07-474, para. 110 (<https://www.legal-tools.org/doc/285b52/>).

the Chamber need not reject the charges but may adjourn the hearing and request the Prosecutor to provide further evidence.³

Effects of Adjournment:

A decision adjourning the confirmation hearing under Article 61(7)(c) of the Statute is not a decision declining to confirm the charges under Article 61(7)(b) of the Statute. Pursuant to Article 61(10) of the Statute, the result of declining to confirm the charges is that the arrest warrant would cease to have effect, but no such provision exists with respect to adjournment of the hearing under Article 61(7)(c). Therefore, a decision to adjourn the confirmation hearing under Article 61(7)(c) does not represent a final disposal of the merits of the case by the Pre-Trial Chamber, but is an intermediate procedural step, and has no effect on the previous finding in relation to the warrant of arrest that there are reasonable grounds to believe that the suspect committed a crime within the jurisdiction of the Court. The fact that the available evidence does not meet the evidentiary threshold for Article 67(1) does not mean there was insufficient evidence for the purposes of issuing an arrest warrant under Article 58(1)(a) of the Statute.⁴

Doctrine: For the bibliography, see the final comment on Article 61.

Author: Enrique Carnero Rojo.

³ ICC, *Prosecutor v. Mbarushimana*, Appeals Chamber, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I of 16 December 2011 Entitled “Decision on the Confirmation of Charges”, 30 May 2012, ICC-01/04-01/10-514, para. 48 (<https://www.legal-tools.org/doc/6ead30/>).

⁴ *Prosecutor v. Gbagbo*, Pre-Trial Chamber I, Third decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute, 12 July 2013, ICC-02/11-01/11-454, paras. 34–35 (<https://www.legal-tools.org/doc/572800/>).

Article 61(7)(c)(ii)

(ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

Different Crimes:

The Pre-Trial Chamber may, on the basis of the confirmation hearing, decide whether to confirm the charges or invite the Prosecutor to consider amending a charge if the Chamber is of the view that the evidence establishes a different crime.¹ In this regard, the confirmation of the charges is possible without adjourning the proceedings and giving the Defence the right to be heard where the legal characterisation of the conflict as of an international nature has already been mentioned in the decision on the arrest warrant, the Defence itself has raised the issue of the international character of the conflict at the confirmation hearing, and all participants have had the opportunity to present their observations on the matter (*Lubanga*, 24 May 2007, para. 43).

Amendment of the Charges:

However, the Pre-Trial Chamber is not vested with the authority to modify the charges brought by the Prosecutor against a suspect. According to Article 61(7) of the Statute, the Pre-Trial Chamber shall, on the basis of the confirmation of charges hearing, “determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged”. On the basis of such determination, the Pre-Trial Chamber shall then either confirm those charges or decline confirmation thereof. Accordingly, the Pre-Trial Chamber does not have the power either to confirm a charge that is not specified by the Prosecutor or to clarify that the charge includes acts in addition to those specified by the Prosecutor as being included in the charge.² On the contrary, when the evidence appears to establish a different crime, pursuant to Article 61(7)(c)(ii) the

¹ ICC *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges, 24 May 2007, ICC-01/04-01/06-915, footnote 36 (*‘Lubanga*, 24 May 2007’) (<https://www.legal-tools.org/doc/602c7a/>).

² ICC, *Prosecutor v. Ruto et al.*, Pre-Trial Chamber II, Decision on the “Request by the Victims’ Representative for authorization by the Chamber to make written submissions on specific issues of law and/or fact”, 19 August 2011, ICC-01/09-01/11-274, para. 7 (*‘Ruto et al.*, 19 August 2011’) (<https://www.legal-tools.org/doc/c84657/>).

Pre-Trial Chamber may request the Prosecution to consider amending a charge. Importantly, it is the Prosecution which would then amend such a charge, not the Pre-Trial Chamber.³

Request to Amend the Charges:

At most, Article 61(7)(c)(ii) of the Statute permits the Pre-Trial Chamber, on the basis of the confirmation of charges hearing, to adjourn the hearing and request the Prosecutor to consider “[a]mending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court”. Only the presence of the requirements provided for by the said provision may trigger, at the appropriate stage of the pre-trial proceedings, the Chamber’s request to the Prosecutor to modify the charges. Such a request must be made on the basis of the confirmation of charges hearing and in light of the evidence submitted (*Ruto et al.*, 19 August 2011, paras. 8–9). Moreover, Article 61(7)(c)(ii) of the Statute allows the Chamber to request the Prosecutor, on the basis of the hearing, to consider amending a charge, that is, to modify the legal characterization of facts underpinning the charges. Conversely, consistent with the principle of prosecutorial discretion, the Chamber is not vested with the authority to request the Prosecutor to consider adding a new charge, that is, to expand the factual ambit of the charges as originally presented.⁴ In this regard, “a complete and in-depth analysis of all the evidence” is unwarranted during the limited examination under Article 61(7)(c)(ii).⁵ It suffices that “the evidence submitted appears to establish a different crime within the jurisdiction of the Court” (*Bemba*, 3 March 2009, para. 1) with the idea that “[t]he notion of a ‘different crime’ pursuant to Article 61(7)(c)(ii) of the Statute relates both to the crimes as defined in Articles 6, 7 and 8 of the Statute as well as to the mode of liability as referred to in Articles 25 and 28 of the Statute. The crimes and the mode of liability correlate to each other. De-

³ ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V, Decision on the content of the updated document containing the charges, 28 December 2012, ICC-01/09-01/11-522, para. 15 (<https://www.legal-tools.org/doc/63df93/>); *Prosecutor v. Kenyatta and Muthaura*, Trial Chamber V, Decision on the content of the updated document containing the charges, 28 December 2012, ICC-01/09-02/11-584, para. 19 (<https://www.legal-tools.org/doc/30206e/>).

⁴ ICC, *Prosecutor v. Kenyatta et al.*, Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red, para. 285 (<https://www.legal-tools.org/doc/4972c0/>).

⁵ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber III, Decision adjourning the hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, 3 March 2009, ICC-01/05-01/08-388, para. 17 (*Bemba*, 3 March 2009’) (<https://www.legal-tools.org/doc/81d7a9/>).

pending on the mode of participation as set out in Articles 25 and 28 of the Statute, the material (objective) elements of the crime are shaped differently” (para. 26).

Effects of Adjournment:

A decision adjourning the confirmation hearing under Article 61(7)(c) of the Statute is not a decision declining to confirm the charges under Article 61(7)(b) of the Statute. Pursuant to Article 61(10) of the Statute, the result of declining to confirm the charges is that the arrest warrant would cease to have effect, but no such provision exists with respect to adjournment of the hearing under Article 61(7)(c). Therefore, a decision to adjourn the confirmation hearing under Article 61(7)(c) does not represent a final disposal of the merits of the case by the Pre-Trial Chamber, but is an intermediate procedural step, and has no effect on the previous finding in relation to the warrant of arrest that there are reasonable grounds to believe that the suspect committed a crime within the jurisdiction of the Court. The fact that the available evidence does not meet the evidentiary threshold for Article 67(1) does not mean there was insufficient evidence for the purposes of issuing an arrest warrant under Article 58(1)(a) of the Statute.⁶

Doctrine: For the bibliography, see the final comment on Article 61.

Author: Enrique Carnero Rojo.

⁶ ICC, *Prosecutor v. Gbagbo*, Pre-Trial Chamber I, Third decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute, 12 July 2013, ICC-02/11-01/11-454, paras. 34–35 (<https://www.legal-tools.org/doc/572800/>).

Article 61(8)

8. Where the Pre-Trial Chamber declines to confirm a charge, the Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence.

Subsequent Request After Completion of Investigation:

The Pre-Trial Chamber can properly evaluate the evidence submitted by the parties even if it lacks the full evidence because the Prosecution has not completed the investigation. Eventually, if the evidence is found to be insufficient, Article 61(8) of the Statute provides that the Prosecutor is not precluded from subsequently requesting the confirmation of charges on the basis of additional evidence.¹

Doctrine: For the bibliography, see the final comment on Article 61.

Author: Enrique Carnero Rojo.

¹ ICC, *Prosecutor v. Mbarushimana*, Appeals Chamber, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I of 16 December 2011 Entitled “Decision on the Confirmation of Charges”, 30 May 2012, ICC-01/04-01/10-514, para. 44 (<https://www.legal-tools.org/doc/6ead30/>).

Article 61(9): Amendment of Charges after Confirmation

9. After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this Article to confirm those charges must be held.

Amended Version of the Confirmed Charges:

In the event that the charges are confirmed, nothing in the Statute and the Rules of Procedure and Evidence prevents the filing in the pre-trial proceedings before the Trial Chamber of an amended charging document in which the underlined facts and their legal characterisation are adjusted in light of the Pre-Trial Chamber's decision confirming the charges.¹

Legal Recharacterisation of the Charges by the Trial Chamber:

By contrast, new facts and circumstances not described in the charges may only be added under the procedure of Article 61(9) of the Statute, since the incorporation of new facts and circumstances into the subject matter of the trial would alter the fundamental scope of the trial. This is consistent with the fact that it is the Prosecutor who, pursuant to Article 54(1) of the Statute, is tasked with the investigation of crimes under the jurisdiction of the Court and who, pursuant to Article 61(1) and (3) of the Statute, proffers charges against suspects.² Accordingly, to give the Trial Chamber the power to extend *proprio motu* the scope of a trial to facts and circumstances not alleged by the Prosecutor would be contrary to the distribution of powers under the Statute (*Lubanga*, 8 December 2009, para. 94). At most, the Trial Chamber may, pursuant to regulation 55 of the Regulations of the Court,

¹ ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the Three Defences' Requests Regarding the Prosecution's Amended Charging Document, 25 June 2008, ICC-01/04-01/07-648, para. 12 (<https://www.legal-tools.org/doc/a1d5d8/>).

² ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgement on the Appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 Entitled "Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts May be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court", 8 December 2009, ICC-01/04-01/06-2205, para. 94 (*Lubanga*, 8 December 2009') (<https://www.legal-tools.org/doc/40d015/>).

change the legal characterisation of the facts confirmed by the Pre-Trial Chamber (paras. 96–97). In fact, the terms of the provision under Article 61(9) of the Statute do not exclude the possibility that a Trial Chamber modifies the legal characterisation of the facts on its own motion once the trial has commenced because Article 61(9) of the Statute and regulation 55 of the Regulations of the Court address different powers of different entities at different stages of the procedure, and the two provisions are therefore not inherently incompatible.³

Binding Character of the Charges for the Trial Chamber:

Nonetheless, the Trial Chamber has no authority to ignore, strike down or declare null and void the charges as confirmed by the Pre-Trial Chamber. The power to frame the charges lies at the heart of the Pre-Trial Chamber’s functions, as set out in Article 61 of the Statute. By Article 61(9), after the charges have been confirmed, control over them remains with the Pre-Trial Chamber until the commencement of the trial, since post-confirmation and “before the trial has begun”, the Prosecutor may, with the permission of the Pre-Trial Chamber and on notice to the accused, amend the charges.⁴ Although the Trial Chamber is not bound by decisions of the Pre-Trial Chamber on evidential or procedural issues, the Trial Chamber has not been given a power to review the only decision of the Pre-Trial Chamber that is definitely binding on the Trial Chamber, namely the decision on the confirmation of charges (*Lubanga*, 13 December 2007, paras. 43–44). The only power which the Trial Chamber has during the stage before the trial has begun, which does not involve altering the wording or the substance of the charges in any way, is to rule on any application for joinder or severance of the charges against more than one accused (para. 41). However, the binding

³ *Lubanga*, 8 December 2009, para. 77; ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on the Legal Representatives’ Joint Submissions concerning the Appeals Chamber’s Decision on 8 December 2009 on Regulation 55 of the Regulations of the Court, 8 January 2010, ICC-01/04-01/06-2223, para. 9 (<https://www.legal-tools.org/doc/54fbac/>); *Prosecutor v. Ruto and Sang*, Appeals Chamber, Decision on the Prosecutor’s appeal against the Decision on the Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute”, 13 December 2013, ICC-01/09-01/11-1123, para. 30 (*‘Ruto and Sang*, 13 December 2013’) (<https://www.legal-tools.org/doc/bb20f5/>).

⁴ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, 13 December 2007, ICC-01/04-01/06-1084, para. 39 (*‘Lubanga*, 13 December 2007’) (<https://www.legal-tools.org/doc/257c48/>).

character of the confirmed charges on the Trial Chamber is limited to the “facts and circumstances described in the charges” or “material facts and circumstances”. By contrast, other information and evidence of the case contained in the document containing the charges may be subject to change as the trial evolves, subject to sufficient notice being provided. In any given case, whether a particular fact or circumstance is one of the “facts and circumstances described in the charges” will depend on the nature of the prosecution’s allegations. By way of example, in the case of a factual allegation pertaining to a simple criminal act or omission, the “facts and circumstances” would include, as a minimum, (i) the person or persons who engaged in the conduct, (ii) the nature of the conduct, (iii) the time, place and manner in which the conduct took place and (iv) the results of the conduct, such as how it affected other persons including victims.⁵

Moment When the Trial Starts:

No definition is provided in the Statute or the Rules of Procedure and Evidence as to when the trial is considered to have begun and the drafters of the Statute, who deliberately adopted a hybrid procedure which borrows from different legal cultures and systems, intended the “commencement of the trial” to mean both the start of the proceedings before the Trial Chamber (“trial proceedings”) and the commencement of hearings on the merits (“trial” or “hearing”), depending on the provision to be applied and the context in which it was to be applied.⁶ For instance, addressing challenges under Article 19 of the Statute, some Trial Chambers have found that the trial commences as soon as the decision on the confirmation of charges is filed (*Katanga and Ngudjolo*, 16 June 2009, paras. 49 and 57), whereas other Trial Chambers, addressing requests to amend the charges under Article 61(9), have relied on the language of Article 61(11) to conclude that the commencement of the trial means the true opening of the trial when the

⁵ ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V, Order regarding the content of the charges, 20 November 2012, ICC-01/09-01/11-475, paras. 10–11 (*Ruto and Sang*, 20 November 2012’) (<https://www.legal-tools.org/doc/556b3c/>); *Prosecutor v. Kenyatta and Muthaura*, Trial Chamber V, Decision appointing a common legal representative of victims, 20 November 2012, ICC-01/09-02/11, paras. 13–14 (*Kenyatta and Muthaura*, 20 November 2012’) (<https://www.legal-tools.org/doc/124ca4/>).

⁶ ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), 16 June 2009, ICC-01/04-01/07-1213, para. 41 (*Katanga and Ngudjolo*, 16 June 2009’) (<https://www.legal-tools.org/doc/e4ca69/>).

opening statements, if any, are made prior to the calling of witnesses (*Lubanga*, 13 December 2007, para. 39). Similarly, the Pre-Trial Chambers have considered requests for amendment of the charges submitted in the course of preparation for the actual commencement of the trial before the Trial Chamber to have been made “before the trial has [actually] begun” in accordance with Article 61(9) of the Statute, and consequently to fall within their competence.⁷

At the time of writing, the Appeals Chamber has still not clarified the meaning of the expression “before the trial has begun” for the purpose of amending the charges under Article 61(9). At most, it has found that the wording of Article 61(9) of the Statute prescribes that an amendment of the charges is no longer possible “after the trial has begun” and, in order to apply this provision, irrespective of the precise moment at which the trial begins within the meaning of Article 61 (9) of the Statute, it has considered the time of the opening statements (*Ruto and Sang*, 13 December 2013, para. 27). Moreover, the Appeals Chamber has found that the wording of Article 61 (9) of the Statute (“the Prosecutor may with the permission of the Pre-Trial Chamber [...] amend the charges”) indicates that not only the request to amend the charges has to be filed before the commencement of the trial, but also that the entire process of amending the charges must be completed by that time, including the granting of permission for the amendment by the Pre-Trial Chamber because at the beginning of the trial, its parameters must be clear. Once the trial has commenced, it is no longer possible to amend or to add to the charges, irrespective of when the Prosecutor filed her request to amend the charges (paras. 29 and 31). If the Prosecutor identifies a need to seek an amendment of the charges shortly before the scheduled start of a trial, she may ask for a postponement of the trial until the amendment process, including any potential appeal in that regard, is concluded (para. 31). The only modification possible under the Court’s legal framework once the trial has commenced is a change to the legal characterisation of the facts pursuant to regulation 55 of the Regulations of the Court (para. 27).

⁷ ICC, *Prosecutor v. Kenyatta*, Pre-Trial Chamber II, Decision on prosecution application for a variation of the time limit to submit agreed facts, 22 March 2013, ICC-01/09-02/11-702, para. 21 (*‘Kenyatta*, 22 March 2013’) (<https://www.legal-tools.org/doc/421827/>); *Prosecutor v. Ruto and Sang*, Pre-Trial Chamber II, Decision on the “Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute”, 16 August 2013, ICC-01/09-01/11-859, paras. 28–29 (*‘Ruto and Sang*, 16 August 2013’) (<https://www.legal-tools.org/doc/692463/>).

Required Application by the Prosecution:

After the charges have been confirmed and before the trial has begun, only the Prosecution may amend the charges.⁸ The wording of Article 61(9) of the Statute allows the Prosecutor to request permission to amend the charges up until the actual commencement of the trial, provided that a request to this effect is properly “supported and justified” (*Kenyatta*, 22 March 2013, para. 21; *Ruto and Sang*, 16 August 2013, para. 31).

Required Permission by the Pre-Trial Chamber:

Pursuant to Article 61(9) of the Statute, the Prosecutor may amend the charges after their confirmation only with the permission of the Pre-Trial Chamber. The Chamber’s permission is a *conditio sine qua non* for any amendment of the charges at this stage, as dictated by the Statute. In order to add additional charges or substitute charges with more serious charges, a new confirmation hearing must be held.⁹ In relation to the power of the Trial Chamber to amend or alter the charges confirmed by the Pre-Trial Chamber, a joint reading of Article 61(9) and Article 61(11) demonstrates that during the preparation phase of the trial any application to amend the charges must be made to the Pre-Trial Chamber (*Lubanga*, 13 December 2007, para. 40). Granting permission pursuant to Article 61(9) of the Statute to amend the charges confirmed entails consideration of the Prosecutor’s request and an evaluation of other relevant information which the Pre-Trial Chamber could seek if necessary for the purposes of its final decision (*Kenyatta*, 22 March 2013, para. 21; *Ruto and Sang*, 16 August 2013, para. 32). In arriving at a proper and balanced decision on a request to amend the charges, the Chamber must take into consideration the diverse factors affecting the case *sub judice*, including whether granting permission to amend will negatively affect other competing interests, such as the fairness

⁸ *Ruto and Sang*, 20 November 2012, para. 4; *Kenyatta and Muthaura*, 20 November 2012, para. 7; *Prosecutor v. Ruto and Sang*, Trial Chamber V, Decision on the content of the updated document containing the charges, 28 December 2012, ICC-01/09-01/11-522, para. 15 (<https://www.legal-tools.org/doc/63df93/>); *Kenyatta and Muthaura*, Trial Chamber V, Decision on the content of the updated document containing the charges, 28 December 2012, ICC-01/09-02/11-584, para. 19 (<https://www.legal-tools.org/doc/30206e/>).

⁹ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence”, 13 October 2006, ICC-01/04-01/06-568, para. 53 (<https://www.legal-tools.org/doc/7813d4/>); *Kenyatta*, 22 March 2013, para. 19; *Ruto and Sang*, 16 August 2013, para. 31.

and expeditiousness of the proceedings, which would result in causing prejudice to the rights of the accused to be informed promptly of the nature, cause and content of the charges, to have adequate time and facilities for the preparation of the defence and to be tried without undue delay (*Kenyatta*, 22 March 2013, paras. 21–22; *Ruto and Sang*, 16 August 2013, paras. 32 and 42). The consideration of relevant factors when entertaining any Article 61(9) request follows from the wording of Article 61(9) of the Statute. This provision allows the Prosecutor to proceed amending the charges post-confirmation only upon having received the “permission of the Pre-Trial Chamber” to do so. Whether to grant permission to amend the charges confirmed should be taken upon an assessment of all relevant circumstances. To say otherwise would mean that the word “permission” in the text of Article 61(9) has no added value.¹⁰

Required Additional Hearing:

If a request for amendment of the charges is rejected, it is not necessary to explore further the two procedural venues provided in Article 61(9) of the Statute namely, whether the charges may be amended by the Prosecutor or whether a hearing to confirm those charges must be held (*Ruto and Sang*, 6 September 2013, para. 35).

Doctrine: For the bibliography, see the final comment on Article 61.

Author: Enrique Carnero Rojo.

¹⁰ ICC, *Prosecutor v. Ruto and Sang*, Pre-Trial Chamber II, Decision on the Prosecutor’s Request for Leave to Appeal the Decision Rejecting the Amendment of the Charges (ICC-01/09-01/11-859), 6 September 2013, ICC-01/09-01/11-912, para. 33 (*‘Ruto and Sang*, 6 September 2013’) (<https://www.legal-tools.org/doc/c91743/>).

Article 61(9): Withdrawal of Charges after Confirmation

After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.

Moment When the Trial Starts:

No definition is provided in the Statute or the Rules of Procedure and Evidence as to when the trial is considered to have begun and the drafters of the Statute, who deliberately adopted a hybrid procedure which borrows from different legal cultures and systems, intended the “commencement of the trial” to mean both the start of the proceedings before the Trial Chamber (“trial proceedings”) and the commencement of hearings on the merits (“trial” or “hearing”), depending on the provision to be applied and the context in which it was to be applied.¹ For instance, addressing challenges under Article 19 of the Statute, some Trial Chambers have found that the trial commences as soon as the decision on the confirmation of charges is filed (*Katanga and Ngudjolo*, 16 June 2009, paras. 49 and 57), whereas other Trial Chambers, addressing requests to amend the charges under Article 61(9), have relied on the language of Article 61(11) to conclude that the commencement of the trial means the true opening of the trial when the opening statements, if any, are made prior to the calling of witnesses.² The latter interpretation has been endorsed to understand the reference to the commencement of trial included in Article 61(9) of the Statute for the withdrawal of charges.³

¹ ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), 16 June 2009, ICC-01/04-01/07-1213, para. 41 (*Katanga and Ngudjolo*, 16 June 2009’) (<https://www.legal-tools.org/doc/e4ca69/>).

² ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, 13 December 2007, ICC-01/04-01/06-1084, para. 39 (*Lubanga*, 13 December 2007’) (<https://www.legal-tools.org/doc/257c48/>).

³ ICC, *Prosecutor v. Kenyatta and Muthaura*, Trial Chamber V, Decision on the withdrawal of charges against Mr Muthaura, 18 March 2013, ICC-01/09-02/11-696, footnote 16 (*Kenyatta and Muthaura*, 18 March 2013’) (<https://www.legal-tools.org/doc/44ecc9/>).

Required Permission by the Trial Chamber:

After the commencement of the trial, it is only the Prosecution that can withdraw the charges.⁴ Withdrawal of charges after the commencement of the trial is only possible with the permission of the Trial Chamber.⁵ Consequently, after the trial has begun, the two additional powers given to the Trial Chamber under the ICC Statute framework in relation to the charges are to grant or reject an application by the prosecution to withdraw the charges and to modify the legal characterization of the facts under Regulation 55 (*Lubanga*, 13 December 2007, para. 42). In deciding whether to grant or not a request by the Prosecution to withdraw the charges, the Trial Chamber assesses the Prosecution's submissions on whether the evidence supports the charges against the accused, and the latter's attitude towards the request for withdrawal of charges (*Kenyatta and Muthaura*, 18 March 2013, para. 11).

Doctrine: For the bibliography, see the final comment on Article 61.

Author: Enrique Carnero Rojo.

⁴ ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V, Order regarding the content of the charges, 20 November 2012, ICC-01/09-01/11-475, para. 4 (<https://www.legal-tools.org/doc/556b3c/>); *Prosecutor v. Kenyatta and Muthaura*, Trial Chamber V, Decision appointing a common legal representative of victims, 20 November 2012, ICC-01/09-02/11, para.7 (<https://www.legal-tools.org/doc/124ca4/>).

⁵ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", 13 October 2006, ICC-01/04-01/06-568, para. 53 (<https://www.legal-tools.org/doc/7813d4/>).

Article 61(10)

10. Any warrant previously issued shall cease to have effect with respect to any charges which have not been confirmed by the Pre-Trial Chamber or which have been withdrawn by the Prosecutor.

Termination of the Proceedings:

Upon ratification of the decision declining to confirm the charges by the Appeals Chamber, where request for leave to appeal has been granted, the decision not to confirm the charges becomes final, and subject to Article 61(8) of the Statute, proceedings related to the case at hand come to an end. Nonetheless, if there remain procedural matters pertaining to the case, triggered in the course of the proceedings, they cannot be left unresolved without judicial intervention from the Chamber, which has been seized of that case.¹ Similarly, the permission of the Trial Chamber to withdraw the charges brings about that (i) the arrest or conditions imposed on the accused cease to have effect, although protective measures ordered in respect of victims and witnesses continue after the proceedings have been concluded and the classification of documents as ‘*ex parte*’ or ‘confidential’ remains in place until otherwise ordered by the Chamber, and (ii) all pending requests or applications by the accused become moot.²

Doctrine: For the bibliography, see the final comment on Article 61.

Author: Enrique Carnero Rojo.

¹ ICC, *Prosecutor v. Mbarushimana*, Pre-Trial Chamber II, Decision on the “Requête en contestation de deux décisions de la Section à l’appui des conseils relatives à l’aide judiciaire”, 3 September 2012, ICC-01/04-01/10-517, para. 7 (<https://www.legal-tools.org/doc/6ba09c/>).

² ICC, *Prosecutor v. Kenyatta and Muthaura*, Trial Chamber V, Decision on the withdrawal of charges against Mr Muthaura, 18 March 2013, ICC-01/09-02/11-696, paras. 12–13 (<https://www.legal-tools.org/doc/44ecc9/>).

Article 61(11)

11. Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.

The Trial Chamber Takes Over:

Once the charges are confirmed against a person and having the Pre-Trial Chamber ruled on any leave to appeal the decision confirming the charges, the Pre-Trial Chamber is no longer seized of any matter in the case. Pursuant to Article 61(11) of the Statute, the Trial Chamber shall be responsible for the conduct of subsequent proceedings and may exercise any relevant functions of the Pre-Trial Chamber which is relevant and capable of application in those proceedings.¹

The Pre-Trial Chamber Continues to Have Authority:

As an exception, Article 61(11) qualifies the authority of the Trial Chamber when giving it responsibility for the conduct of the “subsequent proceedings” after the confirmation of the charges, by making it, *inter alia*, subject to “paragraph 9” which extends the authority of the Pre-Trial Chamber over the charges until the trial has begun.²

Functions of Pre-Trial Chambers Exercised by Trial Chambers:

Once the trial has begun, the Trial Chamber may exercise some functions of the Pre-Trial Chamber pursuant to Article 61(11) of the Statute, such as (i) interim release reviews pursuant to Article 60 of the Statute,³ (ii) re-

¹ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I Decision on the application for additional means under regulation 83(3) of the Regulations of the Court and on the applications to intervene as amici curiae under rule 103 of the Rules of Procedure and Evidence, 5 June 2007, ICC-01/04-01/06-919-tEN, pp. 3–4 (<https://www.legal-tools.org/doc/7d89fb/>).

² ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, 13 December 2007, ICC-01/04-01/06-1084, para. 40 (<https://www.legal-tools.org/doc/257c48/>).

³ ICC, *Prosecutor v. Gbagbo*, Trial Chamber I, Seventh decision on the review of Mr Laurent Gbagbo’s detention pursuant to Article 60(3) of the Statute, 11 November 2014, ICC-02/11-01/11-718-Red, para. 31(d) (<https://www.legal-tools.org/doc/ce4b2b/>).

quests for co-operation by an accused person pursuant to Article 59(3)(b) of the Statute,⁴ and (iii) requests for provisional release by an accused person pursuant to Article 60(3) of the Statute.⁵

Referral of the Confirmation Decision to the Pre-Trial Chamber:

Moreover, the Trial Chamber may refer to the Pre-Trial Chamber the validity of the confirmation decision as a “preliminary issue” for the Trial Chamber pursuant to Article 64(4) of the Statute.⁶ However, in assessing whether the referral of the decision on confirmation of charges to the Pre-Trial Chamber is necessary, the Trial Chamber should not place itself in the position of the Pre-Trial Chamber when it comes to the consideration of the credibility of witnesses and assessment of the evidence presented at the confirmation hearing, and it should not determine that the confirmation decision is invalid merely on the basis that it would have assessed the evidence differently. It is only if it is self-evident that no reasonable Pre-Trial Chamber could have come to the same conclusion in light of subsequent developments that the Trial Chamber could consider a referral of the confirmation decision to the Pre-Trial Chamber (*Kenyatta*, 26 April 2013, paras. 85–86). It is more efficient, expeditious and appropriate for the Trial Chamber to address the post-confirmation developments and challenges as to the sufficiency of the evidence against the accused and evaluate their impact on the Prosecution’s case during the course of the trial rather than refer the case to the Pre-Trial Chamber for a ‘fresh’ confirmation process, which can only be based on changes in the charges (as opposed to the evi-

⁴ ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, Decision on the second motion of the Defence for Germain Katanga seeking the cooperation of the Democratic Republic of the Congo, 6 December 2010, ICC-01/04-01/07-2619-Red-tENG, footnote 9 (<https://www.legal-tools.org/doc/283dec/>); *Prosecutor v. Banda and Jerbo*, Trial Chamber IV, Decision on “Defence Application pursuant to article 57 (3)(b) and 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan”, 1 July 2011, ICC-02/05-03/09-169, para. 6 (<https://www.legal-tools.org/doc/891c96/>); *Prosecutor v. Banda and Jerbo*, Trial Chamber IV, Public Redacted Version of the Decision on the Third Defence Application Pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute, 12 September 2013, ICC-02/05-03/09-504-Red, para. 3 (<https://www.legal-tools.org/doc/f2a4d7/>).

⁵ ICC, *Prosecutor v. Bemba*, Trial Chamber III, Public Redacted Version of the “Decision on Applications for Provisional Release” of 27 June 2011, 16 August 2011, ICC-01/05-01/08-1565-Red, paras. 45–47 (<https://www.legal-tools.org/doc/ddf7c2/>).

⁶ ICC, *Prosecutor v. Kenyatta*, Trial Chamber V, Decision on defence application pursuant to Article 64(4) and related requests, ICC-01/09-02/11-728, 26 April 2013, para. 84 (<https://www.legal-tools.org/doc/da5089/>).

dence) between the confirmation of charges and the trial stages (para. 111). In any event, a request for referral of a confirmation decision under Article 64(4) of the Statute is impermissible if it amounts to an attempt to have the Trial Chamber effectively entertain an appeal of the confirmation decision because the Trial Chamber has no appellate jurisdiction over decisions of the Pre-Trial Chamber nor is the proper body to decide on a reconsideration of the evidence and credibility assessments as performed by the Pre-Trial Chamber (paras. 99–100, 104).

No Power to Appoint a Single Judge:

It must also be noted that the Court has clarified that although by Article 61(11) of the Statute the Trial Chamber may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in the proceedings, it is impossible to read into this provision a power by which the Trial Chamber may appoint one of the three judges to act as a single judge.⁷

Cross-references:

Article 64(4).

Rules 76, 77, 78, 92(3), 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131 and 185.

Regulations 52 and 53.

Doctrine:

1. Fabricio Guariglia, “Investigation and Prosecution”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, Kluwer, The Hague, 1999, pp. 227–37.
2. Michele Marchesiello, *Proceedings Before the Pre-Trial Chambers*, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 1243–46.
3. William A. Schabas, Eleni Chaitidou and Mohamed M. El Zeidy, “Article 61: Confirmation of the Charges Before Trial”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Mu-

⁷ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on whether two judges alone may hold a hearing – and – Recommendations to the Presidency on whether an alternate judge should be assigned for the trial, 22 May 2008, ICC-01/04-01/06-1349, para. 14(a) (<https://www.legal-tools.org/doc/5aaa63/>).

nich/Oxford/Baden-Baden, 2016, pp. 1484–1549 (<https://www.legal-tools.org/doc/040751/>).

4. Leïla Bourguiba, “Article 61: Confirmation des charges avant le procès”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour pénale internationale: Commentaire Article par Article*, A. Pedone, Paris, 2012, pp. 1385, 1412.
5. Enrique Carnero Rojo, “Rome Statute of the International Criminal Court – Article 61: Confirmation of the Charges Before Trial”, in Paul De Hert, Jean Flamme, Mathias Holvoet and Olivia Struyven (eds.), *Code of International Criminal Law and Procedure*, Larcier, Brussels, 2013, pp. 258–73.
6. Håkan Friman, “Charges”, in Göran Sluiter, Håkan Friman, Suzannah Linton, Salvatore Zappalà and Sergey Vasiliev (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, pp. 397–436.

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PART 6. THE TRIAL

Article 62

Place of Trial

Unless otherwise decided, the place of the trial shall be the seat of the Court.

Article 62 should be read together with Article 3 which provides that the seat of the Court is at The Hague in the Netherlands and that “[t]he Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute”. While Article 3 encompasses all organs of the Court, Article 62 is in part 6 of the Statute which deals with the trial. Article 62 is thus not applicable for pre-trial proceedings.

Rule 100(2) provides that Prosecutor, the defence or a majority of the judges of the Court may file an application or recommendation changing the place where the Court sits. Paragraph 3 of the same provides that “[t]he Presidency shall consult the State where the Chamber intends to sit. If that State agrees that the Chamber can sit in that State, then the decision to sit in a State other than the host State shall be taken by the Presidency in consultation with the Chamber”.

Trial Chamber I considered holding parts of the proceedings in *Lubanga* in the Democratic Republic of Congo. A feasibility study was conducted. In the end, the Government withheld consent for holding a trial in the country. Therefore, the Trial Chamber decided that the trial in its entirety would be conducted in The Hague.¹

Doctrine:

1. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 951–956 (<https://www.legal-tools.org/doc/b7432e/>).
2. Otto Triffterer/Till Zimmerman, “Article 62 – Place of the Trial”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the Internation-*

¹ ICC, *Prosecutor v. Lubanga*, Trial Chamber, Decision on disclosure issues, responsibilities for protective measures and other procedural matters, 24 April 2008, ICC-01/04-01/06-1311-Anx2, para. 105 (<https://www.legal-tools.org/doc/a44dab/>).

al Criminal Court: A Commentary, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1551–1562 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Article 63(1)

Trial in the Presence of the Accused

1. *The accused shall be present during the trial.*

The Article lays down the principle that the trial shall generally be conducted in the presence of the accused in order to safeguard his or her position as subject, not object of the proceedings. This principle is also safeguarded by the right of the accused to be present during trial, contained in Article 67(1)(d) (see also the commentary thereto). Article 61(2) contains a specific provision on the presence or absence of the accused at the confirmation hearing.

Article 63 only names one exception to this principle, namely the possibility of removal of the accused for disruptive behaviour mentioned in para. 2. However, it is not clear whether this exhausts all possibilities for trial proceedings conducted (partially) in the absence of the accused. One other possibility would be where the accused chooses not to attend the trial. Such choice has been accepted by both *ad hoc* tribunals and by the Special Court for Sierra Leone.¹ On the other hand, there are also national systems which hold that presence at trial is not only a right, but also a duty of the defendant, from which he or she may only be excused under certain limited circumstances (see Sect. 230 and 236 of the German Code of Criminal Procedure).² In the Statute, the possibility of a waiver of the right to presence is also explicitly mentioned in Article 61(2) on the confirmation hearing (albeit referring to the confirmation hearing as a whole, not to parts of it), but whether the Court will interpret this provision as laying down a general principle also applicable to trial proceedings, or whether it will find a contrario that there may be no such waiver for trial proceedings as it is not explicitly laid down in Article 63, remains to be seen.

¹ See for example, ICTY, *Prosecutor v. Zdravko Delalić et al.*, Trial Chamber, Transcript of 16 April 1998, 16 April 1998, IT-96-21, pp. 11255–56 (<https://www.legal-tools.org/doc/ab1688/>); ICTR, *Prosecutor v. Bagosora et al.*, Trial Chamber, Minutes of Proceedings of 2 April 2002, 2 April 2002, ICTY-98-41-I, para. 1 (<https://www.legal-tools.org/doc/cc5de2/>); SCSL, *Prosecutor v. Sesay et al.*, Trial Chamber, Ruling on the issue of the refusal of the third accused, Augustine Gbao, to attend hearing of the Special Court for Sierra Leone on 7 July 2004 and succeeding days, 12 July 2004, SCSL-2004-15, para. 12 (<https://www.legal-tools.org/doc/139f1c/>).

² Germany, Strafprozeßordnung (Code of Criminal Procedure), 7 April 1987 (<https://www.legal-tools.org/doc/wc212a/>).

For other possibilities for trial proceedings in the absence of the accused, as well as for the question of fitness to stand trial, see commentary to Article 67(1)(d).

Cross-reference:

Article 67(1)(d).

Doctrine: For the bibliography, see the final comment on Article 63.

Author: Björn Elberling, revised by Mark Klamberg.

Article 63(2)

2. If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

Article 63(2) lays down the only clearly established exception to the principle that the accused must be present at her trial, namely his or her removal for disruptive behaviour. It follows similar provisions at other tribunals, such as Rule 80 of the Rules of Procedure and Evidence at both the ICTY and the ICTR, which have seldom if ever been used.

The requirements for removal show that at the ICC too, removal of the accused must be seen as a measure of last resort which should only seldom arise: First of all, the accused must “continue [...] to disrupt the trial”, in other words a single disruption, no matter how grave in itself, will not be sufficient. Rule 170 adds to this the requirement of a prior warning before removal. Second, “other reasonable alternatives” to removal must have proved inadequate – what exactly such “reasonable alternatives” may be is left to the further jurisprudence of the Court, one that springs to mind is shutting off the microphone of the accused (the US Supreme Court has found that US law even allows binding and gagging the defendant if this is the only way to conduct the trial in his or her presence and without disruptions).¹ Finally, removal is limited to “such duration as is strictly required” – especially where the accused has been removed from proceedings for the first time, this may require allowing him or her back into the courtroom after a sufficient ‘cooling off period’ upon the promise to stop disrupting the trial. Whether the reference to “exceptional circumstances” must be interpreted as yet another additional requirement, or whether it is more a description of situations which fulfil the other requirements for removal, is not clear.

¹ United States, Supreme Court, *Illinois v. Allen*, Judgment, 31 March 1970, 397 US 337, p. 343.

If the accused is removed, he or she must nonetheless be enabled to follow the proceedings and instruct counsel from outside the courtroom.

For other possibilities for trial proceedings in the absence of the accused, see commentary to Article 67(1)(d).

Cross-references:

Article 67(1)(d), Rule 170.

Doctrine:

1. William A. Schabas/Veronique Caruana, “Article 63”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1563–1587 (<https://www.legal-tools.org/doc/040751/>).
2. Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, pp. 400–1, mn. 1184–85 (<https://www.legal-tools.org/doc/e35f82/>).
3. Frank Terrier, in Antonio Cassese, *Paola Gaeta and John R.W.D. Jones* (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 2nd. ed., Oxford University Press, 2002, pp. 1282–84 (<https://www.legal-tools.org/doc/01addc/>).

Author: Björn Elberling, revised by Mark Klamberg.

Article 64(1)

Functions and Powers of the Trial Chamber

1. The functions and powers of the Trial Chamber set out in this article shall be exercised in accordance with this Statute and the Rules of Procedure and Evidence.

Article 64 defines most of the functions and powers of the Trial Chamber, but not all of them. Other important provisions include Articles 74–76 which concern decisions on the guilt of the accused, sentencing and decisions on reparations to victims. Article 64 should be read together with Article 21 of the ICC Statute. The provision makes a reference to the ICC Statute as well as the Rules of Procedure and Evidence. Chapter 6 of the Rules deals specifically with the proceedings to be conducted before a Trial Chamber. Chapter 4 of the Rules also deals with proceedings with importance for the Trial Chamber.

Doctrine: For the bibliography, see the final comment on Article 64.

Author: Mark Klamberg.

Article 64(2)

2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

Article 64(2) gives the Trial Chamber the duty to ensure the quality of the trial. The provision instructs the Trial Chamber to ensure full respect for the rights of the accused and due regard for the protection of victims and witnesses. These two interests may come in conflict with each other when it comes to the disclosure of the names and addresses of witnesses in order to allow the accused to prepare his or her defence. One solution is to allow a delayed disclosure where the names of the witnesses are disclosed just before the trial.

Cross-reference:

Rule 81.

Doctrine: For the bibliography, see the final comment on Article 64.

Author: Mark Klamberg.

Article 64(3)

3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:

At the beginning of the existence of the Court, pursuant to Article 61(11) the Presidency has to, once the charges have been confirmed, constitute the Trial Chamber and then assign the case to this Chamber. The Presidency may also refer the case to a previously constituted Trial Chamber pursuant to Rule 130.

Doctrine: For the bibliography, see the final comment on Article 64.

Author: Mark Klamberg.

Article 64(3)(a)

(a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;

The Trial Chamber is to “[c]onfer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings”. This is accomplished by means of status conferences. This is a development from the practice of the ICTY with status, pre-trial and pre-defence conferences provided for in the ICTY Rules of Procedure and Evidence, Rules 65 *bis*, 73 *bis* and 73 *ter*.

Promptly after the Trial Chamber is constituted, ICC Rule 132(1) provides for a mandatory status conference in order to set the date of the trial. Sub-paragraph 2 provides for other status conferences in order to facilitate the fair and expeditious conduct of the proceedings. A Chamber may pursuant to Regulation 30 hold status conferences by way of hearings, including by way of audio- or video-link technology or by way of written submissions. At a status conference, the Trial Chamber may, in accordance with the Statute and the Rules, issue any order in the interests of justice. Regulation 54 provides a non-exhaustive list of such issues.

Cross-references:

Rule 132.

Regulation 30 and 54.

Doctrine: For the bibliography, see the final comment on Article 64.

Author: Mark Klamberg.

Article 64(3)(b)

(b) Determine the language or languages to be used at trial; and

The Trial Chamber shall determine the language or languages to be used at trial. The Court has pursuant to Article 50 of the ICC Statute two working languages, English and French. The Court shall authorize a language other than English or French provided that the Court considers such authorization to be adequately justified. Furthermore, Regulation 39 provides that “[a]ll documents and materials filed with the Registry shall be in English or French, unless otherwise provided in the Statute, Rules, these Regulations or authorised by the Chamber or the Presidency”. The accused has the right according to Article 67(1)(f) to translation or interpretation into a language that he or she “fully understands and speaks”.

Doctrine: For the bibliography, see the final comment on Article 64.

Author: Mark Klamberg.

Article 64(3)(c)

(c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.

The Trial Chamber shall provide for disclosure of documents or information not previously disclosed. It is thus the duty of the Trial Chamber, if not to review, at least to validate the work done by the Pre-Trial Chamber. The Defence may also be called upon under Article 64(3)(c) to the extent it is compatible with rights of the accused to disclose certain documents to the Prosecution. Rules 76–84 establish a regime of disclosure, applicable with important distinctions to both the Prosecution and the Defence.

Cross-reference:

Rule 134.

Doctrine: For the bibliography, see the final comment on Article 64.

Author: Mark Klamberg.

Article 64(4)

4. The Trial Chamber may, if necessary for its effective and fair functioning, refer preliminary issues to the Pre-Trial Chamber or, if necessary, to another available judge of the Pre-Trial Division.

Pursuant to Article 61(11), echoed by Article 64(6)(a), the Trial Chamber shall be responsible for the conduct of proceedings subsequent to the confirmation of charges and may exercise any function of the Pre-Trial Chamber that is relevant in the proceedings. The present provision allows the Trial Chamber to refer preliminary issues to the Pre-Trial Chamber. It should be used restrictively.

The expression “preliminary issues” refers to Part 5 of the ICC Statute, especially Articles 56 and 57. In contrast, the provision is not a reference to Part 2 of the ICC Statute, because Article 19(6) expressly states that after confirmation of the charges, challenges to the admissibility of a case or to the jurisdiction of the Court “shall be referred to the Trial Chamber”.

A decision of a Trial Chamber to refer a preliminary issue to a Pre-Trial Chamber is subject to the condition that it is “necessary for its effective and fair functioning” of the Trial Chamber.

In the *Lubanga* case, the pre-trial record of proceedings had been transferred to Trial Chamber I.¹ The Trial Chamber considered that Article 60(3) requires that a ruling on detention is subject to periodical review and that it did not “have sufficient time [...] to familiarize itself with the record in order to review Mr. Thomas Lubanga Dyilo’s detention in a fair and effective manner”. Thus, the Trial Chamber requested pursuant to Article 64(4) that “Pre-Trial Chamber I review its ruling on the detention of Mr. Thomas Lubanga Dyilo”.²

In the same case, one of the Judges of the Trial Chamber was abroad and the question arose whether a hearing could be held in his absence.³ One

¹ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Request for Review of Detention, 6 June 2007, ICC-01/04-01/06-921 (<https://www.legal-tools.org/doc/b688ce/>).

² For the subsequent decision by the Pre-Trial Chamber, see ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Second Review of the “Decision on the Application for Interim Release of Thomas Lubanga Dyilo”, 11 June 2007, ICC-01/04-01/06-924 (<https://www.legal-tools.org/doc/09a887/>).

³ ICC, *Prosecutor v. Lubanga*, Trial Chamber, Decision on whether two judges alone may hold a hearing – and – Recommendations to the Presidency on whether an alternate judge

of the options considered but rejected was to invoke Article 64(4). The Trial Chamber stated that:

Although by Article 64(4) of the Statute, the Chamber may, for its effective and fair functioning, refer preliminary issues to the Pre-Trial Chamber or, if necessary, to another available judge of the Pre-Trial Division, it may be counter-productive to attempt to delegate the kind of complicated decisions that arise during this preparatory stage to a judge or to judges of another Division who have not been involved in the complex and often interrelated issues that will have arisen following the confirmation of charges. It is likely that it would be necessary for the judge or judges to place the issue referred to them in the overall context of the Trial Chamber's work to date, and that process would be exacting and time-consuming (*Lubanga*, 22 May 2008, para. 14).

Cross-references:

Article 61(11) and 64(6)(a).

Doctrine: For the bibliography, see the final comment on Article 64.

Author: Mark Klamberg.

should be assigned for the trial, 22 May 2008, ICC-01/04-01/06-1349 ('*Lubanga*, 22 May 2008') (<https://www.legal-tools.org/doc/5aaa63/>).

Article 64(5)

5. Upon notice to the parties, the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused.

This provision gives the *ex officio* power explicitly to the Trial Chamber, but also implicitly to the Pre-Trial Chamber, to order joinder or severance. The Chamber must give notice to the parties. The rationale behind this rule is that the interest of justice may require that people involved in one and the same criminal undertaking should be tried at the same time in order to avoid inconsistencies and contradictions.

Rule 136 provides that persons accused jointly shall be tried together unless the Trial Chamber, on its own motion or at the request of the Prosecutor or the defence, orders severance. This may be warranted for three purposes: (i) to avoid serious prejudice to the accused, (ii) to protect the interests of justice or (iii) because a person jointly accused has made an admission of guilt and can be proceeded against in accordance with Article 65, paragraph 2.

Pre-Trial Chamber I decided to join the cases against Germain Katanga and Mathieu Ngudjolo Chui.¹ The Pre-Trial Chamber considered that:

although Article 64(5) of the Statute and Rule 136 of the Rules are included in Chapter VI of the Statute and of the Rules which deals with the ‘Trial Procedure’, the Chamber considers that the contextual interpretation of such provisions, in light of the above-mentioned provisions relating to the Pre-Trial proceedings of a case before the Pre-Trial Chamber included in Chapter V of the Statute and the Rules, does not preclude joint proceedings at the Pre-Trial stage, but rather supports the general rule that there is a presumption of joint proceedings for persons prosecuted jointly (*Katanga and Ngudjolo*, 10 March 2008, pp. 8–9).²

¹ ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the Joinder of the Cases against Germain Katanga and Mathieu Ngudjolo Chui, 10 March 2008 (*‘Katanga and Ngudjolo*, 10 March 2008’) (<https://www.legal-tools.org/doc/37c646/>).

² See also ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on Application for Leave to Appeal by the Defence of Mathieu Ngudjolo Chui against the Decision on Joinder, April 2008, ICC-01/04-01/07-384, (<https://www.legal-tools.org/>

Cross-reference:

Rule 136.

Doctrine: For the bibliography, see the final comment on Article 64.

Author: Mark Klamberg.

doc/5be263/), where the Pre-Trial Chamber granted leave to appeal. The Appeals Chamber upheld the decision of Pre-Trial Chamber I in *Katanga and Ngudjolo*, Appeals Chamber, Judgment on the Appeal Against the Decision on Joinder rendered on 10 March 2008 by the Pre-Trial Chamber in the Germain Katanga and Mathieu Ngudjolo Chui Cases, 9 June 2008, ICC-01/04-01/07-573 (<https://www.legal-tools.org/doc/4feef7/>).

Article 64(6)

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

The powers of the Trial Chamber as set out in Article 64(6) applies both to the phase before the trial and its conduct as such.

Doctrine: For the bibliography, see the final comment on Article 64.

Author: Mark Klamberg.

Article 64(6)(a)

(a) Exercise any functions of the Pre-Trial Chamber referred to in Article 61, paragraph 11;

Article 64(6)(a) coupled with Article 61(11) authorizes the Trial Chamber to “exercise any function of the Pre-Trial Chamber that is relevant”. This covers all the functions of the Pre-Trial Chamber described in Part 5 of the ICC Statute. Thus, the Trial Chamber can undertake such functions as issuance of an arrest warrant, if ever required. Considering that the Pre-Trial Chamber was created to resolve all preliminary issues it is reasonable that the power set forth in Article 64(6)(a) will be exercised only in exceptional circumstances by the Trial Chamber.

Doctrine: For the bibliography, see the final comment on Article 64.

Author: Mark Klamberg.

Article 64(6)(b)

(b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute;

In order to facilitate the attendance and testimony of witnesses and production of documents the Trial Chamber may require and obtain the assistance of States as provided in this Statute. This is a reference to Part 9 and more specifically Article 93. There appears to be an inconsistency between Article 64(6)(b) and Article 93.

Article 93(1)(e) provides that States Parties shall provide assistance with “[f]acilitating the voluntary appearance of persons as witnesses or experts before the Court”. Similarly, the transfer of a person for purposes of obtaining testimony under Article 93(7) is based on the consent of that person. This is a serious weakness of the co-operation scheme in Article 93 considering that Article 69(2) expresses an aspiration that testimony of a witness at trial shall be given in person. In regard to others than the suspect or accused, the ICC Statute gives conflicting messages as to whether the Court may compel an individual to co-operate.

Göran Sluiter holds that “[o]n the basis of Article 93(1)(e) and Article 93(7)(a)(i) [...] an individual has no obligation towards the Court to appear as a witness”. This would imply a voluntary right of a person not to appear and testify before the Court. The preparatory works of the ICC Statute support Sluiter’s conclusion. This would not only impede on the efficiency of the court but could also have negative effects from a fair trial perspective if the accused cannot call witnesses.

Claus Kreß and Kimberly Prost have a slightly different approach when they illustrate how such a right would be inconsistent with Article 64(6)(b) which empowers the Trial Chamber to require the attendance and testimony of witnesses.¹ They appear to argue that a subpoena power does exist. In addition, Article 69(2) provides that the testimony of a witness at trial shall be given in person. Kreß and Prost do not deny the inconsistency between the provisions but it should not be widened. They suggest that Ar-

¹ Claus Kreß and Kimberly Prost, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 2nd. ed., Oxford University Press, 2002 (<https://www.legal-tools.org/doc/01addc/>).

ticle 64(6)(b) create an obligation of persons to appear and testify before the Court, but States are under no duty to enforce that obligation. This interpretation would promote the purpose of Article 64(6)(b) without violating Article 93(1)(e) and Article 93(7)(a)(i).

The issue has to some extent been resolved in *Ruto et al.* where the Appeals Chamber ruled that “the Statute gives Trial Chambers the power to compel witnesses to appear before it, thereby creating a legal obligation for the individuals concerned”. However, the Court is dependent on State cooperation. In this regard, the Appeals Chamber ruled that “[u]nder Article 93(1)(b) of the Statute the Court may [only] request a State Party to compel witnesses to appear before the Court sitting *in situ* in the State Party’s territory or by way of video-link.²

Cross-references:

Articles 69(2) and 93(1)(e) and (7)(a)(i).

Doctrine: For the bibliography, see the final comment on Article 64.

Author: Mark Klamberg.

² ICC, *Prosecutor v. Ruto and Sang*, Appeals Chamber, 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, ICC-01/09-01/11-1598, paras. 1–2, 56, 77 (<https://www.legal-tools.org/doc/e5eb09/>).

Article 64(6)(c)

(c) Provide for the protection of confidential information;

The Trial Chamber has an obligation to protect confidential information, including information affecting a State's national security. This includes the possibility for the Trial Chamber, on its own motion, at the request of the Prosecutor, the Defence or the State concerned, to order *in camera* hearings.

Cross-references:

Articles 54(3)(e), 68(6) and 93(8)(b) and (c).

Doctrine: For the bibliography, see the final comment on Article 64.

Author: Mark Klamberg.

Article 64(6)(d)

(d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties;

This sub-paragraph is influenced by civil law systems and grants the Judges authority to order the parties to submit additional evidence.

Cross-reference:

Article 69(3).

Doctrine: For the bibliography, see the final comment on Article 64.

Author: Mark Klamberg.

Article 64(6)(e)

*(e) Provide for the protection of the accused, witnesses and victims;
and*

This sub-paragraph on protection of the participants of the trial recalls notions developed more in detail elsewhere. For example, Article 68(1) and (2) provides that the “Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means”. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

Cross-references:

Article 68(1) and (2).

Doctrine: For the bibliography, see the final comment on Article 64.

Author: Mark Klamberg.

Article 64(6)(f)

(f) Rule on any other relevant matters.

This sub-paragraph emphasizes the authority of the Trial Chamber. It gives the Judges the possibility of adapting their practice and issue directions accordingly.

Doctrine: For the bibliography, see the final comment on Article 64.

Author: Mark Klamberg.

Article 64(7)

7. The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in Article 68, or to protect confidential or sensitive information to be given in evidence.

This sub-paragraph concerns the principle of publicity which is of interest both for the accused and the general public. It is repeated in Article 67(1). The principle of publicity may be divided up into at least two sub-principles: public access to the actual trial and the pronouncement of the judgment in public. Access for the public and the press to the courtroom, motions and decisions contributes to the fairness of the trial, by enabling third parties to assure themselves of the quality of the proceedings. The Trial Chamber in *Lubanga* acknowledged the principle when it stated that “all evidence will be public unless there is an order specifying otherwise”.¹

Cross-references:

Article 67(1).

Regulation 20.

Doctrine: For the bibliography, see the final comment on Article 64.

Author: Mark Klamberg.

¹ ICC, *Prosecutor v. Lubanga*, Trial Chamber, Order on numbering of evidence, 12 May 2010, ICC-01/04-01/06-2432 (<https://www.legal-tools.org/doc/33b939/>). See also *Prosecutor v. Bemba*, Trial Chamber, Public Redacted Version of the Chamber’s 11 November 2011 Decision regarding the prosecution’s witness schedule, 15 November 2011, ICC-01/05-01/08-1904-Red, para. 18 (<https://www.legal-tools.org/doc/a595ab/>) and *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber II, Ordonnance portant instructions en vue de favoriser la publicité de la procédure, 31 January 2012, ICC-01/04-01/07-3226, para. 1 (<https://www.legal-tools.org/doc/19bf7a/>).

Article 64(8)(a)

8. (a) At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber. The Trial Chamber shall satisfy itself that the accused understands the nature of the charges. It shall afford him or her the opportunity to make an admission of guilt in accordance with Article 65 or to plead not guilty.

The instruction that the Trial Chamber shall read the charges refers to the charges previously confirmed by the Pre-Trial Chamber pursuant to Article 61(7)(a). The provision is also subject to the possibility of the charges being amended after the confirmation hearing (Article 61(9)).

The Trial Chamber has a responsibility at this stage to determine whether the accused is fit to stand trial and understands the nature of the charges. For this purpose, the Trial Chamber may order a medical, psychiatric or psychological examination of the accused pursuant to Rule 135. Where the Trial Chamber is satisfied that the accused is unfit to stand trial, it shall according to Rule 135(4) order that the trial be adjourned. The Trial Chamber may, on its own motion or at the request of the prosecution or the defence, review the case of the accused. In any event, the case shall be reviewed every 120 days unless there are reasons to do otherwise. If necessary, the Trial Chamber may order further examinations of the accused. When the Trial Chamber is satisfied that the accused has become fit to stand trial, it shall proceed with a status conference in accordance with Rule 132.

The procedure for guilty plea is developed in Article 65.

Cross-references:

Article 65.

Rules 135 and 140.

Doctrine: For the bibliography, see the final comment on Article 64.

Author: Mark Klamberg.

Article 64(8)(b)

(b) At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute.

Although the Statute outlines some general principles, it does not specify in any detail the procedure to be followed. Article 64(8)(b) grants the Presiding judge a broad discretion to determine the conduct of the proceedings, a typical civil law feature. It may be used to control the manner of questioning the witnesses to avoid any harassment or intimidation. From a common law perspective such interventions may come in conflict with accused's interests, including the right to confront the evidence against him or her. Common law lawyers wanted to have some guidance in the rules which resulted in Rule 140. The rule has been characterized as a clash of cultures. It does not contain any sequencing instructing when the parties should examine a witness which would be normal in a common law system. However, it does provide that the defence shall have the right to be the last to examine a witness. The Trial Chamber has the right to question the witness, but is encouraged to do so before or after a witness is questioned by a party in order to avoid the judges intervening in the cross-examination of a witness and thereby frustrating a party's line of questioning. The chapeau in sub-rule 2 provides that the rules concerning questioning of witnesses apply "in all cases", which means that the right of a party to question a witness he or she has called, witnesses for the other side, and a right for the defendant to ask the last question is maintained all cases and can not be abrogated from at the discretion of the presiding judge. Thus, the possibility of cross-examination is implicitly recognized without using typical terms from either common law or civil law.

In the *Lubanga* case, the Trial Chamber stated that "by Article 64(8)(b), only at the trial may the presiding judge give directions for the conduct of the proceedings, thereby underlining that the presiding judge cannot adopt an analogous role to that of the single judge of the Pre-Trial Chamber during the preparatory phase before the trial commences".¹

¹ ICC, *Prosecutor v. Lubanga*, Trial Chamber, Decision on whether two judges alone may hold a hearing – and – Recommendations to the Presidency on whether an alternate judge

Cross-reference:

Rule 141.

Doctrine: For the bibliography, see the final comment on Article 64.

Author: Mark Klamberg.

should be assigned for the trial, 22 May 2008, ICC-01/04-01/06-1349, para. 12
(<https://www.legal-tools.org/doc/5aaa63/>).

Article 64(9)(a)

9. The Trial Chamber shall have, *inter alia*, the power on application of a party or on its own motion to:

(a) Rule on the admissibility or relevance of evidence; and

Article 64(9)(a) confirms that the Trial Chamber has the power to rule on the admissibility or relevance of evidence. To a large extent it duplicates the terms in Article 69(4).

In the *Lubanga* case, Trial Chamber I addressed in the extent to which decisions of the Pre-Trial Chamber are binding on the Trial Chamber.¹ The Trial Chamber noted that “Article 64(9) of the Statute gives the Trial Chamber a seemingly unqualified power to rule on the admissibility or relevance of evidence”. (*Lubanga*, 13 December 2007, para. 4) However, Trial Chamber I also stated “that the Trial Chamber should only disturb the Pre-Trial Chamber’s Decisions if it is necessary to do so. Not least for reasons of judicial comity, this Chamber should follow the Pre-Trial Chamber unless that would be an inappropriate approach” (para. 6).

Cross-references:

Rule 63 and 64.

Doctrine: For the bibliography, see the final comment on Article 64.

Author: Mark Klamberg.

¹ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, 13 December 2007, ICC-01/04-01/06-1084, para. 39 (*Lubanga*, 13 December 2007) (<https://www.legal-tools.org/doc/257c48/>).

Article 64(9)(b)

(b) Take all necessary steps to maintain order in the course of a hearing.

In order to maintain order in the course of a hearing, the Trial Chamber has several tools, including: (i) the removal of persons, including the accused (Article 63(2)), who commit misconduct such as disruptions; (ii) other sanctions for misconduct, including fines (Article 71).

Rule 170 provides that the Presiding Judge of the Chamber dealing with the matter may, after giving a warning: (a) Order a person disrupting the proceedings of the Court to leave or be removed from the courtroom; or, (b) In case of repeated misconduct, order the interdiction of that person from attending the proceedings. When the misconduct consists of deliberate refusal to comply with an oral or written direction by the Court, not covered by Rule 170, and that direction is accompanied by a warning of sanctions in case of breach, the Presiding Judge of the Chamber dealing with the matter may pursuant to Rule 171 order the interdiction of that person from the proceedings for a period not exceeding 30 days or, if the misconduct is of a more serious nature, impose a fine. The fine may not exceed 2,000 Euro.

Cross-references:

Article 63(2) and 71.

Rules 170 and 171.

Doctrine: For the bibliography, see the final comment on Article 64.

Author: Mark Klamberg.

Article 64(10)

10. The Trial Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is made and that it is maintained and preserved by the Registrar.

The Trial Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is made and that it is maintained and preserved by the Registrar. Rule 137 provides that the Registrar shall take measures to make, and preserve, a full and accurate record of all proceedings, including transcripts, audio- and video-recordings and other means of capturing sound or image. Real time transcripts of hearings shall pursuant to regulation 27 be provided in at least one of the working languages of the Court to the extent technically possible.

The record of public hearings may be a public document and distributed on conditions laid down by the either the Trial Chamber or the Registrar. By contrast, the record of hearings in camera is by nature confidential and may only be disclosed by an order of the Trial Chamber pursuant to Rule 137(2).

In the *Lubanga* case, the Trial Chamber pursuant to Article 64(10) adopted a revised procedure for the numbering of exhibit for the efficient administration of the record of the trial.¹

Cross-references:

Rule 137 and 138.

Regulation 27.

Doctrine:

1. Alphons Orie, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 2nd. ed., Oxford University Press, Oxford, 2002, p. 1488 (<https://www.legal-tools.org/doc/01addc/>).
2. Gilbert Bitti, “Article 64”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd.

¹ ICC, *Prosecutor v. Lubanga*, Trial Chamber, Order on numbering of evidence, 12 May 2010, ICC-01/04-01/06-2432 (<https://www.legal-tools.org/doc/33b939/>).

- ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1588–1620 (<https://www.legal-tools.org/doc/040751/>).
3. Claus Kreß and Kimberly Prost, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), 2002, pp. 1572, 1576–77, 1584.
 4. Peter Lewis, “trial Procedure”, in Roy S. Lee, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 549–50 (<https://www.legal-tools.org/doc/e34f81/>).
 5. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 973–993 (<https://www.legal-tools.org/doc/b7432e/>).
 6. Frank Terrier, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), 2002, p. 1284.

Author: Mark Klamberg.

Article 65

Proceedings on an Admission of Guilt

General Remarks:

Article 65 provides that if an accused admits guilt before the Trial Chamber, the Chamber may forego a full-blown trial and proceed with the case in an abbreviated fashion. The provision effectively allows for the development of a form of ‘plea bargaining’, or ‘negotiated justice’, whereby the accused agrees to admit guilt in exchange for more lenient treatment. In response to concerns expressed by delegates to the Rome Conference from civil-law countries, Article 65 demands a thorough inquiry by judges to ensure that an admission of guilt is supported by the facts and allows the court to require a more complete presentation of evidence in the interests of justice. The Article also expressly states that negotiations between the parties do not bind the court, emphasizing that judges are the ultimate decision-makers on the facts, the charges, and the sentence.

Article 65 was drafted before plea bargaining developed at the ICTY and ICTR, and before the Rules at these Tribunals were amended to regulate the practice. Because the provisions on guilty pleas at those Tribunals are similar to those on admissions of guilt at the ICC, however, one may expect the ICC to consult Tribunal jurisprudence when interpreting Article 65. ICTY and ICTR jurisprudence is therefore mentioned in this commentary when relevant. Likewise, the commentary refers to the East Timor Special Panels on Serious Crimes (‘SPSC’), because the SPSC accepted admissions of guilt under provisions almost identical to those of the ICC Statute. As of this writing in 2015, the ICC itself has not yet resolved any cases pursuant to the procedure in Article 65.

Preparatory Works:

The negotiations of Article 65 reflected divisions between representatives of common-law countries, who viewed plea bargaining as an efficient mechanism of adjudicating complex crimes, and those of civil-law countries, who found repugnant the notion of ‘bargaining with justice’ for serious international crimes. The International Law Commission’s 1994 Final Draft of the ICC Statute included a provision for the entry of guilty pleas, without specifying the consequences of the procedure. Some delegates objected that the provision might allow for plea bargaining and that such bar-

gaining would be inappropriate “in view of the gravity of the crimes within the jurisdiction of the court”.¹ A compromise was found in a proposal submitted by Argentina and Canada, which suggested a procedure of “abbreviated proceedings on an admission of guilt” (Schabas, 2016, p. 996). To assuage concerns about inaccurate, unfair, or overly lenient plea bargains, the final text included the provision in Article 65(5), which states that any discussions between the parties regarding the charges or the penalty would not bind the court (pp. 996–997).

Analysis:

The accused may formally admit guilt once the case reaches the Trial Chamber (ICC Statute Article 64(8)(a)). The Trial Chamber must then examine the validity of the admission under Article 65(1).

Cross-reference:

Article 64(8).

Doctrine: For the bibliography, see the final comment on Article 65.

Author: Jenia Iontcheva Turner.

¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2nd. ed., 2016, p. 996 (<https://www.legal-tools.org/doc/b7432e/>), citing Report of the Ad Hoc Committee on the Establishment of the International Criminal Court, UN Doc. A/50/22, 7 September 1995, para. 170 (<https://www.legal-tools.org/doc/b50da8/>).

Article 65(1)

Where the accused makes an admission of guilt pursuant to Article 64, paragraph 8 (a), the Trial Chamber shall determine whether:

To determine the validity of an admission of guilt, the Chamber must examine whether the admission is knowing, voluntary, and factually based. Unlike the ICTY and ICTR Rules, the ICC Statute does not expressly require that the admission of guilt be unequivocal. Theoretically, therefore, an accused may be able to admit guilt and yet persist with a legal defense. While Article 65 does not prohibit equivocal admissions, Trial Chambers are unlikely to accept them in practice. Such admissions increase the risk that a potentially innocent defendant is convicted.¹ They also conflict with Article 65's emphasis on a full examination of the facts of the case. At the SPSC, which followed Rules identical to Article 65(1) with respect to the validity of admissions of guilt, judges required that admissions of guilt be unequivocal even though no such requirement was set out in the Court's Rules.²

Cross-reference:

Rule 139.

Doctrine: For the bibliography, see the final comment on Article 65.

Author: Jenia Iontcheva Turner.

¹ ICTR, *Prosecutor v. Serushago*, Trial Chamber, Sentence, 5 February 1999, ICTR-98-39, para. 29 (<https://www.legal-tools.org/doc/e2dddb/>).

² Regulation No. 2000/30 On Transitional Rules of Criminal Procedure, UN Doc. UN-TAET/REG/2000/30, 25 September 2009, R. 29 A (<https://www.legal-tools.org/doc/f3e141/>); SPSC, *Prosecutor v. Fernandes*, Dili District Court, Sentencing Judgement, 25 January 2000, para. 6 (<https://www.legal-tools.org/doc/e2e6d6/>).

Article 65(1)(a)

(a) The accused understands the nature and consequences of the admission of guilt;

The Trial Chamber must examine whether the accused “understands the nature and consequences of the admission of guilt”. The ICC Statute and Rules do not interpret these terms further, but jurisprudence from the ICTY and ICTR offers some guidance.

First, the Chamber must examine whether the accused understands “the elements of the crime or crimes to which he has pleaded guilty to ensure that his understanding of the requirements of the crime reflects his actual conduct and participation as well as his state of mind or intent when he committed the crime”.¹ Where the accused faces alternative charges, he must comprehend “the nature and distinction between the alternative charges and the consequences of pleading guilty to one rather than the other”.²

Second, the Chamber must inform the accused of the rights he or she is waiving by choosing to admit guilt. These include the right to a public trial, the right to prepare a defense against the charges, the right to be tried without undue delay, the right to confront adverse witnesses and obtain defense witnesses, and the right not to be compelled to testify against oneself. (*Erdemović*, 7 October 1997, Separate Opinion, para. 15).

Third, the Chamber must confirm that the accused understands the sentencing consequences of his admission.³ The ICC Statute and Rules do not provide detailed guidance about sentencing. The Chamber will therefore likely have to inform the accused on only two points: (i) that it would not be bound by any sentencing agreement by the parties; and (ii) that it might impose a penalty up to the maximum specified in Article 77 (a max-

¹ ICTY, *Prosecutor v. Nikolić*, Trial Chamber, Sentencing Judgment, 2 December 2003, IT-02-60/1, para. 12 (<https://www.legal-tools.org/doc/f90842/>).

² ICTY, *Prosecutor v. Erdemović*, Appeals Chamber, Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997, IT-96-22, para. 14 (*Erdemović*, 7 October 1997, Separate Opinion) (<https://www.legal-tools.org/doc/f91d89/>).

³ Jenia Iontcheva Turner and Thomas Weigend, “Negotiated Justice”, in Göran Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, p. 1381 (<https://www.legal-tools.org/doc/bcad4c/>).

imum sentence of 30 years, or in extremely grave cases, life imprisonment; a possible fine and forfeiture of proceeds from the crime).

Fourth, the Chamber must verify that the accused is mentally competent to understand the consequences of his actions. The ICTY and ICTR have examined mental competence when determining whether a guilty plea is voluntary, but this evaluation appears to fit more neatly under Article 65(1)(a) at the ICC. The Trial Chamber may order a psychiatric evaluation of the accused to determine his mental competence. (ICC RPE Rule 135(1)). The standard for competence to enter a guilty plea is generally the same as the standard for competency to stand trial. (Turner and Weigend, 2013, p. 1379).

Doctrine: For the bibliography, see the final comment on Article 65.

Author: Jenia Iontcheva Turner.

Article 65(1)(b)

(b) The admission is voluntarily made by the accused after sufficient consultation with defence counsel; and

After determining that the accused has made an informed admission of guilt, the Chamber must also inquire whether the admission is voluntary and whether it was made “after sufficient consultation with defense counsel”. The admission of guilt must not be the product of any threats or inducements other than the expectation of receiving a reduced sentence or charging concessions.¹ Unlike at the Tribunals, at the ICC, an admission of guilt requires consultation with defense counsel. The assistance of counsel is expected to reduce the risk that an accused person would be coerced into admitting guilt.

Doctrine: For the bibliography, see the final comment on Article 65.

Author: Jenia Iontcheva Turner.

¹ ICTY, *Prosecutor v. Erdemović*, Appeals Chamber, Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997, IT-96-22, para. 10 (<https://www.legal-tools.org/doc/f91d89/>); ICTR, *Prosecutor v. Kambanda*, Appeals Chamber, Judgement, 19 October 2000, ICTR-97-23, para. 61 (<https://www.legal-tools.org/doc/9d7f75/>).

Article 65(1)(c)

(c) The admission of guilt is supported by the facts of the case that are contained in:

(i) The charges brought by the Prosecutor and admitted by the accused;

(ii) Any materials presented by the Prosecutor which supplement the charges and which the accused accepts; and

(iii) Any other evidence, such as the testimony of witnesses, presented by the Prosecutor or the accused.

The Chamber must examine the following sources to determine whether an admission of guilt is supported by the facts: (i) the charging document; (ii) “[a]ny materials presented by the Prosecutor which supplement the charges and which the accused accepts; and [(iii)] [a]ny other evidence, such as the testimony of witnesses, presented by the Prosecutor or the accused”. The Article does not appear to contemplate that victims would be providing evidence (other than as witnesses) to support the factual basis of the admission.

Notably, Article 65(1) confirms that the facts on which the admission of guilt rests cannot be negotiated by the parties. This is a formal departure from ICTY and ICTR Rules of Procedure and Evidence, which provide that the “lack of any material disagreement between the parties about the facts of the case” could constitute sufficient factual basis for a guilty plea. (ICTY RPE 62 *bis*(iv); ICTY RPE 62(B)(iv)). In practice, however, ICTY and ICTR judges have typically conducted an independent inquiry into the facts and required evidence beyond the parties’ agreement to support guilty pleas.¹ The factual basis requirement helps to ensure that the accused is admitting responsibility only for conduct of which he is in fact guilty, and that the charges reflect the totality of his conduct.² Given the ICC’s com-

¹ Fabricio Guariglia and Gudrun Hochmayr, “Article 65”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1631 (<https://www.legal-tools.org/doc/040751/>).

² ICTY, *Prosecutor v. Erdemović*, Appeals Chamber, Separate and Dissenting Opinion of Judge Cassese, 7 October 1997, IT-96-22, para. 11 (<https://www.legal-tools.org/doc/a7dff6/>); Jenia Iontcheva Turner and Thomas Weigend, “Negotiated Justice”, in Göran Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, p. 1382 (<https://www.legal-tools.org/doc/bcad4c/>).

mitment to establishing an accurate record of the crimes, ICC judges may be expected to conduct a more probing inquiry into the evidence supporting admissions of guilt than is common in many national courts.

Doctrine: For the bibliography, see the final comment on Article 65.

Author: Jenia Iontcheva Turner.

Article 65(2)

2. Where the Trial Chamber is satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt, together with any additional evidence presented, as establishing all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime.

If the Chamber concludes that the admission of guilt is valid, it “may” convict the accused. A conviction is therefore not automatic even if the court finds that the admission is valid and that the facts of the crime have been established. Under Article 65(4), the Chamber may still require additional presentation of evidence and may even order that the trial continue under ordinary proceedings if it believes that this would serve the interests of justice. At the ICTY and ICTR, judges similarly had the discretion to reject a valid guilty plea if they were “not satisfied with the terms of the plea agreement,” if they were concerned that the agreement did not adequately protect the rights of the accused, or if they believed that accepting the plea would not serve the interests of justice.¹

Should the Chamber enter a conviction after the proceeding on admission of guilt, the sentencing consequences remain unspecified. Neither the Statute nor the Rules mention the admission of guilt as a mitigating factor at sentencing. However, Rule 145(2)(a)(ii) of the ICC Rules of Procedure and Evidence provides that the court should mitigate the sentence, as appropriate, based on “[t]he convicted person’s conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court”. Consistent with practice at the ICTY and ICTR, it is likely that the ICC will consider admissions of guilt as an example of cooperation with the court that deserves a sentence reduction.²

¹ ICTY, *Prosecutor v. Nikolić*, Trial Chamber, Sentencing Judgment, 2 December 2003, IT-02-60/1, para. 54 (<https://www.legal-tools.org/doc/f90842/>); ICTY RPE Rules 62bis, 62(B); Karim A.A. Khan and Rodney Dixon Archbold, *International Criminal Courts: Practice, Procedure, and Evidence*, 3rd. ed., Sweet and Maxwell, London, 2009, p. 330 (<https://www.legal-tools.org/doc/0bc5ef/>).

² Jenia Iontcheva Turner and Thomas Weigend, “Negotiated Justice”, in Göran Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, p. 1391 (<https://www.legal-tools.org/doc/bcad4c/>).

The Statute and Rules are also silent on how an admission of guilt would affect the court's decisions on reparations to victims. In some civil law countries, an accused cannot proceed with abbreviated proceedings upon admission of guilt until the court has resolved the question of reparations.³ The ICC framework does not require this; as noted below, however, one may expect the court to take into account the question of reparations when consulting victims and deciding whether to require a more complete presentation of evidence under Article 65(4).

Doctrine: For the bibliography, see the final comment on Article 65.

Author: Jenia Iontcheva Turner.

³ Jenia Iontcheva Turner, *Plea Bargaining Across Borders*, Aspen, New York, 2009, pp. 146, 155 (<https://www.legal-tools.org/doc/1a330c/>).

Article 65(3)

3. Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt as not having been made, in which case it shall order that the trial be continued under the ordinary trial procedures provided by this Statute and may remit the case to another Trial Chamber.

If the court rejects an admission of guilt as invalid, it must consider the admission as “not having been made”. The Chamber “shall” then order that the case proceed under the ordinary trial procedures. If the court rejects an admission of guilt as invalid, the defendant’s waiver of fundamental rights is null and void and cannot result in any prejudice to him.¹ Under this interpretation and consistent with ICTY and ICTR jurisprudence, statements made by the accused during the proceedings on admission of guilt should not be able to be used against him at trial.² But some commentators have suggested that statements by the accused, as well as evidence introduced to support the admission of guilt, may be used as evidence at trial, if the court considers that the accused has waived his right to remain silent by admitting guilt or that the admission is reliable evidence that cannot be disregarded.³ As a practical matter, if the court adopts this interpretation, it will discourage defendants from admitting their guilt.

If the Trial Chamber rejects the admission of guilt, it “may” remit the case to another Chamber. Transferring the case to another Chamber can help ensure that judges who have heard the admission of guilt are not prejudiced by it during their decision on the verdict. Given the small number of judges at the ICC and the few cases before the Court at any given time, it

¹ Fabricio Guariglia and Gudrun Hochmayr, “Article 65”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1632 (<https://www.legal-tools.org/doc/040751/>).

² Jenia Iontcheva Turner and Thomas Weigend, “Negotiated Justice”, in Göran Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, pp. 1386–87, 1392 (<https://www.legal-tools.org/doc/bcad4c/>).

³ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2nd. ed., 2016, pp. 999–1000 (<https://www.legal-tools.org/doc/b7432e/>); Mirjan Damaška, “Negotiated Justice in International Criminal Courts”, in *Journal of International Criminal Justice*, 2004, vol. 2, p. 1038 (<https://www.legal-tools.org/doc/edbb77/>).

would be difficult in practice to find judges who are entirely unaware of the defendant's admission. Although complete lack of knowledge of the admission is unlikely, Article 65(3) does not require it. The provision merely allows – but does not mandate – the transfer of the case to a different Chamber, apparently under the presumption that judges could remain impartial even after hearing an accused's admission of guilt.

Doctrine: For the bibliography, see the final comment on Article 65.

Author: Jenia Iontcheva Turner.

Article 65(4)

Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims, the Trial Chamber may:

(a) Request the Prosecutor to present additional evidence, including the testimony of witnesses; or

(b) Order that the trial be continued under the ordinary trial procedures provided by this Statute, in which case it shall consider the admission of guilt as not having been made and may remit the case to another Trial Chamber.

Pursuant to sub-paragraph (a), the Trial Chamber may request the prosecution to present additional evidence where it believes that the interests of justice – and in particular the interests of victims – may require it. The Court may need to resort to this procedure if additional facts would be helpful to victims’ reparation claims, to the determination of a just sentence, or to the establishment of a more complete record. No similar provision exists in the ICTY and ICTR Rules. Article 65 reflects a new approach to plea bargaining, in line with the court’s goals of compiling an accurate record and protecting victims’ interests.¹

Article 65(4)(b) of the ICC Statute provides that even when the conditions for a valid admission of guilt are met, the Chamber may nonetheless reject the admission and order the case to proceed through the ordinary trial procedure when the Chamber “is of the opinion that a more complete presentation of the facts is required in the interests of justice”. The court’s view of the interests of justice may override the parties’ wishes to resolve the case through the Article 65 procedure (Turner and Weigend, 2013, p. 1390).

In deciding whether to proceed under Article 65(4), the Chamber may, in accordance with Rule 139(1), invite the views of the prosecution and defense. Because the Chamber will make this determination based on the interests of justice and of victims, however, one may expect the Cham-

¹ Jenia Iontcheva Turner and Thomas Weigend, “Negotiated Justice”, in Göran Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, p. 1380 (<https://www.legal-tools.org/doc/bcad4c/>).

ber to solicit the views of victims as well (Article 68(3)).² This would be consistent with Rule 93, which provides that a Chamber may seek the views of victims or their legal representatives in relation to proceedings on admission of guilt (ICC RPE Rules 93, 139; Turner and Weigend, 2013, p. 1391).

Cross-reference:

Rule 139.

Doctrine: For the bibliography, see the final comment on Article 65.

Author: Jenia Iontcheva Turner.

² William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1000 (<https://www.legal-tools.org/doc/b7432e/>).

Article 65(5)

5. Any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court.

Article 65(5) was included in response to concerns about allowing the parties to resolve the outcome of a case independently of the court and in a manner contrary to the interests of justice.¹ The Article acknowledges that discussions between the parties about the charges and penalty may occur, but it provides that these discussions are not binding on the court. By making the outcome of bargaining subject to judicial approval, Article 65(5) reduces the predictability and therefore the likelihood of agreements between the parties. At the same time, it reinforces the role of judges as the ultimate arbiters with respect to the accuracy and fairness of the verdict and rejects a party-driven model of negotiated justice.

So far, international tribunals have been largely reluctant to accept agreements between the parties concerning the charges and the facts, particularly when such agreements do not adequately reflect the totality of the accused's conduct and the gravity of the offenses committed.² Such agreements are disfavoured because of a concern that they may leave the impression that the outcome is unjust or that the court has not established a full and credible record of the crime (*Nikolić*, 2 December 2003, para. 65). For the same reasons, we can expect that at the ICC, too, charge bargaining will be relatively rare. If parties do enter into agreements, these are more likely to concern the sentence rather than the charges or the facts.

Cross-reference:

Rule 139.

¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2nd. ed., 2016, p. 995 (<https://www.legal-tools.org/doc/b7432e/>).

² ICTY, *Prosecutor v. Nikolić*, Trial Chamber, Sentencing Judgment, 2 December 2003, IT-02-60/1, paras. 50, 65 ('*Nikolić*, 2 December 2003') (<https://www.legal-tools.org/doc/f90842/>); *Prosecutor v. Deronjić*, Trial Chamber, Dissenting Opinion of Judge Schomburg, 30 March 2004, IT-02-61, para. 11 (<https://www.legal-tools.org/doc/95420f/>).

Doctrine:

1. Mirjan Damaška, “Negotiated Justice in International Criminal Courts”, in *Journal of International Criminal Justice*, 2004, vol. 2, 1018.
2. Fabricio Guariglia and Gudrun Hochmayr, “Article 65”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1621–1634 (<https://www.legal-tools.org/doc/040751/>).
3. Karim A.A. Khan and Rodney Dixon Archbold, *International Criminal Courts: Practice, Procedure, and Evidence*, 3rd. ed., Sweet and Maxwell, London, 2009, § 7–161 (<https://www.legal-tools.org/doc/0bc5ef/>).
4. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016 (<https://www.legal-tools.org/doc/b7432e/>).
5. Frank Terrier, “Proceedings before the Trial Chamber”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002 (<https://www.legal-tools.org/doc/01addc/>).
6. Jenia Iontcheva Turner, *Plea Bargaining Across Borders*, Aspen, New York, 2009 (<https://www.legal-tools.org/doc/1a330c/>).
7. Jenia Iontcheva Turner and Thomas Weigend, “Negotiated Justice”, in Göran Sluiter, Håkan Friman, Suzannah Linton, Salvatore Zappalà and Sergey Vasiliev (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013 (<https://www.legal-tools.org/doc/bcad4c/>).

Author: Jenia Iontcheva Turner.

Article 66

Presumption of Innocence

General Remarks:

Article 66 contains the maxim of the presumption of innocence, which is contained in all major human rights instruments, and some corollaries thereto such as the European Convention on Human Rights, Article 6(2), International Covenant on Civil and Political Rights, Article 14(2), the American Convention on Human Rights, Article 8(2), the African Charter on Human and Peoples' Rights, Article 7(1), and others. It is also enshrined nationally indirectly or directly in the legislation of vast majority or rule of law-abiding states.

Article 66 is closely linked to Article 67 which contains the rights of the accused since there can be no fair trial without a presumption of innocence or, for that matter, any of the other rights of the accused. The presumption of innocence itself is not stated as a defendant right under either Article 55(2) or Article 67(1), nevertheless, some of the rights contained in these articles are corollaries of the presumption of innocence, such as the right to silence (Article 55(2)(b), 67(1)(g)) or the prohibition of a reversal of the burden of proof (Article 67(1)(i)). Other provisions, such as those allowing interim release of accused (Articles 59(3)-(6), 60), can be explained on the basis that all accused, including those who apply for provisional release, must, in principle, be considered innocent. The presumption of innocence is to be seen a meta-norm or principle from which many procedural rules are derived.

Despite being placed in Part 6 of the statute, “The Trial”, the presumption of innocence generally applies to all proceedings before the court and to the investigative authorities regarding individuals that are either suspects or defendants, that is, it also encompasses the pre-trial proceedings. The presumption limits, for example, the time until trial by ensuring that the pre-trial investigation continues speedily.¹

¹ See Karol Nowak, *Oskyldighetspresumtionen* (Presumption of innocence), Norstedts, 2003, pp. 115–124; William A. Schabas and Yvonne McDermott, “Article 66”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1636, 1639 (<https://www.legal-tools.org/doc/040751/>); Salvatore Zappalà, “The Rights of the Accused”

The dividing of the fair trial rights when it comes to the presumption of innocence in separate paragraphs is awkward. A solution like that of Article 6 ECHR, in which the presumption of innocence is directly part of the fair trial rights would have been preferable. As it stands now, one must, for example, read two articles consecutively when it comes to the right to a fair and impartial hearing. Bias against the defendant is clearly a breach of the presumption of innocence as is a violation of the right to defense, and perhaps the most obvious example of the connection between the two articles is the part of Article 67 that enshrines the right to silence of the accused and the right to examination of evidence as these spring directly from the presumption of innocence. It is therefore recommended that Articles 65–69 are read consecutively and that they be viewed as a whole in order to maintain an effective presumption of innocence.

The presumption of innocence in the Rome Statute of the International Criminal Court is similar in wording to that in other corresponding conventions such as the ECHR, ICCPR and other international instruments, but not identical. Nevertheless, the application of the presumption draws heavily on the interpretation and case law from other courts such as the European Court of Human Rights ('ECtHR'). This is hardly surprising since the presumption of innocence is one of the corner stones, if not the cornerstone, of a fair trial and because most of the others have been functioning for a substantially longer time and with a considerably heavier case-load than the ICC.

In order to understand the presumption, one must ask why a presumption of innocence is necessary. The question becomes even more pertinent when it comes to international crimes where the atrocities often are obvious and the perpetrators usually are well known, at least as a group. Furthermore, in national as well as in international trials, since the likelihood that the accused is guilty is quite strong, as has been empirically shown, it is assumed that the investigating authorities have done a proper job and that the prosecution only goes to trial when the evidence gathered is compelling and likely to lead to a conviction.

In order to understand the presumption, one must realize that it is a presumption *de jure* and not *de facto*. A presumption *de facto* is something that is not proven but that can be, based on previous experience, be safely

in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002. p. 1342.

assumed will happen again given similar circumstances. One could argue that when the trial starts there is a fact-based presumption of guilt. The police and/or the investigative authorities and prosecutors have gathered evidence and are confident that they have enough for a guilty verdict. If one adds to that the accused might have been, for example, kept on remand, it strengthens the presumption of guilt since at least one judge has ruled that there is *prima facie* evidence to use such measures. Since the argument against the defendant is strong when the trial starts, why not just decide on the sentence. Clearly, such a ‘trial’ would not be a trial at all and would not be legitimate. The presumption has several functions but at its most basic level it can be said to provide legitimacy to the court and can be considered as one of the corner stones of the rule of law by being a presumption *de jure* that counterbalances the presumption *de facto*. By applying a presumption of innocence, the court gains legitimacy which it otherwise would not be able to claim. Without the presumption the trial would, in effect, only be about sentencing (see Nowak, 2003, p. 66).

The presumption of innocence has stood the test of time. It contains several aspects and it functions as a litmus test that can show whether a trial can be considered fair and just or not. In international law this may well be considered even more important than usual since there are bound to be political claims to the contrary, claims that if disproven by the use of the presumption of innocence, are essential for the verdicts of the court to be accepted even by those who do not have influence over the court. The presumption aids in assuring that procedural justice has been done as far as possible, no matter any political considerations.

The presumption has a wide reach and it can be argued that it is to some extent a principle from which rules can be derived. Most of these rules have been established through jurisprudence, see for instance the extensive case law from the ECtHR regarding Article 6(2), but some consequences of how the presumption ought to be applied are also to be found in academia (see *inter alia* Nowak, 2003, pp. 425–453).

The presumption of innocence is also the basis for other rights of the fair trial, such as, for example, the right to a speedy and public trial. The trial needs to be speedy because a lengthy pre-trial investigation and detention inevitably makes the suspect considered guilty in the eyes of the public. It needs to be public to ensure that it is indeed a fair trial and not a trial that was biased against the defendant.

Doctrine: For the bibliography, see the final comment on Article 66.

Author: Karol Nowak.

Article 66(1)

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.

The first paragraph contains requirements for the presumption of innocence to have been upheld during the trial and the pre-trial phase. The requirements are that only a criminal court of law or an equivalent body that functions within the same parameters as a court, has the power to find a person guilty. From this it follows that an assignment of guilt by officials that are not members of the court is contrary to the presumption. It can be argued that other entities, even private ones, also must be careful singling out the defendant as guilty prior to a verdict. See, *inter alia*, Article 10(2) of the European Convention on Human Rights that makes allowances for limiting the freedom of expression in order to maintain the authority and impartiality of the judiciary.

Article 66(1) encompasses the core of the presumption of innocence, everybody must be presumed innocent until proven guilty according to the law. The wording “everyone” shows that the presumption of innocence applies not only to accused during the actual trial but also to persons covered by Article 55(2) in the pre-trial investigative phase. If a guilty verdict is appealed the presumption continues to function during the trial in the appeals chamber but it does not include an obligation to set the accused free in case he was convicted in the first instance. In principle the appeals court, depending on what is appealed, has the same obligations as the first instance court and is to regard the accused as innocent until proven guilty.

Since the presumption mainly is a principle or a meta-norm the question arises what legal consequences can be drawn from it.¹ The main effect, is that an accused may not be convicted unless guilt has been proven according to the applicable law and in accordance with Article 66(2)-(3). “According to the applicable law” in this case may also be read to imply that evidence of guilt that is not presented in accordance with applicable procedural or other norms may not be used to justify a conviction.² The

¹ Karol Nowak, *Oskyldighetspresumtionen (Presumption of innocence)*, Norstedts, 2003, pp. 31–49.

² See Nowak, 2003, pp. 178–183; William A. Schabas, “Article 66”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd.

presumption must be considered in all decisions regarding the defendant and it prohibits any decision based on a preconception of guilt (generally concerning actions that may be in violation of the presumption, including acts of bodies besides the Court, see Nowak, 2003, pp. 425–445, Schabas, 2008, mn. 26–27).

The presumption of innocence is necessary for the trial to be legitimate and ensures, as far as possible, that the true perpetrators are being convicted and that the innocent are set free. The presumption requires that there cannot be any grey areas. The defendant is either guilty or innocent in the eyes of the law and the court must strive to as far as possible act and formulate its verdicts accordingly so as not to inadvertently frame the defendant as guilty, for example in the reasons, although finding him innocent in the conclusion.

The paragraph states that guilt can only be established by a court of law and by the rule of law with all of what that entails. For obvious reasons, the presumption requires that not only must there have been a law that the defendant has violated in order to reach a guilty verdict, the law must also meet certain standards. The standard of proof, for example, needs to set at a certain level that requires effort on behalf of the prosecutor to prove. More on this under Article 66(2). Another requirement is that the charges are specified and that the law that they are based upon is predictable and precise. Wide-ranging criminal laws that do not specify transgressions are thus prohibited.

The fact that a court is required to find the accused guilty also entails that other bodies need to be careful with which measures they use against the suspect or accused since coercive measures in principle only can follow after a guilty verdict if they entail any indication of guilt or are seen as a de facto punishment.

Doctrine: For the bibliography, see the final comment on Article 66.

Author: Karol Nowak.

Article 66(2)

2. The onus is on the Prosecutor to prove the guilt of the accused.

The trial before the court, like most trials, is a two-party adversarial trial in which both parties are equal according to the principle of equality of arms. Since it in most cases is obvious that the prosecution is the stronger party when it comes to resources, if nothing else, there needs to be something that re-establishes the balance between the parties and that is the presumption and that the burden of proof rests solely on the prosecution. The fact that the onus probandi is exclusively on the prosecutor to prove the guilt of the accused and that the article contains no exceptions means that certain other right originates from this such as the right to silence and that the charge needs to be specified when it comes to the who, where, when and what.

The specifics of a charge are especially problematic when it comes to international trials dealing, for example, with crimes against humanity and genocide since these tend to have been perpetrated on a massive scale and individual criminal acts might be difficult to establish and pinpoint in time and space. It might, nevertheless, be obvious that crimes have been committed and that the accused contributed to the atrocities even though individual acts may be difficult to prove.

There are basically two ways of dealing with such issues. The court might find that a few specific acts can be proven, convict and be satisfied with knowing that justice has been served at least in those cases. The silent assumption will then be that the accused is almost certainly guilty of many more crimes but that the victims of those other assumed crimes must be satisfied with that he is found guilty at least of some of the crimes. This modus operandi is basically what is used today in the court and what has been used before as shown by the massive disproportionality between those convicted of these crimes and the number of victims.

The other possibility was used in the *Demjanjuk* case by the German courts. Demjanjuk was convicted as an accessory to the murder of 27,900 Jews in the Sobibor death camp. This was the first time someone was convicted only based on serving as a camp guard, with no evidence of being involved in the death of any specific inmate. It was considered enough that

he was there and in the uniform of the perpetrators.¹ This latter solution is problematic when it comes to the presumption of innocence, but it is difficult to fault on moral grounds if nothing else. Be that as it may, the two methods clearly show the issue when using a nationally developed systems in an international setting.

Since it is exclusively the prosecutor that must prove the guilt of the defendant it follows that the defendant can remain wholly passive during the trial, not having to prove his or her innocence. From this in turn follows a right to silence for the accused. For the European Court of Human Rights, for example, the right to silence is an important part to protect against undue pressure being put on the defendant to compel false admissions of guilt (see Article 65 in the ICC Statute on Proceedings on an admission of guilt). Such methods of applying pressure, even using outright torture have been used historically by some of the most atrocious regimes known to man and the European Convention on Human Rights was to a large extent drafted as a reaction to both the practices used in Nazi Germany and Stalinist Russia. In the context of the ICC Statute, this provision is significantly strengthened by Article 67(1)(i), which prohibits any reversal of the burden of proof and thus shows that the rule contained in Article 66(2) applies generally and without exceptions.

For more on the question of reversal of the burden of proof see below and for examples of provisions which might pose problems under Article 66 and 67, see the commentary to Article 67(1)(i).

Cross-reference:

Article 67(1)(i).

Doctrine: For the bibliography, see the final comment on Article 66.

Author: Karol Nowak.

¹ Germany, Regional Court of Munich, Criminal Chamber I, *Demjanjuk*, Judgement, 12 May 2011, 1 Ks 115 Js 12496/08. See also, *inter alia*, Lawrence Douglas, *The Right Wrong Man: John Demjanjuk and the Last Great Nazi War Crimes Trial*, Princeton University Press, 2016.

Article 66(3)

3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt

The standard of proof in order to convict the accused is enshrined in the article in that it states that in order to convict the accused, the court must be convinced of the guilt of the accused beyond reasonable doubt. Since the court itself decides when it is convinced, the standard of proof can be viewed to be rather arbitrary. Nevertheless, it does not differ from the standard that is used in rule of law-abiding states globally and it sets a high bar for the prosecution to overcome.

The onus on the prosecutor cannot be low as that would render the presumption meaningless. It would not, for instance, be according to the presumption, to set the standard of proof to, for example, ‘not unlikely’ that the accused is guilty of a crime in order to reach a conviction. Such a low standard would in effect mean the reversal of the burden of proof and is therefore unacceptable. Instead, the established standard is ‘proven beyond doubt’. This ‘hurdle’ for the prosecution serves at least two purposes, one is to make sure that only guilty persons are sentenced and that innocents are set free. The other is that by requiring the prosecution to provide evidence to a high standard it becomes possible to scrutinize the prosecution and the following verdict, thus making it legitimate. However, an exact definition of the standard may be almost impossible to reach since it will to some extent always be decided on a case-by-case basis by the individual judges. This follows from the fact that the court, in common with most other courts, makes use of the principle of free evaluation of evidence. This does, however, not mean that it will be decided arbitrarily. There are countless precedents from national and international courts alike that guide the judges and they themselves are supremely qualified to set the bar at an appropriate level.

The standard of proof beyond reasonable doubt does not demand unanimity of the judges, a majority of judges is sufficient for conviction provided that these judges are convinced beyond a reasonable doubt of the guilt of the accused (see Article 74(3)).

Case Law:

The bulk of the available case law that can be used for interpretative purposes is to be found in other instruments for reasons previously mentioned. There are few cases that mention Article 66 directly and, considering the rather glacial progress of the court, for which the court itself cannot be blamed, it might be a while before we see any progress on the development of a specific ICC Article 66 case law. This is not necessarily a weakness since there are other instruments that can be used as guiding examples. Nevertheless, the lack of case law is somewhat surprising considering that the court has, from time to time, been criticized for being biased. One way of dispelling such fears would have been to elaborate more on the presumption of innocence. Having said that, the court is trying the cases before it and is not supposed to be bogged down justifying itself. Nonetheless, all international courts, and perhaps even more so the ICC needs to on frequent basis show why it should be trusted since the member states lack the influence that governments otherwise have on the judicial application of the law domestically thru the legislature.

The bulk of the case law that emanates directly from the ICC on Article 66 is from the appeal of Mr. Thomas Lubanga Dyilo and although it deals with issues connected with the presumption of innocence, it does not primarily deal with the presumption itself. In the judgment, the Appeals Chamber discusses the standard of proof:

pursuant to article 66(3) of the Statute, which requires the Trial Chamber to convict the accused only when it is ‘convinced of the guilt of the accused beyond reasonable doubt’. It is clear that the standard of proof ‘beyond reasonable doubt’ is to be applied only to the facts constituting the elements of the crime and mode of liability of the accused as charged [...] Only those facts falling under the subject matter of the case must be proven beyond reasonable doubt, as dictated by article 66(3) of the Statute. In the view of the Appeals Chamber, when determining whether this standard has been met, the Trial Chamber is required to carry out a holistic evaluation and weighing of all the evidence taken together in relation to the fact at issue. Indeed, it would be incorrect for a finder of fact to do otherwise.¹

¹ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against his conviction, 1 December 2014, ICC-01/04-01/06-3121-Red, paras.

In the judgment, the possibility of bringing additional evidence on appeal that is not directly relevant to the finding of guilt or innocence but rather deals with the fairness of the proceedings, was discussed (*Lubanga*, 1 December 2014, para. 60). The Appeals Chamber was not persuaded by the general statement of the prosecutor that additional evidence on appeal may never relate to questions of whether the proceedings appealed from were unfair and claimed that “Such an evaluation will depend on the circumstances of the case and the evidence sought to be admitted”.

Furthermore, the exclusion of evidence and the specifics of the charges were examined as was the verification of evidence when it came to the age and identity of child soldiers (*Lubanga*, 1 December 2014, paras. 194–207). The Appeals Chamber was not persuaded by Mr. Lubanga’s argument that the evidence on which the Trial Chamber relied was unspecific because it did not disclose the identity and/or precise age of certain individuals. It found that: “it is not per se impermissible to make a finding on the age element of the crimes in circumstances where the identity of the victim is unknown”. Furthermore, it concluded that it suffices that it is established that the victim is within a certain age range and that it is a question of fact and must be decided on a case-by-case basis taking into account the specific facts and circumstances of the case and individual at issue.

The court dismissed Mr. Lubanga’s assertion that there had been a reversal of the burden of proof due to the Trial Chamber’s findings in relation to individuals depicted in the video excerpts whose identities were unknown (*Lubanga*, 1 December 2014, paras. 194–207). It was argued that the Trial Chamber did not require Mr. Lubanga, either directly or indirectly, to inquire about the identities of these individuals or to disprove the Prosecutor’s allegations. Rather, the Trial Chamber evaluated the evidence before it and assessed whether it established beyond reasonable doubt that the individuals concerned were under the age of fifteen years based on their appearance. As noted above, in order to come to such a conclusion, it was not necessary to know the individual’s identities.

The discussion above shows that there has yet to come a case before the court in which the court goes into more detail about the presumption of innocence. Nevertheless, it is a start and it confirms that some of the pillars

22 and 194–209, 218–223 (*Lubanga*, 1 December 2014’) (<https://www.legal-tools.org/doc/585c75/>).

of a fair trial, the burden and standards of proof, the right to hear evidence, and others, are closely connected to the presumption of innocence.

Doctrine:

1. Karol Nowak, *Oskyldighetspresumtionen (Presumption of innocence)*, Norstedts, 2003.
2. Lawrence Douglas. *The Right Wrong Man: John Demjanjuk and the Last Great Nazi War Crimes Trial*, Princeton University Press, 2016.
3. William A. Schabas and Yvonne McDermott, “Article 66”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1635–1649 (<https://www.legal-tools.org/doc/040751/>).
4. Salvatore Zappala, “The Rights of the Accused” in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 1340–1348.

Author: Karol Nowak.

Article 67

Rights of the Accused

General Remarks:

Article 67(1) contains a number of specific rights granted to the accused, most of which are taken, with some modifications, from provisions on defendant rights in human rights instruments, particularly Article 14 of the International Covenant on Civil and Political Rights (ICCPR). Moreover, Article 67(1) is similar to constitutional national texts. Article 67 is not only applicable to trial as their provisions are relevant to all procedural stages.¹ Besides Article 67, other Articles relevant to the rights of the accused person are: (i) Article 21(3), which guarantees the application of international human rights when interpreting the ICC Statute; (ii) Article 55, which fleshes out the rights of persons during an investigation; (iii) Article 61(6), which contains the accused person's specific rights at the confirmation of charges hearing; (iv) Article 66 (Presumption of innocence); and (v) Article 74, which contains the right to a reasoned judgment. Thus, for example, by virtue of Article 21(3) of the ICC Statute, the interpretation and application of the applicable law shall be consistent with internationally recognised human rights and, thus, the broad concept of fair trial should embrace the judicial process in its entirety.² It should finally be borne in mind that, as a rule, the rights of the accused have primacy “over any other conflicting interest”.³

Preparatory Works:

A provision almost identical to Article 14(3) of the ICCPR was included in the International Law Commission draft statute of 1994. Based on this draft, the *Ad Hoc* Committee focused its discussion on some specific is-

¹ ICC, *Situation in the Democratic Republic of Congo*, Pre-Trial Chamber, Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 31 March 2006, ICC-01/04-135-tEN, paras. 34–35 (<https://www.legal-tools.org/doc/902494/>).

² ICC, *Prosecutor v. Gbagbo*, Pre-Trial Chamber I, Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court, 2 November 2012, ICC-02/11-01/11-286-Red, para. 45 (<https://www.legal-tools.org/doc/4729b8/>).

³ Salvatore Zappalà, “The Rights of Victims v. the Rights of the Accused”, in *Journal of International Criminal Justice*, 2010, vol. 8, no.1, pp. 144–145.

sues. The Preparatory Committee, at its August 1996 session, considered the rights of the accused which led to detailed comments and suggestions. The Preparatory Committee addressed the topic again in August 1997 and, at this stage, there were many departures from the text of Article 14(3) of the ICCPR. In addition, there were many cross-references to other ICC Statute provisions. Thus, the Preparatory Committee's 1997 draft contained both modified versions of the rights included in Article 14 of the ICCPR and several new rights. This text was reproduced in the Zutphen Compilation and the final draft of the Preparatory Committee with just few changes. In turn, the Rome Conference swiftly agreed on most of Article 67 provisions and the delegates accepted the approach under which the minimum guarantees of Article 14 of the ICCPR were enlarged.⁴

Cross-references:

Articles 21(3), 55, 61(6), 64, 66 and 74.

Doctrine: For the bibliography, see the final comment on Article 67.

Authors: Juan Pablo Pérez-León-Acevedo and Björn Elberling.

⁴ On preparatory works of Article 67, see, William A. Schabas, "Article 67 – Rights of the Accused", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Nomos, Baden Baden, 1999, pp. 847–848 (<https://www.legal-tools.org/doc/434159/>); William A. Schabas and Yvonne McDermott, "Article 67 – Rights of the Accused", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1653 (<https://www.legal-tools.org/doc/040751/>) and William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1018–1019 (<https://www.legal-tools.org/doc/b7432e/>).

Article 67(1)

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

As to its application, the wording “in the determination of any charge” implies that substance-wise, Article 67 applies not only to crimes referenced in Article 5, but also offences against the administration of justice contained in Article 70.¹ As to temporal application, the wording “in the determination of any charge” is largely identical to human rights norms, which apply once a person has been ‘substantially affected’ by proceedings, that is, even before a formal indictment is brought (Schabas, 1999, p. 849; Schabas and McDermott, 2016, p. 1654; and Schabas, 2016, pp. 1020–1022 with references). On the other hand, the fact that the norm refers to “accused” (on this terminology, see comment to Article 19(2)(a)) and that the rights of persons during an investigation are safeguarded in the separate Article 55, would seem to imply that Article 67(1) only applies once proceedings specifically against an individual accused have begun, that is, after the initial appearance of the accused. This also seems to be the approach so far taken by the Court – when Pre-Trial Chamber II in *Kony et al.* appointed an *ad hoc* counsel for the defence at a time when arrest warrants had been issued but none of the defendants had been arrested, it did so not under Article 67(1), but under its general power under Regulation 76(1).² Indeed, in accordance with Rule 121(1) of the Rules of Procedure and Evi-

¹ William A. Schabas, “Article 67 – Rights of the Accused”, Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Nomos, Baden Baden, 1999, p. 849 (<https://www.legal-tools.org/doc/434159/>); William A. Schabas and Yvonne McDermott, “Article 67 – Rights of the Accused”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1654 (<https://www.legal-tools.org/doc/040751/>) and William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1020–1022 (<https://www.legal-tools.org/doc/b7432e/>).

² ICC, *Prosecutor v. Kony et al.*, Pre-Trial Chamber II, Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 1 February 2007, ICC-02/04-01/05-134, para. 15 (<https://www.legal-tools.org/doc/03e64f/>).

dence (RPE), Article 67(1) fair trial rights are applicable from the first appearance of the suspect before the Pre-Trial Chamber.³

The fact that the temporal application of Article 67 is thus rather limited is partly made up by the fact that the Court is also mindful of the rights and interests of the defence generally – where Article 67 does not yet apply, but where there is a situation in which the interests of the defence generally need to be safeguarded, the Court appoints *ad hoc* counsel for the defence or assigns this task to the Office of Public Counsel for the Defence (‘OPCD’).⁴

According to the chapeau of Article 67(1), all rights contained therein are granted “having regard to the provisions of this Statute”. This provision, which was added rather late in the negotiating process, can best be interpreted as allowing specific limitations of the Article 67-rights to be contained elsewhere in the Statute, not as generally subordinating Article 67 to other norms of the Statute (Schabas, 1999, p. 851; Schabas and McDermott, 2016, p. 1656; and Schabas, 2016, p. 1023). One example for such limitations is the right to a public hearing, exceptions to which are contained in Articles 64(7), 68(2) and 72(7). On the other hand, some defence rights, such as Article 67(1)(d) on the right to be present at one’s trial, explicitly refers to the ICC Statute norms containing limitations (in this case Article 63(2)). In such cases, an argument could be made that no exceptions to these defence rights may be derived from norms not explicitly mentioned in the provision containing the defence right in question (although see commentary to Article 67(1)(d) concerning further limitations to this right).

As for Article 67(1) fair trial rights, Pre-Trial Chamber I in *Gbagbo* indicated certain necessary capacities to meaningfully exercise those rights,

³ ICC, *Prosecutor v. Gbagbo*, Pre-Trial Chamber I, Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court, 2 November 2012, ICC-02/11-01/11-286-Red, para. 44 (*Gbagbo*, 2 November 2012’) (<https://www.legal-tools.org/doc/4729b8/>).

⁴ For example, ICC, *Situation in Darfur, Sudan*, Pre-Trial Chamber I, Decision Inviting Observations in Application of Rule 103 of the Rules of Procedure and Evidence, 24 July 2006, ICC-02/05-10 (<https://www.legal-tools.org/doc/657682/>); *Situation in the Democratic Republic of Congo*, Pre-Trial Chamber I, Decision on Protective Measures Requested by Applicants 01/04-1/dp to 01/04-6/dp, 21 July 2005, ICC-01/04-73 (<https://www.legal-tools.org/doc/a15e9d/>). The OPCD was tasked, for example, in ICC, *Situation in Darfur, Sudan*, Pre-Trial Chamber I, Decision authorising the filing of observations on applications for participation in the proceedings a/0011/06 to a/0015/06, 23 May 2007, ICC-02/05-74 (<https://www.legal-tools.org/doc/685f01/>).

namely, “(i) to understand in detail the nature, cause and content of the charges; (ii) to understand the conduct of the proceedings; (iii) to instruct counsel; (iv) to understand the consequences of the proceedings; and (v) to make a statement” (*Gbagbo*, 2 November 2012, para. 50).

Besides provisions on the applicability of the rights of the accused, the chapeau of Article 67(1) also itself contains certain rights.

First among these is the right to a public hearing. The requirement of publicity is further elaborated upon in Regulations 20 and 21; it may require unsealing of non-public documents, if need be in a redacted form.⁵ There are a number of circumstances under which the publicity of hearings may be restricted – see the articles mentioned above, as well as commentaries to these Articles.⁶ In turn, as Schabas points out, the accused person’s right to privacy is not explicitly recognized in the ICC Statute (Schabas, 2016, p. 1023). However, this right has been invoked by the judges in order to restrict the principle of publicity of proceedings.⁷

It is important to consider the (potential) tension and/or conflict between the right to a public hearing and protective measures ordered under Article 68 (or further and more detailed commentaries, see commentaries on Article 68). Under Article 68(2), these measures “[are] an exception to the principle of public hearings” and, thus, a Chamber “may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means”. Case-law of the ICC has considered the public character of the proceedings as fundamental.⁸ However, the ICC Chambers have made ex-

⁵ See, for example, ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision to Unseal and Reclassify Certain Documents in the Record of the Case against Mr Thomas Lubanga Dyilo, 20 March 2006, ICC-01/04-01/06-42 (<https://www.legal-tools.org/doc/65a377/>).

⁶ See also ICC, *Prosecutor v. Bemba*, Trial Chamber III, Public Redacted Version of the Chamber’s 11 November 2011 Decision regarding the prosecution’s witness schedule, 15 November 2011, ICC-01/05-01/08-1904-Red, para. 18 (<https://www.legal-tools.org/doc/a595ab/>); and *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber II, Ordonnance portant instructions en vue de favoriser la publicité de la procédure, 31 January 2012, ICC-01/04-01/07-3226, para. 1 (<https://www.legal-tools.org/doc/19bf7a/>).

⁷ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber III, Decision on the Second Defence’s Application for Lifting the Seizure of Assets and Request for Cooperation to the Competent Authorities of the Republic of Portugal, 14 November 2008, ICC-01/05-01/08-249, paras. 27–29 (<https://www.legal-tools.org/doc/47a948/>).

⁸ ICC, *Prosecutor v. Bemba*, Appeals Chamber, Order on the reclassification as public of documents ICC-01/05-01/08-498-Conf and ICC-01/05-01/08-503-Conf, 24 February 2010, ICC-01/05-01/08-701 (<https://www.legal-tools.org/doc/4113f1/>); and *Prosecutor v. Katanga*

ceptions to the principle of public hearings considering the protective needs of the witnesses.⁹ Article 68(2) allows a departure from the normal course of “public hearings” in order to protect victims and witnesses, when it is necessary, including “special measures” such as reading partially or totally a witness’s statement in open court or in private provided that “these steps do not detract from the fairness of the proceedings”.¹⁰ In *Katanga and Ngudjolo*, for example, the Chamber ordered closed sessions when certain witnesses would enter and exit the courtroom and when potentially identifying questions would be put to them.¹¹ As other commentators have noticed,¹² the ICC’s case law shows that matters related to victim and witness protection may have an important impact on the principle of public hearings and access to court records.¹³ With regard to specific procedural matters, this arguably requires striking a balance between the rights of the accused and the (procedural) rights of the victims.¹⁴

and Ngudjolo, Trial Chamber II, Order on protective measures for certain witnesses called by the Prosecutor and the Chamber (Rules 87 and 88 of the Rules of Procedure and Evidence), 9 December 2009, ICC-01/04-01/07-1667-Red-tENG, para. 4 (<https://www.legal-tools.org/doc/436dd2/>).

⁹ For example, ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Transcripts, 16 January 2009, ICC-01/04-01/06-T-104, pp. 3–4 (<https://www.legal-tools.org/doc/032a0f/>).

¹⁰ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on the prosecution’s application for the admission of the prior recorded statements of two witnesses, 15 January 2009, ICC-01/04-01/06-1603, para. 17 (<https://www.legal-tools.org/doc/5e9498/>).

¹¹ ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, Decision on the application for the institution of protective measures for Witnesses a/0381/09, a/0018/09, a/0191/08, pan/0363/09 and Victim a/0363/09, issued on 27 January 2011, 22 February 2011, ICC-01/04-01/07-2663-Red, para. 15 (<https://www.legal-tools.org/doc/680d68/>).

¹² William A. Schabas and Yvonne McDermott, “Article 66”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, p. 1972.

¹³ For example, *Prosecutor v. Gbagbo and Blé Goudé*, Trial Chamber I, Decision on protective and special measures, mode of testimony and the order of appearance of certain upcoming witnesses, 3 November 2017, ICC-02/11-01/15-1060 (<https://www.legal-tools.org/doc/a5d7db/>); *Prosecutor v. Ongwen*, Trial Chamber IX, Decision on the “Prosecution’s application for in-court protective and special measures”, 30 November 2016, ICC-02/04-01/15-612 (<https://www.legal-tools.org/doc/1e29c9/>); *Prosecutor v. Bemba et al.*, Trial Chamber VII, Decision on Prosecution Request for In-Court Protective Measures, 28 September 2015, ICC-01/05-01/13-1725 (<https://www.legal-tools.org/doc/3fcae/>).

¹⁴ For further discussion, see Juan-Pablo Pérez-Léon-Acevedo and Joanna Nicholson (eds.), *Defendants and Victims in International Criminal Justice: Ensuring and Balancing Their Rights*, Routledge, Abingdon/New York, 2020.

Nevertheless, the interest of the accused person’s right to a public hearing grows stronger during the trial phase. Thus, for instance, the Trial Chamber in *Lubanga* stated that it would review applications concerning protective measures, including the use of closed sessions, based on individual analysis.¹⁵ Be that as it may, during the trial in *Lubanga*, testimony was frequently heard in “private session” and, thus, the public was unable to follow it; however, the Chamber ordered the public reclassification of any portions that do not contain information which may create a security risk.¹⁶ Trial Chamber II followed the same approach in *Katanga and Ngudjolo*.¹⁷ The excessive or too frequent use of in camera hearings is criticized herein as it is in detriment to the principle of public hearings, which is an important component of the accused’s rights as set out under Article 67(1). Moreover, the excessive frequency of closed hearings, that is, courts sitting in private, may give the wrong impression. Accordingly, the general principle is the publicity of the ICC proceedings, as derived from Articles 67(1) and 64(7) of the ICC Statute, and protective measures in favour of witnesses and victims “shall be considered to be an exception to this principle”.¹⁸ However, in practice, “restriction on the principle of public hearings seems to be the rule” (Schabas, 2016, p. 1061).

Second, Article 67(1) also entitles the accused to a fair hearing – this reference to the rather broad and evolving principle of “fair trial” will allow the Court to keep pace with the development of defence rights in international law also insofar as they go beyond the “minimum guarantees” contained in Article 67(1) itself. As Judge Henderson has determined, the “notion of a fair hearing goes beyond the terms catalogued in Article 67 of the Statute, which identifies those listed as minimum guarantees”.¹⁹ At a more

¹⁵ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on various issues related to witnesses’ testimony during trial, 29 January 2008, ICC-01/04-01/06-1140, paras. 25 and 35 (<https://www.legal-tools.org/doc/8367f1/>).

¹⁶ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Judgment Pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, para. 116 (<https://www.legal-tools.org/doc/677866/>).

¹⁷ ICC, *Prosecutor v. Ngudjolo*, Trial Chamber, Judgment pursuant to Article 74 of the Statute, 18 December 2012, ICC-01/04-02/12-3-tENG, para. 64 (<https://www.legal-tools.org/doc/2c2cde/>).

¹⁸ ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V(A), Decision on the Conduct of Trial Proceedings (General Directions), 9 August 2013, ICC-01/09-01/11-847, para. 30 (<https://www.legal-tools.org/doc/4d09e7/>).

¹⁹ ICC, *Prosecutor v. Gbagbo*, Dissenting Opinion of Judge Henderson, 1 February 2016, ICC-02/11-01/15-405-Anx, para. 9 (<https://www.legal-tools.org/doc/6fbd2c/>).

general level, the ICC's practice on the rights of the accused and related procedural issues shows that the ICC Chambers have considered international human rights law when interpreting and applying the provisions of the ICC instruments, especially, the ICC Statute and the ICC Rules of Procedure and Evidence.²⁰ The Court has found that the reference to fair trial, read in conjunction with the wording "in full equality", lays down the principle of equality of arms which requires "that the minimum guarantees contained in Article 67(1) must be generously interpreted, so as to ensure the defence is placed insofar as possible on an equal footing with the prosecution".²¹ Moreover, as concluded by Pre-Trial Chamber II, fairness is "[...] closely linked to the concept of "equality of arms", or of balance between the parties during the proceedings. As commonly understood, it concerns the ability of a party to proceedings to adequately make its case, with a view to influencing the outcome of the proceedings in its favour".²² Even though "fairness" is worded in relation to the accused, it is applicable to all participants in the proceedings.²³ The ICC has also established that legal certainty constitutes an indispensable element of the fair and expeditious conduct of the proceedings, namely, to respect the principle of legal certainty, "the outcome of the proceedings needs to be predictable to the parties to a degree that is reasonable in the circumstances of the case".²⁴

Third, all hearings before the Court must be conducted impartially, that is, without prejudice or bias on the part of the Court (see Schabas,

²⁰ For further discussion, see Juan-Pablo Pérez-Léon-Acevedo, "International Human Rights Law in International and Hybrid Criminal Courts and Tribunals", in *Global Community: Yearbook of International Law and Jurisprudence-2021*, 2022, vol. 21, no 1 (forthcoming).

²¹ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on defence's request to obtain simultaneous French transcripts, ICC-01/04-01/06-1091, 14 December 2007, para. 18 (<https://www.legal-tools.org/doc/03e64f/>).

²² ICC, *Situation in Uganda*, Pre-Trial Chamber II, Decision on Prosecutor's Application for leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, 19 August 2005, ICC-02/04-01/05-20, para. 30 (<https://www.legal-tools.org/doc/cae449/>).

²³ ICC, *Prosecutor v. Kony et al.*, Pre-Trial Chamber II, Decision on the Prosecutor's Applications for Leave to Appeal Dated the 15th Day of March 2006 and to Suspend or Stay Consideration of Leave to Appeal Dated the 11th Day of May 2006, 10 July 2006, ICC-02/04-01/15-64, para. 24 (<https://www.legal-tools.org/doc/601704/>).

²⁴ ICC, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Pre-Trial Chamber I, Decision on the Prosecutor's request for leave to appeal the "Decision on the 'Application for Judicial Review by the Government of the Union of the Comoros'", 18 January 2019, ICC-01/13-73, para. 48 (<https://www.legal-tools.org/doc/709b2f/>).

1999, p. 852; Schabas and McDermott, 2016, p. 1658; and Schabas, 2016, p. 1026). As opposed to human rights law and earlier drafts, the Statute does not refer to the requirement of independence of the Court. Subjectivity is also part of the analysis of “conducted impartially” (Schabas, 2016, p. 1026). As stated by the Appeals Chamber: “The absence of bias, real or apparent, is what legitimises a judicial body to administer justice”.²⁵

Concerning the phrase “in full equality”, it lays down the principle that all persons shall be equal before the Court. As stated above, this phrase, read in conjunction with the general fair trial requirement, also lays down the principle of equality of arms. Whether the principle of ‘equality of arms’ is applicable *vis-à-vis* victim participants is discussed if and when the latter apply to submit evidentiary material during trial and, additionally, when ruling on the admissibility of such evidence, the Chamber considers the prejudice posed by it to a fair trial (Article 69(4)).²⁶

Some additional commentaries on the rights of the accused at the ICC during the Covid-19 pandemic are provided herein. The Covid-19 pandemic crisis meant an important challenge to the ICC to conduct judicial proceedings in which the accused person’s right to a fair and expeditious trial is fully respected, especially holding courtroom hearings via ‘virtual’ offices, which may in principle be considered contradictory.²⁷ In any event, the ICC optimized its hearings during the Covid-19 pandemic crisis to have them conducted in a consistent manner with the requirements of fair and expeditious hearings laid down in the ICC Statute (Abtahi, 2020, p. 1076). In its case law rendered during the Covid-19 pandemic, the ICC Chambers explicitly referred to the “special circumstances under the Coronavirus Pandemic” in order to adopt procedural decisions such as setting the commencement date of the trial consistently with the ICC’s obligation to “ensure a fair and expeditious trial and that the accused are tried without undue delay” and “that the accused must be provided with adequate time

²⁵ ICC, *Prosecutor v. Katanga and Ngudjolo*, Appeals Chamber, Judgment in the Appeal by Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release, 9 June 2008, ICC-01/04-01/07-572, para. 10 (<https://www.legal-tools.org/doc/69bee9/>).

²⁶ ICC, *Prosecutor v. Banda and Jerbo*, Trial Chamber IV, Decision on the defence request for a temporary stay of proceedings, 26 October 2012, ICC-02/05-03/09-410, para. 152 (<https://www.legal-tools.org/doc/414cc4/>).

²⁷ Hiram Abtahi, “The International Criminal Court during the COVID-19 Pandemic”, in *Journal of International Criminal Justice*, 2020, vol. 18, no. 5, pp. 1072–1073.

and facilities to prepare their defence”.²⁸ The ICC’s Presidency in consultation with the ICC Judges prepared non-binding and temporary guidelines for the judiciary in order to facilitate the ICC Judges’ consideration of the holding of hearings during the Covid-19 pandemic crisis.²⁹ Among other aspects, it was indicated that the ICC Chambers are entirely responsible for the fair and expeditious conduct of the proceedings (ICC Presidency, Covid-19 Guidelines, para. 1) and that: “Each Chamber should consider the consistency of the proposed hearing format with the rights and protections guaranteed in the Rome Statute and the Rules of Procedure and Evidence, reaching its own independent conclusion in this regard, including in respect of the procedural steps to be followed during such consideration” (para. 3).

Cross-references:

Article 55, 63(2), 64(7), 67(1)(d), 68(1), (2), (4), 69(4) and 72(7).

Rule 121(1).

Regulations 20 and 21.

Doctrine: For the bibliography, see the final comment on Article 67.

Authors: Juan Pablo Pérez-León-Acevedo and Björn Elberling.

²⁸ ICC, *Prosecutor v. Yekatom and Ngaïssona*, Trial Chamber V, Decision Setting the Commencement Date of the Trial, 16 July 2020, ICC-01/14-01/18-589, para. 24 (<https://www.legal-tools.org/doc/27mzgg/>).

²⁹ ICC, Presidency, Guidelines for the Judiciary Concerning the Holding of Court Hearings during the COVID-19 Pandemic, 23 June 2020, p. 1 (‘ICC Presidency, Covid-19 Guidelines’) (<https://www.legal-tools.org/doc/jcplq0/>).

Article 67(1)(a)

(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

Article 67(1)(a) endeavours to provide the accused with information which is necessary for the defence preparation.¹ Article 67(1)(a) contains the right of the accused to be informed of the case against him or her. This right is complemented by similar provisions during investigation (Article 55(2)(a)) and in the context of the confirmation hearing (Article 61(3)), as well as by the disclosure requirements in Article 67(2). Taken together, these provisions aim at granting the accused all the information he or she needs to be able to adequately prepare a defence. The accused must, at the minimum, be given a readable version of the warrant of arrest² and access to all public documents in the case.³ Article 67(1)(a) also generally requires that documents classified *ex parte* be re-classified, if need be after redactions, so that they can be made available to the defence.⁴ The Article does not, however, grant a right to be given access to the entire record of the case (*Lubanga*, 17 May 2006).

¹ William A. Schabas, “Article 67 – Rights of the Accused”, Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Nomos, Baden Baden, 1999, p. 853 (<https://www.legal-tools.org/doc/434159/>); William A. Schabas and Yvonne McDermott, “Article 67 – Rights of the Accused”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1660 (<https://www.legal-tools.org/doc/040751/>) and William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1027–1028.

² ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, 24 February 2006, ICC-01/04-01/06-8-US-Corr, p. 2 (<https://www.legal-tools.org/doc/c60aaa/>).

³ Cf. ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Defence Request for Unrestricted Access to the Entire File of the Situation in the Democratic Republic of the Congo, 17 May 2006, ICC-01/04-01/06-103 (*‘Lubanga, 17 May 2006’*) (<https://www.legal-tools.org/doc/59fb84/>).

⁴ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision Concerning Transcripts of in Camera Meeting Held on 17 March 2006, 19 April 2006, ICC-01/04-01/06-78 (<https://www.legal-tools.org/doc/d56380/>).

In the context of the confirmation hearing, Rule 121(3) of the RPE states that the prosecution must provide to the defence a document containing the charges 30 days before the hearing; as to the necessary contents of this document.⁵

All information must generally be in a language the accused understands and speaks. This does not mean, however, that all documents which must be provided to the defence (such as potentially exculpatory evidence under Article 67(2)) must be translated, it suffices that translations are provided for certain documents which enable the accused to get a general picture of the case against him or her⁶ and for those documents which other provisions require to be translated (see Rule 76(3) of the RPE on statements of witnesses).

Similarly, in *Bemba*, the Pre-Trial Chamber stated that the defendant does not have an absolute right to have all documents translated into a language which he fully understands and speaks.⁷ The defendant is entitled to receive translation of such documents that inform him in detail of the nature, cause and content of the charges brought against him, namely: (i) the Prosecutor's application for a warrant of arrest and the Chamber's decision thereon; (ii) the Document Containing the Charges and the List of Evidence as well as any amendment thereto; and (iii) the statements of prosecution witnesses (*Bemba*, 4 December 2008, para. 16).

Where it is difficult to establish which languages the accused fully understands and speaks, Chambers may request further information on this issue from the Registry.⁸ Articles 67(1)(a) and (f) of the Statute do not grant the accused the right to choose the language in which he must be informed of the charges against him and in which translation of documents and interpretation must be provided. The standard is "that of a language that the ar-

⁵ See ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, ICC-01/04-01/06-803-tEN, paras. 146–153 (<https://www.legal-tools.org/doc/b7ac4f/>).

⁶ See ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Requests of the Defence of 3 and 4 July 2006, 4 August 2006, ICC-01/04-01/06-268, pp. 5–6 (<https://www.legal-tools.org/doc/2f7113/>).

⁷ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber III, Decision on the Defence's Request Related to Language Issues in the Proceedings, 4 December 2008, ICC-01/05-01/08-307, para. 11 ('*Bemba*, 4 December 2008') (<https://www.legal-tools.org/doc/ff53d8/>).

⁸ See ICC, *Prosecutor v. Katanga*, Pre-Trial Chamber I, Order for a Report of Additional Information on the Detention and Surrender of the Detainee Germain Katanga, 26 October 2007, ICC-01/04-01/07-45 (<https://www.legal-tools.org/doc/42eb03/>).

rested person or the accused ‘fully understands and speaks’ so as to guarantee the requirements of fairness”.⁹ The defence was granted leave to appeal against the aforementioned decision.¹⁰ Finally, the Appeals Chamber considered that an accused fully understands and speaks a language if he or she “is completely fluent in the language in ordinary, non-technical conversation; it is not required that he or she has an understanding as if he or she were trained as a lawyer or judicial officer” and, in case of any doubt, “the language requested by the person should be accommodated”.¹¹ Later, case law has applied these findings. In *Banda and Jerbo*, the Trial Chamber ordered the Prosecution to translate into Zaghawa the witness statements intended to be relied upon for trial purposes based on Rule 76(3) and Article 67(1)(a) and (f).¹² Corresponding to the accused person’s right to be informed in a language fully understood or spoken by him/her of the “nature, cause and content” of the charges under Article 67(1)(a) of the ICC Statute, Trial Chamber IX in *Ongwen* recalled that: “at the opening of trial the numbered counts without references to the statutory provisions – which were contained in the operative part of the confirmation decision under the subheadings ‘legal characterisation of facts’ – were read out and, in that context, again made available to Dominic Ongwen in Acholi by virtue of the interpretation in the courtroom”.¹³

Pursuant to the objectives in Article 67(1)(a) and (b), that the accused “be informed promptly and in detail of the nature, cause and content of the

⁹ See ICC, *Prosecutor v. Katanga*, Pre-Trial Chamber Ch. I, Decision on Defence Request concerning languages, 21 December 2007, ICC-01/04-01/07-127, para. 30 (<https://www.legal-tools.org/doc/39b114/>).

¹⁰ ICC, *Prosecutor v. Katanga*, Pre-Trial Chamber I, Decision on the Defence Application for Leave to Appeal the Decision on the Defence Request Concerning Languages, ICC-01/04-01/07-149, 18 January 2008, p. 7 (<https://www.legal-tools.org/doc/89843d/>).

¹¹ ICC, *Prosecutor v. Katanga and Ngudjolo*, Appeals Chamber, Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled “Decision on the Defence Request Concerning Languages”, 27 May 2008, ICC-01/04-01/07-522, para. 61 (<https://www.legal-tools.org/doc/62dbba/>).

¹² ICC, *Prosecutor v. Banda and Jerbo*, Trial Chamber IV, Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation, 12 September 2011, ICC-02/05-03/09-214, paras. 25–32 (<https://www.legal-tools.org/doc/ba12c3/>); and *Prosecutor v. Banda and Jerbo*, Trial Chamber IV, Decision on the defence request for a temporary stay of proceedings (and Concurring Separate Opinion of Judge Eboe-Osuji), 26 October 2012, ICC-02/05-03/09-410, paras. 130–135 (<https://www.legal-tools.org/doc/414cc4/>).

¹³ ICC, *Prosecutor v. Ongwen*, Trial Chamber IX, Judgment, 4 February 2021, ICC-02/04-01/15-1762-Red, para. 81 (<https://www.legal-tools.org/doc/kv27ul/>).

charge, in a language which the accused fully understands and speaks” and must “have adequate time and facilities for the preparation of the defence”, the Pre-Trial Chamber in *Bemba* ruled that the evidence exchanged between the parties and communicated to the Chamber must be the subject of a sufficiently detailed legal analysis relating the alleged facts with the constituent elements corresponding to each crime charged. This would also expedite the proceedings.¹⁴

The impact of regulation 55 (change of legal characterization of the facts) of the Regulations of the Court on the rights of the accused has been examined by the ICC. The Appeals Chamber determined that, under Article 67(1)(a) of the ICC Statute, the Trial Chamber may change the legal characterization of the facts during trial, and without formally amending the charges, which is supported by regional human rights instruments and jurisprudence.¹⁵ Accordingly, regulation 55 is not intrinsically incompatible with the accused person’s rights as Article 67(1)(a) does not preclude a change of the legal characterisation of the facts during trial and without formally amending the charges.¹⁶

Having said so, modifying the legal characterisation of the facts may only be conducted with regard to the facts and circumstances depicted in the charges. The restriction of the power to re-characterise facts, vested in the Trial Chamber, guarantees perfect compatibility between, on the one hand, regulation 55 and Article 74(2) of the ICC Statute and, on the other one, Article 67(1)(a).¹⁷ In addition to the accused person’s right to submit

¹⁴ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber III, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, 31 July 2008, ICC-01/05-01/08-55, paras. 65–66, 69 and 72 (<https://www.legal-tools.org/doc/15c802/>).

¹⁵ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled “Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court”, 8 December 2009, ICC-01/04-01/06-2205, para. 84 (<https://www.legal-tools.org/doc/40d015/>).

¹⁶ ICC, *Prosecutor v. Bemba*, Trial Chamber III, Decision lifting the temporary suspension of the trial proceedings and addressing additional issues raised in defence submissions ICC-01/05-01/08-2490-Red and ICC-01/05-01/08-2497, 6 February 2013, ICC-01/05-01/08-2500, para. 16 (<https://www.legal-tools.org/doc/b1027a/>).

¹⁷ ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, Decision on the implementation of regulation 55 of the Regulations of the Court and Severing the charges against the accused persons, 21 November 2012, ICC-01/04-01/07-3319-tENG/FRA, para. 21 (*Katanga and Ngudjolo*, 21 November 2012’) (<https://www.legal-tools.org/doc/f5cbd0/>).

observations on the re-characterisation, it is pivotal to secure that “all facts underpinning the charges whose legal character is modified were clearly set out in the original indictment, from the outset” (*Katanga and Ngudjolo*, 21 November 2012, para. 22). The accused person’s right to be informed promptly and in detail of charges against him or her includes both the facts and their legal characterisation and, therefore, the accused has to be timely put on notice that the legal characterisation could be modified under regulation 55 of the Regulations of the Court.¹⁸

Concerning Articles 67(1)(a) and Article 56 of the ICC Statute, which deal with “unique investigative opportunity” and located in Part 5 of the Statute, Trial Chamber IX in *Ongwen* determined that: “Article 56 [...] is not limited to certain procedural stages. In fact, evidence may be preserved under that provision even before the surrender or voluntary appearance of the person concerned. Accordingly, the Defence interpretation which seeks to require the submission of charges before action in relation to a unique investigative opportunity is taken is without merit” (*Ongwen*, 4 February 2022, para. 64).

Cross-references:

Articles 55(2)(a), 56, 61(2)(b), 61(3), 67(1)(a), and 67(2).
Regulation 55.

Doctrine: For the bibliography, see the final comment on Article 67.

Authors: Juan Pablo Pérez-León-Acevedo and Björn Elberling.

¹⁸ ICC, *Prosecutor v. Katanga*, Trial Chamber II, Judgment pursuant to Article 74 of the Statute, 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 1486 (<https://www.legal-tools.org/doc/f74b4f/>).

Article 67(1)(b)

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

Article 67(1)(b) contains certain rights that aim at allowing the accused to mount an effective defence, namely the right to adequate time and facilities for the preparation of this defence and to free and confidential communication with counsel. It is pivotal to guarantee an appropriate preparation of the defence and, thus, the suspect or accused can confidentially and unrestrictedly communicate with his or her counsel and assistants.¹

The notion of adequate time is hard to define precisely, especially in the context of the rather complex proceedings before international criminal tribunals. Adequate time will in any case depend on the particular circumstances of the case.² Notably, in the first pre-trial proceedings before the ICC, a defence request to postpone the confirmation hearing under this Article was rejected.³ For provisions in the RPE which aim at ensuring adequate time before certain major procedural steps, see, for example, Rule 121(3). As for self-representing accused, international practice, including that of the ICC, evidences that he or she is provided with some level of facilities and legal assistance (Gut *et al.*, 2013, p. 1252).

Communication with counsel shall be free and “in confidence”, that is, not within the hearing of third persons; this is further elaborated upon in Regulation 97. Further to the wording of Article 67(1)(b), the accused may

¹ Till Gut *et al.*, “Defence Issues”, in Göran Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, p. 1210.

² William A. Schabas, “Article 67 – Rights of the Accused”, Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Nomos, Baden Baden, 1999, p. 854 (<https://www.legal-tools.org/doc/434159/>); William A. Schabas and Yvonne McDermott, “Article 67 – Rights of the Accused”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1662 (<https://www.legal-tools.org/doc/040751/>) and William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1032–1033 (<https://www.legal-tools.org/doc/b7432e/>).

³ See ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Defence Request to Postpone the Confirmation Hearing, 8 November 2006/ICC-01/04-01/06-686 (<https://www.legal-tools.org/doc/d8b136/>).

also communicate freely with diplomatic and/or consular representatives of his or her state (Regulation 98).

Additionally, the right under Article 67(1)(b) is present in the robust disclosure obligations that start early in the proceedings.⁴

Concerning the modification of the legal characterization of facts by the Trial Chamber in the course of the trial (Regulation 55 of the Regulations of the Court), the Appeals Chamber considered that it must not render the trial unfair. Thus, the Appeals Chamber noted that Article 67(1)(b) of the Statute provides for the accused person's right to "have adequate time and facilities for the preparation of the defence". In order to avoid violations of this provision, regulations 55(2) and (3) contain "several stringent safeguards for the protection of the rights of the accused. How these safeguards will have to be applied to protect the rights of the accused fully and whether additional safeguards must be implemented [...] will depend on the circumstances of the case".⁵ Thus, regulation 55 refers to Article 67(1)(b) and its stringent safeguards to protect the accused person's rights. By referring to the case-law of the European Court of Human Rights ('ECtHR'),⁶ Trial Chamber II in *Katanga and Ngudjolo* noted that a breach of the accused person's fair trial rights may take place when the legal characterisation of the facts changed without providing the defence the opportunity to file observations.⁷

⁴ ICC, *Prosecutor v. Bemba*, Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled 'Decision on application for interim release', 16 December 2008, ICC-01/05-01/08-323, para. 33 (<https://www.legal-tools.org/doc/5a1931>). See also Schabas, 2016, p. 1033 (<https://www.legal-tools.org/doc/b7432e/>).

⁵ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", 8 December 2009, ICC-01/04-01/06-2205, para. 85 (<https://www.legal-tools.org/doc/40d015/>).

⁶ ECtHR, *Pélissier and Sassi v. France*, Grand Chamber, Judgment, 25 March 1999, Application No. 25444/94 (<https://www.legal-tools.org/doc/c7f9e0/>); *Mattei v. France*, Second Section, Judgment, 19 December 2006, Application No. 34043/02 (<https://www.legal-tools.org/doc/3c8nu9/>).

⁷ ICC, *Katanga and Ngudjolo*, Trial Chamber II, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, 21 November 2012, ICC-01/04-01/07-3319-tENG/FRA, paras. 35–37 (<https://www.legal-tools.org/doc/f5cbd0/>).

In *Ngudjolo*, the Appeals Chamber examined whether the conditions of detention of the accused, at an administrative detention centre at Schiphol Airport (The Netherlands), infringed upon his fair trial rights, in particular those laid down in Article 67(1)(b). First, under Article 3(7)(2) of the Internal Rules and Regulations for Aliens Detention Centre (“Internal Rules and Regulations”), the Appeals Chamber noted that a detainee may be visited by his or her legal assistant on every working day during working hours, and outside these hours when required by the interests of justice. The confidentiality of these communications was guaranteed by the fact that those privileged visits occurred in a visiting room without any detention centre staff member and that solely indirect surveillance was performed by a staff member outside the visiting room. Second, if the accused person’s counsel is provided with hard copies of the documents necessary for the preparation of the defence and thus the accused has access to his case file, the lack of electronic access to it does not prejudice the accused person’s ability to prepare his defence. Third, although whether the accused may receive calls is not explicitly mentioned in the Internal Rules and Regulations, a telephone was located in the accused person’s cell and he was given some weekly telephone credit. Additionally, under Article 3(8)(2) of the Internal Rules and Regulations, telephone calls to privileged contacts cannot be monitored. Fourth, it is up to the accused to make the necessary practical arrangements *vis-à-vis* his or her co-detainee to talk confidentially with his or her lawyer. Concerning the accused person’s complaints about being disturbed by his co-detainee, following the Internal Rules and Regulations, the accused needs to forward those complaints to the relevant bodies of the administrative detention centre. Therefore, based on the above-analysed considerations, the Appeals Chamber found that the conditions in the administrative detention centre did not violate the accused person’s fair trial rights in relation to the proceedings before the ICC.⁸ This decision constitutes a good example of how important is to examine Article 67(1) provisions of the ICC Statute in a systematic and contextual manner paying attention to both the whole ICC legal framework and specific circumstances of the accused person. By doing so, the ICC Chambers may accurately de-

⁸ ICC, *Prosecutor v. Ngudjolo*, Appeals Chamber, Decision on “URGENT application by Mathieu Ngudjolo’s Defence seeking the Appeals Chamber’s instructions on the modalities of preparation for the appeals procedure in view of Mathieu Ngudjolo’s current situation (Article 67 of the Rome Statute)”, 24 April 2013, ICC-01/04-02/12-67, paras. 8–13 (<https://www.legal-tools.org/doc/2f5df2/>).

termine whether and to what extent the accused person's fair trial rights have been violated.

In *Banda and Jerbo*, the defence alleged its inability to conduct interviews to identify and locate potential witnesses with knowledge of the facts relevant to the case due to the obstructionist efforts of the Government of Sudan. In addressing this claim, Trial Chamber IV found that the defence failed to substantiate it properly as it was necessary to identify available evidence with sufficient specificity under the information available to it at the respective stage. Even though the Chamber may consider problems found by the defence when weighting the whole evidentiary materials, an unsubstantiated claim does not meet the high threshold required for staying the proceedings.⁹

Pre-Trial Chamber I in *Gbagbo*, considering the circumstances of the case, found that allowing the Prosecutor to provide more evidence or conduct further investigation for a limited period of time would affect no right of the accused as he would be "given appropriate time to respond to the new evidence presented by the Prosecutor".¹⁰

Duly meeting the requirements of Article 67(1)(b) and (e) of the Statute requires that the Chamber itself reviews the circumstances under which the recharacterisation phase of the proceedings took place, which means to dwell especially on all measures adopted to protect the accused person's rights.¹¹ Attention should be drawn to whether the matter of the opportunity, understood as broadly as possible, was afforded to the defence to: (i) present its case on the recharacterisation envisioned and to put across its view on the correlation between the law and the evidence on record; and (ii) the opportunity afforded to the defence to tender new evidence into the record, after notice of possible recharacterisation (*Katanga*, 7 March 2014, para. 1539).

⁹ ICC, *Prosecutor v. Banda and Jerbo*, Trial Chamber IV, Decision on the defence request for a temporary stay of proceedings, 26 October 2012, ICC-02/05-03/09-410, paras. 101 and 102 (<https://www.legal-tools.org/doc/414cc4/>).

¹⁰ ICC, *Prosecutor v. Gbagbo*, Pre-Trial Chamber I, Decision adjourning the hearing on the confirmation of charges pursuant to Article 61(7)(c)(i) of the Rome Statute, 3 June 2013, ICC-02/11-01/11-432, paras. 42 and 43 (<https://www.legal-tools.org/doc/2682d8/>).

¹¹ ICC, *Prosecutor v. Katanga*, Trial Chamber II, Judgment pursuant to Article 74 of the Statute, 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 1539 ('*Katanga*, 7 March 2014') (<https://www.legal-tools.org/doc/f74b4f/>).

Cross-references:

Article 67(1)(e).

Rule 121(3).

Regulations 55(2), 55(3), 97 and 98.

Internal Rules and Regulations for Aliens Detention Centre Articles
3(7)(2), 3(8)(2).

Doctrine: For the bibliography, see the final comment on Article 67.

Authors: Juan Pablo Pérez-León-Acevedo and Björn Elberling.

Article 67(1)(c)

(c) To be tried without undue delay;

Article 67(1)(c) grants the right to a trial without undue delay and is identical to its respective model provision under the International Covenant on Civil and Political Rights. What exactly this means, especially in the context of international criminal justice, is hard to determine – so far, proceedings at the Court have been similarly slow as at other international criminal tribunals. Thus, in *Lubanga*, the proceedings lasted roughly a year from initial appearance of the accused to confirmation of charges. The trial started more than three years after the initial appearance, took other three years to be completed, and the appeals phase lasted more than two years and a half. This trend has also been present in the other ICC completed trials although these have been shorter. Thus, considering the time elapsed between the accused person's first appearance before the Trial Chamber and the end of his trial, approximately six years and a half passed in *Katanga*, and approximately four years and ten months elapsed in *Ngudjolo*. As for *Bemba*, roughly six years and a half have passed but the Trial Chamber judgment has yet to be rendered. Two cases were joined by the Appeals Chamber paying attention to the impact of this decision on the expeditiousness of the trials.¹ There are several factors behind slowness of international criminal proceedings, which include inter alia the complexity of the facts and, especially, the complexity of the proceedings.² Be that as it may, scholars and case-law on the ICCPR indicate that the time limit is considered from the moment when the suspect or accused is informed of steps towards his or her prosecution.³

¹ ICC, *Prosecutor v. Katanga and Ngudjolo*, Appeals Chamber, Judgment on the Appeal Against the Decision on Joinder rendered on 10 March 2008 by the Pre-Trial Chamber in the *Germain Katanga and Mathieu Ngudjolo Chui* Cases, 9 June 2008, ICC-01/04-01/07-573, para. 8 (<https://www.legal-tools.org/doc/4feef7/>).

² See Robert Heinsch, "How to Achieve Fair and Expeditious Trial Proceedings before the ICC: Is it Time for a more Judge-dominated Approach?", Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Brill/Martinus Nijhoff Publishers, Leiden, 2009, pp. 481–496.

³ See William A. Schabas and Yvonne McDermott, "Article 67 – Rights of the Accused", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1663 (<https://www.legal-tools.org/doc/040751/>) and William A. Schabas, *The International*

On the other hand, in many cases, the defence has not complained of proceedings taking too long, but has rather in some instances argued for further delays.⁴ In fact, the full exercise of other defence rights contained in Article 67(1) may actually require certain delays, which is why the right to trial without undue delay may sometimes in effect be a limiting factor on the scope of other defence rights.⁵ In *Lubanga*, the Appeals Chamber found that a:

conditional stay of the proceedings may be the appropriate remedy where a fair trial cannot be held at the time that the stay is imposed, but where the unfairness to the accused person is of such a nature that a fair trial might become possible at a later stage because of a change in the situation that led to the stay.

If the obstacles that led to the stay of the proceedings fall away, the Chamber that imposed the stay of the proceedings may decide to lift the stay of the proceedings in appropriate circumstances and if this would not occasion unfairness to the accused person for other reasons, in particular in light of his or her right to be tried without undue delay (see Article 67(1)(c) of the Statute).⁶

Thus, the Appeals Chamber determined two conditions under which a stay may be vacated: (i) if the forensic obstacles leading to the stay “fall away”; and (ii) if vacating the stay would not occasion unfairness to the accused “for other reasons, in particular in light of his or her right to be tried without undue delay” (*Lubanga*, 21 October 2008, para. 80). The second condition is reiterated: “If a trial that is fair in all respects becomes possible as a result of changed circumstances, there would be no reason not

Criminal Court: A Commentary on the Rome Statute, 2nd. ed., Oxford University Press, 2016, pp. 1034–1035.

⁴ See ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Defence Request to Postpone the Confirmation Hearing, 8 November 2006, ICC-01/04-01/06-686 (<https://www.legal-tools.org/doc/d8b136/>).

⁵ See, for example, ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Requests of the Defence of 3 and 4 July 2006, 4 August 2006, ICC-01/04-01/06-268, p. 4 (<https://www.legal-tools.org/doc/2f7113/>).

⁶ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008”, 21 October 2008, ICC-01/04-01/06-1486, paras. 4 and 5 (*Lubanga*, 21 October 2008”) (<https://www.legal-tools.org/doc/485c2d/>).

to put on trial a person who is accused of genocide, crimes against humanity or war crimes – deeds which must not go unpunished and for which there should be no impunity” (para. 80). The previous judgment implies that a benign remedy of ‘temporary’ stay may become a situation of ‘permanent’ stay, which also takes place when vacating the stay would not be unfair to the accused due to other reasons, especially, in light of his or her “right to be tried without undue delay”.⁷ The Appeals Chamber’s consideration, in *Banda and Jerbo*, of the right to a speedy trial as an incident of a stay of proceedings tasks the discretion of the Trial Chamber which would have to choose between: (i) preserving the right to a speedy trial “by requiring the case to proceed to trial, at the end of which any complaint of serious prejudice to fair trial is considered as part of the overall evaluation of the case”; and (ii) staying the proceedings prior to trial for an indefinite period, “at the end of which the case may be resumed when the obstacles to fair trial fall away” (*Banda and Jerbo*, 26 October 2012, para. 86).

The trial in *Lubanga* was stayed for a second time in 2010. The failure of the Prosecutor to disclose to the defence the identity of an intermediary who worked in the field on behalf of the Office of the Prosecutor triggered the abuse of process leading to the stay of the proceedings.⁸ Accordingly, the Trial Chamber found the Prosecutor’s refusal to comply with its orders to be not just a smooth delay in the conduct of the proceedings but to render a fair trial impossible.⁹ The Appeals Chamber later overruled such stay. It determined that sanctions under Article 71 of the ICC Statute constitute the proper mechanism for a Trial Chamber to maintain control of the proceedings and, therefore, to ensure a fair trial when a party deliberately refuses to follow its directions.¹⁰ Thus, sanctions should be conducted be-

⁷ ICC, *Prosecutor v. Banda and Jerbo*, Trial Chamber IV, Decision on the defence request for a temporary stay of proceedings (and Concurring Separate Opinion of Judge Eboe-Osuji), 26 October 2012, ICC-02/05-03/09-410, para. 12 (<https://www.legal-tools.org/doc/414cc4/>).

⁸ See Yvonne McDermott, “General Duty to Ensure the Right to a Fair and Expeditious Trial”, in Göran Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, Oxford, 2013, p. 797).

⁹ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Redacted Decision on Intermediaries, 31 May 2010, ICC-01/04-01/06-2434-Red2, para. 20 (<https://www.legal-tools.org/doc/8b5694/>).

¹⁰ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled “Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU”,

fore ordering a stay of proceedings and should be given reasonable time to trigger compliance (*Lubanga*, 8 October 2010, paras. 3 and 59–62).

In *Lubanga*, between the imposition of stay and its lifting, the OTP asked the Trial Chamber to partially lift the stay to hear evidence that could be later included in the trial record in case of lifting the stay. The Trial Chamber rejected it by referring to the second prong of its decision, that is, the OTP was seemingly able to select the judicial orders to comply with based on its interpretation of its responsibilities under the ICC Statute.¹¹ The Trial Chamber established that while the Prosecutor keeps reserving to himself the right not to implement the Chamber’s orders if (s)he considers them to conflict with his or her other obligations, justice can no longer be done in this case (*Lubanga*, 24 September 2010, para. 22). Thus, “to ensure that the trial of the accused is conducted with full respect for his rights”, and to guarantee the rule of law, the Prosecutor has to accept the Chamber’s authority, which is “an irremovable and fundamental ingredient of a fair criminal trial” (para. 22).

The Prosecutor is only required to support each charge with “sufficient” evidence during the confirmation hearing (Article 61(5) of the ICC Statute). However, the ICC practice has understood that the investigation should be mostly complete at the hearing of confirmation of charges, which “ensures continuity in the presentation of the case and safeguards the rights of the Defence [...] [and] also ensures that the commencement of the trial is not unduly delayed and conforms with the right of the Defence to be tried without undue delay pursuant to Article 67(1)(c) of the Statute”.¹² Determining whether Article 61(7)(c)(i) (adjournment of the confirmation of charges hearing, request for the Prosecutor to provide further evidence or conduct further investigation) of the ICC Statute unduly infringes a person’s right to be tried without undue delay and, in general, whether there is a violation of Article 67(1)(c) “must be determined on a case-by-case basis,

8 October 2010, ICC-01/04-01/06-2582, paras. 3 and 58 (*Lubanga*, 8 October 2010’) (<https://www.legal-tools.org/doc/8f3b61/>).

¹¹ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on the “Prosecution’s application to take testimony while proceedings are stayed pending decision of the Appeals Chamber”, 24 September 2010, ICC-01/04-01/06-2574, para. 21 (*Lubanga*, 24 September 2010’) (<https://www.legal-tools.org/doc/9b3617/>).

¹² ICC, *Prosecutor v. Gbagbo*, Pre-Trial Chamber I, Decision adjourning the hearing on the confirmation of charges pursuant to Article 61(7)(c)(i) of the Rome Statute, ICC-02/11-01/11-432, 3 June 2013, para. 25 (<https://www.legal-tools.org/doc/2682d8/>).

taking into account the particularities of the case and in accordance with internationally recognized human rights” (*Gbagbo*, 3 June 2013, para. 39).

Indeed, the ICC practice evidences the application of a test which considers the following prongs. First, length of on-going proceedings which may include extraordinary proceedings. Second, the seriousness of the charges. Third, the complexity of the case at the ICC, which normally involves multiple incidents committed by multiple perpetrators over several months or even years. Fourth, whether requesting further additional evidence is explicitly provided for in the ICC Statute (*Gbagbo*, 3 June 2013, paras. 40–41). Therefore, for example, in *Gbagbo*, the Chamber found that allowing the Prosecutor to provide further evidence or conduct further investigation for a limited period does not unduly breach the accused person’s right to be tried without undue delay (para. 42). This test to determine whether there has been undue delay is relatively similar to that applied by regional human rights courts. In international criminal law, it is common to refer to the complexity of the case (including factual or legal issues), and the situations must be examined on a case-by-case basis as well as an undue delay in criminal proceedings may be compensated by, for example, decrease in sentence.¹³ The ICC Chambers may freely consider the potential impact on the accused person’s rights to evaluate whether any compensatory measures are warranted (*Katanga and Ngudjolo*, 21 November 2012, para. 43). Although triggering Regulation 55 may increase the length of the proceedings, it “does not inevitably entail a violation of the right to be tried without undue delay” (para. 46). The right to be tried without delay requires *inter alia* to reduce to a minimum the time between the end of the pre-trial phase and the beginning of the trial.¹⁴

The Appeals Chamber found “that a change of the legal characterisation of the facts pursuant to Regulation 55 as such will [not] automatically lead to undue delay of the trial. Whether a re-characterisation leads to undue delay will depend on the specific circumstances of the case”.¹⁵ Thus, a

¹³ ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, 21 November 2012, ICC-01/04-01/07-3319-tENG/FRA, para. 43 (*Katanga and Ngudjolo*, 21 November 2012’) (<https://www.legal-tools.org/doc/f5cbd0/>).

¹⁴ ICC, *Prosecutor v. Ongwen*, Pre-Trial Chamber II, Decision Postponing the Date of the Confirmation of Charges Hearing, 6 March 2015, ICC-02/04-01/15-206, para. 30 (<https://www.legal-tools.org/doc/5a0ab1/>).

¹⁵ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled

change of the legal characterisation of facts under regulation 55 leads neither automatically nor inherently to undue delay of the trial as this depends on the case.

Diverse legal and practical factors may determine the need for adjournments of varying duration, including further investigation, consideration of an issue by another Chamber (appeal included), permission of an accused to be excused (including the need for dealing with an urgent national security domestic matter), and difficulties in scheduling witnesses.¹⁶ In contrast to the more “drastic” remedy of a stay of proceedings, the decision “on whether or not to grant the requested adjournment is based on a weighing of the interests of justice in this case, including the rights of the accused and the interests of victims” (*Kenyatta*, 31 March 2014, para. 78). The Chamber is obligated under Article 64(2) of the ICC Statute to ensure that the proceedings are conducted with full respect to the accused person’s rights, in a form that is fair and expeditious, and consistent with internationally recognised human rights (para. 80). Actually, a “further adjournment without justifiable and compelling reasons could constitute undue delay contrary to the rights of the accused” (para. 80).

Concerning how victim participation may potentially result in undue delay of the proceedings, the ICC Statute does not authorize victim participation to be in detriment of the accused person’s rights and, indeed, Article 68(3) states that such participation must take place in a way “not prejudicial to or inconsistent with the rights of the accused”.¹⁷ The ICC Appeals Chamber has recalled “that the duty to act in a diligent and expeditious manner applies to all those involved in the proceedings, including the accused person”.¹⁸

“Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court”, 8 December 2009, ICC-01/04-01/06-2205, para. 86 (<https://www.legal-tools.org/doc/40d015>).

¹⁶ ICC, *Prosecutor v. Kenyatta*, Trial Chamber V(B), Decision on Prosecution’s applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, 31 March 2014, ICC-01/09-02/11-908, para. 77 (<https://www.legal-tools.org/doc/c2209e/>).

¹⁷ See also Salvatore Zappalà, “The Rights of Victims v. the Rights of the Accused”, in *Journal of International Criminal Justice*, 2010, vol. 8, no.1, p. 146.

¹⁸ ICC, *Prosecutor v. Ongwen*, Appeals Chamber, Judgment on the appeal of Mr Dominic Ongwen against Trial Chamber IX’s ‘Decision on Defence Motions Alleging Defects in the

As other authors have remarked, the Strategic Plan (2019–2021) of the Office of the Prosecutor and, to a lesser extent, the Court and the ICC Registry, present and examine measures to increase the speed of the ICC proceedings.¹⁹ With regard to its goal of increasing “the speed, efficiency and effectiveness of preliminary examinations, investigations, and prosecutions”, the Office of the Prosecutor’s Strategic Plan 2019–2021 aimed to implement these strategies:

- a. Optimising preliminary examinations.
- b. Further prioritising amongst investigations and prosecutions.
- c. Developing a clear completion strategy for situations under investigation.
- d. Developing narrower cases, where appropriate.
- e. Preparing and advocating for more expeditious court proceedings.
- f. Conducting further reviews of its working processes.
- g. Optimising cooperation with partners.²⁰

Finally, in the context of the Covid-19 pandemic, Trial Chamber X in *Al Hassan* invited the Office of the Prosecutor and Defence “to increase their efforts on agreed facts as a means of reducing the length of any delay which might arise from the current circumstance”.²¹ To facilitate fair and expeditious proceedings during the Covid-19 crisis, the ICC Chambers have set a cut-off date to transmit victim applications to participate at trial, which normally has been established before trial for ensuring that victims’

Confirmation Decision’, 17 July 2019, ICC-02/04-01/15-1562, para. 152 (<https://www.legal-tools.org/doc/56a5cc/>).

¹⁹ Benjamin Gumpert and Yulia Nuzban, “Length of Proceedings at the International Criminal Court: Context, Latest Developments and Proposed Steps to Address the Issue” in Viviane Dittrich and Alexander Heinze (eds.), *The Past, Present and Future of the International Criminal Court*, Torkel Opsahl Academic EPublisher, Brussels, 2021, p. 579.

²⁰ See ICC OTP, “Strategic Plan 2019–2021”, 17 July 2019, pp. 15–22 (<https://www.legal-tools.org/doc/7ncqt3/>).

²¹ ICC, *Prosecutor v. Al Hassan*, Trial Chamber X, Order to provide information on methods of work to minimise the impact of COVID-19 and related measures on the conduct of proceedings, 29 April 2020, ICC-01/12-01/18-776 para. 9 (<https://www.legal-tools.org/doc/im0831/>).

lawyers can fulfil their mandates during trial.²² In the Covid-19 pandemic scenario, however, Trial Chamber V in *Yekatom and Ngaïssona*:

cognisant of the present difficulties of reaching out to victims and to collect applications in the circumstances caused by the Coronavirus Pandemic [...] [it is] of the view that additional time is required to ensure that victims have appropriate time and opportunities to apply for participation. Consequently, the Chamber finds it appropriate to set the cut-off date at the end of the Prosecution's presentation of evidence. This deadline is without prejudice to receipt and review of subsequent applications to participate in reparations proceedings, if any (*Yekatom and Ngaïssona*, 16 July 2020).

Cross-references:

Articles 61(5) and 61(7)(c)(i).

Rule 101.

Regulation 55

Doctrine: For the bibliography, see the final comment on Article 67.

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²² ICC, *Prosecutor v. Yekatom and Ngaïssona*, Trial Chamber V, Decision Setting the Commencement Date of the Trial, 16 July 2020, ICC-01/14-01/18-589, para. 19 ('*Yekatom and Ngaïssona*, 16 July 2020') (<https://www.legal-tools.org/doc/27mzgg/>).

Article 67(1)(d)-1

(d) Subject to Article 63, paragraph 2, to be present at the trial

Besides the rights to conduct a defence (see comment to next subparagraph), Article 67(1)(d) also contains the right of the accused to be present at trial. This generally precludes trials conducted in his or her absence. Pursuant to Article 63(1) of the ICC Statute, “The accused shall be present during the trial”. However, the ICC has invoked case law of both the Human Rights Committee and the European Court of Human Rights to conclude that there is no blanket prohibition of trials *in absentia* of those individuals who, after being informed of the proceedings in advance, declined to exercise their right to be present provided that there has been a careful adoption of measures to guarantee a fair trial, especially the right to have a proper legal representation.¹ Therefore, the ICC has concluded that the ICC Statute properly understood and general legal principles do not ban the continuation proceedings without the accused person's physical presence when she or he is wilfully absent (*Gbagbo*, 28 May 2020, para. 70). Nevertheless, some commentators have criticized this jurisprudential interpretation.² In any event, the right to presence is not without limitations, the most important of which is the removal of the defendant for disruptive behaviour – see Article 63(2)). Hearings in the absence of an accused who is unable to attend for health reasons, however, would be in violation of Article 67(1)(d) (see Terrier, 2002, pp. 1283–1284). Finally, an exception to the right to presence may also apply where hearings are conducted *ex parte*, that is, in the absence not only of the accused, but of the defence generally, for reasons of witness safety or protection of national security information.³ Contrary to the misleading wording of Article 76(4), Article 67(1)(d) ap-

¹ ICC, *Prosecutor v. Gbagbo and Blé Goudé*, Appeals Chamber, Decision on counsel for Gbagbo's request for reconsideration of the “Judgment on the Prosecutor's appeal against the oral decision of Trial Chamber I pursuant to article 81(3)(c)(i) of the Statute” and on the review of the conditions on the release of Gbagbo and Blé Goudé, 28 May 2020, ICC-02/11-01/15-1355-Red, para. 70 (*'Gbagbo and Ble Goudé*, 28 May 2020') (<https://www.legal-tools.org/doc/pda419/>).

² Caleb Wheeler, “The ICC Appeals Chamber Signals a Possible Change in Approach to the Permissibility of Trials in Absentia”, *EJIL: Talk!*, 3 July 2020.

³ See Article 72(7), RPE rule 74(4) as well as ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Defence Motion concerning the Ex parte hearing of 2 May 2006, 22 May 2006, ICC-01/04-01/06-119 (<https://www.legal-tools.org/doc/6d0232/>).

plies without exception to the hearing in which the sentence is pronounced.⁴

The right to be present at trial presupposes more than physical presence, but also requires that the accused be able to adequately follow and take part in the proceedings; in other words, the accused must be fit to stand trial. This requirement is not explicitly laid down in the Statute, but applies as a necessary corollary to the right to presence (see Schabas, Article 63, 1999, p. 807; and Schabas, 2016, pp. 961–971) and may also be deduced from Rule 135(4) of the Rules of Procedure and Evidence. The overall capacity needed for fitness to stand trial is the same regardless of the stage of the proceedings, that is, Article 67(1) applies to pre-trial and trial stages.⁵ In *Gbagbo*, Pre-Trial Chamber I examined whether the accused was healthy enough to stand trial—concluding in the affirmative. In interpreting the scope of Article 67(1), the Chamber referred to Article 6 of the European Convention on Human Rights (‘ECHR’) and the respective case-law of the European Court of Human Rights as well as international and hybrid criminal courts legal sources to point out that the accused person’s right to participate effectively in a criminal trial requires that he or she is not only present but that the accused can also hear and follow the proceedings (*Gbagbo*, 2 November 2012, paras. 46 and 49).

A special rule concerning presence of the accused at the confirmation hearing is contained in Article 61(2), it allows confirmation hearings in the absence of the accused under certain circumstances. Concerning the possibility of the confirmation hearing in absentia, some academics have considered that it may be held provided that if, after the first appearance, the defendant either cannot be found or fled.⁶ As suggested by former ICC

⁴ William A. Schabas, “Article 67 – Rights of the Accused”, Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Nomos, Baden Baden, 1999, p. 856 (<https://www.legal-tools.org/doc/434159/>); William A. Schabas and Yvonne McDermott, “Article 67 – Rights of the Accused”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1664–1665 (<https://www.legal-tools.org/doc/040751/>) and William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1035–1036 (<https://www.legal-tools.org/doc/b7432e/>).

⁵ ICC, *Prosecutor v. Gbagbo*, Pre-Trial Chamber I, Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court, 2 November 2012, ICC-02/11-01/11-286-Red, para. 54 (*Gbagbo*, 2 November 2012’) (<https://www.legal-tools.org/doc/4729b8/>).

⁶ Michele Marchesiello, “Proceedings Before the Pre-Trial Chamber”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal*

Judge Ekaterina Trendafilova, a close examination of the relevant provisions would indicate that a confirmation hearing in absentia absent a prior initial appearance at the ICC is compatible with both Article 67(1) rights and the RPE “A number of provisions of the Statute and the Rules make clear that the drafters intentionally provided for the possibility of a confirmation hearing in absentia under Article 61(2)(b), prior to surrender and an initial appearance before the Court”.⁷

As a result of the 2013 amendments to the RPE,⁸ the scope of the right of the accused to be present at trial has been fleshed out, introducing flexible provisions which overall speaking favour the accused. Thus, Rule 134 *bis* allows the presence of the accused via video technology: “An accused subject to a summons to appear may submit a written request to the Trial Chamber to be allowed to be present through the use of video technology during part or parts of his or her trial”. Under Rule 134 *ter*, an accused subject to summons to appear may request the Chamber to be excused and be represented by counsel during part(s) of his or her trial, under certain conditions, namely, (i) existence of exceptional circumstances, (ii) inadequacy of alternative measures, (iii) the accused has waived his or her right to be present at trial, and (iv) fulfilment of the accused’s rights during his or her absence. Finally, Rule 134 *quater* allows an accused subject to a summons to appear to be excused from presence at trial because of his or her extraordinary public duties at the highest national level provided that “it is in the interests of justice and provided that the rights of the accused are fully ensured” and this decision on excusal from presence may be reviewed at any time. These new rules, in particular, Rule 134 *quater* were introduced in the context of the increasing tension between the African Union States and the ICC as a consequence of the cases against the President and Vice-President of Kenya, that is, Mr. Uhuru Muigai Kenyatta (no longer prosecuted) and Mr. William Samoei Ruto respectively. Trial Chamber V(a) and (B) had excused Mr. Ruto and Mr. Kenyatta from continuous

Court: A Commentary, 2nd ed., Oxford University Press, 2002, p. 1244 (<https://www.legal-tools.org/doc/01addc/>).

⁷ Ekaterina Trendafilova, “Fairness and Expeditiousness in the International Criminal Court’s Pre-Trial Proceedings”, Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Brill/Martinus Nijhoff Publishers, Leiden, 2009, p. 453.

⁸ ICC, Assembly of States Parties, Resolution ICC-ASP/12/Res.7, 27 November 2013 (<https://www.legal-tools.org/doc/c50839/>).

presence at trial with certain exceptions.⁹ However, the Appeals Chamber reversed the Trial Chamber’s decision based on the following key findings:

1. Article 63(1) of the Statute does not operate as an absolute bar in all circumstances to the continuation of trial proceedings in the absence of the accused.
2. The discretion that the Trial Chamber enjoys under Article 63(1) of the Statute is limited and must be exercised with caution. The following limitations exist: (i) the absence of the accused can only take place in exceptional circumstances and must not become the rule; (ii) the possibility of alternative measures must have been considered, including, but not limited to, changes to the trial schedule or a short adjournment of the trial; (iii) any absence must be limited to that which is strictly necessary; (iv) the accused must have explicitly waived his or her right to be present at trial; (v) the rights of the accused must be fully ensured in his or her absence, in particular through representation by counsel; and (vi) the decision as to whether the accused may be excused from attending part of his or her trial must be taken on a case-by-case basis, with due regard to the subject matter of the specific hearings that the accused would not attend during the period for which excusal has been requested.¹⁰

Thus, the previously referred amendments to the RPE codified these findings of the Appeals Chamber. Finally, under Article 63(1) and Rule 134 *quater*, the Trial Chamber in *Ruto and Sang* excused Ruto from continuous presence at trial under the condition of filing a waiver of his right to be present at trial and be physically present for certain hearings.¹¹

⁹ ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V(a), Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial, 18 June 2013, ICC-01/09/01/11-777 (<https://www.legal-tools.org/doc/b0bc35/>); and *Prosecutor v. Kenyatta*, Trial Chamber V(B), Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial, 18 October 2013 ICC-01/09-02/11-830 (<https://www.legal-tools.org/doc/1919a4/>).

¹⁰ ICC, *Prosecutor v. Ruto and Sang*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled “Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial”, 25 October 2013, ICC-01/09-01/11-1066 (<https://www.legal-tools.org/doc/575657/>).

¹¹ ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V(A), Reasons for the Decision on Excusal from Presence at Trial under Rule 134quarter, 18 February 2014, ICC-01/09-01/11-1186, para. 10 (<https://www.legal-tools.org/doc/8b7d3e/>). See also *Prosecutor v. Ruto and Sang*, Trial Chamber V(A), Decision on “Prosecution’s application for leave to appeal the decision on excusal from presence at trial under Rule 134quarter”, 2 April 2014, ICC-01/09-01/11-1246 (<https://www.legal-tools.org/doc/e373b0/>).

Lastly, it should be examined how the Covid-19 pandemic impacted the ICC's work concerning the accused person's presence at trial. Even when the accused is absent, the protection of his or her fair trial rights is feasible provided that fair trial guarantees are duly observed.¹² The Covid-19 pandemic meant that the ICC as well as other international and hybrid criminal courts had to re-examine the conception of the accused person's right to be present and, thus, international criminal justice institutions such as the ICC have arguably managed to balance the accused person's right to be present at trial and the accused's right to be tried without undue delays (avoiding indefinite postponements of trials) (White, 2021, pp. 13 and 17). The Covid-19 pandemic meant that virtual presence for trial and proceedings at the ICC and other international criminal justice institutions became the new rule during the pandemic crisis as illustrated at the ICC (*Gbagbo and Blé Goudé*, *Yekatom and Ngaïssona*, *Ntaganda*, and *Al Hassan*), the International Residual Mechanism for Criminal Tribunals (*Mladić*, *Stanišić and Simatović*, and *Turinabo et al.*); and STL (*Ayyash et al.* and *Ayyash*) (White, 2021, pp. 20–21).

Cross-references:

Articles 61(2), 63(1), 63(2), 72(7) and 76(4).

Rules 74(4), 135(4), 134 *bis*, 134 *ter*, 134 *quater* and 135(4).

Doctrine: For the bibliography, see the final comment on Article 67.

Authors: Juan Pablo Pérez-León-Acevedo and Björn Elberling.

¹² Elizabeth White, "Towards a New Normal: Digitization of International Criminal Law in the Age of Coronavirus", in *Columbia Journal of Transnational Law*, 2021, vol. 60, p. 11.

Article 67(1)(d)-2

to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;

Article 67(1)(d) also contains what may be termed the right to conduct a defence, which may again be subdivided into three specific rights.

First of all, the provision contains the right to conduct the defence in person, that is, the right to self-representation: The accused is generally free to choose to forego the assistance of defence counsel and to represent him- or herself, provided that she is mentally and intellectually able to do so. While the wording of Article 67(1)(d) does not contain any reference to restrictions of the right to self-representation, such restrictions are legion in the jurisprudence of other international tribunals, where the right to self-representation is guaranteed in words very similar to those of Article 67(1)(d). Exceptions accepted by other tribunals include medical reasons, fear of disruption or delay of the trial, and the potential of prejudice to co-accused.¹ The accused person's self-representation should not be used to obstruct the proceedings, which requires the ICC Trial Chambers to take actions to prevent unnecessary disruption.² Accordingly, self-representation is not an absolute right and may be restricted when there is a continuous and substantial obstruction of trial even if the obstruction is unintentional.³ Whether the ICC will follow other tribunals in limiting the right to self-representation in this way, and which consequences it will draw from any

¹ Geert-Jan Alexander Knoops, *Theory and Practice of International and Internationalized Criminal Proceedings*, Kluwer Law International, The Hague, 2005, pp. 66–80 (<https://www.legal-tools.org/doc/7318c6/>).

² See further Robert Heinsch, “How to Achieve Fair and Expeditious Trial Proceedings before the ICC: Is it Time for a more Judge-dominated Approach?”, in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Brill/Martinus Nijhoff Publishers, Leiden, 2009, pp. 492–494.

³ See Till Gut *et al.*, “Defence Issues”, in Göran Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, p. 1217; Ekaterina Trendafilova, “Fairness and Expeditiousness in the International Criminal Court's Pre-trial Proceedings”, in Stahn and Sluiter (eds.), 2009, p. 449.

such limitations (particularly whether it will appoint defence counsel to take over the defence, standby counsel prepared to take over the defence if need be, or amici curiae to safeguard the rights of the defence independently of the accused (see, for example, Knoops, 2005, pp. 66–80) still remains to be seen.

Be that as it may, self-representation has been almost absent from the ICC’s practice. Only Lubanga requested to represent himself but this took place solely for a short period and for a specific objective.⁴ The meaningful exercise of the accused person’s fair trial rights does not require that he or she is capable of exercising them as if he or she were trained as a lawyer or a judicial officer.⁵ According to international practice, those assigned to assist a self-representing defendant need to follow the same requirements applicable to legal counsels and assistants under the general legal aid scheme (Gut *et al.*, 2013, pp. 1252–1253).

Second, the Article contains the right to be represented by counsel of one’s choosing. In practice, the choice of counsel is not entirely unlimited; accused may only choose counsel who fulfil certain requirements in terms of experience and languages spoken, etcetera (see Rule 22 and Regulation 67 *et seq.*). The Article also states that the accused must be informed of this right. At the ICC and other international and hybrid criminal courts, to guarantee effective representation, there is a trend aligning towards the qualifications for the accused person’s assigned counsel to those for an equivalent position in the Prosecution side (Gut *et al.*, 2013, p. 1237). At the ICC and other international and hybrid criminal courts, the responsibility to guarantee effective representation has been placed on the counsel and the task of verifying the quality of the counsel’s work on the accused (p. 1225). The accused person’s right to choose his or her legal counsel must “be reasonably exercised having regard to the principles of a fair trial. No right can be exercised in a manner frustrating the aims of a fair trial including, no doubt, the reasonableness of the time within which the proceedings must be held”.⁶ The right to counsel and legal assistance is not applicable to

⁴ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges, 24 May 2007, ICC-01/04-01/06-915, paras. 17–18 (<https://www.legal-tools.org/doc/602c7a/>).

⁵ ICC, *Prosecutor v. Gbagbo*, Pre-Trial Chamber I, Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court, 2 November 2012, ICC-02/11-01/11-286-Red, paras. 52 (<https://www.legal-tools.org/doc/4729b8/>).

⁶ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Reasons for “Decision of the Appeals Chamber on the Defence application ‘Demande de suspension de toute action ou procédure

a defendant who has not been arrested or summoned before the ICC; however, the defendant can challenge the admissibility and jurisdiction and the issuance of the arrest warrant prior to his or her surrender to the ICC.⁷ Once the defendant has appeared before the ICC and if he or she has manifested his or her wish to be represented by a counsel, the Registry has to ensure both that a counsel is swiftly assigned and that there is no excessive gap between the moment when the counsel has resigned and when a new one has yet to be appointed.⁸ Counsels are expected to act diligently. Otherwise, the Chamber might reject to consider motions although they are filed to secure defendant's fundamental rights.⁹

In *Saif Gaddafi and Al-Senussi*, Pre-Trial Chamber I found that practical impediments to the provision of effective and timely legal representation to the accused Gaddafi by counsel from the Office of Public Counsel for the Defence made it appropriate and necessary to appoint an alternative legal representative.¹⁰ Noting the complexities of this case and in the interests of justice, the Chamber provisionally appointed a legal representative until the accused would exercise his right to freely choose counsel under Article 67(1)(d) or until admissibility challenge proceedings would be definitively disposed of, at which point the Chamber would revisit the legal representation question (*Gaddafi and Al-Senussi*, 17 April 2013, paras. 19–20).

afin de permettre la désignation d'un nouveau Conseil de la Défense' filed on 20 February 2007" issued on 23 February 2007, 9 March 2007, ICC-01/04-01/06-844, para. 15 (<https://www.legal-tools.org/doc/67912e/>).

⁷ ICC, *Prosecutor v. Kony et al.*, Appeals Chamber, Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under Article 19 (1) of the Statute" of 10 March 2009, 16 September 2009, ICC-02/04-01/05-408 (<https://www.legal-tools.org/doc/c40d73/>).

⁸ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Reasons for the Appeals Chamber's Decision to Extend Time Limits for Defence Documents issued on 3 April 2007, 20 April 2007, ICC-01/04-01/06-871, para. 6 (<https://www.legal-tools.org/doc/3b99de/>).

⁹ ICC, *Prosecutor v. Katanga and Ngudjolo*, Appeals Chamber, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings", 12 July 2010, ICC-01/04-01/07-2259 (<https://www.legal-tools.org/doc/124fb3/>).

¹⁰ ICC, *Prosecutor v. Gaddafi and Al-Senussi*, Pre-Trial Chamber I, Decision on the "Request to Withdraw", 17 April 2013, ICC-01/11-01/11-311-Red, para. 18 (<https://www.legal-tools.org/doc/032039/>).

The legal frameworks of the ICC and other international and hybrid criminal courts contain the fundamental right to legal representation; however, daily practice courtroom at those judicial institutions and beyond has not always complied with it, for example, legal assistance has not always been consistently applied to national proceedings related to international criminal trials (Gut et al., 2013, p. 1264).

Third, where the accused is (wholly or partially) unable to pay for counsel, counsel will be assigned and paid for by the court. Following the example of Article 14(3)(d) of the ICCPR, this right is restricted to cases where the interests of justice require assignment of counsel, although it is hard to imagine that this will lead to a refusal to assign counsel in cases before the ICC. For instance, on 22 February 2008, Ngudjolo Chui was provisionally found indigent by the Registrar, which was subject to verification by the ICC and, indeed, the ICC bore the cost of his defence.¹¹ Where counsel is assigned and paid by the court, the accused does not have an unqualified right to choose counsel, although his or her wishes should be taken into account. In cases before the ICC so far, no controversies seem to have arisen in this regard. There have, however, been some controversies regarding the composition of the defence team, notably the number of legal and other assistants.¹² Moreover, the ICC Prosecutor challenged the appointment of a defence counsel who previously worked at the OTP; however, the Trial Chamber rejected it based on lack of evidence of both conflict of interest and awareness of relevant confidential information, which left no doubts about the counsel's integrity.¹³

There is no distinction between the crimes under Article 70 (Offences against the administration of justice) and those under Article 5 (genocide, crimes against humanity, war crimes and crime of aggression) con-

¹¹ See ICC, *Prosecutor v. Ngudjolo*, Case Information Sheet, ICC-01/04-02/12, updated as of 27 February 2015, p. 2.

¹² See ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Registration in the record of the case of the “Registrar’s Decision on the additional means for the trial phase sought by Mr Thomas Lubanga in his ‘Application for additional means under regulation 83(3) of the Regulations of the Court’ filed on 3 May 2007”, 14 June 2007, ICC-01/04-01/06-927-tENG (<https://www.legal-tools.org/doc/e6f922/>); and generally Regulation 83 and the commentary thereto.

¹³ ICC, *Prosecutor v. Bemba*, Trial Chamber I, Decision on the “Prosecution’s Request to Invalidate the Appointment of Legal Consultant to the Defence Team”, 7 May 2010, ICC-01/05-01/08-769, para. 45 (<https://www.legal-tools.org/doc/15d8d6/>).

cerning the entitlement to legal aid as “Article 67(1) contemplates legal aid ‘[i]n the determination of any charge’”.¹⁴

When accused not wishing to represent themselves are not (yet or anymore) represented by permanent counsel, the court usually assigns duty counsel under Regulation 73 to represent the accused in the meantime;¹⁵ or requests the OPCD to do so¹⁶ this option should, however, only be used sparingly to avoid possible conflicts of interest within the OPCD (see *Katanga*, 5 November 2007, p. 4).

In its jurisprudence, the ICC has stressed that it does not lightly cancel trial hearings.¹⁷ For example, in *Ongwen*, such cancellations were “compelled by considerations of the health and well-being of the accused, noting that the accused has a right under Article 67(1)(d) of the Statute to be present at his trial” (*Ongwen*, 19 February 2019, lines 14–16; *Ongwen*, 4 February 2021, para. 111).

Finally, regarding the impact of the Covid-19 pandemic crisis on *inter alia* the normative provision under analysis, the following should be stated. The non-binding “Guidelines for the Judiciary Concerning the Holding of Court Hearings during the Covid-19 Pandemic” adopted by the ICC’s Presidency in consultation with the ICC Judges indicated *inter alia* that: (i) since contexts such as the Covid-19 pandemic requires additional precautions to guarantee physical safety, each ICC Chamber may determine whether it is necessary that hearings can take place via: “physical hearing held in one or more of the ICC’s courtrooms, a remote hearing facilitated through the use of communications technology not requiring physical pres-

¹⁴ ICC, *Prosecutor v. Bemba et al.*, Trial Chamber VII, Decision on the Defence applications for judicial review of the decision of the Registrar on the allocation of resources during the trial phase, 21 May 2015, ICC-01/05-01/13-955, para. 35 (<https://www.legal-tools.org/doc/d3fff6/>).

¹⁵ For example, ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Appointment of Duty Counsel, 19 April 2007, ICC-01/04-01/06-870 (<https://www.legal-tools.org/doc/442880/>).

¹⁶ ICC, *Prosecutor v. Katanga*, Pre-Trial Chamber I, Decision on the appointment of a duty counsel, 5 November 2007, ICC-01/04-01/07-52, p. 3 (*Katanga*, 5 November 2007’) (<https://www.legal-tools.org/doc/132d68/>).

¹⁷ See ICC, *Prosecutor v. Ongwen*, Trial Chamber IX, Transcripts, 19 February 2019, ICC-02/04-01/15-T-199-Red-ENG, p. 3, lines 13–14 (*Ongwen*, 19 February 2019’) (<https://www.legal-tools.org/doc/70ff0f/>); *Prosecutor v. Ongwen*, Trial Chamber IX, Judgment, 4 February 2021, ICC-02/04-01/15-1762-Red, para. 111 (*Ongwen*, 4 February 2021’) (<https://www.legal-tools.org/doc/kv27ul/>).

ence in a courtroom or a combination thereof”;¹⁸ (ii) taking into the appropriateness of physical hearing, remote hearing or both, each Chamber should consider the situation in place in the State(s) where parties/participants in the proceedings are located (Covid-19 Guidelines, para. 4); (iii) the holding of physical hearings should take into account the issues presented in the Occupational Health and Safety Protocol and the Chamber ought to consult with the Registry in advance of the proposed hearing to ensure clarity regarding details of the occupational health and safety measures to be adopted for each hearing (para. 5); and (iv) when the hearings are remotely facilitated through communications technology, the Chamber should in advance consult with the Registry to ensure clarity on all technological capacity and procedure issues (para. 6).

Cross-references:

Rules 21 and 22.

Regulation 73, 77, 83, 97 and 98.

Doctrine: For the bibliography, see the final comment on Article 67.

Authors: Juan Pablo Pérez-León-Acevedo and Björn Elberling.

¹⁸ ICC, Presidency, Guidelines for the Judiciary Concerning the Holding of Court Hearings during the COVID-19 Pandemic, 23 June 2020, p. 1 (‘Covid-19 Guidelines’) (<https://www.legal-tools.org/doc/jcplq0/>).

Article 67(1)(e)

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

Article 67(1)(e) has been described by the Appeals Chamber as introducing an adversarial hearing to the ICC scheme.¹ Article 67(1)(e) contains some procedural rights which are necessary for the ability of the accused to put up an effective defence at the actual trial.

First of all, this is the right to examination of witnesses against her, including witnesses called by the court.² This right will foreseeably be subject to restrictions for reasons of witness protection, as foreseen by Article 68. However, such restrictions will probably not be considered to be in violation of Article 67(1)(e) as it was explicitly not formulated to include a right to confrontation and cross-examination *strictu sensu* (see Schabas, 1999, p. 859; Schabas and McDermott, 2016, pp. 1270–1671; and Schabas, 2016, p. 1041 (with references to the drafting history)).

Concerning the right to question witnesses, in *Bemba*, the Appeals Chamber examined what happens if the Prosecution witnesses become unavailable or unwilling to testify, or the Prosecution does not call particular witnesses due to any reason. In any of these situations, the Appeals Chamber noted that if these witnesses' statements are still admitted as "evidence", regardless of the fact that the accused has been deprived of his or her right "to examine, or have examined, the witnesses against him or her",

¹ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, 13 June 2007, ICC-01/04-01/06-925, para. 18 (<https://www.legal-tools.org/doc/b3dad9/>).

² William A. Schabas, "Article 67 – Rights of the Accused", Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Nomos, Baden Baden, 1999, p. 859 (<https://www.legal-tools.org/doc/434159/>); William A. Schabas and Yvonne McDermott, "Article 67 – Rights of the Accused", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1670 (<https://www.legal-tools.org/doc/040751/>) and William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1040 (<https://www.legal-tools.org/doc/b7432e/>).

the defence would be required to challenge the admissibility of this “evidence” to have it excluded from the case. Nonetheless, the Appeals Chamber found it as an “impermissible burden shift to the Defence and will also put the Defence in breach of Rule 64(1) which requires that ‘an issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to a Chamber’”.³ Additionally, it was considered the Trial Chamber’s adopted approach. Thus, when the evidence is used by the Prosecution, neither the defence will be aware of the purpose for admission of evidence nor the Chamber will have established whether it is required the implementation of counterbalancing measures to guarantee that:

the probative value of the evidence is not outweighed by its prejudicial impact on the rights of the defence and the fairness and impartiality of the proceedings. Since the Chamber will only be making these determinations at the end of the proceedings, the Defence will be precluded from obtaining appropriate relief [...] in a timely manner, which will further prejudice its right to examine witnesses concerning the Prosecution evidence in an effective manner (*Bemba*, 7 February 2011, para. 52).

If the Trial Chamber indiscriminately admits all the witness statements without giving consideration to whether the admission of a given statement would be inconsistent with or prejudicial to the accused person’s rights, this constitutes an improper exercise of the Trial Chamber’s discretion and, thus, “resulted in the Chamber paying little or no regard to the principle of orality, to the rights of the accused, or to trial fairness generally. It had the potential effect of depriving Mr Bemba of his right ‘to examine, or have examined the witnesses against him’”.⁴

In interpreting Article 6(3)(d) of the ECHR, which is almost identical to Article 67(1)(e) of the ICC Statute, the European Court of Human Rights (‘ECtHR’) in *Kostovski v. The Netherlands* stated that, as a matter of prin-

³ ICC, *Prosecutor v. Bemba*, Appeals Chamber, Defence appeal against the ‘Decision on the admission into evidence of material contained in the Prosecution’s list of evidence’ of 19 November 2010, 7 February 2011, ICC-01/05-01/08-1191, para. 51 (*Bemba*, 7 February 2011’) (<https://www.legal-tools.org/doc/10232c/>).

⁴ ICC, *Prosecutor v. Bemba*, Appeals Chamber, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled ‘Decision on the admission into evidence of materials contained in the prosecution’s list of evidence’, 3 May 2011, ICC-01/05-01/08-1386, para. 79 (<https://www.legal-tools.org/doc/7b62af/>).

principle, all evidence must in general be produced in the accused person's presence during a public hearing with a view to adversarial argument.⁵ Nevertheless, the ECtHR added that such principle does not mean that, to be used as evidence, the statements of witnesses always need to be made during a public hearing in court (*Kostovski*, 20 November 1989, para. 41). Using those statements obtained at the pre-trial stage as evidence is not in itself inconsistent with Article 6 of the ECHR provided that the defence's rights have been respected. In general, those rights demand that "an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings" (para. 41).

Second, the accused has the right to obtain the attendance of witnesses; however, the ICC Statute does not provide for compellability of witnesses (see further Schabas and McDermott, 2016, p. 1270; and Schabas, 2016, p. 1041). Even though the accused has the right to remain silent as the Prosecutor shoulders the onus of proof, the accused is entitled to submit evidence relevant to the case (Article 69(3) of the ICC Statute), which includes the right to "obtain the attendance and examination of witnesses on his or her behalf" (Article 67(1)(e) of the ICC Statute and Rule 140(2)(a) of the RPE).⁶ However, no ICC organ may be found responsible for ensuring the presence of the witnesses called to testify by a party as the party wishing to bring evidence via witness's oral testimony is the only "responsible for contacting the witness concerned, obtaining his or her voluntary consent to testify and proposing to the Chamber a feasible schedule for the appearance of witnesses, taking into account all necessary arrangements that may need to be implemented [...] to enable the witnesses to appear to testify before the Court" (*Bemba*, 6 February 2013).

Third, Article 67(1)(e) also contains the right to equality in manners concerning witnesses between the prosecution and the defence. Generally, limitations concerning attendance and, more importantly, examination of witnesses will not be in violation of Article 67(1)(e) if they are applied to both parties equally (see, however, the criticism of that "granting both the

⁵ ECtHR, *Kostovski v. The Netherlands*, Judgment, 20 November 1989, No. 11454/85, para. 41 ('*Kostovski*, 20 November 1989') (<https://www.legal-tools.org/doc/14aca1/>).

⁶ ICC, *Prosecutor v. Bemba*, Trial Chamber III, Decision lifting the temporary suspension of the trial proceedings and addressing additional issues raised in defence submissions ICC-01/05-01/08-2490-Red and ICC-01/05-01/08-2497, 6 February 2013, ICC-01/05-01/08-2500, para. 23 ('*Bemba*, 6 February 2013') (<https://www.legal-tools.org/doc/b1027a/>).

prosecutor and the defence equivalently watered-down powers does not equate to a fair trial”).⁷

Fourth, the accused has the right to raise defences (with the exception, presumable, of those defences explicitly ruled out in the Statute) and to present admissible evidence besides witness statements – this rather straightforward provision is of course necessary to achieve equality of arms between the parties and to allow the accused to put up an adequate defence.

Fifth, Article 67(1)(e) rights should also be examined in the context of legal recharacterisation of facts. If at any time during the trial (Regulation 55(2)) it seems to the Chamber that the legal characterisation of the facts may be subject to change, it has to give notice to the participants in the proceedings of this possibility and provide the participants with the opportunity to make submissions after having heard the evidence. In turn, regulation 55 sets out the safeguards to be respected in order to protect the accused person’s rights. The safeguards to protect the accused person’s rights depend on the specific circumstances of the case.⁸ Thus, the accused need to have adequate time and facilities for the effective preparation of his or her defence as well as “be given the opportunity to request the presentation of any evidence or witness that he or she considers necessary, in accordance with Article 67(1)(e)” (*Katanga and Ngudjolo*, 21 November 2012, para. 11).

In *Bemba*, when deciding on the remedial measures to be afforded to the accused, under Regulation 55(3), Trial Chamber III considered the prosecution’s statement whereby regulation 55 had no impact on the prosecution case and, thus, it would not submit further evidence. However, the Chamber granted the accused person’s request to collect and submit additional evidence (Article 67(1)(e) of the ICC Statute). Nevertheless, as the accused person is not obliged to present evidence, he or she may voluntarily decide not to do it (*Bemba*, 6 February 2013, paras. 20 and 21). Leading new evidence following the implementation of Regulation 55 may adopt several forms: “the recalling of witnesses who testified at trial, whether for

⁷ Geert-Jan Alexander Knoops, *Theory and Practice of International and Internationalized Criminal Proceedings*, Kluwer Law International, The Hague, 2005, p. 57 (<https://www.legal-tools.org/doc/7318c6/>).

⁸ ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, 21 November 2012, ICC-01/04-01/07-3319-tENG/FRA, paras. 11 and 13 (*Katanga and Ngudjolo*, 21 November 2012”) (<https://www.legal-tools.org/doc/f5cbd0/>).

the Prosecution or the Defence; the calling and the testimony of new witnesses, be they persons whom the Defence met in the course of its earlier investigations or newly identified persons; and the tendering of new documentary evidence”.⁹

Sixth, it should be noted that submissions based on Article 67(1)(b) and (e) may be analysed under the principle whereby a stay of the proceedings is the ultimate remedy to be resorted only when a fair trial is impossible and there is no sufficient indication that any unfairness may be sorted out later or relieved against by the Chamber.¹⁰ The above-mentioned examination demands “a preliminary assessment on whether the right to be provided adequate time and facilities for the preparation of their defence and to obtain the attendance of witnesses require, as a necessary component, on-site investigations” (*Banda and Jerbo*, 26 October 2012, para. 97).

Finally, the ICC has found that the accused person’s right pursuant Article 67(1)(e) of the ICC Statute was not violated because the witnesses testifying under Article 56 of the ICC Statute were not asked ‘for whom’ they intended to testify.¹¹ The ICC has emphasised that witnesses testify to establish the truth, indicating that “at the beginning of each testimony, the Single Judge of the Pre-Trial Chamber asked the witness to make an undertaking to tell the truth” (*Ongwen*, 4 February 2021, para. 67).

Cross-references:

Articles 67(1)(b), 68 and 69.

Rules 64(1) and 140(2)(a).

Regulation 55.

Doctrine: For the bibliography, see the final comment on Article 67.

Authors: Juan Pablo Pérez-León-Acevedo and Björn Elberling.

⁹ ICC, *Prosecutor v. Katanga*, Trial Chamber II, Judgment pursuant to Article 74 of the Statute, 7 March 2014, ICC-01/04-01/07-3436-Teng, para. 1539 (<https://www.legal-tools.org/doc/f74b4f/>).

¹⁰ ICC, *Prosecutor v. Banda and Jerbo*, Trial Chamber IV, Decision on the defence request for a temporary stay of proceedings, 26 October 2012, ICC-02/05-03/09-410, para. 97 (*‘Banda and Jerbo*, 26 October 2012’) (<https://www.legal-tools.org/doc/414cc4/>).

¹¹ ICC, *Prosecutor v. Ongwen*, Trial Chamber IX, Judgment, 4 February 2021, ICC-02/04-01/15-1762-Red, para. 67 (*Ongwen*, 4 February 2021’) (<https://www.legal-tools.org/doc/kv27ul/>).

Article 67(1)(f)

(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks;

The right to interpretation and translation aims to ensure that the accused is able to adequately follow the court proceedings and thus to be ‘present’ in a meaningful sense. Accordingly, “the right to an interpreter seems axiomatic”.¹ The provision goes beyond the text of human rights instruments in several ways, most importantly by referring not only to the interpretation of court proceedings, but also to the translation of documents presented to the court. The right to translation of documents, however, is limited to those documents the translation of which is “necessary to meet the requirements of fairness”. Thus, in *Lubanga*, Pre-Trial Chamber I denied a defence request that all procedural documents be translated into French and that deadlines only begin to run after the receipt of the French translations; it instead ordered the Registry to provide to the Defence the services of a French translator to assist the defence with documents available only in English.²

The right to an interpreter needs to be jointly read with Article 67(1)(a) of the ICC Statute, under which the accused must be in a position to know both the charges and supporting evidence.³

¹ William A. Schabas, “Article 67 – Rights of the Accused”, Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Nomos, Baden Baden, 1999, p. 860 (<https://www.legal-tools.org/doc/434159/>); William A. Schabas and Yvonne McDermott, “Article 67 – Rights of the Accused”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1671 (<https://www.legal-tools.org/doc/040751/>) and William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1043 (<https://www.legal-tools.org/doc/b7432e/>).

² ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Requests of the Defence of 3 and 4 July 2006, 4 August 2006, ICC-01/04-01/06-268 (<https://www.legal-tools.org/doc/2f7113/>) (with references to the jurisprudence of the ECtHR).

³ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber III, Decision on the Defence’s Request Related to Language Issues in the Proceedings, 4 December 2008, ICC-01/05-01/08-307, para. 14 (*‘Bemba*, 4 December 2008’) (<https://www.legal-tools.org/doc/ff53d8/>).

Article 67(1)(f) does not necessarily require that interpretation or translation be into the mother tongue of the accused, translation/interpretation into a language that he or she “fully understands and speaks” is sufficient. Where it was not clear which languages the accused spoke at this level, the Court requested the Registry to provide information on this topic.⁴ Articles 67(1)(a) and (f) of the Statute do not grant the accused the right to choose the language in which he must be informed of the charges against him and in which translation of documents and interpretation must be provided. The standard is “that of a language that the arrested person or the accused ‘fully understands and speaks’ so as to guarantee the requirements of fairness”. Thus, the defence requested in *Katanga* that: (i) documents in French transmitted to the accused as part of the proceedings should be accompanied by a translation into Lingala; and (ii) that the accused should be granted the right to be assisted by a Lingala interpreter and translator during the proceedings was rejected.⁵ The Appeals Chamber found that the Single Judge erred in the interpretation of the standard to be applied under Article 67(1)(a) and (f) of the Statute because she “did not comprehensively consider the importance of the fact that the word ‘fully’ is included in the text, and the Article’s full legislative history”.⁶ In the opinion of the Appeals Chamber, the cumulative requirement “fully understands and speaks” in both paragraphs makes the applicable standard “high – higher, for example, than that applicable under the European Convention on Human Rights and the ICCPR” (*Katanga and Ngudjolo*, 27 May 2008, paras. 62 and 66). The single judge in Pre-Trial Chamber I still held “the view that the right of Germain Katanga and Mathieu Ngudjolo Chui to have the confirmation hearing held within a reasonable period of time must prevail” and decided “that, in application of the Appeals Chamber Judgment concerning Languages, Germain Katanga shall continue to be assisted

⁴ See ICC, *Prosecutor v. Katanga*, Pre-Trial Chamber I, Order for a Report of Additional Information on the Detention and Surrender of the Detainee Germain Katanga, 26 October 2007, ICC-01/04-01/07-45, p. 3 (<https://www.legal-tools.org/doc/42eb03/>).

⁵ See ICC, *Prosecutor v. Katanga*, Pre-Trial Chamber I, Decision on Defence Request concerning languages, 21 December 2007, ICC-01/04-01/07-127, para. 30 (<https://www.legal-tools.org/doc/39b114/>).

⁶ ICC, *Prosecutor v. Katanga and Ngudjolo*, Appeals Chamber, Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled “Decision on the Defence Request Concerning Languages”, 27 May 2008, ICC-01/04-01/07-522, para. 37 (*Katanga and Ngudjolo*, 27 May 2008) (<https://www.legal-tools.org/doc/62dbba/>).

by an interpreter during the hearings held in the remaining proceedings before Pre-Trial Chamber I”.⁷

Article 67(1)(f) does not provide that the defendant has an absolute right to have all documents translated into a language which he fully understands and speaks (*Bemba*, 4 December 2008, para. 11). The defendant is entitled to receive translation of such documents that inform him in detail of the nature, cause and content of the charges brought against him, namely: (i) the Prosecutor’s application for a warrant of arrest and the Chamber’s decision thereon; (ii) the Document Containing the Charges and the List of Evidence as well as any amendment thereto; and (iii) the statements of prosecution witnesses (para. 16).

In *Mbarushimana*, concerning a telephone log disclosed by the Prosecutor as incriminating evidence, the Chamber found that the Prosecutor had no obligation to provide the translation of such material to the defence, “unless he intends to rely on any of those intercepted communications for the purposes of the confirmation hearing in the present case [...]”.⁸ Therefore, the Chamber rejected the defence’s request for the translation of all intercepted communications since the material not sought to be relied on by the parties does not need to be filed in the case record and, thus, the language requirement set out in regulation 39 of the Regulations of the Court was found inapplicable to such material (*Mbarushimana*, 30 March 2011, paras. 15–16).

In *Bemba et al.*, call logs (consisting to a large extent of digits) and chain-of-custody documents included in the Prosecutor’s list of evidence were found not to be critical to the Defence’s ability to either challenge or otherwise rely on them. Thus, the Chamber concluded that there was “no violation of Rule 121(3) of the Rules [...] and does not consider that the translation of the items concerned was necessary to meet the requirements of fairness”.⁹

⁷ ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision Implementing the Appeals Chamber Judgement concerning Languages, 2 June 2008, ICC-01/04-01/07-539, para. 11 (<https://www.legal-tools.org/doc/12d7b1/>).

⁸ ICC, *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on issues relating to disclosure, 30 March 2011, ICC-01/04-01/10-87, para. 16 (*‘Mbarushimana, 30 March 2011’*) (<https://www.legal-tools.org/doc/aee80d/>).

⁹ ICC, *Prosecutor v. Bemba et al.*, Pre-Trial Chamber II, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, 11 November 2014, ICC-01/05-01/13-749, para. 21 (<https://www.legal-tools.org/doc/a44d44/>).

As shown by Regulation 97, the right to translation also applies to communication between the accused and his or her counsel.

Cross-reference:

Article 67(1)(a).

Rule 121(3).

Regulations 39 and 97.

Doctrine: For the bibliography, see the final comment on Article 67.

Authors: Juan Pablo Pérez-León-Acevedo and Björn Elberling.

Article 67(1)(g)

(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

The right to silence, as contained in Article 67(1)(g), goes beyond the rights contained in other tribunals' Statutes and in relevant human rights provisions. First, contrary to, for example, Article 14 of the International Covenant on Civil and Political Rights, Article 67 does not refer to 'testimony against oneself', thus showing that the accused may refuse any testimony even if it might be argued that it could or would be 'in favour' of the accused.¹ The removal of the words "against himself" might also be read to imply that an accused may also refuse to testify if called as a witness in another case. This seems doubtful, however, as such cases would more appropriately be dealt with under the rules concerning the danger of self-incrimination by witnesses (see Rule 74). Certainly, the right to silence can be waived (see further Schabas, 2016, p. 1045).

Second, the ICC Statute goes beyond other instruments by explicitly laying down that silence of the accused may not be considered in the determination of guilt or innocence. This precludes procedures, such as those applicable in some national jurisdictions, allowing negative conclusions to be drawn from the failure of the accused to explain, for example, his or her presence at a location where a crime had taken place. Under Article 67(1)(g) of the ICC Statute, the ICC has determined the right to remain silent guarantees "that, in the context of an investigation and subsequent proceedings, an accused does not have to answer when being questioned, and that this silence cannot be considered against him or her".²

¹ William A. Schabas, "Article 67 – Rights of the Accused", Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Nomos, Baden Baden, 1999, p. 861 (<https://www.legal-tools.org/doc/434159/>); William A. Schabas and Yvonne McDermott, "Article 67 – Rights of the Accused", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1672 (<https://www.legal-tools.org/doc/040751/>) and William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1044.

² ICC, *Prosecutor v. Ongwen*, Trial Chamber IX, Judgment, 4 February 2021, ICC-02/04-01/15-1762-Red, para. 60 (<https://www.legal-tools.org/doc/kv27ul/>).

The Trial Chamber said that “if the Defence identifies lines of defence or issues at a significantly and unnecessarily advanced stage this may have consequences for decisions that relate to disclosure to the accused”.³ The Appeals Chamber found that this “should not be read so as to place pressure on the accused to testify or to raise defences at an early stage as a condition of obtaining prosecution disclosure” (*Lubanga*, 11 July 2008, paras. 1, 19, 55).

In examining Article 67(1)(g), Judge Pikis detailed that the right to silence:

is in no way qualified, save in relation to the specific defences prescribed in Rule 79 of the Rules. The Statute does not merely guarantee the right to silence as the inalienable right of the accused, but further provides that its exercise should draw no adverse consequences for him/her. [...] In addition, the Statute assures to the accused the right “not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal”. The right to silence is interwoven with the presumption of innocence of the accused.⁴

Although under Article 67(1)(g) the accused has the right to remain silent and cannot be compelled to testify, “once an accused voluntarily testifies under oath, he waives his right to remain silent and must answer all relevant questions, even if the answers are incriminating”.⁵ Accordingly, the accused person’s testimony may be used against him or her and, should he or she decline to answer a permissible question, the Chamber may as appropriate deduce any adverse inference (*Katanga and Ngudjolo*, 13 September 2011, para. 8). Additionally, the assurances under Rule 74 (self-incrimination by a witness) of the RPE aim to compel witnesses to answer questions under the objection of potential self-incrimination (para. 9).

³ Cited in ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1433, para. 13 (*Lubanga*, 11 July 2008’) (<https://www.legal-tools.org/doc/f5bc1e/>).

⁴ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, Party dissenting opinion of Judge Georgios M. Pikis, 11 July 2008, ICC-01/04-01/06-1433, para. 14 (<https://www.legal-tools.org/doc/f5bc1e/>).

⁵ ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, Decision on the request of the Defence for Mathieu Ngudjolo to obtain assurances with respect to self-incrimination for the accused, 13 September 2011, ICC-01/04-01/07-3153, para. 7 (*Katanga and Ngudjolo*, 13 September 2011’) (<https://www.legal-tools.org/doc/5e1944/>).

Thus, it is inappropriate to apply this rule to an accused who knowingly committed himself to answer all questions within the scope of cross-examination and, therefore, cross-examination must be limited to matters: (i) raised during examination in chief; (ii) affecting the credibility of the witness; and (iii) relevant to the case for the cross-examining party (para. 10).

The right not to be compelled to testify against oneself is “the corollary of the right to remain silent, both of which are intimately tied to the presumption of innocence”.⁶ Although the right to remain silent and the right not to be compelled to testify against oneself or privilege against self-incrimination are not explicitly recognized in Article 6 of the European Convention on Human Rights, these rights are international standards pivotal to the fair trial. They endeavour to guarantee that confessions obtained via subterfuge, coercion or duress cannot be used at trial in disregard of the accused person’s will to remain silent. In turn, the right to remain silent is related to, inter alia, have the right to decide to testify respected (*Katanga and Ngudjolo*, 21 November 2012, paras. 48 and 49).

Cross-references:

Article 66.

Rule 74.

Doctrine: For the bibliography, see the final comment on Article 67.

Authors: Juan Pablo Pérez-León-Acevedo and Björn Elberling.

⁶ ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, 21 November 2012, ICC-01/04-01/07-3319-tENG/FRA, para. 48 (*‘Katanga and Ngudjolo, 21 November 2012’*) (<https://www.legal-tools.org/doc/f5cbd0/>).

Article 67(1)(h)

(h) To make an unsworn oral or written statement in his or her defence; and

Article 67(1)(h) allows the accused to make an unsworn statement, that is, a statement made without solemn undertaking under Article 69 (and thus not subject to the penalty for false testimony under Article 70) and not subject to cross-examination. The ICC Statute thus seems to follow the civil law model, which generally does not foresee the accused taking the oath as a witness. The unsworn statement constitutes an exception to the general rule according to which testimony must be accompanied by an oath of truthfulness.¹

From the wording of Article 67(1)(h), it seems that the accused only has the right to make one statement, presumably at a specific moment in the trial, such as at the very beginning or after the presentation of all the evidence. The Statute thus does not mandate that the Chamber allows the accused to make statements throughout the trial, as is the case in certain civil law jurisdictions.² Chambers may, however, conceivably grant such rights based on their own power to control the proceedings, as at least one ICTY Trial Chamber has done.³

As the statement is unsworn, its value as evidence is doubtful (see Schabas, 1999, p. 862; Schabas and McDermott, 2016, p. 1674; and Schabas, 2016, p. 1047). Defendants may therefore also wish to testify, that is, to make a sworn statement subject to cross-examination. It is unclear whether the ICC Statute allows this or whether Article 67(1)(h) in conjunc-

¹ See further William A. Schabas, “Article 67 – Rights of the Accused”, Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Nomos, Baden Baden, 1999, p. 862 (<https://www.legal-tools.org/doc/434159/>); William A. Schabas, “Article 67 – Rights of the Accused”, in William A. Schabas and Yvonne McDermott, “Article 67 – Rights of the Accused”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1674 (<https://www.legal-tools.org/doc/040751/>) and William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1046–1047 (<https://www.legal-tools.org/doc/b7432e/>).

² See Germany, Strafprozeßordnung (Code of Criminal Procedure), Section 258(1) (<https://www.legal-tools.org/doc/wc212a/>).

³ ICTY, *Prosecutor v. Mrkšić et al.*, Trial Chamber, Order for Filing of Motions and Related Matters, 2 September 2002, IT-97-13/1, para. 7 (<https://www.legal-tools.org/doc/f738ff/>).

tion with Article 67(1)(g) must be interpreted as limiting the accused to only an unsworn statement.⁴ Be that as it may, concerning the use of unsworn oral statement by the accused, as an example, Mathieu Ngudjolo Chui made two oral statements in accordance with Article 67(1)(h) of the ICC Statute, that is, without oath, although he and his co-accused in general chose to testify pursuant to their right under Article 67(1)(g) of the ICC Statute. Whereas the Chamber to some extent took into account those unsworn statements, only sworn statements were considered part of the case record within the meaning of Article 74(2) of the ICC Statute.⁵ Hence, a Chamber may to a certain degree take into account the testimony of an accused person who, in the exercise of his or her right under Article 67(1)(h), decides not to make it make under oath; however, “only those statements made under oath must be considered part of the record of the case in accordance with article 74(2)”.⁶

The ICC Statute imposes no restriction on the right to make an unsworn written or oral statement “as to when this right may be exercised or the form the statement should take”.⁷ The accused has the right to make an unsworn oral or written statement in his or her defence without this affecting his or her right to remain silent and, therefore, “cannot be compelled to testify under oath even if they make an unsworn statement”.⁸ Nevertheless, if an accused consents to give evidence, he or she “becomes subject to the

⁴ See *pro* Alphons Orié, “Accusatorial v. Inquisitorial Approach in International Criminal Proceedings”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 2nd. ed., Oxford University Press, 2002, p. 1482 (<https://www.legal-tools.org/doc/01addc/>); *contra* Salvatore Zappalà, *Human Rights in International Criminal Proceedings*, Oxford University Press, 2003, p. 79 (<https://www.legal-tools.org/doc/ea2fd4/>).

⁵ ICC, *Prosecutor v. Ngudjolo*, Trial Chamber II, Judgment pursuant to Article 74 of the Statute, 18 December 2012, ICC-01/04-02/12-3-tENG, para. 25 (<https://www.legal-tools.org/doc/2c2cde/>).

⁶ ICC, *Prosecutor v. Katanga*, Trial Chamber II, Judgment pursuant to article 74 of the Statute, 7 March 2014, ICC-01/04-01/07-3436, para. 101 (<https://www.legal-tools.org/doc/f74b4f/>); see also *Prosecutor v. Ntaganda*, Trial Chamber VI, Judgment, 8 July 2019, ICC-01/04-02/06-2359, para. 256, fn. 647 (<https://www.legal-tools.org/doc/80578a/>).

⁷ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on opening and closing statements, 22 May 2008, ICC-01/04-01/06-1346, para. 14 (<https://www.legal-tools.org/doc/5dccaef/>).

⁸ ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, Corrigendum to the Directions for the conduct of the proceedings and testimony in accordance to rule 140, 1 December 2009, ICC-01/04-01/07-1665-Corr, para. 51 (*Katanga and Ngudjolo*, 1 December 2009) (<https://www.legal-tools.org/doc/2bf038/>).

same rules [...] that are applicable to other witnesses” (*Katanga and Ngudjolo*, 1 December 2009, para. 51).

Cross-references:

Articles 67(1)(g), 69, 70 and 74(2).

Doctrine: For the bibliography, see the final comment on Article 67.

Authors: Juan Pablo Pérez-León-Acevedo and Björn Elberling.

Article 67(1)(i)

(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

The right against a reversal of the burden of proof and against an onus of rebuttal is a corollary of Article 66 laying down the presumption of innocence and placing the burden of proof on the prosecution. Article 67(1)(i) reverse onus provision has been considered as quite original since, considering the absence of typical reverse onus provisions in the ICC Statute, its real purpose would apparently be its application to judge-made reverse onus provisions.¹ By explicitly ruling out any reversal of the burden of proof, the ICC Statute goes beyond most human rights norms – the ECHR, for example, also contains the presumption of innocence, but does allow reversals within certain limits.² Indeed, a joint, strict interpretation of Articles 66(2) and 67(1)(i) might in all circumstances lead to the burden of proof on the Prosecution which may turn to be inconsistent with criminal law under certain assumptions such as assuming the sanity of the accused person.³

Article 67(1)(i) may at first glance seem of rather limited practical value as no provisions in the ICC Statute, especially in the Articles defining substantive crimes, order or allow such a reversal. The provision may, however, still be of use in guarding against reversals contained in the Elements of Crimes (of which it does not seem to be any at the moment) or in the context of other norms concerning criminal responsibility, especially those constituting the ‘general part’ of the substantive law (on examples concerning modes of liability and grounds for excluding criminal responsibility, see Schabas, Article 66, 1999, mn. 20–21; and Schabas, 2016, pp. 1004–1005).

¹ See William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1047–1048 (<https://www.legal-tools.org/doc/b7432e/>).

² William A. Schabas, “Article 67 – Rights of the Accused”, Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Nomos, Baden Baden, 1999, mn. 22; Schabas, 2016, pp. 1004–1005 with further references.

³ See Göran Sluiter, “Human Rights Protection in the ICC Pre-Trial Phase”, Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Brill/Martinus Nijhoff Publishers, Leiden, 2009, p. 462.

Judge Pikis detailed that “The accused is presumed to be innocent. He does not have to prove his innocence. What he must do in order to free himself from the accusation is to cast doubt on its validity: it is his right to be acquitted unless the accusations against him are proven beyond reasonable doubt”.⁴ Pursuant to Article 66(2) and (3) of the ICC Statute, the onus of proving the accused person’s guilt is on the Prosecutor and, to convict the accused, the Chamber must be convinced beyond reasonable doubt. Additionally, under Article 67(1)(g) and (i) of the ICC Statute, the accused person is entitled to remain silent and not to have imposed on him or her “any reversal of the burden of proof or any onus of rebuttal”.⁵

Concerning how the rights of victims may potentially conflict with the rights of the accused, the fact that victims are authorized to participate in the ICC proceedings cannot alter, *inter alia*, the rules of burden of proof resting on the Prosecution (Article 66(2)) and the prohibition of reversal of the burden of proof (Article 67(1)(i)).⁶

Cross-references:

Articles 66, 67(1)(g) and 67(1)(i).

Doctrine: For the bibliography, see the final comment on Article 67.

Authors: Juan Pablo Pérez-León-Acevedo and Björn Elberling.

⁴ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, Party dissenting opinion of Judge Georgios M. Pikis, 11 July 2008, ICC-01/04-01/06-1433, para. 14 (<https://www.legal-tools.org/doc/f5bc1e/>).

⁵ ICC, *Prosecutor v. Bemba*, Trial Chamber III, Decision lifting the temporary suspension of the trial proceedings and addressing additional issues raised in defence submissions ICC-01/05-01/08-2490-Red and ICC-01/05-01/08-2497, 6 February 2013, ICC-01/05-01/08-2500, para. 19 (<https://www.legal-tools.org/doc/b1027a/>).

⁶ Salvatore Zappalà, “The Rights of Victims v. the Rights of the Accused”, in *Journal of International Criminal Justice*, 2010, vol. 8, no.1, p. 147.

Article 67(2)

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor’s possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

Article 67(2), which complements Article 54(1)(a) requiring the prosecution to investigate incriminating and exonerating circumstances equally, lays down the duty of the prosecution to disclose to the defence potentially exculpatory evidence. Indeed, the ICC Chambers have extended the disclosure to include both exculpatory and incriminating evidence.¹ Article 67(2) and the related RPE correspond to the general principle of international criminal procedure consisting in that the accused person “shall be granted reasonable access to the prosecution material in order to prepare his defence”.²

Application of Article 67(2) may be wider than that of Article 67(1). The Court has stated that it only applies to proceedings “pertaining to the guilt or innocence of the suspect or accused person or to the credibility of Prosecution witnesses”.³ While this means that Article 67(2) does not apply to proceedings concerning applications for participation as victims in the proceedings, the decisions could be read to imply that the provision may

¹ For example, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Final System of Disclosure and the Establishment of a Timetable, 15 May 2006, ICC-01/04-01/06-102, para. 8 (<https://www.legal-tools.org/doc/052848/>).

² Vladimir Tochilovsky, “Defence Access to the Prosecution Material”, Göran Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, p. 1097.

³ ICC, *Situation in Darfur*, Pre-Trial Chamber I, Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor, 3 December 2007, ICC-02/05-110, para. 20 (*‘Situation in Darfur, 3 December 2007’*) (<https://www.legal-tools.org/doc/5ccca1/>); and *Situation in the Democratic Republic of Congo*, Pre-Trial Chamber I, Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor, 7 December 2007, ICC-01/04-417, para. 11 (<https://www.legal-tools.org/doc/27da16/>).

well apply to other proceedings even in the investigation phase (*Situation in Darfur*, 3 December 2007, para. 6). Such evidence must be disclosed “as soon as practicable”, which also implies that the duty under Article 67(2) applies whenever the prosecution receives such material, independent of the exact stage of proceedings.

In *Lubanga*, Trial Chamber I held that “Exculpatory material [...] includes material, first, that shows or tends to show the innocence of the accused; second, which mitigates the guilt of the accused; and, third, which may affect the credibility of prosecution evidence”.⁴ Thus, the disclosure duty under the first sentence of Article 67(2) is in principle applicable to all materials under the Prosecutor’s possession or control and about which he or she considers that: demonstrate or tend to demonstrate the accused person’s innocence, mitigate the accused person’s guilt or may affect the credibility of the evidence of the Prosecution.⁵ Thus, not later than a date set up by the Trial Chamber and prior to the commencement of the trial, the Prosecution must disclose: (i) all incriminatory material as witness statements or any other material relied on at trial; (ii) Article 67(2) and Rule 77 material in its possession for inspection to the defence teams on a rolling basis; and (iii) expert witness report to be called during the Prosecution case.⁶

Article 67(2) refers only to evidence “in the Prosecutor’s possession or control”, thus excluding, for example, material in the possession of information providers such as UN troops.⁷ In *Lubanga*, the Trial Chamber stated that “the disclosure regime established by the Rome Statute framework is imposed on the prosecution alone: in other words, no positive obligation is imposed on the other organs of the Court, the defence or the par-

⁴ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, ICC-01/04-01/06-1401, para. 59 (<https://www.legal-tools.org/doc/e6a054/>).

⁵ See William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1049.

⁶ ICC, *Prosecutor v. Gbagbo and Blé Goudé*, Trial Chamber I, Order setting the commencement date for trial, 7 May 2015, ICC-02/11-01/15-58, para. 22 (<https://www.legal-tools.org/doc/91fe93/>).

⁷ See ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on Defence Requests for Disclosure of Materials, 17 November 2006, ICC-01/04-01/06-718 (<https://www.legal-tools.org/doc/fc1b60/>); p. 5 on material held by the UN Mission (‘MONU in the Democratic Republic of Congo; in this instance the court sent a request to MONUC via the Registrar in order to gain access to such material in question, see p. 7.

participants to disclose exculpatory material to the defence under Article 67(2) of the Statute, Rule 77 or Rule 76 of the Rules”.⁸

For cases in which disclosure under Article 67(2) may endanger further investigations or conflict with other obligations of the prosecution concerning evidence, Rules 81 and 82 contain certain restrictions on disclosure.⁹

While disclosure of evidence is generally directly between the parties, the court has the power to decide in cases of doubt. This is further elaborated upon in Rule 83 of the RPE. The court may also, under Rule 84, make orders for disclosure of material not yet disclosed prior to trial.

The disclosure obligation under Article 67(2) is ongoing.¹⁰

The Prosecutor has an ongoing obligation to disclose exculpatory material.¹¹ With regard to the disclosure of material in the Prosecution’s possession, however, the ICC’s jurisprudence has considered “it appropriate to set a deadline for the Prosecution to disclose any incriminating material it intends to rely on at trial, in addition to any material in its possession falling under Article 67(2) of the Statute and Rule 77 of the Rules”.¹² In

⁸ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on the defence application for disclosure of victims applications, 21 January 2009, ICC-01/04-01/06-1637, para. 10 (<https://www.legal-tools.org/doc/653f89/>).

⁹ See also ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Information in respect of the Second Decision on Rule 81 Motions, 28 September 2006, ICC-01/04-01/06-490 (<https://www.legal-tools.org/doc/125213/>); *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision Further to the Information Provided by the Prosecutor on 25 October 2006, 30 October 2006, ICC-01/04-01/06-629-tEN (<https://www.legal-tools.org/doc/bcb5ce/>), on conflicts with Article 54(3)(e); and *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Defence Request for Order to Disclose Exculpatory Materials, 2 November 2006, ICC-01/04-01/06-649, p. 3, on witness protection issues (<https://www.legal-tools.org/doc/727d50/>).

¹⁰ See ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision Regarding the Timing and Manner of Disclosure and the Date of Trial, 9 November 2007, ICC-01/04-01/06-1019, para. 28 (<https://www.legal-tools.org/doc/95f02c/>); and *Prosecutor v. Katanga*, Pre-Trial Chamber I, Decision Modifying the Calendar for the Disclosure of the Supporting Materials of the Prosecution Application for a Warrant of Arrest against Germain Katanga, 5 November 2007, ICC-01/04-01/07-60, p. 8 (<https://www.legal-tools.org/doc/dee266/>).

¹¹ ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision Establishing a Calendar in the Case against Germain Katanga and Mathieu Ngudjolo Chui, 10 March 2008, ICC-01/04-01/07-259, p. 12 (<https://www.legal-tools.org/doc/2fc5ef/>).

¹² ICC, *Prosecutor v. Yekatom and Ngaïssona*, Trial Chamber V, Decision Setting the Commencement Date of the Trial, 16 July 2020, ICC-01/14-01/18-589, para. 8 (*Yekatom and Ngaïssona*, 16 July 2020) (<https://www.legal-tools.org/doc/27mzgg/>).

establishing the disclosure deadline, the competent Chamber needs to "balance the competing interests of the parties, whilst taking into consideration the specific circumstances at hand" (*Yekatom and Ngaissona*, 16 July 2020, para. 9).

As Schabas points out, the disclosure duty is seemingly attenuated with regard to confirmation charges (Schabas, 2016, p. 1050). Thus, disclosing the "bulk of the materials identified as potentially exculpatory or otherwise material to the Defence's preparation for the confirmation hearing", also known as "the bulk rule" would suffice, that is, the Prosecutor should disclose to the defence the bulk of potentially exonerating evidence and evidence material to the preparation of the defence, before the confirmation of charges hearing.¹³ In cases when relevant material is subject to redactions, the confirmation hearing is not necessarily unfair if access to certain potentially exculpatory material is denied to the defence.¹⁴ Nevertheless, judges departed from the practice developed in *Lubanga* and *Katanga and Ngudjolo*, that is, the so-called "bulk-rule", since in *Mbarushimana* and the Kenyan cases they opted for the total disclosure of all said material before the confirmation of charges hearing. The Prosecutor has also been asked by the judges to prepare summaries in order to help the defence understand and identify the relevance of each evidentiary piece.¹⁵

Substitutes for disclosure, for example, summaries of materials or disclosure of analogous materials, are insufficient (*Katanga and Ngudjolo*,

¹³ ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing, 20 June 2008, ICC-01/04-01/07-621, para. 8 ('*Katanga and Ngudjolo*, 20 June 2008') (<https://www.legal-tools.org/doc/0d8508/>); and *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06-803, para. 154 (<https://www.legal-tools.org/doc/b7ac4f/>).

¹⁴ ICC, *Prosecutor v. Katanga*, Appeals Chamber, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorization to Redact Witnesses Statements", 13 May 2008, ICC-01/04-01/07-475, paras. 71–73 (<https://www.legal-tools.org/doc/a76f99/>).

¹⁵ ICC, *Prosecutor v. Ruto et al.*, Pre-Trial Chamber II, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 6 April 2011, ICC-01/09-01/11-44, para. 6 (<https://www.legal-tools.org/doc/351827/>); *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on issues relating to disclosure, 30 March 2011, ICC-01/04-01/10-87 (<https://www.legal-tools.org/doc/ace80d/>).

20 June 2008, para. 6). The Trial Chamber may authorize redactions of documents and summaries of exculpatory evidence are not permitted.¹⁶

The Prosecutor's obligation of disclosure under Article 67(2) and the Prosecutor's power to confidentially collect evidence under Article 54(3)(e) are in tension as the latter enables to collect lead-evidence used to produce other evidence rather than for production before the ICC.¹⁷ If information provided under Article 54(3)(e) is given under confidentiality agreement, this happens to contain potentially exculpatory material and the informer denies permission to disclose, the Prosecutor may face severe problems. Precisely, the Trial Chamber in *Lubanga* ordered a stay of proceedings and only lifted it when the Prosecutor had been authorized by the informer to disclose potentially exculpatory evidence to the defence (see Schabas, 2016, p. 1051).

In *Bemba*, the Appeals Chamber noted that the ICC legal framework contains no explicit disclosure regime concerning interim release applications, considered the arrested person's rights and guarantees and stated that he or she should ideally have all such information at the time of his or her initial appearance at the ICC.¹⁸

As to individuals identified by the defence and who may provide critical exculpatory evidence, the Trial Chamber may review Article 67(2) materials available to the defence to ascertain whether evidentiary materials disclosed up to that moment engage defence lines that had been made known to or are apparent to the Chamber.¹⁹ Then, the Chamber reviews the disclosure of the identities of potentially exculpatory witnesses and their

¹⁶ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Reasons for Oral Decision Lifting the Stay of Proceedings, 23 January 2009, ICC-01/04-01/06-1644, paras. 41–47 (<https://www.legal-tools.org/doc/94e831/>).

¹⁷ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008”, 21 October 2008, ICC-01/04-01/06-1486, para. 43 (*‘Lubanga*, 21 October 2008’) (<https://www.legal-tools.org/doc/485c2d/>).

¹⁸ ICC, *Prosecutor v. Bemba*, Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled ‘Decision on application for interim release’, 16 December 2008, ICC-01/05-01/08-323, paras. 26 and 32 (<https://www.legal-tools.org/doc/5a1931/>).

¹⁹ ICC, *Prosecutor v. Banda and Jerbo*, Trial Chamber IV, Decision on the defence request for a temporary stay of proceedings, 26 October 2012, ICC-02/05-03/09-410, para. 98 (*‘Banda and Jerbo*, 26 October 2012’) (<https://www.legal-tools.org/doc/414cc4/>).

statements as well as “issues of interviews between the defence and prosecution witnesses, issues of translation and co-operation and issues of disclosure of documents, including those exculpatory documents received by the prosecution under confidentiality agreements pursuant to Article 54(3)(e)” (*Banda and Jerbo*, 26 October 2012, para. 98). Before the status conference, the Trial Chamber in *Banda and Jerbo* had requested the Prosecutor to file an updated and comprehensive report on exculpatory evidence disclosed to the defence. This had the purpose to enable the Chamber to determine whether, in general, “the disclosed Article 67(2) material may support lines of defence that may reasonably arise from unavailable evidence” and the related analysis also assists “in determining whether a fair trial is impossible in the case” (para. 109). Considering particular circumstances and as an alternative to the severe remedy of temporarily staying proceedings, the defence may voluntarily consider revealing one line of argument to the Prosecutor so as “to facilitate the search for, and disclosure of, relevant evidence and the investigation thereof” (para. 113).

As to requests for filing additional documents before trial, the decision on the confirmation of charges defines the trial parameters.²⁰ Thus, an updated document containing the charges is not needed for the accused person to prepare an effective defence under Article 67. Nevertheless, “this does not preclude the filing, by the Prosecution, of other auxiliary documents with a view of providing the Defence with further details in relation to the charges confirmed” (*Gbagbo and Blé Goudé*, 7 May 2015, para. 17)

The second sentence of Article 67(2) makes it clear that the Trial Chamber conducts the final assessment on whether material in Prosecutor’s control or possession has to be disclosed (*Lubanga*, 21 October 2008, para. 46). Moreover, in doing so, the Trial Chamber may provide protective measures and limitations on disclosure requested by the Prosecutor as far as those are proportionate and necessary to protect the witnesses and without causing unfairness to the defence.²¹ Under Rule 83 of the Rules of Procedure and Evidence, it is possible for the ICC Prosecutor to request a hearing before the competent Chamber in order to:

²⁰ ICC, *Prosecutor v. Gbagbo and Blé Goudé*, Trial Chamber I, Order setting the commencement date for trial, 7 May 2015, ICC-02/11-01/15-58, para. 17 (*‘Gbagbo and Blé Goudé, 7 May 2015’*) (<https://www.legal-tools.org/doc/91fe93/>).

²¹ ICC, *Prosecutor v. Lubanga*, Transcript, 16 January 2009, ICC-01/04-01/06-T-104, p. 13 (<https://www.legal-tools.org/doc/032a0f/>).

determine whether the Defence should have access to some specific materials. The presence of the Defence at this type of hearing would, in principle, defeat its very purpose because: (i) the Prosecution would be prevented from going into the details of the relevant materials, which have not yet been disclosed to the Defence; and (ii) the Defence would not be in a position to make meaningful submissions as it does not have access to such materials (*Katanga and Ngudjolo*, 20 June 2008, para. 2).

Pre-Trial Chamber II, in *Ruto et al.*, considered that it was fair to oblige the Prosecutor to timely make total disclosure at the pre-confirmation stage and concluded that Prosecution's objections to explanatory summaries were result of a misunderstanding of the decision.²² In *Mbarushimana*, Pre-Trial Chamber I found that the disclosure orders were not so burdensome to affect fairness in detriment to the Prosecution.²³

The Trial Chamber has to consider at face value whether the disclosed Article 67(2) evidence involves lines of defence that the defence intends to pursue during trial. After the Trial Chamber examines the whole evidentiary material at the end of the trial, it may arrive to conclusions and strike a balance between fairness and the fact that additional material based upon which the same argumentative lines could not have been obtained by the defence as a consequence of the absence of on-site investigations. Taking into account the case circumstances, the Trial Chamber has to determine whether a fair trial is not prospectively impossible. If a fair trial is seemingly possible, the Trial Chamber may relieve against any prejudice stemming from unfairness in the trial (*Banda and Jerbo*, 26 October 2012, para. 114).

A stay of the proceedings constitutes an exceptional remedy and resorted only if the situation prompting the request for the stay neither can be resolved at a later stage nor can be cured during the trial. If the Chamber considers that the situation of the defence's access to this information has

²² ICC, *Prosecutor v. Ruto et al.*, Pre-Trial Chamber II, Decision on the 'Prosecution's Application for leave to Appeal the 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters' ICC-01/09-01/11-44, 2 May 2011, ICC-01/09-01/11-74, paras. 18 and 27 (<https://www.legal-tools.org/doc/7ea8aa/>).

²³ ICC, *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the "Prosecution's application for leave to Appeal the 'Decision on issues relating to disclosure' (ICC-01/04-01/1-87)", 21 April 2011, ICC-01/04-01/10-116, para. 18 (<https://www.legal-tools.org/doc/c803fc/>).

significantly improved and, thus, disclosure of critical information to the defence prior to the trial is enabled, the Chamber will most likely reject requests for stay of proceedings, even temporarily (*Banda and Jerbo*, 26 October 2012, para. 121). As for defence access to Prosecution witnesses, although it corresponds to the witnesses' prerogatives, the Prosecution is encouraged to do its best to secure defence access to them (para. 128).

For more on disclosure generally, including questions on procedure and timing, see the commentary on Rules 76 *et seq.*

Cross-references:

Article 54(1)(a), 54(3)(e) and 67(1).

Rules 76 *et seq.*, 81–84.

Doctrine:

1. Hiram Abtahi, “The International Criminal Court During the COVID-19 Pandemic”, in *Journal of International Criminal Justice*, 2020, vol. 18, no. 5, pp. 1072–1073.
2. Till Gut *et al.*, “Defence Issues”, in Göran Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, pp. 1203–97.
3. Robert Heinsch, “How to Achieve Fair and Expeditious Trial Proceedings before the ICC: Is It Time for a More Judge-Dominated Approach?”, Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Brill/Martinus Nijhoff Publishers, Leiden, 2009, pp. 479–99.
4. Steven Kay and Bert Swart, “The Role of the Defence”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 2nd. ed., Oxford University Press, 2002, pp. 1421–37 (<https://www.legal-tools.org/doc/01addc/>).
5. Benjamin Gumpert and Yulia Nuzban, “Length of Proceedings at the International Criminal Court: Context, Latest Developments and Proposed Steps to Address the Issue”, in Viviane Dittrich and Alexander Heinze (eds.), *The Past, Present and Future of the International Criminal Court*, Torkel Opsahl Academic EPublisher, Brussels, 2021, pp. 553–613 (<https://www.toaep.org/nas-pdf/5-dittrich-heinze/>).

6. Geert-Jan Alexander Knoops, *Theory and Practice of International and Internationalized Criminal Proceedings*, Kluwer Law International, The Hague, 2005 (<https://www.legal-tools.org/doc/7318c6/>).
7. Michele Marchesiello, “Proceedings Before the Pre-Trial Chamber”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), 2002, pp. 1231–46.
8. Yvonne McDermott, “General Duty to Ensure the Right to a Fair and Expeditious Trial”, in Göran Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, pp. 770–818.
9. William A. Schabas, “Article 63 – Trial in the Presence of the Accused”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Nomos, Baden Baden, 1999, pp. 803–8 (<https://www.legal-tools.org/doc/434159/>).
10. Juan-Pablo Pérez-Léon-Acevedo and Joanna Nicholson (eds.), *Defendants and Victims in International Criminal Justice: Ensuring and Balancing Their Rights*, Routledge, Abingdon/New York, 2020.
11. Juan-Pablo Pérez-Léon-Acevedo, “International Human Rights Law in International and Hybrid Criminal Courts and Tribunals”, in *Global Community: Yearbook of International Law and Jurisprudence-2021, 2022*, vol. 21, no 1 (forthcoming).
12. William A. Schabas, “Article 66 – Presumption of Innocence”, in Otto Triffterer (ed.), 1999, pp. 833–43.
13. William A. Schabas, “Article 67 – Rights of the Accused”, in Otto Triffterer (ed.), 1999, pp. 845–68.
14. William A. Schabas, “Article 63 – Trial in The presence of the Accused”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1563–1587 (<https://www.legal-tools.org/doc/040751/>).
15. William A. Schabas and Yvonne McDermott, “Article 66”, in Otto Triffterer and Kai Ambos (eds.), 2016, pp. 1635–1649.
16. William A. Schabas and Yvonne McDermott, “Article 67 – Rights of the Accused”, in Otto Triffterer and Kai Ambos (eds.), 2016, pp. 1650–1680.
17. William Schabas and Yvonne McDermott, “Article 67 - Rights of the Accused”, in Kai Ambos (ed.), *Rome Statute of the International Crim-*

- inal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, pp. 1966–2000.
18. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1016–1053.
 19. Göran Sluiter, “Human Rights Protection in the ICC Pre-Trial Phase”, in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Brill/Martinus Nijhoff Publishers, Leiden, 2009, pp. 459–75.
 20. Frank Terrier, “Procedure Before the Trial Chamber”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), 2002, pp. 1277–1318.
 21. Vladimir Tochilovsky, “Defence Access to the Prosecution Material”, Göran Sluiter *et al.* (eds.), 2013, pp. 1083–98.
 22. Ekaterina Trendafilova, “Fairness and Expediousness in the International Criminal Court’s Pre-trial Proceedings”, in Carsten Stahn and Göran Sluiter (eds.), 2009, pp. 441–57.
 23. Alphons Orié, “Accusatorial v. Inquisitorial Approach in International Criminal Proceedings”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), 2002. pp. 1439–95.
 24. Caleb Wheeler, “The ICC Appeals Chamber Signals a Possible Change in Approach to the Permissibility of Trials in Absentia”, *EJIL: Talk!*, 3 July 2020.
 25. Elizabeth White, “Towards a New Normal: Digitization of International Criminal Law in the Age of Coronavirus”, in *Columbia Journal of Transnational Law*, 2021, vol. 60, no. 1, pp. 1–42.
 26. Salvatore Zappala, *Human Rights in International Criminal Proceedings*, Oxford University Press, 2003 (<https://www.legal-tools.org/doc/ea2fd4/>).
 27. Salvatore Zappalà, “The Rights of Victims v. the Rights of the Accused”, in *Journal of International Criminal Justice*, 2010, vol. 8, no. 1, pp. 137–64.

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Article 68

Protection of the Victims and Witnesses and their Participation in the Proceedings

General Remarks:

Protection of Victims and Witnesses:

Article 68 establishes an obligation for the Court to protect victims and witnesses, in a similar manner to the obligation established for other international criminal tribunals. In fact, the protection of the victims is a recurring theme of the Statute,¹ to the point that a unit is established within the Registry to advise the Court on the protection of victims and witnesses. Moreover, the Statute and the Rules of Procedure and Evidence grant special protective measures to victims, taking into account their age and the harm they have suffered. As a result, children and victims of sexual violence are specially protected by the Court.

Participation of Victims and Witnesses:

Victims with relevant information to pass it on to the Prosecutor may do so pursuant to Articles 15(2) and 42(1) without the need to be formally accorded a right to participate in the proceedings under Article 68 of the Statute (*Situation in the Democratic Republic of the Congo*, 19 December 2008, para. 53). Moreover, victims are specifically granted the right to make representations under Articles 15(3) and 19(3) of the Statute in specific procedural stages. However, the object and purpose of Article 68(3) is to provide victims with a meaningful role in criminal proceedings before the Court so that they can have a substantial impact in the proceedings.² In this regard, the role of victims in criminal proceedings before the Court, provided for in Article 68(3) of the Statute and the corresponding Rules of Procedure and Evidence, constitutes one of the main features of the proce-

¹ ICC, *Situation in the Democratic Republic of the Congo*, Appeals Chamber, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, 19 December 2008, ICC-01/04-556, para. 54 (*'Situation in the Democratic Republic of the Congo*, 19 December 2008') (<https://www.legal-tools.org/doc/dca981/>).

² ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, 13 May 2008, ICC-01/04-01/07-474, para. 157 (<https://www.legal-tools.org/doc/285b52/>).

dural framework of Court, as well as a novelty in international criminal law. In this regard, the Court has consistently clarified that the participation of victims pursuant to Article 68(3) of the Statute (i) is confined to proceedings before the Court, (ii) aims to afford victims an opportunity to voice their views and concerns on matters affecting their personal interests, and (iii) does not equate victims to parties to the proceedings before a Chamber, restricting their participation to issues arising therein touching upon their personal interests, and then at stages and in a manner not inconsistent with the rights of the accused and a fair and impartial trial.³

Preparatory Works:

The paragraphs of Article 68 dealing with the protection of victims and witnesses were proposed early in the negotiation of the ICC Statute, on the basis of similar provisions from the Statutes of the ICTY and the ICTR,

³ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”, 13 February 2007, ICC-01/04-01/06-824-tCMN (<https://www.legal-tools.org/doc/ff3bd8/>); *Prosecutor v. Lubanga*, Appeals Chamber, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the “Directions and Decision of the Appeals Chamber” of 2 February 2007, 13 June 2007, ICC-01/04-01/06-925 (<https://www.legal-tools.org/doc/b3dad9/>); *Prosecutor v. Lubanga*, Appeals Chamber, Decision, in limine, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision entitled “Decision on Victims’ Participation”, 16 May 2008, ICC-01/04-01/06-1335 (<https://www.legal-tools.org/doc/c27114/>); *Situation in Darfur*, Appeals Chamber, Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence, 18 June 2008, ICC-02/05-138 (<https://www.legal-tools.org/doc/a30c45/>); *Situation in the Democratic Republic of the Congo*, Appeals Chamber, Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 7 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 24 December 2007, 30 June 2008, ICC-01/04-503 (<https://www.legal-tools.org/doc/6aacb4/>); *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432 (<https://www.legal-tools.org/doc/75cfla/>); *Situation in the Democratic Republic of the Congo*, Appeals Chamber, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, 19 December 2008, ICC-01/04-556 (<https://www.legal-tools.org/doc/dca981/>).

and their discussion did not pose particular challenges.⁴ By contrast, the introduction of participatory provisions in Article 68(3) does not have any precedent in other international criminal tribunal and was, as such, quite controversial during the negotiations. France made a proposal for victims to have a right to reparation⁵ and Egypt went even further, suggesting in this sense that they become *parties civiles* with the capacity to submit additional evidence needed to establish the basis of criminal responsibility.⁶ However, some States were against the broad scope of these proposals. As a compromise, New Zealand circulated language taken from paragraph 6(b) of the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.⁷ A compromise solution was eventually reached on the basis of an amended text circulated during the Rome Conference by Canada.⁸

Doctrine: For the bibliography, see the final comment on Article 68.

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⁴ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II, UN Doc. A/51/22, 13 September 1996, p. 204 (<https://www.legal-tools.org/doc/03b284/>); Decisions Taken by the Preparatory Committee at its Session Held from 4 to 15 August 1997, UN Doc. A/AC.249/1997/L.8/Rev.1, 14 August 1997, pp. 36–37 (<https://www.legal-tools.org/doc/11411b/>).

⁵ Draft Statute of the International Criminal Court, Working paper submitted by France, UN Doc. A/AC.249/L.3, 7 August 1996, Articles 50(3), 126 and 130(2) (<https://www.legal-tools.org/doc/4d28ee>).

⁶ Proposal for Article 43 Submitted by Egypt, UN Doc. A/AC.249/WP.11, 19 August 1996, Article 43(2)(b) (<https://www.legal-tools.org/doc/41a017/>).

⁷ Proposal by New Zealand on Article 43, Non-Paper/WG.4/No.19, 14 August 1997, Article 43(3) (<https://www.legal-tools.org/doc/658b45/>).

⁸ Article 68, Protection of the Victims and Witnesses and Their Participation in the Proceedings: Proposal Submitted by Canada, UN Doc. A/CONF.183/C.1/WGPM/L.58/Rev.1, 6 July 1998, Article 68(3) (<https://www.legal-tools.org/doc/8f9b1c/>).

Article 68(1): Appropriate Measures

1. The Court shall take appropriate measures

Analysis:

Initiative on Measures:

Article 68(1) of the Rome Statute mandates the Chambers and the other organs of the Court to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of the victims without prejudicing or being inconsistent with the rights of the accused and a fair and impartial trial.¹ This is a provision of a general nature, which aims at placing on all organs of the Court, including the Prosecution, the obligation to take “appropriate measures” for the protection of witnesses and not to attribute to any of the organs of the Court, including the Prosecution, the power to take whichever protective measure the relevant organ may consider necessary to protect a given witness. Every organ of the Court has the obligation to pay particular attention to the needs of the witnesses in performing their functions and to co-operate, whenever necessary, with those organs of the Court that are competent to adopt specific protective measures.²

The Pre-Trial Chambers are in particular mandated to ensure that measures are adopted for these purposes.³ Victims as well as witnesses may move the Court to take protective measures for their safety, physical and psychological well-being, dignity and privacy as foreseen inter alia in Arti-

¹ ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on protective measures requested by applicants 01/044-1/dp to 01/0-6/dp, 22 July 2005, ICC-01/04-73 (<https://www.legal-tools.org/doc/a15e9d/>), p. 3; ICC, *Situation in Darfur*, Pre-Trial Chamber I, Decision on Confidentiality Matters and Extension of Page Limit, 8 June 2007, ICC-02/05-79, p. 3 (<https://www.legal-tools.org/doc/bbc6b9/>); *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on matters of confidentiality and the Request for extension of the page limit (public redacted version), 19 June 2007, ICC-01/04-342-tEN, pp. 5–6 (<https://www.legal-tools.org/doc/028c61/>)

² ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, 21 April 2008, ICC-01/04-01/07-428, paras. 26–27 (*Katanga and Ngudjolo*, 21 April 2008’) (<https://www.legal-tools.org/doc/595408/>).

³ ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber. I, Decision on the Prosecution requests for redactions pursuant to rule 81(2) and 81(4) of the Rules and for an Extension of Time pursuant to regulation 35 of the Regulations of the Court, 10 March 2008, ICC-01/04-01/07-312, p. 6 (<https://www.legal-tools.org/doc/cdaa87/>).

cle 68(1) and (2) of the Statute and Rules 87 and 88 of the Rules.⁴ Moreover, the Court may also order said measures *proprio motu* under Article 68(1), such as inviting representatives of organisations to submit observations on current and specific issues related to the protection of victims⁵ or mandating the non-disclosure of the identity of victim applicants to the Defence⁶ or to the public⁷ for security reasons.

Control over Protective Measures:

The Chambers of the Court may control the protective measures applied by other organs of the Court and correct them, resorting to the powers expressly entrusted by Article 57(3)(c) of the Statute, if they determine that the behaviour of another organ, such as the Registry, has created a serious risk for the witnesses' safety (*Katanga and Ngudjolo*, 21 April 2008, paras. 49–52). In this regard, the decisions of the Registrar on protective measures will only be struck down either if it has applied an incorrect approach (for example, the wrong criteria) or if the Victims and Witnesses Unit has arrived at a conclusion which, on an assessment of the facts, is plainly wrong. The Victims and Witnesses Unit is entrusted with the discretion to consider applications for protective measures pursuant to Articles 43 and 68 of the Statute and Regulation 96 of the Regulations of the Registry, and the Court may review its decisions either *proprio motu* or upon an application by the parties or the participants, applying judicial review principles.⁸

⁴ ICC, *Situation in the Democratic Republic of the Congo*, Appeals Chamber, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, 19 December 2008, ICC-01/04-556, para. 50 (<https://www.legal-tools.org/doc/dca981/>).

⁵ ICC, *Situation in Darfur, Sudan*, Pre-Trial Chamber I, Decision Inviting Observations in Application of Rule 103 of the Rules of Procedure and Evidence, 24 July 2006, ICC-02/05-10, p. 4 (<https://www.legal-tools.org/doc/657682/>).

⁶ ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the Defence Application for Leave to Appeal the “Decision authorising the filing of observations on the applications for participation in the proceedings a/0327/07 to a/0337/07 and a/0001/08”, 27 February 2008, ICC-01/04-01/07-241, p. 5 (<https://www.legal-tools.org/doc/e9180f/>).

⁷ ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, 13 May 2008, ICC-01/04-01/07-474, paras. 21–22 (<https://www.legal-tools.org/doc/285b52/>).

⁸ ICC, *Prosecutor v. Lubanga*, Trial Chamber, Decision on disclosure issues, responsibilities for protective measures and other procedural matters, 24 April 2008, ICC-01/04-01/06-1311-Anx2, para. 82 (<https://www.legal-tools.org/doc/a44dab/>).

Doctrine: For the bibliography, see the final comment on Article 68.

Author: Enrique Carnero Rojo.

Article 68(1): Measures to Protect the Safety, Well-Being, Dignity and Privacy

to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.

Proportionate Measures:

Article 68(1) of the ICC Statute encompasses the principle of proportionality, according to which protective measures should restrict the rights of the parties only as far as necessary, taking into account the nature and purpose of the proceedings at stake.¹ Particular protective measures must be adopted on a case-by-case basis if and when the need arises.²

List of Measures:

The protective measures ordered by the Court under Article 68(1) of the ICC Statute include:

1. the redaction of the applications for participation received from victims under Article 68(3) and transmitted to the parties for a reply under Rule 89(1), especially if the suspect or accused may have access to said applications;³

¹ ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on Protective Measures Requested by Applicants 01/04-1/dp to 01/04-6/dp, 21 July 2005, ICC-01/04-73, p. 4 (*'Situation in the Democratic Republic of the Congo, 21 July 2005'*) (<https://www.legal-tools.org/doc/a15e9d/>); *Prosecutor v. Kony et al.*, Pre-Trial Chamber II, Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 1 February 2007, ICC-02/04-01/05-134, para. 24 (<https://www.legal-tools.org/doc/03e64f/>).

² ICC, *Situation in Darfur*, Pre-Trial Chamber I, Decision on Confidentiality Matters and Extension of Page Limit, 8 June 2007, ICC-02/05-79, p. 4 (<https://www.legal-tools.org/doc/bbc6b9/>); *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on matters of confidentiality and the Request for extension of the page limit (public redacted version), 19 June 2007, ICC-01/04-342-tEN, p. 7 (<https://www.legal-tools.org/doc/028c61/>).

³ *Situation in the Democratic Republic of the Congo*, 21 July 2005, p. 3; ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision authorising the filing of observations on applications for participation in the proceedings a/0072/06 à a/0072/06 à a/0080/06 et a/0105/06, 29 September 2006, ICC-01/04-01/06-494-tEN, p. 2 (<https://www.legal-tools.org/doc/63059d/>); *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the Requests of the Legal Representative of Applicants on Application Process for Victims' Participation and Legal Representation, 17 August 2007, ICC-01/04-374, paras. 20–21 and 28–

2. the redaction of submissions or decisions that are under seal before making them public⁴ or the redaction of evidence before transmitting it to the suspect or accused;⁵
3. the use of *ex parte* filings and *ex parte* hearings;⁶
4. the use of reference numbers assigned by the Victims Participation and Reparations Section ('VPRS') to the names of victims and witnesses;⁷

29 ('*Situation in the Democratic Republic of the Congo*, 17 August 2007') (<https://www.legal-tools.org/doc/a4e393/>).

- 4 ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision to Unseal the Warrant of Arrest Against Mr. Thomas Lubanga Dyilo and Related Documents, 17 March 2006, ICC-01/04-01/06-37, pp. 3–4 ('*Lubanga*, 17 March 2006') (<https://www.legal-tools.org/doc/9d7bad/>).
- 5 ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision Establishing a Calendar in the Case against Germain Katanga and Mathieu Ngudjolo Chui, 10 March 2008, ICC-01/04-01/07-259, p. 7 (<https://www.legal-tools.org/doc/2fe5ef/>).
- 6 ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Annex I of Decision issuing a redacted version of "Decision on the prosecution's filing entitled 'Prosecution's provision of information to the Trial Chamber' filed on 3 September 2007", 26 September 2007, ICC-01/04-01/06-963-Anx1, para. 27 (<https://www.legal-tools.org/doc/21cca2/>); *Prosecutor v. Lubanga*, Trial Chamber I, Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters, 24 April 2008, ICC-01/04-01/06-1311-Anx2, para. 104 (<https://www.legal-tools.org/doc/a44dab/>).
- 7 *Situation in the Democratic Republic of the Congo*, 17 August 2007, p. 24; ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Corrigendum to the "Decision on the applications for participation filed in connection with the investigation in the Democratic Republic of the Congo by a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06 to a/0080/06 [...]", 31 January 2008, ICC-01/04-423-Corr-tENG, p. 52 ('*Situation in the Democratic Republic of the Congo*, 31 January 2008') (<https://www.legal-tools.org/doc/de0474/>); *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the Set of Procedural Rights Attached to Procedural Status of Victims at the Pre-Trial Stage of the Case (quoted as *Urgent*), 13 May 2008, ICC-01/04-01/07-474, paras. 21–22 (<https://www.legal-tools.org/doc/285b52/>); *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the applications for participation filed in connection with the investigation in the Democratic Republic of Congo by Applicants a/0047/06 to a/0052/06, a/0163/06 to a/0187/06, a/0221/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06, and a/0241/06 to a/0250/06, 3 July 2008, ICC-01/04-505, p. 41 ('*Situation in the Democratic Republic of the Congo*, 3 July 2008') (<https://www.legal-tools.org/doc/79af84/>); *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of Congo by Applicants a/0189/06 to a/0198/06, a/0200/06 to a/0202/06, a/0204/06 to a/0208/06, a/0210/06 to a/0213/06, a/0215/06 to a/0218/06, a/0219/06, a/0223/06, a/0332/07, a/0334/07 to a/0337/07, a/0001/08, a/0030/08 and a/0031/08, 4 November 2008, ICC-01/04-545, p. 39 ('*Situation in the Democratic Republic of the Congo*, 4 November 2008') (<https://www.legal-tools.org/doc/9e1c30/>).

5. the prohibition for the parties to directly obtain confidential information on victims and witnesses, without a Chamber deciding whether to allow the parties to disclose confidential information regarding victims and witnesses;⁸
6. the prohibition for the parties to directly contact victims and witnesses and the obligation to do so only through their legal representatives, the VPRS or the VWU if strictly necessary;⁹
7. the non-publication of particular motions or requests, such as those requesting the issuance of warrant of arrests, until otherwise ordered by a Chamber (*Lubanga*, 17 March 2006, p. 2);
8. the holding of hearings in closed session;¹⁰
9. the provision of assistance to witnesses in the experience of giving oral evidence before the Court so as to prevent them from finding themselves in a disadvantageous position or from being taken by surprise as a result of their ignorance of the process of giving oral testimony ('witness familiarization') before the Court;¹¹
10. the disclosure in advance of the questions or the topics intended to be covered by the parties and participants during their questioning in order to protect traumatised or vulnerable witnesses;¹²

⁸ ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the request by the OPCD for access to previous filings, 11 September 2007, ICC-01/04-389, p. 7 (<https://www.legal-tools.org/doc/cafa3c/>).

⁹ *Situation in the Democratic Republic of the Congo*, 21 July 2005, p. 6; *Situation in Darfur*, Pre-Trial Chamber I, Decision authorising the filing of observations on applications for participation in the proceedings a/0011/06 to a/0015/06, 23 May 2007, ICC-02/05-74, pp. 2 and 4 (<https://www.legal-tools.org/doc/685f01/>); *Situation in the Democratic Republic of the Congo*, 17 August 2007, p. 24; *Situation in the Democratic Republic of the Congo*, 31 January 2008, p. 52; *Situation in the Democratic Republic of the Congo*, 4 November 2008, p. 39.

¹⁰ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Schedule and Conduct of the Confirmation Hearing, 7 November 2006, ICC-01/04-01/06-678, pp. 5 and 6 (<https://www.legal-tools.org/doc/abb2c3/>).

¹¹ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 November 2006, ICC-01/04-01/06-679, paras. 20–21 (<https://www.legal-tools.org/doc/dd3a88/>); *Prosecutor v. Lubanga*, Trial Chamber I, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, 30 November 2007, ICC-01/04-01/06-1049, paras. 33–34 (<https://www.legal-tools.org/doc/ac1329/>).

¹² ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on various issues related to witnesses' testimony during trial, 29 January 2008, ICC-01/04-01/06-1140, para. 33

11. the relocation of witnesses included in the Protection Programme of the Court;¹³
12. the denial of provisional release requested by a suspect or accused;¹⁴ and
13. the modification of the time limits to issue decisions under Article 61.¹⁵

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(<https://www.legal-tools.org/doc/8367f1/>); *Prosecutor v. Lubanga*, Trial Chamber I, Decision on disclosure by the defence, 20 March 2008, ICC-01/04-01/06-1235, para. 37 (<https://www.legal-tools.org/doc/d372fb/>).

¹³ ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, 21 April 2008, ICC-01/04-01/07-428-Corr, paras. 23–25 (<https://www.legal-tools.org/doc/6442e8/>).

¹⁴ ICC, *Prosecutor v. Bemba*, Trial Chamber III, Public Redacted Version of the 26 September 2011 Decision on the accused’s application for provisional release in light of the Appeals Chamber’s judgment of 19 August 2011, 27 September 2011, ICC-01/05-01/08-1789-Red, para. 33 (<https://www.legal-tools.org/doc/efc5ad/>); *Prosecutor v. Gbagbo*, Trial Chamber I, Seventh decision on the review of Mr Laurent Gbagbo’s detention pursuant to Article 60(3) of the Statute, 11 November 2014, ICC-02/11-01/11-718-Red, para. 64 (<https://www.legal-tools.org/doc/ce4b2b/>).

¹⁵ ICC, *Prosecutor v. Ruto et al.*, Pre-Trial Chamber II, Decision on the Issuance of the Decision Pursuant to Article 61(7) of the Rome Statute, 26 October 2011, ICC-01/09-01/11-357, paras. 13–14 (<https://www.legal-tools.org/doc/7605f5/>).

Article 68(1): Factors to be Considered when Adopting Protective Measures

In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in Article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children.

The drafters of the Statute and the Rules of Procedure and Evidence included a number of provisions specifically governing the protection of victims of sexual offences as a result of crimes within the jurisdiction of the Court. In particular, under Article 68(1) of the Statute the Court is required to take appropriate measures to protect victims and witnesses, and to have regard to all relevant factors, “in particular, but not limited to, where the crime involves sexual or gender violence or violence against children”.¹ More generally, protective measures must be adopted on a fact sensitive rather than a mechanical or formulistic basis, identifying the relevant criteria, assessing the level of any threat, the likelihood of harm and the overall risk to the particular individual. In this regard, the Victims and Witnesses Unit of the Court should interpret the expression “likelihood of harm” in a sufficiently flexible and purposive manner to ensure proper protection for any witness who, following careful investigation, faces an established danger of harm or death.²

Doctrine: For the bibliography, see the final comment on Article 68.

Author: Enrique Carnero Rojo.

¹ ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9, ICC-01/04-01/07-160, 23 January 2008, para. 17 (<https://www.legal-tools.org/doc/eb69c1/>).

² ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters, ICC-01/04-01/06-1311-Anx2, 24 April 2008, para. 79 (<https://www.legal-tools.org/doc/a44dab/>).

Article 68(1): Obligation of the Prosecutor to Take Appropriate Protective Measures

The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes.

Initiative on Measures:

By the terms of Article 68(1) of the Statute, the Prosecutor is bound to take measures protective of the safety and well-being of victims. The Prosecutor is equally under obligation to take measures or request that measures be taken for the protection of any person including victims.¹ However, there is no provision in the legal instruments of the Court which confers upon the Prosecutor a power to preventively relocate witnesses until they are included in the Protection Programme of the Court.²

Protective Measures Vis-à-Vis the Prosecutor:

The statutory obligation on the Prosecution to take appropriate protective measures has sometimes been taken into account by the Chambers to exclude the application *vis-à-vis* the Prosecutor of some protective measures adopted by the judges, such as the redactions in the victims' applications for participation in the proceedings.³

Doctrine: For the bibliography, see the final comment on Article 68.

Author: Enrique Carnero Rojo.

¹ ICC, *Situation in the Democratic Republic of the Congo*, Appeals Chamber, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, 19 December 2008, ICC-01/04-556, para. 54 (<https://www.legal-tools.org/doc/dca981/>).

² ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, 21 April 2008, ICC-01/04-01/07-428-Corr, paras. 23–25 (<https://www.legal-tools.org/doc/6442e8/>).

³ ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on protective measures requested by applicants 01/04-1/dp to 01/04-6/dp, 22 July 2005, ICC-01/04-73, p. 5 (<https://www.legal-tools.org/doc/a15e9d/>).

Article 68(1): Protective Measures and Rights of the Defence

These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

Protective Measures and Fair Trials:

While the safety and security of victims is a key responsibility of the Court, when protecting victims the Court must ensure that the rights of the defence are respected and that the trial remains fair.¹ The right of endangered witnesses to protection and of the defendant to a fair trial are immutable, and neither can be diminished because of the need to cater for other interests. Accordingly, if the real possibility exists that the evidence at hand may contribute to a resolution of material factual issues in the case in favour of the accused, the latter is to be provided with it, once protective measures, if relevant, have been implemented. Similarly, the right of a witness to protection cannot be diminished because of the importance of other considerations.²

Consequences of No Protection by the Victims and Witnesses Unit:

Therefore, following a valid refusal by the VWU to provide protective measures for a particular witness or information-provider who provides eyewitness or first-hand evidence of relevant events, the Prosecution must serve the Defence the potentially exculpatory material (the non-redacted witness statements and accompanying documents) in a suitably full and non-redacted form, and including by revealing the identity of the witness (*Lubanga*, 24 April 2008, para. 95).

Consequences of No Co-operation by Witnesses:

For the subgroup of witnesses who provide potentially exculpatory evidence, which the Prosecution is unable to concede, and who may be at risk

¹ ICC, *Prosecutor v. Ngudjolo*, Appeals Chamber, Decision on the participation of anonymous victims in the appeal and on the maintenance of deceased victims on the list of participating victims, 23 September 2013, ICC-01/04-02/12-140, para. 16 (<https://www.legal-tools.org/doc/e34abb/>).

² ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters, 24 April 2008, ICC-01/04-01/06-1311-Anx2, para. 94 (*'Lubanga*, 24 April 2008') (<https://www.legal-tools.org/doc/a44dab/>).

if their identity and involvement with the court is revealed but who either refuse offers of protection or decline to co-operate further with the court, or both, the Chambers must select a solution from the range of possibilities that satisfies both obligations under Article 68(1): (i) for witnesses eventually deciding to co-operate with the judicial process, from full disclosure of the witness' identity and evidence to all parties, participants and the public, and giving evidence publicly in open court without special measures (Rule 88), through to serving redacted evidence and permitting varying levels of anonymity (including the use of a pseudonym *vis-à-vis* the public), together with the witness testifying behind a screen or remotely, either via video-link or by way of pre-recorded testimony (Rules 67 and 68) (*Lubanga*, 24 April 2008, paras. 97–98); and (ii) for witnesses not co-operating further with the Court or unable to be traced, from the disclosure to the accused of a redacted version of their statements and any other relevant material on an anonymous basis, through to eliminating the evidential value of said statement (para. 99).

Doctrine: For the bibliography, see the final comment on Article 68.

Author: Enrique Carnero Rojo.

Article 68(2): Manner of Conduct of Proceedings to Protect Victims, Witnesses or Accused

2. As an exception to the principle of public hearings provided for in Article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

Closed Sessions as an Exception:

Closed sessions are a protective measure granted only on an exceptional basis, as it deprives the public from understanding parts of, or the entirety of, a witness's testimony and therefore, may affect the overall fairness of the proceedings. Some Chambers have, in consultation with the parties and participants, established practices for the limited use of *in camera* hearings.¹ The Court usually calls upon parties and participants insofar as possible, to endeavour to have witnesses' testimonies given in public, and does not favour evidence being given entirely in closed session because there are other possible measures available to protect sensitive information such as witnesses' identities and identifying information – for instance, pursuant to regulation 21(2) of the Regulations of the Court, broadcasts of audio and video recordings of all hearings are delayed by at least 30 minutes (*Bemba*, 19 November 2010, para. 25).

Preparation and Conduct of Closed Sessions:

The practice of the Court on closed sessions has established that:

1. each request for private session should specify the grounds for such protective measure in a neutral and objective fashion, and try to specify the points that will be touched upon;

¹ ICC, *Prosecutor v. Bemba*, Trial Chamber III, Decision on Directions for the Conduct of the Proceedings, 19 November 2010, ICC-01/05-01/08-1023, para. 23 ('*Bemba*, 19 November 2010') (<https://www.legal-tools.org/doc/ac5449/>).

2. parties and participants should provide the Chamber with reasons justifying the continuation of the private session if the reasons that motivated the Chamber's decision for such session have changed;
3. parties and participants are usually encouraged not to request that the Court goes into private session unless there is a serious and established risk which needs to be explained to the Chamber;
4. in preparing their lines of questioning, parties and participants should be endeavour to group together all the identifying questions and to ask these questions at the beginning of the testimony;
5. each party calling a protected witness, must prepare and provide the Chamber, and the parties and participants, with a list of sensitive information and related questions to be dealt with in private session;
6. in addition to the Chamber's *proprio motu* power to reclassify a document, parties and participants should draw the attention of the Chamber to any part of the transcript of a private session that could be reclassified as public after more detailed analysis or a change in circumstances (*Bemba*, 19 November 2010, para. 23).

Doctrine: For the bibliography, see the final comment on Article 68.

Author: Enrique Carnero Rojo.

Article 68(3): Personal Interests

3. Where the personal interests

Personal Interests as Additional Requirement:

The ‘personal interests’ criterion included in Article 68(3) constitutes an additional requirement to be met by victims, over and above the victim status accorded to them under Rule 85, since the same criterion is not included in other provisions granting specific participatory rights to victims, such as Articles 15(3) and 19(3) of the ICC Statute.¹ This requirement serves two interrelated purposes: in the negative, it excludes victims’ participation in proceedings the outcome of which does not affect their interests; in the positive, it grounds the right of the victims to participate before the Court once the other criteria have been met. This criterion is only provided for the purposes of the participation of victims and, being *lex specialis* for a particular participant in the proceedings, cannot be applied by analogy to ground the granting of participatory rights to any person(s).²

Personal Interests of Victims Vis-à-Vis Situations:

The Court initially found that the investigation of a “situation” brought before the Court affected the victims’ personal interests in general since the participation of victims at said stage could serve to clarify the facts, to punish the perpetrators of the crimes and to obtain reparations for the harm suffered.³ Consequently, the Court initially determined that the assessment of the personal interests of victims in specific proceedings carried out during

¹ ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 January 2006, ICC-01/04-101-tEN-Corr, para. 68 (*‘Situation in the Democratic Republic of the Congo*, 14 December 2007’) (<https://www.legal-tools.org/doc/2fe2fc/>).

² ICC, *Situation in Kenya*, Pre-Trial Chamber II, Decision on the “Application for Leave to Participate in the Proceedings before the Pre-Trial Chamber relating to the Prosecutor’s Application under Article 58(7)”, 11 February 2011, ICC-01/09-42, para. 12 (<https://www.legal-tools.org/doc/5579bd/>).

³ *Situation in the Democratic Republic of the Congo*, 14 December 2007, para. 11; *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the applications for participation filed in connection with the investigation in the Democratic Republic of Congo by Applicants a/0047/06 to a/0052/06, a/0163/06 to a/0187/06, a/0221/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06, and a/0241/06 to a/0250/06, 3 July 2008, ICC-01/04-505, para. 26 (<https://www.legal-tools.org/doc/79af84/>).

the investigation of a situation was only to be conducted for the determination of the specific set of procedural rights enjoyed by victims.⁴ From this perspective, the Court initially concluded that the personal interests of victims could be affected during an investigation where proceedings (i) were initiated *proprio motu* by the Pre-Trial Chamber under Article 56(3) and Article 57(3)(c) of the Statute, (ii) were initiated by the Prosecution or the Defence, or (iii) were requested by the victims themselves.⁵

The Appeals Chamber eventually overturned this understanding of Article 68(3) of the Statute, finding that victims cannot be granted a general right to participate in the investigation. The participation of victims within the meaning of Article 68(3) of the Statute “can take place only within the context of judicial proceedings”, including proceedings affecting investigations, provided their personal interests are affected by the issues arising for resolution.⁶ In this regard, victims who have been authorised to

⁴ ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor, 7 December 2007, ICC-01/04-417, para. 3 (<https://www.legal-tools.org/doc/27da16/>); ICC, *Situation in Darfur*, Pre-Trial Chamber I, Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07, 14 December 2007, ICC-02/05-111-Corr, para. 13 (<https://www.legal-tools.org/doc/bf662d/>); *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on Request for leave to appeal the “Decision on the Request of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor”, 23 January 2008, ICC-01/04-438, p. 5 (<https://www.legal-tools.org/doc/ca6330/>); *Situation in Darfur*, Pre-Trial Chamber I, Decision on Request for leave to appeal the “Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor”, 23 January 2008, ICC-02/05-118, p. 5 (<https://www.legal-tools.org/doc/8cc411/>); *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Corrigendum to the “Decision on the applications for participation filed in connection with the investigation in the Democratic Republic of the Congo by a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06 to a/0080/06 [...]”, 31 January 2008, ICC-01/04-423-Corr-tENG, para. 5 (<https://www.legal-tools.org/doc/de0474/>).

⁵ ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 January 2006, ICC-01/04-101-tEN-Corr, paras. 73–75 (<https://www.legal-tools.org/doc/2fe2fc/>).

⁶ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, with Partly Dissenting Opinion of Judge Philippe Kirsch dated 23 July 2008, 11 July

participate in the proceedings are generally allowed to submit observations on the proposed activities by the Trust Fund for Victims, since said activities may have an impact on crucial issues before the Chamber as well as the protection and privacy of victims.⁷

Personal Interests of Victims Vis-à-Vis Cases:

By contrast, the Court has considered incontrovertible from the start of its activities that the personal interests of a victim are affected in respect of a “case” relating to the very crime(s) in which that victim was allegedly involved. Accordingly, this requirement is met whenever a victim pursuant to Rule 85 applies for participation in proceedings following the issuance of a warrant of arrest or of a summons to appear in a case where the said victim was allegedly involved.⁸ In some occasions, the Court has considered that to have a declaration of the truth by the competent body,⁹ and to have the victimisers prosecuted, tried and convicted, and subjected to a certain punishment (*Katanga and Ngudjolo*, 13 May 2008, paras. 37–44 and 160) are among the victims’ personal interests. As a result, the Court has determined at once the rights that victims authorised to participate may exercise in the pre-trial stage of the case (the so-called ‘systematic approach’) (para. 49).

2008, ICC-01/04-01/06-1432, paras. 2 and 61–62 (<https://www.legal-tools.org/doc/75cf1a/>); *Situation in the Democratic Republic of the Congo*, Appeals Chamber, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, 19 December 2008, ICC-01/04-556, paras. 45 and 56–57 (<https://www.legal-tools.org/doc/dca981/>); *Prosecutor v. Gbagbo*, Pre-Trial Chamber I, Decision on Victims’ Participation and Victims’ Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings, 4 June 2012, ICC-02/11-01/11-138, para. 46 (<https://www.legal-tools.org/doc/0fdd1e/>).

⁷ ICC, *Situation in Uganda*, Pre-Trial Chamber II, Decision on Observations on the Notification under Regulation 50 of the Regulations of the Trust Fund for Victims, 5 March 2008, ICC-02/04-120, p. 4 (<https://www.legal-tools.org/doc/b66964/>).

⁸ ICC, *Prosecutor v. Kony et al.*, Pre-Trial Chamber II, Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 10 August 2007, ICC-02/04-01/05-252, paras. 9–10 (<https://www.legal-tools.org/doc/d25664/>).

⁹ ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the Set of Procedural Rights Attached to Procedural Status of Victims at the Pre-Trial Stage of the Case, 13 May 2008, ICC-01/04-01/07-474, paras. 31–36 (*Katanga and Ngudjolo*, 13 May 2008’) (<https://www.legal-tools.org/doc/285b52/>).

Personal Interests of Victims Vis-à-Vis Trials:

In other occasions, the Court has distinguished the general interests of the victims in receiving reparations, establishing the truth, protecting their dignity, ensuring their safety, etcetera, from the victims' "personal interests" whose affection they need to show in order to be authorised to participate in the trial of a case. As a result, the Court has determined that the question of whether the "personal interests" of a victim are affected pursuant to Article 68(3) during a trial is necessarily fact-dependent and is determined, for instance, by the victim's involvement in or presence at a particular incident which a Chamber is considering, or if the victim has suffered identifiable harm from said incident (the so-called 'casuistic approach'). In other words, pursuant to Article 68(3) a victim must show the reasons why his or her interests are affected by the evidence or issues arising in a case before a Trial Chamber, which are defined in turn by the alleged crimes the accused faces.¹⁰ In practical terms, a victim who wishes to participate in relation to any identified stage of the proceedings must set out in a written application not only the nature and the detail of the proposed intervention, but also the way in which his or her personal interest is affected at said proceeding (*Lubanga*, 18 January 2008, para. 102). For instance, the personal interests of victims may be affected by the outcome of the confirmation hearing to the extent that it aims at either (i) confirming the charges against those responsible for perpetrating the crimes which caused harm to the victims or (ii) declining to confirm the charges for those not responsible for such crimes, so that the search for those who are criminally liable can continue.¹¹ Similarly, the personal interests of victims may, in principle, be affected by a determination as to the fitness of a suspect to participate in the hearing on the confirmation of charges against him, in particular by any delay in the

¹⁰ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119, paras. 96–98 ('*Lubanga*, 18 January 2008') (<https://www.legal-tools.org/doc/4e503b/>).

¹¹ ICC, *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the 138 applications for victims' participation in the proceedings, 11 August 2011, ICC-01/04-01/10-351, para. 23 (<https://www.legal-tools.org/doc/17ef31/>).

proceedings which may result therefrom,¹² as well as by the amendment of the charges against an accused person.¹³

Personal Interests of Victims Vis-à-Vis Appeals:

Following the casuistic approach, the Appeals Chamber has ruled that any determination of whether the personal interests of victims are affected in relation to a particular appeal requires careful consideration on a case-by-case basis, assessing in each case whether the interests asserted by victims do not, in fact, fall outside their personal interests and belong instead to the role assigned to the Prosecutor.¹⁴ Accordingly, the Court has ruled that in their applications to participate in any appeal victims must include a statement in relation to whether and how their personal interests are affected by the issues on the appeal at hand.¹⁵ More specifically, in seeking to demon-

¹² ICC, *Prosecutor v. Gbagbo*, Pre-Trial Chamber I, Decision on the OPCV’s “Request for leave to submit observations and Request to access the Expert Reports”, 15 August 2012, ICC-02/11-01/11-211, para. 13 (<https://www.legal-tools.org/doc/c23ccb/>).

¹³ ICC, *Prosecutor v. Kenyatta and Muthaura*, Pre-Trial Chamber II, Decision Requesting Observations on the “Prosecution’s Request to Amend the Final Updated Document Containing the Charges pursuant to Article 61(9) of the Statute”, 29 January 2013, ICC-01/09-02/11-614, para. 11 (<https://www.legal-tools.org/doc/3f752a/>).

¹⁴ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the “Directions and Decision of the Appeals Chamber” of 2 February 2007, 13 June 2007, ICC-01/04-01/06-925, para. 28 (*‘Lubanga*, 13 June 2007’) (<https://www.legal-tools.org/doc/b3dad9/>); *Prosecutor v. Lubanga*, Appeals Chamber, Decision, *in limine*, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision entitled “Decision on Victims’ Participation”, with Separate Opinion of Judge Georghios M. Pikis dated 20 May 2008, 16 May 2008, ICC-01/04-01/06-1335, para. 42 (<https://www.legal-tools.org/doc/c27114/>); *Prosecutor v. Katanga*, Appeals Chamber, Decision on the application of victims to participate in the appeal against Trial Chamber II’s decision on the implementation of regulation 55 of the Regulations of the Court, 17 January 2013, ICC-01/04-01/07-3346, para. 9 (<https://www.legal-tools.org/doc/dbf9cc/>); *Prosecutor v. Banda and Jerbo*, Appeals Chamber, Decision on the participation of victims in the appeal, 6 May 2013, ICC-01/04-02/06-470, para. 12 (<https://www.legal-tools.org/doc/921ad9/>); *Prosecutor v. Gbagbo*, Appeals Chamber, Decision on the application by victims for participation in the appeal, 27 August 2013, ICC-02/11-01/11-491, para. 11 (<https://www.legal-tools.org/doc/0c9220/>); *Prosecutor v. Gbagbo*, Appeals Chamber, Decision on the participation of victims in the Prosecutor’s appeal against the “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute”, 29 August 2013, ICC-02/11-01/11-492, para. 10 (*‘Gbagbo*, 27 August 2013’) (<https://www.legal-tools.org/doc/52a43f/>).

¹⁵ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”, 13 February 2007, ICC-01/04-01/06-824, para. 43 (<https://www.legal-tools.org/doc/ff3bd8/>); *Lubanga*, 13 June

strate that their personal interests are affected, victims should generally ensure, *inter alia*, that express reference is made to the specific facts behind their individual applications, and the precise manner in which those facts are said to fall within the issue under consideration on appeal (*Gbagbo*, 27 August 2013, para. 11). Concerning appeals against judgments brought under Article 81, the Appeals Chamber has found that the victims' personal interests are affected in the same way as they were affected during the trial in which the victims participated.¹⁶

Doctrine: For the bibliography, see the final comment on Article 68.

Author: Enrique Carnero Rojo.

2007, para. 23; *Situation in the Democratic Republic of the Congo*, Appeals Chamber, 14 February 2008, p. 3; *Situation in Darfur*, Appeals Chamber, Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 6 December 2007, 18 June 2008, ICC-02/05-138, para. 49 (<https://www.legal-tools.org/doc/a30c45/>).

¹⁶ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Decision on the participation of victims in the appeals against Trial Chamber I's conviction and sentencing decisions, 13 December 2012, ICC-01/04-01/06-2951, para. 3 (<https://www.legal-tools.org/doc/9551a4/>); *Prosecutor v. Ngudjolo*, Appeals Chamber, Decision on the participation of victims in the appeal against Trial Chamber II's "Jugement rendu en application de l'article 74 du Statut", 6 March 2013, ICC-01/04-02/12-30, para. 3 (<https://www.legal-tools.org/doc/4fc190/>).

Article 68(3): Identification of Victims

of the victims are affected

Rule 85 Determination:

The persons referred to as “victims” in this provision are not identified in the ICC Statute but in Rule 85 of the Rules of Procedure and Evidence. In this regard, the Court has determined that once said identification has been made during a phase of the proceedings, the Chambers need not inquire again whether the same persons qualify as victims in subsequent proceedings, but must proceed to the next stage of the enquiry under Article 68(3), namely, whether their personal interests are affected by the issue(s) in the proceedings at hand.¹

Doctrine: For the bibliography, see the final comment on Article 68.

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¹ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on victims’ participation, 18 January 2008, ICC-01/04-01/06-1119, para. 101 (<https://www.legal-tools.org/doc/4e503b/>); *Situation in the Democratic Republic of the Congo*, Appeals Chamber, Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 7 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 24 December 2007, 30 June 2008, ICC-01/04-503, para. 92 (<https://www.legal-tools.org/doc/6aacb4/>).

Article 68(3): Obligation to Allow and Consider the Victims' Views and Concerns

the Court shall permit their views and concerns to be presented and considered

Positive Obligation Vis-à-Vis Victims:

Article 68(3) imposes a positive obligation on the Court *vis-à-vis* victims to enable them to exercise concretely and effectively their right to access the Court. This obligation has two dimensions, namely to allow victims to present their views and concerns, and to examine them.¹ Nonetheless, said obligations are not automatic or unconditional, since Article 68(3) entrusts the Chambers with the power to first assess and then grant requests for participation and presentation of the victims' views and concerns. Accordingly, the victims' rights under Article 68(3) are not automatic, but subject to judicial scrutiny aimed at ensuring proper and effective participation.² In other words, Article 68(3) of the Statute confers power upon a victim to participate in any proceedings if (i) he or she qualifies as a victim under the definition of this term provided by Rule 85 of the Rules, and (ii) his or her personal interests are affected by the proceedings in hand in, that is, by the issues, legal or factual, raised therein.³

Independent Voice and Role of Victims:

The Statute grants victims an independent voice and role in the proceedings before the Court and the Court has found that such independence should be

¹ ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 January 2006, ICC-01/04-101-tEN-Corr, para. 71 ('*Situation in the Democratic Republic of the Congo*, 17 January 2006') (<https://www.legal-tools.org/doc/2fe2fc/>).

² ICC, *Situation in Uganda*, Pre-Trial Chamber II, Decision on the Prosecution's Application for Leave to Appeal the Decision on Victims' Application for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 19 December 2007, ICC-02/04-112, paras. 32 and 35 ('*Situation in Uganda*, 19 December 2007') (<https://www.legal-tools.org/doc/dae372/>).

³ ICC, *Situation in the Democratic Republic of the Congo*, Appeals Chamber, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, 19 December 2008, ICC-01/04-556, para. 45 (<https://www.legal-tools.org/doc/dca981/>).

preserved, including *vis-à-vis* the Prosecutor so that the victims can represent their interests.⁴ Allowing victims to participate in the proceedings does not mean that the suspect/accused is facing two prosecutors because victims may participate if they fulfil the conditions set forth in Article 68(3) of the Statute, namely that their personal interests are affected, their participation is found to be appropriate, and the manner of their participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.⁵ From this point of view, the Court has noted that victims

⁴ *Situation in the Democratic Republic of the Congo*, 17 January 2006, para. 51; ICC, *Prosecutor v. Kony et al.*, Pre-Trial Chamber II, Decision on “Prosecutor’s Application to attend 12 February hearing”, 9 February 2007, ICC-02/04-01/05-155, p. 4 (<https://www.legal-tools.org/doc/450a92/>); *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the Set of Procedural Rights Attached to Procedural Status of Victims at the Pre-Trial Stage of the Case, 13 May 2008, ICC-01/04-01/07-474, para. 155 (<https://www.legal-tools.org/doc/285b52/>).

⁵ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”, 13 February 2007, ICC-01/04-01/06-824, para. 55 (<https://www.legal-tools.org/doc/ff3bd8/>); *Prosecutor v. Lubanga*, Appeals Chamber, Decision, with Separate Opinion of Judge Georgios M. Pikis dated 20 May 2008, 16 May 2008, ICC-01/04-01/06-1335, para. 36 (<https://www.legal-tools.org/doc/c27114/>); *Situation in Darfur*, Appeals Chamber, Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 6 December 2007, 18 June 2008, ICC-02/05-138, paras. 51 and 60 (<https://www.legal-tools.org/doc/a30c45/>); *Prosecutor v. Lubanga*, Appeals Chamber, Decision on the participation of victims in the appeal, 6 August 2008, ICC-01/04-01/06-1452, para. 7 (<https://www.legal-tools.org/doc/a6acbb/>); *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the 138 applications for victims’ participation in the proceedings, 11 August 2011, ICC-01/04-01/10-351, para. 20 (<https://www.legal-tools.org/doc/17ef31/>); *Prosecutor v. Bemba*, Appeals Chamber, Decision on “Application of Legal Representative of Victims Mr Zarambaud Assingambi for leave to participate in the appeals proceedings following the Defence appeal of 9 January 2012 and addendum of 10 January 2012”, 6 March 2012, ICC-01/05-01/08-2098, para. 11 (<https://www.legal-tools.org/doc/95f629/>); *Prosecutor v. Katanga*, Appeals Chamber, Decision on the application of victims to participate in the appeal against Trial Chamber II’s decision on the implementation of regulation 55 of the Regulations of the Court, 17 January 2013, ICC-01/04-01/07-3346, para. 6 (<https://www.legal-tools.org/doc/dbf9cc/>); *Prosecutor v. Banda and Jerbo*, Appeals Chamber, Decision on the participation of victims in the appeal, 6 May 2013, ICC-01/04-02/06-470, para. 11 (<https://www.legal-tools.org/doc/921ad9/>); *Prosecutor v. Gbagbo*, Appeals Chamber, Decision on the application by victims for participation in the appeal, 27 August 2013, ICC-02/11-01/11-491, para. 9 (<https://www.legal-tools.org/doc/0c9220/>); *Prosecutor v. Gbagbo*, Appeals Chamber, Decision on the participation of victims in the Prosecutor’s appeal against the “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome

may themselves decide to engage in preparatory enquiries, without the Chamber or the Prosecutor monitoring the activities of the victims outside the framework of judicial proceedings (*Situation in Uganda*, 19 December 2007, para. 42).

It must be noted that victims participating in the proceeding under Article 68(3) of the Statute are only “participants” who may present their views and concerns where their personal interests are affected, and only become “parties” during reparations proceedings.⁶ Similarly, the fact that victims are authorised to appear before the Court in person does not necessarily mean that victim participants must be treated automatically as witnesses. Whether or not victims appearing before the Court have the status of witnesses will depend on whether they are called as witnesses during the proceedings.⁷

Scope of Victims’ Views and Concerns:

Addressing the scope of the “views and concerns” of the victims, the Court has found that those of victims having communicated with the Court (Rule 92) may relate not only to the review procedures triggered by a State or the Security Council referral (Article 53(3)(a) of the Statute), but also to the exercise of the *proprio motu* review powers vested in the Pre-Trial Chamber under Article 53(3)(b) of the Statute. In fact, Article 53 of the Statute provides the most significant scenario where victims may play an influential role outside the context of a case due to the concrete possibility that their personal interests would be affected by the decisions of the Prosecutor.⁸ Moreover, in some specific contexts victims applying for participation may submit their views and concerns on the protective measures to be tak-

Statute”, 29 August 2013, ICC-02/11-01/11-492, para. 8 (<https://www.legal-tools.org/doc/52a43f/>).

⁶ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Decision on the admissibility of the appeals against Trial Chamber I’s “Decision establishing the principles and procedures to be applied to reparations” and directions on the further conduct of proceedings, 14 December 2012, ICC-01/04-01/06-2953, para. 67 (<https://www.legal-tools.org/doc/2e59a0/>).

⁷ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on victims’ participation, 18 January 2008, ICC-01/04-01/06-1119, para. 132 (<https://www.legal-tools.org/doc/4e503b/>).

⁸ ICC, *Prosecutor v. Kony et al.*, Pre-Trial Chamber II, Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 10 August 2007, ICC-02/04-01/05-252, para. 95 (*Kony et al.*, 10 August 2007’) (<https://www.legal-tools.org/doc/d25664/>).

en by the Chamber even prior to the consideration of the merits of their applications (*Kony et al.*, 10 August 2007, para. 99).

Doctrine: For the bibliography, see the final comment on Article 68.

Author: Enrique Carnero Rojo.

Article 68(3): Appropriate Stages of the Proceedings

at stages of the proceedings determined to be appropriate by the Court

Judicial Discretion on Appropriate Stages:

The Chambers have discretion as to the appropriateness of the stage of the proceedings at which the views and concerns of the victims may be presented.¹ Nonetheless, the Court's discretion in determining the appropriateness of a victim's participation has to be exercised considering the impact on the personal interests of the victim, the nature and scope of the proceedings, and the personal circumstances of the particular victim.² The discretion of the Chamber cannot be exercised where the stage in which victims seek to be authorised to participate has ended, such as where victims request authorisation to participate in an appeal which has since been discontinued.³

Examples of Appropriate Stages:

Pursuant to this general approach, it is appropriate for the victims to participate in proceedings for the adoption of protective measures. In fact, it is appropriate for victims who may be affected by the protective measures to be authorised to present their views and concerns even prior to being granted victim status in a case because their personal interests may be affected by the adoption of, or the failure to adopt, measures bearing upon their security and privacy (*Kony et al.*, 10 August 2007, para. 98). Similarly, subject to their intervention being restricted to the scope determined by the charges brought against the suspect, the victims may participate in the confirmation hearing by presenting their views and concerns in order to help

¹ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on applications for participation in proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 in the case of, 20 October 2006, ICC-01/04-01/06-601-tEN, p. 10 ('*Lubanga*, 20 October 2006') (<https://www.legal-tools.org/doc/d293d9/>).

² ICC, *Prosecutor v. Kony et al.*, Pre-Trial Chamber II, Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 10 August 2007, ICC-02/04-01/05-252, paras. 88–89 (<https://www.legal-tools.org/doc/d25664/>).

³ ICC, *Prosecutor v. Katanga*, Appeals Chamber, Decision on the victims' requests to participate in the appeal proceedings, 24 July 2014, ICC-01/04-01/07-3505, para. 14 (<https://www.legal-tools.org/doc/c5ef2b/>).

contribute to the prosecution of the crimes from which they allegedly suffered and to, where relevant, subsequently be able to obtain reparations for the harm suffered.⁴

Examples of Inappropriate Stages:

By contrast, the Court has on occasion found inappropriate the participation of victims in the proceedings, considering the increased risk to the victims arising from their contact with the legal representatives for the exercise of their rights before the Court (*Lubanga*, 20 October 2006, p. 11), or the fact that the Court need not take measures to review the Prosecutor's decisions and preserve evidence where there is no indication that the Prosecution has failed to do so in conducting its investigation.⁵ More generally, proceedings that are to be conducted with the exclusive participation of one party (as is the case with proceedings under Article 58 of the Statute) are, by definition, not 'appropriate' for the purposes of victims' participation: victims would, therefore, not be allowed to participate in any such proceedings even if their personal interests were affected by the outcome of the said proceedings.⁶

Appropriateness Regarding Investigation of Situations:

Addressing the appropriateness of the participation of victims at different stages of the proceedings, the Court initially found that the investigation of a situation as such was included in the "proceedings"⁷ because, despite the fact that no case involving victims is as yet under judicial scrutiny at this stage (*Kony et al.*, 10 August 2007, para. 89), the investigation can have an

⁴ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, 22 September 2006, ICC-01/04-01/06-462-tEN, p. 5 (<https://www.legal-tools.org/doc/2f4510/>).

⁵ ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the Requests of the Legal Representative for Victims VPRS 1 to VPRS 6 regarding "Prosecutor's Information on Further Investigation", 26 September 2007, ICC-01/04-399, pp. 5–6 (<https://www.legal-tools.org/doc/30ee9d/>).

⁶ ICC, *Situation in Kenya*, Pre-Trial Chamber II, Decision on the "Application for Leave to Participate in the Proceedings before the Pre-Trial Chamber relating to the Prosecutor's Application under Article 58(7)", 11 February 2011, ICC-01/09-42, para. 13 (<https://www.legal-tools.org/doc/5579bd/>).

⁷ ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 January 2006, ICC-01/04-101-tEN-Corr, paras. 46 and 54 (<https://www.legal-tools.org/doc/2fe2fc/>).

effect on the identification of the victimizers and the eventual issuance of orders for reparations.⁸ The Court initially determined that the participation of victims during the procedural stage of investigation of a situation was appropriate because it did not *per se* jeopardise the appearance of integrity and objectivity of the investigation, nor was it inherently inconsistent with basic considerations of efficiency and security (*Situation in the Democratic Republic of the Congo*, 17 January 2006, para. 57). On this basis, the Pre-Trial Chambers initially found it appropriate for victims to participate in the “situation stage of the proceedings”, thereby becoming “victims of the situation”.⁹ Eventually, however, the Appeals Chamber clarified that victim status cannot be granted to victims outside a judicial proceeding and victims are therefore not entitled to participate generally in the investigatory process. Article 68(3) of the Statute correlates victim participation to “proceedings”, a term denoting a judicial cause pending before a Chamber. In contrast, an investigation is not a judicial proceeding but an inquiry conducted by the Prosecutor into the commission of a crime with a view to

⁸ *Situation in the Democratic Republic of the Congo*, 17 January 2006, para. 72; ICC, *Situation in Darfur*, Pre-Trial Chamber I, Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2) (e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor, 3 December 2007, ICC-02/05-110, para. 3 (<https://www.legal-tools.org/doc/5ccca1/>).

⁹ ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor, 7 December 2007, ICC-01/04-417, para. 2 (<https://www.legal-tools.org/doc/27da16/>); *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on Request for leave to appeal the “Decision on the Request of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor”, 23 January 2008, ICC-01/04-438, p. 5 (<https://www.legal-tools.org/doc/ca6330/>); *Situation in Darfur*, Pre-Trial Chamber I, Decision on Request for leave to appeal the “Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor”, 23 January 2008, ICC-02/05-118, p. 5 (<https://www.legal-tools.org/doc/8cc411/>); *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the applications for participation filed in connection with the investigation in the Democratic Republic of Congo by Applicants a/0047/06 to a/0052/06, a/0163/06 to a/0187/06, a/0221/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06, and a/0241/06 to a/0250/06, 3 July 2008, ICC-01/04-505, para. 26 (<https://www.legal-tools.org/doc/79af84/>).

bringing to justice those deemed responsible. Consequently, victim participation can take place only within the context of judicial proceedings.¹⁰

Appropriateness Regarding Appeals:

Regarding the appropriateness of victims' participation in appeal proceedings, an appeal (even interlocutory ones) is considered to be a separate and distinct stage of the proceedings. As a consequence, the Appeals Chamber is not bound by a previous ruling on the appropriateness of the participation by victims before a court of first instance¹¹ and must itself determine whether the participation of victims is appropriate in the appeal at hand upon an application from the victims addressing *inter alia* the reasons why it is appropriate for the Appeals Chamber to permit their views and concerns to be presented.¹²

¹⁰ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432, paras. 2 and 61–62 (<https://www.legal-tools.org/doc/75cf1a/>); *Situation in the Democratic Republic of the Congo*, Appeals Chamber, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, 19 December 2008, ICC-01/04-556, paras. 45 and 57 (<https://www.legal-tools.org/doc/dca981/>).

¹¹ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo", 13 February 2007, ICC-01/04-01/06-824, para. 43 (<https://www.legal-tools.org/doc/ff3bd8/>); *Situation in Darfur*, Appeals Chamber, Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 6 December 2007, 18 June 2008, ICC-02/05-138, para. 49 (<https://www.legal-tools.org/doc/a30c45/>).

¹² ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, 13 June 2007, ICC-01/04-01/06-925, paras. 23 and 28 (<https://www.legal-tools.org/doc/b3dad9/>); *Situation in the Democratic Republic of the Congo*, Appeals Chamber, 14 February 2008, p. 3; *Situation in Darfur*, Appeals Chamber, Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 6 December 2007, 18 June 2008, ICC-02/05-138, paras. 23 and 49 (<https://www.legal-tools.org/doc/a30c45/>); *Situation in the Democratic Republic of the Congo*, Appeals Chamber, Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 7 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the

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Article 68(3): Rights of the Defence

and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

Recognition as Victims and Rights of the Defence:

The very recognition of individuals as victims with a right to participate in the proceedings has been found not to affect the rights of the defence because said recognition is not, *per se*, prejudicial to the defence.¹ For instance, the Court found that the victims' participation did not create an imbalance *vis-à-vis* the Defence because the victims' right to submit requests for protective measures is linked to their fundamental interest in the protection of their security.²

Extent of the Victims' Participation and Rights of the Defence:

However, the Court must be attentive to the rights of the accused and the requirements of a fair and impartial trial when deciding on the extent of the participation of persons recognised as victims in the proceedings because Article 68(3) of the Statute does not pre-establish all modalities of participation, leaving them to the discretion of the Chambers.³ The modalities of

¹ ICC, *Situation in Darfur*, Appeals Chamber, Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 6 December 2007, 18 June 2008, ICC-02/05-138, para. 4 (<https://www.legal-tools.org/doc/a30c45/>); *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor, 7 December 2007, ICC-01/04-417, para. 4 ('*Situation in the Democratic Republic of the Congo*, 7 December 2007') (<https://www.legal-tools.org/doc/27da16/>).

² ICC, *Situation in Uganda*, Pre-Trial Chamber II, Decision on the Prosecution's Application for Leave to Appeal the Decision on Victims' Application for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 19 December 2007, ICC-02/04-112, para. 44 (<https://www.legal-tools.org/doc/dae372/>).

³ ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on Request for leave to appeal the "Decision on the Request of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor", 23 January 2008, ICC-01/04-438, p. 5 ('*Situation in the Democratic Republic of the Congo*, 23 January 2008') (<https://www.legal-tools.org/doc/ca6330/>); *Situation in Darfur*, Pre-Trial Chamber I, Decision on Request for leave to appeal the "Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the

participation of victims must not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial not only during the investigation stage⁴ but also during the subsequent stages. For instance, if the victims request that their identities remain confidential during the proceedings leading to and at the confirmation of charges hearing, limits to their participation may be imposed, such as being precluded from adding any point of fact or any evidence in order not to violate the fundamental principle prohibiting anonymous accusations, having access to public documents only, and being allowed to be present at the public hearings only.⁵

Chambers to Ensure No Negative Impact on Rights of the Defence:

Accordingly, once the Chamber has determined that the interests of a victim or group of victims are affected, it must exercise its discretion when deciding on the modalities of the participation of the victims in the proceedings to ensure that said participation is not prejudicial to or inconsistent with the rights of the Defence and fair and expeditious proceedings.⁶

Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor”, 23 January 2008, ICC-02/05-118, p. 5 (<https://www.legal-tools.org/doc/8cc411/>).

- ⁴ *Situation in the Democratic Republic of the Congo*, 7 December 2007, para. 3; *Situation in the Democratic Republic of the Congo*, 23 January 2008, p. 5; ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Corrigendum to the “Decision on the applications for participation filed in connection with the investigation in the Democratic Republic of the Congo by a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06 to a/0080/06 [...]”, 31 January 2008, ICC-01/04-423-Corr-tENG, para. 5 (<https://www.legal-tools.org/doc/de0474/>); *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the Set of Procedural Rights Attached to Procedural Status of Victims at the Pre-Trial Stage of the Case, 13 May 2008, ICC-01/04-01/07-474, para. 53 (<https://www.legal-tools.org/doc/285b52/>); *Situation in the Democratic Republic of the Congo*, Appeals Chamber, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, 19 December 2008, ICC-01/04-556, para. 45 (<https://www.legal-tools.org/doc/dca981/>).
- ⁵ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, 22 September 2006, ICC-01/04-01/06-462-tEN, pp. 6 and 8 (<https://www.legal-tools.org/doc/2f4510/>); *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the Defence Applications for Leave to Appeal the “Decision authorising the filing of observations on the applications for participation in the proceedings a/0327/07 to a/0337/07 and a/0001/08”, 27 February 2008, ICC-01/04-01/07-241, p. 7 (<https://www.legal-tools.org/doc/e9180f/>).
- ⁶ ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4,

Appeals Chamber to Ensure No Negative Impact on Rights of the Defence:

In order to ensure no negative impact on rights of the defence, the Court should analyse the impact of the victims' participation on the rights of the defence when granting them the possibility to submit their views and concerns. In proceedings before the Appeals Chamber, the victims concerned must argue why the presentation of their views and concerns would not be prejudicial to or inconsistent with the rights of the defence.⁷ For instance, upon declaring clearly inadmissible an appeal touching upon a suspect's fundamental right to liberty, the Appeals Chamber simply denied the victims' request to participate in said appeal because any delay for procedural reasons in the delivery of the decision on their request could have an effect on the suspect's release and on his fundamental right to liberty.⁸ In turn, the victims' views and concerns must be specifically limited solely to the issues arising in the appeal and to the extent that their personal interests are affected by the proceedings, in order for the manner of participation of victims to comply with the rights of the suspect/accused and a fair and impartial trial.⁹

VPRS 5 and VPRS 6, 17 January 2006, ICC-01/04-101-tEN-Corr, para. 70 (<https://www.legal-tools.org/doc/2fe2fc/>); *Situation in the Democratic Republic of the Congo*, 7 December 2007, para. 2; *Prosecutor v. Lubanga*, Trial Chamber I, Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119, para. 104 ('*Lubanga*, 18 January 2008') (<https://www.legal-tools.org/doc/4e503b/>); *Situation in the Democratic Republic of the Congo*, 31 January 2008, para. 5; *Prosecutor v. Gbagbo*, Appeals Chamber, Decision on the application by victims for participation in the appeal, 27 August 2013, ICC-02/11-01/11-491, para. 14 (<https://www.legal-tools.org/doc/0c9220/>); *Prosecutor v. Gbagbo*, Appeals Chamber, Decision on the participation of victims in the Prosecutor's appeal against the "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute", 29 August 2013, ICC-02/11-01/11-492, para. 11 (<https://www.legal-tools.org/doc/52a43f/>).

⁷ ICC, *Situation in the Democratic Republic of the Congo*, Appeals Chamber, 14 February 2008, p. 3; *Prosecutor v. Lubanga*, Appeals Chamber, Decision,, 16 May 2008, ICC-01/04-01/06-1335, para. 48 ('*Lubanga*, 16 May 2008') (<https://www.legal-tools.org/doc/c27114/>).

⁸ ICC, *Prosecutor v. Mbarushimana*, Appeals Chamber, Reasons for "Decision on the appeal of the Prosecutor of 19 December 2011 against the 'Decision on the confirmation of the charges' and, in the alternative, against the 'Decision on the Prosecution's Request for stay of order to release Callixte Mbarushimana' and on the victims' request for participation" of 20 December 2011, 24 January 2012, ICC-01/04-01/10-483, para. 34 (<https://www.legal-tools.org/doc/64345a/>).

⁹ *Lubanga*, 16 May 2008, para. 50; ICC, *Situation in the Democratic Republic of the Congo*, Appeals Chamber, Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 7 December 2007 and in

Participation of Victims as Witnesses:

Moreover, although a general ban on the victims' participation in the proceedings if they may be called as witnesses would be contrary to the aim and purpose of Article 68(3) of the Statute and the Chambers' obligation to establish the truth, the Court must establish whether the participation by a victim who is also a witness may adversely affect the rights of the defence at a particular stage in the case, taking into consideration the modalities of participation by victims with dual status, the need for their participation and the rights of the accused to a fair and expeditious trial (*Lubanga*, 18 January 2008, paras. 133–134).

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the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 24 December 2007, 30 June 2008, ICC-01/04-503, para. 101 (<https://www.legal-tools.org/doc/6aacb4/>); *Prosecutor v. Lubanga*, Appeals Chamber, Decision on the participation of victims in the appeal, 6 August 2008, ICC-01/04-01/06-1452, paras. 12–13 (<https://www.legal-tools.org/doc/a6acbb/>).

Article 68(3): Submission of Victims' Views and Concerns by Legal Representatives

Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

Victims' Direct Participation:

The use of the term “may” in Article 68(3), the lack of reference to a legal representative in Rule 89(3) and the victim’s freedom to choose a legal representative foreseen in Rule 90(1) entail that a victim’s participation in the proceedings before the Court is not conditional upon the victim being assisted by a legal representative, even after the victim’s application has been granted.¹ In fact, victims have the right to participate directly in the proceedings, since Article 68(3) provides that when the Court considers it appropriate the views and concerns of victims may otherwise be presented by a legal representative.²

Victims' Participation through Legal Representatives:

Nonetheless, the Court has found that there are at least two categories of victims: (i) victims admitted to the proceedings and assisted by a legal representative, who enjoy enhanced procedural rights under Rule 91, and (ii) victims admitted to the proceedings but not assisted by a legal representative, who enjoy more limited rights of participation (*Kony et al.*, 1 February 2007, para. 10). The latter may make opening and closing statements, but

¹ ICC, *Prosecutor v. Kony et al.*, Pre-Trial Chamber II, Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 1 February 2007, ICC-02/04-01/05-134, paras. 3–6 (*Kony et al.*, 1 February 2007) (<https://www.legal-tools.org/doc/03e64f/>); ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V, Decision on victims’ representation and participation, 3 October 2012, ICC-01/09-01/11-460, para. 49 (*Ruto and Sang*, 3 October 2012) (<https://www.legal-tools.org/doc/e037cc/>); *Prosecutor v. Kenyatta and Muthaura*, Trial Chamber V, Decision on victims’ representation and participation, 3 October 2012, ICC-01/09-02/11-498, para. 48 (*Kenyatta and Muthaura*, 3 October 2012) (<https://www.legal-tools.org/doc/535eee/>).

² ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on victims’ participation, 18 January 2008, ICC-01/04-01/06-1119, para. 115 (<https://www.legal-tools.org/doc/4e503b/>); *Ruto and Sang*, 3 October 2012, para. 26; *Prosecutor v. Kenyatta and Muthaura*, 3 October 2012, para. 25.

are precluded from participating in hearings and from questioning a party or a witness (para. 7).

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Article 68(4)

4. The Victims and Witnesses Unit may advise the Prosecutor and the Court

Others at Risk on Account of the Activities of the Court as Clients:

On the basis of *inter alia* Article 68(4) of the ICC Statute, the Appeals Chamber has found that specific provisions of the Statute and the Rules provide “for the protection not only of witnesses and victims and members of their families, but also of others at risk on account of the activities of the Court [indicating] an overarching concern to ensure that persons are not unjustifiably exposed to risk through the activities of the Court”.¹

Court as Client:

Similarly, reading Article 68(4) of the ICC Statute together with Article 43(6), the Appeals Chamber has concluded that it may be appropriate and of assistance to it to hear from the Registrar in particular appeals dealing with protective measures.²

Doctrine: For the bibliography, see the final comment on Article 68.

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¹ ICC, *Prosecutor v. Katanga and Ngudjolo*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, 13 May 2008, ICC-01/04-01/07-475, para. 54 (<https://www.legal-tools.org/doc/a76f99/>).

² ICC, *Prosecutor v. Katanga and Ngudjolo*, Appeals Chamber, Reasons for the “Decision on ‘Victims and Witnesses Unit’s considerations on the system of witness protection and the practice of preventive relocation” and ‘Prosecution’s request for leave to file a response to ‘Victims and Witnesses Unit’s considerations on the system of witness protection and the practice of preventive relocation”, 11 July 2008, ICC-01/04-01/07-675, para. 4 (<https://www.legal-tools.org/doc/d2e229/>).

Article 68(4): Services of the Victims and Witnesses Unit

on appropriate protective measures, security arrangements, counselling and assistance as referred to in Article 43, paragraph 6.

Victims and Witnesses Unit's Exclusivity for Victims' Safety and Security:

Article 68 of the Statute, dealing *inter alia* with the protection of victims, refers to the Registry as a whole and not to the Office of Public Counsel for Victims *per se*, since the Office falls within the remit of the Registry solely for administrative purposes. Therefore, the OPCV has no specific functions relating to any concerns victims may have for their security and safety. Consultation with the Victims and Witnesses Unit is the proper way to address the victims' safety and security issues.¹ Similarly, the decision of the drafters to create a single Victims and Witnesses Unit within the Registry constitutes a clear endorsement of a system of witness protection in which the core role is played by the Registry and a limited mandate is given to the Prosecution, ensuring the equality of arms between the parties as well as the effective use of the Court's resources.² Nonetheless, if the Victims and Witnesses Unit properly assesses and rejects referrals to its protection programme, thereafter it is for the referring party to decide whether to secure any other protective solution, as it considers appropriate.³

Doctrine: For the bibliography, see the final comment on Article 68.

Author: Enrique Carnero Rojo.

¹ ICC, *Prosecutor v. Kony et al.*, Pre-Trial Chamber II, Decision on the OPCV's 'Request to access documents and material', 16 March 2007, ICC-02/04-01/05-222, pp. 5–6 (<https://www.legal-tools.org/doc/30caf7/>).

² ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, 21 April 2008, ICC-01/04-01/07-428-Corr, paras. 28, 31 (<https://www.legal-tools.org/doc/6442e8/>).

³ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters, 24 April 2008, ICC-01/04-01/06-1311-Anx2, para. 80 (<https://www.legal-tools.org/doc/a44dab/>).

Article 68(5)

5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial

The aim behind Article 68(5) – as well as behind Article 61(5) – is first and foremost to ensure the safety of Prosecution witnesses, and minimise the potentially traumatic effects of giving testimony in court by exempting witnesses from the requirement to do so twice, first before the Pre-Trial Chamber and again before the Trial Chamber.¹

Doctrine: For the bibliography, see the final comment on Article 68.

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¹ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the final system of disclosure and the establishment of a timetable, Annex I, 15 May 2006, ICC-01/04-01/06-102, para. 99 (<https://www.legal-tools.org/doc/052848/>).

Article 68(5): Summary Evidence

withhold such evidence or information and instead submit a summary thereof.

Consequently, although the Defence must, in principle, have access to the non-redacted version of the prior statements of any witness on whose written or oral testimony the Prosecution intends to rely at the confirmation hearing,¹ said information may be withheld and replaced with summaries when the disclosure to the Defence of said witness statements, transcripts of witness interviews and investigators' notes and reports of witness interviews would lead to the identification of the Prosecution witnesses, even with the redactions proposed by the Prosecution.²

Doctrine: For the bibliography, see the final comment on Article 68.

Author: Enrique Carnero Rojo.

¹ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the final system of disclosure and the establishment of a timetable, Annex I, 15 May 2006, ICC-01/04-01/06-102, para. 98 (<https://www.legal-tools.org/doc/052848/>).

² ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81, 15 September 2006, ICC-01/04-01/06-437, paras. 8–13 (<https://www.legal-tools.org/doc/28d05d/>).

Article 68(6)

6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information.

See the commentary on Article 72.

Cross-references:

Articles 43(6), 54(1)(b), 54(3)(f), 61(5), 67(1) and 72.

Rules 16, 17, 18, 19, 43, 81, 85, 86, 87, 88, 89, 90, 91, 92, 93, 119(3), 131(2), 134 and 194(3).

Regulations 20, 41, 42 and 86.

Doctrine:

1. Silvia A. Fernández de Gurmendi, “The Process of Negotiations”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results*, Kluwer Law International, The Hague, 1999, pp. 217–26.
2. David Donat-Cattin, “Article 68: Protection of Victims and Witnesses and their Participation in the Proceedings”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Nomos Verlagsgesellschaft, Baden-Baden, 1999, pp. 869–88.
3. John R.W.D. Jones “Protection of Victims and Witnesses”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 2nd ed., Oxford University Press, 2002, pp. 1387–1419.
4. Claude Jorda and Jérôme de Hemptinne, “The Status and Role of the Victim”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), 2002, pp. 1387–1419.
5. Carsten Stahn *et al.*, “Participation of Victims in the Pre-Trial Proceedings of the ICC”, in *Journal of International Criminal Justice*, 2006, vol. 4, no. 2, pp. 219–38.
6. David Donat-Cattin, “Article 68: Protection of Victims and Witnesses and their Participation in the Proceedings”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A*

- Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1681–1711 (<https://www.legal-tools.org/doc/040751/>).
7. Paolina Massidda and Caroline Walter, “Article 68: Protection et participation au procès des victimes et des témoins”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour pénale internationale: Commentaire Article par Article*, A. Pedone, Paris, 2012, pp. 1545–76.
 8. Rogier Bartels, “Rome Statute of the International Criminal Court – Article 68: Protection of Victims and Witnesses and their Participation in the Proceedings”, in Paul De Hert *et al.* (eds.), *Code of International Criminal Law and Procedure*, Larcier, Brussels, 2013, pp. 322–43.
 9. Anne-Marie De Brouwer and Mikaela Heikkilä, “Victim Issues: Participation, Protection, Reparation, and Assistance”, in Göran Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, pp. 1299–1337.

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Article 69

Evidence

General Remarks:

Article 69 provides the main principles on the admissibility of evidence. The ICC Statute and the rules of procedure and evidence provides for a flexible approach to the admission of evidence unhindered by technical rules. Strict and technical provisions are primarily used in common law systems where the law and fact-finding functions have been separated, allocating the former to the judge and the latter to the jury. Part of the rationale is to prevent erroneous conclusions which might be drawn by a lay jury receiving prejudicial or unreliable evidence. From a civil law perspective it is argued that there is no need to guard professional judges because they are not open to prejudice in the same way as a jury. Civil law systems combine the law and fact-finding functions by using professional judges. The ICC uses professional judges and thus there is no need for technical rules on admissibility.

While Article 69 contains more specific rules on evidence, Article 64(9)(a) provides for the general power of the Trial Chamber to “[r]ule on the admissibility or relevance of evidence”.

Article 69 is contained in Part 6 concerning the trial proceedings but Article 69 refers more broadly to “the Court” rather than ‘the Trial Chamber’. Rule 63(1) clarifies this ambiguity by providing that the rules of evidence together with Article 69, apply in all proceedings before all Chambers.

Doctrine: For the bibliography, see the final comment on Article 69.

Author: Mark Klamberg.

Article 69(1)

1. Before testifying, each witness shall, in accordance with the Rules of Procedure and Evidence, give an undertaking as to the truthfulness of the evidence to be given by that witness.

Before testifying, witnesses are required to give the following undertaking, as provided for in Rule 66(1): “I solemnly declare that I will speak the truth, the whole truth and nothing but the truth”.

Rule 66(2) further specifies that persons under the age of 18 or a person whose judgement has been impaired and who does not understand the nature of a solemn undertaking may be allowed to testify without this solemn undertaking if the Chamber considers that the person is able to describe matters of which he or she has knowledge and that the person understands the meaning of the duty to speak the truth.

Rule 66(3) provides that before testifying, the witness shall be informed that giving false testimony is an offence under Article 70(1)(a).

Cross-references:

Rules 65 and 66.

Doctrine: For the bibliography, see the final comment on Article 69.

Author: Mark Klamberg.

Article 69(2)

2. The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in Article 68 or in the Rules of Procedure and Evidence.

Article 69(2) expresses an aspiration that testimony of a witness at trial shall be given in person. In the *Lubanga* case, the Trial Chamber states that “[t]he statutory framework of the Court establishes the clear presumption that the evidence of a witness at trial will be given orally”.¹

However, the ICC Statute gives conflicting messages as to whether the Court may compel an individual to testify. Article 93(1)(e) provides that States Parties shall provide assistance with “[f]acilitating the voluntary appearance of persons as witnesses or experts before the Court” which suggest that it is voluntary. On the other hand Article 64(6)(b) provides that the Trial Chamber may “[r]equire the attendance and testimony of witnesses [...] by obtaining, if necessary, the assistance of States”. In *Ruto et al.*, the Trial Chamber found that the Chamber may – as a compulsory measure – order or subpoena the appearance of witnesses. It also stated that pursuant to Article 93(1)(d) and (1) of the Statute, the Trial Chamber can, by way of requests for co-operation, obligate Kenya both to serve summonses and to assist in compelling the attendance (before the Chamber) of the witnesses summoned.² The Appeals Chamber upheld the decision by the Trial Chamber. It found that the Trial Chamber has the power to compel witnesses to appear before it, thereby creating a legal obligation for the individuals concerned. The Appeals Chamber also stated that under Article 93(1)(b) of the Statute the Court may request a State Party to compel witnesses to appear before the Court sitting *in situ* in the State Party’s territory or by way of video-link.³

¹ ICC, *Prosecutor v. Lubanga*, Trial Chamber, Decision on the Prosecution’s application for admission of four documents from the bar table pursuant to Article 64(9), 20 January 2011, ICC-01/04-01/06-2662, para. 13 (<https://www.legal-tools.org/doc/a7a7f4/>).

² ICC, *Prosecutor v. Ruto et al.*, Trial Chamber, Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation, 17 April 2014, ICC-01/09-01/11-1274-Corr2, paras. 100 and 193 (<https://www.legal-tools.org/doc/e28d64/>).

³ ICC, *Prosecutor v. Ruto et al.*, Trial Chamber, 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

The Court may also permit the giving of *viva voce* (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.

The Court may also permit the giving of *viva voce* (oral) or recorded testimony of a witness by means of video or audio technology. In such cases, Rule 67 requires that the witness may be examined by the prosecutor, the defence and the Chamber, primarily in order to secure the accused's right to confront the witness. In *Bemba*, the Trial Chamber stated that “[o]ne of the relevant criteria for determining whether or not a witness may be allowed to give *viva voce* (oral) testimony by means of video technology relates to the witness's personal circumstances, which have thus far been interpreted as being linked to, *inter alia*, the well-being of a witness”.⁴

Article 69(2) also provides that the Trial Chamber may permit the introduction of documents or transcripts as long as this is not prejudicial to or inconsistent with the rights of the accused. In *Katanga and Ngudjolo*, a witness read a prior recorded statement in silence and the extract was admitted in evidence.⁵ The Trial Chamber rejected the motion of the defence to have the entire prior recorded statement admitted into evidence.

The *Tadić* Trial Chamber has stated that the evidentiary value of testimony provided by video link, although weightier than that of testimony given by deposition, is not as weighty as evidence given in the courtroom.⁶

Cross-references:

Rules 67 and 68.

Request for State Party Cooperation”, 9 October 2014, ICC-01/09-01/11-1598 (<https://www.legal-tools.org/doc/e5eb09/>).

⁴ ICC, *Prosecutor v. Bemba*, Trial Chamber, Public redacted decision on the “Prosecution request to hear Witness CAR-OTP-PPPP-0036’s testimony via video-link”, 3 February 2012, ICC-01/05-01/08-2101-Red2, para. 7 (<https://www.legal-tools.org/doc/8f13c6/>).

⁵ ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber, Decision on Defence Request to Admit into Evidence Entirety of Document DRC-OTP-1017-0572, 25 May 2011, ICC-01/04-01/07-2954, para. 1 (<https://www.legal-tools.org/doc/f0c39b/>).

⁶ ICTY, *Prosecutor v. Tadić*, Trial Chamber, Decision on the Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-link, 25 June 1996, IT-94-1-T, para. 21 (<https://www.legal-tools.org/en/doc/adfc52/>).

Doctrine: For the bibliography, see the final comment on Article 69.

Author: Mark Klamberg.

Article 69(3)

3. The parties may submit evidence relevant to the case, in accordance with Article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

Articles 64(6)(d) and 69(3) of the ICC Statute grants the judges authority to order the parties to submit additional evidence. This means that the parties are not free to withhold evidence that the Court considers to be important, regardless of whether it is incriminatory or exculpatory.

There is a risk that exercise of powers under Article 69(3) may favour one party at the expense of the other party. In *Lubanga*, the Trial Chamber emphasized its “statutory obligation to request the submission of all evidence that is necessary for determining the truth under Article 69(3) of the Statute, although this requirement must not displace the obligation of ensuring the accused receives a fair trial”.¹

In *Prosecutor v. Katanga and Ngudjolo*, the Single Judge considered “that Article 69(3) of the Statute is not applicable during the pre-trial proceedings conducted before the Pre-Trial Chamber because (i) the Pre-Trial Chamber is not a truth-finder; and (ii) according to the literal interpretation of Article 69(3) of the Statute, its application is subject to consideration of the competent Chamber that evidence other than that introduced by the Prosecution and the defence is ‘necessary for the determination of the truth’”.² The Pre-Trial Chamber in *Bemba* took the opposite view when it held that “the rules concerning evidence in Article 69 of the Statute, including the authority of the Chamber to request the submission of further evidence, apply at the pre-trial stage of the proceedings, taking into account the specific purpose and limited scope of the confirmation of the charges”. The Pre-Trial Chamber admitted however that the application of Article 69(3) of the Rome Statute at the confirmation stage is restricted since, in contrast to the trial stage, the Chamber does not have to determine the guilt

¹ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on victims’ participation, 18 January 2008, ICC-01/04-01/06-1119, para. 121 (<https://www.legal-tools.org/doc/4e503b>).

² ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, 13 May 2008, ICC-01/04-01/07-474, paras. 107–113 (<https://www.legal-tools.org/doc/285b52/>).

of the person prosecuted beyond a reasonable doubt. It emphasized that “the search for truth is the principal goal of the Court as a whole”.³

Cross-reference:

Rule 69.

Doctrine: For the bibliography, see the final comment on Article 69.

Author: Mark Klamberg.

³ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber III, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, 31 July 2008, ICC-01/05-01/08-55, paras. 8–11 (<https://www.legal-tools.org/doc/15c802/>).

Article 69(4)

4. The Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

As stated earlier, the ICC Statute has adopted a flexible approach. Article 69(4) provides that in addition to relevance other factors need to be considered for admissibility, including the probative value of evidence and any prejudice such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness. Rule 63 adds general provisions relating to the admissibility of evidence.

During the negotiations preceding the ICC Statute it was decided as a compromise to give some guidance but leave details to the Rules and the Court's own jurisprudence. An initial French draft of Rule 63 would have established an overarching principle of admissibility of all evidence,¹ effectively undoing the compromise reached in Rome. The pendulum swung in the opposite direction and a subsequent proposal would have obliged the Court to assess all evidence for the purpose of admissibility. The adopted version of Rule 63 is a compromise, which authorizes, rather than obliges, a chamber "to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with Article 69".²

Relevance:

The *Katanga and Ngudjolo* Trial Chamber has clarified that "[i]f the evidence tendered makes the existence of a fact at issue more or less probable, it is relevant. Whether or not this is the case depends on the purpose for

¹ Proposal submitted by France concerning the Rules of Procedure and Evidence: Part 3, section 1, subsection 2, PCNICC/1999/DP-10, 22 February 1999, rule 37(1) (<https://www.legal-tools.org/doc/289d76/>).

² Donald K. Piragoff and Paula Clarke, "Article 69 – Evidence", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1717 (<https://www.legal-tools.org/doc/040751/>).

which the evidence is adduced”.³ The Trial Chamber excluded 9 items for lack of relevance (*Katanga and Ngudjolo*, 21 October 2011, paras. 16–19).

Reliability:

During the drafting of Rule 63 there was an attempt to include reliability as a factor to be freely assessed by a Chamber in determining relevance or admissibility. As there was no consensus, the rule is silent on the issue (Piragoff and Clarke, 2016, p. 1717). At the *ad hoc* tribunals there has been controversy as to whether reliability is a separate or inherent component of the admissibility of a particular item of evidence.⁴ For example, in *Delalić et al.* the defence argued that the determination of reliability was a separate component, a first hurdle to be passed before the Trial Chamber can proceed to consider the relevance and probative value of the evidence. The Trial Chamber rejected this argument and stated that “it is an implicit requirement of the Rules that the Trial Chamber give due considerations to indicia of reliability when assessing the relevance and probative value of evidence at the stage of determining its admissibility”.⁵ The Pre-Trial Chamber in *Katanga and Ngudjolo* mentioned the controversy at the ICTY as to whether reliability is a separate or inherent component of the admissibility of a particular item of evidence. The Pre-Trial Chamber decided to “to consider reliability as a component of the evidence when determining its weight”.⁶

The Chamber has a general power under Article 69(4) of the ICC Statute to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial. In *Lubanga*, the Chamber weighed the potential prejudicial effect against the probative value of a report the legal representative of victims sought to introduce. Weighing the

³ ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, Decision on the Bar Table Motion of the Defence of Germain Katanga, 21 October 2011, ICC-01/04-01/07, para. 16 (*Katanga and Ngudjolo*, 21 October 2011) (<https://www.legal-tools.org/doc/5bb37d/>).

⁴ Richard May and Marieke Wierda, *International Criminal Evidence*, Transnational Publishers, Ardsley, 2002, pp. 107 and 109.

⁵ ICTY, *Prosecutor v. Delalić et al.*, Trial Chamber, Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 January 1998, IT-96-21, paras. 19–20 (<https://www.legal-tools.org/doc/51dec6/>).

⁶ ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, ICC-01/04-01/07-717, para. 78 (<https://www.legal-tools.org/doc/67a9ec/>).

slight relevance and the low probative value of the Report and its real prejudicial potential, the Chamber was unpersuaded that it should be admitted.⁷

Status of Pre-Trial Chamber Decisions:

Rule 63(1) provides that the rules of evidence, together with Article 69, apply in all proceedings before all chambers. Does this mean that all evidentiary matters will be treated identically in all stages of the proceedings, should the Pre-Trial Chamber's assessment on admissibility be binding upon the Trial Chamber in relation to the same piece of evidence? In *Lubanga*, Pre-Trial Chamber I noted that Pre-Trial Chamber rulings on the admissibility and probative value of evidence are not binding on a Trial Chamber.⁸

In *Bemba*, the majority of the Chamber decided to admit *prima facie* before the start of the presentation of evidence, all statements of witnesses to be called to give evidence at trial and all the documents submitted by the prosecution in its list of evidence.⁹ The Chamber emphasized that it would evaluate the probative value and give the appropriate weight to the evidence as a whole, at the end of the case when making its final judgement. The Chamber considered "that a ruling on admissibility is not a precondition for the admission of any evidence". Judge Kuniko Ozaki dissented arguing that the concept of 'prima facie admissibility' does not exist in the ICC Statute or in the Rules of Procedure and Evidence. Furthermore, he holds that Article 69(2) of the ICC Statute clearly imposes the principle of primacy of orality in proceedings before the Court. Instead, he submits that in appropriate cases, the parties may request the Chamber to admit the prior-recorded statements in order to impeach the witness, which would be

⁷ ICC, *Prosecutor v. Lubanga*, Trial Chamber, Decision on the request by the legal representative of victims a/0001/06, a/0002/06, a/0003/06, a/0049/06, a/0007/08, a/0149/08, a/0155/07, a/0156/07, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0149/07 and a/0162/07 for admission of the final report of the Panel of Experts on the illegal exploitation of natural resources and other forms of wealth of the Democratic Republic of the Congo as evidence, 22 September 2009, ICC-01/04-01/06-2135, para. 34 (<https://www.legal-tools.org/doc/c84f5b/>).

⁸ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges, 24 May 2007, ICC-01/04-01/06-915, (<https://www.legal-tools.org/doc/602c7a/>).

⁹ ICC, *Prosecutor v. Bemba*, Trial Chamber III, Decision on the admission into evidence of materials contained in the prosecution's list of evidence, 19 November 2010, ICC-01/05-01/08-1022, paras. 8–10 (<https://www.legal-tools.org/doc/ec0a58/>).

exceptional in most court proceedings.¹⁰ The Appeals Chamber reversed the Trial Chamber’s decision and ruled that admission into evidence of the witnesses’ written statements requires a cautious item-by-item analysis.¹¹

Cross-references:

Rules 63, 64, 70, 71 and 72.

Doctrine: For the bibliography, see the final comment on Article 69.

Author: Mark Klamberg.

¹⁰ ICC, *Prosecutor v. Bemba*, Trial Chamber, Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the admission into evidence of materials contained in the prosecution’s list of evidence, 23 November 2010, ICC-01/05-01/08-1028, paras. 4–6, 12 (<https://www.legal-tools.org/doc/9eca75/>).

¹¹ ICC, *Prosecutor v. Bemba*, Appeals Chamber, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence”, 3 May 2011, ICC-01/05-01/08-1386, paras. 2–3, 45 and 70 (<https://www.legal-tools.org/doc/7b62af/>).

Article 69(5)

5. The Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence.

Paragraph 5 provides that the Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence. Rule 73 sets out the following categories of privileged communications: (i) lawyer-client privilege; (ii) Communications made in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure; and (iii) information, documents or other evidence of the International Committee of the Red Cross.

Cross-reference:

Rule 73.

Doctrine: For the bibliography, see the final comment on Article 69.

Author: Mark Klamberg.

Article 69(6)

6. The Court shall not require proof of facts of common knowledge but may take judicial notice of them.

Judicial notice allows the fact-finder to accept facts of common knowledge. Such facts include those of which an informed and reasonable person has knowledge or which he or she can learn from reliable accessible sources.

Facts of Common Knowledge:

UN documents, including resolutions of the Security Council will likely be regarded as facts of common knowledge before the ICC.¹

Adjudicated Facts:

Judicial notice also allows the fact-finder to accept adjudicated facts. However, the ICC has no equivalent to Rule 94(B) of the *ad hoc* tribunals, which would allow a Chamber to admit adjudicated facts under the power of judicial notice. ICC Rule 68 permits the admission of written transcripts but is more restrictive than the comparable rules of the *ad hoc* tribunals; it does not mention judicial notice of adjudicated facts. Considering the specific provisions of ICC Rule 68 Piragoff and Clarke holds it as unlikely that the Court will exercise its authority to admit adjudicated facts under the power of judicial notice (Piragoff and Clarke, 2016, pp. 1728–1730, 1745).

Documentary Evidence:

The Chamber may take judicial notice of documentary evidence from other proceedings (ICTR Rules of Procedure and Evidence, Rule 94(B) and SCSL Rules of Procedure and Evidence, Rule 94(b)). Article 69(6) of the ICC Statute does not explicitly deal with judicial notice of documentary evidence. ICC Rule 69 covers agreements as to facts, which are, inter alia, contained in the contents of a document. Piragoff and Clarke argues that Rule 69 and Article 69(6) do provide vehicles for bringing uncontroversial transcripts (Piragoff and Clarke, 2016, p. 1729).

¹ Donald K. Piragoff/Paula Clarke, “Article 69 – Evidence”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1744 (<https://www.legal-tools.org/doc/040751/>).

Doctrine: For the bibliography, see the final comment on Article 69.

Author: Mark Klamberg.

Article 69(7)

7. Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:
(a) The violation casts substantial doubt on the reliability of the evidence; or
(b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

The issue of the admissibility of illegally or improperly obtained evidence raises contradictory and complex matters of principle. One purpose of having rules about collecting evidence, for example rules on search and seizure, is to ensure that the evidence is of good quality and thus reliable. There is also an interest in due process. Thus, an accused person who has suffered an illegal attack on his rights prior to the trial proceedings, for example through torture, should not be subject to further harm by the use of fruits of such an attack in a trial. On the other hand, in the interest of crime control, all evidence that proves that the accused is guilty should be used, even if it is illegally obtained.

During the negotiations on the ICC Statute “some delegations wanted to exclude evidence obtained by means of a violation of human rights, but this formulation was regarded as too broad”.¹ Instead the Court has to distinguish between minor infringements of procedural safeguards and more serious violations. Whereas violations of human rights law may be a ground for excluding evidence, a violation of national laws does not require exclusion, as long as it is not a violation of internationally recognized human rights. According to Article 69(8) the Court “shall not rule on the application of the State’s national law [...] [w]hen deciding on the relevance or admissibility of evidence collected by a State”. In *Lubanga*, Pre-Trial Chamber I stated that the mere fact that a national court “has ruled on the unlawfulness of the search and seizure conducted by the national authorities cannot be considered binding on the Court”.²

¹ Hans-Jörg Behrens, “The Trial Proceedings”, in Roy S. Lee (ed.), *The International Criminal Court: the Making of the Rome Statute: Issues, Negotiations and Results*, Kluwer Law International, The Hague, 1999, p. 246.

² ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, ICC-01/04-01/06-803-tEN, para. 69 (*Lubanga*, 29 January 2007’) (<https://www.legal-tools.org/doc/b7ac4f/>).

In *Lubanga*, the Defence requested that the Prosecution evidence should be declared inadmissible on the grounds that it had been procured in violation of Congolese rules of procedure and internationally recognised human rights. The Pre-Trial Chamber observed the following:

The mere fact that a national court has ruled on the unlawfulness of the search and seizure conducted by the national authorities cannot be considered binding on the Court. This is clear from Article 69(8) which states that “[w]hen deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State’s national law” (*Lubanga*, 29 January 2007, paras. 62–63 and 69).

In order to determine whether there had been an illegality amounting to a violation of internationally recognized human rights or only an infringement of the domestic rules of procedure, the Chamber sought guidance from international human rights jurisprudence concerning the right to privacy. The Chamber found, in the light of European Court of Human Rights jurisprudence, that the search and seizure were an infringement of the principle of proportionality and as such a violation of internationally recognised human rights. Even though a violation had occurred, the Judges observed that they had the discretion to seek an appropriate balance between the ICC Statute’s fundamental values in their determination whether evidence is admissible. Such fundamental values would arguably include the interests of due process and crime control. In regard to the first limb of the alternative embodied in Article 69(7)(a), the Chamber held the view that the infringement of the principle of proportionality did not affect the reliability of the evidence seized. Had the search and seizure been conducted in full adherence to the principle of proportionality the content of items seized would be the same. The Chamber also considered the second limb of the alternative embodied in Article 69(7)(b), the adverse effect that the admission of such evidence could have on the integrity of the proceedings (*Lubanga*, 29 January 2007, paras. 81–86).

Cross-references:

Rules 74 and 75.

Doctrine: For the bibliography, see the final comment on Article 69.

Author: Mark Klamberg.

Article 69(8)

8. When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law.

Article 69(8) is consistent with Rule 63(5) that the Chambers shall not apply national laws governing evidence, except in accordance with Article 21. There is a relationship between the irrelevance of national law and the exclusionary rule in Article 69(7). In *Lubanga*, Pre-Trial Chamber I stated that the mere fact that a national court “has ruled on the unlawfulness of the search and seizure conducted by the national authorities cannot be considered binding on the Court”.¹

Cross-references:

Regulations 43 and 44.

Doctrine:

1. Hans-Jörg Behrens, “The Trial Proceedings”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations and Results*, Kluwer Law International, The Hague, 1999, pp. 238–46.
2. Gideon Boas, “Admissibility of Evidence under the Rules of Procedure and Evidence of the ICTY: Development of the ‘Flexibility Principle’”, in Richard May, David Tolbert, John Hocking, Ken Roberts, Bing-Bing Jia, Daryl Mundis and Gabriel Oosthuizen (eds.), *Essays on ICTY Procedure and Evidence: In Honour of Gabrielle Kirk McDonald*, Kluwer Law International, The Hague, 2001, pp. 263–74.
3. Richard May and Marieke Wierda, *International Criminal Evidence*, Ardsley, NY, Transnational Publishers, 2002.
4. Mark Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Martinus Nijhoff Publishers, Leiden, 2013.

¹ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, ICC-01/04-01/06-803-tEN, para. 69 (<https://www.legal-tools.org/doc/b7ac4f/>).

5. Donald K. Piragoff/Paula Clarke, “Article 69 – Evidence”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1712–1750 (<https://www.legal-tools.org/doc/040751/>).
6. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1077–1098 (<https://www.legal-tools.org/doc/b7432e/>).

Author: Mark Klamberg.

Article 70

Offences against the Administration of Justice

General Remarks:

Article 70 sets out an exhaustive list of the substantive offences that amount to offences against the administration of justice before the ICC. This contrasts clearly with the equivalent provisions before the ICTY, ICTR and other internationalised tribunals where the list of which acts may constitute the offence, created solely in the Rules rather than in the respective Statute and often referred to by its common law name as contempt, is often open ended. Article 70 lists six offences divided into three general categories of offences, including: (i) providing false testimony or presenting false evidence; (ii) interference with witnesses; and (iii) offences by or against officials of the Court. It also limits the *mens rea* of any of these offences to those committed intentionally.

As well as creating new criminal offences, Article 70 also establishes a procedure for whether or not jurisdiction should be exercised over such offences, further delineated in Rules 162–164 thus underlining the sensitive and complicated nature of such offences and introducing an additional level of factors as to any decision on prosecution.

Although silent on the procedures for investigating and prosecuting such alleged crimes, Article 70 does proceed to establish a maximum term of 5 years or a fine in accordance with the Rules or Procedure and Evidence. It also details its relationship with national investigation and enforcement.

Preparatory Works:

Offences against the administration of justice were not included within the 1994 Draft Statute of the International Law Commission but Article 44(2) of the Draft Statute simply required that States Parties “extend their laws of perjury to cover evidence given under this Statute by their nationals, and shall cooperate with the Court in investigating and where appropriate prosecuting any case of suspected perjury”, justified by the International Law Commission on the basis that it considered that “on balance, prosecutions

for perjury should be brought before the national courts”.¹ When the Statute was created at the Rome Conference, disagreements over the applicable procedure for the investigation and prosecution of such offences, in part whether it should be the same as that followed for the core crimes which eventually were included of Articles 5 to 8 of the ICC Statute, delayed this decision to the drafting of the Rules of Procedure and Evidence (Article 70(2)). After extensive further discussions, the Preparatory Committee included “Offences or acts against the integrity of the Court” as Article 70 of the Draft Statute submitted to the Plenipotentiaries for discussion in Rome. This draft provision included the categories of offences ultimately included within Article 70 of the ICC Statute and covered false testimony, interfering with witnesses and illegally influencing or retaliating against officials of the court but also those relating to compliance with court orders or disruption of its processes (which eventually became “Misconduct before the Court”, covered separately by Article 71 in the ICC Statute). As well as including a *nota bene*, explaining that the provisions of the Statute and Rules relating to jurisdiction would not apply equally to such offences,² the Draft Statute also clarified that such offences shall be tried by a different Chamber than the Chamber in which the alleged offences were committed (Draft Article 70(2)). The final version of Article 70 also included provisions relating to State co-operation (Article 70(4)) and the maximum sanction for the offence (Article 70(3)).

Doctrine: For the bibliography, see the final comment on Article 70.

Author: Geoff Roberts.

¹ Report of the International Law Commission on the work of its forty-sixth session (2 May 1994–22 July 1994), UN Doc. A/49/10, 2 September 1994, p. 59 (<https://www.legal-tools.org/doc/f73459/>).

² Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/2, 15 June-17 July 1998, p. 58 (<https://www.legal-tools.org/doc/732f58/>).

Article 70(1)

1. The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:

Article 70 establishes that the ICC has jurisdiction solely over offences committed “intentionally”. Under Article 30(2) of the Statute, “a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events”. Whether, in accordance with Article 21 of the Statute, the Court may be guided by Article 30 when interpreting the word “intentionally” in Article 70(1),¹ or indeed, “intent in this context cannot have a meaning other than the one ascribed to it by Article 30”² has been settled by the Court. Article 30 is directly applicable to Article 70 offences.³ It embraces “*dolus directus* in the first degree (direct intent) and second degree (oblique intent)”⁴ but excludes “*dolus eventualis*, recklessness and negligence” (*Bemba*, 19 October 2016, para 29). There is also no requirement to prove special intent, either to interfere with the administration of justice or mislead the judge.⁵

¹ Donald K. Piragoff, “Article 69 – Evidence”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2nd ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2008, p. 1339 (<https://www.legal-tools.org/doc/c9bdbd/>).

² Georgios M. Pikiş, “The Rome Statute for the International Criminal Court, Analysis of the Statute, the Rules of Procedure and Evidence”, in *The Regulations of the Court and Supplementary Instruments*, Brill, Nijhoff, p. 230 (<https://www.legal-tools.org/doc/434159/>).

³ ICC, Pre-Trial Chamber II, *Prosecutor v. Gicheru and Bett*, Decision on the “Prosecution’s Application under Article 58(1) of the Rome Statute”, 10 September 2015, ICC-01/09-01/15-1- Red, para. 20 (<https://www.legal-tools.org/doc/fbdfdc/>).

⁴ ICC, *Prosecutor v. Bemba*, Trial Chamber VII, Public Redacted Version of Judgment pursuant to Article 74 of the Statute, 19 October 2016, ICC-01/05-01/13-1989-Red, para. 29 (*‘Bemba*, 19 October 2016’) (<https://www.legal-tools.org/doc/fe0ce4/>).

⁵ *Bemba*, 19 October 2016, para 31; ICC, *Prosecutor v. Bemba*, Appeals Chamber, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018, ICC-01/05-01/13-2275-Red, paras. 677–678 (*‘Bemba*, 8 March 2018’) (<https://www.legal-tools.org/doc/56cfc0/>).

Doctrine: For the bibliography, see the final comment on Article 70.

Author: Geoff Roberts.

Article 70(1)(a)

(a) Giving false testimony when under an obligation pursuant to Article 69, paragraph 1, to tell the truth;

Article 70(1)(a) establishes the offence of “[g]iving false testimony when under an obligation pursuant to Article 69, paragraph 1, to tell the truth”. This offence may therefore only take place when a witness testifies *viva voce* before the Court and after having given an undertaking as to the truthfulness of the evidence to be given by that witness required by this provision. According to Pre-Trial Chamber II, “this offence is committed when a witness intentionally provides a Chamber with information that is false, or otherwise withholds information that is true” and it “relates to any type of information that the witness provides or withholds while testifying under oath”,¹ as long as the information withheld, is “inseparably linked to the issues explored during questioning”.² Article 70(1)(a) must be read in conjunction with the witness’s obligation to speak “the whole truth” under Article 69(1) of the ICC Statute and Rule 66 of the Rules and therefore “intentionally providing an incomplete response is contrary to the obligation to tell the “whole” truth”.³

In this regard, Rule 66(3) obliges the Court to inform any witness who is about to testify, of the offence under Article 70(1)(a). However, under Rule 66(2) a witness may be exempted from the requirement of giving the undertaking if they are “under the age of 18 or a person whose judgment has been impaired and who, in the opinion of the Chamber, does not understand the nature of a solemn undertaking”. In such cases, no prosecution for false testimony under Article 70(1)(a) could arise. Furthermore, Article 70(1)(a) may not apply to false evidence provided to investigators

¹ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber II, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, 11 November 2014, ICC-01/05-01/13-749, para. 28 (<https://www.legal-tools.org/doc/a44d44/>).

² ICC, *Prosecutor v. Bemba*, Trial Chamber VII, Public Redacted Version of Judgment pursuant to Article 74 of the Statute, 19 October 2016, ICC-01/05-01/13-1989-Red, para. 21 (*‘Bemba, 19 October 2016’*) (<https://www.legal-tools.org/doc/fe0ce4/>).

³ ICC, *Prosecutor v. Bemba*, Appeals Chamber, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018, ICC-01/05-01/13-2275-Red, para. 692 (<https://www.legal-tools.org/doc/56cfc0/>).

and tendered by one of the parties under Rule 68 as a witness “is a person appearing before the Court, either in person or by means of audio or video technology, who attests to factual allegations according to his or her personal knowledge” (*Bemba*, 19 October 2016, para 20). It applies equally to fact and expert witnesses (para. 20).

“False testimony” within the meaning of Article 69(1)(a) means giving information that “has an impact on the assessment of the facts relevant to the case or the assessment of the credibility of witnesses” (*Bemba*, 19 October 2016, para 22) but does not need to be “material ‘to the outcome of the case’, either in favour of or against the accused” (para. 23). The term “false” appears only in Articles 70(1)(a), 70(1)(b), and 84(1)(b) which relates to the discovery that decisive evidence relied upon at trial was “false, forged or falsified”. Distinguishing “false testimony” in the sense of Article 70(1)(a) from testimony which is vague, lacking credibility or honest but completely mistaken, is a complicated issue, accentuated by the nature of the core crimes within the Court’s jurisdiction which require testimony often relating to stressful and traumatic events. Consequently, despite being faced with various instances of incorrect testimony, trial chambers have been reluctant to pursue requests for investigation for false testimony under Article 70 (in addition to their lack of authority under the Statute and Rules to order the Prosecution to investigate). Trial Chamber II held that “inconsistencies pointed out by the Defence in the testimony of [the witness] are related before everything on the credibility of his testimony, rather than on a belief that he intentionally lied to the Court”.⁴ Similarly, Trial Chamber III recently held that while “the evidence before the Chamber may raise doubts as to [a part of the witness’ testimony] [...] the Chamber is not persuaded that [he] [...] intentionally tried to mislead the Court during his testimony”.⁵ However, even in final judgement, when the Trial Chamber has been able to ultimately assess credibility and has recognised the possibility that participating victims who testified under oath have assumed a false identity in order so as to benefit from participating in the trial as victims, in

⁴ ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, Transcript of Hearing, 22 September 2010, ICC-01/04-01/07-T-190-Red-ENG, p. 5 (<https://www.legal-tools.org/doc/d745c0/>).

⁵ ICC, *Prosecutor v. Bemba*, Trial Chamber III, Public redacted version of “Decision on the ‘Defence application concerning Witness CAR-OTP-WWWW-0042’s evidence” of 10 October 2013, 16 October 2013, ICC-01/05-01/08-2830-Red, para. 17 (<https://www.legal-tools.org/doc/a7d777/>).

light of the “consistent, credible and reliable witnesses” who contradicted them, no prosecutions for false testimony have resulted.⁶ Ultimately, it has been held that “false testimony” under Article 70(1)(a), “means that the witness does not comply with the duty to tell the truth and makes an objectively untrue statement, thereby misleading the Court” (*Bemba*, 19 October 2016, para. 24).

At the *ad hoc* Tribunals, false testimony is covered by a separate provision from contempt and is proscribed by Rule 91. Although there have been convictions for false testimony, or soliciting false testimony, these have resulted in guilty pleas which have not contested the precise definition of false evidence.⁷ However, the Appeals Chamber, when assessing the evidence of GAA which led to his prosecution for contempt, did thoroughly assess whether his recantation of the evidence he gave before the Trial Chamber was false. In large part their assessment that his original evidence was true and the recantation was false was based on the consistency of his prior statements, the implausibility of inventing specific facts that were corroborated by other evidence as well as the witness’ alleged actions when allegedly deciding to recant and tell the truth, namely by contacting the Defence rather than the Prosecution.⁸ This was perhaps an easier task though as the witness was recanting his own testimony and claiming the opposite to what he had already testified to the Trial Chamber. It is much more difficult to demonstrably prove that a witness is intentionally providing false evidence when the evidence that undermines or contradicts that evidence is provided by another source. This may explain why prosecutions for false testimony are so rare before International Courts, despite various examples of testimony being completely lacking in credibility.

The concept of false testimony has not therefore been adjudicated when contested before international criminal courts. It has been interpreted as “the making of a factual statement, untrue to the knowledge of the mak-

⁶ ICC, *Prosecutor v. Lubanga*, Trial Chamber, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, para. 502 (<https://www.legal-tools.org/doc/677866/>).

⁷ ICTR, *Prosecutor v. GAA*, Trial Chamber, Judgement and Sentence, 4 December 2007, ICTR-07-90-R77-I (<https://www.legal-tools.org/doc/62cecb/>); ICTY, *Prosecutor v. Tabakov*, Trial Chamber II, Sentencing Judgement, 18 March 2010, IT-98-32/1-R77.1, para. 5 (<https://www.legal-tools.org/doc/c5ca66/>).

⁸ ICTR, *Prosecutor v. Kamuhanda*, Appeals Chamber, Judgement, 19 September 2005, ICTR-99-54A-A, paras. 216–221 (<https://www.legal-tools.org/doc/8ff7cd/>).

er”.⁹ As set out above in relation to all offences under Article 70, the falsity of the statement must be made intentionally as recklessness or negligence as to its falsity would not suffice. In this regard, if a witness gave evidence which he thought was true or at least considered it to be reasonably likely to be true, he could not be prosecuted under Article 70 as he does not know the evidence to be false.

There appears to be no specific prerequisites for prosecuting a person for false testimony, or for any accomplice to this crime. Self-evidently, if in a trial judgement, the Chamber considers and also refers to evidence supporting a determination that a witness’ evidence was completely wrong this would facilitate a prosecution under Rule 70(1)(a). However, a trial judgement is not a prerequisite for such a prosecution and at the ICC, accused have been prosecuted for core crimes while concurrently facing charges under Article 70.¹⁰

Doctrine: For the bibliography, see the final comment on Article 70.

Author: Geoff Roberts.

⁹ Georghios M. Pikis, “The Rome Statute for the International Criminal Court, Analysis of the Statute, the Rules of Procedure and Evidence”, in *The Regulations of the Court and Supplementary Instruments*, Brill, Nijhoff, p. 230 (<https://www.legal-tools.org/doc/c9bdbd/>).

¹⁰ ICC, *Prosecutor v. Bemba et al.*, Pre-Trial Chamber II, Warrant of arrest for Jean-Pierre Bemba Gombo, Aime Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidele Babala Wandu and Narcisse Arido, 20 November 2013, ICC-01/05-01/13 (<https://www.legal-tools.org/doc/9f1848/>).

Article 70(1)(b)

(b) Presenting evidence that the party knows is false or forged;

Article 70(1)(b) sets out the offence of intentionally presenting evidence that the party knows is false or forged. This offence is limited to tendering of evidence by a “party”, which would apply only to the Prosecution and Defence. However, the Legal Representatives of Victims, considered to be participants in the regulatory framework of the Court, appear to therefore be exempted from Prosecution for offences under Article 70(1)(b). This appears to be supported by the interpretation by Pre-Trial Chamber II, which held that this provision only applies to “those who have the right to present evidence to a chamber in the course of proceedings before the Court”.¹

This would mean that any evidence they tender while examining the witnesses put forward by the Prosecution or Defence could not give rise to prosecution for being false or forged. Furthermore, having been granted the right to tender evidence and testify under oath, victims participating in proceedings and their legal representatives will not face any prosecution if such evidence is known by them to be false. This lacuna in the Statute must be resolved, especially in light of the findings in *Lubanga* that participating victims had falsified their identities,² although in the absence of a case involving the Legal Representative of Victims, no pronouncement on this issue has yet been issued.³

Within a defence team, it has been held that any team member who “is either formally authorised to present evidence or who, de facto, plays a significant role in the Defence team’s decisions on the strategy of the accused’s representation, including the presentation of evidence” (*Bemba*, 19 October 2016, para. 34) has been held to fall within the scope of party. This

¹ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber II, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, 11 November 2014, ICC-01/05-01/13-749, para. 29 (<https://www.legal-tools.org/doc/a44d44/>).

² ICC, *Prosecutor v. Lubanga*, Trial Chamber, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, para. 502 (<https://www.legal-tools.org/doc/677866/>).

³ ICC, *Prosecutor v. Bemba*, Trial Chamber VII, Public Redacted Version of Judgment pursuant to Article 74 of the Statute, 19 October 2016, ICC-01/05-01/13-1989-Red, para. 34 (*‘Bemba, 19 October 2016’*) (<https://www.legal-tools.org/doc/fe0ce4/>).

includes an accused, in light of Article 67(1)(c)-(e) and Rule 149, which generally allow an accused to present evidence directly or through counsel of their choosing (paras. 35–37). Logically the same would apply to the Prosecution. However, it was later clarified that in this regard Article 70(1)(b) only incriminates “the actual presentation of evidence in the proceedings, while the decision-making as to which evidence should be presented is merely a preparatory act” and therefore falls outside the scope of this provision.⁴

The term “evidence” in Article 70(1)(b) has been held to “encompass all types of evidence, including oral testimony, which seeks to prove a particular factual allegation” (*Bemba*, 19 October 2016, para. 38). The term “false” in this context suffers from the same ambiguities as the term in Article 70(1)(a) but again, and for the sake of consistency, requires that the evidence is “objectively incorrect and not according with truth or fact” (para. 39) and that the person presenting the evidence, knows it to be false. The term “knows” in this provision must be given the meaning set out in Article 30(3), in that the person must be aware that a circumstance exists or that a consequence will occur in the ordinary course of events. Little assistance is provided by the Statute or Rules as to the definition of ‘forged’ as it only appears in Article 84(1)(b) relating to the revision of a conviction or sentence. It has been interpreted to mean subject to a “change or alteration of a document to read something other than it states or conveys”.⁵ There does not appear to be any requirement that the party itself was responsible for the forgery, simply that it presented the document to the court and relied on its truthfulness (*Bemba*, 19 October 2016, para. 40). It appears therefore that “false” in this context is intended to cover the testimony of witnesses called by the relevant party whereas forgery covers the documents it tenders into evidence (para. 39). However, the ICC Appeals Chamber clarified that the wording of Article 70(1)(b) of the Statute cannot be reconciled with the nature of oral testimony and it is therefore meant to encompass only the presentation of false or forged documentary evidence (*Bemba*, 8

⁴ ICC, *Prosecutor v. Bemba*, Appeals Chamber, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018, ICC-01/05-01/13-2275-Red, para. 705 (*Bemba*, 8 March 2018’) (<https://www.legal-tools.org/doc/56cfc0/>).

⁵ Georghios M. Pikis, “The Rome Statute for the International Criminal Court, Analysis of the Statute, the Rules of Procedure and Evidence”, in *The Regulations of the Court and Supplementary Instruments*, Brill, Nijhoff, 2010, p. 231 (<https://www.legal-tools.org/doc/c9bdbd/>).

March 2018, paras. 709–710). Presented, in the context of Article 70(1)(b) has been held to apply “irrespective of whether the evidence is admissible or the presenting party intends to rely on it” (*Bemba*, 19 October 2016, para. 40).

One complicated area revolves around the duties of defence counsel to defend their clients effectively and their obligations not to present evidence they know to be false or forged under Article 70(1)(b). Defence Counsel are disclosed large amounts of material by the Prosecutor and also collect significant information from other sources in the course of their investigations. They may well receive evidence which they consider possibly false, but which is in favour of their client, which they may be obliged to tender into evidence. In addition, they may have received other evidence which may strongly suggest that this evidence is false. If this contrary evidence was received by the Prosecutor he would have to disclose it to the Defence due to his obligation under Article 67 to disclose exculpatory evidence to the accused and so he would probably not present such evidence. However, the Defence has no reciprocal obligation to disclose to the Prosecutor evidence which contradicts or undermines his case under the ICC Statute and Rules. The ICTY adjudicated on this issue when Defence Counsel was prosecuted for contempt for tendering additional evidence on appeal which he allegedly knew to be false as he had been informed so by the person whose statement he tendered. In protesting his innocence, Counsel claimed that it was for the court to determine the veracity of the evidence. The Appeals Chamber, adjudicating at first instance, held that this was “not a situation in which the Tribunal could determine where the truth lay, [and that] [...] by submitting as the only evidence on the point a statement which he knew had been repudiated by the very person who made it, denied to the Tribunal any opportunity to make any determination as to where the truth lay” and convicted him for contempt.⁶

Doctrine: For the bibliography, see the final comment on Article 70.

Author: Geoff Roberts.

⁶ ICTY, *Prosecutor v. Tadić*, Appeals Chamber, Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin, 31 January 2000, IT-94-1-A-R77, para. 156 (<https://www.legal-tools.org/doc/56e534/>).

Article 70(1)(c): Corruptly Influencing a Witness

(c) Corruptly influencing a witness,

The extensive list of offences in Article 70(1)(c) relating to interference with witnesses has seen the most prosecutions for contempt at the *ad hoc* tribunals and also pending ICC cases. It is effectively subdivided into four subcategories of offences.

As held by Pre-Trial Chamber II, this provision “proscribes any conduct that may have (or is expected by the perpetrator to have) an impact or influence on the testimony to be given by a witness, inducing the witness to falsely testify or withhold information before the Court”.¹ Anyone can commit it, not just participants in the proceedings.² Furthermore, the same chamber considered that “the offence of corruptly influencing a witness is constituted independently from whether the pursued impact or influence is actually achieved and must therefore be understood as a conduct crime, not a result crime (*Bemba*, 11 November 2014, para. 30).

Corruptly influencing a witness may be considered to relate to paying a bribe to a witness to testify in a certain manner. However, it appears to be charged together with interfering with the testimony of a witness which is a larger category but which also encapsulates situations where the interference with witnesses is unwelcome. Indeed, it has been recognised at the ICTY that the *actus reus* of interfering with witnesses could include “keeping a witness out of the way, by bribery or otherwise, so as to avoid or prevent service of a subpoena; assaulting, threatening or intimidating a witness or a person likely to be called as a witness; endeavouring to influence a witness against a party by, for instance, disparagement of the party; or endeavouring by bribery to induce a witness to suppress evidence”.³ Indeed, this open-ended definition of influencing a witness has been followed

¹ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber II, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, 11 November 2014, ICC-01/05-01/13-749, para. 30 (*‘Bemba*, 11 November 2014’) (<https://www.legal-tools.org/doc/a44d44/>).

² ICC, *Prosecutor v. Bemba*, Trial Chamber VII, Public Redacted Version of Judgment pursuant to Article 74 of the Statute, 19 October 2016, ICC-01/05-01/13-1989-Red, para. 49 (*‘Bemba*, 19 October 2016’) (<https://www.legal-tools.org/doc/fe0ce4/>).

³ ICTY, *Prosecutor v. Radoslav Brdanin*, Trial Chamber, Concerning Allegations Against Milka Maglov, Decision on Motion for Acquittal pursuant to Rule 98bis, 19 March 2004, IT-99-36-R77, para. 28, footnotes omitted (<https://www.legal-tools.org/doc/dc2c19/>).

by the Court (*Bemba*, 19 October 2016, para. 45) and includes such acts as seeking to modify the witness’s testimony “by instructing, correcting or scripting the answers to be given in court, or providing concrete instructions to the witness to dissemble when giving evidence, such as to act with indecision or show equivocation” (para. 46).

It must be noted that any of the forms of interference under this provision must be with a “witness” which, on a narrow reading, could limit its application to those who testify in accordance with Article 69(1). However, it is possible that such an offence could also cover situations where a person who was corruptly influenced, did not testify because of what he had said or denied when interviewed before giving evidence. Such an offence could be equally damaging to the administration of justice which Article 70 seeks to protect. In this regard Rule 77(A)(iv) of the ICTY Rules of Procedure and Evidence, covering almost identical offences, applies also to “potential witnesses”. Indeed, it has been confirmed that witness in this context applies not only to actual witnesses who have taken an oath before the court as covered by Article 70(1)(a), but “must also encompass ‘potential witnesses’, namely persons who have been interviewed by either party but have not yet been called to testify before the Court” (*Bemba*, 19 October 2016, para. 44). While this broad interpretation of witness in the context of Article 70(1)(c) was upheld by the Appeals Chamber, the requirement that such a potential witness be interviewed by one of the parties, was not.⁴

Exactly what constitutes a bribe has been interpreted at the ICTY as “an inducement offered to procure illegal or dishonest action in favour of the giver [and][...] a price, reward, gift or favour bestowed on promised with a view to pervert the judgement of or influence the action of a person in a position of trust”.⁵ There does not appear to be any requirement that the inducement offered must be of monetary value. Furthermore, proof is not required that the conduct intended to influence the nature of the witness’s evidence produced a result (*Begaj*, 27 May 2005, para. 21; *Bemba*, 19 October 2016, para. 48). Arguably, if the witness was going to testify in

⁴ ICC, *Prosecutor v. Bemba*, Appeals Chamber, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018, ICC-01/05-01/13-2275-Red, para. 791 (*‘Bemba*, 8 March 2018’) (<https://www.legal-tools.org/doc/56cfc0/>).

⁵ ICTY, *Prosecutor v. Begaj*, Trial Chamber I, Judgement on contempt allegations, 27 May 2005, IT-03-66-T-R77, para. 18 (*‘Begaj*, 27 May 2005’) (<https://www.legal-tools.org/doc/24ea5c/>).

a certain manner anyway and was provided with a gift, this would not constitute the offence of corruptly influencing a witness under Article 70(1)(c). Indeed, the ICTY Appeals Chamber, acting in first instance, acquitted an accused of bribery of witnesses where the evidence of a later payment to a witness which was well after the witness was interviewed and unconnected with his testimony, undermined accusations of bribery based on a previous payment for “difficult financial and emotional circumstances” and demonstrated a lack of intent of bribery.⁶

Doctrine: For the bibliography, see the final comment on Article 70.

Author: Geoff Roberts.

⁶ ICTY, *Prosecutor v. Tadić*, Appeals Chamber, Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin, 31 January 2000, IT-94-1-A-R77, para. 158 (<https://www.legal-tools.org/doc/56e534/>).

Article 70(1)(c): Obstructing or Interfering with the Attendance or Testimony of a Witness

obstructing or interfering with the attendance or testimony of a witness,

The obstruction or interference with witness testimony is a general provision covering most forms of interference with prospective witnesses. It most closely equates to Rule 77(a)(iv), which prosecutes for contempt “any person who threatens, intimidates, [...] or otherwise interferes with, a witness”. ICTY jurisprudence, which also includes bribery within this provision considers the following definitions of these provisions: “threat is defined as a communicated intent to inflict harm or damage of some kind to a witness and/or the witness’ property, and/or a third person and/or his property, so as to influence or overcome the will of the witness to whom the threat is addressed”;¹ intimidation consists of acts or culpable omissions likely to constitute direct, indirect or potential threats to a witness, which may interfere with or influence the witness’ testimony;² “otherwise interfering with a witness” is an open ended provision which encompasses acts or omissions, other than threatening, intimidating, causing injury or offering a bribe, capable of and likely to deter a witness from giving full and truthful testimony or in any other way influence the nature of the witness’ evidence (*Brđanin*, 19 March 2004, paras. 27, 28). Furthermore, to establish responsibility, it is immaterial whether the witness actually felt threatened or intimidated, or was deterred or influenced.³ Furthermore, even when it was the witness who initiated the communication by calling the accused, and the accused requested that the witness provide another statement denying knowledge of certain people and come and “fix something up” this can amount to otherwise interfering with a witness (*Begaj*, 27 May 2005, para. 38). The interference need not also be in favour of an accused’s client and

¹ ICTY, *Prosecutor v. Begaj*, Trial Chamber I, Judgement on contempt allegations, 27 May 2005, IT-03-66-T-R77, para. 13 (*Begaj*, 27 May 2005’) (<https://www.legal-tools.org/doc/24ea5c/>).

² ICTY, *Prosecutor v. Brđanin*, Trial Chamber, Concerning Allegations Against Milka Maglov, Decision on Motion for Acquittal pursuant to Rule 98bis, 19 March 2004, IT-99-36-R77, para. 27 (*Brđanin*, 18 March 2004’) (<https://www.legal-tools.org/doc/dc2c19/>).

³ *Begaj*, 27 May 2005, para. 21; *Prosecutor v. Haraqija and Morina*, Trial Chamber, Judgement on Allegations of Contempt, 17 December 2008, IT-04-84-R77.4, para. 61 (<https://www.legal-tools.org/doc/695b22/>).

Defence Counsel have been convicted for witness interference when preventing witnesses from naming other perpetrators.⁴

The *mens rea* for this offence has been held to require proof of a “specific intent to interfere with the administration of justice” (*Begaj*, 27 May 2005, para. 22).

Doctrine: For the bibliography, see the final comment on Article 70.

Author: Geoff Roberts.

⁴ ICTY, *Prosecutor v. Tadić*, Trial Chamber, Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin, 31 January 2000, IT-94-1-A-R77, para. 150 (<https://www.legal-tools.org/doc/56e534/>).

Article 70(1)(c): Retaliation Against a Witness

retaliating against a witness for giving testimony,

By its very nature, retaliation must occur after the giving of testimony, whether to a court or to an investigator for use in court. Indeed, “retaliation is an act of revenge; avenging one who you believe has damned you”.¹ There are few clues as to the nature of the retaliation required, but presumably it may encapsulate the different forms of interference that can occur elsewhere in Article 70(1)(c), such as intimidation, threats or other attempts at interference. It would include physical harm to a witness but not require it and may also be directed at a witness’ property or a third party’s property in order to hurt the witness. In line with the jurisprudence from other courts, it also appears likely that the retaliatory acts, must be intentionally directed against a witness for what they have done, and indiscriminate acts which may harm these same witnessed will not demonstrate the requisite *mens rea* of the offence (*Gucati*, 18 May 2022, para. 628).

Doctrine: For the bibliography, see the final comment on Article 70.

Author: Geoff Roberts.

¹ Georghios M. Pikis, “The Rome Statute for the International Criminal Court, Analysis of the Statute, the Rules of Procedure and Evidence”, in *The Regulations of the Court and Supplementary Instruments*, Brill, Nijhoff, 2010, p. 232 (<https://www.legal-tools.org/doc/c9bdbd/>). See also, KSC, *Prosecutor v. Gucati and Haradinaj*, Public Redacted Version of the Trial Judgment, 18 May 2022, KSC-BC-2020-07, para 132 (*‘Gucati, 18 May 2022’*) (<https://www.legal-tools.org/doc/bme78f/>).

Article 70(1)(c): Destroying, Tampering with or Interfering with the Collection of Evidence

destroying, tampering with or interfering with the collection of evidence;

Forming the last part of Article 70(1)(c), the offence of destroying, tampering with or interfering with the collection of evidence has no direct equivalent before the ICTY. Little guidance is provided by the Statute and Rules as to the meanings of these terms.

One complicated area is the obligation of defence counsel to retain or provide any evidence to the Prosecutor. There is no obligation on Defence Counsel to inform the Prosecutor of the existence of evidence which may be incriminating to their client. In addition, there is no obligation to secure or protect such evidence. As such, and taken in conjunction with Article 70(1) which provides that all offences against the administration of justice must require intent, it would only be if there was an overt intentional act to destroy, tamper with, hide or remove evidence that liability could potentially result.

Doctrine: For the bibliography, see the final comment on Article 70.

Author: Geoff Roberts.

Article 70(1)(d)

(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;

Subparagraphs (d)-(f) concerns offences involving officials of the Court.

Neither the Statute nor Rules define the phrase “official of the Court”. However, to give proper effect to this provision, it must encompass “every person holding office in any department of the Court, not just in the judicial branch,¹ or at least, in accordance with Article 34, it “encompasses representation of all four organs of the Court mentioned here”.² However, this definition would exclude from its ambit any offences against either Defence or Victims’ Counsel, who are not ‘officials of the Court’ but rather independent practising lawyers. It would also exclude offences committed by or against ‘intermediaries’ who are, used primarily by the Office of the Prosecutor to make contact with and communicate with potential witnesses. As such, impeding, retaliating against or bribing defence counsel would not fall under this definition.

Article 70(1)(d) makes it an offence to impede, intimidate or corruptly influence an official of the Court. The purpose of this offence must be to force or persuade the official not to perform, or perform improperly, his or her duties. There is no indication of exactly what duties are covered by this provision and whether they must in any way relate to a particular case or situation but it would appear that no nexus is so required. There appears also to be no requirement that the official did not perform or perform improperly, his or her duties.

Doctrine: For the bibliography, see the final comment on Article 70.

Author: Geoff Roberts.

¹ Georghios M. Pikis, “The Rome Statute for the International Criminal Court, Analysis of the Statute, the Rules of Procedure and Evidence”, in *The Regulations of the Court and Supplementary Instruments*, Brill, Nijhoff, 2010, p. 232 (<https://www.legal-tools.org/doc/c9bdbd/>).

² Donald K. Piragoff, “Article 70: Offences Against the Administration of Justice”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1755 (<https://www.legal-tools.org/doc/040751/>).

Article 70(1)(e)

(e) Retaliating against an official of the Court on account of duties performed by that or another official;

Article 70(1)(e) criminalises retaliation against officials of the Court for the official duties they perform. Again, retaliation is not further defined by the Statute or Rules but should be interpreted in the same way as this term is used in Article 70(1)(c). As such it would logically include but not be limited to intimidation, threats or other attempts at interference as interpreted by the ICTY in relation to contempt cases brought under Rule 77(a)(iv) of the ICTY Rules of Procedure and Evidence. No prosecutions under this provision have occurred at the ICC yet, but one prime example of a situation that would normally fall within this definition would be the illegal arrest, interrogation and detention of four ICC staff members by the Libyan authorities in 2012. No investigation of these actions appears to have been undertaken by the Office of the Prosecutor who retains exclusive jurisdiction to prosecute Article 70 offences under Rule 165.

Retaliation against the officials of the court requires proof of the specific intent that the retaliation occurred “on account of duties performed by that or another official”. Therefore, if the retaliation against the ICC official was for a distinct purpose, this would not entail liability under Article 70.

For the bibliography, see the final comment on Article 70. *Doctrine:* For the bibliography, see the final comment on Article 70.

Author: Geoff Roberts.

Article 70(1)(f)

(f) Soliciting or accepting a bribe as an official of the Court in connection with his or her official duties.

Article 70(1)(f) criminalises both the solicitation or acceptance of a bribe as an official of the Court in connection with his or her official duties. Solicitation will presumably be given the same definition as that provided in Article 25(3)(b) of the ICC Statute. Similarly, bribery of officials in the context of this provision will be interpreted in the same manner as “corruptly influencing” in Article 70(1)(f). Whether a bribe is solicited or simply accepted by an official of the court, it must be “in connection with his or her official duties” to warrant prosecution under this provision. How closely connected is not defined. However, this would exclude bribery solicited for private actions which may be offences under the ICC staff rules or domestic criminal legislation but not under Article 70.

Cross-reference:

Rule 169.

Doctrine: For the bibliography, see the final comment on Article 70.

Author: Geoff Roberts.

Article 70(2): Exercise of Jurisdiction

2. The principles and procedures governing the Court's exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence.

The exercise of jurisdiction by the Court was left to the Rules of Procedure and Evidence which, in Rule 162, derogated from the normal jurisdictional limitations in Article 13 of the Statute for core crimes and established various discretionary factors which may be taken into account when the Court exercises jurisdiction in Article 70 proceedings. It has been confirmed however, that Article 70 of the ICC Statute does not require that the illicit conduct meet any 'gravity' threshold and "considerations of 'gravity' or 'interests of justice' cannot be invoked in the context of Article 70 proceedings".¹

Cross-references:

Rules 163, 164, 165, 170 and 171.

Doctrine: For the bibliography, see the final comment on Article 70.

Author: Geoff Roberts.

¹ ICC, *Prosecutor v. Bemba*, Trial Chamber VII, Public Redacted Version of Judgment pursuant to Article 74 of the Statute, 19 October 2016, ICC-01/05-01/13-1989-Red, para. 15 (<https://www.legal-tools.org/doc/fe0ce4/>).

Article 70(2): International Co-operation

The conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State.

Article 70(2) provides that the conditions for providing international co-operation to the Court with respect to Article 70 proceedings shall be governed by the domestic laws of the requested State. The requests could include requests to arrest, detain and transfer an accused, requests to interview certain persons or indeed requests for the search and seizure of certain evidence. By allowing the domestic laws of the requested State to govern whether the conditions for fulfilling such requests have been met, the Court grants significant power to the individual States to accept or reject these requests and therefore maintain control over these proceedings. The specifics of how this is implemented is addressed in relation to Rule 167(2).

Cross-reference:

Rule 167.

Doctrine: For the bibliography, see the final comment on Article 70.

Author: Geoff Roberts.

Article 70(3)

3. In the event of conviction, the Court may impose a term of imprisonment not exceeding five years, or a fine in accordance with the Rules of Procedure and Evidence, or both.

Article 70(3) provides for a sentence of imprisonment not exceeding five years for an offence against the administration of justice or a fine or a combination. Rule 166 further establishes the procedure for imposing fines and forfeiture orders. The maximum of five years is considered applies to all convictions combined.¹ Rule 166(2), which explicitly excludes the applicability of Article 77(1) to Article 70 offences; the difference between crimes and offences against the administration of justice under the ICC Statute, and Article 78(3), in conjunction with Article 70(3), which prohibits the accumulation of convictions amounting to an accumulation of sentences exceeding five years' imprisonment, all lead to this conclusion (*Bemba*, 22 March 2017, paras. 31–33). However, the Chamber has no inherent authority under the Statute to suspend part of the sentence ordered.²

Cross-reference:

Rule 166.

Doctrine: For the bibliography, see the final comment on Article 70.

Author: Geoff Roberts.

¹ ICC, *Prosecutor v. Bemba*, Decision on Sentence pursuant to Article 76 of the Statute, 22 March 2017, ICC-01/05-01/13-2123-Corr, para. 30 (*'Bemba, 22 March 2017'*) (<https://www.legal-tools.org/doc/78e278/>).

² ICC, *Prosecutor v. Bemba*, Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Decision on Sentence pursuant to Article 76 of the Statute", 8 March 2018, ICC-01/05-01/13-2275-Red, para. 80 (<https://www.legal-tools.org/doc/56cfc0/>).

Article 70(4)

- 4. (a) Each State Party shall extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this Article, committed on its territory, or by one of its nationals;*
(b) Upon request by the Court, whenever it deems it proper, the State Party shall submit the case to its competent authorities for the purpose of prosecution. Those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively.

The obligation upon all State Parties to “extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this Article, committed on its territory, or by one of its nationals” in Article 70(4)(a) most closely replicates the original provision in the International Law Commission’s Draft Statute. It seeks to place the burden on national states to investigate and prosecute these offences rather than the Court itself. Article 70(4)(b) reinforces this burden sharing by obliging State Parties to submit a case to the competent authorities for the purpose of prosecution whenever it is deemed proper. Once submitted, the competent authorities, are further obliged to treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively. This provision appears to demonstrate the concern of the Court that simply referring to the general obligation upon States Parties to co-operate under Article 86, is not sufficient in terms of prosecuting Article 70 offences and that an additional more extensive obligation is necessary.

Cross-references:

Articles 5–8, 30(2), 34, 69(1), 71, 77 and 86.
Rules 162–169.

Doctrine:

1. Georghios M. Pikis, “The Rome Statute for the International Criminal Court, Analysis of the Statute, the Rules of Procedure and Evidence”, in *The Regulations of the Court and Supplementary Instruments*, Brill, Nijhoff, 2010, pp. 230–32, 2010 (<https://www.legal-tools.org/doc/c9bdbd/>).

2. Donald K. Piragoff, “Article 70: Offences Against the Administration of Justice”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1751–1759 (<https://www.legal-tools.org/doc/040751/>).

Author: Geoff Roberts.

Article 71

Sanctions for Misconduct before the Court

General Remarks:

Article 71 concerns contempt of court, that is, conduct that takes place in the court and that defies the authority or dignity of the Court. Reactions towards such behaviour is accepted in most legal systems of the world, but differences do exist as to line between punishable behaviour and less severe conduct. Sanctions may vary, from exclusion from the courtroom to fines and imprisonment. The purpose of Article 71 is thus to avoid behaviour which prevent proper proceedings, for example intimidation of witnesses, disruptions, witnesses refusing or failing to answer a question.

Doctrine: For the bibliography, see the final comment on Article 71.

Author: Mark Klamberg.

Article 71(1)

1. The Court may sanction persons present before it who commit misconduct, including disruption of its proceedings or deliberate refusal to comply with its directions, by administrative measures other than imprisonment, such as temporary or permanent removal from the courtroom, a fine or other similar measures provided for in the Rules of Procedure and Evidence.

From the words “persons before it” follows that the provision only applies to misconduct committed inside the courtroom and not conduct outside the courtroom.

Although Article 71 is contained in Part 6 “The Trial” of the ICC Statute, it also applies to the proceedings of the Pre-Trial Chamber. It applies to public as well as closed sessions.¹

When the Court is in doubt whether the conduct is acceptable, it should advise the person concerned and express a warning before issuing a sanction. This is consistent with Rule 171(5) which provides that “[t]he person concerned shall be given an opportunity to be heard before a sanction for misconduct, as described in this rule, is imposed”.

The paragraph lists two examples of misconduct: disruption of proceedings and deliberate refusal to comply with directions. However, the word “including” suggest that these are only examples, other behaviour may also fall within the scope of Article 71.

Doctrine: For the bibliography, see the final comment on Article 71.

Author: Mark Klamberg.

¹ Otto Triffterer and Christoph Burchard, “Article 71”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1767 (<https://www.legal-tools.org/doc/040751/>).

Article 71(2)

2. The procedures governing the imposition of the measures set forth in paragraph 1 shall be those provided for in the Rules of Procedure and Evidence.

During the negotiations of the ICC Statute some issues were left without agreement to be resolved by the rules of procedure and evidence. The rules have not managed to fill these gaps in a satisfactory manner. For example, it is unclear whether States Parties have an obligation to co-operate and give judicial assistance to the Court in relation to fines imposed for misconduct. The Court could potentially rely upon the second sentence in Article 70(2), paras. (3) and (4). Misconduct covered by Article 71 may also amount to a violation covered by Article 70 which make the rules enacted pursuant to Article 70 applicable.¹

Cross-references:

Rules 170, 171 and 172.

Regulation 29.

Doctrine:

1. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1111–1114 (<https://www.legal-tools.org/doc/b7432e/>).
2. Otto Triffterer and Christoph Burchard, “Article 71”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1760–1774 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

¹ Otto Triffterer and Christoph Burchard, “Article 71”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1774 (<https://www.legal-tools.org/doc/040751/>); William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1113 (<https://www.legal-tools.org/doc/b7432e/>).

Article 72

Protection of National Security Information

General Remarks:

Article 72 sets out the rules and procedure on how the Court should handle the disclosure of information and documents that a State considers to “prejudice its national security interests”. It is a compromise between several interests: national security concerns, the effective functioning of the Court, to establish the guilt or innocence of the accused and the defendant’s right to a fair trial. It represents the conflict between two different views, one that only the State can properly assess when its national security is in jeopardy, the other that the Court should be the ultimate arbiter in such issues. In the end the balance was tilted towards the States. The Court may make determinations on whether information or documents are relevant, necessary and should be disclosed but the decisions are not enforceable.¹

Doctrine: For the bibliography, see the final comment on Article 72.

Author: Mark Klamberg.

¹ Rod Rastan, “Article 72”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1777–1779 (<https://www.legal-tools.org/doc/040751/>).

Article 72(1)

1. This Article applies in any case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests. Such cases include those falling within the scope of Article 56, paragraphs 2 and 3, Article 61 paragraph 3, Article 64, paragraph 3, Article 67, paragraph 2, Article 68, paragraph 6, Article 87, paragraph 6 and Article 93, as well as cases arising at any other stage of the proceedings where such disclosure may be at issue.

National security is closely related to the concept of vital interest of States, which is protected by customary international law as recognized as the *domaine réservé* of States.

The term “national” implies that there must be a danger to the country as a whole. A narrow understanding of the word “security” would include the “threat or use of force against the territorial integrity or political independence of [another] state” as understood in Article 2(4) of the UN Charter. However, a broader definition of national security would include the State’s territorial integrity, sovereignty, national defence issues, military operations, international freedom of action, foreign relations or anything else affecting the State’s national interests. The danger with a broad definition of national security is that the concept becomes meaningless.¹

The words “at any other stage of the proceedings” confirms the broad scope of the provision.

Disclosure in relation to national security interests has a broader meaning than in the sense of prosecution disclosure vis-à-vis the defence. Article 72(1) employs the term in sense of information being revealed generally.²

Doctrine: For the bibliography, see the final comment on Article 72.

Author: Mark Klamberg.

¹ Rod Rastan, “Article 72”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1783–1789 (<https://www.legal-tools.org/doc/040751/>).

² William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1120 (<https://www.legal-tools.org/doc/b7432e/>).

Article 72(2)

2. This Article shall also apply when a person who has been requested to give information or evidence has refused to do so or has referred the matter to the State on the ground that disclosure would prejudice the national security interests of a State and the State concerned confirms that it is of the opinion that disclosure would prejudice its national security interests.

Article 72(2) protects a co-operative witness from being required to reveal sensitive information during examination. The provision is triggered when the individual asked to give evidence invokes the Article. The matter is then referred to the State concerned. Thus, the assessment of national security concerns is done by the State and not the individual.¹

Doctrine: For the bibliography, see the final comment on Article 72.

Author: Mark Klamberg.

¹ Rod Rastan, “Article 72”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1791–1792 (<https://www.legal-tools.org/doc/040751/>); William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1120 (<https://www.legal-tools.org/doc/b7432e/>).

Article 72(3)

3. Nothing in this article shall prejudice the requirements of confidentiality applicable under Article 54, paragraph 3 (e) and (f), or the application of Article 73.

Paragraph 3 clarifies that other provisions which impose requirements of confidentiality do not depend on meeting the “national security” threshold. This includes lead evidence (Article 54(3)(e)) and evidence provided in confidence (Article 73).

Doctrine: For the bibliography, see the final comment on Article 72.

Author: Mark Klamberg.

Article 72(4)

4. If a State learns that information or documents of the State are being, or are likely to be, disclosed at any stage of the proceedings, and it is of the opinion that disclosure would prejudice its national security interests, that State shall have the right to intervene in order to obtain resolution of the issue in accordance with this article.

Paragraph 4 establishes the right of the State to intervene at any stage of the proceedings in relation to information or documents which the State believes would be prejudicial to its national security interests. It reinforces paragraph 1 of Article 72 in this regard.

Doctrine: For the bibliography, see the final comment on Article 72.

Author: Mark Klamberg.

Article 72(5)

5. If, in the opinion of a State, disclosure of information would prejudice its national security interests, all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor, the defence or the Pre-Trial Chamber or Trial Chamber, as the case may be, to seek to resolve the matter by cooperative means. Such steps may include:

- (a) Modification or clarification of the request;*
- (b) A determination by the Court regarding the relevance of the information or evidence sought, or a determination as to whether the evidence, though relevant, could be or has been obtained from a source other than the requested State;*
- (c) Obtaining the information or evidence from a different source or in a different form; or*
- (d) Agreement on conditions under which the assistance could be provided including, among other things, providing summaries or redactions, limitations on disclosure, use of in camera or ex parte proceedings, or other protective measures permissible under the Statute and the Rules of Procedure and Evidence.*

Paragraph 5 provides a list of measures whereby resolution between conflicting interests may be resolved. It follows from the word “may” that the list is non-exhaustive. This is modelled on the *Blaškić* case.¹

Doctrine: For the bibliography, see the final comment on Article 72.

Author: Mark Klamberg.

¹ ICTY, *Prosecutor v. Blaškić*, Appeals Chamber, Judgment on the Request of the Republic of Croatia for Review of the Decision of the Trial Chamber II of 18 July 1997, 29 October 1997, IT-95-14-A, paras. 67–69 (<https://www.legal-tools.org/doc/c5e5ab/>).

Article 72(6)

6. Once all reasonable steps have been taken to resolve the matter through cooperative means, and if the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it shall so notify the Prosecutor or the Court of the specific reasons for its decision, unless a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests.

Paragraph 6 imposes an obligation for States to co-operate with the Court to resolve conflicts relating to national security interests. If the matter cannot be resolved the State must declare “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”. The State is also obliged to explain its reasons, except in cases when that would itself prejudice national security.

Doctrine: For the bibliography, see the final comment on Article 72.

Author: Mark Klamberg.

Article 72(7)

7. Thereafter, if the Court determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused, the Court may undertake the following actions:

(a) Where disclosure of the information or document is sought pursuant to a request for cooperation under Part 9 or the circumstances described in paragraph 2, and the State has invoked the ground for refusal referred to in Article 93, paragraph 4:

(i) The Court may, before making any conclusion referred to in subparagraph 7 (a) (ii), request further consultations for the purpose of considering the State's representations, which may include, as appropriate, hearings in camera and ex parte;

(ii) If the Court concludes that, by invoking the ground for refusal under Article 93, paragraph 4, in the circumstances of the case, the requested State is not acting in accordance with its obligations under this Statute, the Court may refer the matter in accordance with Article 87, paragraph 7, specifying the reasons for its conclusion; and

(iii) The Court may make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances; or

(b) In all other circumstances:

(i) Order disclosure; or

(ii) To the extent it does not order disclosure, make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances.

After the state makes the declaration under paragraph 6, the procedure under paragraph 7 follows. The Court must first determine whether the evidence is “relevant and necessary for the establishment of the guilt or innocence of the accused”. This is done to exclude cases where the evidence sought is not really necessary for the proceedings.

The Court is denied the ability to make orders as to disclosure where the State has declared itself unable to do so because of prejudice to national security interests. However, paragraph 7(a)(ii) states that the Court may make a finding that the state is not acting in accordance with its obligations and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

However, paragraph 7(b)(i) empowers the Court to order to disclose “[i]n all other circumstances”. Such circumstances would include where the information is already in the hands of the Court, defence or a third party.¹

Doctrine:

1. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1115–1124 (<https://www.legal-tools.org/doc/b7432e/>).
2. Rod Rastan, “Article 72”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1775–1815 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

¹ Rod Rastan, “Article 72”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1812 (<https://www.legal-tools.org/doc/040751/>).

Article 73

Third-Party Information or Documents

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

General Remarks:

Article 73 concerns the flow of information between States, and between States and organizations. The provision might have been better placed in Part 9 governing State co-operation because it limits the duty of States to provide assistance to the Court.

Analysis:

Articles 73 and 93(9)(b) allow a State Party to refuse to provide documents or information disclosed to it in confidence by a third State or an international organization, if the consent to disclosure is refused by the originator.

The provision only relates to States Parties and not to non-States Parties. Non-States Parties can enter into an agreement to co-operate with the Court under Article 87(5) but in absence of such agreement there is no obligation to co-operate.

The second sentence provides that if the originator is a State Party, information and evidence can only be withheld if the originator State invokes national security concerns under Article 72. Requests where the originator is a State Party is in essence a request to that State Party. A more straightforward approach for the Court would be to ask that State in the first place which makes this part of Article 73 appear redundant.¹

¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1126 (<https://www.legal-tools.org/doc/b7432e/>).

If the originator is not a State Party and refuses to consent to disclosure, the requested State shall inform the Court of the refusal.

The words “in confidence” should be construed narrowly to prevent illegitimate use of Article 73, such as to protect evidence of crimes committed by a State’s own nationals.²

Doctrine:

1. Annalisa Ciampi, “The Obligation to Cooperate”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 1607–38.
2. Helen Duffy, Christopher K. Hall and Rod Rastan, “Article 73”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1816–1825 (<https://www.legal-tools.org/doc/040751/>).
3. William A., Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1125–1127 (<https://www.legal-tools.org/doc/b7432e/>).

Author: Mark Klamberg.

² Helen Duffy, Christopher K. Hall and Rod Rastan, “Article 73”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1822 (<https://www.legal-tools.org/doc/040751/>).

Article 74

Requirements for the Decision

General Remarks:

Article 74 regulates the key aspects of judicial deliberations in the Trial Chamber on the issue of the guilt or innocence of the accused and sets requirements towards the format and content of the judgment on the merits. This includes the judges' presence requirement as a precondition of the decision's validity (Article 74(1)), the admissible basis and scope of the decision (Article 74(2)), the judicial duty to strive for unanimity and the majority rule (Article 74(3)), the principle of secrecy of judicial deliberations (Article 74(4)), and the requirements regarding the format, reasoning, and the delivery of decisions (Article 74(5)). Notably, deliberations and delivery of judgment are the only interval of the trial stage of the ICC proceedings that is subject to a fairly detailed regulation in the Statute. Other segments of trial, in particular the order and manner in which evidence is to be submitted, are left for the determination of the Trial Chambers, which will confer with the parties and issue directions for the conduct of the proceedings (Article 64(3)(a) and (8)(b)).

Neither the title of Article 74 nor its sub-paragraphs state expressly what category of decisions is covered by the provision. However, subparagraph 2 provides that the decision "shall be based on [...] the *entire* proceedings", and subparagraph 5 stipulates that it "shall contain a *full* and reasoned statement of the Trial Chamber's findings on the evidence and *conclusions*". This language implies that the provision deals solely with the verdicts at trial. Interlocutory decisions of the Trial Chamber may neither be expected to be based on the entire proceeding nor contain findings on the evidence and conclusions. Moreover, Article 81, entitled "Appeal against decision of acquittal or conviction or against sentence", establishes in subparagraph 1 the grounds on which the Prosecutor and the convicted person may appeal "[a] decision under Article 74". Article 81(2) addresses appeals against sentencing decisions pursuant to Article 76, while Article 82 covers appeals against 'other' (interlocutory) decisions (Article 82(1) and (2)). The combined reading of Articles 74 and 81–82 makes it clear

that ‘decision under Article 74’ can only be interpreted as referring to the final decision regarding guilt or innocence at trial.¹

However, this does not rule out the application of parts of Article 74 by analogy, and *mutatis mutandis*, to other decisions, to the extent that they are not subject to special regulation. Whilst Article 83(4) and (5) set the requirements towards the judgments of the Appeals Chamber, a statutory gap with respect to the Pre-Trial Chamber, decisions (see for example Article 61(7)) may be covered through the application of Article 74 by analogy. In particular, the judicial duty to provide reasoned opinions is a general requirement that holds for all decisions affecting the legal status and interests of parties and participants, although the required degree of detail may legitimately vary by a type of decision. In a similar vein, the Pre-Trial Chambers’ decisions are subject to the duty of judges to genuinely deliberate with one another but may also be rendered by majority, in line with Article 74(3) (Triffterer and Kiss, 2016, p. 1830). By the same token, the requirement in Article 74(2) that the judgment must be limited to evidence on the record must apply to any other decisions that involve the making of factual findings.²

Unlike the ICTY and ICTR Statutes (Article 23 and 22 respectively), Article 74 of the ICC Statute avoids the term ‘judgment’. By contrast, all rulings of the ICC Appeals Chamber are denominated as ‘judgments’. The downside of this approach is that the Statute does not make a traditional distinction between interlocutory and final decisions, whether for the purpose of trial or appeals, which may appear confusing.³ The reason for these legislative choices is not self-evident and cannot readily be inferred from the drafting history. The draft Statute as submitted to the Preparatory Committee referred to “judgement” in Articles 72 and 80.⁴ However, the

¹ See also, Otto Triffterer and Alejandro Kiss, “Article 74”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1830 (<https://www.legal-tools.org/doc/040751/>); Christoph Safferling, *International Criminal Procedure*, Oxford University Press, 2010, p. 522 (<https://www.legal-tools.org/doc/50a9f2/>).

² Nina Jørgensen and Alexander Zahar, “Deliberation, Dissent, Judgment”, in Göran Sluiter, Håkan Friman, Suzannah Linton, Salvatore Zappalà and Sergey Vasiliev (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, p. 1155.

³ Gideon Boas *et al.*, *International Criminal Law Practitioner Library Series. Volume III: International Criminal Procedure*, Cambridge University Press, Cambridge, 2011, p. 377.

⁴ Report of the Preparatory Committee on the Establishment of the International Criminal Court, UN Doc. A/CONF.183/2/Add.1, 14 April 1998, pp. 115 and 125 (<https://www.legal->

term was rejected in Rome in favour of a more general term ‘decision’ upon recommendation by the Working Group on Procedural Matters.⁵ As a result, the Committee of the Whole informed the Drafting Committee that ‘the phrase “final decision of acquittal or conviction and sentence” should be used to refer to the final decision of the Trial Chamber throughout the Statute’, without clarifying the rationale behind this choice.⁶

It has been suggested that the omission of the word ‘judgment’ from Article 74 is a result of the drafters’ attempt to avoid a nomenclature associated with particular legal traditions (Schabas 2011, p. 301), although this does not explain why that term was retained for appellate rulings. It is also possible that the drafters wished to reserve the term ‘judgment’ for decisions that are genuinely final, given that the Trial Chamber’s decisions on criminal responsibility are potentially subject to appellate review and may be reversed or amended. Ultimately, the nuances of terminology have proved to be of little practical relevance. Initially, the ICC Trial Chambers referred to a decision on the merits as “Article 74 decision”.⁷ But the verdicts delivered in the first cases bear the conventional label ‘judgment’, which means that, despite what the drafters may have had in mind, the judges still preferred the conventional taxonomy.⁸

tools.org/doc/816405/), cited in William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016 (<https://www.legal-tools.org/doc/b7432e/>).

- ⁵ Report of the Working Group on Procedural Matters, UN Doc. A/CONF-183/C-1/WGPM/L-2, 25 June 1998 (<https://www.legal-tools.org/doc/dc3000/>), cited in Schabas, 2016.
- ⁶ Note regarding Part 6 and Article 72 contained in the transmittal letters from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 10 and 11 July 1998, UN doc. A/CONF.183/DC/R. 145 and Corr. 1 (<https://www.legal-tools.org/doc/77312d/>), cited in Schabas, 2010, p. 874.
- ⁷ ICC, *Prosecutor v. Lubanga*, Trial Chamber, Decision on the press interview with Ms Le Fraper du Hellen, 12 May 2010, ICC-01/04-01/06-2433, para. 51 (<https://www.legal-tools.org/doc/3b613a/>); *Prosecutor v. Lubanga*, Trial Chamber, Decision on the translation of the Article 74 Decision and related procedural issues, 15 December 2011, ICC-01/04-01/06-2834, passim, compare, para. 1 (<https://www.legal-tools.org/doc/d8aa4e/>).
- ⁸ ICC, *Prosecutor v. Lubanga*, Trial Chamber, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842 (<https://www.legal-tools.org/doc/677866/>); *Prosecutor v. Ngudjolo*, Trial Chamber, Judgment pursuant to Article 74 of the Statute, 18 December 2012, ICC-01/04-02/12-3-tENG (<https://www.legal-tools.org/doc/2c2cde/>); *Prosecutor v. Katanga*, Trial Chamber, Jugement rendu en application de l’Article 74 du Statut, 7 March 2014, ICC-01/04-01/07-3436 (<https://www.legal-tools.org/doc/9813bb/>); *Prosecutor v. Bemba*, Trial Chamber, Judgment pursuant to Article 74 of the Statute, 21 March 2016, ICC-01/05-01/08-3343 (<https://www.legal-tools.org/doc/edb0cf/>).

Cross-references:

Articles 64(3)(a) and (8)(b), 81, 82(1) and (2), 83(4) and (5).

Doctrine: For the bibliography, see the final comment on Article 74.

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Article 74(1)

All the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations. The Presidency may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending.

In order for the Trial Chamber to be properly constituted at each stage of the trial and be competent to issue a valid verdict, Article 74(1) requires that all three judges of the Chamber (Article 39(2)(b)(ii)) must have participated throughout the trial and deliberations. In *Lubanga*, the Trial Chamber considered this provision to make it “clear beyond doubt that during the trial the three judges shall function *in banco*”.¹

The requirement of the presence at trial ensures that the judgment is rendered by the bench each member of which is in a position to evaluate “the entire proceedings” (Article 74(2)). This implies the highest degree of knowledge of the evidence and issues discussed during the trial.² The same degree of knowledge may be difficult to achieve for a judge who has absented from one or more of the trial hearings. In respect of the evidentiary hearings, no subsequent familiarization with the transcript of testimony or a summary of evidence would be sufficient to remedy the absent judge’s inability to directly observe the demeanour of a witness, which is crucial for the credibility assessment.

Moreover, the familiarity with the trial record will not always compensate for the absence of a judge because the ICC judges’ role during the trial is not limited to passive presence. Depending on the specific context, it might require active contributions to the court’s inquiry by posing questions to witnesses and experts (Rule 140(2)(c)) and by deciding whether the submission of evidence should be ordered (Article 69(3)). Whilst being the

¹ ICC, *Prosecutor v. Lubanga*, Trial Chamber, Decision on whether two judges alone may hold a hearing – and – Recommendations to the Presidency on whether an alternate judge should be assigned for the trial, 22 May 2008, ICC-01/04-01/06-1349, para. 12 (*‘Lubanga, 22 May 2008’*) (<https://www.legal-tools.org/doc/5aaa63/>).

² Otto Triffterer and Alejandro Kiss, “Article 74”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1831 (<https://www.legal-tools.org/doc/040751/>).

primary responsibility of the Presiding Judge, the conduct of trial hearings is a collective effort. All judges of the Trial Chamber are expected to participate in this process, and to be available for consultation (Regulation 43).

By establishing a formal duty of the judges to be present “throughout their deliberations”, the Statute extends the presence requirement to all deliberation conferences. Due to the secrecy of the internal workings of the Chambers (Article 74(4)), the judicial attendance during deliberations is more difficult for the public to police than the judges’ presence at trial. But as a matter of law, there is an unconditional duty incumbent on all members of the Trial Chamber to be directly and personally involved in every stage of the final decision-making. This involvement extends beyond taking part “at the decisive parts of deliberations” and during voting (cf. Triffterer and Kiss, 2016, p. 1831). The bulk of deliberations may consist in the exchange of drafts and written memoranda among the Trial Chamber judges. But the participation by a judge in the deliberations on the judgment solely through written submissions whereas other members of the bench convene for deliberation in person would arguably fail to meet the Article 74(1) requirement. In the interests of preserving collegiality and avoiding an early split in the Chamber, this provision invites the trial judges to plan their deliberation conferences around the dates when one of them is absent from the seat of the Court.

Notably, the Statute contains no provision obliging all judges of the Trial Chamber to be present at all times during the preparatory stage following the confirmation of charges and leading up to the commencement of the trial. Unlike with the Pre-Trial Chambers, whose functions may be carried out by a single judge (Article 39(2)(b)(iii)), the Statute envisions no possibility for a single judge to exercise the functions of the Trial Chamber. Therefore, the *Lubanga* Chamber interpreted the statutory framework as providing for the duty of all three members, next to their attendance at trial as mandated by Article 74(1), to “be present for each hearing and status conference during the period following the confirmation of charges and leading up to the beginning of the trial” (*Lubanga*, 22 May 2008, para. 15). This meant that, during the preparatory stage, “any urgent issues that arise during the absence of a judge from the seat of the Court will be dealt with solely on the basis of written representations” (para. 15).

Given the evident inefficiency of requiring the presence of a full bench throughout the preparatory stage of trial proceedings due to what appears to have been an accidental lacuna in the Statute, Rule 132 was

adopted in 2012.³ The new Rule authorizes a Trial Chamber to ‘designate one or more of its members for the purposes of ensuring the preparation of the trial’. A single judge of the Trial Chamber has broad powers in preparing the case for the trial, in consultation with the Chamber (Rule 132). But he or she “shall not render decisions which significantly affect the rights of the accused or which touch upon the central legal and factual issues in the case”; except for deciding on the applications of victims for participation at trial, a single judge may not “make decisions that affect the substantive rights of victims” (Rule 132).

The same procedural rationale of preserving the continuity of adjudication at trial and the completeness of the basis for the decision, underlies the rule contained in the second sentence of Article 74(1). It envisages the possibility for the Presidency to assign, on a case-by-case basis, one or more alternate judges that could replace a judge who is unable to continue attending. The excusals and disqualification of the judge are the specific examples of such situations contemplated by the Statute (Article 41). Rule 38 details this provision by stating that a judge may be replaced for “objective and justified reasons”, which include (but are not limited to) resignation; accepted excuse; disqualification; removal from office; and death. Regulation 15(1) provides additionally that in replacing a judge, the Presidency shall take into account, to the extent possible, “gender and equitable geographical representation”.

On several occasions, the Presidency granted judges’ requests for excusal from the exercise of functions as members of their Trial Chambers prior to the commencement of the trial in the respective cases. Thus, the Presidency excused two of the judges of the *Lubanga* Chamber from presiding over the *Bemba* trial in which they had served in the preparatory stage, with reference to their workload in the *Lubanga* case and, in particular, the ‘possible lengthy overlap between the two trials’.⁴

When faced with a situation of temporary absence of one of its members during the preparatory stage of the trial, the *Lubanga* Trial

³ ICC ASP, Amendment of the Rules of Procedure and Evidence, ICC-ASP/11/Res.2, 21 November 2012 (<https://www.legal-tools.org/doc/d09f58/>).

⁴ ICC, *Prosecutor v. Bemba*, Presidency, Decision replacing judges in Trial Chamber III, Annex 2, 20 July 2010, ICC-01/05-01/08-837-Anx2, p. 2 (<https://www.legal-tools.org/doc/a76d2c/>); Presidency, Decision on the request to be excused from the exercise of judicial functions in Trial Chamber III, pursuant to Article 41 of the Rome Statute, 15 July 2010, p. 3.

Chamber pointed out the absence of a pre-determined procedure (*Lubanga*, 22 May 2008, para. 16). Acting *proprio motu* and by majority, it took upon itself to consider whether to recommend the Presidency to designate an alternate judge for the trial and ultimately opined that no alternate judge should be appointed. Trial Chamber I referred to the non-extensive scope of the charges and prosecution evidence and the absence of “known personal circumstances relating to any of the judges which raise any concerns that one or more of them will be unable to complete this trial” (paras. 19–23). In no other case so far has the need to designate an alternate judge been raised and considered. The practice relating to Article 74(1) (second sentence), Rule 39, and Regulation 16 is lacking at present.

Cross-references:

Articles 39(2)(b)(ii), 41 and 69(3).

Rules 39, 41, 132 *bis* and 140(2)(c).

Regulations 15, 16 and 43.

Doctrine: For the bibliography, see the final comment on Article 74.

Author: Sergey Vasiliev.

Article 74(2): Basis for the Trial Chamber’s Decision

The Trial Chamber’s decision shall be based on its evaluation of the evidence and the entire proceedings.

Article 74(2) lays down three closely interrelated principles restricting the admissible factual scope and evidentiary basis of the Trial Chamber’s decision on criminal responsibility, whilst at the same time safeguarding the Chamber’s adjudicative autonomy. It does so by prescribing what relationship should exist between the Pre-Trial Chamber and the Trial Chamber, given the likely overlap between the decision to confirm charges and the judgment pursuant to Article 74. Such overlaps may in particular arise in part of findings on, and evaluation of, the evidence that is relied upon for the purpose of confirming charges and that forms part of the record transmitted to the Trial Chamber under Rule 130.

The first sentence of Article 74(2) stipulates that the judgment must be based on the Trial Chamber’s evaluation of evidence and the entire proceedings. In *Lubanga*, the Trial Chamber held that it would assess the reliability of individual pieces of evidence and their probative value for the purpose of the decision on the merits in the context of other admissible and probative material.¹ The parties were responsible for specifically identifying the parts of oral and written evidence relied upon and they were expected to explain its relevance to the Article 74 decision in their final submissions.² Moreover, in ruling on the admissibility of evidence, the Chamber is guided by the duty to avoid prejudice for a fair trial and ensure a ‘fair evaluation’ in accordance with Article 69(4). The principle of ‘fair evaluation’ mandates the court to rely only on the material that is admissible. The parameters of admissibility of the evidence are its relevance, probative value, and non-prejudicial nature.³ The latter prong can only be determined if

¹ ICC, *Prosecutor v. Lubanga*, Trial Chamber, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, para. 94 (*‘Lubanga*, 14 March 2012’) (<https://www.legal-tools.org/doc/677866/>).

² *Lubanga*, 14 March 2012, paras. 95–96; ICC, *Prosecutor v. Lubanga*, Trial Chamber, Transcript, 1 April 2011, ICC-01/04-01/06-T-342-ENG, pp. 64–65 (<https://www.legal-tools.org/doc/4bcdfd/>).

³ ICC, *Prosecutor v. Bemba*, Appeals Chamber, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled “Decision on the admission into evidence of materials contained in the prosecution’s list of evi-

the Chamber duly considers the context and procedural history of the case, in particular any past – and anticipated – delays that are potentially problematic in light of Article 67(1)(c).

Although the Court’s legal instruments do not clarify the meaning of ‘the entire proceedings’, this element can be interpreted as requiring the Court to adopt a holistic approach to the evaluation of evidence when deciding on the merits of the case. The evaluation should be informed by the consideration of the procedural context in which the evidence is submitted and the conduct of the relevant actors in the courtroom, which are the pertinent aspects of “entire proceedings”. This includes, for example, the demeanour of the witness, “the manner in which he or she gave evidence” (*Lubanga*, 14 March 2012, para. 102), and the accused’s attitude and reactions to the evidence.⁴ The temporal aspect of ‘entire proceedings’ is that the evidence may be admitted even after the formal close of the submission of evidence pursuant to Rule 141(1), subject to ‘the reopening of oral proceedings to hear adversarial submissions as to the appropriate weight to be attached in the light of the whole case file’.⁵

The qualification “*its* evaluation” in Article 74(2) underscores that the evaluation of evidence by the Trial Chamber should be its own, rather than that of any other Chamber. The evidence submitted during the confirmation hearing and relied upon in the decision to confirm charges is highly likely to be discussed at trial. Even though at the confirmation stage the Prosecutor may rely principally on documentary or summary evidence and need not call witnesses expected to testify at trial (Article 61(5)), the ICC’s initial practice demonstrates that there will normally be a partial overlap in evidence between the two stages. Whilst this increases a chance that multiple and divergent judicial evaluations will be given to the same evidence in the same case, Article 74(2) reaffirms the Trial Chamber’s competence to evaluate evidence independently.

ence”, 3 May 2011, ICC-01/05-01/08-1386, para. 37 (<https://www.legal-tools.org/doc/7b62af/>).

⁴ Otto Triffterer and Alejandro Kiss, “Article 74”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1840 (<https://www.legal-tools.org/doc/040751/>).

⁵ ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber, Decision on the request by the Defence for Germain Katanga seeking to admit excerpts from the judgment rendered in *Lubanga*, 26 April 2012, ICC-01/04-01/07-3279-tENG, para. 14 (*Katanga and Ngudjolo*, 26 April 2012’) (<https://www.legal-tools.org/doc/1a8829/>).

Its adjudicative autonomy vis-à-vis the Pre-Trial Chamber involved in the same case follows from the distinct purposes of the confirmation and the trial as well as the fundamentally different functions of the Pre-Trial and Trial Chambers. Importantly, the standards of proof for the purposes of the confirmation of charges and conviction are not the same, both in terms of the quantity of evidence and its persuasiveness as to the guilt.⁶ Article 61(7) requires “sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged” for the Pre-Trial Chamber to confirm the charges, but Article 66(3) sets the threshold for conviction at ‘beyond reasonable doubt’ and thus compels the prosecution to present additional evidence that can meet that burden. Because the Pre-Trial and Trial Chambers as a matter of principle labour under the different standards of proof, the Trial Chamber must conduct a fully independent assessment of both the admissibility and weight of evidence.

As held by Trial Chamber I, Article 64(9) provides the Trial Chamber with an “unfettered authority [...] to rule on the admissibility or relevance of evidence”, while Rule 63(2) authorizes it “to assess freely” all evidence when determining admissibility and relevance.⁷ The evidence admitted by the Pre-Trial Chamber and constituting a part of the record of the proceedings transmitted to the Trial Chamber pursuant to Rule 130, cannot be introduced into the trial automatically: it requires a *de novo* consideration (*Lubanga*, 13 December 2007, para. 8). This implies that the Trial Chamber shall not be guided, and much less bound, by the evaluations of the evidence by the Pre-Trial Chamber in the same case.

The Trial Chamber that is trying the case may also be confronted with another trial bench’s findings or evaluation of evidence in another case (particularly in the context of the same situation), which can be relevant to the Trial Chamber’s assessment of the credibility of evidence before it. The question of status before the Trial Chamber of the evaluations and findings from another trial arose in *Katanga and Ngudjolo*. In that case, the defence requested Trial Chamber II to admit excerpts from the *Lubanga*

⁶ For example, ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber, Decision on the Filing of a Summary of the Charges by the Prosecutor, 21 October 2009, ICC-01/04-01/07-1547-tENG, para. 25 (<https://www.legal-tools.org/doc/7e906f/>).

⁷ ICC, *Prosecutor v. Lubanga*, Trial Chamber, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, 13 December 2007, ICC-01/04-01/06-1084, paras. 4–5 (*Lubanga*, 13 December 2007’) (<https://www.legal-tools.org/doc/257c48/>).

trial judgment containing Trial Chamber I's discussion of the role of intermediaries P-143 and P-316 and their impact on the credibility of witnesses, given that the same intermediaries had had contact with witnesses in the *Katanga and Ngudjolo* trial.

Trial Chamber II held the *Lubanga* judgment to constitute 'new material' as an appropriate basis for reopening the oral proceedings, the issue of intermediaries relevant to the case, and the *Lubanga* Chamber's findings probative and highly reliable (*Katanga and Ngudjolo*, 26 April 2012, paras. 15–16). However, Trial Chamber II turned down the admission request, among others, on the ground that Trial Chamber I's findings on the behaviour of the intermediaries towards witnesses not involved in the present case would not have "an appreciably more significant impact on the assessment [...] of the credibility of the witnesses concerned" than the evidence already on the trial record (paras. 16–20). Trial Chamber II assured that it did not artificially dissociate the role of intermediaries in the *Lubanga* case from their role in the present case (para. 15).

However, the minority opinion to the *Katanga* trial judgment criticized the majority's disregard of the *Lubanga* findings when assessing the credibility of key witnesses (P-28 and P-132) involved with intermediary P-143. The dissenting judge held that oral proceedings must have been reopened to introduce the relevant sections of the *Lubanga* judgment.⁸ The Trial Chambers' adjudicative autonomy *vis-à-vis* each other in part of admissibility rulings and the evaluation of evidence and the 'entire proceedings' does not require insulation from the findings on shared issues reached in adjacent cases. On the contrary, where such evaluations point to the material evidence missing from the record in the present case and to any circumstances relevant for the fair evaluation of the record, the presumption of innocence (Article 66) and the *in dubio pro reo* principle as its component⁹ militate against an overly restrictive and isolationist approach in this regard.

⁸ ICC, *Prosecutor v. Katanga*, Trial Chamber, Minority Opinion of Judge Christine Van den Wyngaert, Jugement rendu en application de l'Article 74 du Statut, 7 March 2014, ICC-01/04-01/07-3464-AnxI, paras. 161–163 (<https://www.legal-tools.org/doc/9b0c61/>).

⁹ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber, 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, ICC-01/05-01/08-424, para. 31 (<https://www.legal-tools.org/doc/07965c/>).

Doctrine: For the bibliography, see the final comment on Article 74.

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Article 74(2): Not Exceeding the Facts

The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges.

The second principle in Article 74(2), namely that the decision “shall not exceed the facts and circumstances described in the charges and any amendments” thereto, imposes a duty on the Trial Chamber to adjudicate strictly within the factual boundaries of the charges as confirmed or amended by the Pre-Trial Chamber. In the period after the confirmation of charges and before the commencement of trial, the Prosecutor may amend the charges with the permission of the Pre-Trial Chamber and after notice to the accused; adding or substituting more serious charges requires that a confirmation hearing be held on those additional charges; after the commencement of the trial, the charges may be withdrawn with the permission of the Trial Chamber (Article 61(9)).¹ The decision to confirm the charges and any subsequent amendments are binding on the Trial Chamber in part of the factual scope of the case at trial.² It demarcates the ambit of the Trial Chamber’s authority over the case by fixing and settling its factual basis, thereby providing the accused with a clear notice of the relevant ‘facts and circumstances’ within the meaning of Article 74(2) and precluding related disputes at trial (*Katanga and Ngudjolo*, 21 October 2009, paras. 22 and 31).

¹ ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber, Decision on the Filing of a Summary of the Charges by the Prosecutor, 21 October 2009, ICC-01/04-01/07-1547-tENG, para. 21 (*Katanga and Ngudjolo*, 21 October 2009’) (<https://www.legal-tools.org/doc/7e906f/>).

² ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgement on the Appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 Entitled “Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts May be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court”, 8 December 2009, ICC-01/04-01/06-2205, paras. 91 (*Lubanga*, 8 December 2009’) (<https://www.legal-tools.org/doc/40d015/>); *Prosecutor v. Lubanga*, Trial Chamber, Judgement Pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, para. 3 (<https://www.legal-tools.org/doc/677866/>); *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, 21 November 2012, ICC-01/04-01/07-3319-tENG, para. 10 (*Katanga and Ngudjolo*, 21 November 2012’) (<https://www.legal-tools.org/doc/85f380/>).

Next to the amendment and withdrawal of charges pursuant to Article 61(9), Regulation 55 constitutes an avenue – albeit a narrow one – through which charges may be modified. It is a reflection of the civil law principle of *iura novit curia*, which was extensively debated during the negotiations on the Statute and the Rules but ultimately not incorporated into the primary instruments owing to significant differences between legal cultures.³ The application of this provision proved contentious, confused, and highly controversial in the ICC’s practice. Regulation 55(1) authorizes the Trial Chamber to change the legal characterization of facts to accord with crime definitions or with the forms of participation, but it prohibits the Chamber to exceed ‘the facts and circumstances described in the charges and any amendments to the charges’ when doing so (*Lubanga*, 8 December 2009, paras. 88–93). The Appeals Chamber defined ‘facts’ as “the factual allegations which support each of the legal elements of the crime charged”, distinguishable from “the evidence put forward by the Prosecutor at the confirmation hearing to support a charge [...] as well as from background or other information that, although contained in the document containing the charges or the confirmation decision, does not support the legal elements of the crime charged”. Facts “must be identified with sufficient clarity and detail, meeting the standard in Article 67(1)(a) of the Statute” (para. 90, fn. 163). On that basis, the Appeals Chamber rejected the *Lubanga* Trial Chamber’s interpretation of Regulation 55 as allowing it to change the legal characterization “based on facts and circumstances that, although not contained in the charges and any amendments thereto, build a procedural unity with the latter and are established by the evidence at trial” (paras. 88, 90–93). Reliance on additional facts not properly described in the charges but introduced into the trial via the change of legal characterization is inconsistent with Article 74(2) and Regulation 55(1), just as a change in the statement of facts rather than in their legal characterization (para. 97).

In *Katanga*, the change of legal characterization of facts by the Trial Chamber’s majority from Article 25(3)(a) initially charged to the Article 25(3)(d)(ii) liability, on the basis of which the accused was ultimately convicted, was highly controversial. As a way of deflecting critique based on the violation of Article 74(2), the Trial Chamber’s majority assured that it

³ See Håkan Friman, “Charges”, in Göran Sluiter, Håkan Friman, Suzannah Linton, Salvatore Zappalà and Sergey Vasiliev (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, Oxford, 2013, pp. 431–432 (<https://www.legal-tools.org/doc/040751/>).

did not exceed the facts and circumstances underlying the charges confirmed, but it nevertheless might legitimately place more emphasis on certain facts than on the others and disregard certain facts in favour of the others (*Katanga and Ngudjolo*, 21 November 2012, paras. 31–34).

But, in her dissents to both the Regulation 55 decision and Katanga’s subsequent conviction, Judge Van den Wyngaert held that the majority’s use of Regulation 55 not only was fundamentally unfair towards the accused but also violated the terms of Article 74(2) and Regulation 55(1) itself. First, in re-qualifying Katanga’s mode of liability, the majority relied on ‘subsidiary facts’ falling outside the “facts and circumstances” underlying the confirmation decision, as opposed to ‘material facts’ that properly constitute the factual allegations supporting the legal elements of the crimes charged. Since subsidiary facts are not part of the “facts and circumstances described in the charges” they may not be subject to legal recharacterization under Regulation 55. Second, by recasting the facts under a different mode of liability, the majority amended the narrative of the facts underlying the charges so drastically that it exceeded the facts and circumstances described in the charges.⁴ While the dissenting judge agreed with the majority that it is not forbidden for there to be any change of factual narrative for the purpose of legal recharacterization of facts (*Katanga*, Minority Opinion of Judge Christine Van den Wyngaert, 7 March 2014, para. 29), whether such a change violates Article 74 is “a question of fact and degree”.⁵

Doctrine: For the bibliography, see the final comment on Article 74.

Author: Sergey Vasiliev.

⁴ ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, Dissenting Opinion of Judge Christine Van den Wyngaert, 21 November 2012, ICC-01/04-01/07-3319-tENG, paras. 13–23 (<https://www.legal-tools.org/doc/85f380/>); *Prosecutor v. Katanga*, Trial Chamber, Jugement rendu en application de l’Article 74 du Statut, Minority Opinion of Judge Christine Van den Wyngaert, 7 March 2014, ICC-01/04-01/07-3436-AnxI, paras. 2, 12, 16–49 (*Katanga*, Minority Opinion of Judge Christine Van den Wyngaert, 7 March 2014’) (<https://www.legal-tools.org/doc/9b0c61/>).

⁵ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Second Corrigendum to “Minority opinion on the “Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court” of 17 July 2009”, Annex 1, 31 July 2009, ICC-01/04-01/06-2069-Anx1, para. 19 (<https://www.legal-tools.org/doc/d46a46/>); *Katanga*, Minority Opinion of Judge Christine Van den Wyngaert, 7 March 2014, para. 29.

Article 74(2): Decision Must Be Based on Trial Evidence

The Court may base its decision only on evidence submitted and discussed before it at the trial.

The third principle contained in Article 74(2), restricts the evidentiary basis for the Trial Chamber’s decision to “evidence submitted and discussed before it at the trial”. ‘Evidence submitted [...] at the trial’ refers to the evidence presented by the parties or ordered by the Trial Chamber (including the evidence of victim participants) pursuant to Articles 64(6)(d) and 69(3). Next to oral testimony, documents, and video recordings ‘discussed’ during the trial hearings, the evidence discussed before the Trial Chamber encompasses also “any items of evidence “discussed” in the written submissions of the parties and the participants at any stage during the trial (for example, documents introduced by counsel pursuant to a written application)”. It is essential that all evidence constituting the basis for the judgment “must have been introduced during the trial and have become part of the trial record, through the assignment of the evidence (EVD) number” and that “the parties should have had an opportunity to make submissions as to each item of evidence”.¹

Therefore, the Trial Chamber’s judgment may only be based on the evidence that has been produced before it and that the accused person had an opportunity to confront in accordance with Article 67(1)(e). The only exception to the principles of adversarial argument and immediacy is allowed for those alleged facts contained in the charges, the contents of a document, the expected testimony of a witness or other evidence that are not contested among the parties. Such agreed facts may be considered by the Chamber as being proven without a substantive discussion and detailed examination, unless the court is of the opinion that a more complete presentation of the alleged facts is necessary in the interests of justice, in particular in the interests of the victims (Rule 69). Other than that, the Trial Chamber shall ignore any information generated outside of the trial pro-

¹ *Prosecutor v. Lubanga*, Trial Chamber I, Judgement Pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, para. 98 (<https://www.legal-tools.org/doc/677866/>); *Prosecutor v. Katanga*, Trial Chamber, Judgment pursuant to article 74 of the Statute, 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 78 (<https://www.legal-tools.org/doc/f74b4f/>).

cess, as not having been ‘discussed before it at trial’, including the evidence produced for the purpose of the confirmation of charges. This bolsters the first principle of Article 74(2) discussed above to the effect that the trial judgment must be based on the Trial Chamber’s own evaluation of evidence.

Cross-references:

Articles 25(3)(a) and (d)(ii), 61(5), (7), and (9), 64(6)(d) and (9), 66(3), 67(1)(a), (c), (d) and (e), and 69(3).

Rules 64(1), 69, and 130.

Regulation 55.

Doctrine: For the bibliography, see the final comment on Article 74.

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Article 74(3)

The judges shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges.

Paragraph 3 addresses the process of deliberation of the Trial Chamber, which commences upon the delivery of closing statements in the case (Rule 141(1)). The provision is remarkable in several respects. It lays down the judges' duty to deliberate with one another by prescribing that they must *attempt* to achieve unanimity before a majority. This requires each and every member of the Trial Chamber, and not only the Presiding Judge deciding by *ex officio*, to be fully invested in the search for consensus.¹ The obligation to strive for unanimity is an innovation of the ICC Statute. Except for the ECCC Internal Rule 98(4), it does not feature in the legal texts of other international or hybrid courts.

The duty of the members of the Trial Chamber to actively participate in the deliberations can also be inferred from Rule 39. It stipulates that where the Presidency assigns an alternate judge to a Trial Chamber in accordance with Article 74(1), he or she shall sit through all proceedings and deliberations, but may not take any part therein unless and until he or she is required to replace a member of the Trial Chamber who is unable to continue attending. The prerogative to deliberate is what distinguishes the regular members of the Trial Chamber from alternates. Notably, Article 83(4) that governs deliberation and judgment of the Appeals Chamber only mentions the lack of unanimity as the situation in which the “judgement of the Appeals Chamber shall contain the views of the majority or the minority [and] a judge may deliver a separate or dissenting opinion on a question of law”. But since it does not articulate a duty to attempt to achieve unanimity in their decision, it is unclear whether appellate judges are bound by it by analogy, or whether they are exempt from it – for example because dissents on the issues of law are deemed beneficial for the progressive development of jurisprudence.

¹ See also Otto Triffterer and Alejandro Kiss, “Article 74”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1848 (<https://www.legal-tools.org/doc/040751/>).

Article 74(3) reflects a recognition of “the importance of authoritative, preferably unanimous, judgments”.² But it clearly falls short of instituting a preference or demand for unanimity. The provision results from a compromise in the Preparatory Committee between the proponents of the majority rule and the advocates of unanimity in decision-making.³ The prescription that the ICC trial judges engage in a joint deliberation with one another is meant to strengthen the collegiate character of decision-making, by preventing a premature split on the trial bench and the proliferation of avoidable dissenting opinions. Whilst the commentators have described the effects of the codified duty to strive for unanimity as “highly uncertain”, and the provision itself as “purely hortatory”, they recognize that the striving for unanimity inheres in any effort of collegiate decision-making and is good practice.⁴

Apart from the general consideration that deliberations enhance the quality of legal reasoning, the duty to strive for unanimity has several specific rationales in the ICC context. First, the consensus on the verdict and on the underlying reasons at least among two trial judges is a precondition for the Trial Chamber’s ability to pass a decision. Only two verdicts are available to the ICC Trial Chamber: guilty or not guilty. The latter verdict equals to a legal recognition of innocence – in this sense, the statement by Trial Chamber II that “finding an accused person not guilty does not necessarily mean that the Chamber considers him or her to be innocent” is based on a misunderstanding of the presumption of innocence (Article 66(1)).⁵

² Göran Sluiter, “Human Rights Protection in the ICC Pre-trial Phase”, in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Brill/Martinus Nijhoff, Leiden, 2009, p. 511.

³ Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/51/22, 14 September 1996, para. 291 (<https://www.legal-tools.org/doc/e75432/>).

⁴ Göran Sluiter, “Unity and Division in Decision Making – The Law and Practice on Individual Opinions at the ICTY”, in Bert Swart, Göran Sluiter and Alexander Zahar (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford University Press, 2011, p. 203 (<https://www.legal-tools.org/doc/bcad4c/>); William A., Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1133 (<https://www.legal-tools.org/doc/1435ae/>).

⁵ ICC, *Prosecutor v. Ngudjolo*, Trial Chamber II, Judgment pursuant to article 74 of the Statute, 18 December 2012, ICC-01/04-02/12-3-tENG, para. 36 (<https://www.legal-tools.org/doc/2c2cde/>); *Prosecutor v. Katanga*, Trial Chamber II, Judgement pursuant to article 74 of the Statute, 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 70 (<https://www.legal-tools.org/doc/f74b4f/>).

Given the binary nature of decision-making on the issue of guilt or innocence, it is in theory possible for two judges to arrive at the same verdict via separate reasoning routes, without deliberation oriented at consensus, and to form the majority in respect of the verdict as opposed to the third judge who has voted in favour of another verdict. However, the reasoning forms an integral part of the decision. In the scenario described above, despite that two votes are cast in favour of the majority verdict, there will be three separate opinions but no ‘majority decision’ within the meaning of Article 74(3). Mere coincidence of verdicts between two judges does not make a judgment. Consensus and possible compromises will also need to cover the reasons controlling the majority decision. This means that joint deliberations are not only desirable but also unavoidable if the Trial Chamber is to issue a judgment at all.

Second, the expectation that the Trial Chamber judges will engage in joint deliberation is also a corollary of the system for the nomination and election of candidates, which is based on the areas of competence. Article 36(5) envisages that two lists containing the names of candidates with different qualifications will be compiled. List A will contain the names of candidates who “[h]ave 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”, whereas list B will contain the names of candidates with “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(3)(b) and (5)). The Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience (Article 39(1)). But it is possible that a member of the Trial Chamber will have been elected from among the candidates on List B as a specialist in international (humanitarian) law. It may thus be particularly important for the judges to approach the adjudicative task collegially in order to benefit from each other’s expertise. This will enrich the deliberation by insights from the relevant disciplines and, arguably, enhance the quality of the judgment.

Contrary to the view that the duty under Article 74(3) did not require codification (Sluiter, 2011, p. 203), there is no reason to lament its inclusion. Given that the ICC judges come from different legal-cultural and professional backgrounds, the provision usefully clarifies what minimal duties judges have in respect of the deliberation process. Notably, the Rules of

Procedure and Evidence, Regulations of the Court, and the Code of Judicial Ethics do not provide further standards to govern judicial deliberations. Rule 142(2) merely prescribes that the judges decide separately on each charge and on each accused where there are several charges or accused. The provision of Article 74(3) goes some way to compensating for the scarcity of the ICC law in this area and precluding deliberation irregularities, even if does not rule out split judgments entirely.

Cross-references:

Article 36(3)(b) and (5), 39(1), and 83(4).

Rules 39 and 142(1) and (2).

Doctrine: For the bibliography, see the final comment on Article 74.

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Article 74(4)

The deliberations of the Trial Chamber shall remain secret.

Article 74(4) enshrines the fundamental principle of secrecy of judicial deliberations, which is well-established in most domestic jurisdictions. How votes have been cast will be evident from the judgment's disposition, but the principle of secrecy of deliberations forbids the members of the Trial Chamber to disclose to the public the details of debates in the Chambers, including the positions initially held, adjusted, or withdrawn by the judges in the course of deliberations. Being an outgrowth of the guarantees of judicial independence and impartiality, the principle is meant to enable the judges to exchange their views freely in the expectation that whatever is said in the deliberation room will stay there. The rationale for the prohibition on making the content of judicial discussions public is that unless the judges are assured that secrecy shall be respected, they might feel deterred from expressing their views. If that is so, the trust and collegiality in the Chamber would be undermined, which will likely congeal and impoverish the deliberation of judges on the issues relevant to the case.

Besides Article 74(4), the principle of secret deliberations is given expression in numerous other provisions of the ICC's legal framework. Thus, the pledge to respect secrecy of deliberations is a constituent element of the solemn undertaking each judge shall make before exercising his or her functions under the Statute (see Rule 5(1)(a)). Article 6 of the Code of Judicial Ethics, entitled 'Confidentiality', provides that "Judges shall respect the confidentiality of consultations which relate to their judicial functions and the secrecy of deliberations". Therefore, although it is not restated in respect of the judges of the Pre-Trial Chambers and the Appeals Chamber (see Articles 57 and 83), the principle is of general application and holds equally for all judges.

Unlike ICTY, ICTR, and SCSL Rule 29 ("The deliberations of the Chambers shall take place in private and remain secret"), Article 74 does not make a distinction between 'privacy' (a confidential character of the process itself), on the one hand, and 'secrecy' (a confidential character of the contents of judicial debates after their close), on the other hand. However, the French language version of Article 74(4) covers both aspects of confidentiality ("Les délibérations de la Chambre de première instance *sont et demeurent secrètes*"). In addition, Rule 142(1) states that "after the clos-

ing statements, the Trial Chambers shall retire to deliberate, *in camera*". In essence, this means that deliberations shall take place in private. Thus, the substance of judicial consultations that does not form part of 'a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions' (Article 74(5)) shall remain confidential indefinitely.¹

Cross-references:

Articles 57 and 83.

Rules 5(1)(a) and 142(1).

Code of Judicial Ethics, Article 6.

Doctrine: For the bibliography, see the final comment on Article 74.

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¹ Otto Triffterer and Alejandro Kiss, "Article 74", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1849 (<https://www.legal-tools.org/doc/040751/>).

Article 74(5): In Writing

The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions.

While Article 74(2) provides for the admissible scope and content of trial judgments, paragraph 5 establishes the requirements as to their form and reasoning, the number of decisions and the accommodation of dissenting views, and the delivery of judgments in open court.

Some interlocutory decisions at trial may be delivered orally, but a trial judgment self-evidently should be rendered in writing. Thus the parties are enabled to exercise effectively their right to appeal the judgment under Article 81(1). For the same reason, the judgment shall contain “a full and reasoned statement of [...] findings on the evidence and conclusions”. This requirement is a rendition of the right to a reasoned opinion that is recognized in international human rights jurisprudence as a component of the right to a fair trial and, in particular, the right of the accused to have his or her conviction reviewed by a higher tribunal (Article 14(5) ICCPR; Article 2, Protocol No. 7, European Convention on Human Rights (‘ECHR’)). The Human Rights Committee stated that “[t]he right to have one’s conviction reviewed can only be exercised effectively if the convicted person is entitled to have access to a duly reasoned, written judgement of the trial court”.¹ Similarly, the European Court of Human Rights has recognized the obligation of courts to adequately state reasons for their judgments (albeit without requiring a detailed answer to every argument) as an integral element of the right of the accused to a fair trial under Article 6(1) ECHR and a principle “linked to the proper administration of justice”.² By contrast, a

¹ General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN doc. CCPR/C/GC/32, 23 August 2007, para. 49.

² ECtHR, *Van de Hurk v. Netherlands*, Judgment, 19 April 1994, Application No. 16034/90, para. 61 (<https://www.legal-tools.org/doc/852b0e/>); *Hiro Balani v. Spain*, Judgment, 9 December 1994, Application No. 18064/91, para. 27 (<https://www.legal-tools.org/doc/d20a45/>); *Ruiz Torija v. Spain*, Judgment, 9 December 1994, Application No. 18390/91, para. 29 (<https://www.legal-tools.org/doc/cf84b3/>); *Higgins et al. v. France*, Judgment, 19 February 1998, Application No. 20124/92, para. 42 (<https://www.legal-tools.org/doc/61e00b/>); *García Ruiz v. Spain*, Judgment, 21 January 1999, Application No. 30544/96, para. 26 (<https://www.legal-tools.org/doc/e4bae4/>); *Hadjianastassiou v. Greece*, Judgment, 16 December 1992, Application No. 12945/87, para. 33 (<https://www.legal-tools.org/doc/0c4d17/>).

judgement of the Appeals Chamber “shall state the reasons on which it is based” (Article 83(4)), which appears to be a lower threshold than which applies to trial judgments. As the court of last resort, the Appeals Chamber need not necessarily provide a full statement of reasons.

The Appeals Chamber is yet to pronounce itself on the meaning of a ‘full and reasoned statement’ in the context of appellate review of decisions pursuant to Article 74. Its jurisprudence thus far has discussed the requirement that rulings must be reasoned in relation to decisions of a Pre-Trial Chamber in the following terms: “it is essential that it [the decision] indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the Pre-Trial Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion”.³ In another judgment, the Appeals Chamber observed that “[t]he reasons for a decision should be comprehensible from the decision itself. It is not sufficient for the Pre-Trial Chamber to identify simply which filings were before it. The decision must set out which of the relevant facts and legal arguments that were before the Pre-Trial Chamber were found to be persuasive for the determination it reached”.⁴ Although these rulings concern the reasoning in the decisions of Pre-Trial Chambers rather than Article 74 decisions, the same rationales, at minimum, apply to the latter decisions, if they are to meet the requirement of a full and reasoned statement of the findings on evidence and conclusions.

In light of the grounds of appellate review (Articles 81(1) and 83(2)), a “full and reasoned statement” of “findings on evidence and conclusions” should be such as to persuade the Appeals Chamber that the Trial Chamber has not committed any errors of fact or errors of law materially affecting the decision, or other errors affecting fairness or reliability of the decision.⁵

³ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”, 14 December 2006, ICC-01/04-01/06-773, para. 20 (<https://www.legal-tools.org/doc/883722/>).

⁴ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision of Pre-Trial Chamber I Entitled “Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”, 14 December 2006, ICC-01/04-01/06-774, para. 33 (<https://www.legal-tools.org/doc/2b7ca3/>).

⁵ Otto Triffterer and Alejandro Kiss, “Article 74”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H.

The final decision at trial that satisfies the parameters of Article 74(5) must state the applicable law and relevant facts, each established by the evidence on the trial record, and explain how the Chamber arrived at the legal conclusions based on the application of law to facts. Furthermore, the reasoning underlying the trial judgment must be presented in a way that allows a meaningful inquiry by the Appeals Chamber into the alleged errors and demonstrates the soundness of the Trial Chamber’s findings and conclusions. In other words, the statement of findings and conclusions must be complete, well-structured, comprehensible, transparent, and logical. At the same time, the judgment must not stray beyond the boundaries of factual and legal relevance set by the Pre-Trial Chamber’s decision on the confirmation of charges, as required by Article 74(2) and Regulation 55 discussed above.

The first Article 74 judgments delivered thus far have departed from the template of the *ad hoc* tribunals’ judgments and adopted a structure and legal drafting technique distinct from those typically used by the ICC’s predecessors. All of them are highly detailed, heavily referenced, and fairly lengthy, especially considering that they deal with the cases involving limited charges against single accused. Thus, the *Lubanga* trial judgment is 593 pages (excluding two separate and dissenting opinions); the *Ngudjolo* trial judgment 198 pages (excluding a concurring opinion); and the *Katanga* trial judgment 881 pages (including a 170-page minority opinion, but excluding a concurring opinion). One commentator’s concern that “new records in verbosity may well be set”⁶ has rather not been confirmed, at least not in the sense that the length of the opinions was excessive and unjustified. In terms of discursive transparency and candour, the judicial style adopted by the ICC trial judges when setting out issues and analysing the evidence, including its deficiencies and overall complexities of fact-finding, is comparable to that of the *ad hoc* tribunals.

Doctrine: For the bibliography, see the final comment on Article 74.

Author: Sergey Vasiliev.

Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1851 (<https://www.legal-tools.org/doc/040751/>).

⁶ William A., Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2010, p. 875 (<https://www.legal-tools.org/doc/1435ae/>).

Article 74(5): One Decision

The Trial Chamber shall issue one decision.

When there is no unanimity, the Trial Chamber’s decision shall contain the views of the majority and the minority. Turning to the issue of the number of decisions and the accommodation of dissenting views, Article 74(5)-which should be read jointly with paragraph 3 providing for the judicial duty to attempt to achieve unanimity-states that “[t]he Trial Chamber shall issue one decision” and “[w]hen there is no unanimity, the Trial Chamber’s decision shall contain the views of the majority and the minority”. In contrast with the allowance made for the judges of the Appeals Chamber to “deliver a separate or dissenting opinion on a question of law” (Article 83(4)), the trial judges are not explicitly authorized to append separate (concurring or dissenting) individually signed opinions to their judgment.¹ Moreover, whilst Article 83(4) does not feature the requirement of ‘one decision’ in respect of the Appeals Chamber’s judgment, Article 74(5) does envisage the issuance of a single decision containing the views of both the majority and the minority. On that basis, some scholars have argued that this provision “clearly intends to discourage the writing of separate and dissenting opinions on a purely individual basis and to prevent the publication of separate and dissenting voices some time after the publication of the judgment” (Sluiter 2009, p. 511).

However, in practice the trial judges have not adopted the interpretation of Article 74(5) as prescribing them to issue a single consolidated decision and precluding them from appending separate opinions to the trial judgment. The trial judgments issued thus far were all accompanied by individual opinions that do not qualify as ‘minority opinions’ within the meaning of Article 74(5).² On these instances, the conclusions on the ques-

¹ Göran Sluiter, “Human Rights Protection in the ICC Pre-trial Phase”, in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Brill/Martinus Nijhoff, Leiden, 2009, p. 511; but cf. William A., Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1133 (<https://www.legal-tools.org/doc/b7432e/>).

² ICC, *Prosecutor v. Lubanga*, Trial Chamber, Separate opinion of Judge Adrian Fulford and Separate and Dissenting Opinion of Judge Odio Benito, Judgment pursuant to Article 74 of the Statute, 14 March 2014, ICC-01/04-01/06-2842 (<https://www.legal-tools.org/doc/677866/>); *Prosecutor v. Ngudjolo*, Trial Chamber, Concurring Opinion of Judge Christine Van den Wyngaert, Judgment pursuant to Article 74 of the Statute, 18 December 2012,

tion of guilt or innocence of the accused were reached unanimously, but the verdicts were still accompanied by individual opinions on discrete issues, delivered on the same date as the judgment and bearing the same individual number. Apparently, the judges did not construe the ‘one decision’ requirement restrictively, but chose to append any dissenting views on the majority’s reasoning as separate documents within the same filing, instead of including them as the ‘minority opinion’ within the body of the verdict itself. The implications of the requirement that where there is no unanimity the decision “shall contain the views of the majority and the minority” are uncertain. The text allows several interpretations. First, the body of the trial judgment could include the minority position and attribute it to the judge. The example of this approach is provided by the judgment of the Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia in Case 001, whereby a dissenting opinion of Judge Cartwright was incorporated into the text of the judgment itself.³ Second, the trial judgment could blend both positions of the majority and the minority in a consolidated reasoning and present the latter as a set of counterarguments ultimately rejected by the court as erroneous or unconvincing.⁴ Third, the minority opinion may be stated separately from the majority opinion whilst still forming part of the same filing. For instance, Judge Van den Wyngaert’s ‘minority opinion’ in *Katanga* (which in fact amounts to a partially dissenting opinion) was appended to the ‘majority opinion’ (denominated as judgment). The dissent stated that “this constitutes the Minority Opinion and forms an integral part of Trial Chamber II’s judgment on the charges pursuant to Article

ICC-01/04-02/12-4 (<https://www.legal-tools.org/doc/7d5200/>); *Prosecutor v. Katanga*, Appeals Chamber, Decision on the Presiding Judge of the Appeals Chamber in the appeal of the Prosecutor against the decision of Trial Chamber II entitled “Jugement rendu en application de l'article 74 du Statut”, 10 April 2014, ICC-01/04-01/07-3464 (<https://www.legal-tools.org/doc/d5bb52/>).

³ ECCC, *Kaing Guek Eav*, Trial Chamber, Judgment, 26 July 2010, 001/18-07-2007/ECCC/TC, paras. 397–399 (<https://www.legal-tools.org/doc/dbdb62/>).

⁴ See for example, Otto Triffterer, “Article 74”, in Otto Triffterer (ed.), *Commentary on the Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2nd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2008, p. 1398 (<https://www.legal-tools.org/doc/a9e9f7/>) “different findings on the evidence and/or different conclusions ought to be mentioned within the decision of the majority, without, however, indicating any assignment to a specific judge”.

74”.⁵ If the ‘minority opinion’ is attributed (the options 1 and 3 above), there is no principled difference between such an opinion and a traditional ‘dissenting opinion’. The arguments *a contrario* and by analogy based on textual differences between Articles 74(5) and 83(4) are a tenuous basis for claiming that the ICC Statute authorizes – or forbids – the Trial Chamber judges to append separate and dissenting opinions to Articles 74 decisions. The drafting history of the Rome Statute does not provide clarity in this respect either. The issue of allowing for individual opinions was side-lined at the decisive stages of negotiations in Rome. However, it did receive attention during the drafting of the ILC Statute of 1994. The draft’s Article 45(5) ruled out the possibility for the judges to append separate opinions to the final decision and contained the requirement of the “sole judgement”.⁶ The commentary on the Article justified this choice with reference to the prevailing view that allowing separate or dissenting opinions “could undermine the authority of the court and its judgements” (Draft Statute with commentaries, 22 July 1994, p. 59). Since the negotiation record of the ICC Statute contains no traces of similar debates, its *travaux préparatoires* are of a limited value in interpreting Article 74(5).

Doctrine: For the bibliography, see the final comment on Article 74.

Author: Sergey Vasiliev.

⁵ ICC, *Prosecutor v. Katanga*, Trial Chamber, Minority Opinion of Judge Christine Van den Wyngaert, Jugement rendu en application de l’Article 74 du Statut, 7 March 2014, ICC-01/04-01/07-3436-AnxI, fn. 1 (<https://www.legal-tools.org/doc/9b0c61/>).

⁶ “Draft Statute for an International Criminal Court with commentaries”, in Yearbook of the International Law Commission, Vol. 2, UN Doc. A/CN.4/SER.A/1994/Add.1 (Part 2), 22 July 1994, p. 59 (‘Draft Statute with commentaries, 22 July 1994’) (<https://www.legal-tools.org/doc/390052/>).

Article 74(5): Decision in Open Court

The decision or a summary thereof shall be delivered in open court.

While it is meant to serve an expressive function,¹ the public delivery of the judgment, in the presence of the parties and participants, also constitutes an important aspect of the principle of a public hearing (Articles 64(7) and 67(1)) and is mandated by human rights law (Article 6(1) ECHR and Article 14 ICCPR). Thus, the ECtHR held that the pronouncement of judgements in public or making them public or available to those who established interest (depending on the special features of the proceedings) ensures “scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial”. It protects litigants against the “administration of justice in secret with no public scrutiny” and contributes to the maintenance of confidence in the courts and “the achievement of a fair trial”.² A similar rationale was expressed by Judge Pikis when he held that the publication of ICC decisions is mandated by “the significance of judgments and decisions as a source of law, a fact expressly acknowledged by Article 21(2) of the Statute [...] Making the case law known is a condition of its applicability. Withholding publication of judgments/decisions is tantamount to secreting their existence, making the principles deriving therefrom inaccessible to the public”.³

The Reading out of the summary is intended to replace the pronouncement of the full text of a judgment, which will usually be of a considerable length. In principle, as has often been the practice at the ICTR, the summary may be pronounced before the drafting of the full text of the decision is completed and the judgment can be made public. This may be the way to give a notice of the verdict to the parties and remove the uncer-

¹ See, for example, William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1135 (<https://www.legal-tools.org/doc/b7432e/>).

² ECtHR, *Pretto et al. v. Italy*, Judgment, 8 December 1983, Application No. 7984/77, paras. 20–27 (<https://www.legal-tools.org/doc/37d2ed/>); *Biryukov v. Russia*, Judgment, 17 January 2008, Application No. 14810/02, paras. 30 and 45 (<https://www.legal-tools.org/doc/b2e266/>).

³ ICC, *Prosecutor v. Kony et al.*, Appeals Chamber, Separate Opinion of Judge Georghios M. Pikis, Decision of the Appeals Chamber on the Unsealing of Documents, 4 February 2008, ICC-02/04-01/05-266, para. 9 (<https://www.legal-tools.org/doc/932792/>).

tainty about the outcome as early as possible (which is particularly important in case of an acquittal). However, the summary is an unofficial document that does not contain a ‘full and reasoned statement’ and does not enable the parties to prepare a notice of appeal. Furthermore, there is a risk that the reasons stated in the summary might diverge from the written reasons ultimately given in the judgment.⁴ It is therefore advisable for the ICC to avoid – as it has done thus far – the unfortunate practice of other tribunals not to make full reasons available on the same day when the oral summary is delivered in open court.

Indeed, the ICC Trial Chambers took care to publish both the decisions pursuant to Article 74 (in the original language) as well as the summaries on the day of the pronouncement of the judgment. According to the practice in the first cases, at the hearing for the delivery of the judgment, the President reads out the summary of the judgment in open court. Where the verdict is unanimous but accompanied by individual opinions, a note of that is made in the summary of the judgment but it does not include the summary of such opinions, and separate opinions are not read out.⁵ However, in case of a non-unanimous verdict, a minority opinion is incorporated into the summary that is read out by the Presiding Judge in open court.⁶

Given that delayed issuance of judgments used to be a recurring problem in other tribunals (in particular, the ICTR), the time of the delivery of the decision and the admissible duration of deliberations are important issues raised by the consideration of Article 74(5). Rule 142(1) provides for the duty of the Trial Chamber to “inform all those who participated in the proceedings of the date on which the Trial Chamber will pronounce its de-

⁴ Otto Triffterer and Alejandro Kiss, “Article 74”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1851–1852 (<https://www.legal-tools.org/doc/040751/>).

⁵ ICC, *Prosecutor v. Lubanga*, Trial Chamber, Summary of the “Judgment pursuant to Article 74 of the Statute”, 14 March 2012, ICC-01/04-01/06-2843, para. 41 (<https://www.legal-tools.org/doc/99d5ee/>); *Prosecutor v. Ngudjolo*, Trial Chamber, Résumé du jugement rendu en application de l’Article 74 du Statut dans l’affaire Le Procureur c. Mathieu Ngudjolo le 18 décembre 2012 par la Chambre de première instance II, 18 December 2012, ICC-01/04-02/12-3-tENG, para. 47 (<https://www.legal-tools.org/doc/2c2cde/>).

⁶ ICC, *Prosecutor v. Katanga*, Trial Chamber, Summary of Trial Chamber II’s Judgment of 7 March 2014, pursuant to Article 74 of the Statute in the case of The Prosecutor v. Germain Katanga, 7 March 2014, ICC-01/04-01/07-3436, paras. 54–60 (<https://www.legal-tools.org/doc/8k0rrk/>).

cision” and adds that “[t]he pronouncement shall be made within a reasonable period of time after the Trial Chamber has retired to deliberate’. The practical implications and enforceability of this rule are uncertain. There is a tension between the need for a carefully researched and drafted judgment satisfying the requirements of Article 74(5) and the interest in obtaining a prompt judgment, which is an aspect of a fair and expeditious trial and the right of the accused to be tried without undue delay. Since the optimal balance between these interests will vary by case and depend on the case’s complexity and any other contingencies encountered in the preparation of the judgment, setting a time limit *in abstracto* may be inexpedient. In the absence of a fixed time limit, what a “reasonable period of time” amounts to is to be determined on a case-by-case basis.

This issue generated debates when drafting the ICC Rules. Some delegations to the Preparatory Commission felt that defendants should not remain incarcerated indefinitely while waiting for the judgment. The Mexican delegation proposed setting a fixed time limit for the issuance of the decision on the charges.⁷ However, for many delegations, the Mexico proposal could not be pursued due to the difficulty of agreeing on the reasonable time limit and uncertainty as to what sanctions or consequences, if any, were to attach to non-compliance with the deadline (Lewis, 2001). The delegates to the Preparatory Committee benefited from the recommendation by then ICTY President Jorda on this point, who strongly advised to refrain from imposing specific deadlines because that would have been unreasonable in the circumstances of international trials (pp. 551–552). The result was the current compromise solution that the Chamber is to notify the parties and participants of the date for the pronouncement of the decision in advance, and that such date is to be set ‘within a reasonable period of time’, rather than within a term fixed by law. This was hoped to ‘discipline’ the judges and put ‘moral pressure’ on them to deliver the final decision as soon as possible whilst at the same time allowing for reasonable flexibility (p. 522).

Cross-references:

Articles 76(4), 81(1) and 83(2) and (4).

Rules 142(1) and 144.

⁷ Peter Lewis, “Trial Procedure”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, p. 551 (<https://www.legal-tools.org/doc/e34f81/>).

Regulation 55.

Doctrine:

1. Gideon Boas, *International Criminal Law Practitioner Library Series. Volume III: International Criminal Procedure*, Cambridge University Press, 2011, p. 377.
2. Håkan Friman, “Charges”, in Göran Sluiter, Håkan Friman, Suzannah Linton, Salvatore Zappalà and Sergey Vasiliev (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, pp. 431–32 (<https://www.legal-tools.org/doc/bcad4c/>).
3. Nina Jørgensen and Alexander Zahar, “Deliberation, Dissent, Judgment”, in Göran Sluiter, Håkan Friman, Suzannah Linton, Salvatore Zappalà and Sergey Vasiliev (eds.), 2013, pp. 1155.
4. P. Lewis, “Trial Procedure”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 551, 553 (<https://www.legal-tools.org/doc/e34f81/>).
5. Christoph Safferling, *International Criminal Procedure*, Oxford University Press, 2010, p. 522 (<https://www.legal-tools.org/doc/50a9f2/>).
6. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2010, pp. 872–877.
7. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1128–1135 (<https://www.legal-tools.org/doc/b7432e/>).
8. William A. Schabas, *An Introduction to the International Criminal Court*, 6th. ed., Cambridge University Press, 2020, pp. 300, 325–326 (<https://www.legal-tools.org/doc/e9fb2f/>).
9. Göran Sluiter, “Separate and Dissenting Opinions”, in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, 2009, pp. 511–12 (<https://www.legal-tools.org/doc/7be65f/>).
10. Göran Sluiter, “Unity and Division in Decision Making – The Law and Practice on Individual Opinions at the ICTY”, in Bert Swart, Göran Sluiter and Alexander Zahar (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford University Press, 2011, p. 203 (<https://www.legal-tools.org/doc/bcad4c/>).

11. Otto Triffterer, “Article 74”, in Otto Triffterer (ed.), *Commentary on the Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2nd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2008, pp. 1387–1398 (<https://www.legal-tools.org/doc/a9e9f7/>)
12. Otto Triffterer and Alejandro Kiss, “Article 74”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1826–1852 (<https://www.legal-tools.org/doc/040751/>).

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Article 75

Reparations to Victims

General Remarks:

Article 75, which deals with reparations to victims, is a novelty in international law as it allows victims to file claims against, and be awarded reparations from, an individual perpetrator of a crime in an international criminal process. The reparations scheme is considered a key feature of the Statute, on which the success of the Court is partly depending.¹ Logically, Article 75 implies that victims possess a right of reparations under international law and that this right can be satisfied in the framework of international criminal proceedings.² A general concern, however, is that the perpetrator-centred reparation regime, which is also complex and requires expert advice, might create hierarchies or dividing lines among victims who falls inside or outside of the regime.³

The first, and so far only, decisions on reparations were handed down in *Lubanga* by the Trial Chamber on 7 August 2012,⁴ and by the Appeals Chamber on 3 March 2015.⁵

Preparatory Works:

The 1994 International Law Commission Draft Statute did not contain any provision on reparations to victims.⁶ Some proposals were made in the ne-

¹ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber, Corrigendum of Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58, 10 February 2006, ICC-01/04-01/06-1, para. 150 (<https://www.legal-tools.org/doc/af6679/>).

² Salvatore Zappalà, "The Rights of Victims v. the Rights of the Accused", in *Journal of International Criminal Justice*, 2010, vol. 8, no. 1, pp. 159–160.

³ Sara Kendall and Sarah Nouwen, "Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood", *Law and Contemporary Problems*, 2013, vol. 76, nos. 3 and 4.

⁴ ICC, *Prosecutor v. Lubanga*, Trial Chamber, Decision establishing the principles and procedures to be applied to reparations, 7 August 2012, ICC-01/04-01/06-2904 (<https://www.legal-tools.org/doc/a05830/>).

⁵ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, 3 March 2015, ICC-01/04-01/06-3129 (<https://www.legal-tools.org/doc/c3fc9d/>).

⁶ Report of the International Law Commission on the work of its forty-sixth session (2 May 1994–22 July 1994), UN Doc. A/49/10, (<https://www.legal-tools.org/doc/f73459/>).

gotiations of the ICC Statute⁷ but they were discussed in earnest first at the last session of the Preparatory Committee in March/April 1998. These discussions were based upon three alternative proposals reproduced in the so-called Zutphen Draft⁸ and a joint proposal by France and the United Kingdom. The result was a draft Article, within brackets, transmitted to the Diplomatic Conference for further discussions as to whether there should be any Article at all and, if so, its content.⁹ The Article, finally the current Article 75, was substantially re-drafted by the Working Group on Procedures and finally adopted by the Diplomatic Conference. The legal principles and procedures for reparations in Article 75 are outlined only in very general terms and it was clear that implementing provisions were necessary in the Rules of Procedure and Evidence. In order to air the issues and create a deeper understanding, the French Government arranged an international seminar on 27–29 April 1999 (the Paris Seminar). The Report from the Paris Seminar¹⁰ then served as a point of departure for the drafting of the Rules.¹¹

Doctrine: For the bibliography, see the final comment on Article 75.

Author: Håkan Friman.

⁷ Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/51/22, 14 September 1996, para. 224, Article 45, subheading G (<https://www.legal-tools.org/doc/e75432/>).

⁸ Draft Report of the Intersessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands, Article 66.

⁹ Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/2, 14 April 1998 (<https://www.legal-tools.org/doc/732f58/>).

¹⁰ Report on the International Seminar on Victims' Access to the International Criminal Court, UN Doc. PCNICC/1999/WGRPE/INF/2, 7 July 1999 (<https://www.legal-tools.org/doc/4c4512/>).

¹¹ An account of the negotiations is provided in Håkan Friman and Peter Lewis, *Reparations to Victims*, in Roy S. Lee *et al.* (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, 2001.

Article 75(1): Principles Relating to Reparations

1. The Court shall establish principles relating to reparations

The Court has settled for a case specific approach to the stipulation of the Court's reparation principles. The question of pre-established general principles has been discussed but rejected by the plenary of judges in 2006 and 2008.¹ The case-by-case approach was also underlined by the Trial Chamber in the *Lubanga* decision on reparations² and approved by the Appeals Chamber.³

The ASP, on the other hand, has requested the Court to ensure court-wide and coherent principles relating to reparations to be “established in accordance with Article 75, paragraph 1” based on which individual orders may be issued.⁴ The approach by the Court has also been criticized by others as contrary to the spirit and letter of Article 75(1) (for example, Redress, 2011).

In *Lubanga*, the Appeals Chamber stressed that the principles relevant to the circumstances of a case must be distinguished from the order of reparations: “principles should be general concepts that, while formulated in light of the circumstances of a specific case, can nonetheless be applied, adapted, expanded upon, or added to by future Trial Chambers”, while the order is “the Trial Chamber’s holdings, determinations and findings based upon those principles” (*Lubanga*, 3 March 2015, paras. 3 and 55). Accordingly, the Appeals Chamber presented the principles separate from the order for reparations. Moreover, the Appeals Chamber held that both individual and collective awards made against the convicted person, regardless of

¹ ICC ASP, Report of the Court on Principles Relating to Victims’ Reparations, ICC-ASP-12/39, 8 October 2013, paras. 3 and 17–18 (<https://www.legal-tools.org/doc/q7etim/>).

² ICC, *Prosecutor v. Lubanga*, Trial Chamber, Decision Establishing the Principles and Procedures to be Applied to Reparations, 7 August 2012, ICC-01/04-01/06-2904, para. 181 (*Lubanga*, 7 August 2012’) (<https://www.legal-tools.org/doc/a05830/>).

³ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 with amended order for reparations (Annex A) and public annexes 1 and 2, 3 March 2015, ICC-01/04-01/06-3129, para. 55 (*Lubanga*, 3 March 2015’) (<https://www.legal-tools.org/doc/c3fc9d/>).

⁴ ICC ASP, Resolution ICC-ASP/10/Res.3, 20 December 2011 (<https://www.legal-tools.org/doc/fl5c3c/>), adopted by consensus.

whether they are made directly or through the Trust Fund for Victims, must be based on the relevant Article 75(1)-principles (paras. 52–53).

In *Lubanga*, the Trial Chamber laid down a number of general principles (*Lubanga*, 7 August 2012). General aims of reparations are to repair the harm caused and to provide accountability (para. 179). The Appeals Chamber agreed.⁵ A number of international soft law-instruments (principles and declarations), certain significant human rights reports (by van Boven and Bassiouni) as well as the jurisprudence of regional human rights courts and national and international mechanisms may be consulted for guidance (*Lubanga*, 7 August 2012, paras. 185–186).

As a general principle, victims “should receive appropriate, adequate and prompt reparations” (*Lubanga*, Annex A, 3 March 2015, para. 44). The awards ought to be proportionate to the harm, injury, loss and damage as established by the Court (para. 45). Importantly, the Appeals Chamber concluded that a reparation order in all circumstances – whether individual or collective, direct or made through the Trust Fund for Victims – must be issued against the convicted person (*Lubanga*, 3 March 2015, paras. 64–76 and Annex A, para. 20). The convicted person’s liability for reparations must be proportionate to the harm caused and, inter alia, his or her participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case (*Lubanga*, 3 March 2015, paras. 6, 118 and Annex A, para. 21).

Under the heading “Dignity, non-discrimination and non-stigmatisation”, the Trial Chamber held that “all victims are to be treated fairly and equally as regards reparations, irrespective of whether they participated in the trial proceedings”, as the Trial Chamber considered it inappropriate to limit reparations to the rather small group of participating victims (*Lubanga*, 7 August 2012, para. 187). The victims, as defined in Rule 85, shall enjoy equal access to information and assistance from the Court, and the Court shall take into account the needs of all the victims but pay special attention to victims who are children, elderly, have disabilities or are victims of sexual or gender violence (paras. 188–189). When deciding on reparations, the Court shall treat the victims with humanity, respect their dignity and human rights and implement appropriate measures to ensure

⁵ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Annex A to Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 order for reparations (amended), 3 March 2015, ICC-01/04-01/06-3129-AnxA, para. 2 (*Lubanga*, Annex A, 3 March 2015’) (<https://www.legal-tools.org/doc/df2804/>).

their safety, physical and psychological wellbeing and privacy, and apply the non-discrimination principle set forth in Article 21(3) (paras. 190–191). These principles were upheld by the Appeals Chamber (*Lubanga*, Annex A, 3 March 2015, paras. 12–19).

In line with theories of so-called transformative justice, the Trial Chamber found that reparations must address any underlying injustices and be implemented so as to avoid replicating discriminatory practices or structures that predated the crimes and to avoid further stigmatization of the victims and discrimination by their families and communities (*Lubanga*, 7 August 2012, paras. 192 and 227). Whenever possible, reparations should secure reconciliation (para. 193). A particular aim is to reconcile the victims with their families and all the communities affected by the charges (para. 244). Also in these respects the Appeals Chamber concurred (*Lubanga*, Annex A, 3 March 2015, paras. 17 and 46).

The Trial Chamber also adhered to the concept of gender justice stating that a gender-inclusive approach should guide the design of the principles and that gender parity in all aspects of reparations is an important goal of the Court (*Lubanga*, 7 August 2012, para. 202). Reparations are to be awarded on a non-discriminatory and gender-inclusive basis (paras. 218 and 243). The Appeals Chamber upheld these principles (*Lubanga*, Annex A, 3 March 2015, paras. 12 and 18). The Trial Chamber took the issue further by stating that appropriate and gender-sensitive reparations must be formulated and implemented with respect to victims of sexual or gender-based violence (*Lubanga*, 7 August 2012, paras. 207–209). However, the Appeals Chamber noted that the conviction in the case at hand did not include responsibility for sexual and gender-based violence and thus that such violence could not be defined as a harm resulting from the convicted crimes (*Lubanga*, 3 March 2015, paras. 196–198). Hence, the convicted person could not be held liable for reparations in respect of such harm.

As for child victims, the age-related harm experienced as well as their needs must be considered and the Court should be guided by the principle of the “best interest of the child” as enshrined in the Convention on the Rights of the Child as well as other guidelines in the Convention and other international instruments (*Lubanga*, Annex A, 3 March 2015, paras. 23–24).

Reparations should also, whenever possible, reflect local cultural and customary practices, unless these are discriminatory, exclusive or deny vic-

tims equal access to their rights (*Lubanga*, Annex A, 3 March 2015, para. 47).

Doctrine: For the bibliography, see the final comment on Article 75.

Author: Håkan Friman.

Article 75(1): Victims

to, or in respect of, victims

Article 75(1) and (2) refer to reparations “to, or in respect of victims”, and a definition is provided in Rule 85, but the Court has found it necessary to give further clarifications. With reference to Rule 85, reparations may be granted to direct and indirect victims, including family members to direct victims, anyone who attempted to prevent one or more of the relevant crimes, and those who suffered personal harm as a result of these offences.¹ Unless it is someone who suffered harm when helping or intervening on behalf of a direct victim (*Lubanga*, 7 August 2012, para. 196),² an indirect victim should have a close personal relationship with a direct victim and in considering the relationship the applicable social and familial structures ought to be regarded (*Lubanga*, 7 August 2012, para. 195).³ In an earlier decision, the Trial Chamber clarified that indirect victims must establish that, as a result of their relationship with the direct victim, the loss, injury, or damage suffered by the latter gives rise to harm to them; hence, the harm suffered by indirect victims must arise out of the harm suffered by direct victims, brought about by the commission of the crimes charged (*Lubanga*, 8 April 2009, para. 49). Reparations can also be granted to legal entities (*Lubanga*, 7 August 2012, para. 197).

The Appeals Chamber has recognised that the concept of ‘family’ may have many different cultural variations and that the Court should have regard to the applicable societal and familial structures, but also the widely accepted presumption that an individual is succeeded by his or her spouse and children.⁴ Priority may need to be given to certain particularly vulnera-

¹ ICC, *Prosecutor v. Lubanga*, Trial Chamber, Decision Establishing the Principles and Procedures to be Applied to Reparations, 7 August 2012, ICC-01/04-01/06-2904, para. 194 (*‘Lubanga*, 7 August 2012’) (<https://www.legal-tools.org/doc/a05830/>).

² See also ICC, *Prosecutor v. Lubanga*, Trial Chamber, Redacted version of “Decision on ‘indirect victims’”, 8 April 2009, ICC-01/04-01/06-1813, para. 51 (*‘Lubanga*, 8 April 2009’) (<https://www.legal-tools.org/doc/c1cf65/>).

³ See also ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432, para. 32 (<https://www.legal-tools.org/doc/75cf1a/>).

⁴ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Annex A to Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7

ble victims or victims who require urgent assistance (*Lubanga*, 7 August 2012, para. 200, and *Lubanga*, Annex A, 3 March 2015, para. 19). Examples are victims of sexual or gender-based violence, individuals who require immediate medical care (for example, plastic surgery or HIV treatment) or severely traumatized children. Hence, the Chamber may adopt “measures that constitute affirmative action in order to guarantee equal, effective and safe access to reparations for particularly vulnerable victims”.

The *Lubanga* Trial Chamber took a very broad approach to which victims may benefit from reparations, including victims who did not request reparations although they participated in the trial proceedings.⁵ The Chamber also held that a collective approach to reparations should ensure that reparations reach also those victims who are currently unidentified (*Lubanga*, 7 August 2012, para. 219). The Appeals Chamber, noting that the reparations proceedings are a distinct process and that Rule 94 does not require participation in the criminal proceedings (in accordance with Rule 89), has generally accepted the broad approach.⁶ However, the Appeals Chamber rejected, for the purpose of an appeal, the inclusion of unidentified individuals since it was impossible to discern who belongs to this group (*Lubanga*, 14 December 2012, para. 72).

Doctrine: For the bibliography, see the final comment on Article 75.

Author: Håkan Friman.

August 2012 order for reparations (amended), 3 March 2015, ICC-01/04-01/06-3129-AnxA, para. 7 (*Lubanga*, Annex A, 3 March 2015’) (<https://www.legal-tools.org/doc/df2804/>).

⁵ ICC, *Prosecutor v. Lubanga*, Trial Chamber, Scheduling order concerning timetable for sentencing and reparations, 14 March 2012, ICC-01/04-01/06-2844, para. 8 (<https://www.legal-tools.org/doc/f91ad4/>).

⁶ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Decision on the admissibility of the appeals against Trial Chamber I’s “Decision establishing the principles and procedures to be applied to reparations” and directions on the further conduct of proceedings, 14 December 2012, ICC-01/04-01/06-2953, paras. 69–72 (*Lubanga*, 14 December 2012’) (<https://www.legal-tools.org/doc/2e59a0/>).

Article 75(1): Modalities of Reparations

including restitution, compensation and rehabilitation.

According to the Appeals Chamber, also a community – understood as a group of victims- may be awarded collective reparations.¹ However, this does apply only to members of the community meeting the relevant criteria for eligibility and, thus, the Trial Chamber must establish the criteria for this distinction (*Lubanga*, 3 March 2015, para. 214).²

As to the modalities of reparations, the *Lubanga* Trial Chamber concluded that the list in Article 75(1) is not exclusive and that also, for example, reparations with a symbolic, preventative or transformative value may be appropriate.³ Other modalities of reparations may include campaigns, certificates of harm suffered, outreach and promotional programmes, and educational measures (*Lubanga*, 7 August 2012, para. 239). Measures to address shame and to prevent further victimization may also be considered, and the Chamber noted that the accused is able to contribute by way of a voluntary apology to individual victims or groups of victims on a public or confidential basis (paras. 240–241).

The Appeals Chamber, while agreeing with these findings, stressed that the Trial Chamber must identify in the reparation order the most appropriate modalities of reparations in the case at hand, and that this question is inter-linked to the identification of the harm caused to the direct and indirect victims (*Lubanga*, 3 March 2015, paras. 200 and 202–203, and Annex A, paras. 34 and 67). Individual and collective reparations are not mutually exclusive and may be awarded concurrently (*Lubanga*, Annex A,

¹ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 with amended order for reparations (Annex A) and public annexes 1 and 2, 3 March 2015, ICC-01/04-01/06-3129, paras. 211–212 (*Lubanga*, 3 March 2015’) (<https://www.legal-tools.org/doc/c3fc9d/>).

² *Lubanga*, 3 March 2015, and ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Annex A to Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 order for reparations (amended), 3 March 2015, ICC-01/04-01/06-3129-AnxA, para. 54 (*Lubanga*, Annex A, 3 March 2015’) (<https://www.legal-tools.org/doc/df2804/>).

³ ICC, *Prosecutor v. Lubanga*, Trial Chamber, Decision Establishing the Principles and Procedures to be Applied to Reparations, 7 August 2012, ICC-01/04-01/06-2904, para. 222 (*Lubanga*, 7 August 2012’) (<https://www.legal-tools.org/doc/a05830/>).

3 March 2015, para. 33). Once the appropriate modalities are established by the Trial Chamber, it may be left to the Trust Fund for Victims to design the concrete awards for reparations to the victims (paras. 200–201).

Restitution, which is mentioned in Article 75(1), is directed at the restoration of an individual’s life and should as far as possible restore the victim to his or her circumstances before the crime was committed (*Lubanga*, 7 August 2012, paras. 223–224, and *Lubanga*, Annex A, 3 March 2015, paras. 35 and 67). It may be an appropriate modality for legal bodies (*Lubanga*, Annex A, 3 March 2015, para. 36).

Compensation should be considered when the economic harm is sufficiently quantifiable, an award of this kind would be appropriate and proportionate, and there are available funds to make the result feasible (*Lubanga*, Annex A, 3 March 2015, para. 37). Compensation requires a broad application to encompass all forms of damage, loss and injury, including physical harm, moral and non-material damage resulting in physical, mental and emotional suffering, material damage, lost opportunities (employment, education, etcetera), and costs of legal or other relevant experts, medical services, psychological and social assistance (paras. 39–40).

Rehabilitation shall include the provision of medical services and health care, psychological, psychiatric and social assistance to support those suffering from grief and trauma, and any relevant legal and social services (*Lubanga*, Annex A, 3 March 2015, para. 42). Rehabilitation may include measures that are directed at facilitating the reintegration into society, such as education, vocational training and sustainable work opportunities (para. 67). Compensation and rehabilitation shall be approached on a gender-inclusive basis (paras. 38, 41 and 67).

With reference to decisions by the Inter-American Court of Human Rights, the *Lubanga* Trial Chamber stated that the conviction and sentence are also examples of reparations, “given they are likely to have significance for the victims, their families and communities” (*Lubanga*, 7 August 2012, para. 237). This part of the decision has been criticized, however, for conflating retributive and reparative justice by making the former a part of the

latter.⁴ Nonetheless, the Appeals Chamber upheld the Trial Chamber's conclusion (*Lubanga*, Annex A, 3 March 2015, para. 43).⁵

Doctrine: For the bibliography, see the final comment on Article 75.

Author: Håkan Friman.

⁴ Carolyn Hoyle and Leila Ullrich, "New Court, New Justice?", in *Journal of International Criminal Justice*, 2014, vol. 12, no. 4, p. 698.

⁵ For a further discussion on modalities of reparations (that is, restitution, compensation, different forms of satisfaction), see Conor McCarthy, *Reparations and Victim Support in the International Criminal Court*, Cambridge University Press, 2012, pp. 158–182.

Article 75(1): Triggering of Reparations

upon request or on the Court's own motion

Article 75(1) makes clear that reparations may be decided upon request or, in exceptional circumstances, on the Court's own motion. The *Lubanga* Trial Chamber, however, established that reparations are “entirely voluntary” and that the informed consent of the recipient is required prior to any award.¹ The Appeals Chamber agreed.² Consequently, even in case the Court moves on the issue on its own motion, informed consent must be obtained from each victim concerned.

Doctrine: For the bibliography, see the final comment on Article 75.

Author: Håkan Friman.

¹ ICC, *Prosecutor v. Lubanga*, Trial Chamber, Decision Establishing the Principles and Procedures to be Applied to Reparations, 7 August 2012, ICC-01/04-01/06-2904, para. 204 (<https://www.legal-tools.org/doc/a05830/>).

² ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 with amended order for reparations (Annex A) and public annexes 1 and 2, 3 March 2015, ICC-01/04-01/06-3129, paras. 159–160 (<https://www.legal-tools.org/doc/c3fc9d/>).

Article 75(1): Damage, Loss and Injury Versus Harm

scope and extent of any damage, loss and injury

The concepts “damage, loss and injury”, as set forth in Article 75(1), are synonymous with ‘harm’.¹ It is not necessary that the harm is direct, but it must be personal to the victim, and it can consist of material, physical or psychological harm (*Lubanga*, 11 July 2008, para. 32). Nonetheless, in its decision on reparations the *Lubanga* Trial Chamber sometimes placed the four terms side by side,² thus confusing the terminology. Whether the harm should be of a recoverable nature was not addressed by the Chambers, although the Appeals Chamber noted with respect to compensation that some forms of damage are “essentially unquantifiable in financial terms”.³

The Appeals Chamber stressed that the Trial Chamber must clearly identify the harm to direct and indirect victims caused by the crimes in the case at hand and form part of the reparation order.⁴ Amending the Trial Chambers order in *Lubanga* (*Lubanga*, 3 March 2015, para. 191 and Annex A, para. 58), the Appeals Chamber held that the harm of direct victims consisted of: a) physical injury and trauma; b) psychological trauma and the development of psychological disorders (suicidal tendencies, for instance); c) interruption and loss of schooling; d) separation from families; e) expo-

¹ See rule 85(a) and ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432, para. 31 (*Lubanga*, 11 July 2008’) (<https://www.legal-tools.org/doc/75cf1a/>).

² ICC, *Prosecutor v. Lubanga*, Trial Chamber, Decision Establishing the Principles and Procedures to be Applied to Reparations, 7 August 2012, ICC-01/04-01/06-2904, para. 243 (*Lubanga*, 7 August 2012’) (<https://www.legal-tools.org/doc/a05830/>); for a general discussion, see Conor McCarthy, *Reparations and Victim Support in the International Criminal Court*, Cambridge University Press, 2012, pp. 100–101.

³ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Annex A to Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 order for reparations (amended), 3 March 2015, ICC-01/04-01/06-3129-AnxA, para. 40 (*Lubanga*, Annex A, 3 March 2015’) (<https://www.legal-tools.org/doc/df2804/>); for a general discussion, see Conor McCarthy, *Reparations and Victim Support in the International Criminal Court*, Cambridge University Press, 2012, pp. 100–101.

⁴ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 with amended order for reparations (Annex A) and public annexes 1 and 2, 3 March 2015, ICC-01/04-01/06-3129, paras. 181, 184 (*Lubanga*, 3 March 2015’) (<https://www.legal-tools.org/doc/c3fc9d/>).

sure to an environment of violence and fear; f) difficulties socializing within their families and communities; g) difficulties in controlling aggressive impulses; and h) the non-development of ‘civilian life skills’ resulting in the victim being at a disadvantage, particularly as regards employment. Indirect victims suffered harm such as: a) psychological suffering experiences as a result of the sudden loss of a family member; b) material deprivation that accompanies the loss of family members’ contributions; c) loss, injury or damage suffered by the intervening person from attempting to prevent the child from being further harmed as a result of a relevant crime; and d) psychological and/or material sufferings as a result of aggressiveness on the part of former child soldiers relocated to their families and communities.

Causation

In *Lubanga*, the Trial Chamber concluded that there must be a causal link between the relevant crimes and the “damage, loss and injury” which form the basis of the reparation claim (*Lubanga*, 7 August 2012, para. 247). But there was some ambiguity as to whether the Chamber required the harm to be linked to the crimes of which the accused was actually convicted. It referred more neutrally to the type of offences concerned (“the crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in the hostilities” paras. 247 and 249). Further, the Chamber stated that the relevant standard of causation needs to reflect and balance the divergent interests and rights of the victims and convicted person (para. 250). Nonetheless, the linkage between the harm and the crimes of which the accused was convicted was established by a ‘but-for’ relationship between the crime and the harm (para. 250). Instead of requiring direct harm or immediate effects of the crimes, the Chamber concluded that a looser standard of “proximate cause” should be applied (para. 249).

The Appeals Chamber considered that the casual link between the crime and the harm for the purposes of reparations is to be determined in light of the specificities of the case (*Lubanga*, 3 March 2015, para. 80). It upheld the but/for-relationship and “proximate cause”-standard of causation (paras. 124–129 and Annex A, para. 59).

Doctrine: For the bibliography, see the final comment on Article 75.

Author: Håkan Friman.

Article 75(2)

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in Article 79.

Reparation Orders and Awards:

Article 75(2) refers to an order of reparations as well as an award for reparations to be made through the Trust Fund for Victims. The terms are intended to be synonymous as they are in the French and Spanish versions of the Statute.

An order of reparations may be made against a person only once he or she is convicted. The post-conviction nature of the reparations proceedings follows also from Article 76(3).

In *Lubanga*, the Appeals Chamber established that a reparation order must contain, at a minimum, five essential elements: (i) it must be directed against the convicted person; (ii) it must establish and inform the convicted person of his or her liability with respect to the reparations awarded in the order; (iii) it must specify, and provide reasons for, the type of reparations ordered, either collective, individual or both, pursuant to Rules 97(1) and 98; (iv) it must define the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted, as well as identify the modalities of reparations that are considered appropriate based on the specific circumstances of the specific case at hand; and (v) it must identify the victims eligible to benefit from the awards for reparations or set out criteria of eligibility based upon the link between the harm suffered by the victims and the crimes for which the person was convicted.¹

a. Direct Orders and Awards through the Trust Fund:

In *Lubanga*, the Trial Chamber was drawing extensively on the Trust Fund for Victims to make determinations and award reparations, but also to make

¹ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 with amended order for reparations (Annex A) and public annexes 1 and 2, 3 March 2015, ICC-01/04-01/06-3129, para. 1 (*‘Lubanga*, 3 March 2015’) (<https://www.legal-tools.org/doc/c3fc9d/>).

use of funds available to the Fund from its own resources.² Instead of examining individual applications for reparations, the Chamber endorsed an implementation plan suggested by the Trust Fund (*Lubanga*, 7 August 2012, paras. 281–283 and 289).

This caused the Appeal Chamber to settle a number of questions with respect to the responsibilities of the Trial Chamber and the relationship to the Trust Fund and its various mandates. The fundamental principle was that reparations, irrespective of whether they are ordered directly or through the Trust Fund, must be directed against the convicted person (*Lubanga*, 3 March 2015, paras. 1 and 69–76). Although the Trial Chamber’s decision in *Lubanga* did not explicitly award reparations to any victim, the Appeals Chamber found that it should be deemed to be an order for reparations.³ Decisive for this determination was the fact that apart from establishing principles, the decision also established procedures to be applied and tasked the Trust Fund for Victims to carry out the implementation which could only be done based upon a reparation order (*Lubanga*, 14 December 2012, paras. 51–64).

As long as the Trial Chamber concludes that the convicted person is liable for the reparations awarded, identifies the harms to direct and indirect victims and set the criteria for the assessment, as well as identifies the most appropriate modalities of reparations (based upon the specific circumstances), the Chamber may delegate to the Trust Fund to assess the harm suffered by the victims and decide the nature and size of the awards (*Lubanga*, 14 December 2012, paras. 101, 181–184 and 200–203). It is possible that not all the modalities will ultimately be reflected in the actual awards and, if so, the Trust Fund for Victims must explain why.⁴ In addi-

² ICC, *Prosecutor v. Lubanga*, Trial Chamber, Decision Establishing the Principles and Procedures to be Applied to Reparations, 7 August 2012, ICC-01/04-01/06-2904 (*‘Lubanga*, 7 August 2012’) (<https://www.legal-tools.org/doc/a05830/>).

³ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Decision on the admissibility of the appeals against Trial Chamber I’s “Decision establishing the principles and procedures to be applied to reparations” and directions on the further conduct of proceedings, 14 December 2012, ICC-01/04-01/06-2953, para. 51 (*‘Lubanga*, 14 December 2012’) (<https://www.legal-tools.org/doc/2e59a0/>).

⁴ *Lubanga*, 3 March 2015, para. 201 and ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Annex A to Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 order for reparations (amended), 3 March 2015, ICC-01/04-01/06-3129-AnxA, paras. 68–70 (*‘Lubanga*, Annex A, 3 March 2015’) (<https://www.legal-tools.org/doc/df2804/>).

tion, the order must identify the victims eligible to benefit from reparations or set out criteria of eligibility (*Lubanga*, 14 December 2012, paras. 205 and 210–215). The indigence of the convicted person is irrelevant for the liability (*Lubanga*, 14 December 2012, paras. 102–15; compare *Lubanga*, 7 August 2012, paras. 269–271). Moreover, the so-called ‘other resources’ of the Trust Fund fall solely under the control of the Fund and, thus, are not subject to an order by the Court, although the Fund might voluntarily make use of these resources without exonerating the convicted person from liability (*Lubanga*, 14 December 2012, paras. 4–5 and 106–117; compare *Lubanga*, 7 August 2012, paras. 270–273). These ‘other resources’ may also be utilized for victims that fall outside of the Court’s reparations award (*Lubanga*, 14 December 2012, para. 215).

b. Individual and Collective Reparations

While Article 75(2) distinguishes between orders directed against the convicted person and awards made through the Trust Fund for Victims, Rule 97(1) makes clear that reparations may be awarded on an individualized basis, or on a collective one, or by a combination of the two. Individual and collective reparations are not mutually exclusive and may be awarded concurrently (*Lubanga*, 7 August 2012, para. 220, and *Lubanga*, Annex A, 3 March 2015, para. 33).

According to Rule 98(1), individual awards for reparations shall be made directly against the convicted person. But under certain conditions the Court may, under Rule 98(2), order that such awards be deposited with the Trust Fund. In addition, Rule 98(3) allows collective awards against a convicted person be made through the Trust Fund. A collective approach was preferred in *Lubanga* to ensure that reparations reach those victims who were currently unidentified (*Lubanga*, 7 August 2012, para. 219). In case of collective awards only, the Appeals Chambers agreed that the Trial Chamber is not required to rule on the merits of the individual requests, but instead – if applicable – to deny, as a category, individual awards (*Lubanga*, 3 March 2015, para. 152). Collective reparations may be awarded also without an application to that effect (para. 151). Individual claims may be disregarded (para. 7).

Collective awards may be motivated by a considerable number of victims, particularly when only a limited number of individuals have applied for reparations (*Lubanga*, 3 March 2015, para. 153). Further, both the Trial Chamber and the Appeals Chamber held that reparations need to sup-

port programmes that are self-sustaining so that they can be beneficial over an extended period of time (*Lubanga*, 7 August 2012, para. 246, and *Lubanga*, Annex A, 3 March 2015, para. 48). For example, if pensions are paid they should be periodic rather than paid by way of a lump payment.

Doctrine: For the bibliography, see the final comment on Article 75.

Author: Håkan Friman.

Article 75(3)

3. Before making an order under this Article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.

Reparation Proceedings:

The procedures before a Trial Chamber leading to the issuance of an order for reparations are regulated in particular by Articles 75 and 76(3) of the Statute and rules 94, 95, 97 and 143 of the Rules of Procedure and Evidence. The first part is the establishment of principles relating to reparations to, or in respect of, victims, which concludes with the issuance of an order for reparations under Article 75(2) or a decision not to award reparations. The second part of the proceedings consists of the implementation phase, which is regulated primarily by Article 75(2) and Rule 98.¹

The reparations proceedings are considered to be distinct and not forming part of the trial *strictu sensu*, which means, for example, that a Chamber different from the Trial Chamber convicting the accused may be constituted.² Similarly, the *Lubanga* Trial Chamber concluded that a different Chamber could monitor and supervise reparations to be awarded through the Trust Fund for Victims.³ This solution was upheld by the Appeals Chamber, which also devised a more detailed scheme for issues to be adjudicated by the Chamber.⁴

¹ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Decision on the admissibility of the appeals against Trial Chamber I's "Decision establishing the principles and procedures to be applied to reparations" and directions on the further conduct of proceedings, 14 December 2012, ICC-01/04-01/06-2953, paras. 260–262 ('*Lubanga*, 14 December 2012') (<https://www.legal-tools.org/doc/2e59a0/>).

² ICC, *Prosecutor v. Katanga*, Presidency, Decision on conclusion of term of office of Judges Bruno Cotte and Fatoumata Dembele Diarra, 16 April 2014, ICC-01/04-01/07-3468-AnxI (<https://www.legal-tools.org/doc/a90f9e/>).

³ ICC, *Prosecutor v. Lubanga*, Trial Chamber, Decision Establishing the Principles and Procedures to be Applied to Reparations, 7 August 2012, ICC-01/04-01/06-2904, paras. 54–55 ('*Lubanga*, 7 August 2012') (<https://www.legal-tools.org/doc/a05830/>).

⁴ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with amended order for reparations (Annex A) and public annexes 1 and 2, 3 March 2015, ICC-01/04-01/06-3129, paras. 167, 232–236 ('*Lubanga*, 3 March 2015') (<https://www.legal-tools.org/doc/c3fc9d/>); *Prosecutor v. Lubanga*, Appeals Chamber, Annex

An important feature of the reparations proceedings is that the victims are parties and not merely participants to the proceedings.⁵ This is also true with respect to the appeals stage (*Lubanga*, 14 December 2012, para. 67).

Representations:

In seeking inspiration regarding the principles to be established, the Trial Chambers have reached out within and outside of the Court. In *Lubanga*, written instructions were issued by e-mail of 16 March 2011 whereby the Chamber requested a consolidated and updated joint filing on reparations from the Trust Fund for Victims and the Registry.⁶

Moreover, five organizations were granted leave to make written representations concerning reparations.⁷ The defence argued that such intervention was only possible under Rule 103 of the RPE (*amicus curiae*), but the Trial Chamber concluded that the proceedings set out in Article 75(3) are distinct from those of Rule 103(2)-(3) and they require the Court to take representations that it has received into account (*Lubanga*, 20 April 2012, paras. 11 and 20).

In the appeals process, however, the Appeals Chamber opted to rely upon Rule 103 (*Lubanga*, 14 December 2012, para. 77). Once submitted, the Appeals Chamber rejected the various requests to submit *amicus curiae* observations (*Lubanga*, 3 March 2015, paras. 247–251).

Requests for Reparations and other Procedural Issues:

Rule 94 of the RPE contains provisions on the procedure to follow in case of a victim's request for reparations. According to the rule, the request shall

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⁵ For example, Salvatore Zappalà, “The Rights of Victims v. the Rights of the Accused”, in *Journal of International Criminal Justice*, 2010, vol. 8, no. 1, p. 157; Håkan Friman, “The International Criminal Court and Participation of Victims: A Third Party to the Proceedings?”, in *Leiden Journal of International Law*, 2009, vol. 22, p. 496.

⁶ ICC, *Prosecutor v. Lubanga*, Trust Fund for Victims, Public Redacted Version of ICC-01/04-01/06-2803-Conf-Exp-Trust Fund for Victims’ First Report on Reparations, 1 September 2011, ICC-01/04-01/06-2803-Red, (<https://www.legal-tools.org/doc/4f144e/>).

⁷ ICC, *Prosecutor v. Lubanga*, Trial Chamber, Decision granting leave to make representations in the reparations proceedings, 20 April 2012, ICC-01/04-01/06-2870 (*Lubanga*, 20 April 2012’) (<https://www.legal-tools.org/doc/a10f88/>).

contain, *inter alia*, the identity and address of the claimant, a description of the injury, loss or harm, and information concerning the incident and, if possible, the person responsible. These requirements may be too onerous considering the actual situation, however, and the Court has accepted different means of identification, including official or unofficial identification documents or a statement signed by two credible witnesses.⁸

Rule 95 sets out the procedure when the Court intends to proceed with awarding reparations on its own motion. The threshold for the application of this rule (“exceptional circumstances”) is different from that applicable to collective reparations (“more appropriate”) (*Lubanga*, 3 March 2015, para. 148 c.).

The Registry is tasked with providing a standard form for reparations claims as well as to assist the victims and make certain inquiries (regulation 88). In *Katanga*, the Registry was requested to assist in clarifying and updating the requests for reparations by contacting the victims and report back to the Trial Chamber (including information on the harm suffered and the reparations sought).⁹

The *Lubanga* Trial Chamber stressed that the victims, together with their families and communities, should be able to participate throughout the reparations process and receive adequate support to make their participation substantive and effective (*Lubanga*, 7 August 2012, para. 203). The Registry was tasked with deciding the most appropriate form of participation in the proceedings (para. 268). Moreover, the Chamber addressed outreach activities, communication, and consultations (paras. 205–206).

In the same case, the OPCV was designated to act as the legal representative of unrepresented applicants for reparations until their status is determined or until the Registrar arranges a legal representative to act on their behalf; and to represent the interests of victims who have not submit-

⁸ ICC, *Prosecutor v. Lubanga*, Trial Chamber I Decision on Victims’ Participation, Separate and Dissenting Opinion of Judge René Blattman, 18 January 2008, ICC-01/04-01/06-1119, paras. 87–88 (<https://www.legal-tools.org/doc/4e503b/>) and *Lubanga*, 7 August 2012, para. 198.

⁹ ICC, *Prosecutor v. Katanga*, Trial Chamber, Order instructing the Registry to report on applications for reparations, 27 August 2014, ICC-01/04-01/07-3508 (<https://www.legal-tools.org/doc/980629/>).

ted applications but who may benefit from an award for collective reparations, pursuant to Rules 97 and 98 of the RPE.¹⁰

Standard and Burden of Proof:

No agreement on rules on evidence with respect to reparations could be reached in the negotiations of the RPE.¹¹ The *Lubanga* Trial Chamber found that the standard of “a balance of probabilities” was sufficient and proportionate concerning an order directed against the convicted person (*Lubanga*, 7 August 2012, para. 253). On the other hand, the Trial Chamber considered that no such standard was required when reparations are awarded through the Trust Fund and instead “a wholly flexible approach to determining factual matters is appropriate” (para. 254).

The Appeal Chamber disagreed and established that the “balance of probabilities”-standard applies in both instances (*Lubanga*, 3 March 2015, para. 83 and Annex A, para. 22). The Appeals Chamber added that the applicant shall provide sufficient proof of the causal link between the crime and the harm suffered, based on the specific circumstances of the case (para. 81).

Expert Assistance:

According to Rule 97(2), the Court may appoint experts to assist it in determining the scope, extent of any damage, loss or injury to or in respect of victims, and to suggest various options concerning the types and modalities of reparations. The *Lubanga* Trial Chamber strongly recommended that a multidisciplinary team of experts be retained to provide assistance and delegated the issue to the Trust Fund (*Lubanga*, 7 August 2012, paras. 263–265). The Appeals Chamber stressed that expert assistance could be obtained both before the reparation order, and after (that is, at the implementation stage) (*Lubanga*, 3 March 2015, para. 178).

Publicity:

The responsibility of the Registry to give publicity to the reparations proceedings is laid down in Rule 96. While the rule is primarily aimed at pub-

¹⁰ ICC, *Prosecutor v. Lubanga*, Trial Chamber, Decision on the OPCV’s request to participate in the reparations proceedings, 5 April 2012, ICC-01/04-01/06-2858 (<https://www.legal-tools.org/doc/f091b2/>).

¹¹ Håkan Friman and Peter Lewis, *Reparations to Victims*, in Roy S. Lee *et al.* (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, 2001, pp. 484–486.

licity to ensure that victims could file claims and take part in the proceedings (Friman and Lewis, 2001, p. 482), the *Lubanga* Trial Chamber found it applicable also to publicity of the principles that the Chamber had established (*Lubanga*, 7 August 2012, para. 258; see also *Lubanga*, Annex A, 3 March 2015, paras. 51–52).

Doctrine: For the bibliography, see the final comment on Article 75.

Author: Håkan Friman.

Article 75(4)

4. In exercising its power under this Article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this Article, it is necessary to seek measures under Article 93, paragraph 1.

Seeking State Co-operation to Give Effect to an Order:

Unlike Article 75(5) which deals with enforcement of an issued reparation order, Article 75(4) empowers the Court to seek measures in order to secure the enforcement of a future reparation order. The provision refers to international co-operation measures under Article 93(1), which includes the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture (Article 93(1)(k)). Article 75(4) explicitly apply only subsequent to the conviction of the perpetrator concerned by the Court (and, arguably, only to convictions concerning a core crime under the Court's jurisdiction). The assistance by States Parties, and invited non-States Parties that commit themselves to co-operate (Article 87(5)(a)), shall be timely, effective and provided at the earliest possible stage of the proceedings.¹

The *Lubanga* Trial Chamber, which did not distinguish between Article 75(4) and (5), generally noted the identification and freezing of any assets of the convicted person as a fundamental element in securing effective reparations, and handed the issue over to the Registry and the Trust Fund for Victims with the recommendation to establish standard operating procedures, confidentiality protocols and financial reporting obligations.² The Appeals Chamber merely recalled the States Parties' obligation to co-operate.³ The Chambers did not elaborate on to what extent, if any, issues concerning international co-operation and enforcements would fall under

¹ ICC ASP, Reparations, Resolution ICC-ASP/10/Res.3, 20 December 2011 (<https://www.legal-tools.org/doc/fl5c3c/>).

² ICC, *Prosecutor v. Lubanga*, Trial Chamber, Decision Establishing the Principles and Procedures to be Applied to Reparations, 7 August 2012, ICC-01/04-01/06-2904, paras. 277–278 (<https://www.legal-tools.org/doc/a05830/>).

³ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Annex A to Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 order for reparations (amended), 3 March 2015, ICC-01/04-01/06-3129-AnxA, para. 50 (<https://www.legal-tools.org/doc/df2804/>).

the (newly constituted judicial) Chamber’s remaining monitoring and oversight functions; the reference in the Chamber’s “conclusions” is limited to functions in accordance with Article 64(2) and (3)(a) appears to exclude such issues.

Interim Protective Measures:

In this context, protective measures under Article 57(3)(e) should also be noted since the provision does also encompass measures to secure future forfeiture “for the ultimate benefit of victims”. Clearly, forfeiture as a penalty (Article 77(2)(b)) may benefit victims through an order by the Court. In accordance with Article 79(2), that money or other property collected through fines or forfeiture may be transferred to the Trust Fund. But the question has arisen as to whether protective measures under Article 57(3)(e) may be ordered by the Pre-Trial Chamber for the direct purpose of a future reparation order. In *Kenyatta*, the majority of the Trial Chamber answered this question in the affirmative.⁴ One judge dissented, however, and found that protective measures to secure a future reparation order is possible only post-conviction in accordance with Article 75(4).⁵ Although less explicit, earlier Pre-Trial Chamber decisions have also made the connection between the protective measures under Article 57(3)(e) and future reparations awards.⁶

Doctrine: For the bibliography, see the final comment on Article 75.

Author: Håkan Friman.

⁴ ICC, *Prosecutor v. Kenyatta*, Trial Chamber, Decision on the implementation of the request to freeze assets, 8 July 2014, ICC-01/09-02/11-931, para. 12 (<https://www.legal-tools.org/doc/7b1d6f/>).

⁵ ICC, *Prosecutor v. Kenyatta*, Trial Chamber, Dissenting Opinion of Judge Henderson, Decision on the implementation of the request to freeze assets, 9 July 2014, ICC-01/09-02/11-931-Anx, para. 3 (<https://www.legal-tools.org/doc/f0f945/>).

⁶ For example, ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber, Request to the Democratic Republic of the Congo for the purpose of obtaining the identification, tracing, freezing and seizure of property and assets belonging to Mr. Thomas Lubanga Dyilo, 9 March 2006, ICC-01/04-01/06-22-tEN (<https://www.legal-tools.org/doc/8fe2d4/>); *Prosecutor v. Bemba*, Pre-Trial Chamber, Décision et demande en vue d’obtenir l’identification, la localisation, le gel et la saisie des biens et avoirs adressées à la République portugaise, 27 May 2008, ICC-01/05-01/08-8 (<https://www.legal-tools.org/doc/047cd5/>).

Article 75(5)

5. A State Party shall give effect to a decision under this Article as if the provisions of Article 109 were applicable to this article.

Without effective enforcement, the reparation awards will be merely symbolic. Enforcement of fines and forfeiture orders are regulated in Article 109 and the expression “give effect to” (instead of ‘enforce’) is used in order to set forth the material obligation but leave the States with discretion concerning the procedures for doing so.¹ Article 75(5) provides the equivalent obligation of States Parties to “give effect to” a decision on reparations “as if the provisions of Article 109 were applicable”.

Further directions are given in the Rules. Rule 217 provides for the role of the Presidency in seeking co-operation and enforcement and Rule 218 the content of relevant orders to allow for their effective enforcement. The reparations ordered may not be modified by the enforcing State according to Rule 219. The Presidency is responsible for the disposition or allocation of property or assets realized through the enforcement of a Court order (Rule 221) and it may assist with service of notifications and other matters in furtherance of the enforcement (Rule 222). The Presidency shall establish an enforcement unit (Regulation 113) and the Registry may be enlisted to assist with certain tasks, which may include ongoing monitoring of a sentenced person’s financial situation (Regulations 116–117).

The *Lubanga* Trial Chamber merely noted that in order for a reparations award to have effect, the Court “requires the cooperation of States Parties and non-states parties” and in particular close co-operation with the “DRC local government”.²

Doctrine: For the bibliography, see the final comment on Article 75.

Author: Håkan Friman.

¹ Draft Report of the Working Group on Enforcement, U.N. Doc. A/CONF.183/C.1/WGE/L.13, 5 July 1998, p. 5 (<https://www.legal-tools.org/doc/098f35/>).

² ICC, *Prosecutor v. Lubanga*, Trial Chamber, Decision Establishing the Principles and Procedures to be Applied to Reparations, 7 August 2012, ICC-01/04-01/06-2904, para. 278 (<https://www.legal-tools.org/doc/a05830/>).

Article 75(6)

6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

In *Lubanga*, the Chambers underlined that the decision was not intended to affect the rights of victims to reparations in other cases, whether before the ICC or national, regional or other international bodies.¹ Although decisions by other national or international bodies do not affect the rights to reparations under Article 75, the Court may take other orders and awards into account in order to guarantee that reparations are not applied unfairly or in discriminatory manner (*Lubanga*, 7 August 2012, para. 201).

Cross-references:

Rules 94, 95, 96 and 97.

Regulations 38, 56 and 88.

Doctrine:

1. Anne-Marie de Brouwer and Mikaela Heikkilä, “*Victim Issues: Participation, Protection, Reparation, and Assistance*”, in Göran Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013.
2. David Donat-Cattin, “Article 75”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1853–1870 (<https://www.legal-tools.org/doc/040751/>).
3. Eva Dwertmann, *The Reparation System of the International Criminal Court*, Martinus Nijhoff Publishers, Leiden/Boston, 2010.
4. Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, Cambridge University Press, 2012.

¹ ICC, *Prosecutor v. Lubanga*, Trial Chamber, Decision Establishing the Principles and Procedures to be Applied to Reparations, 7 August 2012, ICC-01/04-01/06-2904, paras. 181 (“*Lubanga*, 7 August 2012”) (<https://www.legal-tools.org/doc/a05830/>); *Prosecutor v. Lubanga*, Appeals Chamber, Annex A to Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 order for reparations (amended), 3 March 2015, ICC-01/04-01/06-3129-AnxA, para. 4 (<https://www.legal-tools.org/doc/df2804/>).

5. Carla Ferstman *et al.* (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, Martinus Nijhoff Publishers, 2009.
6. Håkan Friman, “The International Criminal Court and Participation of Victims: A Third Party to the Proceedings?”, in *Leiden Journal of International Law*, 2009, vol. 22, pp. 485–500.
7. Håkan Friman and Peter Lewis, *Reparations to Victims*, in Roy S Lee *et al.* (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 479–91.
8. Carolyn Hoyle and Leila Ullrich, “New Court, New Justice?”, in *Journal of International Criminal Justice*, 2014, vol. 12, no. 4, pp. 681–703.
9. Sara Kendall and Sarah Nouwen, “Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood”, *Law and Contemporary Problems*, 2013, vol. 76, no. 3 and 4, pp. 235–262.
10. Conor McCarthy, *Reparations and Victim Support in the International Criminal Court*, Cambridge University Press, 2012.
11. Luke Moffett, *Justice for Victims before the International Criminal Court*, Routledge, London/New York, 2014.
12. Christopher Muttukumaru, “Reparation to Victims”, in Roy S Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999, pp. 262–70.
13. Juan Carlos Ochoa, *The Rights of Victims in Criminal Justice Proceedings for Serious Human Rights Violations*, Martinus Nijhoff Publishers, 2013.
14. Valentina Spiga, “No Redress without Justice: Victims and International Criminal Law”, in *Journal of International Criminal Justice*, 2012, vol. 10, no. 5, pp. 1377–1394.
15. Carsten Stahn, “Reparative Justice after the Lubanga Appeals Judgment on Principles and Procedures of Reparation”, in *European Journal of International Law: Talk!*, 7 April 2015.
16. Salvatore Zappalà, “The Rights of Victims v. the Rights of the Accused”, in *Journal of International Criminal Justice*, 2010, vol. 8, no. 1, pp. 137–64.

17. Liesbeth Zegveld, “Victims’ Reparations Claims and International Criminal Courts”, in *Journal of International Criminal Justice*, 2010, vol. 8, no. 1, pp. 79–111.

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Article 76

Sentencing

General Remarks:

Sentencing is one of the most important stages of the trial proceedings and marks the culmination of the trial. It is a logical ending to the truth-finding task that parties to the proceedings have embarked upon with the view of determining the personal consequences that a convicted person would bear for committing the crimes within the jurisdiction of the International Criminal Court. It lies at the core of the entire functioning of the criminal justice system, be it national or international. Without the final stage of sentencing, the criminal justice process would make little sense, as it is at this stage that the goals of punishment are being achieved.

Article 76, the final provision of Part 6 of the ICC Statute, provides for sentencing following conviction. Since its inception, the ICC has sentenced four individuals in the *Lubanga*, *Katanga*, *Bemba* and *Al Mahdi* cases.¹ Of these, Jean-Pierre Bemba's conviction was overturned on 8 June 2018, which essentially reversed his 18-year initial custodial sentence handed down on 21 June 2016. Instead, on 17 September 2018, Trial Chamber VII of the ICC sentenced Jean-Pierre Bemba to a year of imprisonment and fined him 300,000 Euro with regard to offences against the administration of justice. The 12-month period was deducted from the time Mr. Bemba had already spent in pre-trial detention and therefore, the sentence of imprisonment was considered to have already been served.

With regard to the trial process, if an accused is convicted, Article 76 prescribes a distinct sentencing phase following the trial, where the appropriate sentence is determined. In determining this sentence, the Trial Chamber should take into consideration the evidence presented and the

¹ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Sentencing Order, 10 July 2012, ICC-01/04-01/06-2901 ('Lubanga, 10 July 2012') (<https://www.legal-tools.org/doc/c79996/>); *Prosecutor v. Katanga*, Trial Chamber II, Decision on Sentence pursuant to Article 76 of the Statute, 23 May 2014, ICC-01/04-01-07-3484-tENG-Corr ('Katanga, 23 May 2014') (<https://www.legal-tools.org/doc/5af172/>); *Prosecutor v. Bemba*, Trial Chamber III, Decision on Sentence pursuant to Article 76 of the Statute, 21 June 2016, ICC-01-05-01/08-3399 ('Bemba, 21 June 2016') (<https://www.legal-tools.org/doc/f4c14e/>); *Prosecutor v. Al Mahdi*, Trial Chamber VIII, Judgment and Sentence, 27 September 2016, ICC-01/12-01/15-171 ('Al Mahdi, 27 September 2016') (<https://www.legal-tools.org/doc/042397/>).

submissions made during the trial that are of relevance to sentencing. The *Lubanga*, *Katanga* and *Bemba* cases all saw the conduction of a separate sentencing hearing following conviction. On 8 July 2019, Bosco Ntaganda was convicted of war crimes and crimes against humanity. At the time of writing, Bosco Ntaganda remains in ICC custody pending the decision on his sentence following a separate sentencing hearing.² In the *Al Mahdi* case, due to entering a guilty plea, which triggers the application of Article 65 of the Statute, the parties reached an agreement at the status conference, in which they were unanimous that the judgment and sentence would be rendered simultaneously in the event of conviction (*Al Mahdi*, 27 September 2016, paras. 5–7).

Preparatory Works:

The drafting history of Article 76 of the ICC Statute can be dated back to the early 1990s. The first mention of a sentencing provision appeared in Draft Article 52 in the Report of the Working Group on a draft statute for an international criminal court, which was part of the 1993 Report of the International Law Commission. This draft statute envisioned a separate sentencing hearing that is separate from the trial. The draft provision imposed an obligation upon the Court to hear submissions from the prosecution and the defence and any evidence it considered relevant for sentencing. However, the commentary to the draft provision pointed out that the accused's rights at this sentencing stage may not be as extensive as at the trial stage (for example, the right to cross-examine witnesses may not be available). It was further recommended that a sentencing hearing, which accompanies the judgment in a given case, should be in open court.³

In 1994, the International Law Commission presented a further draft titled the Draft Code of Crimes against the Peace and Security of Mankind, which was included in the Report of the International Law Commission. Draft Article 46 of this draft code, in addition to maintaining the preference for a separate sentencing hearing, imposed an obligation on the Trial Chamber to consider factors such as the gravity of the crime and the individual circumstances of the convicted person, when imposing the sentence.

² ICC, *Prosecutor v. Ntaganda*, Trial Chamber VI, Judgment, 8 July 2019, ICC-01/04-02/06-2359 (<https://www.legal-tools.org/doc/80578a/>).

³ “Report of the Working Group on a Draft Statute for an International Criminal Court”, Yearbook of the International Law Commission, Vol. 2, U.N. Doc. A/CN.4/SER.A/1993/Add.1 (Part 2), 23 July 1993, pp. 124–5 (<https://www.legal-tools.org/doc/a06e09/>).

Moreover, in its commentary on Draft Article 46(2), the drafters made reference to the Trial Chamber having regard to factors such as “the degree of punishment commensurate with the crime in accordance with the general principle of proportionality” when deciding on an appropriate sentence.⁴

In 1995, while the Report of the Ad Hoc Committee on the Establishment of an International Criminal Court (1995) did make reference to various matters connected to sentencing, this particular provision on sentencing was not discussed.⁵ However, the Report of the Preparatory Committee on the Establishment of an International Criminal Court of 1996, in its Draft Article 46, reaffirmed the preference for the bifurcation of proceedings by proposing a further (pre-sentencing) hearing following conviction in order to hear any evidence relevant to sentencing. The draft further elaborated on the obligation to consider the gravity of the crime and the individual circumstances of the convicted person, including aggravating, extenuating and mitigating circumstances. Additionally, the Draft Article laid out the manner in which the parties at the hearing should ordinarily present their submissions and suggested that the Trial Chamber should indicate whether multiple sentences should be served consecutively or concurrently. This was also the first instance in its drafting history where the drafters proposed that the sentence was to be pronounced in the presence of the convicted individual.⁶

In 1997, this particular provision on sentencing was not considered by the Preparatory Committee and its working groups during its sessions held in early December.⁷ However, the Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands’ ‘Zutphen Draft’, in Draft Article 67 proposed several alterations to the original ILC and Preparatory Committee drafts. The Zutphen Draft also maintained the strong presumption in favour of a separate sentencing hearing. However, the drafters viewed it as being appropriate to strike out the references to the

⁴ “Draft Statute for an International Criminal Court with commentaries”, in Yearbook of the International Law Commission, Vol. 2, UN Doc. A/CN.4/SER.A/1994/Add.1 (Part 2), 22 July 1994, p. 60 (<https://www.legal-tools.org/doc/390052/>).

⁵ Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, UN Doc. A/50/22, 7 September 1995 (<https://www.legal-tools.org/doc/b50da8/>).

⁶ Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/51/22[VOL-II](SUPP), 13 September 1996, p. 226 (<https://www.legal-tools.org/doc/03b284/>).

⁷ Preparatory Committee on the Establishment of an International Criminal Court, 1–12 December 2007.

Trial Chamber's obligation to take into account factors such as gravity of the crime and the individual circumstances of the convicted individual, as they considered these provisions to have already been included under more appropriate articles elsewhere in the Statute. The Zutphen Draft did elucidate however that submissions made during the sentencing hearing "may go to aggravation, extenuation or mitigation evidence, or the issue of rehabilitation". It further retained the sections from the 1996 Preparatory Committee draft, on the manner in which the parties should ordinarily present submissions at the sentencing hearing, and on pronouncement of sentence in public and in the presence of the convicted individual.⁸

A further version of the draft statute was set out in the Report of the Preparatory Committee on the Establishment of an International Criminal Court (14 April 1998) that was presented at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court held in Rome, Italy from 15th June to 17th July 1998. In it, Draft Article 74 referred to sentencing and bore many similarities to Article 76 as it appears in the Rome Statute today. Here, Draft Article 74(1) mirrored Article 76(1) of the ICC Statute. Except for the wording, the subsequent paragraphs of the Draft Article were identical to Articles 76(2), 76(3) and 76(4) in the Rome Statute in terms of substance. In terms of Draft Article 74(4), the part of the sentence "and in the presence of the accused" was included within square brackets, as at this point it was yet unclear as to whether in absentia trials would be permitted at the ICC.⁹ The final version of Article 76 of the ICC Statute as it stands today, was transmitted by the Committee of the Whole, to the Diplomatic Conference and was adopted on 18 July 1998.

Doctrine: For the bibliography, see the final comment on Article 76.

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⁸ Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands, UN Doc. A/AC.249/1998/L.13, 5 February 1998, pp. 124–5 (<https://www.legal-tools.org/doc/7ba9a4/>).

⁹ Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/2, 14 April 1998, p. 62 (<https://www.legal-tools.org/doc/732f58/>).

Article 76(1)

1. In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence.

In the event that an accused individual is convicted, the Trial Chamber is to determine an appropriate sentence to be imposed on the convicted individual. Article 76(1) provides that the Trial Chamber should consider the “appropriate sentence” to be imposed and that in making this decision, “take into account the evidence presented and submissions made during the trial that are relevant to the sentence”. This Article should be read together with Article 77 (on applicable penalties). It should additionally be read together with Article 78 of the Statute and Rule 145 of the Rules of Procedure and Evidence governing the determination of the sentence that require the Chamber to take into account the gravity of the crime and the individual circumstances of the convicted person, as well as any mitigating and aggravating circumstances.

The pivotal *Lubanga* decision on sentencing provides valuable insights into how the evidence presented during trial and additional submissions during a separate sentencing hearing were utilized for the purposes of determining the appropriate sentence. It is instructive that while considering the sentence to be imposed upon Thomas Lubanga Dyilo for his role as a co-perpetrator on the charges of conscripting, and enlisting children under the age of fifteen years and using them to actively participate in hostilities, the judges studied the practices of the Special Court for Sierra Leone with respect to its sentencing practices regarding the use of child soldiers.¹ The developed jurisprudence of the SCSL provides a detailed treatment of the war crime of the use of child soldiers in hostilities and lays a good foundation for determining which evidence is relevant for determining the appropriate sentence. While not being bound by the SCSL’s sentencing practices, the ICC Trial Chamber took note of the high sentences imposed upon two Revolutionary United Front rebel commanders, 50 and 35 years of imprisonment respectively, in light of the gravity of the crime that mani-

¹ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Sentencing Order, 10 July 2012, ICC-01/04-01/06-2901, paras. 12–15 (‘Lubanga, 10 July 2012’) (<https://www.legal-tools.org/doc/c79996/>).

fested itself in the use of child soldiers on a large scale and with a significant degree of brutality (*Lubanga*, 10 July 2012, paras. 12–13). In the subsequent sentencing decisions, the ICC judges, if necessary, referred to the jurisprudence of the *ad hoc* tribunals with respect to their sentencing practices. However, the ICC Appeals Chamber also emphasized that sentencing practices of other tribunals cannot be instructive or binding for the ICC that has to follow its own statutory framework and rules.²

a. Evidence Pertinent to the Gravity of a Crime for the Purposes of Sentencing:

It is helpful to look at the evidence adduced by the parties to the proceedings in order to understand how the ICC judges assess the gravity of the crime for the purposes of sentencing. Despite the limited number of sentencing decisions that have been rendered by the ICC to date, the crimes that the convicted persons were charged with have spanned from the use of child soldiers to the destruction of cultural property, and have all been different in terms of the gravity. When assessing the evidence pertinent to the ‘gravity of crime’ *vis-à-vis* factors relevant to sentencing provided for in Rule 145(1)(c) of the RPE, the Trial Chamber in *Lubanga* paid particular attention to expert evidence on the psychological impact of child soldiering (*Lubanga*, 10 July 2012, paras. 39–42). In its determination of the gravity requirement, the judges attributed considerable weight to the evidence of the widespread involvement of children in hostilities (paras. 49–50). The judges also treated *Lubanga*’s mature age as well as his educational background in psychology as factors that amplified the gravity of the crimes, since he should have understood the seriousness of the crimes of which he had been convicted (paras. 54–56). In *Katanga*, the evidence, which was submitted to demonstrate the gravity requirement, concerned a wider spectrum of crimes in comparison to *Lubanga* and pertained to the crimes of murder as a war crime and a crime against humanity, and those of attacks against civilians, destruction and pillaging as war crimes.³ The judges concluded that the gravity requirement was present by examining the evidence

² ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the “Decision on Sentence pursuant to Article 76 of the Statute”, 1 December 2014, ICC-01/04-01/06-3122, para. 77 (*‘Lubanga*, 1 December 2014’) (<https://www.legal-tools.org/doc/a9bd07/>).

³ ICC, *Prosecutor v. Katanga*, Trial Chamber II, Decision on Sentence pursuant to article 76 of the Statute, 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr, para. 44 (*‘Katanga*, 23 May 2014’) (<https://www.legal-tools.org/doc/5af172/>).

on (1) the violence and the scale of crimes committed in the village of Bogoro (*Katanga*, 23 May 2014, paras. 46–52); (2) the discriminatory dimension of the attack, which targeted the civilians on the basis of their ethnic background (paras. 53–54); and (3) the post-attack situation in Bogoro and the harm caused to victims and their relatives (paras. 55–60). In *Katanga*, the judges made an important distinction between the crimes against persons and the crimes against property, emphasizing the inherent difference between these two categories of crimes in terms of their gravity (para. 145). This distinction was further articulated in the *Al Mahdi* case, in which the accused was charged solely with a crime against property. This case has garnered much attention, as it is the first time in the history of international criminal courts where a person was convicted for the destruction of cultural heritage. The evidence that the judges assessed to determine the gravity of crime for the purposes of sentencing included the extent of the damage caused to the cultural heritage sites, the nature of the unlawful behaviour and circumstances during which the crime took place.⁴ The judges looked into the symbolic and emotional value assigned to the destroyed cultural sites by local inhabitants, people of Mali and the international community, as well as religious motives entertained by the perpetrators of the crime (*Al Mahdi*, 27 September 2016, paras. 79–81).

The sentencing decision in *Bemba* dealt with the evidence pertinent to the gravity of the war crimes of rape and pillaging. Notwithstanding Mr. Bemba's acquittal, it is important to bear in mind that the discussion on the sentencing related evidentiary matters in his trial still holds true, although these sentencing considerations are no longer applicable to Mr Bemba in light of his acquittal, with the exception of the conviction for the offences against the administration of justice. As an illustration, in the initial sentencing decision, the Trial Chamber found that the evidence on the substantial number of victims as well as the severe degree of damage caused to the victims and communities in the Central African Republic ('CAR') attested to the serious gravity of the crime.⁵ Here, the judges reached the same conclusion with respect to the crime of pillaging given the substantial number

⁴ ICC, *Prosecutor v. Al Mahdi*, Trial Chamber VIII, Judgment and Sentence, 27 September 2016, ICC-01/12-01/15, para. 76 ('*Al Mahdi*, 27 September 2016') (<https://www.legal-tools.org/doc/042397/>).

⁵ ICC, *Prosecutor v. Bemba*, Trial Chamber III, Decision on Sentence pursuant to Article 76 of the Statute, 21 June 2016, ICC-01-05-01/08-3399, para. 40 ('*Bemba*, 21 June 2016') (<https://www.legal-tools.org/doc/f4c14e/>).

of victims and its impact on their lives (*Bemba*, 21 June 2016, para. 51). Therefore, one may deduce that such factors as the substantial number of victims, the severe degree of damage and the impact of crimes on the lives of victims will count towards the gravity of a crime for the purposes of sentencing.

b. Evidence Pertinent to the Convicted Person’s Degree of Participation and Culpability:

The sentence to be imposed upon the convicted person should not only be proportionate to the crime but should also reflect the culpability of the convicted person (Art. 81(2)(a), ICC Statute; Rule 145(1)(a) of the RPE). In order to assess the culpability of an individual, it is necessary to examine the person’s degree of participation in a crime and the accompanying mens rea. While assessing the evidence on Lubanga’s *mens rea*, the Trial Chamber was not convinced that the accused entertained the direct intent (*dolus directus* of the first degree) with respect to enlistment, conscription and use of children under the age of fifteen, but instead concluded that he “was aware that, in the ordinary course of events, this would occur” (*Lubanga*, 10 July 2012, para. 52). As to the degree of Lubanga’s participation, the evidence corroborated his role as a co-perpetrator that requires an essential contribution to the common plan (para. 52). It has been long speculated in academic circles whether principal and accessory modes of liability provided for in Article 25 of the ICC Statute were arranged in a particular hierarchy of blameworthiness and if so, how this will be reflected in the scale of punishments at the sentencing stage. This question was finally answered in *Katanga* and *Bemba* where the judges held that the distinction between various modes of liability neither implied a hierarchy of blameworthiness nor a gradation of punishment (*Katanga*, 23 May 2014, para. 61; *Bemba*, 21 June 2016, para. 16). The judges merely stated that the convicted person’s degree of participation and *mens rea* must be assessed *in concreto* on the basis of the factual and legal findings (*Katanga*, 23 May 2014, para. 61, *Bemba*, 21 June 2016, para. 16). Whereas in *Katanga* the judges did not find evidence that was supportive of the essential contribution of the convicted person to the crimes, they nevertheless found that Katanga’s “activities as a whole and the various forms which his contribution took had a significant influence on the commission of the crimes” (*Katanga*, 23 May 2014, para. 67). In addition to that, the Chamber considered evidence on the convicted person’s mens rea, which included knowledge that the militia would engage in the crimes he was charged with, as well as knowledge of

the suffering endured by the civilian population (para. 68). In another case, while assessing the evidence pertinent to Al-Mahdi's culpable conduct, the judges accorded weight to Al Mahdi's essential role in the execution of the attack against the protected objects and his direct intent (*Al Mahdi*, 27 September 2016, paras. 84–85).

In *Bemba*, in the initial sentencing decision (on Mr. Bemba's acquittal, see Art 76 'General remarks'), the Trial Chamber provided helpful guidance on how to assess the gravity of the crime in cases of command responsibility, pointing to the necessity to evaluate the gravity of "(i) the crimes committed by the convicted person's subordinate; and (ii) the convicted person's own conduct in failing to prevent or repress the crimes, or submit the matter to the competent authorities" (*Bemba*, 21 June 2016, para. 15). The judges found that the evidence demonstrating Bemba's "repeated and ongoing failures" to stop the commission of crimes, despite his knowledge and ultimate authority over the Mouvement de Libération du Congo troops, demonstrated the culpable conduct of serious gravity.

Although the Trial Chamber introduced a helpful legal test in assessing evidentiary matters pertinent to the convicted person's degree of participation and culpability in the cases involving command responsibility, the Appeals Chamber, which reversed Mr. Bemba's conviction, went one step further in clarifying how the evidence in such cases should be interpreted in light of the legal test of command responsibility in Article 28(a) of the ICC Statute. More specifically, the Appeals Chamber elaborated on evidentiary matters concerning the scope of a commander's duty to take "all necessary and reasonable measures", which is intrinsically linked to his or her material ability to prevent or repress the commission of crimes or submit the matter to the competent authorities for investigation/prosecution.⁶ An important clarification rendered by the Appeals Chamber is that a commander is not required "to employ every single conceivable measure within his or her arsenal, irrespective of considerations of proportionality and feasibility" (*Bemba*, 8 June 2018, para. 169).

⁶ ICC, *Prosecutor v. Bemba*, Appeals Chamber, Judgment, 8 June 2018, ICC-01/05-01/08-3636-Red, paras. 167–194 ('*Bemba*, 8 June 2018') (<https://www.legal-tools.org/doc/40d35b/>).

c. Evidence Constituting Aggravating Circumstances for the Purposes of Sentencing:

The existing sentencing practice of the ICC, although still in its nascent phase, provides a good overview as to what evidence the judges could accept as aggravating factors. In *Lubanga*, when requesting the Trial Chamber to impose the maximum imprisonment term of 30 years, the Prosecution submitted evidence in support of its claim of the existence of aggravating circumstances on (1) harsh conditions in the camps and the brutal treatment of the children; (2) sexual violence; (3) recruitment of children at a very young age as young as 5 or 6 years; and (4) discriminatory motive directed at the female recruits who were subject to sexual violence (*Lubanga*, 10 July 2012, paras. 57–81). In terms of aggravating circumstances, the applicable standard of proof is that they must be established beyond reasonable doubt (*Lubanga*, 10 July 2012, para. 33; *Katanga*, 23 May 2014, para. 34). In *Lubanga*, the judges were not satisfied that the evidence presented by the Prosecution with respect to the brutal treatment of children, sexual violence and discriminatory motive, proved the existence of those aggravating circumstances beyond reasonable doubt (*Lubanga*, 10 July 2012, para. 59, 75 and 81; *Lubanga*, 1 December 2014, para. 93). Here, the Prosecution’s submissions on sexual violence as an aggravating circumstance proved to be particularly controversial. Whereas the judges agreed to consider the evidence on sexual violence for sentencing purposes, they nevertheless vehemently criticized the ICC Prosecutor’s reluctance to include additional charges on sexual violence during the trial (*Lubanga*, 10 July 2012, para. 60). The Prosecutor’s tactics of introducing evidence on sexual violence for the purposes of sentencing was largely perceived as being an attempt at bringing additional charges through the backdoor. In many instances, the Prosecution adduced evidence on aggravating circumstances that in fact was indicative of the gravity of the crime. As an example, in *Lubanga*, the evidence in relation to the young age of children was treated as going to the issue of the gravity of the crime and therefore was not considered as an aggravating circumstance (para. 78). In *Katanga*, the evidence on aggravating circumstances introduced by the Prosecution was pertinent to “(1) particularly defenseless victims; (2) particular cruelty of the commission of the crime; (3) motive involving discrimination; and (4) abuse of power or official capacity” (*Katanga*, 23 May 2014, para. 70). However, the Chamber did not consider such evidence (apart from the evidence on the abuse of power or official capacity that was discussed sepa-

rately) to constitute aggravating circumstances as it went to the issue of the gravity of the crime (para. 71). Targeting of “particularly defenseless victims” and “particular cruelty of the commission of the crime” were not considered as constituting aggravating circumstances in *Katanga*. However, in Bemba’s initial sentencing decision (on Mr. Bemba’s acquittal, see comment on Article 76 ‘General remarks’), the Trial Chamber in *Bemba* arrived at the opposite conclusion by finding that the evidence on the war crime of rape carried out by the MLC armed soldiers against vulnerable unarmed civilians, including children, as well as the particular cruelty of the crimes of rape and pillaging constituted aggravating circumstances for the purpose of sentencing (*Bemba*, 21 June 2016, paras. 43, 47, 57 and Judge Ozaki’s Separate Opinion). As to Katanga’s exercise of power, the judges helpfully clarified that the exercise of power may constitute an aggravating circumstance if it is proved that the person also abused this power (*Katanga*, 23 May 2014, para. 75). The abuse of power and official capacity as aggravating circumstances were also advanced by the Prosecution in the *Al Mahdi* case. However, in this particular instance, the evidence was not treated as constituting aggravating circumstances, as the judges confirmed the earlier jurisprudence of the Court, which states that an official position as such, in the absence of the abuse of that position, cannot be treated as an aggravating circumstance (*Al Mahdi*, 27 September 2016, para. 86). The evidence on the far-reaching impact of the crime affecting multiple victims as well as the religious nature of an attack was dismissed as constituting aggravating circumstances, as it had already formed part of the Chamber’s assessment of the gravity of the crime (*Al Mahdi*, 27 September 2016, paras. 87–88). In Bemba’s initial sentencing decision (on Mr. Bemba’s acquittal, see comment on Article 76 ‘General remarks’), the judges emphasized that the Trial Chamber cannot “double-count” any factors in relation to the gravity of the crimes as aggravating circumstances (*Bemba*, 21 June 2016, para. 14).

d. Evidence Constituting Mitigating Circumstances for the Purposes of Sentencing:

When considering the evidence in mitigation of the sentence, the Trial Chamber must be convinced of the existence of mitigating circumstances “on a balance of probabilities” (*Lubanga*, 10 July 2012, para. 34; *Katanga*, 23 May 2014, para. 34, *Bemba*, 21 June 2016, para. 19). It is also important to bear in mind that mitigating circumstances “need not to be directly related to the crimes” and are “not limited by the scope of the charges or judg-

ment”, however, they need to “relate directly to the convicted person” (*Lubanga*, 10 July 2012, para. 34, *Katanga*, 23 May 2014, para. 32, *Bemba*, 21 June 2016, para. 19). To prove mitigating circumstances in *Lubanga*, the Defence adduced the evidence on the necessity faced by Lubanga and others “to build an army [...] in order to establish political and military control over Ituri as a response to the threat of massacre” and Lubanga’s motives to bring peace and demobilization (*Lubanga*, 10 July 2012, paras. 83–85). However, the judges accorded limited relevance to that evidence, emphasizing that the critical factor was that, “in order to achieve his goals, [Lubanga] used children as part of the armed forces over which he had control” (para. 87). They, however, considered that Lubanga’s co-operation throughout the trial, notwithstanding repeated procedural violations of his rights by the prosecution, warranted the mitigation of his sentence (para. 91). In *Katanga*, the Defence argued that the evidence pertinent to Katanga’s personal circumstances (young age, the type of role he played, the exceptional circumstances in which he found himself, and his family situation), his contribution to peace processes and the co-operation with the Court should be considered as mitigating circumstances. Although the Trial Chamber considered Katanga’s young age, his family situation and his attitude towards the community in mitigation of his sentence, it did however note the limited weight accorded to such evidence (*Katanga*, 23 May 2014, para. 88). The judges affirmed that the efforts to promote peace and reconciliation may potentially serve as mitigating circumstances. Regardless of this, however, it explicated that “such efforts must be both palpable and genuine” (*Katanga*, 23 May 2014, para. 91; *Bemba*, 21 June 2016, para. 72 “genuine and concrete”). Whereas the Chamber in *Katanga* was unable to conclude on the basis of the evidence that Katanga was actively promoting the peace process, it nevertheless considered the evidence of his active participation in the demobilization process in mitigation of his sentence (*Katanga*, 23 May 2014, para. 115). An interesting argument on the convicted person’s peace building efforts was advanced in *Bemba*’s initial sentencing decision (on Mr. Bemba’s acquittal, comment on Article 76 ‘General remarks’) where the Defence argued that Bemba’s contribution to peace in neighbouring Democratic Republic of the Congo (‘DRC’) should be treated as a mitigating circumstance. The Chamber dismissed such evidence as being irrelevant to the case, emphasizing that Bemba’s selective peace efforts in the DRC do not demonstrate his good character (*Bemba*, 21 June 2016, para. 76). In *Katanga* and *Bemba*, the judges provided helpful guid-

ance on what kind of evidence of the convicted person's co-operation with the Court should be considered as a mitigating circumstance. More specifically, it expounded that the evidence of the conduct that is reasonably expected from any accused person (for example, attendance of court proceedings, good behaviour in court) cannot serve as a mitigating circumstance, as the convicted person's behaviour and co-operation should be "exceptional" in order for it to qualify (*Katanga*, 23 May 2014, para. 128; *Bemba*, 21 June 2016, para. 81). The violations of the defence's rights and procedural irregularities were also pleaded as mitigating circumstances in *Katanga* and *Bemba*. In *Katanga*, the convicted person submitted evidence alleging the violation of his procedural rights by the Congolese authorities prior to his transfer to The Hague. However, the Trial Chamber held that, although such violations could form a basis for mitigation of the sentence, it is not within its discretion to rule on the alleged violations of the convicted person's procedural rights to which he was subjected to in the national context (*Katanga*, 23 May 2014, para. 136). In other words, the procedural violations can only be imputed to the ICC if they had taken place at the Court and were governed by its procedural framework. In *Bemba's* initial sentencing decision (on Mr. Bemba's acquittal, see comment on Article 76 'General remarks'), the Trial Chamber considered that the alleged violations of the accused's procedural rights had been addressed during the trial and therefore, could not constitute a mitigating circumstance (*Bemba*, 21 June 2016, para. 89). In *Al Mahdi*, although the Trial Chamber dismissed the evidence on the convicted person's age, background and the absence of prior conviction as being relevant for the purposes of sentencing, it accorded substantial weight to his admission of guilt and co-operation (*Al Mahdi*, 27 September 2016, paras. 96–97). The admission of guilt is a rare occurrence in the context of international criminal trials. The Trial Chamber noted that the admission of guilt not only contributed to the rapid resolution of the case, but also had a potential of furthering peace and reconciliation in Northern Mali as well as have a general deterrent effect (para. 100). The Trial Chamber also attributed considerable weight to Al Mahdi's substantial co-operation with the Prosecution as well as the expression of genuine remorse for his acts and empathy to the victims (paras. 101–102 (co-operation), paras. 103–105 (remorse)).

e. Determination of the Appropriate Sentence:

The Trial Chamber has considerable discretion in imposing a proportionate sentence (*Lubanga*, 1 December 2014, para. 34). Given the absence of con-

sistent sentencing practices in the work of the ICC's predecessors, the ICC Prosecutor used his submission in *Lubanga* to highlight the necessity for a 'consistent baseline' for the determination of sentences at the ICC. The Prosecution argued for introducing a starting point for all sentences at approximately 80% of the statutory maximum, which should be adjusted in accordance with Rule 145 by considering any aggravating and/or mitigating circumstances, other factors relevant to the convicted person and the circumstances of the crimes (*Lubanga*, 10 July 2012, para. 92). However, this approach was dismissed by the judges due to the lack of support for such a proposition in the statutory framework of the ICC or the relevant jurisprudence. The judges held that the sentence passed by a Trial Chamber should always be proportionate to a crime and dismissed the suggested automatic starting point for all crimes as undermining that principle (para. 93). Adopting the Prosecution approach would essentially translate into accepting that all crimes within the jurisdiction of the Court are of the same gravity, which is something that the Chamber refused to accept in *Katanga* where it brought up an example as to how it was important to distinguish crimes against persons from those targeting property (*Katanga*, 23 May 2014, paras. 43, 145). To date, four sentencing decisions have been rendered by the Court, which gives a good preliminary overview as to where the Court is heading with its sentencing practice (*Lubanga* – 14 years of imprisonment, *Katanga* – 12 years of imprisonment, *Al Mahdi* – 9 years of imprisonment, *Bemba* – 18 years of imprisonment – later acquitted of all war crimes charges and sentenced to 1 year of imprisonment for offences against the administration of justice). However, it is still premature to draw any definite conclusions as to the consistency of its sentencing practice. This is also largely due to the fact that four cases concern a diverse spectrum of crimes within the ICC's jurisdiction and varying degrees of the convicted persons' participation in the crimes. The ICC judges have also made it clear that, although they must consider all relevant evidence and submissions throughout the trial, they are not obliged to "expressly reference or comment" on each piece of evidence (*Lubanga*, 10 July 2012, paras. 69–70; *Bemba*, 21 June 2016, para. 9). In the absence of any aggravating circumstances in *Lubanga*, the Majority determined that the appropriate sentence proportionate to Lubanga's criminal responsibility was a total period of 14 years of imprisonment (*Lubanga*, 10 July 2012, para. 107). In her dissent, Judge Odio Benito did not oppose the Majority's determination of the sentence as such, but disagreed with its decision to disregard the evi-

dence with respect to the damage caused to the victims and their families, as a result of the harsh punishment and sexual violence (*Lubanga*, 10 July 2012, Dissenting Opinion Judge Odio Benito, para. 2). While determining the appropriate sentence in *Katanga*, the judges accorded limited weight to Katanga's young age and his family situation, however, assigned a greater weight to his active support to the process of disarming and demobilizing child soldiers (*Katanga*, 23 May 2014, para. 144). The joint sentence imposed upon Katanga in light of his contribution as an accessory to the crimes, amounted to 12 years of imprisonment (para. 147). In *Bemba*, in the absence of any mitigating circumstances, the judges imposed 18 years of imprisonment upon the convicted person, having taken into account aggravating circumstances that the war crimes of rape and pillaging had been directed against defenseless victims and committed with particular cruelty (*Bemba*, 21 June 2016, para. 93, Judge Ozaki appending a separate opinion on the crime of pillaging). In *Al Mahdi*, the judges considered the convicted person's admission of guilt, the expression of empathy to the victims and the substantial co-operation with the Prosecution in mitigation of the sentence, and sentenced him to 9 years of imprisonment (*Al Mahdi*, 27 September 2016, para. 109).

Doctrine: For the bibliography, see the final comment on Article 76.

Authors: Iryna Marchuk and B. Aloka Wanigasuriya.

Article 76(2)-(3)

2. Except where Article 65 applies and before the completion of the trial, the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence.

3. Where paragraph 2 applies, any representations under Article 75 shall be heard during the further hearing referred to in paragraph 2 and, if necessary, during any additional hearing.

Article 76(2) grants the possibility of conducting a separate sentencing hearing following conviction and prior to the completion of the trial. This separate sentencing hearing may be initiated at the Trial Chamber's own motion or must be commenced following a request by the Prosecutor or the accused. Rule 143 of the Rules of Procedure and Evidence clarifies that the presiding judge is to set the date for such a hearing.¹ Additionally, according to Rule 93 of the RPE, the Chamber may seek the views of victims (both taking part in proceedings or not) on any matter, including matters related to sentencing (Sluiter, 2013, p. 537). The exception to holding a separate sentencing hearing is the application of Article 65, which sets out the procedure to be followed if the accused has made an admission of guilt.

The purpose of this separate sentencing hearing is to hear any additional evidence or submissions relevant to the sentence. In the context of international criminal trials, the introduction of a separate sentencing hearing has been discussed at great length.² It was introduced in the early days of the *ad hoc* tribunals. Both in *Tadic* (ICTY) and *Akayesu* (ICTR) separate sentencing hearings were held, however, the rules were subsequently amended with the view of abolishing the practice altogether in 1998.³ As noted by Schabas, the judges of the *ad hoc* tribunals appear to have considered that distinct sentencing hearings were a feature of common law proce-

¹ Göran Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, p. 536 (<https://www.legal-tools.org/doc/bcad4c/>).

² Mark Findlay and Ralph Henham, *Beyond Punishment: Achieving International Criminal Justice*, Palgrave Macmillan, London, 2010, p. 153 (<https://www.legal-tools.org/doc/97798c/>).

³ Ralph Henham, "Procedural Justice and Human Rights in International Sentencing", in *International Criminal Law Review*, 2004, vol. 4, no. 2, p. 187 (<https://www.legal-tools.org/doc/958a69/>).

ture involving juries, and therefore not relevant and necessary in trials before a professional bench.⁴The modified rules of the *ad hoc* tribunals largely conformed with the civil law approach to sentencing. Although the abolition of a separate sentencing hearing in the *ad hoc* tribunals could be perceived as an effective means of saving time, money and resources, the practice of not having such a hearing may have compromised the fairness of trials by putting the accused at a serious disadvantage by limiting possible strategies for his defence.⁵ As Henham points out, “the existence of [separate sentencing] hearings promotes the creation and development of a sentencing jurisprudence [...] that encourages a culture of judicial transparency through the public reception and rational evaluation of evidence” (Henham, 2004, p. 190).

The final text of Article 76 of the ICC Statute does not impose an obligation to conduct a separate sentencing hearing, making it optional, although creating “a strong presumption in favour of a distinct sentencing hearing following conviction” (Schabas, 2016, p. 1149). However, given that holding such a hearing is mandatory upon the request of the Prosecutor or the convicted individual, it was anticipated that there would be a separate sentencing hearing in nearly all cases. As the practice of the Court shows, to date, sentencing hearings have been conducted in all cases, with the exception of the *Al Mahdi* case where the accused entered a guilty plea. Hence, the anticipated concerns about making a sentencing hearing optional have not materialised.⁶

In *Lubanga*, at the preparation stage of the trial, the Defence requested a separate sentencing hearing.⁷ Following the request, the *Lubanga* Trial Chamber confirmed it would hold such a hearing, yet however, expressed a strong preference for the evidence relating to sentencing to be admitted during the trial for reasons of efficiency and economy (*Lubanga*, 10 July 2012, para. 30). As to the scope of the evidence to be submitted at

⁴ William A. Schabas, *The International Criminal Court: Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1148 (<https://www.legal-tools.org/doc/b7432e/>).

⁵ Andrew N. Keller, “Punishment for Violations of International Criminal Law: An Analysis of Sentencing at the ICTY and ICTR”, in *Indiana International and Comparative Law Review*, 2001, vol. 12, no. 1, pp. 68–69 (<https://www.legal-tools.org/doc/fbb49f/>).

⁶ Silvia D’Ascoli, *Sentencing in International Criminal Law: The Approach of the two Ad Hoc Tribunals and Future Perspectives for the International Criminal Court*, Hart Publishing, Oxford, 2011, p. 277 (<https://www.legal-tools.org/doc/4cd0da/>).

⁷ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Sentencing Order, 10 July 2012, ICC-01/04-01/06-2901, para. 20 (*‘Lubanga, 10 July 2012’*) (<https://www.legal-tools.org/doc/c79996/>).

the sentencing hearing stage, the Lubanga Trial Chamber clarified that it “can exceed the facts and circumstances set out in the confirmation decision, provided the Defence has had a reasonable opportunity to address them” (para. 29). After the delivery of the judgment, the Trial Chamber issued an order setting the date for the public hearing on sentence and at the same time instructed parties and legal representatives of victims to file submissions on the sentence to be imposed on Lubanga (paras. 5, 8). It also granted the Defence request to introduce additional evidence during the sentencing hearing by calling two additional witnesses to testify via video-link from the Democratic Republic of the Congo and admitting additional documentary evidence (paras. 8, 10). During the hearing, Lubanga also made a statement to the Chamber (para. 11).

In *Katanga*, the Defence requested an additional sentencing hearing in its closing statement.⁸ In preparation for such a hearing, both the Prosecution and the legal representatives presented submissions listing aggravating circumstances and arguing against any mitigating circumstances (*Katanga*, 23 May 2014, paras. 10–11). At the same time, the Prosecution sought authorization to call a witness from the DRC to testify about the impact of the crimes on the survivors of the attack (para. 10). In addition to pleading mitigating circumstance, the Defence requested to call two witnesses to testify via video link on Katanga’s behaviour in his community and admit into record witness statements with respect to his moral standing (para. 12). The judges satisfied both the Prosecution and Defence requests despite the protracted argument between both parties on the necessity to hear additional evidence (paras. 13–14). As to the scope of the sentencing hearing, the Trial Chamber emphasized that no reference should be made to substantive issues that had been already addressed in the judgement (para. 14). Katanga also availed himself of the opportunity to make a statement in accordance with Article 67(1)(h) of the ICC Statute (para. 24).

In *Bemba*, the parties had divergent views on the need for a separate sentencing hearing, with Defence arguing against such a hearing for the sake of expeditiousness of the trial.⁹ However, the Chamber, in light of the

⁸ ICC, *Prosecutor v. Katanga*, Trial Chamber II, Decision on Sentence pursuant to article 76 of the Statute, 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr, para. 2 (*‘Katanga*, 23 May 2014’) (<https://www.legal-tools.org/doc/5af172/>).

⁹ ICC, *Prosecutor v. Bemba*, Trial Chamber III, Decision on the timetable and on the sentencing procedure, 26 May 2014, ICC-01-05-01/08-3071, para. 6 (*‘Bemba*, 26 May 2014’) (<https://www.legal-tools.org/doc/e4b798/>).

Prosecution request within Article 76(2) of the ICC Statute, upheld the necessity to conduct such a hearing given that it would allow the parties “to make focused and meaningful submissions on sentencing” (*Bemba*, 26 May 2014, para. 13). During the course of the hearing, the Chamber heard the Prosecution and Defence witnesses as well as oral submissions of the parties to proceedings and the legal representative of victims.¹⁰

The exception to Article 76(2)-(3) is situations where the parties have reached a plea agreement in relation to the charges in accordance with Article 65 of the Statute. For the first time in the history of the ICC, such agreement was reached in the *Al Mahdi* case where the accused was charged with the war crime of attacking protected objects under Article 8(2)(e)(iv) of the Statute.¹¹ During the status conference, it was decided that, in the event of conviction, the judgement and sentence would be rendered simultaneously, which was subsequently done (*Al Mahdi*, 27 September 2016, para. 5). Although no separate sentencing hearing was applicable in light of the accused’s admission of guilt and entering into a plea agreement, this did not impede his Defence from submitting relevant evidence beyond the charge that the accused had accepted, which was relevant for sentencing purposes (para. 7). Acting in a contrary manner would have deprived the accused from presenting additional evidence related to sentence that could be considered in mitigation of his sentence.

Neither Article 76 of the Statute nor Rule 143 provide a straightforward answer as to whether a separate hearing could also be held at the appeals stage. As noted by Schabas, although such a hearing would not make much sense at the appeals stage where no new evidence is being introduced, it may still be utilized as an option in the future practice of the Court.¹² The early practice of the Court reinforces the utility of bifurcated proceedings when a separate sentencing hearing is being held. As clear from the examples provided above, all parties to the proceedings have thus

¹⁰ ICC, *Prosecutor v. Bemba*, Trial Chamber III, Decision on Sentence pursuant to Article 76 of the Statute, 21 June 2016, ICC-01/05-01/08-3399, para. 7 (*‘Bemba*, 21 June 2016’) (<https://www.legal-tools.org/doc/f4c14e/>).

¹¹ ICC, *Prosecutor v. Al Mahdi*, Trial Chamber VIII, Judgment and Sentence, 27 September 2016, ICC-01/12-01/15-171, para. 3 (*‘Al Mahdi*, 27 September 2016’) (<https://www.legal-tools.org/doc/042397/>).

¹² William A. Schabas and Kai Ambos, “Article 76”, in Otto Triffterer and Kai Ambos (eds.), *Commentary on the Rome Statute of the International Criminal Court*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/ Baden-Baden, 2016, p. 1873 (<https://www.legal-tools.org/doc/040751/>).

far greatly benefitted from separate sentencing hearings where they used ample opportunities to adduce additional evidence relevant for the purposes of sentencing.

Doctrine: For the bibliography, see the final comment on Article 76.

Authors: Iryna Marchuk and B. Aloka Wanigasuriya.

Article 76(4)

4. The sentence shall be pronounced in public and, wherever possible, in the presence of the accused.

Article 76(4) necessitates that the Trial Chamber's decision on sentencing be delivered in public. This requirement for the public pronouncement of sentencing decisions is further supported by Rule 144(1) of the Rules of Procedure and Evidence. As certain commentators have suggested, the wording of the Statute and the RPE leaves the decision on whether to issue two decisions – namely (i) a decision regarding guilt or innocence, and (ii) a decision on sentencing (provided that the accused receives a conviction) – at the discretion of the Trial Chamber.¹

What appears to have generated most discussion with regard to Article 76(4) is its reference to the presence of the accused in court when the sentence is pronounced. Generally, the accused should be present during all stages of the trial, including during the sentencing hearing, unless she or he is excused. While continental European criminal procedure is familiar with the concept of trials *in absentia*, international criminal procedure, which resembles Anglo-American practices in that regard, demonstrates a preference for the accused's presence at trial.² Trials *in absentia* hearings are generally perceived as being unfair. Trials in absentia have been prohibited at the *ad hoc* tribunals (Art. 21(4)(d) ICTY Statute, Art. 20(4)(d) ICTR Statute). This prohibition relates to the rights enshrined in Article 14(3)(d) of the International Covenant on Civil and Political Rights. However, at the *ad hoc* tribunals the accused's right to be present at trial is not absolute and is subject to two exceptions, these being (i) waiver and (ii) disruption.³

With regard to the ICC, an express prohibition against trials in absentia is contained in Article 63(1) of the ICC Statute, with the defendant's

¹ William A. Schabas, *The International Criminal Court: Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1151 (<https://www.legal-tools.org/doc/b7432e/>).

² Christoph Safferling, *International Criminal Procedure*, Oxford University Press, 2012, p. 396 (<https://www.legal-tools.org/doc/50a9f2/>).

³ For example, ICTR, *Prosecutor v. Zigiranyirazo*, Appeals Chamber, Decision on Interlocutory Appeal, 30 October 2006, ICTR-2001-AR73, para. 14 (<https://www.legal-tools.org/doc/6be72d/>); *Prosecutor v. Milošević*, Appeals Chamber, Decision on Interlocutory Appeal of the trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004, IT-02-54-AR73.7, para. 13 (<https://www.legal-tools.org/doc/b62746/>).

right to be present at trial being set out in Article 67(1)(d). Additionally, Article 76(4) explicitly states that the sentence should be pronounced in the presence of the accused, wherever possible. However, just as with the *ad hoc* tribunals, right to be present comes with exceptions. Article 63(2) endows the Trial Chamber with the power to remove the accused from the courtroom in exceptional circumstances, if the accused continues to disrupt the trial. Additionally, Rules 134 *ter* (excusal from presence at trial), 134 *quater* (excusal from presence at trial due to extraordinary public duties) and 134 *bis* (presence through the use of video technology) of the RPE provide further exceptions for situations when the accused's presence may not be required.⁴ These additional exceptions, which were introduced through an amendment to the RPE in 2013, are in line with the adopted flexible approach encapsulated in the phrase 'wherever possible' with regard to the requirement for the accused to be present at the sentencing hearing. While some have argued that such a flexible reading of the phrase is contrary to the *travaux préparatoires*, these exceptions appear to strengthen such a flexible reading of 'wherever possible'.⁵ Furthermore, the argument has been posed that these absentia exceptions that apply to the trial stage, should by logical extension also apply to the sentencing stage where the sentence is pronounced (Schabas and Ambos, 2016, p. 1876). This would at least be true in terms of Rule 134 *quater*, where an accused waives his or her right to be present at trial and is granted permission to be represented by counsel only (unlike Rule 134 *ter* under which an accused is only permitted to be represented by counsel during a certain part or parts of the trial). In this respect, it is particularly instructive to look at the defence request pursuant to Article 63(1) and Rule 134 *quater* to excuse Kenyan Deputy President William Samoei Ruto from attending his trial.⁶ Following this request, the Court decided to conditionally excuse Mr. Ruto from presence at trial pursuant to Rule 134 *quater* with regard to: (i) the entirety of

⁴ ICC ASP, Amendments to the Rules of Procedure and Evidence, ICC-ASP/12/Res.7, 27 November 2013 (<https://www.legal-tools.org/doc/c50839/>).

⁵ William A. Schabas and Kai Ambos, "Article 76", in Otto Triffterer and Kai Ambos (eds.), *Commentary on the Rome Statute of the International Criminal Court*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/ Baden-Baden, 2016, p. 1876 (<https://www.legal-tools.org/doc/040751/>).

⁶ ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V, Defence Request pursuant to Article 63(1) of the Rome Statute and Rule 134 of the Rules of Procedure and Evidence to excuse Mr. William Samoei Ruto from attendance at trial, 16 December 2013, ICC-01/09-01/11-1124 (<https://www.legal-tools.org/doc/954195/>).

the closing statements of all parties and participants in the case; (ii) when victims present their views and concerns in person; (iii) the entirety of the delivery of the judgment in the case; (iv) the entirety of the sentencing hearing (if applicable); (v) the entirety of the sentencing (if applicable); (vi) the entirety of the victim impact hearings (if applicable); (vii) the entirety of the reparation hearings (if applicable); (viii) the first five days of hearing starting after a judicial recess as set out in regulation 19 *bis* of the Regulations; and (ix) any other attendance directed by the Chamber either *proprio motu* or other request of a party or participant as decided by the Chamber.⁷ This application of Rule 134 *quater* in order to permit an accused to be absent from the entirety of the sentencing hearing and the entirety of the sentencing illustrates that the exceptions set out in the new rules, as outlined above, apply not only to the trial stage but also to the sentencing stage.

The presence of the phrase “wherever possible” in Article 76(4) of the Statute, in the context of requiring the presence of the accused when the sentence is pronounced, has generated scholarly attention as to how this could be translated to the sentencing generates uncertainty as to the practical application of the provision at the sentencing stage. According to Schabas, the expression ‘whenever possible’ may have been adopted to reflect a common law principle to avoid a situation whereby an individual who has been found guilty of a crime manages to abscond between the verdict and the determination of sentence (Schabas, 2016, p. 1151). At the ICC, however, where provisional release is rather an exception as opposed to the norm, the possibility of absconding is almost non-existent.

Doctrine:

1. G. Acquaviva, “Single and Bifurcated Trials” in Göran Sluiter, Håkan Friman, Suzannah Linton, Sergey Vasiliev and Salvatore Zappalà (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, pp. 534–43 (<https://www.legal-tools.org/doc/bcad4c/>).
2. M. Cherif Bassiouni and William A. Schabas (eds.), *The Legislative History of the International Criminal Court*, 2nd. ed., Brill Nijhoff, Leiden/Boston, 2016 (<https://www.legal-tools.org/doc/8768f2/>).

⁷ ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V, Reasons for the Decision on Excusal from the Presence at Trial under Rule 134, 18 February 2014, ICC-01/09-01/11-1186, para. 79 (<https://www.legal-tools.org/doc/8b7d3e/>).

3. Silvia D'Ascoli, *Sentencing in International Criminal Law the UN and ad hoc Tribunals and Future Perspectives for the ICC*, Hart Publishing, Oxford/Portland, 2011, p. 277 (<https://www.legal-tools.org/doc/4cd0da/>).
4. Peter Lewis, "Trial Procedure" in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 539–53 (<https://www.legal-tools.org/doc/e34f81/>).
5. Christoph Safferling, *International Criminal Procedure*, Oxford University Press, 2012, p. 396 (<https://www.legal-tools.org/doc/50a9f2/>).
6. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1147–52.
7. William A. Schabas and Kai Ambos in Otto Triffterer and Kai Ambos (eds.), *Commentary on the Rome Statute of the International Criminal Court*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/ Baden-Baden, 2016, pp. 1873–76 (<https://www.legal-tools.org/doc/040751/>).
8. Mark Findlay and Ralph Henham, *Beyond Punishment: Achieving International Criminal Justice*, Palgrave Macmillan, London, 2010 (<https://www.legal-tools.org/doc/97798c/>).
9. Andrew N. Keller, "Punishment for Violations of International Criminal Law: An Analysis of Sentencing at the ICTY and ICTR", in *Indiana International and Comparative Law Review*, 2001, vol. 12, no. 1, pp. 53–74 (<https://www.legal-tools.org/doc/fbb49f/>).
10. Ralph Henham, "Procedural Justice and Human Rights in International Sentencing", in *International Criminal Law Review*, 2004, vol. 4, no. 2, pp. 185–210 (<https://www.legal-tools.org/doc/958a69/>).

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PART 7. PENALTIES

Article 77

Applicable Penalties

General Remarks:

Under Article 77 the Court may impose a penalty against a person convicted of a crime under its jurisdiction, that is, one or more of the crimes specified in Article 5 of the ICC Statute. The list of penalties is exhaustive in accordance with the *nulla poena sine lege* principle found in Article 23. Notably, the only punishment that the Court can impose is imprisonment, which, further to Article 77(2), can be followed but not replaced by a fine or forfeiture of proceeds, property and assets derived directly or indirectly from the crime. Evidently, the drafters of the ICC Statute did not leave it open to the Court to impose the death penalty, a non-custodial or a suspended sentence. It should be noted that once a convicted person has been sentenced, the Court relies on the co-operation and assistance of States Parties for the enforcement of the sentence, pursuant to Article 103. Article 110 is relevant for post-conviction measures, for example as regards a reduction of the sentence, stipulating that the Court shall review the sentence to determine whether it should be reduced once two-thirds of a fixed-term sentence have been served, or 25 years in the event of life imprisonment. Article 110 merely provides that a review shall not be conducted before such time and should not be read as giving the convicted person an automatic right to release upon having served the proportion of the sentence stipulated in the Article. As the Court relies on States for the enforcement of its sentences, pursuant to Article 103, Article 110(2) is fundamental in stating that the Court alone shall have the right to decide any reduction of sentence.

Preparatory Works:

A Working Group on Penalties was created to discuss all matters related to the penalties, both before and during the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, with a Norwegian diplomat, Rolf Einar Fife, as chair. Discussions on penalties were not without contentions, with State representatives

disagreeing whether to include capital punishment, life imprisonment and minimum fixed term sentences. Rolf Einar Fife has remarked that the negotiations at the Diplomatic Conference on these issues were made difficult and time consuming by “the marked differences in national values, norms, standards and judicial practices” of the participants.¹

Doctrine: For the bibliography, see the final comment on Article 77.

Author: Dejana Radisavljević.

¹ Rolf Einar Fife, “Article 77 – Applicable Penalties”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1881 (<https://www.legal-tools.org/doc/040751/>).

Article 77(1)

1. Subject to Article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in Article 5 of this Statute:

Use of the terminology “person” indicates that the Court’s jurisdiction is limited to natural persons and, as such, does not extend to legal persons. In accordance with Article 26, Article 77(1) is to be read as giving the Court jurisdiction over natural persons over 18 years of age. Moreover, the penalties enumerated in Article 77 may only be imposed against persons “convicted of a crime referred to in Article 5”. As a consequence, offences against the administration of justice covered in Article 70, and misconduct before the Court covered by Article 71 are implicitly excluded.

Doctrine: For the bibliography, see the final comment on Article 77.

Author: Dejana Radisavljević.

Article 77(1)(a)

a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or

Pursuant to Article 77(1)(a), the Court cannot impose a fixed-term sentence that exceeds 30 years' imprisonment. There is no provision on the minimum fixed-term sentence imposable, although the wording "imprisonment for a specified number of *years*" (emphasis added) has led some commentators such as Silvia D'Ascoli to deduce that the minimum sentence must be expressed in years.¹ Notably lacking in this sub-paragraph is recognition of the different crimes enumerated in Article 5 and their respective gravity; that is, there is no mention of a range of sentences for the different crimes. This leaves the Court's judiciary significant discretion in determining a sentence for a specific crime, although, as the commentary on Article 78 will illustrate, the ICC Statute and the Rules of Procedure and Evidence do provide guidance on the factors to consider when imposing a sentence.

The Court is not alone in excluding a provision on the minimum fixed-term sentence imposable and providing for a range of sentences based on the different crimes, as such provisions are lacking in the Statutes of the *ad hoc* tribunals preceding the Court: the ICTY, the ICTR, the SCSL, and the STL. Article 24(1) of the ICTY Statute and Article 23(1) of the ICTR Statute provide only that "[t]he penalty imposed by the Trial Chamber shall be limited to imprisonment," while Article 19 of the SCSL Statute and Article 24 of the STL Statute provide that imprisonment shall be "for a specified number of years". In practice, fixed-term sentences imposed by the ICTY range from 6 years' imprisonment, imposed on Dražen Erdemović, to 40 years' imprisonment, imposed on Milomir Stakić and Goran Jelisić.² Sentences handed down by the ICTR range from 6 years' imprisonment, imposed on Michel Bagaragaza, to 45 years' imprisonment, im-

¹ Silvia D'Ascoli, *Sentencing in International Criminal Law: The Approach of the two Ad Hoc Tribunals and Future Perspectives for the International Criminal Court*, Hart Publishing, Oxford, 2011, p. 1901 (<https://www.legal-tools.org/doc/4cd0da/>).

² ICTY, *Prosecutor v. Erdemović*, Appeals Chamber, Judgment, 7 October 1997, IT-96-22 (<https://www.legal-tools.org/doc/f49012/>); ICTY, *Prosecutor v. Stakić*, Appeals Chamber, Judgment, 22 March 2006, IT-97-24 (<https://www.legal-tools.org/doc/09f75f/>); ICTY, *Prosecutor v. Jelisić*, Appeals Chamber, Judgment, 5 July 2001, IT-95-10 (<https://www.legal-tools.org/doc/477a30/>).

posed on Juvénal Kajelijeli.³ While lacking specificity, the fact that the IC-TY and ICTR were established to try persons in two specific conflicts made it possible to include that “in determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts” of the former Yugoslavia and Rwanda respectively. In contrast, the reference to national sentencing practices is missing in Article 77 of the ICC Statute. Rolf Einar Fife has remarked that this, along with the lack of a range of sentences for the different crimes, is in recognition of the flexibility required of a court that will deal with crimes relating to any number of different conflicts across the globe. This flexibility allows the Court to treat equally all convicted persons, regardless of their nationality.⁴

In practice, the Court has convicted five individuals of one or more of the crimes enumerated in Article 5 of the Statute: Thomas Lubanga Dyilo; Germain Katanga; Jean-Pierre Bemba; Ahmad al-Faqi al-Mahdi; and Bosco Ntaganda. The first sentence handed down by the Court was in the case of the Prosecutor v. Thomas Lubanga Dyilo. On 1 December 2014, the Appeals Chamber confirmed the conviction and sentence against Thomas Lubanga Dyilo, imposing a sentence of 14 years’ imprisonment.⁵ On 22 September 2015, the Appeals Chamber reviewed Mr. Lubanga’s sentence and decided against reducing it, pursuant to Article 110(3) of the Rome Statute. In its second conviction, on 23 May 2014, Trial Chamber II sentenced Germain Katanga to 12 years’ imprisonment.⁶ Although a sentence at the first instance, it is final as the Defence and the Prosecution both dropped their appeals against the judgment, on 25 June 2014. Mr. Katan-

³ ICTR, *Prosecutor v. Bagaragaza*, Trial Chamber, Sentencing Judgment, 17 November 2009, ICTR-05-86 (<https://www.legal-tools.org/doc/3d2d48/>); ICTR, *Prosecutor v. Kajelijeli*, Appeals Chamber, Judgment, 23 May 2005, ICTR-98-44A (<https://www.legal-tools.org/doc/2b7d1c/>).

⁴ Rolf Einar Fife, “Article 77 – Applicable Penalties”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1878 and 1881 (<https://www.legal-tools.org/doc/040751/>).

⁵ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against “Decision on Sentence pursuant to Article 76 of the Statute”, 1 December 2014, ICC-01/04-01/06-3122 (<https://www.legal-tools.org/doc/a9bd07/>).

⁶ ICC, *Prosecutor v. Katanga*, Trial Chamber II, Decision on Sentence pursuant to article 76 of the Statute, 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr (<https://www.legal-tools.org/doc/ff32a8/><https://www.legal-tools.org/doc/5af172/>).

ga's sentence was reduced by three years and eight months on 13 November 2015, pursuant to Article 110(3),⁷ meaning that Mr. Katanga served his sentence on 18 January 2016. Jean-Pierre Bemba Gombo was the third individual to be convicted by the ICC, and on 21 June 2016 he was sentenced to 18 years' imprisonment.⁸ On 22 July 2016, both the Defence and the Prosecution notified of their intention to appeal the Decision on the Sentence of Mr. Bemba. On 8 June 2018, the Appeals Chamber acquitted Mr. Bemba.⁹ On 27 September 2016, Ahmad Al Faqi Al Mahdi became the fourth individual to be convicted by the ICC. Mr. Al Mahdi was sentenced to 9 years' imprisonment by Trial Chamber VIII.¹⁰ On 8 July 2019, Bosco Ntaganda became the fifth individual to be convicted by the Court and sentenced to 30 years' imprisonment.¹¹ On 30 March 2021, the Appeals Chamber confirmed his conviction and sentence. A sixth individual, Dominic Ongwen, was convicted and sentenced to 25 years' imprisonment in the first instance on 6 May 2021.¹²

Doctrine: For the bibliography, see the final comment on Article 77.

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⁷ ICC, *Prosecutor v. Katanga*, Appeals Chamber, Decision on the review concerning reduction of sentence of Mr Germain Katanga, 13 November 2015, ICC-01/04-01/07-3615 (<https://www.legal-tools.org/doc/f36347/>).

⁸ ICC, *Prosecutor v. Bemba*, Trial Chamber III, Decision on Sentence pursuant to Article 76 of the Statute, 21 June 2016, ICC-01/05-01/08 (<https://www.legal-tools.org/doc/f4c14e/>).

⁹ ICC, *Prosecutor v. Bemba*, Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", 8 June 2018, ICC-01/05-01/08-3636-Red (<https://www.legal-tools.org/doc/40d35b/>).

¹⁰ ICC, *Prosecutor v. Al Mahdi*, Trial Chamber VIII, Judgment and Sentence, 27 September 2016, ICC-01/12-01/15 (<https://www.legal-tools.org/doc/042397/>).

¹¹ ICC, *Prosecutor v. Ntaganda*, Trial Chamber, Sentencing Judgment, 7 November 2019, ICC-01/04-02/06-2442 (<https://www.legal-tools.org/doc/yyw2ef/>).

¹² ICC, Trial Chamber IX, *Prosecutor v. Ongwen*, Sentence, 6 May 2021, ICC-02/04-01/15-1819-Red (<https://www.legal-tools.org/doc/vj1y8k/>).

Article 77(1)(b)

b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

The possibility of imposing a sentence of life imprisonment is explicitly provided in Article 77(1)(b), as an alternative to a fixed-term sentence. Life imprisonment is only an option in exceptional circumstances, where “the extreme gravity of the crime and the individual circumstances of the convicted person” justify its imposition. These two justifications are cumulative and as such the judges imposing the sentence must be convinced that consideration of both factors justifies imposing a life sentence. This requirement of justification is connected to the debates during the Diplomatic Conference, on the appropriateness of including life imprisonment. As Rolf Einar Fife has reported, some States viewed life imprisonment as a “pre-requisite for the credibility of the Court and its deterrent functions”,¹ while others opposed it, based on their national laws.

In contrast, the Statutes of the ICTY and ICTR do not explicitly pronounce on the possibility of imposing a sentence of life imprisonment. It is only in the Rules of Procedure and Evidence that life imprisonment is referred to, with Rule 101(A) of the ICTY Rules stating that “[a] convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person’s life”. Rule 101(A) of the ICTR Rules similarly states that “[a] person convicted by the Tribunal may be sentenced to imprisonment for a fixed term or the remainder of his life”. The Statute of the SCSL in Article 19, on the other hand, provides that imprisonment shall be for “a specified number of years”, thus implicitly excluding the possibility of imposing a sentence of life imprisonment. This is perhaps one of the reasons behind the fact that the SCSL has handed out the lengthiest fixed-term sentences of all international tribunals, imposing 52 years’ imprisonment on Issa Sesay.² The jurisprudence of the ICTY and

¹ Rolf Einar Fife, “Article 77 – Applicable Penalties”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1879 and 1882 (<https://www.legal-tools.org/doc/040751/>).

² SCSL, *Prosecutor v. Sesay et al.*, Trial Chamber, Sentencing Judgment, 8 April 2009, SCSL-04-15-T-1251 (<https://www.legal-tools.org/doc/fcc685/>).

ICTR in this context is instructive for the ICC, as the ICTY has handed down five life sentences and the ICTR has imposed 17 life sentences. The STL, on the other hand, allows for the imposition of life sentences, with Article 24 of the Statute providing that the Trial Chamber “shall impose upon a convicted person imprisonment for life or for a specified number of years”. The option of life imprisonment as a penalty precedes imposition of a fixed-term sentence and, as such, may be regarded as a usual sentence rather than one requiring particular justification. This remains to be seen in practice, as the STL has yet to impose a sentence.

Unlike the STL, the Court, by providing for life imprisonment as an alternative only to be imposed when “justified by the extreme gravity of the crime and the individual circumstances of the convicted person”, effectively restricted its imposition. As William Schabas has commented, these words were “added as part of a delicate compromise aimed at winning the agreement of some States for whom life imprisonment was deemed to be cruel, inhuman and degrading treatment or punishment”.³ For Schabas, life imprisonment was included on the assumption that it would rarely come to use. Indeed, the Court can only prosecute individuals for crimes of a particularly heinous nature, thus adding the additional caveat of extreme gravity of the crime in order to impose life imprisonment leans towards limiting its use.

As a result of compromise during the Diplomatic Conference, sentences of life imprisonment are subject to a mandatory review after 25 years have been served, pursuant to Article 110(3). It is important to note that this Rule does not provide that a person serving a life sentence has a right to be released upon having served 25 years of his or her sentence, stipulating only that the Court is obliged to review the sentence. Nonetheless, it provides a measure of certainty for the convicted person and his or her counsel and is an important factor in ensuring that convicted persons are treated equally regardless of the State in which the sentence is being served. Commentators such as William Schabas have described the Court’s approach as more lenient than that of the *ad hoc* tribunals, noting the ruling of the European Court of Human Rights where judges pointed to the Rome Statute as evidence of a “a commitment in international law to the rehabilitation of prisoners sentenced to life terms and to the prospect of their even-

³ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1159 (<https://www.legal-tools.org/doc/b7432e/>).

tual release” (Schabas, 2016, p. 1160). This is also much more coherent an approach than that taken by the Court’s predecessors who have failed to set any benchmarks in the enforcement of life sentences.

In his first decision on the early release of a person serving a sentence of life imprisonment, the President of the Mechanism for International Criminal Tribunals (mandated *inter alia* to supervise the enforcement of ICTY and ICTR sentences) denied the early release of Stanislav Galić.⁴ On 23 June 2015, the President issued the public redacted version of the reasons for the decision, in which he pronounced that the existing threshold of considering those convicted by the ICTR, the ICTY or the Mechanism eligible for early release upon having served two-thirds of their sentence would similarly be applicable to persons serving life sentences. As regards how a life sentence, and the early release eligibility threshold thereof, would be calculated, the President decided that “a sentence of life imprisonment is to be treated as equivalent to more than a sentence of 45 years” – the lengthiest sentence imposed by the ICTR, the ICTY or the Mechanism, in the case of Mr. Juvenal Kajelijeli.⁵ Calculating the two-thirds threshold on this basis, the President concluded at paragraph 36 that Galić should be considered eligible for early release upon having served more than 30 years of his sentence. Noting that a fixed-term sentence higher than 45 years may be imposed by the ICTY, the ICTR or the Mechanism in the future, the President concluded, at paragraph 38, that “the interests of justice and the principle of legal certainty require that no change in the present calculation of the eligibility threshold for those sentenced to life imprisonment take place”. Finally, the President explained that “[t]he consequences of this decision for those on whom a fixed-term sentence of more than 45 years is imposed in the future, and who would therefore reach two-thirds of their sentences after Galić and others sentenced to the higher sentence of life imprisonment were eligible for early release will be considered if and as necessary in light of the principle of treating similarly situated persons equally” (*Galić*, 23 June 2005, para. 38).

⁴ IRMCT, *Prosecutor v. Galić*, Presidency, Public Redacted Version of the 5 December 2014 Decision with Reasons to Follow on the Early Release of Stanislav Galić, 23 June 2015, MICT-14-83-ES (<https://www.legal-tools.org/doc/86b169/>).

⁵ IRMCT, *Prosecutor v. Galić*, Presidency, Reasons for the President’s Decision to Deny the Early Release of Stanislav Galić and Decision on Prosecution Motion, 23 June 2015, MICT-14-83-ES, para. 35 (*Galić*, 23 June 2005) (<https://www.legal-tools.org/doc/de38d8/>).

Doctrine: For the bibliography, see the final comment on Article 77.

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Article 77(2)

2. In addition to imprisonment, the Court may order:

- a) A fine under the criteria provided for in the Rules of Procedure and Evidence;**
- b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.**

In addition to imprisonment, the Court may order the convicted person to pay a fine and/or a forfeiture of proceeds, property and assets, for any of the crimes enumerated in Article 5. Fines and forfeitures are not alternatives to imprisonment, but can be imposed additionally. Interestingly, reference to a forfeiture of proceeds, property and assets derived directly or indirectly from the crime, as Rolf Einar Fife has remarked, implicitly excludes the Court from ordering forfeiture of “property used or intended to be used to commit the crime”.¹

Article 77(2)(a) directs the Court to the criteria provided in Rule 146 of the Rules of Procedure and Evidence, which states that the Court, in determining whether to order a fine “shall determine whether imprisonment is a sufficient penalty”, giving “due consideration to the financial capacity of the convicted person, including any orders for forfeiture in accordance with Article 77, paragraph 2(b), and, as appropriate, any orders for reparation in accordance with Article 75”.

Moreover, Rule 146 states that the Court shall take into account “whether and to what degree the crime was motivated by personal financial gain”. A fine shall be set “at an appropriate level”, taking into consideration “the damage and injuries caused as well as the proportionate gains derived from the crime by the perpetrator” and must not “exceed 75 percent of the value of the convicted person’s identifiable assets, liquid or realizable, and property, after deduction of an appropriate amount that would satisfy the financial needs of the convicted person and his or her dependents”. Where a fine has been imposed, Regulation 116 of the Regulations of the Court

¹ Rolf Einar Fife, “Article 77 – Applicable Penalties”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1889 (<https://www.legal-tools.org/doc/040751/>).

state that the enforcement of fines, forfeiture orders and reparation orders lies with the Presidency, who shall:

Receive payment of fines as described in Article 77, paragraph 2 (a); Receive, as described in Article 109, paragraph 3, property or the proceeds of the sale of real property or, where appropriate, the sale of other property; Account for interest gained on money received under (a) and (b) above; Ensure the transfer of money to the Trust Fund or to victims, as appropriate.

Rule 146(3) states that the convicted person shall be allowed a reasonable period in which to pay the fine, which may be made either through a lump sum or in instalments. Moreover, the Court has the possibility to calculate the fine “according to a system of daily fines”, the minimum duration of which is 30 days and the maximum duration of which is 5 years. The amount of such payments shall be determined “in the light of the individual circumstances of the convicted person, including the financial needs of his or her dependents”. In enforcing a fine, forfeiture or reparation order, the President shall, pursuant to Rule 217 and as appropriate, seek the cooperation of a State with which the convicted person has a direct connection. Rule 217 specifies that a direct connection between a State and the convicted person can be established either by “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”. This should be read in conjunction with Article 109, which stipulates that “States Parties shall give effect to fines or forfeitures ordered by the Court under Part 7, without prejudice to the rights of *bona fide* third parties and in accordance with the procedure of their national law”. In the case of continued wilful non-payment of a fine the Presidency, on its own motion or at the request of the Prosecutor, pursuant to Rule 146, “may as a last resort extend the term of imprisonment for a period not to exceed a quarter of such term or five years, whichever is less”, provided that it is “satisfied that all available enforcement measures have been exhausted”. This is an important enforcement incentive, which, as William Schabas has remarked, is the sole example of the Presidency exercising a judicial power in the ICC Statute.

The practical implications of the Court’s power to impose fines and forfeitures and the difficulties in enforcing them has yet to be seen. In the *Lubanga* case, the Trial Chamber considered it inappropriate to impose a fine in addition to the prison term, given the financial situation of Mr.

Lubanga.² Similarly, the Trial Chamber in the *Katanga case* decided against imposing a fine, noting that Mr. Katanga's financial situation had not changed since his indigence during trial.³ In the cases of *Bemba* and *Al Mahdi*, Trial Chambers III and VIII respectively, noted that as there was no request for the imposition of a fine or order of forfeiture, it would impose only a sentence of imprisonment.⁴ Moreover, in the case of Ntaganda, the Trial Chamber considered it inappropriate to also impose a fine or forfeiture of proceeds, "taking into consideration the nature and gravity of the crimes, as well as Mr. Ntaganda's solvency".⁵

The provision of forfeiture of proceeds, property and assets derived from the crime is part of traditional criminal law rationale that a criminal should not profit from his or her crime (Fife, 2008, p. 1425). However, their explicit inclusion in the ICC Statute is unprecedented in international criminal justice. Aside from giving this power to the Court, one must look to the Rules of Procedure and Evidence for further provisions on such orders. Rule 147 is instructive in stating that "at any hearing to consider an order of forfeiture, the Chamber shall hear evidence as to the identification and location of specific proceeds, property or assets which have been derived directly or indirectly from the crime". Having heard the evidence, the Chamber may issue an order of forfeiture in relation to specific proceeds, property or assets. Once again, the Chamber will have considerable discretion in ordering forfeitures, as there is no definition of property or assets. For guidance on the meaning of these terms as well as "derived directly or indirectly from that crime" (a rather broad and vague wording) the Court will have to turn to other courts or international or European Conventions. Notably, there is no mention of the standard of proof, except that the Court

² ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on Sentence pursuant to Article 76 of the Statute, 10 July 2012, ICC-01/04-01/06-2901, para. 106 (<https://www.legal-tools.org/doc/c79996/>).

³ ICC, *Prosecutor v. Katanga*, Trial Chamber II, Decision on Sentence pursuant to article 76 of the Statute, 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr, para. 169 (<https://www.legal-tools.org/doc/ff32a8/>).

⁴ ICC, *Prosecutor v. Bemba*, Trial Chamber III, Decision on Sentence pursuant to Article 76 of the Statute, 21 June 2016, ICC-01/05-01/08-3399, para. 95 (<https://www.legal-tools.org/doc/edb0cf/>); *Prosecutor v. Al Mahdi*, Trial Chamber VIII, Judgment and Sentence, 27 September 2016, ICC-01/12-01/15, para. 110 (<https://www.legal-tools.org/doc/042397/>).

⁵ ICC, *Prosecutor v. Ntaganda*, Trial Chamber, Sentencing Judgment, 7 November 2019, ICC-01/04-02/06-2442, para. 247 (<https://www.legal-tools.org/doc/yyw2ef/>).

must be “satisfied” that the proceeds, property and/or assets have been derived directly or indirectly from the crime, pursuant to Rule 147.

The power of the Court to impose fines under Article 77(2)(a) exceeds the powers of the ICTY and ICTR, which can only impose a fine for administrative offences such as, contempt of court, in accordance with Rule 77(g) of the Rules of Procedure and Evidence, and for false testimony, in accordance with Rule 91(g). Moreover, the *ad hoc* tribunals’ Rules of Procedure and Evidence restrict the imposition of fines by setting the maximum value of such a fine at 100,000 Euro for the ICTY and 10,000 USD for the ICTR. As regards forfeiture, Article 24(3) of the ICTY Statute and Article 23(3) of the ICTR Statute further permit the respective *ad hoc* tribunals to “order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners”. Accordingly, the Court’s authority to prescribe fines, forfeiture measures and reparation orders has been described as “a novel system within the history of international criminal law due to its comprehensiveness”.⁶

The provision that forfeiture may be ordered “without prejudice to the rights of bona fide third parties” is in accordance with general principles of law and the need to respect third parties’ rights. However, such a provision is not without its difficulties, particularly in the case of armed conflicts where property rights may be difficult to establish. Moreover, this proviso restricts the Court’s jurisdiction in a way that the ICTY, ICTR, and SCSL have avoided. Thus, the ICTY, ICTR, and SCSL may order restitution of property or the proceeds thereof, “even in the hands of third parties, not otherwise connected with the crime of which the convicted person has been found guilty”.

The general difficulties inherent in ordering and enforcing forfeitures have been remarked by Rolf Einar Fife, particularly in terms of determining ownership, the standards for burden of proof and choice of law in determining ownership and where “victims, property and thirds parties are located in different jurisdictions” (Fife, 2008, p. 1430). Moreover, as noted above, the Court relies on State co-operation in the enforcement of any fines and forfeiture, pursuant to Rule 217. The obligations of State Parties to provide the Court with assistance in this regard is established in Article

⁶ Hirad Abtahi and Steven Arrigg Koh, “The Emerging Enforcement Practice of the International Criminal Court”, in *Cornell International Law Journal*, 2012, vol. 45, no. 1, p. 4 (<https://www.legal-tools.org/doc/2217b4/>).

93. An incentive for convicted persons to assist the Court can be found in Article 110(4)(b) which provides the Court with the possibility of reducing a sentence where *inter alia* the convicted person has “provided assistance in locating assets subject to orders of fine, forfeiture or reparation which may be for the benefit of victims”.

Finally, pursuant to Article 79(2), the collection of fines or forfeitures can be to the benefit of the victims and their families as the Chamber may order the transfer of any such fines or forfeitures to the Trust Fund for victims. In this regard, Rule 148 provides that “[b]efore making an order pursuant to Article 79 paragraph 2, a Chamber may request the representatives of the Fund to submit written or oral observations to it”.

Cross-references:

Articles 5, 22, 23, 24, 26, 70, 71, 76, 78, 79, 93, 103, 109, and 110.

Rules 145, 146, 147, 148, 212, and 217.

Regulations 116 and 118.

Doctrine:

1. Hiram Abtahi and Steven Arrigg Koh, “The Emerging Enforcement Practice of the International Criminal Court”, in *Cornell International Law Journal*, 2012, vol. 45, no. 1, pp. 1–23 (<https://www.legal-tools.org/doc/2217b4/>).
2. Gideon Boas, James L. Bischoff and Nathalie L. Reid, *International Criminal Law Practitioner Library: International Criminal Procedure, Vol. II: Elements of Crimes under International Criminal Law*, Cambridge University Press, 2008 (<https://www.legal-tools.org/doc/d3e484/>).
3. Karin Calvo-Goller, *The Trial Proceedings of the International Criminal Court: ICTY and ICTR Precedents*, Martinus Nijhoff Publishers, 2005.
4. Silvia D’Ascoli, *Sentencing in International Criminal Law: The Approach of the two Ad Hoc Tribunals and Future Perspectives for the International Criminal Court*, Hart Publishing, Oxford, 2011 (<https://www.legal-tools.org/doc/4cd0da/>).
5. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1155–1162 (<https://www.legal-tools.org/doc/b7432e/>).

6. William A. Schabas, *War Crimes and Human Rights: Essays on the Death Penalty Justice and Accountability*, Cameron May, London, 2008 (<https://www.legal-tools.org/doc/e2e46b/>).
7. Rolf Einar Fife, “Article 77 – Applicable Penalties”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1877–1890 (<https://www.legal-tools.org/doc/040751/>).

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Article 78

Determination of the Sentence

General Remarks:

Article 78 relates to the determination of sentences imposable by the Court, which as Article 77(1) provides, must be a sentence of imprisonment whether for a fixed term of up to 30 years' imprisonment or life imprisonment. Article 78 does not concern any fines or forfeiture of proceeds, property and assets that are provided in Article 77(2). Article 78 deals with three specific matters regarding such sentences of imprisonment: the factors to be taken into account in determining a sentence; the deduction of time spent in detention; and, instances where a person has been convicted of multiple crimes.

Doctrine: For the bibliography, see the final comment on Article 78.

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Article 78(1)

1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

Article 78(1) provides the factors to be taken into consideration when determining the length of a sentence: the gravity of the crime committed – an aggravating factor – and the individual circumstances of the convicted person – a mitigating factor. Significantly, the list is merely illustrative. There is no evident hierarchy between the two factors, but the importance of gravity as a consideration in determining a sentence is apparent in the jurisprudence of the ICTY and ICTR, where it has been noted that “[b]y far the most important consideration, which may be regarded as the litmus test for the appropriate sentence, is the gravity of the offence”.¹ There is, however, no indication of the factors deemed relevant in determining the gravity of the crime.

It appears that the drafters of the ICC Statute intended the Rules of Procedure and Evidence to provide further guidance, as evident in the scarce provisions in Article 78 and the words “in accordance with the Rules of Procedure and Evidence”. Thus, Rule 145(1)(a) states that the Court is to “bear in mind that the totality of any sentence of imprisonment and fine, as the case may be, imposed under Article 77 must reflect the culpability of the convicted person”. This is in recognition of the heinous nature of international crimes as well as the notion that the sentence imposed on the individual should not exceed his or her culpability. The ICTY in *Delalić et al.* articulated this as meaning that the sentence must be “both just and appropriate”.² While an uncontroversial principle, this is the first mention of culpability in the regulations of an international court, as Silvia D’Ascoli notes.³ Rule 145(1)(b) is of further assistance, stipulating that the Court is

¹ ICTY, *Prosecutor v. Delalić et al.*, Trial Chamber, Judgment, 16 November 1998, IT-96-21-T, para. 1225 (<https://www.legal-tools.org/doc/6b4a33/>).

² ICTY, *Prosecutor v. Delalić et al.*, Appeals Chamber, Judgment, 20 February 2001, IT-96-21-A, para. 429 (*‘Delalić et al., 20 February 2001’*) (<https://www.legal-tools.org/doc/051554/>).

³ Silvia D’Ascoli, *Sentencing in International Criminal Law the UN and ad hoc Tribunals and Future Perspectives for the ICC*, Hart Publishing, Oxford/Portland, 2011, p. 29 (<https://www.legal-tools.org/doc/4cd0da/>).

to balance all the relevant factors, “including any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime”. The use of the term “including” implies that the list of factors, as in Article 78, is not exhaustive. In the same vein, Rule 145(1)(c) provides additional, illustrative, factors to take into consideration in determining a sentence, namely the extent of the damage caused, in particular the harm caused, and the nature of the behaviour and the means employed to execute the crime, all of which go towards considering the gravity of the crime. Moreover, Rule 145(1)(c) states that the Court shall consider the degree of participation of the convicted person, the degree of his or her intent, the circumstances, time and location as well as the age, education, social and economic condition of the convicted person. In addition to the already substantial list of factors, Rule 145(2) provides a further list of mitigating and aggravating circumstances for the Court to take into account. Use of the term “such as” in Rule 145(2)(a) reiterates that the list of mitigating factors is merely illustrative. While there is a notable lack of words like “such as” and “*inter alia*” preceding the list of aggravating circumstances, thus insinuating that the list provided is exhaustive, the words in Rule 145(2)(b)(vi) “other circumstances which, although not enumerated above, by virtue of their nature are similar to those mentioned”, leave some room for additional factors to be taken into account. This discretion provided to the judges is important in giving scope for the development of aggravating and mitigating factors, allowing the judiciary to consider factors relevant to each individual case.

Finally, Rule 145(3) addresses life imprisonment, reiterating the words used in Article 77 of the Statute, that “life imprisonment may be imposed when justified by the extreme gravity of the crime and the individual circumstances of the convicted person”. Rule 145(3) further add that these are evidenced “by the existence of one or more aggravating circumstances” – presumably including those illustrated in Rule 145.

As William Schabas has noted, there is nothing to indicate the standard of proof for mitigating or aggravating factors.⁴ The Trial Chamber in the *Lubanga* case thus had no guidance from the Statute or Rules of Procedure and Evidence, and declared that it was for the Chamber to establish

⁴ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, Oxford, 2010, p. 904 (<https://www.legal-tools.org/doc/1435ae/>).

the standard of proof.⁵ As there is nothing in the basic legal texts of the Court to guide the Chamber, the jurisprudence of the ICTY and ICTR may prove an important source of information. In this regard, the ICTY and the ICTR have established that the burden of proof for aggravating factors lies with the prosecution, and that such factors must be proven beyond a reasonable doubt.⁶ As regards mitigating factors on the other hand, the ICTY has established that the burden of proof is on the balance of probabilities.⁷

While this jurisprudence may be of assistance to the Court, it is not bound to follow it and is free to set its own standard of proof. The Trial Chamber in *Lubanga*, the Court's first conviction, stated in its Decision on Sentence pursuant to Article 76 of the Statute that:

It is for the Chamber to establish the standard of proof for the purposes of sentencing, given the Statute and the Rules do not provide any guidance. Since any aggravating factors established by the Chamber may have a significant effect on the overall length of the sentence Mr. Lubanga will serve, it is necessary that they are established to the criminal standard of proof, namely beyond a reasonable doubt (*Lubanga*, 10 July 2012, para. 33).

Moreover, the Trial Chamber accepted the defence submission that “the mitigating factors are not limited to the facts and circumstances described in the Decision [on the Confirmation of Charges]” adding that “as to the standard of proof, the Chamber is of the view that the *in dubio pro reo* principle applies at the sentencing stage of the proceedings, and any mitigating circumstances are to be established on a balance of the probabil-

⁵ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on Sentence pursuant to Article 76 of the Statute, 10 July 2012, ICC-01/04-01/06-2901, paras. 33 (*Lubanga*, 10 July 2012') (<https://www.legal-tools.org/doc/c79996/>).

⁶ *Delalić et al.*, 20 February 2001, para. 763; ICTY, *Prosecutor v. Bralo*, Trial Chamber, Judgment, 7 December 2005, IT-95-17, para. 27 (<https://www.legal-tools.org/doc/e10281/>); *Prosecutor v. Brđanin*, Trial Chamber, Judgment, 1 September 2004, IT-99-36-T, para. 1096 (<https://www.legal-tools.org/doc/4c3228/>); *Prosecutor v. Kunarac et al.*, Trial Chamber, Judgement, 22 February 2001, IT-96-23 and IT-96-23/2, para. 847 (<https://www.legal-tools.org/doc/fd881d/>).

⁷ ICTY, *Prosecutor v. Blaškić*, Appeals Chamber, Judgement, 29 July 2004, IT-95-14-A, para. 697 (<https://www.legal-tools.org/doc/88d8e6/>); *Prosecutor v. Blagojević and Jokić*, Trial Chamber, Judgment, 17 January 2005, IT-02-60-T, paras. 850 (*Blagojević and Jokić*, 17 January 2005') (<https://www.legal-tools.org/doc/7483f2/>); *Prosecutor v. Babić*, Appeals Chamber, Judgment, 18 July 2005, IT-03-72, para. 43 (<https://www.legal-tools.org/doc/640374/>).

ities” (*Lubanga*, 10 July 2012, para. 34). Finally, the Trial Chamber stated that “any factors that are to be taken into account when assessing the gravity of the crime will not additionally be taken into account as aggravating circumstances and vice versa” (para. 35).

The Trial Chamber in *Lubanga* noted that while the Statute fails to identify which factors are to be taken into account when considering “the individual circumstances of the convicted person”, as referred to in Article 78(1), Rule 145(c) of the Rules of Procedure and Evidence refer to “the age, education, social and economic situation of the convicted person” (para. 54). In this regard, the Trial Chamber in its Decision, para. 56, noted that “Mr Lubanga is clearly an intelligent and well-educated individual, who would have understood the seriousness of the crimes of which he has been found guilty. This marked level of awareness on his part is a relevant factor in determining the appropriate sentence” (*Lubanga*, 10 July 2012). The Prosecution in *Lubanga* submitted harsh conditions and treatment in the camps, and the commission of sexual violence and rape as aggravating circumstances, which, they argued also showed, that “the harms committed were gender based”, and an abuse of Thomas Lubanga’s power or official capacity, where the victim was particularly defenceless (in this case due to very young age), noting the broader social impact of the crimes on the families and communities affected. In its judgment, the Trial Chamber decided that it had not been demonstrated that “the individual punishments referred to by the Chamber were the responsibility of Mr. Lubanga, and in any event the Chamber has not taken this into account as an aggravating factor in the determination of his sentence” (para. 59). As regards sexual violence, the Trial Chamber noted that:

The prosecution’s failure to charge Thomas Lubanga Dyilo with rape and other forms of sexual violence as separate crimes within the jurisdiction of the Court is not determinative of the question of whether that activity is a relevant factor in the determination of the sentence. The Chamber is entitled to consider sexual violence under Rule 145(1)(c) of the Rules as part of: (i) the harm suffered by the victims; (ii) the nature of the unlawful behaviour; and (iii) the circumstances of manner in which the crime was committed; additionally, this can be considered under Rule 145(2)(b)(iv) as showing the crime was committed with particular cruelty (*Lubanga*, 10 July 2012, para. 67).

Nonetheless, the Chamber found that, as a result of the prosecution's failure to introduce evidence on this issue during the sentencing hearing "the link between Mr. Lubanga and sexual violence, in the context of the charges, has not been established beyond reasonable doubt. Therefore, this factor cannot properly form part of the assessment of his culpability for the purposes of sentence" (para. 75).

As for the prosecution's submission that the crimes were committed against particularly defenceless victims, the Trial Chamber found that "[a]s already indicated, the factors that are relevant for determining the gravity of the crime cannot additionally be taken into account as aggravating circumstances. Therefore, the age of the children does not both define the gravity of the crime and act as an aggravating factor. Accordingly, the age of the children does not constitute an aggravating factor as regard these offences" (para. 78). As regards gender-based violence, the Trial Chamber judged that "the Court has not been provided with any evidence that Mr. Lubanga deliberately discriminated against women in committing these offences, in the sense suggested by the prosecution or the victims. In any event, 'motive involving discrimination' pursuant to Rule 145(2)(b)(v) has not been treated as an aggravating factor".

Lubanga's defence submitted a number of mitigating factors: necessity, peaceful motives, demobilisation orders and Mr. Lubanga's co-operation with the Court. As regards peaceful motive, the Trial Chamber accepted that "Mr Lubanga hoped that peace would return to Ituri once he had secured his objectives", but found this only of limited relevance given the persistent recruitment of child soldiers during the period covered by the charges. However, the Trial Chamber in this regard noted Lubanga's notable co-operation with the Court and the fact that he was respectful and co-operative throughout the proceedings, "notwithstanding some particularly onerous circumstances" (para. 91).

The precedent on standard of proof for mitigating and aggravating circumstances set in the *Lubanga* case was adopted by the Trial Chamber in the Court's second case, that is, the case against Germain Katanga. Citing *Lubanga*, the Trial Chamber in *Katanga* affirmed the notion that "any factors that are to be taken into account when assessing the gravity of the

crime will not additionally be taken into account as aggravating circumstances and vice versa”.⁸

Interestingly, the Trial Chamber in *Katanga* spoke to the aims of imprisonment, referring to the Statute’s Preamble and deducing that “Il s’agit donc de sanctionner les crimes qui ‘menacent la paix, la sécurité et le bien-être du monde’ et de faire en sorte que la peine ait un effet réellement dissuasive” (author’s translation: The Court is to punish crimes that “threaten the peace, security and wellbeing of the world” and to ensure that the penalty acts as a real deterrent). The Trial Chamber went on to explain that “[e]lle considère que la peine a donc deux fonctions importantes: le châtiement d’une part, c’est-à-dire l’expression de la réprobation sociale qui entoure l’acte criminel et son auteur et qui est aussi une manière de reconnaître le préjudice et les souffrances causées aux victimes; la dissuasion d’autre part, dont l’objectif est de détourner de leur projet d’éventuels candidats à la perpétration de crimes similaires. (own translation: the Trial Chamber considers that the sentence has two important functions: on the one hand condemnation of the criminal act and its perpetrator, as a way of recognising the harm done to the victims; and on the other hand, deterrence, with the objective of deterring others from committing similar crimes). As concerns deterrence, the Trial Chamber evoked the ICTY’s sentiment that it is not the length of the sentence but its inevitability which is of importance.⁹ Moreover, the Trial Chamber added that pursuant to Rule 145(1), the sentence should be proportionate and contribute to the restoration of peace and reconciliation and must encourage the rehabilitation of the convicted person. Interestingly, the Trial Chamber referred to Jennings who has asserted that all crimes are not of equal gravity and, as such, “the Court will have to consider the nature and scale of crimes in determining their gravity”.¹⁰

In *Katanga*, the Trial Chamber discussed only one aggravating factor: whether Katanga abused his authority, considering that the other fac-

⁸ ICC, *Prosecutor v. Katanga*, Trial Chamber II, Decision on Sentence pursuant to article 76 of the Statute, 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr, para. 35 (*Katanga*, 23 May 2014”) (<https://www.legal-tools.org/doc/7e1e16/>).

⁹ ICTY, *Prosecutor v. Furundžija*, Trial Chamber, Judgment, 10 December 1998, IT-95-17/1-T, para. 290 (<https://www.legal-tools.org/doc/e6081b/>).

¹⁰ Mark Jennings, “Article 79 – Trust Fund”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2nd. ed., C.H. Beck/Hart/ Nomos, Munich/Oxford/Baden-Baden, 2008, p. 1436 (<https://www.legal-tools.org/doc/a9e9f7/>); and *Katanga*, 23 May 2014, para. 43.

tors submitted by the prosecution had already been taken into account in determining the gravity of the crimes. In this case, the Trial Chamber judged that the one aggravating factor had not been proven beyond a reasonable doubt. As for mitigating factors, the defence relied on Katanga's young age, the nature of the role he played, the exceptional circumstances in which he found himself, his willingness to change and the co-operation given to the court as well as asking the Trial Chamber to take into consideration his personal and family life. The Trial Chamber accepted that Katanga's young age, his family situation as a father of six children and protective and watchful eye over the civilian population could be considered as mitigating factors. However, these factors could not have a determinative role in view of the nature of the crimes committed. Following the precedent set by the ICTY in *Blagojević and Jokić*, 17 January 2005, paras. 858–860, and *Plavšić*,¹¹ the Trial Chamber noted that efforts to promote peace and reconciliation should be taken into consideration in determining the sentence. While the Trial Chamber did not conclude that it had been proven on the balance of probabilities that Katanga had made efforts to actively encourage the peace process, evidence did demonstrate that he played a positive role in the disarmament and demobilisation of child soldiers, which was given more weight than his young age and personal circumstances. The Trial Chamber further considered Katanga's statements of remorse and the expressions of sympathy and compassion towards the victims, distinguishing the two and giving the latter less weight. In so doing, the Trial Chamber referred to the ICTY jurisprudence, finding that Katanga's words of remorse remained conventional in nature and noting that he was not easily able to acknowledge his crimes. Such words of remorse were thus not considered a mitigating circumstance.

As regards co-operation with the prosecution, the Trial Chamber distinguished the wording used in Rule 145 from the requirement in Rule 101 of the Rules of Procedure and Evidence of the ICTY and ICTR, which require substantial co-operation, while also noting that the ICTY has exercised a certain discretion in interpreting this requirement. In judging what would be considered as co-operation, the Trial Chamber noted that it must go beyond good behaviour in court and noted Katanga's testimony, the fact that he responded to questions from both parties, and the information that he brought before the court. The Chamber declined to comment on the im-

¹¹ ICTY, *Prosecutor v. Plavšić*, Trial Chamber, Sentencing Judgment, 27 February 2003, IT-00-39 and IT-00-40/1, paras. 85–94 and 110 (<https://www.legal-tools.org/doc/f60082/>).

portance of Katanga’s good behaviour in detention. Moreover, the Trial Chamber relied on *Semanza*, *Nahimana et al.* and *Kajelijeli* in stating that the violation of fundamental human rights during detention could be considered as mitigating factors.¹² The Trial Chamber however found that it could only judge on Katanga’s detention further to an order of the Court and thus could not pass judgment on his detention in the Democratic Republic of the Congo.

In *The Prosecutor v. Ahmad Al Faqi Al Mahdi*¹³ the Trial Chamber found the crime for which Mr. Al Mahdi was convicted to be of significant gravity, noting nonetheless that crimes against property are “generally of lesser gravity than crimes against persons” (*Al Mahdi*, 27 September 2016, para. 77). In determining the gravity of the crime, the Trial Chamber deemed relevant the fact that the targeted buildings were of symbolic and emotional value for the inhabitants of Timbuktu; that all but one site was a UNESCO World Heritage site and thus affected not only the direct victims but also the international community; and, the discriminatory religious motive for the destruction. As regards Mr. Al Mahdi’s culpable conduct, the Trial Chamber found that he “played an essential role in the execution of the attack” and personally participated in it, justifying his actions in public speeches (paras. 84–85).

The Trial Chamber found no aggravating circumstances against Mr. Al Mahdi, as it was not convinced that the convicted person had abused his power and official capacity and could not take into consideration the same factors it had already taken into account in its assessment of the gravity of the crime (*Al Mahdi*, 27 September 2016, paras. 86–88). The Trial Chamber found five mitigating circumstances, that is: Mr. Al Mahdi’s early, full and genuine admission of guilty; his substantial co-operation with the Prosecution; his remorse and empathy for the victims; his initial reluctance to commit the crime and the steps taken to limit the damage caused; and, his good behaviour in detention despite his family situation (paras. 89–109). Although relevant the Trial Chamber found Mr. Al Mahdi’s irre-

¹² ICTR, *Prosecutor v. Semanza*, Trial Chamber, Judgment and Sentence, 15 May 2003, ICTR-97-20-T (<https://www.legal-tools.org/doc/7e668a/>); *Prosecutor v. Nahimana et al.*, Trial Chamber, Judgment and Sentence, 3 December 2003, ICTR-99-52, paras. 983–999 (<https://www.legal-tools.org/doc/45b8b6/>); and *Prosecutor v. Kajelijeli*, Appeals Chamber, Judgment, 23 May 2005, ICTR-98-44A (<https://www.legal-tools.org/doc/2b7d1c/>).

¹³ ICC, *Prosecutor v. Al Mahdi*, Trial Chamber VIII, Judgment and Sentence, 27 September 2016, ICC-01/12-01/15 (‘*Al Mahdi*, 27 September 2016’) (<https://www.legal-tools.org/doc/042397/>).

proachable behaviour during detention, despite serious security concerns for his family, to be of limited weight. Furthermore, the Trial Chamber found that his admission of guilt and co-operation “show that he is likely to successfully reintegrate into society” and accorded this factor limited weight (para. 97). Finally, the Trial Chamber did not consider Mr. Al Mahdi’s age, economic background, status as scholar and expert in religious matters and lack of prior convictions to be of relevance. As regards prior convictions, the Trial Chamber noted that this is a common feature among international convicts (para. 96).

In its sentencing judgment in the case of Bosco Ntaganda, the Trial Chamber considered separately the gravity and aggravating and mitigating circumstances for each crime of which Mr. Ntaganda was convicted.¹⁴ Among the aggravating circumstances, the Chamber noted the cruelty with which Ntaganda’s crimes were committed and the discriminatory intent behind them. Moreover, the Chamber accepted no mitigating circumstances in this case, finding his words of remorse to lack sincerity. As regards, Mr. Ntaganda’s individual circumstances, the Trial Chamber did not accept any of the circumstances discussed as a mitigating or aggravating factor in the case. In the most recent case, that of *The Prosecutor v. Dominic Ongwen*, the Chamber considered at length the “extreme gravity of the crimes”, nonetheless balanced against his individual circumstances, and in particular his early abduction and integration into the Lord’s Resistance Army, the impact that this had on his education, the killing of his parents as well as his behaviour as a child prior to abduction. Overall, the Chamber considered it “fitting and reasonable” that the convicted individual’s personal circumstances warranted “approximately a one third-reduction” in the sentence that would otherwise be imposed.¹⁵

Doctrine: For the bibliography, see the final comment on Article 78.

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¹⁴ ICC, *Prosecutor v. Ntaganda*, Trial Chamber, Sentencing Judgment, 7 November 2019, ICC-01/04-02/06 (<https://www.legal-tools.org/doc/yyw2ef/>).

¹⁵ ICC, Trial Chamber IX, *Prosecutor v. Ongwen*, Sentence, 6 May 2021, ICC-02/04-01/15-1819-Red, para. 88 (<https://www.legal-tools.org/doc/vj1y8k/>).

Article 78(2)

2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.

Pursuant to Article 78(2) of the Statute, the Court “shall deduct the time, if any, previously spent in detention in accordance with an order of the Court [and] may deduct any time otherwise spent in detention in connection with conduct underlying the crime”. This provides the convicted person with an automatic right to have the time already spent in detention pursuant to an order of the Court, that is the arrest warrant, deducted from his or her sentence. Additionally, the Chamber has the discretion to deduct any time spent in detention other than by an order of the Court, as long as the detention is “in connection with conduct underlying the crime”. This is an important and necessary discretion because, pursuant to Article 20, “national convictions are not an absolute bar to prosecutions before the Court”.¹ However, Article 78(2) neither stipulates the factors that the Court will take into account when exercising this discretion nor the relevant standard of proof.

The formulation in Article 78(2) is arguably broader than that of the *ad hoc* tribunals as it “presumably could include detention by order of a national or other international court, and time spent in pre-trial detention, during trial, or serving a sentence imposed by that court”.² In this respect, Rule 101(c) of the ICTY Rules of Procedure and Evidence of the ICTY and Rule 101(d) of the ICTR Rules of Procedure and Evidence state that “[c]redit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal”. While the terminology used differs in that the Court refers to a deduction of time were the ICTY and ICTR

¹ Karim A.A. Khan, “Article 78 – Determination of the Sentence”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1893 (<https://www.legal-tools.org/doc/040751/>).

² Gideon Boas, James L. Bischoff and Nathalie L. Reid, *International Criminal Law Practitioner Library Series. Volume III: International Criminal Procedure*, Cambridge University Press, 2011, p. 409 (<https://www.legal-tools.org/doc/d3e484/>).

refer to credit for time spent in detention, their impact remains the same. Along with this obligation to deduct time spent in detention pending surrender, trial or appeal, the ICTY and ICTR have discretion similar to that found in Article 78(2) of the Court's Statute. Thus, Article 10(3) of the ICTY Statute and Article 9(3) of the ICTR Statute stipulate that "[i]n considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served". As noted above, this is potentially a narrower discretion than that provided to the judiciary of the Court. While there is no indication of the factors to take into account when exercising its discretion, the ICTY in its first trial, that of *Tadić*, ruled that fairness required that account be taken of the period he had spent in detention in the Federal Republic of Germany prior to the issuance of the ICTY's formal request for deferral.³

The *Lubanga* case was the first instance in which the Court was required to consider the application of Article 78(2). Lubanga's defence submitted that his house arrest and detention by the Democratic Republic of the Congo authorities between 2003 and 2006 should be deducted from his sentence, arguing that, in accordance with Article 78(2), the detention was imposed as a result of the same conduct underlying the crimes for which he was convicted by the Court.⁴

However, the Trial Chamber judged that the defence failed to establish on the balance of probabilities that there was sufficient evidence that Lubanga was detained in the Democratic Republic of Congo ('DRC') for conduct underlying the crimes for which he was convicted by the Court, namely the conscription and enlistment of children under the age of 15 and their active participation in hostilities.⁵ As such, the Chamber refused to deduct any time Lubanga spent in detention prior to the DRC acting on the

³ ICTY, *Prosecutor v. Tadić*, Appeals Chamber, Judgment in Sentencing Appeals, 26 January 2000, IT-94-1-A, para. 38 (<https://www.legal-tools.org/doc/df7618/>).

⁴ ICC, *Prosecutor v. Lubanga*, Defence, Defence Observations on Sentence, 3 June 2012, ICC-01/04-01/06-2891-Red, paras. 133–140 (<https://www.legal-tools.org/doc/7f39ba/>).

⁵ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on Sentence pursuant to Article 76 of the Statute, 10 July 2012, ICC-01/04-01/06-2901, para. 102 (<https://www.legal-tools.org/doc/c79996/>).

Court's arrest warrant. The Appeals Chamber refused to intervene in the Trial Chamber's finding.⁶

In the second case before the Court, the Trial Chamber in *Katanga* started counting Katanga's sentence from the date at which the Congolese authorities were informed of the arrest warrant issued by the Court. The period in detention spent before this period was judged as neither having been pursuant to an order of the Court nor connected with the crimes for which Katanga was convicted by the Court. Accordingly, this time spent in detention was not deducted under Article 78(2).

In its third sentencing decision, the ICC gave Mr. Bemba credit for the time he had spent in detention since his arrest pursuant to a warrant issued by the Court, thus beginning to count Mr. Bemba's sentence from 24 May 2008. Similarly, in their latest convictions, the Trial Chambers in the cases of Mr. Al Mahdi and Mr. Ntaganda deducted the time they spent in detention since their arrest and surrender to the court.⁷ In the *Ongwen* case, the Trial Chamber deducted the time Mr. Ongwen spent in detention from 4 January 2015.⁸ This despite the fact that the Trial Chamber did not accept the Defence assertion that Mr. Ongwen was detained further to the ICC's Arrest Warrant from 4 to 16 January 2015, when he left the Lord's Resistance Army ('LRA'). In this regard, the Trial Chamber noted that this detention "while not pursuant to an order of this Court, was in any case due to his status as an LRA commander" and thus used its discretion to take it into consideration when deducting the time spent in detention. The Trial Chamber furthermore decided that the time Mr. Ongwen was held captive by the LRA as a child did not constitute detention, and could therefore not be taken into consideration for the purposes of Article 78(2).

⁶ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the "Decision on Sentence pursuant to Article 76 of the Statute, 1 December 2014, ICC-01/04-01/06-3122 (<https://www.legal-tools.org/doc/a9bd07/>).

⁷ ICC, *Prosecutor v. Al Mahdi*, Trial Chamber VIII, Judgment, 27 September 2016, ICC-01/12-01/15-171, para. 111 (<https://www.legal-tools.org/doc/042397/>); *Prosecutor v. Ntaganda*, Trial Chamber, Sentencing Judgment, 7 November 2019, ICC-01/04-02/06-2442, para. 242 (<https://www.legal-tools.org/doc/yyw2ef/>).

⁸ ICC, Trial Chamber IX, *Prosecutor v. Ongwen*, Sentence, 6 May 2021, ICC-02/04-01/15-1819-Red, paras. 400–402 (<https://www.legal-tools.org/doc/vj1y8k/>).

Doctrine: For the bibliography, see the final comment on Article 78.

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Article 78(3)

3. When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with Article 77, paragraph 1 (b).

Article 78(3) requires the Court to pronounce a sentence for each crime followed by a joint sentence specifying the total period of imprisonment. The joint sentence cannot exceed the maximum fixed term sentence imposable, that is 30 years' imprisonment, pursuant to Article 77(1)(a), or life imprisonment further to Article 77(1)(b). As there is no determined hierarchy of crimes enumerated in Article 5, the obligation to pronounce a separate sentence for each crime is an opportunity for the Court to ascertain the different degrees of gravity of the crimes, remarked as crucial by Silvia D'Ascoli.¹ Only the jurisprudence of the Court, as it develops, will tell whether clear degrees of gravity will be established.

In contrast, the ICTY and the ICTR have no such obligation to impose a sentence for each crime and a joint sentence specifying the total period of imprisonment. Rule 87(c) of the Rules of Procedure and Evidence of the ICTY and ICTR state:

If the Trial Chamber finds the accused guilty on one or more of the charges contained in the indictment, it shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused.

Similarly, Rule 101(c) of the SCSL Rules of Procedure and Evidence state that “[t]he Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently”. In practice, international judges have tended to impose a single sentence without specifying individual sentences for each crime. As a result, a hierarchy of crimes is not clear

¹ Silvia D'Ascoli, *Sentencing in International Criminal Law the UN and ad hoc Tribunals and Future Perspectives for the ICC*, Hart Publishing, Oxford/Portland, 2011, p. 267 (<https://www.legal-tools.org/doc/4cd0da/>).

from the jurisprudence of these tribunals, with the exception of genocide, which has been regarded as the most serious crime.²

In its first judgment, the Court sentenced Lubanga to 13 years' imprisonment for having committed, jointly with other persons, the crime of conscripting children under the age of 15 into the Union of Congolese Patriots; to 12 years' imprisonment for having committed, jointly with other persons, the crime of enlisting children under the age of 15 into the Union of Congolese Patriots; and, to 14 years' imprisonment for having committed, jointly with other persons, the crime of using children under the age of 15 to participate actively in hostilities. The Trial Chamber then rendered a joint sentence of 14 years' imprisonment, which was confirmed by the Appeals Chamber.³

In the ICC's second verdict, on 23 May 2014, the Trial Chamber sentenced Germain Katanga to 12 years' imprisonment for murder constituting a crime against humanity; 12 years' imprisonment for murder as a war crime; 12 years' imprisonment for directing an attack against the civilian population as such or against individual civilians not taking direct part in hostilities as a war crime; 10 years' imprisonment for destroying the enemy's property as a war crime; and, 10 years' imprisonment for pillaging constituting a war crime.⁴ The Trial Chamber pronounced a joint sentence of 12 years' imprisonment. In its determination, the Trial Chamber noted, at paragraph 145 of the Decision its intention to distinguish between murder and attacks against civilians and the destruction of property and pillaging. Thus, the Trial Chamber considered it appropriate to punish more severely crimes against the person than against property, which was evident by the Court's sentencing Katanga to 12 years for crimes against the person and 10 years for crimes against property.

On 21 June 2016, the Trial Chamber sentenced Jean-Pierre Bemba Gombo to 16 years' imprisonment for murder as a war crime; 16 years' im-

² ICTR, *Prosecutor v. Kambanda*, Trial Chamber, Judgement and Sentence, 4 September 1998, ICTR-97-23-S, paras. 10–16 (<https://www.legal-tools.org/doc/49a299/>); ICTY, *Prosecutor v. Krstić*, Trial Chamber, Judgment, 2 August 2001, IT-98-33-T, para. 700 (<https://www.legal-tools.org/doc/440d3a/>).

³ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, ICC-01/04-01/06-3121-Red (<https://www.legal-tools.org/doc/585c75/>).

⁴ ICC, *Prosecutor v. Katanga*, Trial Chamber II, Decision on Sentence pursuant to article 76 of the Statute, 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr (<https://www.legal-tools.org/doc/7e1e16/>).

prisonment for murder as a crime against humanity; 18 years' imprisonment for rape as a war crime; 18 years' imprisonment for rape as a crime against humanity; and 16 years' imprisonment for pillaging as a war crime.⁵ As murder and rape as both war crimes and crimes against humanity were based on the same acts, the Trial Chamber pronounced cumulative convictions therefor. Moreover, the Trial Chamber considered that the 18 years' imprisonment for rape (as a war crime and crime against humanity) reflected the totality of Mr. Bemba's culpability and thus decided that the sentences for murder, rape and pillaging would run concurrently (*Bemba*, 21 June 2016, para. 95). Finally, on 8 June 2018, the Appeals Chamber reversed Mr. Bemba's convictions and acquitted him.

On 27 September 2016, Mr. Al Mahdi was convicted, as co-perpetrator, of the war crime of intentionally directing attacks against historic monuments and buildings dedicated to religion under Article 8(2)(e)(iv) and sentenced to 9 years' imprisonment.⁶

In its latest sentencing, the Trial Chamber sentenced Bosco Ntaganda to:

- 30 years' imprisonment for murder and attempted murder as a crime against humanity and as a war crime;
- 14 years' imprisonment for intentionally directing attacks against civilians as a war crime;
- 28 years' imprisonment for rape of civilians as a crime against humanity and as a war crime;
- 17 years' imprisonment for rape of children under the age of 15 incorporated into the UPC/FPLC as a war crime;
- 12 years' imprisonment for sexual slavery of civilians as a crime against humanity and as a war crime;
- 14 years' imprisonment for sexual slavery of children under the age of 15 incorporated into the UPC/FPLC as a war crime;
- 30 years' imprisonment for persecution as a crime against humanity;
- 12 years' imprisonment for pillage as a war crime;

⁵ ICC, *Prosecutor v. Bemba*, Trial Chamber III, Decision on Sentence pursuant to Article 76 of the Statute, 21 June 2016, ICC-01/05-01/08-3399 (*Bemba*, 21 June 2016') (<https://www.legal-tools.org/doc/f4c14e/>).

⁶ ICC, *Prosecutor v. Al Mahdi*, Trial Chamber VIII, Judgment, 27 September 2016, ICC-01/12-01/15-171, para. 49 (<https://www.legal-tools.org/doc/042397/>).

- 10 years' imprisonment for forcible transfer of the civilian population as a crime against humanity;
- 8 years' imprisonment for ordering the displacement of the civilian population as a war crime;
- 18 years' imprisonment for conscripting and enlisting children under the age of 15 years into an armed group and using them to participate actively in hostilities as a war crime;
- 10 years' imprisonment for intentionally directing attacks against protected objects as a war crime; and,
- 15 years' imprisonment for destroying the adversary's property as a war crime.

The Trial Chamber then combined the above to impose a single sentence of 30 years' imprisonment on Mr. Ntaganda.⁷ Despite the wishes of the victims, through the Legal Representative of the Victims of the Attacks, and the lack of mitigating circumstances, the Trial Chamber determined that a sentence of life imprisonment was not warranted. The sentence was confirmed by the Appeals Chamber on 30 March 2021.⁸ In the case of Dominic Ongwen, the Trial Chamber pronounced individual sentences for the 61 crimes for which Mr. Ongwen was convicted, before imposing a single joint sentence of 25 years' imprisonment. The Trial Chamber also considered imposing life imprisonment as a single joint sentence, as recommended by the legal representatives of the participating victims, finding that such a sentence “would surely be in order” in this case. However, the Trial Chamber decided against imposing it against Mr. Ongwen, taking into consideration his “unique” circumstances and the fact that he was abducted and integrated into the Lord's Resistance Army when he was only nine years old, which would make imposing life imprisonment “excessive”. Moreover, the Trial Chamber noted its belief that Mr. Ongwen should be given a “concrete prospect” at rebuilding his life and reinserting into socie-

⁷ ICC, *Prosecutor v. Ntaganda*, Trial Chamber VI, Sentencing Judgment, ICC-01/04-02/06-2442, 7 November 2019 (<https://www.legal-tools.org/doc/yyw2ef/>).

⁸ ICC, *Prosecutor v. Ntaganda*, Appeals Chamber, Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment', 30 March 2021, ICC-01/04-02/06-2666-Red (public redacted version) (<https://www.legal-tools.org/doc/zy5pmd/>).

ty upon release from his punishment, in due course, which weighed against imposing a sentence of life imprisonment.⁹

Cross-references:

Article 20.

Rule 145.

Doctrine:

1. Gideon Boas, James L. Bischoff and Nathalie L. Reid, *International Criminal Law Practitioner Library, Vol. II: Elements of Crimes under International Criminal Law*, Cambridge University Press, 2008 (<https://www.legal-tools.org/doc/d3e484/>).
2. Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, 2009 (<https://www.legal-tools.org/doc/7be65f/>).
3. Karin Calvo-Goller, *The Trial Proceedings of the International Criminal Court: ICTY and ICTR Precedents*, Martinus Nijhoff Publishers, Leiden, 2005 (<https://www.legal-tools.org/doc/9cc9cc/>).
4. Silvia D’Ascoli, *Sentencing in International Criminal Law: The Approach of the two Ad Hoc Tribunals and Future Perspectives for the International Criminal Court*, Hart Publishing, Oxford, 2011 (<https://www.legal-tools.org/doc/4cd0da/>).
5. Human Rights Watch, *Genocide, War Crimes and Crimes Against Humanity: A Topical Digest of the Case Law of the International Criminal Tribunal for the former Yugoslavia*, 2006 (<https://www.legal-tools.org/doc/4c90f8/>).
6. Michael Kurth, “The Lubanga Case of the International Criminal Court: A Critical Analysis of the Trial Chamber’s Findings on Issues of Active Use, Age and Gravity”, in *Goettingen Journal of International Law*, 2013, vol. 5, no. 2, pp. 431–453 (<https://www.legal-tools.org/doc/082e42/>).
7. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1163–1181 (<https://www.legal-tools.org/doc/b7432e/>).

⁹ ICC, Trial Chamber IX, *Prosecutor v. Ongwen*, Sentence, 6 May 2021, ICC-02/04-01/15-1819-Red (<https://www.legal-tools.org/doc/vj1y8k/>).

8. Karim A.A. Khan, “Article 78 – Determination of the Sentence”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1891–1900 (<https://www.legal-tools.org/doc/040751/>).

Author: Dejana Radisavljević.

Article 79

Trust Fund

General Remarks:

The ICC Statute created two independent institutions: the International Criminal Court and the Trust Fund for Victims. It is aimed to establish a system which combines retributive and restorative justice.¹

The TFV's two mandates are: (1) Reparations Mandate: implementing awards for reparations ordered by the Court against a convicted person (Article 75(2), Rule 98 (1–4)); (2) Assistance Mandate: using other resources (voluntary contributions and private donations) to provide victims and their families in situations where the Court is active with physical rehabilitation, psychological rehabilitation, and/or material support (Rule 98 (5); TFV Regulation 50).²

The TFV's first mandate is linked to specific cases. Resources are collected through fines or forfeiture and awards for reparations (TFV Regulations 43–46) and complemented with “other resources of the Trust Fund” if the Board of the Directors so determines (TFV Regulation 56). The Board of directors may launch a public donor appeal supported by reparations order (TFV Regulation 20).

The assistance mandate of the TFV envisions the possibility of victims and their families to receive assistance separate from and prior to a court conviction, using resources the TFV has raised through voluntary contributions. The TFV started field operations related to the assistance mandate in northern Uganda and Democratic Republic of Congo in 2008 (TFV Programme Progress Report Summer 2014, p. 6). The Board of Directors shall notify the relevant Chamber before undertaking activities under this mandate (TFV Regulation 50).³

¹ ICC, *Prosecutor v. Lubanga*, Trial Chamber, Decision Establishing the Principles and Procedures to be Applied to Reparations, 7 August 2012, ICC-01/04-01/06-2904, paras. 177 (<https://www.legal-tools.org/doc/a05830/>).

² ICC ASP, Regulations of the Trust Fund for Victims, 3 December 2005, ICC-ASP/4/Res.3, ('TFV Regulations') (<https://www.legal-tools.org/doc/bf30c8/>). For details, see, for example, ICC, Trust Fund for Victims, “Programme Progress Report Summer 2014” ('TFV Programme Progress Report Summer 2014') (<https://www.legal-tools.org/doc/52ff99/>).

³ For example, ICC, *Situation in the Democratic Republic of the Congo*, Trust Fund for Victims, Notification of the Board of Directors of the Trust Fund for Victims in accordance with

Doctrine: For the bibliography, see the final comment on Article 79.

Author: Song Tianying.

Regulation 50 of the Regulations of the Trust Fund for Victims with Confidential Annex, 24 January 2008, ICC-01/04-439, para. 31 (<https://www.legal-tools.org/doc/ccbc5a/>); *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund, 11 April 2008, ICC-01/04-492 (<https://www.legal-tools.org/doc/a2eff7/>).

Article 79(1): Establishment

1. A Trust Fund shall be established by decision of the Assembly of States Parties

In 2002, the Trust Fund for Victims was established by Assembly of States Parties.¹ The TFV is consisted of Board of Directors and its Secretariat. The Board of Directors is the decision-making body of TFV (ASP Res. 6, 9 September 2002, Annex, para. 7). The Board of Directors report annually on TFV activities to the Committee on Budget and Finance and the External Auditor and the Assembly of States Parties (Regulation 76).² The Secretariat is under the full authority of the Board of Directors and provides assistance to it. For administrative purposes, the Secretariat is attached to the Registry of the Court and, as part of the staff of the Registry and, as such, of the Court, the staff of the Secretariat enjoy the same rights, duties, privileges, immunities and benefits. Although the Board and the Secretariat are independent from the Court, the Registrar of the Court may provide necessary assistance for their proper functioning.³

For example, the Registry assists in developing and disseminating standard application forms for reparations, receiving and treating submitted applications, seeking additional information from victims and generally assisting victims in relation to reparations (Rule 94, Rules of Procedure and Evidence; Regulations 86, 88, Regulations of the Court). The Victims Participation and Reparation Section of the Registry is responsible for such matters (Regulation 86(9), Regulations of the Court).

The TFV is funded by:

1. Voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties;

¹ ICC ASP, Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, 9 September 2002, ICC-ASP/1/Res.6 ('ASP Res. 6, 9 September 2002') (<https://www.legal-tools.org/doc/1b6ce9/>).

² ICC ASP, Regulations of the Trust Fund for Victims, 3 December 2005, ICC-ASP/4/Res.3, Regulation 76 ('TFV Regulations') (<https://www.legal-tools.org/doc/bf30e8/>).

³ ICC ASP, Establishment of the Secretariat of the Trust Fund for Victims, 10 September 2004, ICC-ASP/3/Res.7 (<https://www.legal-tools.org/doc/55vniz/>); TFV Regulations 18–19.

2. Money and other property collected through fines or forfeiture transferred to the Trust Fund if ordered by the Court pursuant to Article 79, paragraph 2, of the Statute;
3. Resources collected through awards for reparations if ordered by the Court pursuant to Rule 98 of the Rules of Procedure and Evidence;
4. Such resources, other than assessed contributions, as the Assembly of States Parties may decide to allocate to the Trust Fund (ASP Res. 6, 9 September 2002, para. 2; Regulation 21, TFV Regulations).

Doctrine: For the bibliography, see the final comment on Article 79.

Author: Song Tianying.

Article 79(1): Victims

for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.

On the implementation level, the Trust Fund for Victims uses two definitions of victims pursuant to its two mandates. For Court-ordered reparations, victims are defined in Rule 85 of the Rules of Procedure and Evidence and may apply to receive reparations in the context of a particular case according to orders made under Article 75 of the ICC Statute (see above commentary to Article 75(1), “to, or in respect of, victims”).

Under the TFV’s assistance mandate, the category of ‘victims’ is broader, encompassing all victims of crimes within the jurisdiction of the Court and their families.¹ For example, the Appeals Chamber held in the *Lubanga* case that “it is appropriate for the Board of Directors of the Trust Fund to consider, in the exercise of its mandate under Regulation 50(a) of the Regulations of the Trust Fund, the possibility of including members of the affected communities in the assistance programmes operating in the situation area in the Democratic Republic of the Congo, where such persons do not meet” the eligibility criterion for Court-ordered reparations.²

While maximizing the scope of beneficiaries, the TFV should notify the Court of its planned activities to ensure such activities would not “pre-determine any issue to be determined by the Court, including the determination of jurisdiction pursuant to Article 19, admissibility pursuant to Articles 17 and 18, or violate the presumption of innocence pursuant to Article 66, or be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”.³

¹ ICC Trust Fund for Victims, “Programme Progress Report Summer 2014”, p. 8 (<https://www.legal-tools.org/doc/52ff99/>).

² ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 with amended order for reparations (Annex A) and public annexes 1 and 2, 3 March 2015, ICC-01/04-01/06-3129-AnxA, para. 55 (*Lubanga*, 3 March 2015’) (<https://www.legal-tools.org/doc/df2804/>).

³ ICC ASP, Regulations of the Trust Fund for Victims, 3 December 2005, ICC-ASP/4/Res.3, Regulation 50a (‘TFV Regulations’) (<https://www.legal-tools.org/doc/bf30c8/>); ICC, *Situation in the Democratic Republic of the Congo*, Trust Fund for Victims, Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund for Victims with Confidential Annex, 24 January 2008, ICC-

Doctrine: For the bibliography, see the final comment on Article 79.

Author: Song Tianying.

01/04-439, para. 31 (<https://www.legal-tools.org/doc/ccbc5a/>); *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund, 11 April 2008, ICC-01/04-492 (<https://www.legal-tools.org/doc/a2eff7/>).

Article 79(2)

2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.

The Board of Directors shall, at the request of the Chamber, make written or oral observations on the transfer of fines or forfeitures to the Trust Fund for Victims.¹ The Board of Directors shall determine the uses of such resources in accordance with any stipulations or instructions contained in such orders, in particular on the scope of beneficiaries and the nature and amount of the award(s) (Reg. 43). The Board of Directors may seek further instructions from the relevant Chamber on the implementation of its orders (TFV Regulation 45). The TFV shall submit to the relevant Chamber, via the Registrar, the draft implementation plan for approval and shall consult and update the relevant Chamber on the implementation of the award (TFV Regulations 57, 58).

Resources collected through awards for reparations may only benefit victims as defined in Rule 85 of the Rules of Procedure and Evidence, and, where natural persons are concerned, their families, affected directly or indirectly by the crimes committed by the convicted person (TFV Regulation 46). The Board of Directors has discretion as to whether to complement the resources collected through awards for reparations with “other resources of the Trust Fund” and shall advise the Court accordingly (TFV Regulation 56).

In the Lubanga case, the convicted person was declared indigent. No assets or property of the convicted person was identified for the purposes of reparations.² The Appeals Chamber held that should the TFV provide “other resources of the Trust Fund” for reparation, the convicted person remains liable and must reimburse the Trust Fund.³ The TFV will be able to

¹ ICC ASP, Regulations of the Trust Fund for Victims, 3 December 2005, ICC-ASP/4/Res.3, Regulation 31 (‘TFV Regulations’) (<https://www.legal-tools.org/doc/bf30c8/>); Rule 148, Rules of Procedure and Evidence.

² ICC, *Prosecutor v. Lubanga*, Trial Chamber, Decision establishing the principles and procedures to be applied to reparations, 7 August 2012, ICC-01/04-01/06-2904, para. 269 (<https://www.legal-tools.org/doc/a05830/>).

³ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, 3 March

claim the advanced resources from Lubanga. His financial situation shall be monitored pursuant to Regulation 117 of the Regulations of the Court (*Lubanga*, 3 March 2015, para. 116).

Doctrine: For the bibliography, see the final comment on Article 79.

Author: Song Tianying.

Article 79(3)

3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

The Assembly of States Parties adopted the Regulations of the Trust Fund in 2005, with a view to ensure the proper and effective functioning of the Trust Fund for Victims.¹ They contain provisions regulating:

- the management and oversight of the TFV;
- the receipt of funds;
- the activities and projects of the TFV; and
- the TFV’s reporting requirements.

Cross-references:

Rules 94, 98 and 148.

Regulations 86, 88 and 116.

Doctrine:

1. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016 (<https://www.legal-tools.org/doc/b7432e/>).
2. Karim A.A. Khan, “Article 79 – Trust Fund”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1901–1908 (<https://www.legal-tools.org/doc/040751/>).

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¹ ICC ASP, Regulations of the Trust Fund for Victims, 3 December 2005, ICC-ASP/4/Res.3 (<https://www.legal-tools.org/doc/0177da/>).

Article 80

Non-prejudice to national application of penalties and national laws Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.

General Remarks:

Article 80 was introduced in the final draft of the ICC Statute in order to calm the minority of states that had campaigned to include the capital punishment within the available penalties. Some of these states were concerned that the exclusion of the death penalty could be interpreted as part of trend and an emerging norm of customary international law on the matter.¹

Analysis:

The element “[n]othing in this Part affects the application by States of penalties prescribed by their national law” means that the penalties system set out in Part 7 only applies to the ICC and does not affect national criminal justice systems. This is relevant for example in relation to the non-inclusion of the death penalty.

The element “nor the law of States which do not provide for penalties prescribed in this Part” is based on the same assumption. It means that the inclusion of certain penalties in the ICC Statute and other criteria for their applicability does not affect national criminal justice systems which do not provide for such penalties. This is relevant for the inclusion of the ICC Statute of life imprisonment, a penalty not used by all states.

Doctrine:

1. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1193–1204 (<https://www.legal-tools.org/doc/b7432e/>).
2. Rolf Einar Fife, “Article 80”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1909–1914 (<https://www.legal-tools.org/doc/040751/>).

¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1193 (<https://www.legal-tools.org/doc/b7432e/>).

Author: Mark Klamberg.

PART 8.
APPEAL AND REVISION

Article 81

Appeal against Decision of Acquittal or Conviction or against Sentence

General Remarks:

Article 81 concerns the appeal of the final decision on conviction or acquittal. The possibility of the defendant to appeal a criminal conviction is a human right pursuant to Article 14(5) of the ICCPR.

One question is whether the appeal proceedings are intended to be a trial *de novo* or are more of a corrective procedure. Brady argues that the specified grounds for appeal in Article 81 of the Rome Statute would suggest that the appeal is more in nature with a corrective procedure.¹ Staker holds a similar view.² Roth and Henzelin are more cautious and they are more open towards trial *de novo*. They argue that the case-law from the ECtHR which allows more corrective appeal proceedings has been applied to minor cases and not to cases of the nature that the ICC is concerned with.³

Article 81 contain distinct provisions for an appeal of the verdict and an appeal of the sentence. Only the prosecutor or the convicted person may file an appeal. Although this excludes victims, they may participate in the appeals if their personal interests are affected by the appeal to the extent that it is not “prejudicial to or inconsistent with the rights of the accused

¹ Helen Brady, “Appeal”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, New York, 2001, p. 583 (<https://www.legal-tools.org/doc/e34f81/>).

² Christopher Staker and Franziska Eckelmans, “Article 81 – Appeal Against Decision or Acquittal or Conviction or Against Sentence”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1922–1923 (<https://www.legal-tools.org/doc/040751/>).

³ Robert Roth and Marc Henzelin, “The Appeal Procedure of the ICC”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court*, Oxford University Press, 2002, pp. 1552–1555 (<https://www.legal-tools.org/doc/01addc/>).

and a fair and impartial trial”.⁴ Pursuant to Rule 103 the Appeals Chamber may, if it considers it appropriate, invite or grant leave to a State, organization or person to submit observations.

Cross-reference:

Rule 152.

Doctrine: For the bibliography, see the final comment on Article 81.

Author: Mark Klamberg.

⁴ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Decision on the participation of victims in the appeal, 6 August 2008, ICC-01/04-01/06-1453, para. 7 (<https://www.legal-tools.org/doc/e8d72a/>).

Article 81(1)

1. A decision under Article 74 may be appealed in accordance with the Rules of Procedure and Evidence as follows:

(a) The Prosecutor may make an appeal on any of the following grounds:

(i) Procedural error,

(ii) Error of fact, or

(iii) Error of law;

(b) The convicted person, or the Prosecutor on that person's behalf, may make an appeal on any of the following grounds:

(i) Procedural error,

(ii) Error of fact,

(iii) Error of law, or

(iv) Any other ground that affects the fairness or reliability of the proceedings or decision.

Paragraph 1 provides for three grounds on which the Prosecution may bring an appeal, and four grounds on which the convicted person can appeal.

Procedural errors include non-compliance with mandatory procedural requirements of the Statute and the RPE as well as errors relating to the exercise of the discretion by a Trial Chamber (for example, on admissibility of evidence).

Errors of fact includes two types of errors. The first type is when it is alleged that the Trial Chamber erred in reaching the conclusions of fact it did on the basis of the evidence that was before it. The second type concerns the type when the Trial Chamber was justified in reaching the final conclusion on the evidence presented at trial, but where additional evidence present on appeal casts doubt on those findings.¹

Errors of law may concern any determination made by a Trial Chamber on a question of the substantive or procedural law of the Court.

¹ Christopher Staker and Franziska Eckelmans, “Article 81 – Appeal Against Decision or Acquittal or Conviction or Against Sentence”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1935–1940 (<https://www.legal-tools.org/doc/040751/>).

The phrase “any other ground that affects the fairness or reliability of the proceedings or decision” is a ‘catch-all’ provision that may add little to the other specified grounds of appeal.

Doctrine: For the bibliography, see the final comment on Article 81.

Author: Mark Klamberg.

Article 81(2)

2. (a) A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence;

(b) If on an appeal against sentence the Court considers that there are grounds on which the conviction might be set aside, wholly or in part, it may invite the Prosecutor and the convicted person to submit grounds under Article 81, paragraph 1 (a) or (b), and may render a decision on conviction in accordance with Article 83;

(c) The same procedure applies when the Court, on an appeal against conviction only, considers that there are grounds to reduce the sentence under paragraph 2 (a).

Paragraph 2 provides for appeal against the sentence. In contrast to paragraph 1(b), there is no express provision for the Prosecutor to bring an appeal of the convicted person, although nothing in the wording of paragraph 2 would prevent it.¹

The paragraph only provides for ground for appeal is that there is “disproportion between the crime and the sentence”. However, it follows from Article 83(2) that appeals may also be brought against a sentence based on allegations of “error of fact or law or procedural error”. This could include: failure to hold a hearing under Article 76(2); determining the sentence based on matters that are factually wrong; and/or misconstruing a provision of the Statute or the Rules.

Doctrine: For the bibliography, see the final comment on Article 81.

Author: Mark Klamberg.

¹ Christopher Staker and Franziska Eckelmans, “Article 81 – Appeal Against Decision or Acquittal or Conviction or Against Sentence”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1921 (<https://www.legal-tools.org/doc/040751/>).

Article 81(3)

3. (a) *Unless the Trial Chamber orders otherwise, a convicted person shall remain in custody pending an appeal;*
(b) *When a convicted person's time in custody exceeds the sentence of imprisonment imposed, that person shall be released, except that if the Prosecutor is also appealing, the release may be subject to the conditions under subparagraph (c) below;*
(c) *In case of an acquittal, the accused shall be released immediately, subject to the following:*
(i) *Under exceptional circumstances, and having regard, inter alia, to the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal, the Trial Chamber, at the request of the Prosecutor, may maintain the detention of the person pending appeal;*
(ii) *A decision by the Trial Chamber under subparagraph (c) (i) may be appealed in accordance with the Rules of Procedure and Evidence.*

A convicted person shall remain in custody pending an appeal unless the Trial Chamber orders otherwise. This is based on the assumption that the convicted person is already in custody, which is not necessarily the case.

If the person has been acquitted the person is to be released immediately. However, the Prosecutor may request the Trial Chamber to maintain the detention of the person pending appeal in “exceptional circumstances” taking into consideration, *inter alia*, “the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal”.

Doctrine: For the bibliography, see the final comment on Article 81.

Author: Mark Klamberg.

Article 81(4)

4. Subject to the provisions of paragraph 3 (a) and (b), execution of the decision or sentence shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings.

Apart from the fact that the person convicted normally remain in custody, as provided for in paragraph 3, execution of the decision or sentence shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings.

Cross-references:

Rules 149, Rule 150, 151, 152 and 154.

Regulations 57, 58, 59, 60, 61 and 63

Doctrine:

1. Helen Brady, “Appeal”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 575–96.
2. Robert Roth and Marc Henzelin, “The Appeal Procedure of the ICC”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court*, Oxford University Press, 2002, pp. 1535–58.
3. Christopher Staker and Franziska Eckelmans, “Article 81 – Appeal Against Decision or Acquittal or Conviction or Against Sentence”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1915–53 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Article 82

Appeal against Other Decisions

General Remarks:

Article 82(1)-(2) addresses interlocutory appeals against certain decisions by the Pre-Trial or Trial Chamber. Paragraphs 1(a)-(c) and (2) set out decisions against which an interlocutory appeal is always permitted. Paragraph 1(d) provides a system for certification – leave to appeal – regarding other decisions. A decision that may not be appealed separately, or for which leave to appeal is not granted, can be challenged in an appeal against the final decision in the case.

Article 82(3) deals with suspensive effects of an appeal and Article 82(4) with appeals against reparation orders, provisions that are not confined to interlocutory appeals.¹

i. Grounds for and Standards of Review:

As to the grounds for appeal, the Appeals Chamber has accepted that the categories of errors in Article 81(1)(a) be transposed to interlocutory appeals: procedural error, error of fact and error of law.² Hence, the appellant may rely on procedural errors as the basis also for impugning a decision concerning the admissibility of the case.³

The Appeals Chamber may confirm, reverse or amend the decision appealed (Rule 158(1)). Initially it was not clear whether the requirements set forth for reversal or amendment in Article 83(2) are applicable also in case of an appeal in accordance with Article 82 (*Situation in the Democratic Republic of Congo*, 13 July 2006, para. 83). But later the Appeals Cham-

¹ See also ICC, *Prosecutor v. Ngudjolo*, Appeals Chamber, Decision on the Public document request of the Prosecutor of 19 December 2012 for suspensive effect, 20 December 2012, ICC-01/04-02/12-12, para. 15 (<https://www.legal-tools.org/doc/3d3eba/>).

² ICC, *Situation in the Democratic Republic of Congo*, Appeals Chamber, Judgment on the Prosecutor’s Appeal against the decision of the Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58”, 13 July 2006, ICC-01/04-169, paras. 34–35 (*‘Situation in the Democratic Republic of Congo, 13 July 2006’*) (<https://www.legal-tools.org/doc/8c20eb/>).

³ For example, ICC, *Prosecutor v. Kony, Otti, Odhiambo and Ongwen*, Appeals Chamber, Judgment on the appeal of the Defence against the “Decision on the admissibility of the case under Article 19(1) of the Statute” of 10 March 2009, 16 September 2009, ICC-02/04-01/05-408, para. 47 (<https://www.legal-tools.org/doc/c40d73/>).

ber has clarified that Article 83(2) does not apply to appeals under Article 82.⁴

Nonetheless, the Appeals Chamber has regularly applied the requirement, found in Article 83(2), that the error of fact or law or procedural error must have “materially affected” the decision.⁵ The impugned decision is materially affected by the error if the decision would otherwise have been “substantially different” (*Situation in the Democratic Republic of Congo*, 13 July 2006, para. 84).

The Appeals Chamber will not interfere with a discretionary decision by another Chamber unless that decision is vitiated by a legal error, a factual error or a procedural error, and only if the error materially affected the decision, which includes assessing whether the other Chamber erred in law, gave undue weight to extraneous factors, or failed to consider relevant factors.⁶ Under this standard of review, the Appeals Chamber will not reverse the impugned decision simply because it would have decided differently, but only when it finds that the Trial Chamber exercised its discretion incorrectly. In applying this “margin of appreciation”, the Appeals Chamber will interfere only in the case of a clear error, namely where it cannot discern

⁴ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence”, 13 October 2006, ICC-01/04-01/06-568, para. 13 (<https://www.legal-tools.org/doc/7813d4/>).

⁵ For example, ICC, *Situation in Uganda*, Appeals Chamber, Judgment on the appeals of the Defence against the decisions entitled “Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06” of Pre-Trial Chamber II, 23 February 2009, ICC-02/04-179, para. 40 (<https://www.legal-tools.org/doc/5808c7/>); *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the release of Thomas Lubanga Dyilo”, 21 October 2008, ICC-01/04-01/06-1487, para. 44 (<https://www.legal-tools.org/doc/55e587/>); *Prosecutor v. Katanga and Ngudjolo*, Appeals Chamber, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, ICC-01/04-01/07-1497, para. 38 (<https://www.legal-tools.org/doc/ba82b5/>).

⁶ ICC, *Prosecutor v. Katanga and Ngudjolo*, Appeals Chamber, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings”, 12 July 2010, ICC-01/04-01/07-2259, para. 34 (<https://www.legal-tools.org/doc/124fb3/>).

how the Chamber’s conclusion could have reasonably been reached from the evidence before it.⁷

One example of improper application of discretion was the Pre-Trial Chamber (Single Judge) ordering the production and submission of so-called “in-depth analysis charts” without first receiving submissions from the parties concerning the utility of the ordered scheme.⁸ This exercise of discretion was considered to be “unfair and unreasonable and had a material effect on the Impugned Decision”.

ii. Errors of Law:

On legal errors, the Appeals Chamber has stated that it “will not defer to the Trial Chamber’s interpretation of the law”, but instead that “it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law”.⁹ In case of an error of law, the Appeals Chamber will only intervene if the error materially affected the impugned decision (*Banda and Jerbo*, 17 February 2012, para. 20). Insufficient reasoning may amount to an error of law.¹⁰

Where the appellant, while alleging an error of law, challenges the factual finding based on that law, the Appeals Chamber will consider such an alleged error as an error of fact.¹¹

⁷ ICC, *Prosecutor v. Mbarushimana*, Appeals Chamber, Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled “Decision on the ‘Defence Request for Interim Release’”, 14 July 2011, ICC-01/04-01/10-283, para. 17 (*Mbarushimana*, 14 July 2011’) (<https://www.legal-tools.org/doc/64a283/>).

⁸ ICC, *Prosecutor v. Ongwen*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II entitled “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, 17 June 2015, ICC-02/04-01/15-251, para. 46 (<https://www.legal-tools.org/doc/0052a2/>).

⁹ ICC, *Prosecutor v. Banda and Jerbo*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled “Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation”, 17 February 2012, ICC-02/05-03/09-295, para. 20 (*Banda and Jerbo*, 17 February 2012’) (<https://www.legal-tools.org/doc/c5440f/>).

¹⁰ For example, ICC, *Prosecutor v. Gbagbo*, Appeals Chamber, Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled “Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’”, 26 October 2012, ICC-02/11-01/11-278, paras. 46–47 (<https://www.legal-tools.org/doc/571dbb/>). and the dissenting opinions of judges Ušacka and Kourula.

¹¹ ICC, *Prosecutor v. S. Gbagbo*, Appeals Chamber, Judgment on the appeal of Côte d’Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled “Decision on Côte

iii. Errors of Fact:

On factual errors, the Appeals Chamber has stated that it will not interfere with factual findings of a first-instance Chamber unless it is shown that Chamber “committed a clear error, namely: misappreciated the facts, took into account irrelevant facts or failed to take into account relevant facts”.¹² Hence, the appraisal of evidence lies, in the first place, with the relevant Chamber and the Appeals Chamber will “defer or accord a margin of appreciation both to the inferences [the Trial Chamber] drew from the available evidence and to the weight it accorded to the different factors militating for or against detention”.¹³ The appellant’s mere disagreement with the conclusions that the Chamber drew from the available facts or the weight it accorded to particular factors is not enough to establish a clear error (*Mbarushimana*, 14 July 2011, para. 17).

iv. Procedural Errors:

On procedural errors, the guiding question for the Appeals Chamber’s review is whether the procedure the Pre-Trial or Trial Chamber adopted was so unfair and unreasonable as to constitute an abuse of discretion (for example, *Gaddafi and Al-Senussi*, 21 May 2014, para. 162).

v. Additional Evidence on Appeal:

The corrective function of the Appeals Chamber and the fact that the scope of proceedings on appeal is determined by the scope of the relevant proceedings before the Pre-Trial or Trial Chamber have been held against accepting additional evidence on appeal.¹⁴ It would, according to the Appeals

d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo”, 27 May 2015, ICC-02/11-01/12-75, paras. 70 and 78 (<https://www.legal-tools.org/doc/cfc2de/>).

¹² For example, ICC, *Prosecutor v. Gaddafi and Al-Senussi*, Appeals Chamber, Judgment on the Appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled “Decision on the admissibility of the case against Saif Al-Islam Gaddafi”, 21 May 2014, ICC-01/11-01/11-547-Red, para. 93 (*Gaddafi and Al-Senussi*, 21 May 2014”) (<https://www.legal-tools.org/doc/0499fd/>).

¹³ ICC, *Prosecutor v. Bemba*, Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 6 January 2012 entitled “Decision on the defence’s 28 December 2011 “Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo”, 5 March 2012, ICC-01/05-01/08-2151-Red, para. 16 (<https://www.legal-tools.org/doc/ca5ff9/>).

¹⁴ For example, *Prosecutor v. Ruto and Sang*, Appeals Chamber, Decision on the “Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber’s Decision on Admissibility”, 28 July 2011, ICC-01/09-01/11-234, paras. 9–

Chamber, not be appropriate for it to consider the information (some of which post-dated the impugned decision) when the Pre-Trial Chamber had not done so.¹⁵ Likewise, the Appeals Chamber did not take into account, in the circumstances of the case at hand, any other factual matters that post-date the impugned decision or were not before the Pre-Trial Chamber (*Gaddafi and Al-Sanussi*, 24 July 23014, para. 59).

vi. Other Procedural Issues:

Some procedural provisions are provided in the Rules. As a general principle, Parts 5 and 6 of the Statute and the rules governing proceedings and the submission of evidence in the Pre-Trial and Trial Chambers are also applicable, *mutatis mutandis*, to the proceedings in the Appeals Chamber (Rule 149). The filing of interlocutory appeals is addressed in Rule 154 (no leave to appeal required) and Rule 155 (leave for appeal required). The procedure before the Appeals Chamber, directly or upon leave to appeal, is set out in Rule 156. Further directions are given in regulations 64 and 65. An appeal may be discontinued at any time before the judgment (Rule 157). Apart from setting out the power of the Appeals Chamber to confirm, reverse or amend the impugned decision, Rule 158 provides that the judgment shall be delivered in accordance with Article 83(4).

The Appeals Chamber may decide to render a single judgment on multiple appeals when the impugned decision is identical.¹⁶ The same approach has also been taken when the subject-matter of each one of the appeals under review is identical.¹⁷

14 (<https://www.legal-tools.org/doc/3d65de/>); *Prosecutor v. Gaddafi and Al-Senussi*, 21 May 2014, para. 43.

¹⁵ ICC, *Prosecutor v. Gaddafi and Al-Sanussi*, Appeals Chamber, Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled “Decision on the admissibility of the case against Abdullah Al-Senussi”, 24 July 2014, ICC-01/11-01/11-565, para. 58 (*Gaddafi and Al-Sanussi*, 24 July 2014’) (<https://www.legal-tools.org/doc/ef20c7/>).

¹⁶ ICC, *Prosecutor v. Kony, Otti, Odhiambo, and Ongwen*, Appeals Chamber, Judgment on the appeals of the Defence against the decisions entitled “Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06” of Pre-Trial Chamber II, 23 February 2009, ICC-02/04-01/05-371, para. 12 (<https://www.legal-tools.org/doc/e287c9/>).

¹⁷ For example, *Situation in Darfur, Sudan*, Appeals Chamber, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the deci-

Preparatory Works:

As with the rest of the ICC Statute, there is a lack of pertinent *travaux préparatoires* for the purpose of assisting in the interpretation and application of the provisions. The 1994 ILC Draft Statute contained only brief provisions on appeals and revision, inspired by the provisions of the ICTY Statute (Articles 48–50).¹⁸ The subsequent negotiations in the Preparatory Committee generated a large number of additional proposals with respect to appeals, which were listed in a compilation – ‘the telephone book’ (Article 48).¹⁹ In order to further compile and clarify the alternatives, and to create a higher degree of compatibility and consistency among the proposals, delegations met at an intersessional meeting in Siracusa in May and June 1997. Although the new compilation was an informal document, it proved very influential as a point of departure in the further negotiations.

Another compiled draft Statute – the Zutphen draft – formed the basis of the final session of the Preparatory Committee and it contained more elaborated texts on appeals, albeit with various options (Articles 73–74).²⁰ The Report of the Preparatory Committee, which was the basis for the Rome Diplomatic Conference, contained further refined provisions, including an article specifically addressing interlocutory appeals (Article 81).²¹ This draft provision also included a default rule on leave to appeal which was similar to the final Article 82(1)(d).

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sion of Pre-Trial Chamber I of 3 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 6 December 2007, 2 February 2009, ICC-02/05-177 (<https://www.legal-tools.org/doc/95100b/>).

¹⁸ Report of the International Law Commission on the work of its forty-sixth session (2 May 1994–22 July 1994), UN Doc. A/49/10, pp. 125–129 (<https://www.legal-tools.org/doc/f73459/>).

¹⁹ Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/51/22, 13 September 1996, pp. 235–242 (<https://www.legal-tools.org/doc/e75432/>).

²⁰ Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands, UN Doc. A/AC.249/1998/L.13, 5 February 1998 (<https://www.legal-tools.org/doc/7ba9a4/>).

²¹ Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/2, 14 April 1998, pp. 64–66 (<https://www.legal-tools.org/doc/732f58/>).

Article 82(1)

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

Article 82(1) designates the right to appeal to “either party”. The Appeals Chamber has concluded that “the Statute defines exhaustively the right to appeal” and further held that the limitation of the right to bring interlocutory appeals to those subjects listed in Article 82 of the Statute is fully consistent with internationally recognized human rights.¹ This means that no one else than a party may appeal or be granted leave to appeal.²

As part of the reasons in support of the application of a ground of appeal, an appellant is obliged not only to set out the alleged error, but also to indicate, with sufficient precision, how this error would have materially affected the impugned decision.³ This may include explaining how the decision would have been substantially different without the error, such as by referring to arguments that the appellant would have made in response to an incorrectly handled submission and that could have led to a different decision.⁴ If these requirements are not met, the Appeals Chamber may dismiss arguments *in limine*, without full consideration of their merits.⁵

¹ ICC, *Situation in the Democratic Republic of Congo*, Appeals Chamber, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, paras. 38–39 (<https://www.legal-tools.org/doc/a60d23/>).

² ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Decision on the “Urgent Request for Directions” of the Kingdom of the Netherlands of 17 August 2011, 26 August 2011, ICC-01/04-01/06-2799, para. 8 (<https://www.legal-tools.org/doc/88d2f4/>).

³ ICC, *Prosecutor v. Kony, Otti, Odhiambo and Ongwen*, Appeals Chamber, Judgment on the appeal of the Defence against the “Decision on the admissibility of the case under Article 19(1) of the Statute” of 10 March 2009, 16 September 2009, ICC-02/04-01/05-408, para. 48 (<https://www.legal-tools.org/doc/c40d73/>).

⁴ ICC, *Prosecutor v. Gbagbo*, Appeals Chamber, Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of the proceedings, 12 December 2012, ICC-02/11-01/11-321, para. 44 (<https://www.legal-tools.org/doc/649ff5/>).

⁵ For example, ICC, *Prosecutor v. Ntaganda*, Appeals Chamber, Judgment on the appeal of Mr Bosco Ntaganda against the decision of Pre-Trial Chamber II of 18 November 2013 entitled “Decision on the Defence's Application for Interim Release”, 5 March 2014, ICC-01/04-02/06-271, para. 32 (<https://www.legal-tools.org/doc/77a892/>).

Doctrine: For the bibliography, see the final comment on Article 82.

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Article 82(1)(a)

(a) A decision with respect to jurisdiction or admissibility;

The Appeals Chamber is the competent Chamber to decide whether the defence may avail itself of the procedural remedy of an appeal under Article 82(1)(a) and thus to decide on related matters such as the extension of time limits.¹ The function of the Appeals Chamber in respect of appeals brought under Article 82(1)(a) is to determine whether the determination on the admissibility of the case or the jurisdiction of the Court was in accord with the law.² Hence, its function is not to decide anew on the admissibility of the case.³

In light of the limitation in Article 19(4) concerning the number of challenges that a person or a State may raise with respect to the jurisdiction of the Court or the admissibility of the case, an appellant may wish to preserve the right to challenge by discontinuing an appeal. However, the Appeals Chamber has concluded that discontinuance of an appeal cannot be made subject to reservations and found as invalid a notice of discontinuance subject to the appellants retaining the right to challenge the admissibility of the case.⁴ Further, the Appeals Chamber has rejected the appellants request that the matter be referred to the Pre-Trial Chamber (see Article 19(6)) and instead deemed the appeal as abandoned and dismissed.⁵

¹ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber, Decision on the Application by the Duty Counsel for the Defence Dated 20 March 2006, 22 March 2006, ICC-01/04-01/06-50 (<https://www.legal-tools.org/doc/28395c/>).

² ICC, *Prosecutor v. Kony, Otti, Odhiambo and Ongwen*, Appeals Chamber, Judgment on the appeal of the Defence against the “Decision on the admissibility of the case under Article 19(1) of the Statute” of 10 March 2009, 16 September 2009, ICC-02/04-01/05-408, para. 80 (<https://www.legal-tools.org/doc/c40d73/>).

³ For example, ICC, *Prosecutor v. Muthaura, Kenyatta and Ali*, Appeals Chamber, Decision on the “Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber’s Decision on Admissibility”, 28 July 2011, ICC-01/09-02/11-202, paras. 9, 11 (<https://www.legal-tools.org/doc/b33bab/>).

⁴ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Decision on Thomas Lubanga Dyilo’s Brief Relative to Discontinuance of Appeal, 3 July 2006, ICC-01/04-01/06-176 (<https://www.legal-tools.org/doc/da5616/>).

⁵ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Decision on Thomas Lubanga Dyilo’s Application for Referral to the pre-Trial Chamber/in the Alternative, Discontinuance of Appeal, 6 September 2006, ICC-01/04-01/06-393 (<https://www.legal-tools.org/doc/a376c2/>).

The phrase “decision with respect to” is interpreted to mean that the operative part of the decision itself must pertain directly to a question on the jurisdiction of the Court or the admissibility of a case, and it is not sufficient that there is an indirect or tangential link between the underlying decision and questions of jurisdiction or admissibility.⁶ Hence, an appeal was not allowed on this ground against a decision concerning assistance to and co-operation with the Court just because it was related to a challenge to the admissibility of two cases that the appellant had lodged. Likewise, an appeal was rejected when the impugned decision concerned a request for the postponement of surrender under Article 95 but contained no determination concerning the admissibility of the case.⁷

The notion of ‘jurisdiction’ is not entirely the same in different legal traditions and there may be different opinions as to what constitutes a jurisdictional issue. In *Lubanga*, the defence challenged the jurisdiction of the Court by reference to the “doctrine of abuse of process”. In the appeal against the Pre-Trial Chamber’s decision establishing jurisdiction (and the admissibility of the case), the Appeals Chamber rejected the submission that a challenge based upon this doctrine raises a challenge to the jurisdiction of the Court.⁸ Instead, the doctrine should be considered a *sui generis* application to stay the proceedings and release the suspect, that is to relinquish jurisdiction. Nonetheless, the appeals, referring to Article 82(1)(a), were addressed in substance by the Chamber.

⁶ ICC, *Situation in Kenya*, Appeals Chamber, Decision on the admissibility of the “Appeal of the Government of Kenya against the ‘Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence’”, 10 August 2011, ICC-01/09-78, paras. 15–16 (<https://www.legal-tools.org/doc/872314/>); *Prosecutor v. Gaddafi and Al-Senussi*, Appeals Chamber, Decision on the admissibility of the “Appeal Against Decision on Application Under Rule 103” of Ms Mishana Hosseinioun of 7 February 2012, 9 March 2012, ICC-01/11-01/11-74, para. 10 (<https://www.legal-tools.org/doc/3bf35a/>).

⁷ ICC, *Prosecutor v. Gaddafi and Al-Senussi*, Appeals Chamber, Decision on “Government of Libya’s Appeal Against the ‘Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi’” of 10 April 2012, 25 April 2012, ICC-01/11-01/11-126, para. 14 (<https://www.legal-tools.org/doc/11d158/>).

⁸ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, para. 24 (*Lubanga*, 14 December 2006’) (<https://www.legal-tools.org/doc/1505f7/>).

In *Gbagbo*, on the other hand, the Appeals Chamber stated that a decision to reject a request to stay the proceedings is not a “decision with respect to jurisdiction” in terms of Article 82(1)(a) and may therefore be appealed only with the leave of the Chamber under Article 82(1)(d).⁹ Conversely, a decision that is subject to an appeal under Article 82(1)(a) may not be appealed pursuant to Article 82(1)(d).¹⁰

Also the concept ‘subject-matter jurisdiction’ may be understood differently. In *Lubanga*, the Appeals Chamber concluded that “[j]urisdiction under Article 19 of the Statute denotes competence to deal with a criminal cause or matter under the Statute” (*Lubanga*, 14 December 2006, para. 24). An appeal which challenged the Pre-Trial Chamber’s interpretation of the requirement of an “organizational policy” for crimes against humanity (see Article 7(2)(a)) was held to relate to the substantive merits of the case as opposed to the issue whether the Court has subject-matter jurisdiction to consider the question.¹¹ Hence, the appeal should be lodged pursuant to Article 82(1)(d) and not under Article 82(1)(a) (paras. 29 and 33).¹²

The purpose of an admissibility challenge and, by extension, an appeal under Article 82(1)(a), is to determine whether or not a case is admissible, and generally speaking, the admissibility of a case must be determined on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge.¹³

⁹ ICC, *Prosecutor v. Gbagbo*, Appeals Chamber, Judgment on the appeal of Mr Laurent Koukou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of the proceedings, 12 December 2012, ICC-02/11-01/11-321, para. 101 (<https://www.legal-tools.org/doc/649ff5/>).

¹⁰ ICC, *Prosecutor v. Gaddafi and Al-Senussi*, Pre-Trial Chamber, Decision on Libya application for leave to appeal and request for reconsideration of the “Decision on the ‘Urgent Defence Request’”, 24 April 2013, ICC-01/11-01/11-316, para. 30 (<https://www.legal-tools.org/doc/0aa863/>).

¹¹ ICC, *Prosecutor v. Ruto, Kosgey and Sang*, Appeals Chamber, Decision on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Pre-Trial Chamber II of 23 January 2012 entitled “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, 24 May 2012, ICC-01/09-01/11-414, paras. 23–33 (*Ruto, Kosgey and Sang*, 24 May 2012’) (<https://www.legal-tools.org/doc/8f555e/>).

¹² Similarly, see *Prosecutor v. Muthaura, Kenyatta and Ali*, Appeals Chamber, Decision on the appeal of Mr Francis Kirimi Muthaura and Mr Uhuru Muigai Kenyatta against the decision of Pre-Trial Chamber II of 23 January 2012 entitled “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, 24 May 2012, ICC-01/09-02/11-425 (<https://www.legal-tools.org/doc/b6aad9/>).

¹³ *Prosecutor v. Katanga and Ngudjolo*, Appeals Chamber, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Ad-

Questions of admissibility of the case may arise at different junctures of the process and interlocutory appeals have been accepted under this ground against a decision to deny a request to issue an arrest warrant because of inadmissibility.¹⁴ However, the Appeals Chamber made clear that the admissibility of the case is not a criterion for the issuance of an arrest warrant (*Situation in the Democratic Republic of Congo*, 13 July 2006, para. 45) and further that the circumstances were not such that a separate assessment of this issue was motivated (paras. 46–53).

Doctrine: For the bibliography, see the final comment on Article 82.

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missibility of the Case, 25 September 2009, ICC-01/04-01/07-1497, para. 56 (<https://www.legal-tools.org/doc/ba82b5/>).

¹⁴ ICC, *Situation in the Democratic Republic of Congo*, Appeals Chamber, Judgment on the Prosecutor’s Appeal against the decision of the Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58”, 13 July 2006, ICC-01/04-169 (*Situation in the Democratic Republic of Congo*, 13 July 2006’) (<https://www.legal-tools.org/doc/8c20eb/>).

Article 82(1)(b)

(b) A decision granting or denying release of the person being investigated or prosecuted;

This ground for interlocutory appeal applies to decisions by the Pre-Trial or Trial Chamber “granting or denying release”. However, it is not applicable to any decision having an impact on the detention or release of the person, such as a decision to confirm charges, and the effect or implications of a decision do not qualify or alter the character of the decision.¹ With other words: “it is the nature or character of a decision and not its implications or effects which determine whether a party is entitled to bring an appeal pursuant to Article 82(1)(b)”.² A decision rejecting a request that the Pre-Trial Chamber consider the admissibility of the case as it stood at the time of the issuance of the arrest warrant and, based on this, the validity of the arrest warrant was not considered a decision on the question of whether to grant or deny the appellants release (*Mbarushimana*, 21 September 2011, para. 17). Further, interlocutory appeal against a decision on the issuance of a warrant of arrest does also not fall under this provision and instead requires leave for appeal.³

A decision on a request for staying an already ordered release is also not a “decision granting or denying release” and cannot be appealed under Article 82(1)(b).⁴

¹ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Decision on the admissibility of the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Décision sur la confirmation des charges” of 29 January 2007”, 13 June 2007, ICC-01/04-01/06-926, paras. 10–11, 15–16 (<https://www.legal-tools.org/doc/d0b8dd/>).

² ICC, *Prosecutor v. Mbarushimana*, Appeals Chamber, Decision on the admissibility of the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 28 July 2011 entitled “Decision on “Second Defence request for interim release”, 21 September 2011, ICC-01/04-01/10-438, para. 17 (*Mbarushimana*, 21 September 2011’) (<https://www.legal-tools.org/doc/32d9e2/>).

³ See, for example, ICC, *Prosecutor v. Al Bashir*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, 3 February 2010, ICC-02/05-01/09-73 (<https://www.legal-tools.org/doc/9ada8e/>).

⁴ ICC, *Prosecutor v. Mbarushimana*, Appeals Chamber, Reasons for “Decision on the appeal of the Prosecutor of 19 December 2011 against the ‘Decision on the confirmation of the charges’ and, in the alternative, against the ‘Decision on the Prosecution’s Request for stay of order to release Callixte Mbarushimana’ and on the victims’ request for participation” of

A decision granting conditional release is “a decision granting or denying release” regardless of the fact that implementation of the decision has been deferred.⁵

Moreover, the decision must concern the “person being investigated or prosecuted” by the Court, which excludes, for example, detained witnesses who have been transferred from a State to the Court for giving evidence but who are not subject to a warrant of arrest issued by the Court.⁶

In addition, the error must relate to the “decision appealed”, which follows from Rule 158(1), and a challenge that relates to something which was only assessed in previous decision, such as the risk of flight, may not be brought up in the appeal against a subsequent decision.⁷

It may be noted that the periodic review of a ruling on release or detention, under Article 60(3), is considered to be triggered first when a request for interim release has already been submitted and ruled upon and the warrant of arrest is not sufficient to trigger the review obligation.⁸ Hence, the absence of such review prior to a decision based on a request for interim release cannot be challenged on appeal. Further, a decision in response to a request for release, other than interim release, does not trigger the peri-

20 December 2011, 24 January 2012, ICC-01/04-01/10-483, para. 31 (<https://www.legal-tools.org/doc/64345a/>).

⁵ ICC, *Prosecutor v. Bemba*, Appeals Chamber, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II’s “Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa”, 2 December 2009, ICC-01/05-01/08-631, para. 36 (<https://www.legal-tools.org/doc/5bc6b2/>).

⁶ ICC, *Prosecutor v. Katanga*, Appeals Chamber, Decision on the admissibility of the appeal against the “Decision on the application for the interim release of detained Witnesses DRC-D02-P0236, DRC-D02-P0228 and DRC-D02-P0350”, 20 January 2014, ICC-01/04-01/07-3424, paras. 37–38 (<https://www.legal-tools.org/doc/cdc267/>).

⁷ ICC, *Prosecutor v. Bemba*, Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 6 January 2012 entitled “Decision on the defence’s 28 December 2011 ‘Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo’”, 5 March 2012, ICC-01/05-01/08-2151, para. 29 (<https://www.legal-tools.org/doc/ca5ff9/>).

⁸ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”, 13 February 2007, ICC-01/04-01/06-824, paras. 94–100 (*Lubanga*, 13 February 2007) (<https://www.legal-tools.org/doc/ff3bd8/>).

odic reviews under Article 60(3) (*Lubanga*, 13 February 2007, paras. 103–106).

The grounds for arrest in Article 58(1)(b)(i)-(iii) are stated in the alternative and the conclusion that the assessment of one ground is affected by a procedural error does not mean that the decision must be reversed as long as continued detention is justified under one of the other grounds.⁹ In case of a reversal of the impugned decision due to procedural errors, the Appeals Chamber may remand the matter to the lower Chamber for new consideration, while ordering the person to remain in detention subject to the other Chamber’s decision on the matter.¹⁰

Doctrine: For the bibliography, see the final comment on Article 82.

Author: Håkan Friman.

⁹ ICC, *Prosecutor v. Bemba*, Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 26 September 2011 entitled “Decision on the accused’s application for provisional release in light of the Appeals Chamber’s judgment of 19 August 2011”, 23 November 2011, ICC-01/05-01/08-1937, para. 68 (<https://www.legal-tools.org/doc/0195e1/>).

¹⁰ For example, ICC, *Prosecutor v. Bemba*, Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled “Decision on Applications for Provisional Release”, 19 August 2011, ICC-01/05-01/08-1626, para. 87 (<https://www.legal-tools.org/doc/64dc49/>).

Article 82(1)(c)

(c) A decision of the Pre-Trial Chamber to act on its own initiative under Article 56, paragraph 3;

There has not yet been a decision whereby a Pre-Trial Chamber has acted on its own motion with respect to a unique investigative opportunity in accordance with Article 56(3) and, thus, no appeal regarding this matter.

Doctrine: For the bibliography, see the final comment on Article 82.

Author: Håkan Friman.

Article 82(1)(d)

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

All other decisions may, with leave for appeal, be subject to interlocutory appeal if it is a decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

Initially, the Pre-Trial and Trial Chambers were very reluctant to grant leave for appeal. An attempt by the Prosecutor to seek extraordinary review of a decision ruling out an appeal was rejected by the Appeals Chamber finding no room for such a review in the law of the Court.¹ Hence, the certification process is put exclusively in the hands of the Chamber that rendered the challenged decision. Later, however, leave for appeal was granted more frequently. It is not a question of defending the impugned decision, but instead the application of a test.²

The consistent practice on leave to appeal, first established by the Appeals Chamber, is a two-component test.

The first component is to identify whether there exists an “issue” that may be the subject of appeal – an “issue” is an identifiable subject or topic requiring a decision for its resolution that is not merely a question over which there is disagreement or conflicting opinion (*Situation in the Democratic Republic of Congo*, 13 July 2006, para. 9). Put differently, an “issue” is “constituted by a subject the resolution of which is essential for the de-

¹ ICC, *Situation in the Democratic Republic of the Congo*, Appeals Chamber, Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168 (*‘Situation in the Democratic Republic of the Congo, 13 July 2006’*) (<https://www.legal-tools.org/doc/a60023/>).

² ICC, *Prosecutor v. Muthaura, Kenyatta and Ali*, Pre-Trial Chamber II, Decision on the “Prosecution’s Application for Leave to Appeal the ‘Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence (ICC-01/09-02/11-185)’”, 18 August 2011, ICC-01/09-02/11-253, para. 28 (<https://www.legal-tools.org/doc/b24b64/>).

termination of matters arising in the judicial cause under examination” and it may be legal or factual or a mixed one (para. 9). Moreover, the “issue” must be one apt to significantly affect, in a material way, either the fair and expeditious conduct of the proceedings or the outcome of the trial (para. 10). The term ‘fair’ is associated with the norms of a fair trial, which also include the expeditiousness of the proceedings, and it must be interpreted and applied in accordance with internationally recognized human rights (para. 11; see also Articles 64(2), 69(1) and 21(3)). The principles of a fair trial are not confined to the trial proceedings but apply to the criminal investigation and pre-trial proceedings as well (para. 11). The term “proceedings” also includes prior and subsequent proceedings (para. 12). A forecast must be made of the possible implications of the given issue being wrongly decided on the outcome of the case (para. 13).

The second component of the test is whether the “issue” is one “for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”. Hence, the “issue” must be such “that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial” (*Situation in the Democratic Republic of Congo*, 13 July 2006, para. 14). The term “advance” should be understood as moving the case forward by ensuring that the proceedings follow the right course (para. 15). Here too, the term “proceedings” should be understood broadly (para. 17). By the term “immediate” is required the prompt reference of the issue to the Appeals Chamber and this Chamber, in turn, must render its decision as soon as possible (para. 18).

Consequently, the Chambers have generally applied the following scheme.³ The criteria are: (a) whether the matter is an “appealable issue”; (b) whether the issue at hand could significantly affect: (i) the fair and expeditious conduct of the proceedings, or (ii) the outcome of the trial; and (c) whether in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber could materially advance the proceedings. The

³ For example, ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on the Prosecution’s Application for Leave to Appeal the ‘Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused’, 2 July 2008, ICC-01/04-01/06-1417, paras. 17–18 (<https://www.legal-tools.org/doc/798121/>).

requirements (a), (b) and (c) are cumulative and therefore the failure to fulfil one or more of them is fatal to an application for leave to appeal. Assessing whether the issue would indeed significantly affect one of the elements of justice in (i) or (ii), the Chamber “must ponder the implications of a given issue being wrongly decided” on the fairness and expeditiousness of the proceedings or the outcome of the trial, performing an “exercise [that] involves a forecast of the consequences of such an occurrence” (*Situation in the Democratic Republic of Congo*, 13 July 2006, para. 13).

It has been held that the ‘outcome of the trial’ at the trial level can only be a judgment (pursuant to Article 74) in which an accused is found individually criminally responsible for all or parts of the counts as confirmed, or not to be; with other words a pronouncement of guilt or an acquittal. During the subsequent appeals proceedings, however, the Statute provides the Appeals Chamber with other options in which it can ‘significantly affect’ the outcome of the trial proceedings, including the repetition of (certain parts of) the trial proceedings as envisaged by the Prosecution.⁴

It is not sufficient for the purposes of granting leave to appeal that the issue for which leave to appeal is sought is of general interest or that it may arise in future pre-trial or trial proceedings.⁵ It is also insufficient that an appeal may be legitimate or even necessary at some future stage, as opposed to requiring immediate resolution by the Appeals Chamber in order to materially advance the proceedings.⁶

The applicant for leave is required to identify a specific issue which has been dealt with in the relevant decision and which constitutes the appealable subject. In *Gbagbo*, the Pre-Trial Chamber sought, to the extent possible, to give the defence submissions an “effective interpretation, ra-

⁴ ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V(a), Decision on Prosecution’s Application for Leave to Appeal the “Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial”, 18 July 2013, ICC-01/09-01/11-817, para. 22 (<https://www.legal-tools.org/doc/307061/>).

⁵ ICC, *Situation in Uganda*, Pre-Trial Chamber II, Decision on Prosecutor’s Application for Leave to Appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58, 19 August 2005, ICC-02/04-01/05-20, para. 21 (<https://www.legal-tools.org/doc/cae449/>).

⁶ ICC, *Prosecutor v. Bemba*, Trial Chamber, Decision on the prosecution and defence applications for leave to appeal the “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence”, 26 January 2011, ICC-01/05-01/08-1169, para. 25 (<https://www.legal-tools.org/doc/e5c220/>).

ther than rejecting proposed issues for incompleteness of argument”.⁷ Nonetheless, the Chamber concluded that none of the issues identified by the defence met the criteria of Article 82(1)(d) because: (i) some issues proposed by the defence were in fact extraneous to the decision; (ii) other issues misrepresented the decision or involved various disagreements with the decision with no identifiable impact on the confirmation of charges against Gbagbo; (iii) other issues arose out of the decision but, in the conclusion of the Chamber, did not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. The Chamber then provided detailed reasons concerning each of the proposed issues.

In practice, the Appeals Chamber has generally accepted the Pre-Trial or Trial Chamber’s determination of what is an appealable issue.⁸ However, the Appeals Chamber may address various certified ‘issues’ together.⁹ Further, the Appeals Chamber may clarify or amend the “issue”.¹⁰ A certified issue may also be rendered moot by a subsequent decision.¹¹

⁷ ICC, *Prosecutor v. Gbagbo*, Pre-Trial Chamber I, Decision on the Defence request for leave to appeal the “Decision on the Confirmation of Charges against Laurent Gbagbo”, 11 September 2014, ICC-02/11-01/11-680, para. 10 (<https://www.legal-tools.org/doc/17d7c7/>).

⁸ For example, ICC, *Situation in Uganda*, Appeals Chamber, Judgment on the appeals of the Defence against the decisions entitled “Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06” of Pre-Trial Chamber II, 23 February 2009, ICC-02/04-179 (<https://www.legal-tools.org/doc/5808c7/>); compare, the dissenting opinion of Judge Pikis; *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1433, para. 11, (<https://www.legal-tools.org/doc/f5bc1e/>); cf. dissenting opinion of Judge Song.

⁹ For example, ICC, *Prosecutor v. Muthaura, Kenyatta and Ali*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II dated 20 July 2011 entitled “Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence”, 10 November 2011, ICC-01/09-02/11-365, para. 44 (<https://www.legal-tools.org/doc/57c327/>).

¹⁰ For example, ICC, *Prosecutor v. Katanga*, Appeals Chamber, Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, 13 May 2008, ICC-01/04-01/07-476, para. 46 (<https://www.legal-tools.org/doc/da8435/>); *Prosecutor v. Katanga and Ngudjolo*, Appeals Chamber, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled “Decision on the Modalities of Victim Participation at Trial”, 16 July 2010, ICC-01/04-01/07-2288, paras. 56–57, 88–90 (<https://www.legal-tools.org/doc/e58575/>).

¹¹ For example, ICC, *Prosecutor v. Katanga and Ngudjolo*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the “Decision on Evidentiary Scope of the Confirmation

Doctrine: For the bibliography, see the final comment on Article 82.

Author: Håkan Friman.

Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules” of Pre-Trial Chamber I, 26 November 2008, ICC-01/04-01/07-776, para. 11 (<https://www.legal-tools.org/doc/7c6b2d/>).

Article 82(2)

2. A decision of the Pre-Trial Chamber under Article 57, paragraph 3 (d), may be appealed against by the State concerned or by the Prosecutor, with the leave of the Pre-Trial Chamber. The appeal shall be heard on an expedited basis.

The Pre-Trial Chamber's power, under Article 57(3)(d), to authorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the co-operation of that State under Part 9, was very controversial during the negotiations of the Statute.¹ Hence, an explicit provision on interlocutory appeals, to be heard on an expedited basis, was introduced. Since no such authorization has been granted there are not yet any appeals on this ground.

Doctrine: For the bibliography, see the final comment on Article 82.

Author: Håkan Friman.

¹ Håkan Friman, "Interlocutory Appeals in the Early Practice of the International Criminal Court", in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff Publishers, Leiden, 2009, pp. 507–509.

Article 82(3)

3. An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence.

Neither Article 82(3) nor Rule 156(5) stipulate in which circumstances suspensive effect should be ordered, and thus, this decision is left to the discretion of the Appeals Chamber which will determine the matter on a case-by-case basis.¹ When examining a request for suspensive effect, the Appeals Chamber “will consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under these circumstances”.²

The Appeals Chamber may require that the implementation of the impugned decision would create an irreversible situation that could not be corrected if the Appeals Chamber eventually were to find in favour of the appellant (*Lubanga*, 22 April 2008, para. 8). The suspension could, for example, relate to the release of the suspect although the detention is considered necessary to secure his or her presence at trial.³ Another reason may be that the decision “could potentially defeat the purpose of the [...] appeal” (*Lubanga*, 22 July 2008, para. 10). The standard is not met in case the Appeals Chamber is able to reverse, confirm or amend the impugned deci-

¹ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Decision on the request of Mr. Thomas Lubanga Dyilo for suspensive effect of his appeal against the oral decision of Trial Chamber I of 18 January 2008, 22 April 2008, ICC-01/04-01/06-1290, para. 7 (*Lubanga*, 22 April 2008’) (<https://www.legal-tools.org/doc/86650f/>).

² For example, ICC, *Prosecutor v. Bemba et al.*, Appeals Chamber, Decision on the Prosecutor’s urgent request for suspensive effect of the “Decision ordering the release of Aimé Kiloilo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido” of 21 October 2014, 22 October 2014, ICC-01/05-01/13-718, para. 5 (*Bemba et al.*, 22 October 2014’) (<https://www.legal-tools.org/doc/37d93a/>).

³ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Reasons for the decision on the request of the Prosecutor for suspensive effect of his appeal against the “Decision on the release of Thomas Lubanga Dyilo”, 22 July 2008, ICC-01/04-01/06-1444 (*Lubanga*, 22 July 2008’) (<https://www.legal-tools.org/doc/4f026b/>); *Prosecutor v. Lubanga*, Appeals Chamber, Decision on the Prosecutor’s request to give suspensive effect to the appeal against Trial Chamber I’s oral decision to release Mr Thomas Lubanga Dyilo, 23 July 2010, ICC-01/04-01/06-2536 (<https://www.legal-tools.org/doc/8fd3ed/>).

sion irrespective of whether the proceedings before Trial Chamber continue.⁴

Resolution of the question whether the accused's absence from the upcoming trial hearings would be permitted, met the requirements because the decision, if overturned, would mean that the trial had to restart in his presence and that witnesses who testified in his absence may be unwilling or unable to return to testify again.⁵ But it is not sufficient that the potential effect that the enforcement of the impugned decision might have on the witnesses is largely speculative.⁶

However, the threshold need not be so high. It may be sufficient that, absent a resolution by the Appeals Chamber, the Trial Chamber could be considering additional material with resulting effects on the fairness and expeditiousness of the trial and the outcome and that there is a risk for unnecessary appeals.⁷ Other considerations are the need to preserve the integrity of the proceedings, and the delay that a suspension would cause weighed against the impact that continuing the proceedings before the Trial Chamber based on the impugned decision could have, in particular, on the rights of the accused, should the Appeals Chamber eventually reverse or amend the decision.⁸

⁴ ICC, *Prosecutor v. Bemba*, Appeals Chamber, Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the “Decision on the Admissibility and Abuse of Process Challenges”, 9 July 2010, ICC-01/05-01/08-817, para. 11 (<https://www.legal-tools.org/doc/c4d631/>); *Prosecutor v. Ruto, Kosgey and Sang*, Appeals Chamber, Decision on the requests of Mr Ruto and Mr Sang for suspensive effect, 29 February 2012, ICC-01/09-01/11-391, para. 10 (<https://www.legal-tools.org/doc/a22e2e/>); *Prosecutor v. Muthaura, Kenyatta and Ali*, Appeals Chamber, Decision on the request of Mr Kenyatta and Mr Muthaura for suspensive effect, 29 February 2012, ICC-01/09-02/11-401, para. 10 (<https://www.legal-tools.org/doc/d90327/>).

⁵ ICC, *Prosecutor v. Ruto and Sang*, Appeals Chamber, Decision on the request for suspensive effect, 20 August 2013, ICC-01/09-01/11-862 (<https://www.legal-tools.org/doc/3578c4/>).

⁶ ICC, *Prosecutor v. Ruto and Sang*, Appeals Chamber, Decision on Mr William Samoei Ruto's request for suspensive effect, 17 June 2014, ICC-01/09-01/11-1370, para. 9 (<https://www.legal-tools.org/doc/834f30/>).

⁷ *Prosecutor v. Lubanga*, Appeals Chamber, Decision on the requests of the Prosecutor and the Defence for suspensive effect of the appeals against Trial Chamber I's Decision on Victim's Participation of 18 January 2008, ICC-01/04-01/06-1347, 22 May 2008, paras. 19–20 (*'Lubanga, 22 May 2008'*) (<https://www.legal-tools.org/doc/093bc1/>).

⁸ ICC, *Prosecutor v. Katanga*, Appeals Chamber, Decision on the request for suspensive effect of the appeal against Trial Chamber II's decision on the implementation of regulation 55 of the Regulations of the Court, 16 January 2013, ICC-01/04-01/07-3344, paras. 8–9 (<https://www.legal-tools.org/doc/40a7b8/>).

In any case, a party claiming suspensive effect must present persuasive reasons why the absence of a stay would have consequences that “would be very difficult to correct” or that “may be irreversible”.⁹

An order for suspensive effect is aimed at preserving the situation existing prior to the issuance of the impugned decision and the suspension may not go beyond that scope, for example by being directed to domestic proceedings.¹⁰

Quite apart from this provision on suspensive effects of an appeal is the issue of a stay of the entire process. The Appeals Chamber has unanimously held that it has no power to order stay of all proceedings before another Chamber.¹¹ Nonetheless, the suspension of the decision that is subject to an appeal may well affect the proceedings of the Chamber which has issued the impugned decision and this is accepted insofar it does not by implication necessitate the suspension of all the proceedings before the other Chamber (*Lubanga*, 22 May 2008, para. 25). Furthermore, the Appeals Chamber has accepted a power to stay the entire proceedings because of breaches of the fundamental rights of the suspect or the accused by his or her accusers, which may be either a permanent stay¹² or a conditional one.¹³ Such a stay is not, however, based upon Article 82(3).

⁹ Cf. ICC, *Prosecutor v. Gbagbo*, Appeals Chamber, Decision on Côte d’Ivoire’s request for suspensive effect of its appeal against the “Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo” of 11 December 2014, 20 January 2015, ICC-02/11-01/12-56, paras. 14–18 (<https://www.legal-tools.org/doc/4d94ed/>).

¹⁰ ICC, *Prosecutor v. Gaddafi and Al-Senussi*, Appeals Chamber, Decision on the request for suspensive effect and the request to file a consolidated reply, 22 November 2013, ICC-01/11-01/11-480, paras. 15–18 (<https://www.legal-tools.org/doc/11a20e/>).

¹¹ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Reasons for “Decision of the Appeals Chamber on the Defence application ‘Demande de suspension de toute action ou procédure afin de permettre la désignation d’un nouveau Conseil de la Défense’ filed on 20 February 2007” issued on 23 February 2007, 9 March 2007, ICC-01/04-01/06-844, para. 3 (<https://www.legal-tools.org/doc/67912e/>).

¹² ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, paras. 37–39 (<https://www.legal-tools.org/doc/1505f7/>).

¹³ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008”, 21 October 2008, ICC-01/04-01/06-1486, paras. 80–83 (<https://www.legal-tools.org/doc/485c2d/>).

Doctrine: For the bibliography, see the final comment on Article 82.

Author: Håkan Friman.

Article 82(4)

4. A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under Article 75 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence.

The “Decision establishing the principles and procedures to be applied to reparations” by the *Lubanga* Trial Chamber established principles relating to reparations as well as some procedures.¹ Due to the latter feature, the Appeals Chamber was persuaded to consider the decision as an order for reparations and, thus, subject to appeal in accordance with Article 82(4).² An order for reparations may not be appealed in accordance with Article 82(1)(d) (*Lubanga*, 14 December 2012, para. 64).

The convicted person has an unencumbered right to appeal orders for reparations, and this right is not limited to monetary awards (*Lubanga*, 14 December 2012, para. 66). Victims are considered parties to the reparations proceedings and hence they may be entitled to bring an appeal (para. 67). Such victims may also include individuals who did not participate in the proceedings concerning the accused person’s guilt or innocence or the sentence insofar they have requested reparations (para. 69). Since the reparations proceedings are a distinct stage of the process, also victims whose right to participate was withdrawn or rejected and victims who participated in the proceedings concerning guilt or innocence or on sentencing may have a right to appeal (paras. 70–71). However, an appeal cannot be made with reference to the interests of unidentified victims who have not made requests but who may benefit from a collective award (para. 72).

An appeal pursuant to Article 82(4) does not mean the automatic suspension of the order for reparations. Instead a request for suspensive effect must be made in accordance with Article 82(3) and Rule 156(5), notwithstanding the fact that the wording of Rule 156(5) does not cover

¹ ICC, *Prosecutor v. Lubanga*, Trial Chamber, Decision Establishing the Principles and Procedures to be Applied to Reparations, 7 August 2012, ICC-01/04-01/06-2904 (‘*Lubanga*, 7 August 2012’) (<https://www.legal-tools.org/doc/a05830/>).

² ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Decision on the admissibility of the appeals against Trial Chamber I’s “Decision establishing the principles and procedures to be applied to reparations” and directions on the further conduct of proceedings, 14 December 2012, ICC-01/04-01/06-2953, para. 51 (‘*Lubanga*, 14 December 2012’) (<https://www.legal-tools.org/doc/2e59a0/>).

appeals against reparation orders under Article 82(4) (*Lubanga*, 14 December 2012, paras. 79–80). In suspending the execution of the reparation order, the Appeals Chamber attached weight to the undesirability of having to halt or revise later the ongoing engagement with victims in accordance with the order and the fact that the order could not in any case be executed until the accused’s conviction had been confirmed on appeal (paras. 83 and 86).

The standard of review with respect to appeals against a reparations order is the same as for all other appeals.³

Cross-references:

Rules 154, 155 and 156.

Regulations 64 and 65.

Doctrine:

1. Gideon Boas *et al.*, “Appeals, Reviews, and Reconsideration”, in Göran Sluiter, Håkan Friman, Suzannah Linton, Sergey Vasiliev and Salvatore Zappalà (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, Chapter 6.
2. Helen Brady, “Appeals and Revision”, in Roy S Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 575–603.
3. Håkan Friman, “Interlocutory Appeals in the Early Practice of the International Criminal Court”, in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff Publishers, Leiden, 2009.
4. Håkan Friman, “Investigation and Prosecution”, in Roy S Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2014.
5. Alena Hartwig, “Appeal and Revision”, in Christoph Safferling (ed.), *International Criminal Procedure*, Oxford University Press, 2012, pp. 531–39.

³ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 with amended order for reparations (Annex A) and public annexes 1 and 2, 3 March 2015, ICC-01/04-01/06-3129, para. 40 (<https://www.legal-tools.org/doc/c3fc9d/>).

6. Robert Roth and Marc Henzlin, “The Appeal Procedure of the ICC”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 2nd ed., Oxford University Press, 2002, pp. 1535–58.
7. Volker Nerlich, “Article 82”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1954–1964 (<https://www.legal-tools.org/doc/040751/>).

Author: Håkan Friman.

Article 83

Proceedings on Appeal

General Remarks:

Article 83 deals with powers and procedures of the Appeals Chamber in the context of appellate proceedings. The provision performs the same role as Article 57 on the “Functions and Powers of the Pre-Trial Chamber” and Article 64 on “Functions and Powers of the Trial Chamber”.

Doctrine: For the bibliography, see the final comment on Article 83.

Author: Mark Klamberg.

Article 83(1)

1. For the purposes of proceedings under Article 81 and this Article, the Appeals Chamber shall have all the powers of the Trial Chamber.

Article 83(1) only applies to proceedings under Article 81, which excludes interlocutory appeals. This is confirmed later in subsequent paragraphs: appeals against the decisions on conviction or acquittal (paragraph 2(a)), ordering a new trial (paragraph 2(b)) and sentence (paragraph 3).¹

Doctrine: For the bibliography, see the final comment on Article 83.

Author: Mark Klamberg.

¹ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence”, 13 October 2006, ICC-01/04-01/06-568, para. 16 (<https://www.legal-tools.org/doc/7813d4/>).

Article 83(2)

2. If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may:

(a) Reverse or amend the decision or sentence; or

(b) Order a new trial before a different Trial Chamber. For these purposes, the Appeals Chamber may remand a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly, or may itself call evidence to determine the issue. When the decision or sentence has been appealed only by the person convicted, or the Prosecutor on that person's behalf, it cannot be amended to his or her detriment.

This provision allows the Appeals Chamber to reverse as well as amend the decision and sentence. This means that the Appeals Chamber may itself determine issue of fact. However, as already indicated in the comment on Article 81, the Statute envisages that trial proceedings, involving fact-finding, will be held before the Trial Chambers, not the Appeals Chamber.

Doctrine: For the bibliography, see the final comment on Article 83.

Author: Mark Klamberg.

Article 83(3)

3. If in an appeal against sentence the Appeals Chamber finds that the sentence is disproportionate to the crime, it may vary the sentence in accordance with Part 7.

As already indicated in the comment on Article 81(2), the Appeals Chamber may vary the sentence if there is a disproportion between the crime and the sentence.

Doctrine: For the bibliography, see the final comment on Article 83.

Author: Mark Klamberg.

Article 83(4)

4. The judgement of the Appeals Chamber shall be taken by a majority of the judges and shall be delivered in open court. The judgement shall state the reasons on which it is based. When there is no unanimity, the judgement of the Appeals Chamber shall contain the views of the majority and the minority, but a judge may deliver a separate or dissenting opinion on a question of law.

During the drafting of the ICC Statute there was debate whether unanimity was required for a decision the Appeals Chamber or simply a majority.¹ The wording for paragraph 4 seems to suggest that concern of the majority and minority in relation to a procedural error or error of fact should be expressed within the judgment whereas a judge may deliver a separate or dissenting opinion on a question of law. In practice dissenting and separate opinions have included not only questions of law but also views on procedural errors and errors of fact.²

Doctrine: For the bibliography, see the final comment on Article 83.

Author: Mark Klamberg.

¹ Christopher Staker and Franziska Eckelmans, “Article 83—Proceedings on Appeal”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1972 (<https://www.legal-tools.org/doc/040751/>); William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1246 (<https://www.legal-tools.org/doc/b7432e/>).

² ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Dissenting Opinion of Judge Anita Ušacka, Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the “Decision on Sentence pursuant to Article 76 of the Statute”, 1 December 2014, ICC-01/04-01/06-3121-Anx2 (<https://www.legal-tools.org/doc/df4480/>).

Article 83(5)

5. The Appeals Chamber may deliver its judgement in the absence of the person acquitted or convicted.

Paragraph 5 is an exception of the rejection of *in absentia* proceedings and may be contrasted with Articles 63 and 76(4), the latter providing that “[t]he sentence shall be pronounced in public and, wherever possible, in the presence of the accused”.

Cross-references:

Rules 156, 157, 153 and 158.

Doctrine:

1. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1238–1248 (<https://www.legal-tools.org/doc/b7432e/>).
2. Christopher Staker and Franziska Eckelmans, “Article 83-Proceedings on Appeal”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1965–1985 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Article 84

Revision of Conviction or Sentence

General Remarks:

This provision provides for revision which is different from appeal in the sense that revision does not challenge the conclusions of the Trial Chamber. Instead it reviews a decision based upon facts that were not available at trial. The mechanism of revision is familiar both at the international level and many national jurisdictions although there may be differences when the mechanism may be applied. Proceedings of this kind are normally regarded as an extraordinary remedy and are more common in civil law systems. In common law systems this type of proceedings are brought before a court of appeal.¹

At the *ad hoc* tribunals it is called ‘review’, see ICTY Statute, Article 26 and ICTR Statute, Article 25.

Doctrine: For the bibliography, see the final comment on Article 84.

Author: Mark Klamberg.

¹ Christopher Staker and Volker Nerlich, “Article 84—Revisions of conviction or sentence”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1987 (<https://www.legal-tools.org/doc/040751/>); William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1250 (<https://www.legal-tools.org/doc/b7432e/>).

Article 84(1)

1. The convicted person or, after death, spouses, children, parents or one person alive at the time of the accused's death who has been given express written instructions from the accused to bring such a claim, or the Prosecutor on the person's behalf, may apply to the Appeals Chamber to revise the final judgement of conviction or sentence on the grounds that:

(a) New evidence has been discovered that:

(i) Was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and

(ii) Is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict;

(b) It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified;

(c) One or more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under Article 46.

Revisions proceedings can only be brought by the person convicted or certain others on behalf of the convicted. This includes the Prosecutor. However, the Prosecutor can only bring revision against a conviction, not against an acquittal.

Sub-paragraph (a) provides for revision when “new evidence” has been discovered. For revision, it is required that this new evidence was not available at the time of the trial and is sufficiently important in the sense that it would have affected the outcome of the trial.

Revision is also possible under sub-paragraph (b) if it is newly discovered that the evidence was false, forged or falsified.

Finally, revision is possible under sub-paragraph (c) when “[o]ne or more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty”.

Cross-references:

Rules 159, 160 and 161.

Regulations 62 and 66.

Doctrine: For the bibliography, see the final comment on Article 84.

Author: Mark Klamberg.

Article 84(2)

2. The Appeals Chamber shall reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:

(a) Reconvene the original Trial Chamber;

(b) Constitute a new Trial Chamber; or

(c) Retain jurisdiction over the matter, with a view to, after hearing the parties in the manner set forth in the Rules of Procedure and Evidence, arriving at a determination on whether the judgement should be revised.

Paragraph 2 provides for the procedure on revision which is divided in two stages which establishes a ‘filter’ mechanism for revision applications. The purpose is to prevent “frivolous applications”.¹

First, the Appeals Chamber shall consider whether the application is “unfounded”. If the Appeals Chamber finds the application meritorious it may reconvene the original Trial Chamber; constitute a new Trial Chamber; or retain jurisdiction over the matter, “with a view to, after hearing the parties in the manner set forth in the Rules of Procedure and Evidence, arriving at a determination on whether the judgement should be revised”.

Doctrine:

1. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1249–1255 (<https://www.legal-tools.org/doc/b7432e/>).
2. Christopher Staker and Volker Nerlich, “Article 84 – Revisions of conviction or sentence”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1986–1997 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

¹ Christopher Staker and Volker Nerlich, “Article 84—Revisions of conviction or sentence”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 1996 (<https://www.legal-tools.org/doc/040751/>).

Article 85

Compensation to an Arrested or Convicted Person

General Remarks:

Article 85 contains a number of provisions concerning compensation to defendants for unjust arrest, detention or conviction. Paras. 1 and 2 are taken almost verbatim from relevant human rights instruments (see Articles 9(5), 14(6) of the International Covenant on Civil and Political Rights; Article 5(5) of the European Convention on Human Rights, Article 3 of Additional Protocol No. 7 to the ECHR; similarly Article 10 of the American Convention on Human Rights). There are no comparable norms in the legal texts of other international tribunals, although the ad hoc Tribunals have in principle allowed claims for compensation for miscarriages of justice or violations of defence rights.¹ Procedural rules for claims under Article 85 are contained in Rules 173–175.

The wording of several provisions (“enforceable right”, “compensated according to law”) might be interpreted as a sign that compensation under Article 85 may be claimed not only from the Court, but also from states under national proceedings mandated by Article 85.² Those peculiarities in the wording are, however, most likely due to the fact that Article 85(1) and (2) were imported almost verbatim from human rights treaties (see Zappala, 2002, p. 1582); in fact, Rules 173–175 refer solely to compensation claimed directly from the Court.

As Rule 173(3) shows, Article 85 refers only to monetary compensation, not to, for example, claims that a violation of the defendant’s rights must lead to a termination of proceedings. However, as Article 85(3) presupposes, such claims may in principle be made under the Statute – the

¹ See Salvatore Zappala, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 2nd. ed., Oxford University Press, 2002, pp. 1579–1582 (<https://www.legal-tools.org/doc/01addc/>).

² See Christopher Staker and Volker Nerlich, “Article 85: Compensation to an arrested or convicted person”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 2000–2001 (<https://www.legal-tools.org/doc/040751/>).

Court had occasion to pronounce on this question, under Article 21(3), in the Lubanga case (see the commentary to Article 21(3)).³

Cross-references:

Rules 173, 174 and 175.

Doctrine: For the bibliography, see the final comment on Article 85.

Author: Björn Elberling, revised by Mark Klamberg.

³ See also ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber, Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute, 3 October 2006, ICC-01/04-01/06-512 (<https://www.legal-tools.org/doc/bedbe7/>); *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, paras. 37–39 (<https://www.legal-tools.org/doc/1505f7/>).

Article 85(1)

1. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 85(1) deals with compensation for unlawful arrest and/or detention. Its wording is substantially identical to Article 9(5) International Covenant on Civil and Political Rights and Article 5(5) European Convention on Human Rights. An arrest or detention is, first of all, unlawful under Article 85(1) if it is in violation of the ICC Statute. The wording is not clear on whether a violation of other norms of international law would also render an arrest or detention unlawful under Article 85(1), but one may presume that this is the case given the applicability of general international law under Article 21 and the drafting history of Article 85(1).¹ Given that it is states which will arrest suspects, the most interesting question is whether Article 85(1) also applies to arrest and detention by State authorities in connection with Court proceedings, which may be unlawful also under national law. One argument for applying Article 85(1) to such situations is that Article 59(1) specifies that arrest shall be in accordance with national laws, thus making compliance with national laws a requirement also under the Statute. (cf. Staker and Nerlich, 2016, p. 2000)

Cross-references:

Rules 173 and 174.

Doctrine: For the bibliography, see the final comment on Article 85.

Author: Björn Elberling, revised by Mark Klamberg.

¹ See Christopher Staker and Volker Nerlich, “Article 85 – Compensation to an arrested or convicted person”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 2000 (<https://www.legal-tools.org/doc/040751/>).

Article 85(2)

2. When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.

Article 85(2) applies to compensation for unjust conviction. Its wording is substantially identical to that of Article 14(6) International Covenant on Civil and Political Rights and Article 3 of the Additional Protocol No. 7 to the European Convention on Human Rights. Article 85(2) does not contain a reference to a person being pardoned after a finding that there had been a miscarriage of justice – this is because a power of pardon is not foreseen in the Rome Statute. The provision sets up four requirements for such compensation: First, the person must have been convicted by a final decision (that is not only by a judgment in first instance still open to appeal) and must have suffered punishment as a result of this judgment. Second, the conviction must have been reversed, presumably after a revision pursuant to Article 84. Third, this reversal must have been based on evidence showing a miscarriage of justice – the exact definition of this term will have to be left to the future jurisprudence of the Court. Finally, the late disclosure of this evidence must not be wholly or partially attributable to the convicted person – this requirement basically repeats what is already a requirement for the availability of the revision procedure based on new evidence under Article 84(1)(a)(i) (see the commentary thereto).¹

Cross-references:

Article 84.

Rules 173 and 174.

¹ See also Salvatore Zappala, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 2nd. ed., Oxford University Press, 2002, p. 1583 (<https://www.legal-tools.org/doc/01addc/>), who argues in favour of partial compensation, to be given at the discretion of the court, where the non-disclosure was partly attributable to the person convicted.

Doctrine: For the bibliography, see the final comment on Article 85.

Author: Björn Elberling, revised by Mark Klamberg.

Article 85(3)

3. In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.

Article 85(3), which goes beyond the requirements of international human rights law, refers to compensation for detention where there has been a particularly grave miscarriages of justice, namely those which are “grave and manifest” and which, moreover, lead to acquittal of the person or termination of proceedings. Which violations of defence rights fulfil these conditions must be left to the further jurisprudence of the Court – at the ICTR, even the rather grave violations in the *Barayagwiza* case ultimately did not lead to a termination of the proceedings.¹ Even where these rather strict preconditions are fulfilled, the payment of compensation is left to the Court and reserved for “exceptional circumstances” (according to Zappala, 2002, p. 1583, “exceptional circumstances” should not be interpreted as a further requirement, but rather as a description of the requirement of a grave and manifest miscarriage of justice leading to acquittal or termination of proceedings). Article 85(3) is thus rather narrow when compared to similar provisions in national law, some of which in principle grant compensation for detention to all acquitted persons.² Where the requirements of Article 85(3) are fulfilled, Rule 175 lists some factors to be taken into account in determining the amount of compensation.

Cross-references:

Rules 173, 174 and 175.

¹ See Salvatore Zappala, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 2nd. ed., Oxford University Press, 2002, pp. 1581–1582 (<https://www.legal-tools.org/doc/01addc/>).

² See, for example, Germany, Gesetz über die Entschädigung für Strafverfolgungsmaßnahmen, 8 March 1971, Section 2; for more examples, see Christopher Staker and Volker Nerlich, “Article 85 – Compensation to an arrested or convicted person”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 2000–2001, fn. 14 (<https://www.legal-tools.org/doc/040751/>).

Doctrine:

1. Christopher Staker and Volker Nerlich, “Article 85-Compensation to an arrested or convicted person”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1998–2002 (<https://www.legal-tools.org/doc/040751/>).
2. Salvatore Zappala, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 2nd. ed., Oxford University Press, 2002, pp. 1577–83.

Author: Björn Elberling, revised by Mark Klamberg.

PART 9.
INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

Article 86

General Obligation to Co-operate

General Remarks:

Article 86 establishes an obligation for States Parties to the Rome Statute to co-operate with the International Criminal Court. The Statute thus provides a genuine legal duty which the Court may seek to implement, as opposed to a non-legally binding expectation of co-operation that the States Parties would only fulfil voluntarily.

The draft Statute for an International Criminal Court, adopted by the International Law Commission in 1994,¹ contains in its Article 51(1) a first and more simplified version of the clause on the general obligation to co-operate. Based on the International Law Commission's draft, a number of proposals were discussed between 1996 and 1998 in the Preparatory Committee for the International Criminal Court. The importance of having a general clause on co-operation was never put into question. As such, in 1998, the Preparatory Committee adopted an autonomous draft article on the general obligation to co-operate with few substantive differences with regard to the final version of Article 86 that was later as adopted at the Rome Conference: it defined the scope of co-operation by reference to the "crimes under this Statute" (while Article 86 defines it by reference to the "crimes within the jurisdiction of the Court"); it established that States Parties should co-operate "without [undue] delay" (this text was not included in the final version of Article 86 because it was ultimately considered to be redundant).

This Article, while generic in its wording, is of structural importance for the judicial activity of the Court insofar as the Court is dependent on the judicial system of States Parties for carrying out various judicial acts during the investigation and prosecution, including in what concerns the gathering of evidence or the arrest and surrender of suspects to the Court.

¹ Report of the International Law Commission on the work of its forty-sixth session (2 May 1994–22 July 1994), UN Doc. A/49/10, 2 September 1994 ('UN Doc. A/49/10') (<https://www.legal-tools.org/doc/f73459/>).

The idea that the Court could not perform its role without the States Parties is present since the beginning of the drafting process of the Statute – the commentary to Article 51(1) of the draft Statute adopted by the International Law Commission warned that “the effective functioning of the Court will depend upon the international cooperation and judicial assistance of States” (UN Doc. A/49/10, p. 62). The Court has already emphasized this idea several times. For example, the Pre-Trial Chamber II in the *Al Bashir* case has pointed out “that, unlike domestic courts, the ICC has no direct enforcement mechanism in the sense that it lacks a police force. As such, the ICC relies mainly on the States’ cooperation, without which it cannot fulfill its mandate”.²

The forms of co-operation covered by the general obligation to co-operate are expressly referred to in Part 9 of the Statute dealing with international co-operation and judicial assistance, where Article 86 is inserted. Those forms of co-operation include the arrest and surrender of persons to the Court (Articles 89 and ff.) and other typical forms of international judicial co-operation between States listed in Article 93, such as the identification and whereabouts of persons or location of items, the taking of evidence, the questioning of persons, the service of documents, the execution of searches and seizures, the provision of records and documents or the protection of victims and witnesses.

Doctrine: For the bibliography, see the final comment on Article 86.

Author: Mateus Kowalski (the views expressed are those of the author alone and do not necessarily reflect the views of any other person or institution).

² ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber II, Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir, 26 March 2013, ICC-02/05-01/09-151, para. 22 (<https://www.legal-tools.org/doc/51390ff/>).

Article 86: Obligation of States Parties

States Parties shall, in accordance with the provisions of this Statute [...]

The general obligation to co-operate with the Court has its source in an international treaty – the ICC Statute – and is therefore limited to the States Parties to the Statute, by virtue of the relative effect of treaties, as reflected in Articles 24 and 35 of the 1969 Vienna Convention on the Law of Treaties. Accordingly, the Court has had the occasion to affirm that only State Parties are obliged to co-operate with the Court¹ and that, consequently, the co-operation of a non-State Party cannot be imposed by the Court and would require, in principle, that State’s consent.² The subject of this obligation is the concerned State Party – as the holder of the international legal personality – and not a specific State organ or official.

Nevertheless, Article 87 provides for the possibility of States that are not Parties to the Statute (Article 87(5)) and of intergovernmental organizations (Article 87(6)) to co-operate with the Court. In addition, a Security Council decision adopted under Chapter VII of the Charter of the United Nations establishing an obligation to co-operate with the Court in a given situation is binding on any Member State of the United Nations, whether or not a State Party to the ICC Statute, in accordance with Articles 25 and 103 of the UN Charter. The Court has stated that such obligation to co-operate stems directly from the Charter.³

The Security Council, when referring to the Court the situation in Darfur, Sudan, which was not a State Party, decided “that the Government

¹ For example, ICC, *Prosecutor v. Nourain and Jerbo*, Trial Chamber IV, Decision on Defence Application pursuant to articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan, 2 July 2011, ICC-02/05-03/09-169, para. 14 (*Nourain and Jerbo*, 2 July 2011’) (<https://www.legal-tools.org/doc/891c96/>).

² ICC, *Prosecutor v. Gaddafi and Al-Senussi*, Pre-Trial Chamber I, Decision on the request of the Defence of Abdullah Al-Senussi to make a finding of non-cooperation by the Islamic Republic of Mauritania and refer the matter to the Security Council, 28 August 2013, ICC-01/11-01/11-420, para. 12 (*Gaddafi and Al-Senussi*, 28 August 2013’) (<https://www.legal-tools.org/doc/7342b3/>).

³ ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber II, Decision on the Prosecutor’s Request for a Finding of Non-Compliance Against the Republic of the Sudan, 9 March 2015, ICC-02/05-01/09-227, para. 13 (<https://www.legal-tools.org/doc/59d181/>).

of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution”.⁴ The Court later affirmed this obligation by recalling that Sudan, while being a non-party to the Statute, is under an obligation to co-operate with the Court by virtue of the mentioned Security Council Resolution and the Charter.⁵ In the same resolution, while recognizing that States that are not Parties to the Statute and international organizations do not have a duty to co-operate with the Court, the Security Council urged them to co-operate fully (UNSC Resolution 1593, 2005, para. 2). In comparison, Resolution 827 (1993) setting up the ICTY is more substantial. This Resolution provides on its OP4 an obligation for all states to “cooperate fully” with the Tribunal as well as to take any measures necessary under their domestic law to implement the provisions of the resolution, including the obligation to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the ICTY Statute.

The Security Council has also imposed a duty of co-operation on Libya, which was not a State Party, when referring the situation of Libya to the Court.⁶ This duty only extends to the non-States Parties mentioned in the Security Council’s resolution. In 2013, the Defence of Abdullah Al-Senussi sought from the Court a finding of non-co-operation by Mauritania which extradited Abdullah Al-Senussi to Libya despite the arrest warrant issued by the Court in 2011. Since Mauritania was not a Party to the Statute and the Security Council had imposed an obligation to co-operate with the Court only on Libya, the Court ruled that Mauritania was under no obligation to surrender Abdullah Al-Senussi to the Court (*Gaddafi and Al-Senussi*, 28 August 2013, para. 15).

When the Security Council establishes an obligation to co-operate regarding a non-State Party it is typically expanding the subjective scope of the obligation to co-operate in accordance with the provisions of the Statute to a State that is not a Party to it. Therefore, although the obligation is triggered by a Security Council resolution and thus established under the Char-

⁴ Resolution 1593 (2005), UN Doc. S/RES/1593 (2005), 31 March 2005, para. 2 (‘UNSC Resolution 1593, 2005’) (<https://www.legal-tools.org/doc/4b208f/>).

⁵ ICC, *Prosecutor v. Nourain*, Trial Chamber IV, Decision on the Joint Submission regarding the contested issues and the agreed facts, 30 September 2011, ICC-02/05-03/09-227, para. 14 (<https://www.legal-tools.org/doc/b3f7b1/>).

⁶ Resolution 1970 (2011), UN Doc. S/RES/1970 (2011), 26 February 2011, para. 5 (<https://www.legal-tools.org/doc/00a45e/>).

ter, the decision of the Security Council does not establish an autonomous legal framework for co-operation different than the one provided for in the Statute. The Court has affirmed this view when it decided that the power of the Court to request the co-operation of Sudan in the *Nourain and Jerbo* case was confined to the provisions of the Statute and its supplementary instruments (*Nourain and Jerbo*, 2 July 2011, para. 15).

It is interesting to note that when referring the situation of Sudan (Darfur) to the Court, the Security Council has imposed a duty of co-operation on “all other parties to the conflict in Darfur” (UNSC Resolution 1593, 2005, para. 2), thus including the non-state actors involved in the conflict. However, the legal possibility for the Security Council to impose direct obligations on non-state actors, even if they pose a threat to peace, is questionable. The same applies to international organizations other than the United Nations, non-governmental organizations, private companies or individuals.

Doctrine: For the bibliography, see the final comment on Article 86.

Author: Mateus Kowalski (the views expressed are those of the author alone and do not necessarily reflect the views of any other person or institution).

Article 86: Full Co-operation

cooperate fully with the Court [...]

The expression ‘full co-operation’ should be understood in its broadest sense, comprising a co-operation with the Court in *bona fide*, without reservations and executed in due time. Only a broad understanding of what ‘full co-operation’ entails allows the Court to receive the judicial assistance necessary for the effective investigation and prosecution of a particular case as well as for the pursuit of the Court’s statutory purposes in general.

Article 88 provides that States Parties shall ensure the availability of the necessary legal procedures for them to comply with all requests for co-operation made by the Court under the Statute. This means that the obligation to co-operate with the Court entails the obligation of States Parties to enact any necessary implementing national legislation to enable them to co-operate fully with the Court and comply with its requests. In addition, it should be noted that although the Statute uses the expression ‘request’, it is in fact more of a court order as it generates a compulsory obligation under the Statute. Accordingly, States Parties have, in principle, no discretion to decide whether or not to accede to the request, or even to accede only partially.

From the interpretation of Articles 86 and 87 it is possible to conclude that for the obligation of co-operation to be triggered, a request from the Court is necessary. However, States may co-operate with the Court on their own initiative and on a voluntary basis without the Court’s request, for example by providing information relevant to an ongoing investigation.

The obligation to co-operate, however, is not absolute. The Statute provides for three exceptions to that obligation in which a State, in specific circumstances, may deny a request for assistance: when the request concerns information or documents relating to its national security (Articles 72 and 93(4)); in case of a request for any other type of assistance besides those types referred to in Article 93(1)(a-k), when the assistance requested is prohibited by the law of the requested State (Article 93(1)(l)); when the assistance requested is prohibited in the requested State on the basis of an existing fundamental legal principle of general application and, after consultations with the Court, the matter is not resolved (Article 93(3)).

States Parties may also find themselves in the midst of conflicting obligations. As the Court is based on an international treaty, the Court's requests under the obligation to co-operate may conflict with the obligations of the requested State *vis-à-vis* other States under other international treaties or international customary law. This is the case, for instance, when a State Party receives competing requests for the surrender to the Court (Article 89) and for the extradition to another State of the same person for the same facts. Article 90 of the Statute establishes criteria to resolve such situations while admitting that, in certain circumstances, the requested State may decide to proceed with the extradition to the other State rather than surrendering the person to the Court. Competing requests regarding other forms of assistance may also be resolved in accordance with the criteria established in Article 90 (Article 93(9)(a)).

It is also understood that the requested State is under no obligation to make available information, property or persons under the control of a third State or an international organization – the cases regarding classified information in the possession of the requested State but originated in a third State or international organization are paradigmatic. In such cases, the Court has to direct its request directly to the third State or international organization originator of the classified information in question (Article 93(9)(b)).

Another important impediment limiting the principle of full co-operation concerns the conflict between the Court's request and the requested State obligations under international law with respect to the immunity enjoyed by persons or property of a third State (Article 98). In such cases, the requested State has to notify the Court of the problem in executing the request and has to provide any information relevant to assist the Court in the application of Article 98 (Rule 195(1) of the Rules of Procedure and Evidence).

Article 97 (c) provides that such disputes are to be settled by means of consultations between the requested State and the Court. While there is an obligation for consultations to be carried out in *bona fide* and with the genuine purpose to resolve the matter, that does not mean that there is an obligation to reach a result where the requested State would respond favourably to the request and execute it in its entirety, since, as mentioned above, there may be lawful grounds for the requested State to refuse the execution of the request.

A relevant question is whether States can challenge a request from the Court that they consider to be illegal under the Statute, a Security Council resolution or a *jus cogens* norm. Although the Statute does not establish a specific mechanism for resolving a dispute on a request for cooperation, it will be for the Court to decide on such dispute, without prejudice to any consultations that may exist between the Court and the State concerned to resolve it. Article 119(1) seems to confirm this interpretation when providing that “any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court”.

Doctrine: For the bibliography, see the final comment on Article 86.

Author: Mateus Kowalski (the views expressed are those of the author alone and do not necessarily reflect the views of any other person or institution).

Article 86: Investigation and Prosecution

in its investigation and prosecution

Article 86 expressly provides that the obligation to co-operate refers specifically to the “investigation and prosecution” stages, which have to be understood broadly. Therefore, the obligation applies to the investigation of a case and to the initiation and conduction of proceedings against the person(s) accused of a crime under the jurisdiction of the Court, including the pre-trial, trial and post-trial phases.

This means that an investigation must be initiated for the obligation to operate. The Office of the Prosecutor, headed by the Prosecutor, is responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting the investigations and prosecutions before the Court (Article 42(1)). Investigations may be initiated by the Prosecutor following a referral by a State Party, by the Security Council or by the initiative of the Prosecutor *proprio motu* (Article 13). In the cases where the Prosecutor wishes to initiate an investigation *proprio motu*, the commencement of the investigation has to be authorized by the Pre-Trial Chamber (Article 15(4)) following the procedure provided for in Rule 50 of the Rules of Procedure and Evidence. Only after such authorization has the investigation formally began.

Therefore, there is no obligation to co-operate when the Prosecutor is conducting a preliminary examination of information received related to crimes within the jurisdiction of the Court. The Prosecutor is authorized to seek additional information from States in this preliminary stage (as well as from international organizations, non-governmental organizations and other reliable sources) (Article 15(2)). Nevertheless, it is up to the concerned State to decide if it wishes or not to assist the Prosecutor.

It can be argued that, when the Court is dealing with issues of admissibility (Article 17), the act of assessing whether the case has been or is being duly investigated or prosecuted amounts to an investigation. This interpretation is supported by Article 53(2)(b) which seems to infer that the assessment by the Prosecutor that there is no sufficient basis for a prosecution because the case is inadmissible has to follow an investigation. Therefore, there is an obligation to co-operate under Article 86 when the Court is dealing with issues of admissibility.

The obligation to co-operate ceases if the investigation or the prosecution end or are suspended. Accordingly, if an ongoing investigation or prosecution is deferred by the Security Council under Article 16 of the Statute, the obligation to co-operate is suspended until the end of the period of deferral decided by the Security Council.

Doctrine: For the bibliography, see the final comment on Article 86.

Author: Mateus Kowalski (the views expressed are those of the author alone and do not necessarily reflect the views of any other person or institution).

Article 86: Crimes Within the Jurisdiction of the Court

of crimes within the jurisdiction of the Court.

The obligation to co-operate under Article 86 is limited to the crimes under jurisdiction of the Court. This is a somewhat redundant reference and has the sole effect of confirming that the obligation to co-operate is confined to the scope of jurisdiction of the Court.

The crimes within the jurisdiction of the Court are the “most serious crimes of concern to the international community as a whole” listed in Article 5: the crime of genocide, crimes against humanity, war crimes and the crime of aggression.

The expression “Court” must be understood as including all the organs of the Court, as set out in Article 34 of the Statute: the President; the Appeals Division, the Trial Division and the Pre-Trial Division; the Office of the Prosecutor; and the Registry. However, each organ has different powers and competences and do not have the same type of intervention in what concerns judicial co-operation with the Court. The co-operation is due to the Court as a whole independently of the organ(s) intervening in the specific co-operation request, as long as the concerned organ, and therefore the Court, is acting within its powers and competences under the Statute.

Doctrine:

1. Annalisa Ciampi, “The Obligation to Cooperate”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 1607–38.
2. Claus Kreß and Kimberly Prost, “Article 86”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 2014–18 (<https://www.legal-tools.org/doc/040751/>).
3. Olympia Bekou and Daley J. Birkett (eds.), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice*, Brill Nijhoff, Leiden/Boston, 2016.

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Article 87

Requests for Cooperation: General Provisions

General Remarks:

The ICC Statute establishes a system of judicial co-operation between the Court and the competent authorities of States and organs of international organizations to enforce the substantive criminal law and the jurisdiction of the Court set out in the Statute. Article 87 establishes the general provisions governing the requests for co-operation necessary to make operative the general obligation to co-operate provided for in Article 86.

The draft Statute for an International Criminal Court, adopted by the International Law Commission in 1994,¹ already included some of the general provisions currently referred to in Article 87, although dispersed in different provisions of the draft: Articles 51(2)(3) and 57 referred to the transmission and form of requests; Article 56 referred to the co-operation with non-States Parties. Based on the International Law Commission's draft, a number of proposals were discussed between 1996 and 1998 in the Preparatory Committee for the International Criminal Court. In 1998, the Preparatory Committee adopted an autonomous draft Article on the requests for co-operation with few substantive differences from the final version of Article 87 as subsequently adopted at the Rome Conference, including: it had no provisions regarding the protection of victims, of potential witnesses and of their families (currently in Article 87(4)); the referral of a failure to co-operate by States Parties and non-States Parties to the United Nations General Assembly was still being considered (currently there is no referral to the General Assembly in either case, and in case of failure to co-operate by non-States Parties, the Court "informs" but does not 'refer' the matter to the Assembly of State Parties or the Security Council).

Article 87 affirms the authority of the Court to make binding requests for co-operation to States Parties or, in certain circumstances, to non-States Parties (besides the possibility of seeking the co-operation of international organizations), while providing procedures to be followed in case of failure to co-operate. The rules on the transmission, language and confidentiality

¹ Report of the International Law Commission on the work of its forty-sixth session (2 May 1994–22 July 1994), UN Doc. A/49/10, 2 September 1994 (<https://www.legal-tools.org/doc/f73459/>).

of requests are similar to those in inter-State judicial co-operation under bilateral and multilateral treaties on international judicial assistance and on extradition.

Other Articles in Part 9 of the ICC Statute detail the procedure of specific forms of co-operation, including the arrest and surrender of persons to the Court (Articles 89 and ff.), and other typical forms of judicial assistance in relation to investigations or prosecutions (Articles 93 and ff.). The general rules provided for in Article 87 apply to all forms of co-operation. Rules 176 to 180 of the Rules of Procedure and Evidence address procedural matters regarding the requests for co-operation under Article 87.

Doctrine: For the bibliography, see the final comment on Article 87.

Author: Mateus Kowalski (the views expressed are those of the author alone and do not necessarily reflect the views of any other person or institution).

Article 87(1)

1. (a) The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession.

Subsequent changes to the designation shall be made by each State Party in accordance with the Rules of Procedure and Evidence.

(b) When appropriate, without prejudice to the provisions of subparagraph (a), requests may also be transmitted through the International Criminal Police Organization or any appropriate regional organization.

The Court has the authority to make requests to States Parties for cooperation. From the interpretation of this provision in conjunction with Article 86, it results that these requests are binding on States Parties which have the obligation to fully comply with them without delay.

The expression “Court” refers to any organ competent to make a request. Rule 176(2) and (4) of the Rules of Procedure and Evidence provides that the Registrar transmits the requests made by the Chambers and receives the replies from States or international organizations, whereas the requests made by the Prosecutor are dealt with within the same organ, as it is for the Office of the Prosecutor to transmit the request made by the Prosecutor and to receive the replies. The Pre-Trial Chamber I, in the *Lubanga case*, has taken the view that the Pre-Trial Chamber, assisted by the Registry, is the only organ of the Court competent to make and transmit a cooperation request for arrest and surrender.¹

An important part of the total of requests made by the Chambers relate to requests presented by the Defence under Article 57(3)(b) and Rule 116, as the collection of evidence necessary to the proper preparation of a person’s defence is essential to ensure a fair trial. Illustrating the importance given to the co-operation for the benefit of the Defence, in the *Kenyatta case*, the Pre-Trial Chamber I affirmed that the unlikelihood that the Democratic Republic of Congo would comply in time with the request

¹ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Prosecutor’s Application for a warrant of arrest, Article 58, 10 February 2006, ICC-01/04-01/06-1-Corr-Red, para. 117 (<https://www.legal-tools.org/doc/af6679/>).

to transmit certain documents sought by the Defence was a valid reason to postpone a hearing.²

In any case, the authority to make the request for co-operation lies with the Chambers and not with the Defence. Therefore, the Chambers may decide to not proceed with a request sought by the Defence. In the case of *Katanga and Ngudjolo*, the Trial Chamber II has rejected part of an urgent motion filed by the Defence of Germain Katanga seeking the Chamber's assistance to obtain the co-operation of the Democratic Republic of the Congo, as it considered that, under Article 93(1), "a request for cooperation cannot take the form of questions put to a government about the facts concerning a case currently before the Chamber".³

The Court has affirmed in different occasions that the requests for co-operation should adhere to the requirements of specificity, relevance and necessity,⁴ and has also noted that they must reflect items which remain specific to the charges.⁵ Moreover, the requests for co-operation have to be sufficiently precise to enable the requested State to execute the requests. In the *Katanga and Ngudjolo* case, the Court affirmed that "where a request is made for the provision of documents [...] it must target specific and identifiable items or categories of item. [...] The Court cannot merely request a government's assistance in obtaining all types of unidentified or unidentifiable documents that might be in the government's possession" (*Katanga and Ngudjolo*, 6 December 2010, para. 13). In the *Kenyatta* case, when assessing the relevance and necessity of a request by the Prosecution in what concerned the time covered by the request, the Court took the view that investigative inquiries are not necessarily confined to the immediate period of violence and may be conducted with respect to any period where prepar-

² ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the Defence Request for Postponement of the Confirmation Hearing, 25 April 2008, ICC-01/04-01/07-446, p. 6 (<https://www.legal-tools.org/doc/fla7a4/>).

³ ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, Decision on the second motion of the Defence for Germain Katanga seeking the cooperation of the Democratic Republic of the Congo, 6 December 2010, ICC-01/04-01/07-2619-Red-tENG, para. 12 ('*Katanga and Ngudjolo*, 6 December 2010') (<https://www.legal-tools.org/doc/283dee/>).

⁴ For example, *Prosecutor v. Nourain*, Trial Chamber IV, Decision on "Defence Application pursuant to Articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the African Union", 4 July 2011, ICC-02/05-03/09-170, paras. 15 ff. (<https://www.legal-tools.org/doc/06bc5f/>).

⁵ ICC, *Prosecutor v. Kenyatta*, Trial Chamber V(b), Decision on the Prosecution's revised cooperation request, 31 July 2014, ICC-01/09-02/11-937 ('*Kenyatta*, 31 July 2014') (<https://www.legal-tools.org/doc/9e7a87/>).

atory or post-violence acts have been performed by the accused (*Kenyatta*, 31 July 2014, para. 37).

As the Court had occasion to observe, the execution of requests for co-operation is not conditioned by an accused's consent (*Kenyatta*, 31 July 2014, para. 47). This observation is a logical consequence of the obligation of a State Party to fully co-operate with the Court. It is not possible to conceive a judicial proceeding where the performance of certain judicial acts would depend on the will of the accused.

Article 87(1) enumerates the channels for transmission of the requests for co-operation. Subparagraph (a) indicates a specific channel of transmission – the diplomatic channel – while authorizing the transmission by other established means. This provision maintains the traditional and more formal approach on the communication with States as the default option. In such cases, the Court sends the request to the diplomatic mission of the requested State within the respective area of jurisdiction – in principle, to its Embassy in the Hague; then the mission sends it to the Ministry of Foreign Affairs in the capital of the requested State; the Ministry will then forward it to the national authority responsible for international judicial assistance in criminal matters. The response follows the inverse route.

However, subparagraph (a) opens the possibility for each State Party to designate other appropriate channels for routing the requests. This more pragmatic approach eliminates from the chain the diplomatic intermediary entities – the Ministries of Foreign Affairs, including the diplomatic missions – which have no judiciary competence, thus speeding up the transmission and ensuring a more efficient execution of requests. In these cases, the communications are established directly between the Court and the competent national authorities, usually in the ministry of justice or in the prosecutor general's office. This mixed approach is the one usually found in treaties on international judiciary assistance and on extradition.

The designation by States of a channel other than the diplomatic for the transmission of requests is made upon the deposit of the respective instrument of ratification, acceptance, approval or accession to the ICC Statute. The designation has to include all relevant information about the national authorities responsible for receiving the requests for co-operation (Rule 177(1)). Since the depository of the Rome Statute is the Secretary-General of the United Nations, the information on the designation of the alternative channel has to be conveyed to the Court by the Office of Legal Affairs of the United Nations. The Registrar is responsible for obtaining

such information from the Secretary-General (Rule 176(1)). The channel so designated is, in principle, exclusive and has to be followed for the transmission of every request. A State may make subsequent changes to the designation. The Registrar shall be the recipient of communications concerning such changes (Rule 176(3)). Changes concerning the channel of communication shall be communicated in writing to the Registrar at the earliest opportunity (Rule 180(1)) and shall take effect at a time agreed between the Court and the State or, in the absence of such an agreement, forty-five days after the Court has received the communication (Rule 180(2)).

Subparagraph (b) of Article 87(1) allows for requests to also be transmitted through Interpol or any appropriate regional organization, when appropriate and without prejudice to the other channels available under subparagraph (a).

Doctrine: For the bibliography, see the final comment on Article 87.

Author: Mateus Kowalski (The views expressed are those of the author alone and do not necessarily reflect the views of any other person or institution).

Article 87(2)

2. Requests for cooperation and any documents supporting the request shall either be in or be accompanied by a translation into an official language of the requested State or one of the working languages of the Court, in accordance with the choice made by that State upon ratification, acceptance, approval or accession.

Subsequent changes to this choice shall be made in accordance with the Rules of Procedure and Evidence.

Article 87(2) deals with the language of the requests for co-operation and of the documents supporting the request. In the context of judiciary co-operation between States, usually the requests have to be transmitted in the language of the requested State. Article 87(2), while embracing this approach, also provides for cases where the responsibility of the translation would lie with the requested State. Article 87(2) provides that the requests and supporting documents have to be transmitted in the official language of the requested State. In case the official language of the requested State is not the language in which the request was issued, then the original document has to be accompanied by a translation into the official language of the State.

The choice of language should be made by the State upon the deposit of the respective instrument of ratification, acceptance, approval or accession to the Statute. A State may make subsequent changes to the language chosen. The Registrar shall be the recipient of communications concerning such changes, which have to be made in writing and at the earliest opportunity (Rules 176(3) and 180(1)). When a requested State has more than one official language, it may indicate that the requests for co-operation and any supporting documents can be drafted in any one of its official languages (Rule 178(1)). When the requested State has not chosen a language, the request for co-operation shall either be in or be accompanied by a translation into one of the working languages of the Court (Rule 178(2)), that is, into English or French (Article 50(2)). To alleviate the burden on the Court to produce translations, instead of receiving a translation into their official language, States may in theory choose to receive the requests in one of the working languages of the Court. The State would then be responsible for translating it into its own official language.

Article 87(2), referring to the choice of language made by a “State upon ratification, acceptance, approval or accession” of the Statute, should be interpreted as to apply only to States Parties. However, a non-State Party that has agreed to provide assistance to the Court (Article 87(5)) may also choose the language for requests. If it has not made a choice, then the requests for co-operation shall either be in or be accompanied by a translation into one of the working languages of the Court (Rule 179).

Doctrine: For the bibliography, see the final comment on Article 87.

Author: Mateus Kowalski (the views expressed are those of the author alone and do not necessarily reflect the views of any other person or institution).

Article 87(3)

3. The requested State shall keep confidential a request for cooperation and any documents supporting the request, except to the extent that the disclosure is necessary for execution of the request.

Article 87(3) imposes an obligation on the requested State to treat with confidentiality the request for co-operation received from the Court as well as any supporting documents attached thereto. The confidentiality of judicial acts in criminal investigations is essential to the success of the proceedings, whereas its disclosure can compromise the preservation of evidence, the availability of witnesses or the execution of an arrest warrant. When making a request for co-operation, the Court may find useful to stress such obligation.¹

In the *Kenyatta* case, the Prosecution requested the Trial Chamber V to caution Kenya on its confidentiality obligation under Article 87(3) after a disclosure of the existence and volume of Prosecution's requests for assistance and the specific information requested.² However, noting the apology and assurances provided by Kenya, the Trial Chamber considered the Prosecutor's request moot (*Kenyatta*, 3 July 2013, para. 17).

Keeping the requests and related documentation confidential is equally important in the context of the co-operation with non-State Parties. Given that Article 87(3) refers to States in general without apparent distinction between Parties and non-Parties, the obligation of confidentiality is, in principle, applicable also to a non-State Party that has agreed to provide assistance to the Court under Article 87(5). In addition, the Court may also seek further assurances of confidentiality from non-States Parties, including in the arrangements, agreements or other means used to establish the co-operation.

¹ For example, ICC, *Prosecutor v. Muthaura, Kenyatta and Hussein Ali*, Pre-Trial Chamber II, Decision ordering the Registrar to prepare and transmit a request for cooperation to the Republic of Kenya for the purpose of securing the identification, tracing and freezing or seizure of property and assets of Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 5 April 2011, ICC-01/09-02/11-42, p. 5 (<https://www.legal-tools.org/doc/e75157/>).

² ICC, *Prosecutor v. Kenyatta*, Trial Chamber V(b), Decision concerning the Government of Kenya's submissions on its cooperation with the Court, 3 July 2013, ICC-01/09-02/11-770, para. 15 ('*Kenyatta*, 3 July 2013') (<https://www.legal-tools.org/doc/b3d8fc/>).

While it seems that the same principle should apply to the co-operation with international organizations under Article 87(6), Article 87(3) only refers to States thus not being *per se* applicable to international organizations. Nevertheless, the Court may ask for assurances from international organizations that the requests and related documentation would be treated as being confidential. The enforceability, however, may constitute a challenge, also because such assurances don't have in principle legal binding nature.

In some circumstances, a request for co-operation cannot be executed without at least a partial disclosure of the information contained in the request. This is, for instance, the case when the execution of the request would require the co-operation of public or private entities not subject to the duty of confidentiality or to whom the request and related information would have to be disclosed by law. For such cases, Article 87(3) establishes an exception to the obligation of confidentiality. The extent of the necessary disclosure is left in a great measure to the requested State. It should be understood, however, that the disclosure should be limited to the strictly necessary. Moreover, the Court may consult with the State when the confidentiality of a given request raises specific issues, including when the Court does not wish that the State discloses any part or at least certain specific parts of the request. When the State identifies problems in executing the request due to its confidentiality, it may also wish to consult with the Court under Article 97.

Doctrine: For the bibliography, see the final comment on Article 87.

Author: Mateus Kowalski (the views expressed are those of the author alone and do not necessarily reflect the views of any other person or institution).

Article 87(4)

4. In relation to any request for assistance presented under this Part, the Court may take such measures, including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families. The Court may request that any information that is made available under this Part shall be provided and handled in a manner that protects the safety and physical or psychological well-being of any victims, potential witnesses and their families.

Article 87(4) is linked to Article 68 regarding the protection of victims and witnesses and their participation in the proceedings. The importance conferred to this provision is reflected in its applicability “to any request for assistance” under Part 9, meaning that it is applicable in all cases of co-operation between the Court and States Parties, non-States Parties and international organizations.

The requests of co-operation involving victims and witnesses are of particular sensitivity. While the co-operation of victims and witnesses is essential to the proceedings, their direct or indirect involvement may put them and their families in risk of violent acts, psychological intimidation or other types of threats and retaliations. The Court may thus take the necessary measures (first part of paragraph 4) or may request that any information available be handled in an adequate manner (second part of paragraph 4) to, at the same time, ensure the victims and witnesses involvement in the proceedings, and the protection of their physical and psychological well-being.

The Statute leaves to the Court the assessment on the measures and content of the request adequate to a specific case. They may include the withholding of information in the request that might lead to the identification of victims and witnesses; the request to the concerned State or international organization to take certain steps to protect the concerned persons; the order that certain information in the request should not be disclosed in any circumstance (see Article 87(3)); or even that, when executing the request, the victim or witness is not confronted with certain details that might cause them unnecessary psychological suffering. For instance, the Pre-Trial Chamber I, when requesting Uganda to arrest and surrender Bosco Ntaganda, has at the same time requested Uganda “to provide and handle any in-

formation that is made available to it with respect to this request in a manner that protects the safety and physical or psychological well-being of any victims, potential witnesses and their families”.¹

Doctrine: For the bibliography, see the final comment on Article 87.

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¹ ICC, *Prosecutor v. Ntaganda*, Pre-Trial Chamber I, Request to the Republic of Uganda for the Arrest and Surrender of Bosco Ntaganda, 8 February 2008, ICC-01/04-02/06-13-US, p. 3 (<https://www.legal-tools.org/doc/a3b04a/>).

Article 87(5)(a)

5. (a) *The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.*

The general obligation to co-operate with the Court has its source in an international treaty – the Rome Statute – and is therefore limited to the States Parties to the Statute, by virtue of the relative effect of treaties, as reflected in Articles 24 and 35 of the 1969 Vienna Convention on the Law of Treaties. Consequently, the obligation to co-operate established in Article 86 only applies to States Parties to the Statute. The Court has had the occasion to affirm that only State Parties are obliged to co-operate with the Court¹ and that, consequently, the co-operation of a non-State Party cannot be imposed by the Court and would require, in principle, that State’s consent.²

However, the Statute recognizes that the co-operation of non-States Parties is relevant to fulfil the greater purpose of putting “an end to impunity for the perpetrators of [the most serious international] crimes”, as referred to in the Preamble. In this regard, the preamble, further states that this is an objective to be pursued by all States, and not only by the States Parties to Statute, when recalling the “duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”. Accordingly, Article 87(5) provides for the possibility of States that are not Parties to the Statute to co-operate with the Court.

From the wording of subparagraph (a), the co-operation with non-States Parties could be established either on *ad hoc* basis with regard to a specific situation or on a general level following the conclusion by a non-State Party of a general co-operation agreement with the Court. Moreover, the scope of the co-operation is, in principle, established through negotiations between the Court and the non-State Party. Therefore, the scope may

¹ ICC, *Prosecutor v. Nourain*, Trial Chamber IV, Decision on “Defence Application pursuant to articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan”, 2 July 2011, ICC-02/05-03/09-169, para. 14 (<https://www.legal-tools.org/doc/891c96/>).

² ICC, *Prosecutor v. Gaddafi and Al-Senussi*, Pre-Trial Chamber I, Decision on the request of the Defence of Abdullah Al-Senussi to make a finding of non-cooperation by the Islamic Republic of Mauritania and refer the matter to the Security Council, 28 August 2013, ICC-01/11-01/11-420, para. 12 (<https://www.legal-tools.org/doc/7342b3/>).

include only some – and not necessarily all – of the forms of co-operation envisaged in Part 9 of the Statute, contrary to what happens with States Parties that are bound to all forms of co-operation provided for in the Statute.

In what concerns the form under which such co-operation relationship would be constituted, the formulation of Article 87(5)(a) is wide enough to encompass any form that satisfies the two sides, either a legally binding instrument (that is, a treaty) or a less formal and non-legally binding arrangement. Accordingly, Regulation 107 of the Regulations of the Court distinguishes between three types of arrangements and agreements on co-operation: agreements setting out a general framework for co-operation, which are to be concluded by the President on behalf of the Court; arrangements or agreements to facilitate the co-operation of a State, intergovernmental organization or person under Article 54(3)(d), entered into by the Prosecutor; and any other arrangement or agreement on co-operation but not setting a general framework for co-operation, which shall be concluded by the President or by delegation by the relevant organ under whose authority the arrangement or agreement has been negotiated.

Besides those types of arrangements and agreements, Article 87(5) provides that the co-operation can also be based “on any other appropriate basis” (for example, a unilateral declaration). This is the case, for instance, where a non-State Party accepts the jurisdiction of the Court. Article 12(3) provides that “[t]he accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9”. When lodging with the Registrar the declaration accepting the jurisdiction of the Court, the non-State Party – as a third State – is expressly accepting the obligation to cooperate with the Court. Part 9 of the Statute is then applicable in its entirety. Nevertheless, although having accepted the jurisdiction of the Court, the State does not lose its status of non-State Party.

Doctrine: For the bibliography, see the final comment on Article 87.

Author: Mateus Kowalski (the views expressed are those of the author alone and do not necessarily reflect the views of any other person or institution).

Article 87(5)(b)

(b) Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council.

In accordance with subparagraph (b), when a non-State Party does not comply with a request from the Court under an arrangement or agreement, the State is considered to have failed to co-operate. In such case, the Court may decide or not to inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council. However, the Court is under no obligation to also inform the Assembly when it informs the Security Council (and vice-versa). For instance, as in other cases, the Pre-Trial Chamber IV decided to only inform the Security Council of the failure to co-operate of Sudan, a non-State Party, with regard to the arrest and surrender of Abdallah Banda.¹ Moreover, the Court may only inform the Security Council when the matter was referred to the Court by the Security Council.

It is interesting to note that while Article 87(5)(b) provides that the Court may “inform” of the failure to co-operate by a non-State Party, Article 87(7) regarding the non-co-operation of States Parties provides that the Court may “make a finding” and “refer” it. The difference of the strength of reactions by the Court may be explained by the different sources of the obligation to co-operate: while the co-operation relationship with non-State Parties is based on the arrangement or agreement, the obligation to co-operate by States Parties results directly from the Statute. This distinction might also be explained by political considerations, to avoid putting States Parties and non-States Parties in an equal footing *vis-à-vis* the Court when they fail to co-operate. The failure to co-operate in violation of an international obligation stemming from a legally binding agreement on co-operation entails the international responsibility of the non-State Party.

¹ ICC, *Prosecutor v. Nourain*, Trial Chamber IV, Decision on the Prosecution’s Request for a Finding of Non-Compliance, 19 November 2015, ICC-02/05-03/09-641 (<https://www.legal-tools.org/doc/bd9e38/>).

Under Article 112(2)(f), the Assembly of States Parties has the competence to consider any question relating to non-co-operation by non-States Parties as much as by States Parties. Any action from the Assembly has a non-judicial nature and consists mainly in diplomatic efforts to promote co-operation and react to non-co-operation. The Assembly has adopted procedures relating to non-co-operation,² where it considers two scenarios that may require action by the Assembly: a scenario where the Court has referred the failure to co-operate to the Assembly under Article 87(5), which may or may not require urgent action by the Assembly to bring about co-operation; exceptionally, a scenario where the Court has not yet informed the Assembly, but a serious incident of failure to co-operate regarding a request for arrest and surrender might occur or is ongoing and urgent action by the Assembly may help bring about co-operation (ICC ASP, Resolution 5, Annex, 21 December 2011, para. 7).

The Assembly has some latitude on the means to address the failure to co-operate, including entirely informal or formal responses, as well as informal and urgent responses as precursors to a formal response, in particular where it is still possible to achieve co-operation. Formal responses may include actions taken by the Assembly or the Bureau, such as open letters from the President of the Assembly to the State concerned; formal meetings with a representative of the concerned State; public meetings on the matter to allow for an open dialogue with the requested State; discussion in a plenary session of the Assembly and adoption of a resolution with recommendations on the matter (ICC ASP, Resolution 5, Annex, 21 December 2011, para. 14). Informal responses may include the good offices by the President of the Assembly (para. 15).

The failure to co-operate may also be informed to the Security Council, when the Court's jurisdiction regarding the case in question was triggered by a referral of that United Nations organ. The Security Council may then take the action it deems appropriate, including the adoption of sanctions under Article 41 of the Charter of the United Nations.

It should be noted that a non-State Party may be required to co-operate with the Court under other sources of international law than the Statute. A Security Council decision adopted under Chapter VII of the

² ICC ASP, Strengthening the International Criminal Court and the Assembly of States Parties, 21 December 2011, ICC-ASP/10/Res.5, Annex ('ICC ASP, Resolution 5, Annex, 21 December 2011') (<https://www.legal-tools.org/doc/ec50d0/>).

Charter of the United Nations establishing an obligation to co-operate with the Court in a given situation is binding on the United Nations Member State to which it is addressed, whether or not a State Party to the ICC Statute, in accordance with Articles 25 and 103 of the Charter. The Court has observed that such obligation to co-operate stems directly from the Charter.³ It is, therefore, not based on Article 87(5).

The Security Council, when referring to the Court the situation in Darfur, Sudan, which was not a State Party, decided “that the Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution”.⁴ The Court later affirmed this obligation by recalling that Sudan, while being a non-State Party to the Statute, is under an obligation to co-operate with the Court by virtue of the mentioned Security Council resolution and the Charter.⁵ By the same resolution, while recognizing that States that are not Parties to the Statute and international organizations do not have a duty to co-operate with the Court, the Security Council urged them to co-operate fully (UNSC Resolution 1593, 2005, para. 2).

The Security Council has also imposed a duty of co-operation on Libya, which was not a State Party, when referring the situation of Libya to the Court.⁶ This duty only extends to the non-State Party mentioned in the Security Council’s resolution – Libya. In 2013, the Defence of Abdullah Al-Senussi sought from the Court a finding of non-co-operation by Mauritania which extradited Abdullah Al-Senussi to Libya despite the arrest warrant issued by the Court in 2011. Since Mauritania was not a Party to the Statute and the Security Council had imposed an obligation to co-operate

³ ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber II, Decision on the Prosecutor’s Request for a Finding of Non-Compliance against the Republic of the Sudan, 9 March 2015, ICC-02/05-01/09-227, para. 13 (<https://www.legal-tools.org/doc/59d181/>).

⁴ Resolution 1593 (2005), UN Doc. S/RES/1593 (2005), 31 March 2005, para. 2 (‘UNSC Resolution 1593, 2005’) (<https://www.legal-tools.org/doc/4b208f/>).

⁵ ICC, *Prosecutor v. Nourain*, Trial Chamber IV, Decision on the Joint Submission regarding the contested issues and the agreed fact, 30 September 2011, ICC-02/05-03/09-227, para. 14 (<https://www.legal-tools.org/doc/b3f7b1/>).

⁶ Resolution 1970 (2011), UN Doc. S/RES/1970 (2011), 26 February 2011, para. 5 (<https://www.legal-tools.org/doc/00a45e/>).

with the Court only on Libya, the Court ruled that Mauritania was under no obligation to surrender Abdullah Al-Senussi to the Court.⁷

When the Security Council establishes an obligation to co-operate regarding a non-State Party, it is typically expanding the subjective scope of the obligation to co-operate in accordance with the provisions of the Statute to a State that is not a Party to it. Therefore, although the obligation is triggered by a Security Council resolution under the Charter of the United Nations, the decision of the Security Council does not establish an autonomous legal framework for co-operation different than the one provided for in the Statute. The Court has affirmed this view when it decided that the power of the Court to request the co-operation of Sudan in the *Nourain* case was confined to the provisions of the Statute and its supplementary instruments.⁸

It is interesting to note that when referring the situation of Darfur, Sudan to the Court, the Security Council has imposed a duty of co-operation on “all other parties to the conflict in Darfur” (UNSC Resolution 1593, 2005, para. 2), thus including the non-state actors involved in the conflict. However, the legal possibility for the Security Council to impose direct obligations on non-state actors, even if they pose a threat to peace, is questionable. The same applies to international organizations other than the United Nations, non-governmental organizations, private companies or individuals.

Nevertheless, and although subparagraph (b) only refers to the failure to co-operate with requests pursuant to an arrangement or agreement, it should be understood that the Court may also inform the Security Council and the Assembly of a case of non-co-operation based on an obligation to co-operate established by the Security Council under Chapter VII of the Charter. If not, the Court would find itself in the absurd situation of not being able to inform the Security Council of a failure to comply with the obligation to co-operate established by a decision of that organ. For instance,

⁷ ICC, *Prosecutor v. Gaddafi and Al-Senussi*, Pre-Trial Chamber I, Decision on the request of the Defence of Abdullah Al-Senussi to make a finding of non-cooperation by the Islamic Republic of Mauritania and refer the matter to the Security Council, 28 August 2013, ICC-01/11-01/11-420, para. 15 (<https://www.legal-tools.org/doc/7342b3/>).

⁸ ICC, *Prosecutor v. Nourain*, Trial Chamber IV, Decision on “Defence Application pursuant to articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan”, 2 July 2011, ICC-02/05-03/09-169, para. 15 (<https://www.legal-tools.org/doc/891c96/>).

in the *Harun and Ali Kushayb* case, the Pre-Trial Chamber II decided to inform the Security Council that Sudan was failing to comply with its obligation to co-operate stemming from the Council's Resolution 1593 of 2005.⁹

Moreover, the view may be held that the obligation enshrined in Article 1 of all the four 1949 Geneva Conventions to undertake and ensure the respect of the respective convention has become a customary international law obligation. Accordingly, it has been argued that the co-operation with the Court, including by non-States Parties to the Statute, may be sometimes the only, or at least the most effective way to comply with their obligation to ensure international humanitarian law. Although it is perhaps too far-fetched to expect anytime soon a practical situation where such obligation would become the basis for the co-operation of a non-State Party with the Court, it is certainly a possibility worth discussing.

Doctrine: For the bibliography, see the final comment on Article 87.

Author: Mateus Kowalski (the views expressed are those of the author alone and do not necessarily reflect the views of any other person or institution).

⁹ ICC, *Prosecutor v. Harun and Ali Kushayb*, Pre-Trial Chamber I, Decision informing the United Nations Security Council about the lack of cooperation by the Republic of the Sudan, 25 May 2010, ICC-02/05-01/07-57, p. 7 (<https://www.legal-tools.org/doc/565d18/>).

Article 87(6)

6. The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate.

As is the case with non-States Parties, international organizations are not under an obligation to co-operate with the Court. However, the Statute recognizes that the co-operation of international organizations, in particular those that have a presence in the territory where the crimes have been committed, may be relevant to the activities of the Court.

Article 87(6) provides for two types of co-operation with international organizations: the Court may ask an international organization to provide information or documents; and the Court may ask for other forms of co-operation and assistance as may be agreed upon. In both cases, the co-operation is, in principle, voluntary. Although the wording of this provision seems to put the Court in the active position of seeking the information, it cannot be interpreted as precluding the Court from receiving and using information submitted by international organizations which has not been ‘asked’ by the Court.

As in the case of non-States Parties, Regulation 107 distinguishes between three types of arrangements and agreements on co-operation that may be concluded with international organizations: agreements setting out a general framework for co-operation, which are to be concluded by the President on behalf of the Court; arrangements or agreements to facilitate the co-operation of a State, intergovernmental organization or person under Article 54(3)(d), entered into by the Prosecutor; and any other arrangement or agreement on co-operation but not setting a general framework for co-operation, which shall be concluded by the President or, by delegation, by the relevant organ under whose authority the arrangement or agreement has been negotiated.

Although Article 87(6) does not *per se* impose any obligation to co-operate, such obligation may stem from a legally binding instrument. For example, Part III of the Relationship Agreement between the International Criminal Court and the United Nations, concluded pursuant Article 2 of the Statute, establishes a framework for co-operation between the two interna-

tional organizations, including on: the provision to the Court of such information or documents as the Court may request (Article 15(1)); the testimony of United Nations officials (Article 16); the co-operation between the Security Council and the Court (Article 17); the co-operation between the United Nations and the Prosecutor (Article 18); the protection of confidentiality (Article 20).

The co-operation with the United Nations includes the co-operation with peacekeeping operations, which are subsidiary organs of the United Nations. In fact, some peacekeeping operations have been expressly mandated by the Security Council to co-operate with the Court in the arrest and bringing to justice of those responsible for genocide, war crimes and crimes against humanity. This is the case with MINUSCA in relation to the Central African Republic¹ and MONUSCO in relation to the Democratic Republic of Congo.²

In the *Nourain* case, the Defence has requested the Trial Chamber IV to ask the African Union to provide certain documents to the accused.³ The Court found that, in order to seek co-operation from international organizations, the request has also to comply with the requirements of specificity, relevance and necessity, as in the case of co-operation with States.⁴ In the same case, the Trial Chamber IV has invited (and not ordered) the representatives of the African Union to consult, without delay, with the Chamber in case it identifies problems in executing the request.⁵ In another example, concerning the *Lubanga* case, the Pre-Trial Chamber I has ordered the Registrar to “immediately send a cooperation request to the United Nations in order to obtain notes of those interviews of MONUC officials with [cer-

¹ Resolution 2301 (2016), UN Doc. S/RES/2301 (2016), 26 July 2016, para. 35(a)(iii) (<https://www.legal-tools.org/doc/51e9b4/>).

² Resolution 2277 (2016), UN Doc. S/RES/2277 (2016), 30 March 2016, para. 35(ii)(d) (<https://www.legal-tools.org/doc/bd01b8/>).

³ ICC, *Prosecutor v. Nourain*, The Defence, Defence Application pursuant to Articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the African Union, 11 May 2011, ICC-02/05-03/09-146 (<https://www.legal-tools.org/doc/378e64/>).

⁴ ICC, *Prosecutor v. Nourain*, Trial Chamber IV, Decision on “Defence Application pursuant to Articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the African Union”, 4 July 2011, ICC-02/05-03/09-170, para. 14 (*‘Nourain*, 4 July 2011’) (<https://www.legal-tools.org/doc/06bc5f/>).

⁵ ICC, *Prosecutor v. Nourain*, Trial Chamber IV, Public redacted Decision on the second defence’s application pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute, 21 December 2011, ICC-02/05-03/09-268-Red, p. 13 (<https://www.legal-tools.org/doc/f856b9/>).

tain] witnesses”.⁶ The co-operation request was based in the Relationship Agreement with the United Nations and also in the 2005 Memorandum of Understanding between MONUC (now MONUSCO) and the Court.

The second part of Article 87(6) provides that the Court may ask “other forms of cooperation and assistance [...] which are in accordance with its competence or mandate”, following the principle that international organizations may only exercise the powers that are conferred to them by their constitutive instruments. Although the wording seems to suggest that it is for the Court to determine whether the request is within the scope of competence or mandate of the international organization, it would be in principle for the concerned organization to inform the Court that is unable to comply with a request due to the lack of statutory competence.

However, the Court may find itself in a position where it has to decide on the competence of an international organization. For instance, the Defence may argue before the Court that the acts of co-operation performed by the requested international organization fall out of its competence and, therefore, should not be admissible due to the violation of the second part of Article 87(6). The Court would have, in principle, to make a determination on the admissibility of the co-operation provided. Nevertheless, it is reasonable to expect that the Court would rely on the interpretation by the concerned international organization of its own statutes, unless the non-competence was manifest and concerned an organization’s statutory rule of fundamental importance.

Contrary to what happens in relation to States Parties and non-States Parties, Article 87(6) is moot on the eventuality of failure to co-operate by an international organization. Accordingly, Article 112(2)(f) does not confer to the Assembly of States Parties the competence to consider a question of non-co-operation involving international organizations. Consequently, any violation of an obligation to co-operate between the Court and another international organization has to be dealt with within the context of the bilateral and legally binding co-operation agreement, if any. A failure to co-operate under such agreement might, in theory, entail international responsibility. Nevertheless, in cases where the international organization does not comply with requests from the Court – either in the case where a legal

⁶ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on Defence Requests for Disclosure of Materials, 17 November 2006, ICC-01/04-01/06-718, p. 7 (<https://www.legal-tools.org/doc/fc1b60/>).

obligation to co-operate exists or not – the Court has no specific competence to submit the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

Also contrary to what happens with non-States Parties to the Statute that are Parties to the Charter of the United Nations, when the situation is referred to the Court by the Security Council, the Council cannot impose direct obligations to international organizations other than the United Nations, given that they are not Parties to the Charter.

Doctrine: For the bibliography, see the final comment on Article 87.

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Article 87(7)

7. Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

Article 87(7) addresses the issue of non-compliance by States Parties to the Statute. The wording of the provision implies that for a failure to comply to be relevant it has to have the effect of preventing the Court of conducting its judicial activity regarding a certain case. Since every judicial act of the Court has a specific function in the course of the proceedings, this condition should be interpreted in a broad sense to include, in principle, all requests for co-operation of the Court. In any event, only in the case of a relevant failure to comply may the Court “make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council”. As noted by the Assembly of States Parties, “this needs to be distinguished from a situation where there is no specific Court request and a State Party has yet to implement the Rome Statute domestically in such a manner as to be able to comply with Court requests, which may lead to non-cooperation in the medium or longer-term future”.¹

The obligation to co-operate, however, is not absolute and there may be justifiable reasons for States Parties to not comply with a request for co-operation. The Statute provides for three exceptions to that obligation in which a State Party, in specific circumstances, may deny a request for assistance: when the request concerns information or documents relating to its national security (Articles 72 and 93(4)); in case of a request for any other type of assistance besides those types referred to in Article 93(1)(a-k), when the assistance requested is prohibited by the law of the requested State (Article 93(1)(l)); when the assistance requested is prohibited in the requested State on the basis of an existing fundamental legal principle of

¹ ICC ASP, Strengthening the International Criminal Court and the Assembly of States Parties, 21 December 2011, ICC-ASP/10/Res.5, Annex, para. 5 (‘ICC-ASP, Resolution 5, Annex, 21 December 2011’) (<https://www.legal-tools.org/doc/ec50d0/>).

general application and, after consultations with the Court, the matter is not resolved (Article 93(3)).

States Parties may also find themselves in the midst of conflicting obligations. As the Court is based on an international treaty, the Court's requests under the obligation to co-operate may conflict with the obligations of the requested State vis-à-vis other States under other international treaties or international customary law. This is the case, for instance, when a State Party receives competing requests for the surrender to the Court (Article 89) and for the extradition to another State of the same person for the same facts. Article 90 establishes criteria to resolve such situations while admitting that, in certain circumstances, the requested State Party may decide to proceed with the extradition to the other State rather than surrendering the person to the Court. Competing requests regarding other forms of assistance may also be resolved in accordance with the criteria established in Article 90 (Article 93(9)(a)).

It is also understood that the requested State Party is under no obligation to make available information, property or persons under the control of a third State or an international organization – the cases regarding classified information in the possession of the requested State but originated in a third State or international organization are paradigmatic. In such cases, the Court has to direct its request directly to the third State or international organization originator of the classified information in question (Article 93(9)(b)).

Another important impediment limiting the principle of full co-operation concerns the conflict between the Court's request and the requested State obligations under international law with respect to the immunity enjoyed by persons or property of a third State (Article 98). In such cases, the requested State has to notify the Court of the problem in executing the request and has to provide any information relevant to assist the Court in the application of Article 98 (Rule 195(1)). The Democratic Republic of Congo has argued that it could not arrest Omar Al Bashir while he was present in its territory as he enjoyed immunity as the president of Sudan. While acknowledging that a conflict between the request of the Court and the immunity of a Head of State would, in principle, require the Court to request the co-operation of the Sudan for the waiver of the immunity of Omar Al Bashir in accordance with Article 98(1), the Court noted that it was not required in that case. The Court took the position that since the Security Council, in its resolution 1593 (2005) referring the situation in Su-

dan (Darfur) to the Court, had decided that Sudan was under the obligation to fully co-operate with the Court, that had the effect of eliminating any impediment to the proceedings before the Court, including any immunity that Omar Al Bashir might enjoy.² This position was notably re-affirmed by the Court in the widely participated appeal by Jordan regarding the decision of the Pre-Trial Chamber on the non-compliance of Jordan with the request by the Court for the arrest and surrender of Omar Al Bashir. The Appeals Chamber found that a State, by becoming Party to the ICC Statute, is consenting to the inapplicability of Head of State immunity for the purposes of proceedings before the Court. Therefore “[...] both in the State Parties’ vertical relationship with the Court and in the horizontal relationship between States Parties there is no Head of State immunity if the Court is asking for the arrest and surrender of a person”.³

In any case, Article 97 (c) provides that such disputes are to be settled by means of consultations between the requested State Party and the Court. While there is an obligation for consultations to be carried out in *bona fide* and with the genuine purpose to resolve the matter, that does not mean that there is an obligation to reach a result where the requested State would respond favourably to the request and execute it in its entirety, since, as mentioned above, there may be lawful grounds for the requested State to refuse the execution of the request.

A relevant question is whether States Parties can challenge a request from the Court that they consider to be illegal under the Statute, a Security Council resolution or a *jus cogens* norm. Although the Statute does not establish a specific mechanism for resolving a dispute on a request for co-operation, it will be for the Court to decide on such dispute, without prejudice to any consultations that may exist between the Court and the State concerned to resolve it. Article 119(1) seems to confirm this interpretation when providing that “any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court”.

² ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber II, 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, ICC-02/05-01/09-195, para. 29 (*‘Al Bashir*, 9 April 2014’) (<https://www.legal-tools.org/doc/89d30d/>).

³ ICC, *Prosecutor v. Al Bashir*, Appeals Chamber, Judgment in the Jordan Referral re Al-Bashir Appeal, 17 May 2019, ICC-02/05-01/09-397-Corr, para. 132 (*‘Al Bashir*, 17 May 2019’) (<https://www.legal-tools.org/doc/0c5307/>).

Conversely, and as observed by the Court, practical or administrative difficulties of the requested State do not constitute fundamental legal principles under Article 93(3) preventing the execution of a request by the Court, or invalidate the request that objectively meets the requirements of specificity, relevance and necessity.⁴ In addition, the Court has stated in a different occasion that political changes in a country do not release the State from its international obligations towards the Court, thus including the obligation to co-operate; and that the fact that the relevant national authorities have not taken the necessary internal co-ordination steps is not in itself a valid justification to not execute a request for co-operation.⁵ Furthermore, the Court has also affirmed that a deficiency in domestic legal procedures cannot serve as a valid excuse for a State Party to not co-operate with the Court.⁶

In case of a failure to co-operate, the Court may make a finding to that effect. It is for the competent Chamber, upon application of the requesting body, or for the Chamber that has made the request for co-operation to make such finding (Regulation 109(1)(2)). Before making a finding, the requested State Party is given an opportunity to express its views (Regulation 109(3)). Where a finding of non-co-operation has been made, the President of the Court may refer the matter to the Assembly of States Parties or the Security Council, in this latter case in accordance with the Relationship Agreement between the United Nations and the Court (Regulation 109(4)). The competence of the Assembly to consider any question relating to the non-co-operation of a State Party is also established in Article 112(2)(f).

The referral to the Assembly of States Parties or to the Security Council is not an automatic consequence of a finding of non-co-operation, as such “determination falls within the discretion of the Chamber seized of

⁴ ICC, *Prosecutor v. Kenyatta*, Trial Chamber V(b), Decision on the Prosecution’s revised cooperation request, Trial Chamber V(b), 31 July 2014, ICC-01/09-02/11-937, para. 34 (<https://www.legal-tools.org/doc/9e7a87/>).

⁵ ICC, *Prosecutor v. Hussein*, Pre-Trial Chamber II, Decision on the cooperation of the Central African Republic regarding Abdel Raheem Muhammad Hussein’s arrest and surrender to the Court, 13 November 2013, ICC-02/05-01/12-21, para. 12 (<https://www.legal-tools.org/doc/2a3d71/>).

⁶ ICC, *Prosecutor v. Kenyatta*, Trial Chamber V(b), Decision on Prosecution’s applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, 31 March 2014, ICC-01/09-02/11-908, para. 47 (<https://www.legal-tools.org/doc/c2209e/>).

the Article 87(7) application”.⁷ In fact, before making the referral, the concerned Chamber should assess whether such action is an effective means of obtaining the co-operation requested. Such assessment does not have a direct correlation with the seriousness and negative effect of the non-co-operation in the proceedings. For instance, the Court has decided that a referral of South Africa for failing to arrest and surrender Omar Al Bashir would not necessarily be an effective way to foster co-operation.⁸ Nevertheless, the Court may wish to refer the matter to the attention of the Assembly and of the Security Council, even if it does not foresee that such action will necessarily bring a positive effect on the request for co-operation that was not complied with by the State in question.

However, the Court cannot ignore a genuine intention to engage in consultations regarding non-co-operation. The Appeals Chamber has considered that the Pre-Trial Chamber erred when it referred Jordan to the Assembly of States Parties and the Security Council for failing to arrest and surrender Omar Al Bashir, since Jordan had in fact tried to enter into consultations with the Court as per Article 97(3) (*Al Bashir*, 17 May 2019, para. 212).

As referred to above in relation to non-States Parties, the Assembly has adopted procedures relating to non-co-operation, which are also applicable to States Parties (ICC-ASP, Resolution 5, Annex, 21 December 2011, para. 7), where it considers two scenarios that may require action by the Assembly: a scenario where the Court has referred the failure to co-operate to the Assembly under Article 87(7), which may or may not require urgent action by the Assembly to bring about co-operation; exceptionally, a scenario where the Court has not yet informed the Assembly, but a serious incident of failure to co-operate regarding a request for arrest and surrender might occur or is ongoing and urgent action by the Assembly may help bring about co-operation (Resolution ICC-ASP/10/Res.5, 21 December 2011, annex, para. 7). The Assembly has some latitude on the means to address the failure to co-operate, including entirely informal or formal re-

⁷ ICC, *Prosecutor v. Kenyatta*, Appeals Chamber, Judgment on the Prosecutor’s appeal against Trial Chamber V(B)’s “Decision on Prosecution’s application for a finding of non-compliance under Article 87(7) of the Statute”, 19 August 2015, ICC-01/09-02/11-1032, para. 53 (<https://www.legal-tools.org/doc/23bed6-1/>).

⁸ ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber II, Decision under Article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, 6 July 2017, ICC-02/05-01/09-302, para. 139 (<https://www.legal-tools.org/doc/68ffc1/>).

sponses, as well as informal and urgent responses as precursors to a formal response, in particular where it is still possible to achieve co-operation. Formal responses may include actions taken by the Assembly or the Bureau, such as open letters from the President of the Assembly to the State concerned; formal meetings with a representative of the concerned State; public meetings on the matter to allow for an open dialogue with the requested State; discussion in a plenary session of the Assembly and adoption of a resolution with recommendations on the matter (Resolution ICC-ASP/10/Res.5, 21 December 2011, annex, para. 14). Informal responses may include the good offices by the President of the Assembly (ICC-ASP, Resolution 5, 21 December 2011, Annex, para. 15).

Where the failure to co-operate is referred to the Security Council, this organ of the United Nations may take the action it deems appropriate, including the adoption of sanctions under Article 41 of the Charter of the United Nations.

The Court is under no obligation to also refer the non-co-operation to the Assembly when referring it to the Security Council (and vice-versa). Moreover, the Court may only refer the non-co-operation to the Security Council when the matter was referred to the Court by that organ of the United Nations.

Many of the examples of non-co-operation under Article 87(7) relate to the situation of Sudan, and in particular of the travel of Omar Al Bashir to other States in official visit, including to Chad,⁹ the Democratic Republic of Congo (*Al Bashir*, 9 April 2014), Djibouti,¹⁰ Malawi,¹¹ Uganda,¹² South

⁹ ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber II, Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir, 26 March 2013, ICC-02/05-01/09-151 (<https://www.legal-tools.org/doc/51390f/>).

¹⁰ ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber II, Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute, 11 July 2016, ICC-02/05-01/09-266 (<https://www.legal-tools.org/doc/a09363/>).

¹¹ ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber, 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, ICC-02/05-01/09-139-Corr (<https://www.legal-tools.org/doc/8c9d80/>).

¹² ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber II, *Decision* on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court

Africa.¹³ or Jordan (*Al Bashir*, 17 May 2019). In those instances, the Court made a finding on the failure by the visited States to arrest and surrender Omar Al Bashir and, with the exceptions of South Africa and Jordan (in which case, as noted above, the Appeals Chamber has later reversed the referral of the Pre-Trial Chamber), the Court referred the matter to both the Assembly of States Parties and the Security Council.

In an interesting case, while noting that Nigeria had not arrested and surrendered Omar Al Bashir during his presence in the territory to participate in a meeting convened by the African Union, the Court was sensitive to the arguments of Nigeria that Omar Al Bashir appeared in Nigeria ostensibly and had departed prior to the end of the meeting and while the authorities of Nigeria were considering what steps to take consistent with its international obligations. The Court limited itself to request Nigeria to arrest Omar Al Bashir should a similar situation arise in the future, without referring the matter to the Assembly or the Security Council.¹⁴

The failure to co-operate constitutes a violation of the Statute, notably of Article 86 and other relevant provisions of Part 9. The violation of this treaty obligation entails the international responsibility of the State Party that has failed to co-operate.

Cross-references:

Rules 176, 177, 178, 179 and 180.
Regulation 107 and 109.

Doctrine:

1. Annalisa Ciampi, “The Obligation to Cooperate”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 2nd. ed., Oxford University Press, 2002, p. 1621.

and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute, 11 July 2016, ICC-02/05-01/09-267 (<https://www.legal-tools.org/doc/51c322-1/>).

¹³ ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber II, Decision under Article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, 6 July 2017, ICC-02/05-01/09-302 (<https://www.legal-tools.org/doc/68ffc1/>).

¹⁴ ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber II, Decision on the Cooperation of the Federal Republic of Nigeria Regarding Omar Al-Bashir’s Arrest and Surrender to the Court, 5 September 2013, ICC-02/05-01/09-159 (<https://www.legal-tools.org/doc/1822e7/>).

2. Claus Kieß and Kimberly Prost, “Article 87 – Request for Cooperation: General Provisions”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 2019–2042 (<https://www.legal-tools.org/doc/040751/>).
3. Dapo Akande, “The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC”, *Journal of International Criminal Justice*, 2012, vol. 10, no. 2, pp. 299–324.
4. Georghios Pikis, *The Rome Statute for the International Criminal Court: Analysis of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and Supplementary Instruments*, Brill Nijhoff, Leiden/Boston, 2010.
5. Olympia Bekou and Daley J. Birkett (ed.), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice*, Martinus Nijhoff Publishers, Leiden/Boston, 2016.
6. Rod Rastan, “Testing Co-operation: The International Criminal Court and National Authorities”, *Leiden Journal of International Law*, 2008, vol. 21, no. 2, pp. 431–456.

Author: Mateus Kowalski (the views expressed are those of the author alone and do not necessarily reflect the views of any other person or institution).

Article 88

Availability of Procedures under National Law

States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.

General Remarks:

An international court requires effective co-operation by States to achieve its goal to bring perpetrators of international crimes to justice. It is for that matter that Article 86 proclaims a general obligation of the States Parties to co-operate. A pre-condition for a successful and timely co-operation is the existence of sufficient procedures in place. This holds especially true when it comes to matters of arrest and surrender. Such matters are by their very nature of a certain urgency. Sensitive issues such as arrest (Article 89), evidence gathering, searches and seizures, protection of witnesses or freezing of assets (Article 93 (1)) require a balancing act that allows the Court to call for an active contribution of the States in the international fight for justice and, at the same time, guarantees that the rights accorded to a suspect under national law and the sovereignty of the State be respected as far as possible. Such a balancing act can hardly be achieved on an *ad hoc* basis. Article 88 takes this fact into account and obliges the States Parties to ensure that procedures for an effective co-operation are made available under their national law. The intention is to instigate a quick implementation.¹

Preparatory Works:

Article 88 was subject to much debate during the negotiations in Rome. Reason for the discussion is a fundamental disaccord about the nature of the entire co-operation regime of the Court. Some States favoured a horizontal approach that would grant more leeway to the requested State which would remain ‘in control’ over the degree of co-operation; others emphasized the need for a vertical co-operation regime with a direct execution of

¹ Annalisa Ciampi, “The Obligation to Cooperate”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court. A Commentary*, Oxford University Press, 2002, p. 1626 (<https://www.legal-tools.org/doc/01addc/>).

decisions by the Court in the national context.² The proponents of a vertical approach highlighted the risks a reference to national laws might entail and warned that States could provide less than full co-operation by applying provisions in bad faith or by claiming national exceptions on the basis of the national legal or constitutional framework (Kreß and Prost, 2022, Article 88, para. 2). The compromise is highlighted in Article 89(1) and Article 93(1) which both make reference to the provisions of the Statute as well as national laws.³ Article 88 was included to further highlight the fact that the State cannot refuse co-operation by arguing insufficient or conflicting national laws (Kreß and Prost, 2022, Article 88, para. 3). Due to Article 88 the State can only invoke limits imposed by its national laws where such limitations are explicitly recognized by the Statute,⁴ such as in Article 93(1)(l). The obligations to co-operate are therefore the same for all States Parties (Kreß and Prost, 2022, Article 88, para. 3; Raspail, 2012, Article 88, p. 1826). Article 88 reaffirms the primacy of international law over the national legal system (Raspail, 2012, Article 88, p. 1826). As a matter of international law, Part 9 of the ICC Statute has no direct effect on the national level (Raspail, 2012, Article 88, p. 1826). The effect of international law on the national level depends on the constitutional approach taken by the respective State (Raspail, 2012, Article 88, p. 1827). Kreß and Prost (Kreß and Prost, 2022, Article 88, para. 3) highlight the origin of the provision in Article 5(3) of the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.⁵ The final version is based on a proposal introduced by Canada at the Rome Conference (Schabas, 2016, Article 88, p. 1280, 1281 with further references to the discussions).

Doctrine: For the bibliography, see the final comment on Article 88.

Author: Mayeul Hiéramente.

² Claus Kreß and Kimberly Prost, “Article 88”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 2.

³ William A. Schabas, *The International Criminal Court. A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, Oxford, 2016, p. 1280 (<https://www.legal-tools.org/doc/b7432e/>).

⁴ Héléne Raspail, “Article 88”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1829 (<https://www.legal-tools.org/doc/872bf2/>).

⁵ Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, UN Doc. E/CONF.82/15, 20 December 1988 (<https://www.legal-tools.org/doc/4b1a1d/>).

Article 88: States Parties

States Parties

Article 88 sets out an obligation to implement a co-operation regime under national law. The norm imposes an obligation on States Parties to the ICC Statute. While non-States Parties can be under an obligation to co-operate with the ICC by virtue of a Security Council resolution,¹ the same does not apply to the implementation obligation under Article 88. It is difficult to assume that the obligation to co-operate with the Court imposed by virtue of Chapter VII of the UN Charter for a *specific* situation could oblige a non-States Party to incorporate specific rules for co-operation with the Court into its domestic law.

Doctrine: For the bibliography, see the final comment on Article 88.

Author: Mayeul Hiéramente.

¹ See, for example, Astrid Reisinger-Coracini, “Cooperation from States and other Entities”, in Göran Sluiter, Håkan Friman, Suzannah Linton, Sergey Vasiliev, and Salvatore Zappalà (eds.), *International Criminal Procedure. Rules and Principles*, Oxford University Press, 2013, p. 101 ff. (<https://www.legal-tools.org/doc/bcad4c/>); Resolution 1593 (2005), UN Doc. S/RES/1593 (2005), 31 March 2005 (<https://www.legal-tools.org/doc/4b208f/>): “[d]ecides that the Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully”; Resolution 1970 (2011), UN Doc. S/RES/1970 (2011), 26 February 2011 (<https://www.legal-tools.org/doc/00a45e/>): “[d]ecides that the Libyan authorities shall cooperate fully”; ICC, *Prosecutor v. Saif al-Islam Gaddafi and al-Senussi*, Pre-Trial Chamber I, Decision on Libya’s Submissions Regarding the Arrest of Saif al-Islam Gaddafi, 7 March 2012, ICC-01/11-01/11-72, para. 12 (<https://www.legal-tools.org/doc/ceaea3/>).

Article 88: Procedures under National Law

shall ensure that there are procedures available under their national law

Article 88 seems rather easy to interpret and apply in practice. The Court has noted that the provisions of Article 88 and Article 89 (1) “do not make cooperation with the Court contingent on a State Party choosing to put in place the related national procedures”.¹ The fact that a State decides not to implement the necessary national legislation cannot serve as a justification for a refusal to comply with a request for surrender.² The same holds true if the national procedures in place (or an interpretation thereof) show deficiencies that hinder the co-operation or endanger a timely compliance with requests for assistance. This approach has a practical advantage since it relieves the Court from the duty to interpret national laws. Trial Chamber V(b) notes:

The Chamber finds it unnecessary to consider whether or not the International Crimes Act and other Kenyan domestic legislation provides a sufficient basis for executing cooperation requests under Part 9 of the Statute. Any purported deficiency in domestic legal procedures (or interpretation thereof), cannot be raised as a shield to protect a State Party from its obligation to cooperate with the Court [...].³

¹ ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber II, Decision on the non-compliance by the Republic of Djibouti with the request for arrest and surrender Omar Al-Bashir to the Court and referring the matters to the United Nations Security Council and the Assembly of States Parties to the Rome Statute, 11 July 2016, ICC-02/05-01/09-266, para. 10 (<https://www.legal-tools.org/doc/a09363/>).

² Astrid Reisinger-Coracini, “Cooperation from States and Other Entities”, in Göran Sluiter, Håkan Friman, Suzannah Linton, Sergey Vasiliev, and Salvatore Zappalà (eds.), *International Criminal Procedure. Rules and Principles*, Oxford University Press, 2013, p. 99 (<https://www.legal-tools.org/doc/bcad4c/>); Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003, p. 44 (<https://www.legal-tools.org/doc/8d1442/>); Kai Ambos, *Treatise on International Criminal Law, Vol III: International Criminal Procedure*, Oxford University Press, Oxford, 2016, p. 602 (<https://www.legal-tools.org/doc/995606/>); Annalisa Ciampi, “The Obligation to Cooperate”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court. A Commentary*, Oxford University Press, 2002, p. 1630 (<https://www.legal-tools.org/doc/01addc/>).

³ ICC, *Prosecutor v. Kenyatta*, Trial Chamber V(b), Decision on Prosecution’s Application for a finding of non-compliance pursuant to Article 87 (7) and for an adjournment of the provi-

By refusing to accept deficiencies of the national legal system to justify a failure to comply with the co-operation obligations of the Statute, the Court emphasizes that States, upon signature of the Statute, are bound by the principle of *pacta sunt servanda*. Generally speaking, it is a common feature of international treaties that States are not entitled to invoke limitations imposed by their national laws.

The interesting question is whether States are obliged to anticipate (potential) future conflicts between the obligations imposed on the State by virtue of the Statute on the one side and national laws that might bind the national authorities involved in the process of arrest and surrender on the other.⁴ Raspail has convincingly argued that Article 88 does not entail an obligation to provide for a detailed and specific regulatory framework (Raspail, 2012, Article 88, p. 1827). She emphasizes that a special law regulating the future co-operation with the Court is not warranted for all national legal systems. Raspail rightly reminds us that the legal and constitutional system might differ significantly (Raspail, 2012, Article 88, p. 1826 ff.). Some constitutions accentuate the importance of international law and allow for a direct application of international norms in the national context, other States follow a strict dualist approach requiring the implementation of international norms by the national legislator. Due to the variety of legal systems and constitutional arrangements (Meißner, 2003, p. 44) a one-size-fits-all approach is not possible. Article 88 imposes an obligation to guarantee the result and refrains from detailed guidelines (Meißner, 2003, p. 44). It is an obligation of result, not one of conduct.⁵ It is the sovereign right of the States Parties to decide how to implement the obligations contained in Part 9 of the Statute. Many States have opted for specific legislation implementing Part 9 (for a detailed overview see Schabas, 2016, Article 88, p. 1282 *et seq.*; Ambos, 2016, pp. 608 ff.). From a practitioner's perspective such ICC specific laws are to be applauded as they provide for greater transparency and guidance for the national authorities tasked with

sional trial date, 31 March 2014, ICC-01/09-02/11-908, para. 47 ('*Kenyatta*, 31 March 2014') (<https://www.legal-tools.org/doc/c2209e/>).

⁴ H el ene Raspail, "Article 88", in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour P enale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1830 (<https://www.legal-tools.org/doc/872bf2/>).

⁵ William A. Schabas, *The International Criminal Court. A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1281 (<https://www.legal-tools.org/doc/b7432e/>); Ciampi, 2002, p. 1625; Ambos, 2016, p. 604.

handling a Court request.⁶ A State might, however, opt for a different approach or even decide on a monist approach and accord decisions by the Court and the obligations contained in Part 9 primacy over their own national laws (see Raspail, 2012, Article 88, p. 1827). Trial Chamber III notes with regards to the freezing and seizure of assets:

Therefore, the Court itself does not order the freezing or seizure of assets, but rather orders that cooperation requests be sent to States for them do so. The State then decides to either directly enforce the Court's request for freezing or seizure if so permitted under domestic law, or to use the information provided in the Court's request to initiated domestic proceedings to preserve the assets. Irrespective of which approach the State applies, the assets are ultimately frozen or seized on the basis of actions taken by that State under its domestic law. By the same token, the lifting of coercive measures, including the unfreezing of assets, must be done under domestic law.⁷

The fact that a specific implementation law is not required by virtue of Article 88 does, however, not imply that the States Parties face no obligation at all to make the necessary legal arrangements. The wording of Article 88 clearly indicates that the Statute requires an active review on the part of the State to assess whether the national legal framework can guarantee the availability of the necessary procedures (Kreß and Prost, 2022, Article 88, para. 4; Meißner, 2003, p. 44). Raspail points out that the wording suggests the idea of an '*effet utile*' and an obligation to anticipate and clear any barriers imposed by national law (Raspail, 2012, Article 88, p. 1831). If the State, upon the necessary review of its laws, is made aware of any provisions that could hinder the national authorities to accommodate a request by the Court, the State has to take the necessary (legislative) steps to pre-empt such a conflict by adapting its national legislation (Raspail, 2012, Article 88, p. 1832). Kreß and Prost (Kreß and Prost, 2022, Article 88, para. 4) note that the State remains free to decide how to ensure compliance

⁶ Claus Kreß and Kimberly Prost, "Article 88", in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 7.

⁷ ICC, *Prosecutor v. Bemba*, Trial Chamber III, 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, 20 November 2018, ICC-01/05-01/08-3660-Red2, paras. 11–12 (<https://www.legal-tools.org/doc/637a6f/>).

with co-operation requests by the Court: through legislation, treaty implementation or through administrative practices. The necessary adaptations might also encompass changes to the substantive law (Meißner, 2003, p. 44) if the relevant procedural rules, especially those allowing for a deprivation of liberty, refer to the corpus of substantive law. A State might even opt for a memorandum of understanding with the Court (Reisinger-Coracini, 2013, p. 99).

If a State fails to comply with a request due to incompatibilities in its national legal system, such failure amounts to a breach of the ICC Statute (Schabas, 2016, Article 88, p. 1281) and can lead to a finding of non-compliance, Article 87 (7). This is not subject to much debate (see Raspail, 2012, Article 88, p. 1831 ff.). The question arises whether the mere inaction of the State in and of itself constitutes a violation of Article 88 and merits a finding of non-compliance by the Court (see Ciampi, 2006, p. 723). As has been discussed above, Article 88 encompasses an obligation which is distinct from the obligation to comply with a concrete co-operation request. Duffy and Huston⁸ therefore advance the argument that a refusal by the State to make the necessary adaptations is in itself incompatible with the international obligation and constitutes a violation of the treaty. This would at least be the case where the law renders a required form of co-operation impossible (Duffy and Huston, 2000, p. 34). The consequences of a violation of Article 88, without a failure to comply with a request by the Court warrants, are far from clear. The wording of Article 87(7) allows only for a finding of non-compliance if the State fails to comply with a request for co-operation (Raspail, 2012, Article 88, p. 1832). A settlement of disputes pursuant to Article 119 does also not seem warranted (p. 1832). Finally, the Court lacks a general competence to review national legislation and administrative practices (p. 1833). It is therefore unlikely that a violation of the general obligation enshrined in Article 88 will be established or even sanctioned. In the *Kenyatta* case, the Trial Chamber V(b) has noted in this regard:

Where the requested State asserts that non-compliance is as a result of lack of capacity, the Chamber has to consider whether such inability is genuine and well- founded. The Chamber

⁸ Hellen Duffy and Jonathan Huston, “Implementation of the ICC Statute: International Obligations and Constitutional Considerations”, in Claus Kreß and Flavia Lattanzi (eds.), *The Rome Statute and Domestic Legal Orders*, vol. 1, Nomos, Baden-Baden, 2000, p. 34; see also Raspail, 2012, Article 88, p. 1832.

will first consider whether the requested State has complied with its obligation under Article 88 of the Statute which provides that ‘States Parties shall ensure that there are procedures available under their national law for all forms of cooperation which are specified under [Part 9 of the Statute]’. If the Chamber is satisfied that the requested State has fulfilled the requirements under Article 88 of the Statute (which in itself involves a margin of assessment), the Chamber still may consider whether there is a persuasive reason why the State lacks capacity to comply with the cooperation request. This inquiry is a case-specific one, depending on the nature of the request concerned and the specific circumstances of the requested State, including whether the requested State made bona fide efforts to overcome any difficulties encountered. Therefore, where the non-compliance arises from a genuine and demonstrated lack of capacity or ability, the Chamber may decide that such non-compliance will not amount to that required under the first part of Article 87(7) of the Statute.⁹

The Trial Chamber highlights three important facts. First, an assessment pursuant to Article 87(7) only refers to a specific request for cooperation. In order to assess whether to issue a finding of non-compliance the Chamber may take into consideration whether the State generally fulfilled its obligations under Article 88. Second, the Chamber notes that Article 88 grants the State a margin of assessment and does therefore not stipulate the steps to be taken. Third, any assessment under Article 87 (7) is case-specific. This should rule out that a simple violation of the anticipatory obligation laid down in Article 88 will be subject to review. For lack of legal options to review compliance, it is up to the Registrar (Schabas, 2016, Article 88, p. 1283) to remain in contact with national authorities to improve the co-operation regime. As outlined by Schabas (Schabas, 2016, Article 88, p. 1282), the Assembly of States Parties encourages and assists any reform in this regard. It supports any improvements of an effective functioning of the Court (Reisinger-Coracini, 2013, p. 110).

Doctrine: For the bibliography, see the final comment on Article 88.

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⁹ ICC, *Prosecutor v. Kenyatta*, Trial Chamber V (b), Decision on Prosecution’s Application for a finding of non-compliance under Article 87 (7) of the Statute, 3 December 2014, ICC-01/09-02/11-982, para. 41 (<https://www.legal-tools.org/doc/d9a9e5/>).

Article 88: Forms of Co-operation

for all of the forms of cooperation which are specified under this Part.

The obligation enshrined in Article 88 refers to all the forms of co-operation in Part 9 of the Statute. The focus lays on the arrest and surrender (Article 89(1)), the provisional arrest (Article 92) and the transit (Article 89 (3)) of a person sought for surrender to the Court. Article 88 also refers to the other forms of co-operation enumerated in Article 93 (1). One example is the freezing and seizure of assets.¹ It has to be specified that Article 88 imposes no additional obligation regarding “any other type of assistance” as laid down in Article 93 (1)(l). Such assistance is dependent on the national law of the requested State.² The Court cannot impose an obligation to accommodate for such judicial assistance. States Parties are required to provide assistance with the investigative measures indicated in Article 93 (1) (a)-(k). The Statute is mute as to the exact contours and conditions. Meißner therefore argues that the obligation under Article 88 only requires the States Parties to allow for these ‘types’ of measures without imposing any concrete specifications (Meißner, 2003, p. 44). Articles 86 and 88 require, however, that the State makes *bona fide* effort to allow for an effective compliance.

Cross-references:

Article 87(7), 89 (1) and 93 (1).

¹ ICC, *Prosecutor v. Bemba*, Trial Chamber III, 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, 20 November 2018, ICC-01/05-01/08-3660-Red2, paras. 11 *et seq.* (<https://www.legal-tools.org/doc/637a6f/>).

² Claus Kreß and Kimberly Prost, “Article 88”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 5; Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003, p. 44 (<https://www.legal-tools.org/doc/8d1442/>); ICC, *Prosecutor v. Ruto and Sang*, OTP, Prosecution consolidated response to Mr. Ruto and Mr. Sang’s appeals against the “Decision on the Prosecutor’s application for Witness Summonses and Resulting Request for State Party Cooperation”, 20 June 2014, ICC-01/09-01/11-1380, p. 15, fn. 66 (<https://www.legal-tools.org/doc/7dac32/>).

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law. Vol III: International Criminal Procedure*, Oxford University Press, 2016 (<https://www.legal-tools.org/doc/995606/>).
2. Annalisa Ciampi, “The Obligation to Cooperate”, in Antonio Cassese, Paola Gaeta and John Jones (eds.), *The Rome Statute of the International Criminal Court. A Commentary*, Oxford University Press, 2002, pp. 1607–1640 (<https://www.legal-tools.org/doc/01addc/>).
3. Annalisa Ciampi, “Current and Future Scenarios for Arrest and Surrender to the ICC”, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2006, vol. 66, pp. 719–736.
4. Hellen Duffy and Jonathan Huston, “Implementation of the ICC Statute: International Obligations and Constitutional Considerations”, in Claus Kreß and Flavia Lattanzi (eds.), *The Rome Statute and Domestic Legal Orders*, vol. 1, Nomos, Baden-Baden, 2000, pp. 29–49.
5. Claus Kreß and Kimberly Prost, “Article 88”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, pp. 2492–2495.
6. Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003 (<https://www.legal-tools.org/doc/872bf2/>).
7. Hélène Raspail, “Article 88”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, pp. 1826–1833.
8. Astrid Reisinger-Coracini, “Cooperation from States and other Entities”, in Göran Sluiter, Håkan Friman, Suzannah Linton, Sergey Vasiliev, and Salvatore Zappalà (eds.), *International Criminal Procedure. Rules and Principles*, Oxford University Press, 2013, pp. 95–115 (<https://www.legal-tools.org/doc/bcad4c/>).
9. William A. Schabas, *The International Criminal Court. A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1280–1287 (<https://www.legal-tools.org/doc/b7432e/>).

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Article 89

Surrender of Persons to the Court

General Remarks:

Article 89 is one of the cornerstones of the entire co-operation regime.¹ It addresses the ‘standard procedure’ to be followed by the Court in order to obtain the arrest and surrender of a person sought for prosecution by the Court. It focuses on the relationship between the Court, the requested State(s) and – as far as transit is concerned – a States Party that might be involved in the ‘delivery’ of the person to the seat of the Court in The Hague, Netherlands (see Article 3(1)). The provision is closely intertwined with Article 58(1) which determines the condition for the issuance of a warrant of arrest and Article 59 which applies to the arrest proceeding in the custodial State. Article 89 is supplemented by Article 91 in which the mandatory content of a request for arrest and surrender is determined. The detailed nature of the provisions is meant to diminish the risk of non-compliance on the part of the requested State and to allow for an effective collaboration between the international and the national level as emphasized in Articles 86 and 88. The degree of effectivity of the processes laid down in Article 89 ultimately determines whether the Court can succeed in bringing the perpetrators of crimes that shock the conscience of humankind to justice.²

Preparatory Works:

The entire co-operation regime, now encompassed in Part 9 of the Statute, was subject to much debate in the Working Group of the International Law Commission, the Preparatory Committee and during the negotiations at the Rome Conference (for an overview see Schabas, 2016 Article 89, pp. 1289 ff.). The ultimate question that had to be solved was the degree of influence

¹ See Kai Ambos, *Treatise on International Criminal Law, Vol III: International Criminal Procedure*, Oxford University Press, 2016, p. 606 (<https://www.legal-tools.org/doc/995606/>).

² For an overview, see William A. Schabas, *The International Criminal Court. A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1291–1292 (<https://www.legal-tools.org/doc/b7432e/>); Rita Mutyaba, “An Analysis of the Cooperation Regime of the International Criminal Court and its Effectiveness in the Court’s Objective in Securing Suspects in Ongoing Investigations and Prosecutions”, in *International Criminal Law Review*, 2012, vol. 12, no. 5, p. 955 ff. (<https://www.legal-tools.org/doc/e84222/>).

on the surrender process that should be granted to a requested State (Schabas, 2016, Article 89, p. 1290). The underlying debate was reflected in disagreements regarding the wording ('surrender', 'transfer' or 'extradition'). Upon suggestion by the United Kingdom, it was finally decided that the central term would be that of 'surrender'. It is now defined in Article 102 (a) as the "delivering up of a person by a State to the Court, pursuant to this Statute" (see Schabas, 2016, Article 89, p. 1291) and is contrasted with the term 'extradition' applicable to the inter-state level.

Doctrine: For the bibliography, see the final comment on Article 89.

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Article 89(1)

1. The Court may transmit

Article 89 (1) is the central paragraph of the provision and addresses the steps to be undertaken to ensure the presence of a person, a pre-condition for a trial by the Court to take place (see Article 63 (1)).¹ It is supplemented by Rule 184.

Doctrine: For the bibliography, see the final comment on Article 89.

Author: Mayeul Hiéramente.

¹ See Dine Rinoldi and Nicoletta Parisi, “International Cooperation and Judicial Assistance between States Parties and the International Criminal Court”, in Flavia Lattanzi and William A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, vol. 1, 1999, p. 344 (<https://www.legal-tools.org/doc/27edd7/>).

Article 89(1): Transmittal

The Court may transmit

Article 89(1) determines that “the Court” may transmit a request for arrest and surrender to the requested State. It has been subject to debate which organ of the Court is entitled to transmit such request. Despite multiple requests by the Prosecutor, the Judges of the ICC have repeatedly held that by virtue of Rule 176(2) such a request is to be transmitted by the Registrar upon the demand of the respective Chamber.¹ The Chamber derives its competence to ‘make’ such a request from the fact that it issues and amends an arrest warrant (Articles 58 (1) and (6)), decides on admissibility challenges (Article 19) and deals with any incident that might affect a surrender to the Court.² The determination that the Registrar is the competent organ for the transmission is based on Rule 176(2) which stipulates that the Registrar shall transmit any request made by the Chambers. Despite the clear wording of the rule, Pre-Trial Chamber II suggested the possibility of

¹ See, for example, ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, 24 February 2006, ICC-01/04-01/06-8-Corr, para. 116 (<https://www.legal-tools.org/doc/c60aaa/>); *Prosecutor v. Ntaganda*, Pre-Trial Chamber I, Decision on the Prosecution Application for a Warrant of Arrest, 6 March 2007, ICC-01/04-02/06-1, para. 69 (<https://www.legal-tools.org/doc/ec44d2/>); *Prosecutor v. Katanga*, Pre-Trial Chamber I, Order on the execution of the warrant of arrest against Germain Katanga, 5 November 2007, ICC-01/04-01/07-54-tENG (<https://www.legal-tools.org/doc/39349b/>); *Prosecutor v. Kony et al.*, Pre-Trial Chamber II, Decision to issue requests for arrest and surrender to the Central African Republic, 21 March 2007, ICC-02/04-01/05-224-Red (<https://www.legal-tools.org/doc/bd77b8/>); William A. Schabas, *The International Criminal Court: Commentary on the Rome Statute*, 2nd ed., Oxford University Press, 2016, p. 1292 (<https://www.legal-tools.org/doc/b7432e/>); Julien Cazala, “Article 89”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1837 (<https://www.legal-tools.org/doc/872bf2/>).

² See also ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber I, Decision on the Prosecutions’ Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-3, para. 237 (<https://www.legal-tools.org/doc/e26cf4/>); Claus Kreß and Kimberly Prost, “Article 88”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 4 with further references; for a critical view, see Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003, p. 113 (<https://www.legal-tools.org/doc/8d1442/>).

an exception if ‘specific and compelling circumstances’ warrant a transmission by the Prosecutor.³ This assessment may seem rather surprising. Kreß and Prost (Kreß and Prost, 2022, Article 89, para. 4; see also Cazala, 2012, Article 89, p. 1838) rightly remark that Rule 176(2) does not accord to the Chamber any discretion to delegate the transmission process to the Prosecutor. The Pre-Trial Chamber has not specified the ‘circumstances’ it considers relevant. This makes a definitive assessment difficult at this stage. The Judges have further noted that the Registrar shall co-ordinate and share information with the Prosecutor (Cazala, 2012, Article 89, p. 1838). In case of the escape of a sentenced person, Rule 225 declares the Presidency as competent (see also Meißner, 2003, p. 113).

The Chamber is, however, granted a certain leeway whether or not to order a transmission of an arrest and surrender request and, if so, which States should receive such request. It decides also on the timing (Cazala, 2012, Article 89, p. 1837). The wording of the first part of the sentence (“may transmit”) seems at odds with the second part which states that the Court ‘shall request’ co-operation in the arrest and surrender (Kreß and Prost, 2022, Article 89, para. 4). It should be noted, however, that Article 89(1) suggests a sequencing. First, the Court takes a decision (‘may’) to transmit a request to “any State” it considers an appropriate recipient. Only in a second step, it requests co-operation of “that State” (“shall request”). A strict reading of the sentence therefore leads to the conclusion that the Court is indeed granted a discretion on whether to transmit a request in the first place. Such a reading is in line with the purpose of Article 89(1). A strict obligation to submit a request to every State on the territory of which the person may be found could easily turn out to be a strategical and logistical nightmare for the Court. Experience shows that not all the States (Parties) are participating bona fide in the investigation and prosecution of international crimes. It might therefore be a strategic choice not to transmit a

³ ICC, *Prosecutor v. Kony et al.*, Pre-Trial Chamber II, Decision on the Prosecutor’s Application for Warrants of Arrest under Article 58, 8 July 2005, ICC-02/04-01/05-1, p. 6 (<https://www.legal-tools.org/doc/8db08a/>); Confirmed by *Prosecutor v. Kony et al.*, Pre-Trial Chamber II, Decision on Prosecutor’s Application for Leave to Appeal in part Pre-Trial Chamber II’s Decision the Prosecutor’s Application for Warrants of Arrest under Article 58, 19 August 2005, ICC-02/04-01/05-20 (<https://www.legal-tools.org/doc/cae449/>); see also *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, 24 February 2006, ICC-01/04-01/06-8-Corr, para. 119 (<https://www.legal-tools.org/doc/c60aaa/>).

(sealed) arrest warrant to guarantee its confidential nature. The current practice of the Court demonstrates that a person sought for surrender might hold an official position in the State in question.⁴ In such a case, an official request pursuant to Article 89(1) could have adverse effects on the entire proceedings and decrease the likelihood of a future arrest. A degree of discretion is therefore *sine qua non* for an effective co-operation regime. The fact that the Court retains a measure of discretion does not signify that the Pre-Trial Chamber, as the competent organ to make the request, is granted unfettered discretion to abstain from a request for arrest and surrender. Article 58(1) stipulates that the Pre-Trial Chamber is legally bound by the Statute to issue an arrest warrant if the requirements are fulfilled.⁵ The strict obligation articulated in Article 58(1) cannot be circumvented by the Pre-Trial Chamber in the surrender process under Part 9 of the Statute.

Doctrine: For the bibliography, see the final comment on Article 89.

Author: Mayeul Hiéramente.

⁴ See, for example, Annalisa Ciampi, “Legal Rules, Policy Choices and Political Realities in the Functioning of the Cooperation Regime of the International Criminal Court”, in Olympia Bekou and Daley J. Birkett (eds.), *Cooperation and the International Criminal Court. Perspectives from Theory and Practice*, Brill Nijhoff, Leiden, Boston, 2016, p. 14 (<https://www.legal-tools.org/doc/880a24/>).

⁵ Cedric Ryngaert, “Article 58”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 10.

Article 89(1): Request for Arrest and Surrender

a request for the arrest and surrender of a person,

A request pursuant to Article 89(1) is comprised of a request to arrest and an additional request for surrender. Generally speaking, a request under Part 9 must be specific, relevant and necessary.¹ The wording of Article 89(1) indicates the ‘standard procedure’ to be followed in case of arrest and surrender. The existence of a separate provision dealing with the provisional arrest (Article 92) illustrates that the Court, under the normal circumstances envisaged in Article 89(1), shall not request the mere arrest of a person. Otherwise the person taken into custody upon request of the Court might face a disproportionate deprivation of liberty until the actual surrender request is made. Article 92(3) and Rule 188 guarantee that any detention based on a request for arrest by the Court shall not exceed 60 days if the requested State has not received the request for surrender. These protective mechanisms cannot be circumvented. It is for that reason that Article 89(1) envisages a combination of both requests.²

As highlighted by Pre-Trial Chamber I in the Darfur situation “it is not possible to envisage a surrender [...] without the prior issuance of warrant of arrest”.³ Trial Chamber IV similarly suggests that a State shall receive a simple ‘co-operation request’ to take all necessary steps to facilitate a person’s presence at trial in a situation where only a summons to appear

¹ Kai Ambos, *Treatise on International Criminal Law, Vol III: International Criminal Procedure*, Oxford University Press, 2016, p. 604 (<https://www.legal-tools.org/doc/995606/>); ICC, *Prosecutor v. Banda and Jerbo*, Trial Chamber IV, Decision on “Defence Application pursuant to article 57 (3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan”, 1 July 2011, ICC-02/05-03/09-169, para. 17 (<https://www.legal-tools.org/doc/891c96/>).

² Dine Rinoldi and Nicoletta Parisi, “International Cooperation and Judicial Assistance between States Parties and the International Criminal Court”, in Flavia Lattanzi and William A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, vol. 1, 1999, p. 344 (<https://www.legal-tools.org/doc/27edd7/>).

³ ICC, *Prosecutor v. Harun and Kushayb*, Pre-Trial Chamber, Decision on the Prosecution Application under Article 58 (7) of the Statute, 27 April 2007, ICC-02/05-01/07-1-Corr, para. 121 (<https://www.legal-tools.org/doc/e2469d/>); see also Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003, p. 110 (<https://www.legal-tools.org/doc/8d1442/>); Rinoldi and Parisi, 1999, p. 345.

has been issued.⁴ The Trial Chamber did, however, not refer to Article 89(1) when making such a ‘co-operation request’. Following a factual reassessment,⁵ the Chamber issued an arrest warrant and ordered the Registrar to transmit a request pursuant to Articles 89(1) and 91.

Doctrine: For the bibliography, see the final comment on Article 89.

Author: Mayeul Hiéramente.

⁴ ICC, *Prosecutor v. Banda*, Trial Chamber IV, Decision as to the future steps for the trial proceedings, 14 July 2014, ICC-02/05-03/09-590-Red, para. 36 (<https://www.legal-tools.org/doc/0f3de7/>).

⁵ ICC, *Prosecutor v. Banda*, Trial Chamber IV, Warrant of Arrest for Abdallah Banda Abakaer Nourain, 11 September 2014, ICC-02/05-03/09-606, para. 24 (<https://www.legal-tools.org/doc/aeda93/>).

Article 89(1): Material Supporting the Request

together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person.

The Court may transmit a request for co-operation in the arrest and surrender of a person sought for prosecution to “any State”.¹ The wording of Article 89(1) clearly demonstrates that the requested State must not be a States Party.² As indicated in the second sentence, which explicitly refers to States Parties, it is only the obligation to comply with such request that differs between States Parties and non-States Parties. This does not preclude the Court from contacting non-States Parties with a request for arrest and surrender, to inform such States about the content of the arrest warrant and to put them in a position to co-operate on a voluntary basis. Such a co-operation can result, inter alia, from a declaration pursuant to Article 12(3) or on the basis of Article 87(5). The possibility to contact “any State” enhances the chances of a successful arrest and has repeatedly been used by the Court.

The wording of Article 89(1) places limitations on a broad circulation in that it requires the recipient of the request to be a State “on the territory of which that person may be found” (Kreß and Prost, 2022, Article 89, para. 4). Kreß and Prost³ therefore question whether the practice of Pre-Trial Chamber I⁴ to transmit requests to “all States Parties to the Statute” as well as “all United Nations Security Council members that are not States Parties to the Statute” can be reconciled with the wording of Article 89(1).

¹ For an overview, see Julien Cazala, “Article 89”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1838 ff. (<https://www.legal-tools.org/doc/872bf2/>).

² Claus Kreß and Kimberly Prost, “Article 89”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 4.

³ See also Cazala, 2012, Article 89, p. 1840; ICC, *Situation in Libya*, OTP, Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif al-Islam Gaddafi and Abdullah al-Sennussi, 16 May 2011, ICC-01/11-4-Red, paras. 65 ff. (<https://www.legal-tools.org/doc/d49120/>).

⁴ ICC, *Prosecutor v. Harun and Kushayb*, Pre-Trial Chamber, Decision on the Prosecution Application under Article 58 (7) of the Statute, 27 April 2007, ICC-02/05-01/07-1-Corr (<https://www.legal-tools.org/doc/e2469d/>).

The Chamber has not explained its decision and it is indeed difficult to assume that all recipients of the request qualify as States where the persons may be found. A decision by Pre-Trial Chamber II seems to suggest that the test to adapt is that of ‘reasonable basis to believe’.⁵ While Article 89(1) does not require certainty as to the presence of the person on the territory of the requested State, the mere theoretical possibility cannot suffice. In case of extensive travel activities of a person sought for arrest and surrender⁶ a broad interpretation of Article 89(1) must be tolerated. The Court should, however, refrain from using Article 89(1) to up the ante by putting public pressure on the international community. It might help to notify the requested States in time and can thereby facilitate a finding of non-compliance.⁷

The Court directs its request at States and not private persons or organs of the State.⁸ The respect of the proper channels of communication as envisaged in Articles 89(1) and 87(1) can have a negative impact on the effectivity of the co-operation regime. In a situation where the requested State suffers from internal conflict or armed upheaval, the Court has, nonetheless, to accept the facts on the ground. In the Libya situation, Pre-Trial Chamber I was confronted with an application by the Prosecutor⁹ in which

⁵ ICC, *Prosecutor v. Kony et al.*, Pre-Trial Chamber II, Decision to issue requests for arrest and surrender to the Central African Republic, 21 March 2007, ICC-02/04-01/05-224-Red (<https://www.legal-tools.org/doc/bd77b8/>); William A. Schabas, *The International Criminal Court: Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1293 (<https://www.legal-tools.org/doc/b7432e/>); see also Kreß and Prost, 2022, para. 23.

⁶ For an overview, see Annalisa Ciampi, “Legal Rules, Policy Choices and Political Realities in the Functioning of the Cooperation Regime of the International Criminal Court”, in Olympia Bekou and Daley J. Birkett (eds.), *Cooperation and the International Criminal Court. Perspectives from Theory and Practice*, Brill Nijhoff, Leiden, Boston, 2016, p. 25 (<https://www.legal-tools.org/doc/880a24/>); Lorraine Smith-van Lin, “Non-Compliance and the Law and Politics of State Cooperation: Lessons from the Al Bashir and Kenyatta Cases”, in Olympia Bekou and Daley J. Birkett (eds.), *Cooperation and the International Criminal Court. Perspectives from Theory and Practice*, Brill Nijhoff, Leiden, Boston, 2016, p. 121 (<https://www.legal-tools.org/doc/880a24/>).

⁷ Kreß and Prost, 2022, Article 89, para. 20; ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber II, 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, ICC-02/05-01/09-195, para. 14 (<https://www.legal-tools.org/doc/89d30d/>).

⁸ Kai Ambos, *Treatise on International Criminal Law, Vol III: International Criminal Procedure*, Oxford University Press, 2016, p. 604 (<https://www.legal-tools.org/doc/995606/>).

⁹ ICC, *Prosecutor v. Gaddafi*, OTP, Request for an order directing the Registrar to transmit the request for arrest and surrender to Mr. Al ‘Ajami Al ‘Atiri, Commander of the Abu Bakr al-

the Chamber was asked to issue a direct request for arrest and surrender of Saif al-Islam Gaddafi to the local authorities in Zintan. The Pre-Trial Chamber determined¹⁰ that Libya was obliged to co-operate with the Court by virtue of UN Security Council resolution 1970 of 2011¹¹ but insisted that the Court is not in a position to bypass the competent national authorities recognized by the international community (*Gaddafi*, 21 November 2016, para. 15). The judges thus declared that a request cannot be made to a non-State entity despite the fact that the entity claimed to represent the State.

Doctrine: For the bibliography, see the final comment on Article 89.

Author: Mayeul Hiéramente.

Siddiq Battalion in Zintan, Libya, 26 April 2016, ICC-01/11-01/11-624 (<https://www.legal-tools.org/doc/9961e3/>).

¹⁰ ICC, *Prosecutor v. Gaddafi*, Pre-Trial Chamber I, Decision on the Prosecutor’s “Request for an order directing the Registrar to transmit the request for arrest and surrender to Mr. Al ‘Ajami Al ‘Atiri, Commander of the Abu Bakr al-Siddiq Battalion in Zintan, Libya”, 21 November 2016, ICC-01/11-01/11-634-Red, para. 14 (*Gaddafi*, 21 November 2016’) (<https://www.legal-tools.org/doc/42935a/>).

¹¹ Resolution 1970 (2011), UN Doc. S/RES/1970, 26 February 2011 (<https://www.legal-tools.org/doc/00a45e/>).

Article 89(1): Compliance by States Parties

States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.

The second sentence of Article 89(1) emphasizes that States Parties have to comply with a request by the Court.¹ It has to be read in conjunction with, among others, Article 86,² Article 89 (2), Article 90 and Article 91 (Cazala, 2012, Article 89, p. 1841). Article 89 (1) does not encompass any of the traditional grounds for refusal of extradition such as nationality (Kreß and Prost, 2022, Article 89, para. 6), human rights concerns (Swart, 2002, p. 1684) or substantive grounds which are common in domestic extradition treaties (Swart, 2002, p. 1680 ff.). The provision was debated extensively (Kreß and Prost, 2022, Article 89, para. 5). While Article 89 (1) refers to national procedures, it is clear from the context and Article 88 that such procedures cannot be invoked to refuse co-operation with the Court (Kreß and Prost, 2022, Article 89, para. 24; Cazala, 2012, Article 89, p. 1842). The provision refers, inter alia, to arrest procedures to be followed.³

A request can solely be denied or postponed by virtue of other provisions in Part 9 to which Article 89(1) explicitly refers (see Kreß and Prost, 2022, Article 89, para. 6). It was the general idea of the drafters to regulate the co-operation regime in a separate Part 9. This raised the question whether Article 27(2) – irrelevance of official capacity – also applied to requests for arrest and surrender and whether States Parties could invoke

¹ Claus Kreß and Kimberly Prost, “Article 89”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 10; Julien Cazala, “Article 89”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, Editions A. Pedone, Paris, 2012, p. 1841 (<https://www.legal-tools.org/doc/872bf2/>); see also Bert Swart, “General Problems”, in Antonio Cassese, Paola Gaeta and John Jones (eds.), *The Rome Statute of the International Criminal Court. A Commentary*, Oxford University Press, 2002, p. 1596 (<https://www.legal-tools.org/doc/01addc/>).

² William A. Schabas, *The International Criminal Court: Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1292 (<https://www.legal-tools.org/doc/b7432e/>).

³ Dine Rinoldi and Nicoletta Parisi, “International Cooperation and Judicial Assistance between States Parties and the International Criminal Court”, in Flavia Lattanzi and William A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, vol. 1, 1999, p. 349 (<https://www.legal-tools.org/doc/27edd7/>).

the immunity of the accused to refuse the arrest and surrender of a foreign Head of State. This question became relevant in the Al Bashir proceedings and the refusal of, *inter alia*, South Africa and the Hashemite Kingdom of Jordan to arrest the (then) sitting president of Sudan. Jordan (and others) argued that Article 27(2) addresses the ability of the Court to exercise jurisdiction and should thereby not affect the obligation of States under Part 9.⁴ The ‘immunity-argument’ was ultimately rejected by the Appeals Chamber which based its decision on the main argument that Heads of States do not benefit from immunity from prosecution by international courts and tribunals⁵ as well as the execution of a request for arrest and surrender by such a court (*Al Bashir*, 6 May 2019, par. 116). The Appeals Chamber also noted (paras. 121 ff.):

The extent of the obligation of States Parties to cooperate fully must be understood in the context of the Statute as a whole and bearing in mind its object and purpose. [...] While articles 27 and 86 et seq. are located in different parts of the Statute, they must be read together and any possible tension between them must be reconciled. [...] Therefore, contrary to the submission of Jordan and some of the amicus curiae, article 27 (2) is relevant not only to the adjudicatory jurisdiction of the Court, but also to the Court’s ‘enforcement jurisdiction’ vis-à-vis States Parties to the Rome Statute.

The Appeals Chamber went on to state that Article 98 did not allow Jordan to refuse co-operating with the request for arrest and surrender of Al Bashir (*Al Bashir*, 6 May 2019, paras. 128 ff.)

⁴ ICC, *Prosecutor v. Al Bashir*, Appeals Chamber, The Hashemite Kingdom of Jordan’s appeal against the “Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar al-Bashir”, 12 March 2018, ICC-02/05-01/09-326 (<https://www.legal-tools.org/doc/826788/>); see also *Prosecutor v. Al Bashir*, Appeals Chamber, Observations by Professor Roger O’Keefe, pursuant to Rule 103 of the Rules of Procedure and Evidence, on the merits of the legal questions presented in the ‘Hashemite Kingdom of Jordan’s Appeal against the “Decision under Article 87(7) of the Rome Statute on the Non-Compliance of Jordan with Request by the Court for the Arrest and Surrender of Omar al-Bashir of 12 March 2018”’ (ICC-02/05-01/09-326), 18 June 2018, ICC-02/05-01/09-360, para. 7 (<https://www.legal-tools.org/doc/8e6e48/>).

⁵ ICC, *Prosecutor v. Al Bashir*, Appeals Chamber, Judgment in the Jordan referral re Al-Bashir Appeal, 6 May 2019, ICC-02/05-01/09-397-Corr, paras. 113 ff. (*Al Bashir*, 6 May 2019’) (<https://www.legal-tools.org/doc/0c5307/>).

The obligation to co-operate with a request for arrest and surrender under Article 89 (1) applies directly to States Parties (Rinoldi and Parisi, 1999, p. 348). In addition, Article 12(3) states that a State that has accepted the jurisdiction of the Court shall also co-operate in accordance with Part 9. Furthermore, the Court may invite a State not party to the Statute to provide assistance under this part [Part 9] on the basis of an *ad hoc* arrangement, an agreement or any other appropriate basis.⁶ The exact scope of such a case-by-case arrangement is not defined by the Statute. This allows a State not party to the Statute to determine the exact contours of and limits to the co-operation (Kreß and Prost, 2022, Article 89 para. 34.). Article 87(6) allows for a co-operation with international organisations.

In addition to the co-operation obligations stipulated in the Statute, States (not party to the Statute) can be obliged to co-operate with the Court by virtue of a binding UN Security Council resolution under Chapter VII of the UN Charter.⁷ Whether or not a UN Security Council resolution entails such obligation is subject to interpretation and depends on the wording of the resolution.⁸ The Security Council may merely ‘invite’ or ‘urge’ States to

⁶ See also Annalisa Ciampi, “The Obligation to Cooperate”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 1617 (<https://www.legal-tools.org/doc/01addc/>); Pascal Turlan, “The International Criminal Court Cooperation Regime – A Practical Perspective from the Office of the Prosecutor”, in Olympia Bekou and Daley J. Birkett (eds.), *Cooperation and the International Criminal Court. Perspectives from Theory and Practice*, Brill Nijhoff, Leiden, Boston, 2016, p. 70 ff. (<https://www.legal-tools.org/doc/880a24/>); Kai Ambos, *Treatise on International Criminal Law, Vol III: International Criminal Procedure*, Oxford University Press, 2016, p. 596 (<https://www.legal-tools.org/doc/995606/>).

⁷ See, for example, ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber I, Decision on the Prosecutions’ Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-3, para. 240 ff. (<https://www.legal-tools.org/doc/e26cf4/>); Cazala, 2012, Article 89, p. 1841; Dapo Akande, “Classification of Armed Conflicts: Relevant Legal Concepts”, in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, 2012, p. 299 ff. (<https://www.legal-tools.org/doc/415188/>).

⁸ Michiel Blommestijn and Cedric Ryngaert, “Exploring the Obligations of States to Act upon the ICC’s Arrest Warrant for Omar Al-Bashir”, in *Zeitschrift für Internationale Strafrechtsdogmatik*, 2010, vol. 5, no. 6, p. 442 (<https://www.legal-tools.org/doc/75c5d0/>).

co-operate⁹ or ‘decide’ that a State shall co-operate fully with the investigation.¹⁰ The former phrasing suggests that no legal obligation is imposed.¹¹

In practice, such imposition of an obligation to co-operate is closely linked to a Security Council referral under Article 13(b). In case of a referral to the Court pursuant to Article 13(b), the Court is bound by the provisions of the Statute and the co-operation regime of Part 9 (*Al Bashir*, 6 May 2019, para. 135). As a matter of law it is, however, conceivable that – even absent a referral – the UN Security Council imposes co-operation obligations on States if it considers that the lack of co-operation amounts to a threat of peace in the sense of Chapter VII of the UN Charter (see, for example, Ciampi, 2002, p. 1611). The Security Council can also request from UN Member States an enhanced co-operation with the Court that surpasses the obligations under Part 9 of the Statute.¹² The Appeals Chamber explicitly acknowledged such a possibility but clarified (*Al Bashir*, 6 May 2019, para. 137):

While the UN Security Council may obligate States not parties to the Statute to cooperate with the Court, it is of note that the Statute does not provide for a third regime specific to UN Security Council referrals. Thus, given that the Court must exercise its jurisdiction ‘in accordance with [the] Statute’, co-operation by a State following a referral by the UN Security Council must either follow the rules provided for States Par-

⁹ See, for example, Resolution 1593 (2005), UN Doc. S/RES/1593 (2005), 31 March 2005 (‘UNSC Resolution 1593, 2005’) (<https://www.legal-tools.org/doc/4b208f/>), with regard to “all States”.

¹⁰ See, for example, UNSC Resolution 1593, 2005, with regard to the Government of Sudan; see also ICC, *Prosecutor v. al-Bashir*, Appeals Chamber, Observations pursuant to Rule 103 of the Rules of Procedure and Evidence on the Merits of the Legal Questions presented in the Hashemite Kingdom of Jordan’s Appeal against the Decision under Article 87(7) of the Rome Statute on the Non-Compliance of Jordan with Request by the Court for the Arrest and Surrender of Omar al-Bashir of 12 March 2018, 18 June 2018, ICC-02/05-01/09-357, paras. 7 ff. (<https://www.legal-tools.org/doc/9be866/>).

¹¹ See ICC, *Prosecutor v. Gaddafi and Al Senussi*, Pre-Trial Chamber I, Decision on the request of the Defence of Abdullah al-Senussi to make a finding on non-cooperation by the Islamic Republic of Mauritania and refer the matter to the Security Council, 28 August 2013, ICC-01/11-01/11-420, para. 14 (<https://www.legal-tools.org/doc/7342b3/>).

¹² Claus Kreß and Kimberly Prost, “Preliminary Remarks”, in Ambos (ed.), 2022, para. 9; Astrid Reisinger-Coracini, “Cooperation from States and Other Entities”, in Göran Sluiter, Håkan Friman, Suzannah Linton, Sergey Vasiliev, and Salvatore Zappalà (eds.), *International Criminal Procedure. Rules and Principles*, Oxford University Press, 2013, p. 101 (<https://www.legal-tools.org/doc/bcad4c/>).

ties (articles 86 *et seq.* of the Statute) or the more limited regime for States not parties to the Statute (Article 87(5) of the Statute). That is to say, in the absence of a comprehensive regime of cooperation spelt out in a Security Council resolution, with the clear intention of replacing the two cooperation regimes provided for in the Rome Statute, cooperation must be governed by either of the two regimes provided for under the Rome Statute.

Pre-Trial Chamber I has decided that the fact that the Libyan authorities are obliged to ‘co-operate fully’ would lead to the applicability of the entire co-operation regime of Part 9 of the Statute:

[T]hat, although Libya is not a State Party to the Statute, it is under an obligation to cooperate with the Court. This obligation stems directly from the Charter of the United Nations, more precisely Article 25 and Chapter VII of that Charter, and UNSC Resolution 1970/25 UNSC Resolution 1970 orders Libya to “cooperate fully” with the Court, which means that the Statute, and especially its Part 9, is the legal framework within which Libya must comply with the Surrender Request.¹³

The assessment that the Statute is the ‘legal framework within which Libya must comply’ is a determination by the Chamber. It was not made by the UN Security Council itself. The restrictive interpretation by the Chamber could possibly limit the effectiveness in that it allows Libya to invoke possible objections to a co-operation as envisaged, for example, in Articles 90, 94 or 95 of the Statute.¹⁴ A broader interpretation of such resolutions,

¹³ ICC, *Prosecutor v. Gaddafi and Al Sennussi*, Pre-Trial Chamber I, Decision on Libya’s Submissions Regarding the Arrest of Saif al-Islam Gaddafi, 7 March 2012, ICC-01/11-01/11-72, para. 12 (<https://www.legal-tools.org/doc/ceaea3/>); see also ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber I, Decision on the Prosecutions’ Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-3, para. 45 (<https://www.legal-tools.org/doc/e26cf4/>); ICC, *Prosecutor v. Banda and Jerbo*, Trial Chamber IV, Decision on “Defence Application pursuant to article 57 (3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan”, 1 July 2011, ICC-02/05-03/09-169, para. 15 (<https://www.legal-tools.org/doc/891c96/>).

¹⁴ See ICC, *Prosecutor v. Gaddafi and Al Senussi*, Pre-Trial Chamber I, Decision on the postponement of the execution of the request for surrender of Saif al-Islam Gaddafi pursuant to article 95 of the Rome Statute, 1 June 2012, ICC-01/11-01/11-163 (<https://www.legal-tools.org/doc/ae7c48/>); Claus Kreß and Kimberly Prost, “Article 95”, in Ambos (ed.), 2022, para. 56.

that also takes into consideration the weight given to obligations imposed by the UN Security Council by virtue of Article 103 of the UN Charter, would lead to an enhanced co-operation regime beneficial for the Court's investigations.¹⁵

A failure to comply with a co-operation request by the Court can, depending on the legal basis for the obligation to co-operate, be addressed pursuant to Article 87.¹⁶

In an instance where the Registry considers that the State receiving a request is not obliged to co-operate it can "invite" said State to co-operate.¹⁷

It is unclear whether the obligation to co-operate with a request for arrest and surrender ends with the acquittal of the person sought for surrender. Trial Chamber III, notes:

The Chamber further clarifies that, contrary to the submissions advanced, an acquittal or other cessation of proceedings does not render the cooperation requests nor the coercive measures invalid, null or void. The cooperation requests issued in this case remain, but cease to have effect in the sense that States are no longer required to comply with them, for instance by keeping assets frozen.¹⁸

¹⁵ See Kreß and Prost, 2022, Preliminary Remarks, para. 9; see also ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber I, Decision on the Prosecutions' Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-3, para. 247 (<https://www.legal-tools.org/doc/e26cf4/>).

¹⁶ Göran Sluiter and Stanislas Talontsi, "Credible and Authoritative Enforcement of State Cooperation with the International Criminal Court", in Olympia Bekou and Daley J. Birkett (eds.), *Cooperation and the International Criminal Court. Perspectives from Theory and Practice*, Brill Nijhoff, Leiden, Boston, 2016, p. 80 ff. (<https://www.legal-tools.org/doc/880a24/>). Sluiter, 2018, pp. 393 ff.; Hannah Woolaver and Emma Palmer, "Challenges to the Independence of the International Criminal Court from the Assembly of States Parties", in *Journal of International Criminal Justice*, 2017, vol. 15, no. 4, p. 652 ff. For a detailed analysis, see *Al Bashir*, 6 May 2019).

¹⁷ See, for example, ICC, *Prosecutor v. Hussein*, Pre-Trial Chamber II, Request for the Arrest and Surrender of Abdel Raheem Muhammad Hussein to the United Arab Emirates, 22 December 2016, ICC-02/05-01/12-36 (<https://www.legal-tools.org/doc/d79b58/>).

¹⁸ ICC, *Prosecutor v. Bemba*, Trial Chamber III, 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 2018, para. 13 (<https://www.legal-tools.org/doc/637a6f/>).

This line of reasoning should definitely apply in case the Appeals Chamber has confirmed the acquittal.

Doctrine: For the bibliography, see the final comment on Article 89.

Author: Mayeul Hiéramente.

Article 89(2): Challenge before National Court

2. Where the person sought for surrender brings a challenge before a national court

Article 89(2) addresses a situation where the person sought for surrender objects to the arrest and surrender by invoking the principle of *ne bis in idem*. It is supplemented by Rule 181 and is closely related to Article 95.

The provision addresses the possibility of a person sought for surrender objecting to the surrender to The Hague and seizing the national courts¹ of the requested State where he or she was arrested on the orders of the ICC. The existence of such provision is rather surprising and seems, at least at first sight, at odds with the co-operation regime of the Statute, which guarantees that national laws are in place to fulfil co-operation requests by the Court (see Article 88) and grant the Court the role of ultimate arbiter (see, for example, Articles 19, 87(7), 119). The fact that the Statute recognizes a potential *ne bis in idem* challenge before a national court does not, however, call into question these principles.

Article 89(2) simply takes note of the fact that many national legal systems allow a person sought for ‘delivery’ to seize a national court before being surrendered or extradited.² Neither does it grant the requested State the right to decide on the admissibility of the case nor to invoke a decision by a national court as ground for refusal of co-operation.³ If the requested State or its national judicial authorities concur with the *ne bis in idem* challenge by the person, the requested State is allowed to bring forward its own challenge to the admissibility of the case on the basis of Article 19(2)(b)

¹ See also ICC, *Prosecutor v. Saif al-Islam Gaddafi*, Pre-Trial Chamber I, Public Redacted Version of “Prosecution Response to ‘Admissibility Challenge by Dr. Saif al-Islam Gaddafi pursuant to articles 17(1)(c), 19 and 20(3) of the Rome Statute” filed on 28 September 2018 (ICC-01/11-01/11-653-Conf), 11 October 2018, ICC-01/11-01/11-653-Red, para. 96 (<https://www.legal-tools.org/doc/5af850/>).

² Claus Kieß and Kimberly Prost, “Article 89”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 31.

³ Kieß and Prost, 2022, para. 32; Julien Cazala, “Article 89”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1842 (<https://www.legal-tools.org/doc/872bf2/>).

and thereby request a decision by the Court.⁴ Furthermore, the person sought for surrender – against whom a warrant of arrest has been issued – can submit its own admissibility challenge with the Court pursuant to Article 19(2)(a) (Rinoldi and Parisi, 1999, p. 350).

Doctrine: For the bibliography, see the final comment on Article 89.

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⁴ Dine Rinoldi and Nicoletta Parisi, “International Cooperation and Judicial Assistance between States Parties and the International Criminal Court”, in Flavia Lattanzi and William A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, vol. 1, 1999, p. 350 (<https://www.legal-tools.org/doc/27edd7/>).

Article 89(2): The Principle of *Ne Bis in Idem*

on the basis of the principle of ne bis in idem as provided in article 20,

The Statute recognizes the right of a person sought for surrender to seize the national courts only on the basis of the principle of *ne bis in idem*. Meißner argues that the national definition of *ne bis in idem* matters.¹ He rightly points out that national courts apply their national law (Meißner, 2003, p. 135). Yet, the wording of the provision is quite clear and guarantees that only challenges before national courts that could have an impact on an admissibility decision pursuant to Articles 17 and 19 be considered. For the purpose of Article 89(2) only *ne bis in idem* challenges conforming to the definition of Article 20 are relevant. Other challenges before national courts, such as complementarity or insufficient gravity, are of no concern to Article 89(2). The person sought for surrender can raise such arguments in an admissibility challenge before the Court pursuant to Article 19(2)(a) and Article 17 (see Meißner, 2003, p. 135). They are not sufficient to trigger the consultation process as envisaged in Article 89(2) if (solely) raised in national courts. A requested State confronted with such challenges before its national courts will have to assess whether to bring its own admissibility challenge under Article 19(2)(b), which it shall make at the earliest opportunity, Article 19(5).

Doctrine: For the bibliography, see the final comment on Article 89.

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¹ Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003, p. 135 (<https://www.legal-tools.org/doc/8d1442/>).

Article 89(2): Consultation

the requested state shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the requested State shall proceed with the execution of the request. If an admissibility ruling is pending, the requested State may postpone the execution of the request for surrender of the person until the Court makes a determination on admissibility.

In case of a national *ne bis in idem* challenge, the requested State is tasked to immediately consult with the Court. The consultation takes place with the Chamber through the Registrar (see Rules 181, 184). The objective of the consultation is to determine whether the Court has determined¹ or intends to make a determination with regards to the admissibility of the case. Such consultation is necessary in the likely event² that the Registrar has not yet provided a copy of an admissibility ruling when transmitting the request (see Regulation 111; Kreß and Prost, 2022, Article 89, para. 31). It also allows the Court to make a determination of the admissibility on its own motion pursuant to Article 19(1) and request the necessary information.³

If, as a consequence of the consultation, the requested State is informed that the Court has ruled on (Schabas, 2016, Article 89, p. 1293) and confirmed the admissibility of the case, the request for surrender is to be executed.⁴ A possible appeal against an affirmative admissibility ruling does not grant the right to postpone the execution unless the suspensive effect of the appeal is established pursuant to Article 82(3).⁵ The person has

¹ Claus Kreß and Kimberly Prost, “Article 89”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 31.

² William A. Schabas, *The International Criminal Court: Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1293 (<https://www.legal-tools.org/doc/b7432e/>).

³ Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003, p. 136 (<https://www.legal-tools.org/doc/8d1442/>).

⁴ Bert Swart, “Arrest and Surrender”, in Antonio Cassese, Paola Gaeta and John Jones (eds.), *The Rome Statute of the International Criminal Court. A Commentary*, Oxford University Press, 2002, p. 1685 (<https://www.legal-tools.org/doc/01addc/>).

⁵ See, for example, ICC, *Prosecutor v. Gbagbo*, Appeals Chamber, Decision on Côte d’Ivoire’s request for suspensive effect of its appeal against the “Decision on Côte d’Ivoire’s

to be surrendered.⁶ If the Chamber decides that the case is inadmissible there can be no obligation to surrender the person (Kreß and Prost, 2022, Article 89, para. 34). In a situation where a negative admissibility ruling is appealed, the requested State has to keep the person sought for surrender in custody and may postpone the surrender (Kreß and Prost, 2022, Article 89, para. 34). The State has to consult with the Court to determine if the negative decision has been appealed, if the Prosecutor submitted a request for review under Article 19(10) and whether or not the arrest warrant against the person remains in effect (Article 58(4)). Only the Court has the power to lift the arrest warrant.⁷ The postponement of the surrender does not per se effect the arrest situation (Meißner, 2003, p. 137; Cazala, 2012, Article 89, p. 1843; Swart, 2002, p. 1694). The requested State may decide on an interim release pursuant to Article 59(4)-(5). Kreß and Prost (Kreß and Prost, 2022, Article 89, para. 36) highlight that the Court will uphold its request only in exceptional circumstances.

Article 89(2) further stipulates that if an admissibility ruling is pending, the requested State may postpone the execution of the surrender request until the Court makes a determination of the admissibility. An identical right to postpone the execution of a co-operation request is granted to the requested State in Article 95. Kreß and Prost (Kreß and Prost, 2022, Article 89, para. 35; see also Meißner, 2003, p. 136) argue that Article 89(2) and Article 95 apply concurrently where a situation of a national *ne bis in idem* challenge and an admissibility challenge under Article 19 occur simultaneously. It is indeed correct that the requested State may postpone the surrender of a person if an application under Article 19 – no matter by whom – was made and an admissibility ruling is pending. A literal interpre-

challenge to the admissibility of the case against Simone Gbagbo” of 11 December 2014, 20 January 2015, ICC-02/11-01/12-56 (<https://www.legal-tools.org/doc/4d94ed/>); *Prosecutor v. Simone Gbagbo*, Pre-Trial Chamber, Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo, 11 December 2014, ICC-02/11-01/12-47-Red, para. 80 (<https://www.legal-tools.org/doc/ef697a/>); Anne-Aurore Bertrand and Natacha Schauder, “Practical Cooperation Challenges Faced by the Registry of the International Criminal Court”, in Olympia Bekou and Daley J. Birkett (eds.), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice*, Brill Nijhoff, Leiden/Boston, 2016, p. 155.

⁶ See Kreß and Prost, 2022, Article 89, para. 33; Meißner, p. 136; Julien Cazala, “Article 89”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1843 (<https://www.legal-tools.org/doc/872bf2/>).

⁷ Cedric Ryngaert, “Article 58”, in Ambos (ed.), 202, para. 29.

tation of Article 89(2) suggests, however, that the “pending ruling” referred to in the third sentence of Article 89(2) is itself not directly connected to the national *ne bis in idem* challenge which is, by definition, no challenge under Article 19 and can therefore not lead to an admissibility decision by the ICC. Meißner convincingly argues that in a situation where the person seizes the national courts but abstains from an application pursuant to Article 19(2)(a), the Court shall make a determination on its own motion (Meißner, 2003, p. 137). If the Court is in the process of making such determination the requested State should thus be granted the right to postponement the execution of the surrender request.

The wording of Article 89(2) does not address a situation where no admissibility ruling is pending at all. Meißner argues that in the absence of admissibility proceedings, the requested State shall be allowed to postpone the execution of the surrender request (Meißner, 2003, p. 137). The fact that the requested State is free to challenge the admissibility of the case and subsequently postpone the execution of the surrender request pursuant to Article 95 suggests otherwise. The requested State should not be given the right to refuse co-operation without seeking a legal assessment regarding the admissibility. In practice, suspects might be inclined to avoid admissibility proceedings altogether before a surrender takes place (Schabas, 2016, Article 89, p. 1294). Finally, it should be noted that the person sought for surrender is – under the Statute – in no position to force the requested State to invoke the right to postpone the execution of the surrender request (‘may’) even in a situation of a pending admissibility ruling.

Doctrine: For the bibliography, see the final comment on Article 89.

Author: Mayeul Hiéramente.

Article 89(3)

- 3. (a) A State Party shall authorize, in accordance with its national procedural law, transportation through its territory of a person being surrendered to the Court by another State, except where transit through that State would impede or delay the surrender.*
- (b) A request by the Court for transit shall be transmitted in accordance with Article 87. The request for transit shall contain:*
- (i) A description of the person being transported;*
 - (ii) A brief statement of the facts of the case and their legal characterization; and*
 - (iii) The warrant for arrest and surrender;*
- (c) A person being transported shall be detained in custody during the period of transit;*
- (d) No authorization is required if the person is transported by air and no landing is scheduled on the territory of the transit State;*
- (e) If an unscheduled landing occurs on the territory of the transit State, that State may require a request for transit from the Court as provided for in subparagraph (b). The transit State shall detain the person being transported until the request for transit is received and the transit is effected, provided that detention for purposes of this subparagraph may not be extended beyond 96 hours from the unscheduled landing unless the request is received within that time.*

Article 89(3) addresses the transport of the surrendered person from the requested State to the Court through the territory of another State. Sub-paragraphs (a)-(c) concern the general rules that, as a consequence of the following sub-paragraphs, mainly apply to the transit via land. Sub-paragraphs (d)-(e) address the preferred mode of transit via air transport as well as the situation of an unscheduled landing. Article 89(3) is supplemented by Rule 182.

Doctrine: For the bibliography, see the final comment on Article 89.

Author: Mayeul Hiéramente.

Article 89(3)(a)

a. A State Party shall authorize, in accordance with its national procedural law, transportation through its territory of a person being surrendered to the Court by another State, except where transit through that State would impede or delay surrender.

The seat of the Court is in The Hague, Netherlands. While Article 3(3) allows the Court to sit elsewhere, this remains a theoretical possibility. The Court therefore requires co-operation of States to arrest a suspect as well as co-operation in allowing or facilitating the transportation to the seat of the Court. The effective functioning of a system of transit is a practical necessity for the co-operation regime.¹ Article 89(3) postulates that States Parties are obliged to co-operate with the Court by allowing transit through their territory by all modes of transportation (Kreß and Prost, 2022, Article 89, para. 39). The transit takes place in accordance with national law which has to allow for an effective co-operation.² The drafters of the Statute included an exception “where transit through that State would impede or delay surrender”. The exception is meant to serve the interests of the Court in guaranteeing a smooth and easy transit process.³ This might be the case in a situation where the transit State is not able to assure the safe passage of the surrendered person due to internal strife, (civil) war, and others.⁴ Delays or impediments might also result from constitutional or other legal obligations the transit State is facing and that might lead to delays caused by judicial protection sought by the surrendered person (Kreß and Prost, 2022, Article 89, para. 40; Cazala, 2012, Article 89, p. 1844). Whether or not the State is

¹ Claus Kreß and Kimberly Prost, “Article 89”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 38.

² Kreß and Prost, 2022, Article 89, para. 41; Julien Cazala, “Article 89”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1844 (<https://www.legal-tools.org/doc/872bf2/>).

³ See Article 88; Kreß and Prost, 2022, Article 89, para. 39; Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003, p. 184 (<https://www.legal-tools.org/doc/8d1442/>).

⁴ Meißner, 2003, p. 186; Dine Rinoldi and Nicoletta Parisi, “International Cooperation and Judicial Assistance between States Parties and the International Criminal Court”, in Flavia Lattanzi and William A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, vol. 1, 1999, p. 366 (<https://www.legal-tools.org/doc/27edd7/>).

allowed to invoke such legal reasons is certainly debatable in light of Article 88 (Meißner, 2003, p. 86). In the interest of the Court, the transit State should invoke any possible delays to allow the Court to consider alternative transit routes. Meißner rightly advances that Articles 95 and 98 also apply to the transit process (Meißner, 2003, pp. 185–186).

Doctrine: For the bibliography, see the final comment on Article 89.

Author: Mayeul Hiéramente.

Article 89(3)(b)

- b. A request by the Court for transit shall be transmitted in accordance with article 87. The request for transit shall contain*
- i. A description of the person being transported;*
 - ii. A brief statement of the facts of the case and their legal characterization; and*
 - iii. The warrant for arrest and surrender;*

Article 89(3)(b) requires the Court to make a transit request to the transit State to take into consideration its sovereignty.¹ The transit request is made by the Registrar pursuant to Rule 184 as it is an intrinsic part of the surrender process co-ordinated by the Registrar.² The Pre Trial Chamber has also instructed the Registry to prepare requests for transit in case they might be necessary.³ The formal requirements of the request (channels of communication, language, confidentiality) are determined by reference to Article 87. The enumeration of the minimal content of the request in sub-paragraph (b) provides the transit State with the critical information to identify the surrendered person and to follow national procedures allowing for the detention of the person in conformity with its national laws.⁴

Doctrine: For the bibliography, see the final comment on Article 89.

Author: Mayeul Hiéramente.

¹ Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003, p. 183 (<https://www.legal-tools.org/doc/8d1442/>).

² Meißner, 2003, p. 184; see ICC, *Prosecutor v. Banda*, Trial Chamber IV, Warrant of Arrest for Abdallah Banda Abakaer Nourain, 11 September 2014, ICC-02/05-03/09-606 (<https://www.legal-tools.org/doc/aeda93/>).

³ ICC, *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Pre-Trial Chamber, Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 27 March 2018, ICC-01/12-01/18-2-tENG (<https://www.legal-tools.org/doc/41c013/>).

⁴ Claus Kreß and Kimberly Prost, “Article 89”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 43.

Article 89(3)(c)

c. A person being transported shall be detained in custody during the period of transit;

The Statute envisages that the surrendered person remains in custody during the entire transit. The law of the transit State has to provide the necessary legal instruments to allow for the detention of the person while on the territory of the transit State.¹ Article 89(3) grants a certain leeway as to the exact implementation of the transit regime. The State decides, inter alia, whether or not it is willing to accept that officials of the surrendering State and/or the Court are present during the transit (Meißner, 2003, p. 187). It can refuse participation of foreign officials as long as its national law and the resources made available assure the safety of the surrendered person and its custody during transit (Meißner, 2003, p. 187). Contrary to the view held by Rinoldi and Parisi,² no preference as to the authority detaining the person is expressed in Article 89(3). In all likelihood the surrendering State will (have to) be involved.

Doctrine: For the bibliography, see the final comment on Article 89.

Author: Mayeul Hiéramente.

¹ Claus Kreß and Kimberly Prost, “Article 89”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 44; Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003, p. 187 (<https://www.legal-tools.org/doc/8d1442/>).

² Dine Rinoldi and Nicoletta Parisi, “International Cooperation and Judicial Assistance between States Parties and the International Criminal Court”, in Flavia Lattanzi and William A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, vol. 1, 1999, p. 366 (<https://www.legal-tools.org/doc/27edd7/>).

Article 89(3)(d)

d. No authorization is required if the person is transported by air and no landing is scheduled on the territory of the transit State;

The rules applying to air transit differ significantly from those applicable to a transportation through the territory on the ground. The provision follows the model of many (bilateral) extradition treaties.¹ The practical relevance of air transits is very high. This is not surprising given that most situations under investigation by the Court are on the African continent and most arrested persons are African citizens. Article 89(3)(d) only applies to States Parties which agreed to the air transit by ratifying the ICC Statute.² Other States may collaborate on a voluntary basis and grant permission for air transits. It follows from the waiver of an authorization as determined by Article 89(3)(d) that a request pursuant to sub-paragraph (b) is not mandated. Furthermore, the States Party is not in a position to invoke impediments or delays to refuse an air transit.

Doctrine: For the bibliography, see the final comment on Article 89.

Author: Mayeul Hiéramente.

¹ Claus Kreß and Kimberly Prost, “Article 89”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 45; Julien Cazala, “Article 89”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1844 (<https://www.legal-tools.org/doc/872bf2/>).

² Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003, p. 183 (<https://www.legal-tools.org/doc/8d1442/>).

Article 89(3)(e)

e. If an unscheduled landing occurs on the territory of the transit State, that State may require a request for transit from the Court as provided for in subparagraph (b). The transit State shall detain the person being transported until the request for transit is received and the transit is effected, provided that detention for purposes of the subparagraph may not be extended beyond 96 hours from the unscheduled landing unless the request is received within that time.

In the event of an unscheduled landing, the ‘normal’ rules for transit should apply.¹ The State may ask for a request for transit as defined in subparagraph b), Article 87 and Rule 182 (1). The provision takes note of the fact that the transit State is confronted with a *fait accompli* without having given prior authorization to the transit process. Article 89(3)(e) therefore stipulates that the States Party² is only obliged to hold the person in custody for 96 hours and, after expiry of the time limit, is at liberty to end the detention. The provision is meant to protect the rights of the State in question (Cazala, 2012, Article 89, p. 1844). The State can decide whether or not to request additional documentation (Kreß and Prost, 2022, Article 89, para. 47) and is free to keep the person in custody after expiry of the time limit.³ The custodial arrangements can be upheld in order to allow for the continuation of the transit proceedings, a subsequent arrest upon request of the Court (see Rule 182(2)) or any other reasons constituting ground for arrest under the national law of the State (Meißner, 2003, p. 188). Rule 182(2) clarifies that the release of the person is without prejudice to a subsequent arrest in accordance with Articles 89 or 92. The 96-hours’ time limit was

¹ Julien Cazala, “Article 89”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1844 (<https://www.legal-tools.org/doc/872bf2/>).

² Claus Kreß and Kimberly Prost, “Article 89”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 48; Cazala, 2012, Article 89, p. 1845; William A. Schabas, *The International Criminal Court: Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1295 (<https://www.legal-tools.org/doc/b7432e/>).

³ Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003, p. 188 (<https://www.legal-tools.org/doc/8d1442/>).

introduced to accommodate States with domestic limitations on detention (Kreß and Prost, 2022, Article 89, para. 49), especially in a situation where no information on the suspect and supporting material has been provided that would allow for a judicial assessment by the national authorities. Article 89(3) addresses the transport of the surrendered person from the requested State to the Court through the territory of another State. Sub-paragraphs (a)-(c) concern the general rules that, as a consequence of the following sub-paragraphs, mainly apply to the transit via land. Sub-paragraphs (d)-(e) address the preferred mode of transit via air transport as well as the situation of an unscheduled landing. Article 89(3) is supplemented by Rule 182.

Doctrine: For the bibliography, see the final comment on Article 89.

Author: Mayeul Hiéramente.

Article 89(4)

4. If the person sought is being proceeded against or is serving a sentence in the requested State for a crime different from that for which surrender to the Court is sought, the requested State, after making its decision to grant the request, shall consult with the Court.

It might occur that the requested State, especially if it is the State the person sought for surrender is a national of, is prosecuting the person for conduct – not legal qualification¹ – other than the conduct on which the request for arrest and surrender is based. In such a case, the complementarity regime of Article 17(1)(a)-(b) fails to protect the requested State. The State has no recourse to Article 19(2)(b) and is, as a consequence, prevented from invoking a right to postpone the surrender by virtue of Article 95. Article 89(4) stipulates that the requested State shall consult with the Court.² Such consultations can lead to a temporary surrender pursuant to Rule 183. The wording of Article 89(4) is clear insofar that it presupposes that the requested State makes a decision to grant the request prior to any consultations. It also clear that it is a right of the requested State and not the individual.³

The content of Article 89(4) was extensively debated during the negotiations (for an overview see Kreß and Prost, 2022, Article 89, paras. 52 ff.; Cazala, 2012, Article 89, p. 1845). A right to postpone the surrender to

¹ Claus Kreß and Kimberly Prost, “Article 89”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 58; Julien Cazala, “Article 89”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1846 (<https://www.legal-tools.org/doc/872bf2/>); Nicola Palmer, “The Place of Consultation in the International Criminal Court’s Approach to Complementarity and Cooperation”, in Olympia Bekou and Daley J. Birkett (eds.), *Cooperation and the International Criminal Court. Perspectives from Theory and Practice*, Brill Nijhoff, Leiden, Boston, 2016, p. 217 (<https://www.legal-tools.org/doc/880a24/>).

² For an assessment of the ‘harmony-approach’, see Göran Sluiter, “Enforcing Cooperation. Did the Drafters Approach It the Wrong Way?”, in *Journal of International Criminal Justice*, 2018, vol. 16, no. 2, p. 384.

³ Dine Rinoldi and Nicoletta Parisi, “International Cooperation and Judicial Assistance between States Parties and the International Criminal Court”, in Flavia Lattanzi and William A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, vol. 1, 1999, p. 350 (<https://www.legal-tools.org/doc/27edd7/>).

allow for domestic proceedings – no matter at which stage⁴ – and service of the sentence to be completed would have frustrated any efforts of justice for international crimes (Kreß and Prost, 2022, Article 89, para. 52). It is worth remembering that investigations by the Court centre on (alleged) perpetrators most responsible for the commission of international crimes. It therefore comes as no surprise that nearly all suspects under investigation by the Prosecutor have been in a certain position of power allowing them to perpetrate a broad variety of crimes over an extensive period of time. Given these circumstances, it is far from unlikely that national authorities opened their own investigations into crimes that would be considered crimes “different from that for which surrender” is sought (see Palmer, 2016, p. 212 ff.). Considering the rather focused prosecution strategy opted for by the Prosecutor in cases like Lubanga or al-Mahdi, it can also not be ascertained that ICC investigations are per se addressing crimes of a more substantial gravity than those prosecuted by national authorities. The requested State might have legitimate reasons to invoke its national proceedings (for example, for crimes against the State or other international crimes) in the consultations with the Court (Meißner, 2003, p. 138). Article 89(4) does not specify the exact content of the consultations.

A pre-condition is the arrest of the person sought for surrender.⁵ The consultations have to be conducted in good faith and must allow the Court to assess the exact state of the national proceedings as well as the scope, nature and gravity of the charges brought before the national courts. Although Articles 17 and 20(3) are not directly applicable in such a situation, it is clear that the State can only invoke its own proceedings if they are conducted genuinely (Kreß and Prost, 2022, Article 89, para. 56; Meißner, 2003, p. 141). The consultations will also address the possibility of a temporary surrender (Rule 183).

Paragraph 4 is silent as to the consequences of consultations ending without an agreement (Meißner, 2003, p. 141). Article 89(4) does not contain grounds for a total refusal (Kreß and Prost, 2022, Article 89, para. 59; Meißner, 2003, p. 140). Whether or not it allows for a temporary refusal is

⁴ Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003, p. 139 (<https://www.legal-tools.org/doc/8d1442/>).

⁵ ICC, *Prosecutor v. Harun and Kshayb*, Pre-Trial Chamber I, Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007, ICC-02/05-01/07-1, para. 121 (<https://www.legal-tools.org/doc/0b8412/>).

subject to debate. Meißner argues that Article 89(4) recognizes that the interests of the Court and the requested State have both to be taken into consideration and that the State is granted a certain leeway to determine the modalities and the timing of the surrender (Meißner, 2003, p. 141). The discretion should be guided by the factors described in Article 90(7)(b).⁶ In general, this would lead to priority being given to the international proceedings (Meißner, 2003, p. 141; Kreß and Prost, 2022, Article 89, para. 62). The outer limit of the postponement should be the one described in Article 94(1) (Meißner, 2003, p. 141; Kreß/Prost, 2022, Article 89, para. 62). The Court remains the ultimate arbiter (Meißner, 2003, p. 141; Kreß and Prost, 2022, Article 89, para. 62) and has, inter alia, to determine whether the national proceedings are genuine (Meißner, 2003, p. 142). The Court itself seems to hold the contrary position. Pre-Trial Chamber I has noted that Article 89 (4) is *lex specialis* to Article 94(1) and that Libya is not entitled to postpone the execution of the surrender request.⁷ Pre-Trial Chamber I has not explicitly concluded that Article 89(4) does not allow for a postponement in case the consultations have failed. However, the phrasing of the decision suggests that the consultation process is meant to allow the requested State to convince the Court to voluntarily accept a postponement of the execution of the surrender request. Failure to come to an agreement would then allow the Court to go back to the original surrender request that has already been granted by the State (see also Cazala,

⁶ Meißner, 2003, p. 141; Kreß and Prost, 2022, Article 89, para. 62; Kai Ambos, *Treatise on International Criminal Law. Vol III: International Criminal Procedure*, Oxford University Press, 2016, p. 615 (<https://www.legal-tools.org/doc/995606/>).

⁷ ICC, *Prosecutor v. Saif al-Islam Gaddafi and al-Senussi*, Pre-Trial Chamber I, Decision on Libya's Submissions Regarding the Arrest of Saif al-Islam Gaddafi, 7 March 2012, ICC-01/11-01/11-72 (<https://www.legal-tools.org/doc/ceaea3/>); see also *Prosecutor v. Saif al-Islam Gaddafi and al-Senussi*, Pre-Trial Chamber I, Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif al-Islam Gaddafi, 4 April 2012, ICC-01/11-01/11-100, para. 19 (<https://www.legal-tools.org/doc/0000b9/>); *Prosecutor v. Gaddafi and al-Senussi*, The Defence, Response on behalf of Abdullah al-Senussi to the Submission of the Government of Libya for Postponement of the Surrender Request for Mr. Al-Senussi, 24 April 2013, ICC-01/11-01/11-319, para. 60 (<https://www.legal-tools.org/doc/d7f696/>); *Prosecutor v. Gaddafi and al-Senussi*, OTP, Prosecution's Response to 'Application on behalf of the Government of Libya relating to Abdullah al-Senussi pursuant to Article 19 of the Statute, 2 May 2013, ICC-01/11-01/11-321-Red, para. 26, fn. 41 (<https://www.legal-tools.org/doc/00bc27/>); *Prosecutor v. Blé Goudé*, Pre-Trial Chamber, Decision on Côte d'Ivoire's request to postpone the surrender of Charles Blé Goudé to the Court, 3 March 2014, ICC-02/11-02/11-41, paras. 7–8 (<https://www.legal-tools.org/doc/5ebb30/>); see also Meißner, 2003, p. 138.

2012, Article 89, p. 1846). The existence of Rule 183, which gives the requested State the right to condition the surrender on a re-surrender, also suggests that it is envisaged that the requested State cannot refuse the surrender even in a situation where it has a legitimate interest in prosecuting the person for other crimes. The wording of Article 89(4) is inconclusive.⁸ and a definitive assessment of the Court is lacking.

Cross-references:

Articles 27, 98.

Rules 176, 181, 182, 183 and 184.

Regulation 111.

Doctrine:

1. Dapo Akande, “The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC”, in *Journal of International Criminal Justice*, 2012, vol. 10, no. 2, pp. 293–324 (<https://www.legal-tools.org/doc/989c20/>).
2. Kai Ambos, *Treatise on International Criminal Law. Vol III: International Criminal Procedure*, Oxford University Press, 2016 (<https://www.legal-tools.org/doc/995606/>).
3. Anne-Aurore Bertrand and Natascha Schauder, “Practical Cooperation Challenges Faced by the Registry of the International Criminal Court”, in Olympia Bekou and Daley J. Birkett (eds.), *Cooperation and the International Criminal Court. Perspectives from Theory and Practice*, Brill Nijhoff, Leiden, Boston, 2016, pp. 152–184 (<https://www.legal-tools.org/doc/880a24/>).
4. Michiel Blommestijn and Cedric Ryngaert, “Exploring the Obligations of States to Act upon the ICC’s Arrest Warrant for Omaar Al-Bashir”, in *Zeitschrift für Internationale Strafrechtsdogmatik*, 2010, vol. 5, no. 6, pp. 428–444 (<https://www.legal-tools.org/doc/75c5d0/>).
5. Annalisa Ciampi, “Legal Rules, Policy Choices and Political Realities in the Functioning of the Cooperation Regime of the International Criminal Court”, in Olympia Bekou and Daley J. Birkett (eds.), 2016, pp. 7–57.

⁸ William A. Schabas, *The International Criminal Court: Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1296 (<https://www.legal-tools.org/doc/b7432e/>).

6. Julien Cazala, “Article 89”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, pp. 1835–1847 (<https://www.legal-tools.org/doc/872bf2/>).
7. Cedric Ryngaert, “Article 58”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, pp. 1710–1731.
8. Claus Kreß and Kimberly Prost, “Article 89”, in Ambos (ed.), 2022, pp. 2496–2509.
9. Claus Kreß and Kimberly Prost, “Preliminary Remarks”, in Ambos (ed.), 2022, pp. 2439–2451.
10. Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003 (<https://www.legal-tools.org/doc/8d1442/>).
11. Rita Mutyaba, “An Analysis of the Cooperation Regime of the International Criminal Court and its Effectiveness in the Court’s Objective in Securing Suspects in Ongoing Investigations and Prosecutions”, in *International Criminal Law Review*, 2012, vol., no. 5, pp. 937–962 (<https://www.legal-tools.org/doc/e84222/>).
12. Nicola Palmer, “The Place of Consultation in the International Criminal Court’s Approach to Complementarity and Cooperation”, in Olympia Bekou and Daley J. Birkett (eds.), *Cooperation and the International Criminal Court. Perspectives from Theory and Practice*, Brill Nijhoff, Leiden, Boston, 2016, pp. 210–226 (<https://www.legal-tools.org/doc/880a24/>).
13. Astrid Reisinger-Coracini, “Cooperation from States and other Entities”, in Göran Sluiter, Håkan Friman, Suzannah Linton, Sergey Vasiliev, and Salvatore Zappalà (eds.), *International Criminal Procedure. Rules and Principles*, Oxford University Press, 2013, pp. 95–115 (<https://www.legal-tools.org/doc/bcad4c/>).
14. Dine Rinoldi and Nicoletta Parisi, “International Cooperation and Judicial Assistance between States Parties and the International Criminal Court”, in Flavia Lattanzi and William A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, vol. 1, 1999, pp. 339–390 (<https://www.legal-tools.org/doc/fla609/>).

15. William A. Schabas, *The International Criminal Court. A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1288–1296 (<https://www.legal-tools.org/doc/b7432e/>).
16. Göran Sluiter and Stanislas Talontsi, “Credible and Authoritative Enforcement of State Cooperation with the International Criminal Court”, in Olympia Bekou and Daley J. Birkett (eds.), 2016, pp. 80–113.
17. Lorraine Smith-van Lin, “Non-Compliance and the Law and Politics of State Cooperation: Lessons from the Al Bashir and Kenyatta Cases, in Olympia Bekou and Daley J. Birkett (eds.), 2016, pp. 114–151.
18. Bert Swart, “General Problems”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court. A Commentary*, Oxford University Press, 2002, pp. 1589–1605 (<https://www.legal-tools.org/doc/01addc/>).
19. Bert Swart, “Arrest and Surrender”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), 2002, pp. 1639–1703.
20. Pascal Turlan, “The International Criminal Court Cooperation Regime – A Practical Perspective from the Office of the Prosecutor, in Olympia Bekou and Daley J. Birkett (eds.), 2016, pp. 58–79.
21. Göran Sluiter, “Enforcing Cooperation. Did the Drafters Approach It the Wrong Way?”, in *Journal of International Criminal Justice*, 2018, vol. 16, no. 2 pp. 383–402.
22. Hannah Woolaver and Emma Palmer, “Challenges to the Independence of the International Criminal Court from the Assembly of States Parties”, in *Journal of International Criminal Justice*, 2017, vol. 15, no. 4, pp. 641–665.

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Article 90

Competing Requests

General Remarks:

The provision addresses a situation in which the requested State is faced by a competing (extradition) request by another State. Paragraphs 2 and 3 deal with an extradition request by States Parties while paragraphs 4, 5 and 6 address requests by Third States. For the situation envisaged in Paragraph 7, State Parties and Non-State Parties are treated equally.¹ The first and the last paragraph postulate notification obligations in case a competing request is made (paragraph 1) and if an extradition to the requesting State is refused (paragraph 8). Article 90 establishes rules for a triangular conflict between the Court, the requested State (which received a surrender request pursuant to Article 89) and the requesting State (which asked for the extradition of the person in question). There was broad agreement at the Rome Conference that such a provision would be necessary to regulate the steps to be taken in case of such competing requests (Kreß and Prost, 2022, para. 1). There were, however, disagreements as to which request should take precedence (Kreß and Prost, 2022, para. 2). This issue is closely intertwined with the principle of complementarity (for example Articles 17 and 19), a cornerstone of the entire ICC Statute, and the underlying question whether or not the Court should be entitled to interfere with national proceedings. The practical relevance of Article 90 has so far been minimal. It seems that not many States are eager to investigate and prosecute the “most serious crimes of concern to the international community” once the ICC has shown an interest in holding the perpetrators accountable on the international level. Even most of the home States of (alleged) perpetrators have not shown a great interest in domestic prosecutions. The (political) costs of such investigations as well as the political instability of some of the (situation) countries will therefore make competing requests a rather unlikely event.

¹ Claus Kreß and Kimberly Prost, “Article 90”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 25.

Preparatory Works:

The complexity of the issue of competing requests results from the fact that a provision has to address the competing interests of States Parties and Non-State Parties and that it needs to take into account a broad variety of international legal frameworks (for example, bilateral and multilateral extradition treaties, international conventions, customary international law). Some of the existing extradition regimes contain provisions with a degree of flexibility while others impose stricter obligations on the signatories. The Draft Statute² contained different options to tackle the issue of competing requests. Draft Article 87(6) contained three options of which none was as comprehensive as the current Article 90. The draft cannot be considered as a big progress (see for example Kreß and Prost, 2022, Article 90, para. 3). The matters had to be discussed intensively in the Working Group on International Cooperation (Kreß and Prost, 2022, para. 3). The achievements of these discussions are significant. The finalized version now clearly distinguishes between States Parties and Non-State Parties (Schabas, 2016, p. 1299), between the same conduct and other conduct³ and highlights the need to establish whether or not the requested State is facing a legal obligation to extradite.

² Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, UN Doc. A/CONF.183/2/Add.1, 14 April 1998 (<https://www.legal-tools.org/doc/816405/>); see also Proposal on Article 87 of the Draft Statute of an International Criminal Court, Submitted By China, UN Doc. A/Conf.183/C.1/WGIC/L.2, 25 June 1998 (<https://www.legal-tools.org/doc/8eeb4c/>); and Proposal on Article 87, Paragraph 6 of the Draft Statute Of An International Criminal Court, Submitted By Italy, UN Doc. A/Conf.183/C.1/WGIC/L.3, 25 June 1998 (<https://www.legal-tools.org/doc/9f57cd/>). For an overview on the prior discussions, see William A. Schabas, *The International Criminal Court. A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1299 (<https://www.legal-tools.org/doc/b7432e/>).

³ Regarding the role of Article 90 to determine the ‘same person, same conduct’ test, see references to the provision in, for example, ICC, *Prosecutor v. Muthaura, Kenyatta and Hussein Ali*, OTP, Prosecution’s Response to the “Appeal of the Government of Kenya against the Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute”, 12 July 2011, ICC-01/09-02/11-168, para. 102 (<https://www.legal-tools.org/doc/e923b0/>); *Prosecutor v. Gaddafi and Al Senussi*, Libyan Government’s Consolidated Reply to the Response of the Prosecution, Defence and OPCV to the Libyan Government’s Application relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute, 14 August 2013, ICC-01/11-01/11-403-Red2, paras. 57 ff. (<https://www.legal-tools.org/doc/68f474/>).

Analysis:

Article 90 complements Article 89 and focuses solely on surrender requests. The fact that a competing request (for extradition) by a requesting State is received by the requested State does not exempt the latter from the obligation to arrest the person sought for surrender by the Court.

Doctrine: For the bibliography, see the final comment on Article 90.

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Article 90(1)

1. A State Party which receives a request from the Court for the surrender of a person under Article 89 shall, if it also receives a request from any other State for the extradition of the same person for the same conduct which forms the basis of the crime for which the Court seeks the person's surrender, notify the Court and the requesting State of that fact.

Article 90(1) imposes an obligation on the requested State to inform the Registrar of the Court¹ as well as the requesting State of the existence of competing requests. This allows both the Court and the requesting State to reconsider the surrender or extradition request and, if appropriate, to withdraw such request. The provision forms part of the general approach opted for in Part 9 to require close communication between the relevant Parties as a prerequisite for consensus and judicial oversight by the Court.² Its existence shows that the Court is not tasked to verify whether or not there are competing requests (Meißner, 2003, p. 143). Knowledge of identical investigations by the requesting State might, however, lead to a *proprio motu* assessment of the admissibility by the Court as envisaged in Article 19(1). Article 90(1) supplements Article 18 which obliges the Prosecutor to inform States that would normally exercise jurisdiction (Article 18(1)) and which invites the States to provide the Court with information about any national investigations into the matter (Article 18(2)). This procedure will make it less likely that the Court and the requesting State are not aware of the respective investigations.³ It can, however, not be assumed that the Prosecutor correctly identified all States that might be inclined to investi-

¹ Julien Cazala, “Article 90”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1852 (<https://www.legal-tools.org/doc/872bf2/>).

² Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003, p. 143 (<https://www.legal-tools.org/doc/8d1442/>).

³ Claus Kreß and Kimberly Prost, “Article 90”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 6, fn. 3; see also Dino Rinoldi and Nicoletta Parisi, “International Cooperation and Judicial Assistance between States Parties and the International Criminal Court”, in Flavia Lattanzi and William A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, vol. 1, 1999, p. 354 (<https://www.legal-tools.org/doc/27edd7/>).

gate the case (Cazala, 2012, p. 1852). The notification requirement is therefore necessary to guarantee a smooth and effective functioning of the cooperation regime and to expedite the surrender/extradition proceedings of the arrested person.

Article 90(1) applies to extradition requests by States Parties and Non-States Parties.⁴ It stipulates that the obligation to notify only applies where the requesting State demands extradition of the same person for the ‘same conduct’.⁵ In case of doubt regarding the ‘same conduct’-requirement, Article 90(1) must also apply to allow the Court to make an assessment in this regard. Article 90 does not contain any obligation to notify the Court of a competing request for ‘another conduct’. The restrictive scope of application of Article 90(1) results from the fact that the Court is only tasked to consider the investigations of the requesting State in an admissibility ruling if these investigations deal with the same person and the same conduct. A formal notification is therefore not warranted for investigations into ‘other conduct’. If the existence of the competing request impedes or threatens to delay the surrender process, the requested State will have to bring it to the attention of the Court by virtue of Rule 184.

Doctrine: For the bibliography, see the final comment on Article 90.

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⁴ Kreß and Prost, 2022, para. 5; Meißner, 2003, p. 144; Cazala, 2012, pp. 1852–1853; Bert Swart, “Arrest and Surrender”, in Antonio Cassese, Paola Gaeta and John Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 1695 (<https://www.legal-tools.org/doc/01addc/>).

⁵ For more information regarding the same conduct test, see Kai Ambos, *Treatise on International Criminal Law. Vol III: International Criminal Procedure*, Oxford University Press, 2016, p. 613 (<https://www.legal-tools.org/doc/995606/>).

Article 90(2)

2. Where the requesting State is a State Party, the requested State shall give priority to the request from the Court if:

(a) The Court has, pursuant to Article 18 or 19, made a determination that the case in respect of which surrender is sought is admissible and that determination takes into account the investigation or prosecution conducted by the requesting State in respect of its request for extradition; or

(b) The Court makes the determination described in subparagraph (a) pursuant to the requested State's notification under paragraph 1.

Article 90(2) is closely related to paragraph 3. The provision only applies to a competing extradition request by a States Party for the conduct that underlies the Court's surrender request. Due to the fact that the requesting State is also bound by the ICC Statute and especially Part 9, Article 90(2) states that priority is to be given to the request by the Court.¹ It would not make sense to grant the requested State the right to extradite the person to a State that itself would be under the obligation to surrender the person to The Hague.² Furthermore, the requested State should not be allowed to overrule or circumvent an admissibility ruling by the Court.³

Despite the fact that Article 90(2) does not explicitly refer to the same person, same conduct test, it is beyond dispute that the provision only covers competing requests for the same conduct.⁴ The provision immediately follows Article 90(1) and deals with the admissibility of the case, which concerns the complementarity principle. Furthermore, Article 90(7) postulates a different approach for competing requests for conduct other

¹ See also, ICC, *Prosecutor v. Al Bashir*, Appeals Chamber, Annex 4 to the Order inviting submissions in the Jordan Referral re Al-Bashir Appeal, 20 September 2018, ICC-02/05-01/09-386-Anx4, p. 32 (<https://www.legal-tools.org/doc/9692c9/>).

² Bert Swart, "Arrest and Surrender", in Antonio Cassese, Paola Gaeta and John Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 1696 (<https://www.legal-tools.org/doc/01addc/>).

³ Claus Kreß and Kimberly Prost, "Article 90", in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 9.

⁴ Kreß and Prost, 2022, para. 4; Julien Cazala, "Article 90", in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1853 (<https://www.legal-tools.org/doc/872bf2/>).

than the one investigated by the Court. Priority of the Court's surrender request is pre-conditioned on an affirmative admissibility ruling by the Court. Such a ruling will mostly focus on the unwillingness or inability of the requesting State to investigate and prosecute.⁵ As a consequence, the requested State will be required to ignore treaty obligations with regard to extradition which are subordinated to the surrender obligation by virtue of the ratification of the ICC Statute (Schabas, 2016, p. 1301).

Sub-paragraph a) addresses the situation of an admissibility ruling that precedes a notification pursuant to Article 90(1). In such a situation, the requested State should not be granted a possibility to avoid the surrender to the Court provided that the assessment of the admissibility of the case already took into consideration the investigation by the requesting State. This requires that the Court had been made aware of the existence and contours of the requesting State's criminal proceedings, for example in the form envisaged in Article 18(2), prior to the admissibility ruling. Sub-paragraph a) refers to Article 18 as well as Article 19. The latter reference is self-explanatory. As noted by Kreß and Prost (Kreß and Prost, 2022, para. 8), the reference to Article 18 is less clear. While Article 90(2)(a) requires a 'determination of admissibility', Article 18(2) merely speaks of an "authorization" of an investigation. Such authorization implies, however, an assessment of the national criminal proceedings⁶ so that an "authorization" in the sense of Article 18(2) should suffice to establish the priority of the Court's surrender request (Kreß and Prost, 2022, paras. 8–9).

Sub-paragraph b) establishes that the Court can claim priority of its surrender request if it determines the case to be admissible *after* having received and reviewed the notification regarding the competing request by the requesting State or if it reconsiders a prior admissibility decision in light of the new facts and upholds its decision (Kreß and Prost, 2022, para. 10). This presupposes that any notification by the requested State is comprehensive enough to allow for such an assessment. Article 90 does not explicitly stipulate the obligations of the Parties in this regard. Contrary to Article 95, neither the requested State nor the requesting State is under the obligation to bring an admissibility challenge to invoke the competing re-

⁵ Cazala, 2012, p. 1854; William A. Schabas, *The International Criminal Court. A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1301 (<https://www.legal-tools.org/doc/b7432e/>).

⁶ Daniel D. Ntanda Nsereko and Manuel J. Ventura, "Article 19" in Ambos (ed.), 2022, para. 37.

quest and delay surrender to the Court. The fact that Article 19(5) requires a State to make an admissibility challenge at the earliest opportunity does also not impose an obligation on the two States (the requesting State might only be barred from challenging the admissibility at a later stage.⁷ If the two States fail to challenge the admissibility, the Court can decide on its own motion (Article 19(1)). However, this does not mean that the States can refuse to provide the necessary information. It follows from Article 86 that the requesting State Party shall provide the requested State – or directly the Court – with sufficient information if it insists on the competing extradition request. The requested State has to forward such information to the Court to allow for a determination on an expedited basis as envisaged in Article 90(3). Failure to provide such information grants the respective Chamber the right to make an (affirmative) admissibility determination, to invoke priority of its surrender request and request an immediate surrender.

Doctrine: For the bibliography, see the final comment on Article 90.

Author: Mayeul Hiéramente.

⁷ For an overview, see Nsereko and Ventura, 2022, paras. 70 ff.; ICC, *Prosecutor v. Gaddafi and Al Senussi*, Pre-Trial Chamber I, Decision on Libya’s postponement of the execution of the request for arrest and surrender of Abdullah al-Senussi pursuant to Article 95 of the Rome Statute and related Defence request to refer Libya to the UN Security Council, 14 June 2013, ICC-01/11-01/11-354, para. 32 (<https://www.legal-tools.org/doc/a400f4/>).

Article 90(3)

3. Where a determination under paragraph 2 (a) has not been made, the requested State may, at its discretion, pending the determination of the Court under paragraph 2 (b), proceed to deal with the request for extradition from the requesting State but shall not extradite the person until the Court has determined that the case is inadmissible. The Court's determination shall be made on an expedited basis.

Article 90(3) addresses the period of uncertainty until an admissibility decision in the sense of the previous paragraph is made. It is recognized that an admissibility determination – even if the Court proceeds on an expedited basis – might take some time and might create a legal limbo.¹ The Court has to gather the necessary information with regards to the national criminal proceedings by the requesting State and determine if the State is willing and able to prosecute the person for the same conduct. The parties to the proceedings will be allowed to make observations which can also delay a prompt determination. Article 90(3) presumes that the requested State is entitled to refuse a surrender to the Court until a determination under Article 90(2)(b) is made.

The provision grants the requested State the right to proceed with the often time-consuming national extradition proceedings.² It accepts a parallelism of the two proceedings. Given that the person sought for surrender (by the Court) and extradition (by the requesting State) is likely detained by the requested State, any unnecessary delays in the extradition proceedings should be avoided. By emphasizing that the requested State may, at its discretion, continue the extradition progress, the Statute takes note of the fact that the Court might declare the case inadmissible and allow the requested State the right to extradite the person to the requesting State. Whether or not such a clarification was legally necessary is subject to some debate (see Kreß and Prost, 2022, para. 12). As long as extradition proceedings under national law do not frustrate the ongoing surrender proceedings,

¹ Claus Kreß and Kimberly Prost, “Article 90”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 11.

² Julien Cazala, “Article 90”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1854 (<https://www.legal-tools.org/doc/872bf2/>).

the requested State remains free to proceed. Article 88 further stipulates that, in return, the State could not invoke such proceedings to deny or delay co-operation with the Court. The provision is, however, helpful in that it emphasizes that the Court will not interfere in the extradition proceedings as long as any *fait accompli* is avoided. Article 90(3) provides guidance to the national authorities. The provision states that the requested State is not entitled to proceed with the actual extradition until a negative admissibility ruling by the Court has been made. The final version of paragraph 3 was a compromise acceptable to all delegations at the conference (Kreß and Prost, 2022, para. 13). Finally, the provision highlights that the conflict should be resolved as fast as possible. While it is clear that the Court should always make its assessments without undue delay, the reference to a determination “on an expedited basis” was included to emphasize the urgency (see Kreß and Prost, 2022, para. 14). After all, the requested State took custody of a person it does not intend to prosecute itself and should therefore not be burdened by a dispute between the Court and another State. The Statute lacks specific procedures for such an urgent assessment (Cazala, 2012, p. 1855).

Doctrine: For the bibliography, see the final comment on Article 90.

Author: Mayeul Hiéramente.

Article 90(4)

4. If the requesting State is a State not Party to this Statute the requested State, if it is not under an international obligation to extradite the person to the requesting State, shall give priority to the request for surrender from the Court, if the Court has determined that the case is admissible.

Paragraphs 4 to 6 are closely intertwined. All of them deal with a competing extradition request by a non-State Party. Article 90(4) addresses the situation of a competing extradition request for the same conduct.¹ It presupposes that the Court received a notification pursuant to paragraph 1 (Kreß and Prost, 2022, para. 15). Paragraph 4 makes very clear that it only applies to a situation where the requested State faces no international legal obligation to extradite the person to the requesting State. The requested State faces no conflicting legal obligations (Kreß and Prost, 2022, para. 16) and is therefore not at risk to be in breach of international law. It is for that reason that the ICC Statute can claim priority of the surrender request by the Court (Kreß and Prost, 2022, Article 90, para. 16). The priority of the surrender request is pre-conditioned: First, the requested State is under no legal obligation to extradite the person to the requesting State. Second, the Court must have already ruled on the admissibility in the affirmative.

i. International Obligation:

The central question is whether the requested State faces a legal obligation to extradite the person by virtue of a bilateral or multilateral extradition treaty or by virtue of customary international law.² There is no general obligation to extradite.³

It is not absolutely clear from the ICC Statute if Article 90 covers only extradition treaties ratified by the requested State prior to the ratification

¹ Claus Kreß and Kimberly Prost, “Article 90”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 15.

² See, for example, William A. Schabas, *The International Criminal Court. A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1301 (<https://www.legal-tools.org/doc/b7432e/>).

³ Julien Cazala, “Article 90”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1855 (<https://www.legal-tools.org/doc/872bf2/>).

of the Statute or if the requested State can also invoke a subsequent extradition treaty. Meißner argues that the requested State deserves no additional protection for any extradition agreements concluded after its accession to the ICC Statute.⁴ The State could have avoided the risk of conflicting surrender and extradition requests and was bound by Article 86 to avoid any interference with the existing co-operation regime (Meißner, 2003, p. 147). These arguments have some merits. Meißner's reference to the wording of the provision is, however, less convincing (Meißner, 2003, p. 147). Article 90(6) provides no clear indication with regards to this specific question. Article 90(6), in its English version, refers to "existing international obligations" which might also suggest that the obligation to extradite must exist the moment the requested State receives the surrender request. It definitely prevents any *ad hoc* extradition agreements to frustrate the ongoing surrender proceedings. However, it is not clear from the wording that the drafters meant that the term "existing" should exclude treaty arrangements entered into by the requested State subsequent to its ratification of the ICC Statute. Meißner correctly notes that the reference to "existing" does not appear in the French version of the Statute (Meißner, 2003, p. 147).

Whether or not an extradition contains an international obligation in the sense of Article 90(4)-(6) deserves a case-by-case analysis. Treaties generally include grounds for refusal (Cazala, 2012, p. 1856). The assessment is easy if the requested State faces no discretion whether or not to extradite (Meißner, 2003, p. 146). A determination is more complicated if the extradition agreement allows for a discretionary decision. Meißner highlights that this might occur when the extradition itself contains provisions regarding competing extradition requests. In such a situation, the surrender request by the Court should be interpreted as an extradition request for the purpose of the application of the extradition treaty. The distinction between surrender and extradition (Article 102) does not apply to such treaties (Meißner, 2003, p. 146; Kreß and Prost, 2022, Article 90, para. 16). Whether or not an international obligation exists in case of discretion is difficult to assess. Meißner rightly notes that the objective of Article 90(4)-(6) is to avoid any conflicting legal obligations on the part of the requested State (Meißner, 2003, p. 147). As a consequence, unfettered discretion granted to the requested State militates in favour of a surrender to the Court

⁴ Kreß and Prost, 2022, para. 21; Cazala, 2012, Article 90, p. 1858; Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003, pp. 146–147 (<https://www.legal-tools.org/doc/8d1442/>).

(Meißner, 2003, pp. 146–147). If the extradition treaty imposes criteria that govern the discretionary assessment, the provisions included in Article 90(4)-(6) have to allow for such an assessment and a refusal of the surrender as a possible outcome (Meißner, 2003, p. 147). Any assessment may be subject to a review under Article 87(7) (Meißner, 2003, p. 148).

ii. Admissibility Decision:

The provision limits the priority of surrender requests to instances where the Court has already ruled on and confirmed the admissibility. Despite the fact that the requested State does not face any conflicting legal obligations, the drafters of the Statute decided to accord the requested State an additional layer of protection and to strengthen the principle of complementarity (Kreß and Prost, 2022, Article 90, para. 16). The admissibility criteria referred to in Article 17 apply to investigations by State Parties and Non-State Parties alike (Schabas, 2016, p. 1301). It would indeed make little sense to force the requested State to refuse extradition to the requesting State if the Court deemed the case inadmissible. Contrary to paragraph 2 a), the determination of admissibility does not have to include any assessment of the national proceedings in the requesting State. As a non-State Party, the requesting State is not accorded the same level of protection (Meißner, 2003, p. 148). A State that has received notification under Article 18(1) but has chosen to make a competing extradition request in lieu of or without advising the Court of its investigation pursuant to Article 18(2) should not be allowed to further delay the surrender to the Court if the Court, based on the information at its disposal, has already made a ruling on the admissibility (Kreß and Prost, 2022, Article 90, para. 18). The requesting State is free to challenge the admissibility if it deems the case inadmissible (Meißner, 2003, p. 148). Kreß and Prost rightly remark that paragraph 2 also encompasses the situation of conflicting legal obligations (by a State Party) which make a comprehensive assessment of all admissibility related issues necessary. This is different in the case of paragraph 4 so that a ‘simple’ admissibility decision suffices (Kreß and Prost, 2022, Article 90, para. 17). If the Court wishes to claim priority and is not faced with an admissibility challenge by either the requested or the requesting State, it is free to make a determination on the admissibility on its own motion (Meißner, 2003, p. 148).

Doctrine: For the bibliography, see the final comment on Article 90.

Author: Mayeul Hiéramente.

Article 90(5)

5. Where a case under paragraph 4 has not been determined to be admissible by the Court, the requested State may, at its discretion, proceed to deal with the request for extradition from the requesting State.

A pre-condition for the application of Article 90(5) is that the requested State faces no conflicting legal obligation to extradite the person sought for surrender. While the previous paragraph deals with the situation where the Court has already pronounced itself on the admissibility, Article 90(5) determines the right of the requested State to proceed, at its discretion,¹ with the extradition request if no determination regarding the admissibility is made. The same consequences ought to apply *a fortiori* if the Court has concluded that the case is inadmissible. The paragraph is mute as to the consequences of a pending admissibility ruling. It does not contain the safeguard, included in paragraph 3, that the person shall not be extradited pending a final decision by the Court. A literal interpretation of Article 90(5) would therefore suggest that the requested State is only hindered from extraditing the person if the Court already made its determination.² Schabas therefore submits that the Statute seems to suggest a race between the Court and the requested State's extradition proceedings. Such an outcome is hardly acceptable.³ Meißner remarks that the requested State deserves no additional protection as it is under no legal obligation to extradite and is bound, by virtue of Article 86, to refrain from any acts that might hinder an effective co-operation.⁴ It is therefore suggested that the request-

¹ Kai Ambos, *Treatise on International Criminal Law. Vol III: International Criminal Procedure*, Oxford University Press, 2016, p. 617 (<https://www.legal-tools.org/doc/995606/>).

² Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003, p. 149 (<https://www.legal-tools.org/doc/8d1442/>); Claus Kreß and Kimberly Prost, "Article 90", in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 20.

³ Bert Swart, "Arrest and Surrender", in Antonio Cassese, Paola Gaeta and John Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 1696 (<https://www.legal-tools.org/doc/01addc/>).

⁴ Meißner, 2003, p. 149; Kreß and Prost, 2022, para. 20; see also, ICC, *Prosecutor v. Gaddafi and Al Senussi*, Pre-Trial Chamber I, Decision on the postponement of the execution of the request for surrender of Saif al-Islam Gaddafi pursuant to article 95 of the Rome Statute, 1 June 2012, ICC-01/11-01/11-163, para. 40 (<https://www.legal-tools.org/doc/ae7c48/>).

ed State should refrain from an extradition if it is made aware that the Court is in the process of making an admissibility determination and will come to a decision without undue delay.⁵ The State should consult with the Court in this regard. If the Court refrains from an admissibility review of its own motion altogether, the requested State is free to proceed with the extradition. Given the fact that many extradition processes are lengthy and that Article 90(1) imposes a notification upon reception of the competing request, such a ‘race’ situation will mostly likely be a rather rare occurrence.

Doctrine: For the bibliography, see the final comment on Article 90.

Author: Mayeul Hiéramente.

⁵ Meißner, 2003, p. 149; Kreß and Prost, 2022, para. 20; Julien Cazala, “Article 90”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1857 (<https://www.legal-tools.org/doc/872bf2/>).

Article 90(6)

6. In cases where paragraph 4 applies except that the requested State is under an existing international obligation to extradite the person to the requesting State not Party to this Statute, the requested State shall determine whether to surrender the person to the Court or extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to:

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

Contrary to the situation described in paragraphs 4 and 5, Article 90(6) envisages an instance where the requested State is faced by a competing extradition request and is subject to a legal obligation to fulfil this request. The requested State is under two co-operation obligations for the same person: The Court as well as the requesting State (a non-State Party) have declared the intention to prosecute the person for the same conduct.¹ Meißner correctly remarks that the provision is meant to protect the requested State from breaching its international obligations *vis-à-vis* the requesting State and that the requested State's legal obligation towards a non-State Party is independent of the admissibility assessment by the Court.² This does not imply, however, that an (affirmative) admissibility decision by the Court has no effect on the application of Article 90(6). The reference to paragraph 4 indicates that paragraph 6 only applies to instances where the Court has already determined that the case is admissible.³ If such a determination has not been made, the requested State is entitled to proceed with the extradi-

¹ Claus Kreß and Kimberly Prost, "Article 90", in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 21.

² Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003, p. 149 (<https://www.legal-tools.org/doc/8d1442/>).

³ Implicitly, William A. Schabas, *The International Criminal Court. A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1302 (<https://www.legal-tools.org/doc/b7432e/>).

tion to the requesting State at its discretion without express consideration of the criteria enumerated in paragraph 6. The Statute grants such broad discretion even where the requested State faces no conflicting legal obligation. The broad discretion granted in Article 90(4) must *a fortiori* also apply to instances where the requested State faces such international obligation.

In a situation where the requested State faces conflicting obligations, the Statute does not proclaim priority of the Court's surrender request. A legal obligation is more than the mere existence of an extradition treaty and demands a case-by-case assessment.⁴ The obligations *vis-à-vis* the requesting State are placed on an equal footing.⁵ Instead, the requested State is invited to make a determination and to decide which request to grant. The right to grant the extradition request include the right to refuse a surrender to the Court (Meißner, 2003, p. 150). The State is required to take into consideration all relevant factors. The contours of the legal obligation towards the requesting State are the guideline and limit to the discretion.⁶

The Statute provides a non-exhaustive list common to many extradition treaties.⁷ It refers *inter alia* to the respective dates of the requests – the first request being more relevant (Cazala, 2012, Article 90, p. 1859) –, the interests of the requesting State, and the possibility of a subsequent surrender between the Court and the requesting State. Kreß and Prost highlight that in addition to the list included in paragraph 6, the requested State should determine whether the requesting State is willing and able to prosecute the person for the same conduct. The requesting State could not genuinely invoke its right to have the person extradited if it intends to shield the

⁴ See also Dine Rinoldi and Nicoletta Parisi, "International Cooperation and Judicial Assistance between States Parties and the International Criminal Court", in Flavia Lattanzi and William A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, vol. 1, 1999, p. 355 (<https://www.legal-tools.org/doc/27edd7/>).

⁵ Kreß and Prost, 2022, para. 23; see also, Annalisa Ciampi, "The Obligation to Cooperate", in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 1631 (<https://www.legal-tools.org/doc/01addc/>).

⁶ Meißner, 2003, p. 150; See also, Bert Swart, "Arrest and Surrender", in Antonio Cassese, Paola Gaeta and John Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 1697 (<https://www.legal-tools.org/doc/01addc/>).

⁷ Kreß and Prost, 2022, para. 22; Julien Cazala, "Article 90", in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1858 (<https://www.legal-tools.org/doc/872bf2/>).

perpetrator from justice (Kreß and Prost, 2022, para. 24; Meißner, 2003, p. 151; Schabas, 2016, Article 90, p. 1302; Cazala, 2012, Article 90, p. 1859). This criterion is valid and, in practice, partially reflected in Article 90(6)(c). The requested State will have to consider any assessment by the Court in this regard and should refrain from an extradition if unwillingness or inability on the part of the requesting State is obvious (Meißner, 2003, p. 151). One can, however, not require the requested State to actively assess the national proceedings by the requesting State (see also Meißner, 2003, p. 151). Any (enhanced) co-operation obligations imposed by the UN Security Council might also influence the decision.⁸ One further fact complicates an assessment: Many extradition treaties contain their own criteria to determine which request takes precedence. Some of these criteria (for example nationality, territory) cannot be applied directly to the Court (see, for example, Cazala, 2012, p. 189; Meißner, 2003, 150).

Doctrine: For the bibliography, see the final comment on Article 90.

Author: Mayeul Hiéramente.

⁸ Rinoldi and Parisi, 1999, p. 355; Annalisa Ciampi, “Current and Future Scenarios for Arrest and Surrender to the ICC”, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2006, vol. 66, p. 722.

Article 90(7)

7. Where a State Party which receives a request from the Court for the surrender of a person also receives a request from any State for the extradition of the same person for conduct other than that which constitutes the crime for which the Court seeks the person's surrender:

(a) The requested State shall, if it is not under an existing international obligation to extradite the person to the requesting State, give priority to the request from the Court;

(b) The requested State shall, if it is under an existing international obligation to extradite the person to the requesting State, determine whether to surrender the person to the Court or to extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to those set out in paragraph 6, but shall give special consideration to the relative nature and gravity of the conduct in question.

Article 90(7) focuses on a distinct situation: a competing request for conduct other than the conduct for which surrender is sought. It encompasses extradition request from any State, States Party or not.¹ It differentiates between extradition requests where the requested State is under a legal obligation to fulfil the requests and those where no legal obligation exists. For the latter, the Statute postulates a priority of the surrender request by the Court. The requested State does not face any conflicting legal obligations and the admissibility of the case is not in doubt in a situation where only a conduct other than the one for which surrender is sought is investigated by the requesting State.² Priority of the Court's surrender request is the logical consequence. Meißner even argues that Article 90(7)(a) should apply to all competing extradition requests from States Parties since these States are in turn bound by the co-operation regime and obliged to co-operate under Ar-

¹ Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003, p. 152 (<https://www.legal-tools.org/doc/8d1442/>); Julien Cazala, "Article 90", in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1860 (<https://www.legal-tools.org/doc/872bf2/>).

² Claus Kreß and Kimberly Prost, "Article 90", in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 26.

ticle 86 (Meißner, 2003, p. 152). In his view, there can be no legally binding extradition request by a State Party for the same person that relates to a conduct other than that which constitutes the crime for which the Court seeks the surrender. By accepting the ICC Statute, the States Parties accepted that the prosecution of the ICC Statute’s core crimes should take precedence (Meißner, 2003, p. 152).

In cases in which the requested State is facing a conflicting legal obligation to extradite, the Statute demands an assessment of all relevant factors including those referred to in paragraph 6. In addition, Article 90(7)(b) requires that the requested State “shall give special consideration to the relative nature and gravity of the conduct in question”. This reference highlights the distinct nature and gravity of the crimes prosecuted by the International Criminal Court and implies that the prosecution of “the most serious crimes of concern to the international community as a whole” should, in general, take precedence over national proceedings for domestic crimes (Meißner, 2003, p. 153). Whether or not the provision is strict enough or a risk for an effective co-operation regime remains to be seen (Cazala, 2012, p. 1860). The requested State is tasked to assess the nature and gravity of the respective (alleged) crimes irrespective of the status of the requesting State (unclear in Cazala, 2012, pp. 1860–1861). Schabas cautions that crimes prosecuted by the Court are not per se of higher gravity.³ The OTP prosecution strategy, which is often focused on awareness building with regards to certain types of crimes (for example enlisting and conscripting of child soldiers in the *Lubanga* case, destruction of religious and historic building in the *al Mahdi* case), leave room for national investigations into crimes that might well qualify as more grave than those prosecuted by the Court (see, for example, Schabas, 2016, Article 90, p. 1302; Kreß and Prost, 2022, para. 27). The requested State should further consider the *ratio legis* of Article 17, which itself does not apply to different conducts, and ensure that an extradition to a State that intends to shield the person from criminal prosecution or a requesting State unable to guarantee a trial is denied.

Doctrine: For the bibliography, see the final comment on Article 90.

Author: Mayeul Hiéramente.

³ William A. Schabas, *The International Criminal Court. A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1302 (<https://www.legal-tools.org/doc/b7432e/>).

Article 90(8)

8. Where pursuant to a notification under this Article, the Court has determined a case to be inadmissible, and subsequently extradition to the requesting State is refused, the requested State shall notify the Court of this decision.

The last paragraph takes note of the possibility that an extradition to the requesting State fails. Such an occurrence can have an important impact on the admissibility of the case which was, pursuant to a notification by the requested State, (also) determined by the stated intention of the requesting State to investigate and prosecute the conduct in question.¹ By obliging the requested State to notify the Court about the refusal to extradite, it allows the Court to review its admissibility decision (Article 19(10)) and, possibly, to reiterate its request for surrender to the Court. The refusal is a new fact.² The direct link to the admissibility decision as well as to the prior notification makes clear that Article 90(8) refers to competing requests for the same conduct (Meißner, 2003, p. 151). Rule 186 guarantees that the Prosecution is informed about this new fact without undue delay.³ The refusal to extradite might have different reasons: it might result from a failure on the part of the requesting State or from a (political) decision by the requested State that the person should not be extradited or even be protected from criminal prosecution altogether. The requested State might also employ de-

¹ William A. Schabas, *The International Criminal Court. A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1300 (<https://www.legal-tools.org/doc/b7432e/>); Bert Swart, “Arrest and Surrender”, in Antonio Cassese, Paola Gaeta and John Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 1698 (<https://www.legal-tools.org/doc/01addc/>).

² Schabas, 2016, p. 1300; Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003, p. 151 (<https://www.legal-tools.org/doc/8d1442/>); Julien Cazala, “Article 90”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1861 (<https://www.legal-tools.org/doc/872bf2/>); Claus Kreß and Kimberley Prost, “Article 90”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 29.

³ Frederick Harhoff and Phakiso Mochochoko, “International Cooperation and Judicial Assistance”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, 2001, p. 656 (<https://www.legal-tools.org/doc/e34f81/>).

laying tactics that should, for the application of Article 90(8), be equated to a refusal.

Cross-reference:

Rule 186.

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law. Vol III: International Criminal Procedure*, Oxford University Press, 2016 (<https://www.legal-tools.org/doc/995606/>).
2. Julien Cazala, “Article 90”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, editions A. Pedone, Paris, 2012, pp. 1849–1861.
3. Annalisa Ciampi, “The Obligation to Cooperate”, in Antonio Cassese, Paola Gaeta and John Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 1607–1640 (<https://www.legal-tools.org/doc/01addc/>).
4. Annalisa Ciampi, “Current and Future Scenarios for Arrest and Surrender to the ICC”, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2006, vol. 66, pp. 719–736.
5. Daniel D. Ntanda Nsereko and Manuel J. Ventura, “Article 19”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, pp. 1033–1090.
6. Frederick Harhoff and Phakiso Mochochoko, “International Cooperation and Judicial Assistance”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 637–670.
7. Claus Kreß and Kimberly Prost, “Article 90”, in Ambos (ed.), 2022, pp. 2510–2518.
8. Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003 (<https://www.legal-tools.org/doc/872bf2/>).
9. Daniel D. Ntanda Nsereko and Manuel J. Ventura, “Article 18”, in Kai Ambos (ed.), 2022, pp. 1009–1032.

10. Dine Rinoldi and Nicoletta Parisi, “International Cooperation and Judicial Assistance between States Parties and the International Criminal Court”, in Flavia Lattanzi and William A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, vol. 1, 1999, pp. 339–390 (<https://www.legal-tools.org/doc/fla609/>).
11. William A. Schabas, *The International Criminal Court. A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1297–1303 (<https://www.legal-tools.org/doc/b7432e/>).
12. Bert Swart, “Arrest and Surrender”, in Antonio Cassese, Paola Gaeta and John Jones (eds.), 2002, pp. 1639–1703.

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Article 91

Contents of Request for Arrest and Surrender

General Remarks:

The heading of Article 91 might suggest a rather technical provision. It is indeed true that it largely addresses formal requirements for arrest and surrender requests.¹ Looking at the entire Article 91 one notes that it is a rather comprehensive provision that deals with a multitude of issues. It addresses the form of a request (paragraph 1), the necessary content for a request for the arrest and surrender of a person sought for prosecution (paragraph 2) and for a request post-conviction (paragraph 3). It also contains a broad consultation clause that goes beyond the individual case (paragraph 4). The most divisive issue of the provision is included in Article 91(2)(c) in which it is stipulated which documents, statements and information must be provided to the requested State (Kreß and Prost, 2022, Article 91, paras. 2–3). Article 91 supplements Article 89 and is complemented by Rule 187 which covers translations in the interest of the person sought for surrender. It is also linked to Article 87 which determines, inter alia, the communication channels.²

Preparatory Works:

Most aspects of the provision were not subject to much debate once it was decided that no indictment phase be included in the Statute.³ The main debate, described by commentators as “extremely lively and on some occasions, volatile” (Kreß and Prost, 2022, Article 91, para. 3), focused on what is now included in Article 91(2)(c). The discussion centred around one fundamental question: Should the requested State be entitled to demand evidence from the Court? As noted by Kreß and Prost, common law countries,

¹ Claus Kreß and Kimberly Prost, “Article 91”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 2.

² See also, William A. Schabas, *The International Criminal Court. A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1305 (<https://www.legal-tools.org/doc/b7432e/>).

³ Kreß and Prost, 2022, para. 1; Schabas, 2016, p. 1306; see also Draft Article 88, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, UN Doc. A/CONF.183/2/Add.1, 14 April 1998, pp. 139 ff. (<https://www.legal-tools.org/doc/816405/>).

accustomed to such a requirement in their regular extradition regimes, advocated for the inclusion of a such a requirement while many civil law countries were wary of a clause that could weaken the co-operation regime.⁴ Finally, it was decided that the term “evidence” should not appear and that it would be explicitly stated that any requirements “should not be more burdensome than those applicable to requests for extradition” between States Parties and other States.⁵ Furthermore, Article 91(4) was included to allow the Court to engage in an early consultation to prepare for arrest and surrender requests (Kreß and Prost, 2022, Article 91, para. 4; Schabas, 2016, Article 91, p. 1306; Prost, 2018, p. 372). Differences between States that require additional information and those who do not, remain (Cazala, 2012, Article 91, p. 1864; Meißner, 2003, p. 117).

Analysis:

Article 91 refers to arrest and surrenders in the sense of Article 89(1). It does not apply to a transit request for which the necessary content is defined in Article 89(3)(b). A request for provisional arrest (Article 92) also follows its own logic.

Doctrine: For the bibliography, see the final comment on Article 91.

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⁴ For an overview, see Kreß and Prost, 2022, paras. 3 ff.; Schabas, 2016, p. 1305; Julien Cazala, “Article 91”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1864 (<https://www.legal-tools.org/doc/872bf2/>); Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003, p. 117 (<https://www.legal-tools.org/doc/8d1442/>); Bert Swart, “Arrest and Surrender”, in Antonio Cassese, Paola Gaeta and John Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 1690 (<https://www.legal-tools.org/doc/01addc/>); Kimberly Prost, “The Surprises of Part 9 of the Rome Statute on International Cooperation and Judicial Assistance”, in *Journal of International Criminal Justice*, 2018, vol. 16, no. 2, p. 371.

⁵ See Cazala, 2012, p. 1867; Kai Ambos, *Treatise on International Criminal Law. Vol III: International Criminal Procedure*, Oxford University Press, 2016, p. 612 (<https://www.legal-tools.org/doc/995606/>).

Article 91(1)

1. A request for arrest and surrender shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in Article 87, paragraph 1 (a).

The provision stipulates that under normal circumstances,¹ a request for arrest and surrender should be in writing. It is transmitted via the channels determined pursuant to Article 87(1)(a). The paragraph contains an exception to the general rule that an arrest and surrender request shall be made in writing. “In urgent cases, a request may be made by any medium capable of delivering a written record” and can thereby be transferred, for example, via email or facsimile.² The confidentiality of the communication, as required by Article 87(3) must be ensured (Cazala, 2012, Article 91, p. 1864). Practical necessities might require an immediate communication between the actors involved. The exact reasons for such an urgency and the relationship between an urgent case as defined in Article 91(1) and an urgency in the sense of Article 92 are not defined by the Statute. The Statute is further mute as to the channels to use to transmit an urgent request in the sense of Article 91(1). Kreß and Prost rightly remark that the provision is confusing in this regard (Kreß and Prost, 2022, Article 91, para. 6). A literal interpretation suggests that the urgency of the situation does not exempt the Court from going through the correct (diplomatic) channels. This interpretation is confirmed by the ratio of Article 87(1) which allows the State to designate specific channels for the communication that allow for a viable and effective co-ordination even in cases of urgency. Both the urgent request and the confirmation have to go through the designated channels (Meißner, 2003, p. 114). The latter has to be in writing. Even though the provision is mute

¹ Claus Kreß and Kimberly Prost, “Article 91”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 5.

² Kreß and Prost, 2022, para. 6; Julien Cazala, “Article 91”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1864 (<https://www.legal-tools.org/doc/872bf2/>); Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003, p. 115 (<https://www.legal-tools.org/doc/8d1442/>).

in this regard the confirmation has to occur without undue delay (Kreß and Prost, 2022, Article 91, para. 6; Cazala, 2012, Article 91, p. 1865). The derogation from the general rule allows only a delay caused by the transport of the original document itself and does not grant the Court the right to invoke any other reasons (Meißner, 2003, p. 115). The confirmation will therefore have to be provided in a matter of days.

Doctrine: For the bibliography, see the final comment on Article 91.

Author: Mayeul Hiéramente.

Article 91(2)

2. In the case of a request for the arrest and surrender of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber under Article 58, the request shall contain or be supported by:

Article 91(2) reiterates that a request for arrest and surrender requires the issuance of an arrest warrant by the Pre-Trial Chamber pursuant to Article 58. It applies to arrest and surrender requests for persons sought for prosecution. The provision defines the content of the request. Article 87(2) and Rule 187 require translations for the requested State and the accused person respectively. The last sentence of the chapeau highlights that the required documentation does not have to form an integral part of the request but can be annexed to the request.¹ This facilitates the work of the Registrar who is often tasked to prepare separate requests to multiple States. It is therefore common that the information is provided in the form of annexes. Article 91(2) contains a definitive list of information to be provided to the requested State.

Doctrine: For the bibliography, see the final comment on Article 91.

Author: Mayeul Hiéramente.

¹ Claus Kreß and Kimberly Prost, “Article 91”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 8.

Article 91(2)(a)

(a) Information describing the person sought, sufficient to identify the person, and information as to that person’s probable location;

Sub-paragraph a) asks the Court to include information “describing the person sought, sufficient to identify the person”. The Court should, if possible, provide photos, the name and date and place of birth of the person sought for arrest and surrender.¹ It might also include aliases or any other information that might assist the requested State in identifying the person.² Sub-paragraph a) further tasks the Court with providing “information as to the person’s probable location”. Kreß and Prost rightly remark that the existence of this provision suggests that the Court should refrain from issuing requests for arrest and surrender to all States Parties and should instead focus on States “on the territory of which the person may be found” (Article 89(1)).³ Article 91(2)(a) puts an extra burden on the Court and requires the Registrar to assist the requested State in localizing the person sought for surrender (for an overview see Cazala, 2012, Article 91, pp. 1866–1867). It falls short, however, of requiring certainty as to the location (Kreß and Prost, 2022, Article 91, para. 10). If the information does not suffice to localize the person, the requested State should ask for additional information. The Court may provide any information that allows the requested State to trace the person, for example, name and place of a location, places where the presence of the person has been confirmed in the past, regular contacts of the person, cell phone data (for example, SIM number, IMEI) that allows for an IT-based search.

Doctrine: For the bibliography, see the final comment on Article 91.

Author: Mayeul Hiéramente.

¹ Claus Kreß and Kimberly Prost, “Article 91”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, pp. 2521–2522.

² Julien Cazala, “Article 91”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1870 (<https://www.legal-tools.org/doc/872bf2/>).

³ Kreß and Prost, “Article 89”, in Ambos (ed.), 2022, para. 1.

Article 91(2)(b)

(b) A copy of the warrant of arrest; and

Sub-paragraph b) declares that the Court shall provide a copy of the arrest warrant. It is not required that the Registrar includes the original arrest warrant.¹ It is an absolute standard in extradition treaties that the requested State be provided with an arrest warrant by the requesting entity. The provision only requires that the Court includes the warrant itself. The Court is not obliged to hand over the decision on the arrest warrant application. It is now common practice that the Court decides on the Prosecutor's application pursuant to Article 58 and prepares a separate document for the purpose of a future arrest and surrender request.² Sub-paragraph b) requires solely that the latter be provided to the requested State. In light of sub-paragraph c), the Court can decide to also include the decision on the Prosecutor's application. The charges as contained in the arrest warrant are relevant for the application of the rule of speciality enshrined in Article 101.³

Doctrine: For the bibliography, see the final comment on Article 91.

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¹ Claus Kreß and Kimberly Prost, "Article 91", in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 11; Julien Cazala, "Article 91", in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1867 (<https://www.legal-tools.org/doc/872bf2/>).

² See, for example, ICC, *Prosecutor v. al-Bashir*, Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-3 (<https://www.legal-tools.org/doc/e26cf4/>), operative part: "[d]ecides that the warrant of arrest of Omar Al Bashir shall be included in a separate self-executing document containing the information required by Article 58(3) of the Statute"; *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision concerning Pre-Trial Chamber I's Decision of February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, 24 February 2006, ICC-01/04-01/06-8-Corr (<https://www.legal-tools.org/doc/c60aaa/>).

³ ICC, *Prosecutor v. Blé Goudé*, Pre-Trial Chamber I, Decision on the "Defence Request to amend the document containing the charges for violation of the rule of speciality", 11 September 2014, ICC-02/11-02/11-151, paras. 12 ff. (<https://www.legal-tools.org/doc/819a98/>).

Article 91(2)(c)

(c) Such documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State, except that those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court.

Sub-paragraph c) was, as already discussed, the most debated issue of Article 91. It allows States whose national laws require the production of evidence in an extradition situation to request “documents, statements or information” from the Court. As noted by Kreß and Prost,¹ the provision focuses only on very specific kind of supporting material. The Court is therefore not required to allow the requested State access to witnesses and the original exhibits (for example, from the crime scene). It follows from Article 91(2)(c) that the drafters envisaged a procedure centred on written documentation such as reports, witness statements or any written assessment by the Court itself (for example, a decision on the arrest warrant application). As mentioned above, the provision resulted from a compromise between States requiring a review of the evidence and those arguing for a very confined surrender process (Kreß and Prost, 2022, para. 12). The requested State is only entitled to ask for supporting material if these are strictly necessary under its national laws (Kreß and Prost, 2022, para. 12). Upon request of the Court, it has to demonstrate why a certain request for additional information is required (see Article 91(4)). The provision further stipulates that the “requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties and arrangements between the requested State and other States”. The reference to “other States” combined with the exhortation that the process shall be the least burdensome possible leads to the conclusion that the requested State shall apply the lowest threshold applicable in its extradition treaties to its relationship with the Court. The Court shall benefit from any favourable treatment accorded by the requested State to other States (Kreß and Prost,

¹ Claus Kreß and Kimberly Prost, “Article 91”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 12.

2022, para. 13). Article 91(2)(c) works as a sort of ‘most favoured nation’-clause.² The Statute invites the requested State to lower the threshold even further by highlighting the importance of the prosecution of international crimes and the special nature – conceived as neutral and apolitical – of the Court. States Parties should require the bare minimum (Kreß and Prost, 2022, para. 14). Some States request no additional information (Cazala, 2012, p. 1869). The Court is entitled to ask the respective States to inform the Court about any requirement in the sense of Article 91(2)(c). In practice, the Court’s starting point is that no additional information is required.³ The Chamber regularly demands that the Registrar and the Prosecutor consult in order to determine what information might have to be transmitted.⁴ The fact that the requested State is entitled to receive additional material to make an assessment under its national law does not grant the requested State the right to question the admissibility of the case. This decision remains solely with the Court.⁵ It is also the prerogative of the Court to determine whether the requested State can refuse co-operation (Meißner, 2003, p. 118). It is for that reason that the Court can consult with the State to receive all information necessary to scrutinize any refusal by the requested State (Meißner, 2003, p. 118). The provision remains unclear in one major point: Article 91(2)(c) merely refers to the surrender process.

² For an overview of the discussion see Julien Cazala, “Article 91”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1868 (<https://www.legal-tools.org/doc/872bf2/>); but see also Bert Swart, “Arrest and Surrender”, in Antonio Cassese, Paola Gaeta and John Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 1692 (<https://www.legal-tools.org/doc/01addc/>), who cautions that the wording might give some leeway to the State.

³ Kreß and Prost, 2022, Article 91, para. 14; see, for example, ICC, *Prosecutor v. Ntaganda*, Pre-Trial Chamber I, Request to the Republic of Uganda for the arrest and surrender of Bosco Ntaganda, 8 February 2008, ICC-01/04-02/06-13 (<https://www.legal-tools.org/doc/a3b04a/>); *Prosecutor v. Katanga*, Pre-Trial Chamber I, Request to the Democratic Republic of Congo for the Arrest and Surrender of Germain Katanga, 6 July 2007, ICC-01/04-01/07-6 (<https://www.legal-tools.org/doc/f5ef12/>); *Prosecutor v. Harun and Kushayb*, Pre-Trial Chamber I, Request to the Republic of Sudan for the arrest and surrender of Ahmad Harun, 4 June 2007, ICC-02/05-01/07-13-tENG (<https://www.legal-tools.org/doc/d78608/>).

⁴ See, for example, ICC, *Prosecutor v. Ongwen*, Pre-Trial Chamber II, Request for Arrest and Surrender of Dominic Ongwen, 8 July 2005, ICC-02/04-01/05-16 (<https://www.legal-tools.org/doc/5c1095/>).

⁵ Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003, pp. 117–118 (<https://www.legal-tools.org/doc/8d1442/>).

This would suggest that the requested State has to proceed with the arrest in order to guarantee an effective co-operation. Moreover, the current practice by the Court, to submit a first request without any additional information, suggests that the Court expects an arrest of the person upon reception of the arrest and surrender request.⁶ A broad interpretation would, however, call into question the need for a provisional arrest under Article 92.

Doctrine: For the bibliography, see the final comment on Article 91.

Author: Mayeul Hiéramente.

⁶ See Dino Rinoldi and Nicoletta Parisi, “International Cooperation and Judicial Assistance between States Parties and the International Criminal Court”, in Flavia Lattanzi and William A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, vol. 1, 1999, p. 349 (<https://www.legal-tools.org/doc/27edd7/>).

Article 91(3)

- 3. In the case of a request for the arrest and surrender of a person already convicted, the request shall contain or be supported by:**
- (a) A copy of any warrant of arrest for that person;**
 - (b) A copy of the judgement of conviction;**
 - (c) Information to demonstrate that the person sought is the one referred to in the judgement of conviction; and**
 - (d) If the person sought has been sentenced, a copy of the sentence imposed and, in the case of a sentence for imprisonment, a statement of any time already served and the time remaining to be served.**

The requirements differ slightly in case of a request for arrest and surrender post-conviction. Article 91(3) stipulates that the Court should submit “a) a copy of any warrant of arrest, b) a copy of the judgment of conviction, c) information to demonstrate that the person sought is the one referred to in the judgment of conviction”; and, if applicable, d) a copy of the sentencing judgment as well as a statement regarding the time already served and the remaining time to be served. Paragraph 3 does not require any additional evidence or documentation. The requested State has to rely on the comprehensive assessment provided for in the judgment of conviction. It is for that reason that the Statute contains a separate provision.¹ Paragraph 3 is meant to guarantee that procedures are in place for the unlikely event that a convicted person needs to be re-arrested. This might for example occur if the person manages to flee or if the State tasked with enforcing the sentence of imprisonment (Article 103) releases the person in violation of its obligation towards the Court. Sub-paragraph a) highlights that the Court needs to issue a new warrant for an arrest request post-conviction and has to provide it to the requested State. The facts will most likely be described *in extenso* in the judgment of conviction (see Article 74).² which has to be submitted as a copy pursuant to sub-paragraph b). Sub-paragraph 3 is similar to Article 90(2)(a) and puts the requested State in a position to identify the person

¹ Claus Kreß and Kimberly Prost, “Article 91”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 16.

² Julien Cazala, “Article 91”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1870 (<https://www.legal-tools.org/doc/872bf2/>).

sought (Cazala, 2012, p. 1870). It also allows the Court to connect the person to the judgment of conviction (Kreß and Prost, 2022, para. 19). The last sub-paragraph acknowledges that the Court is not bound to decide on the sentencing together with its judgment of conviction. It is a common practice at the ICC to separate the decision on the guilt of the accused from the sentencing (for example, the *Lubanga*, *Katanga*, *Bemba* cases). The requirements contained in sub-paragraph d) are common features of multilateral extradition treaties (Kreß and Prost, 2022, para. 21). Kreß and Prost note that the “requirement” to inform the requested State about the time remaining to be served is of limited relevance since States Parties are not entitled to refuse the surrender based on the argument that the person has only limited time to serve.³ The information might be relevant if the requested State is granted discretion by virtue of another provision (Meißner, 2003, p. 119 with reference to Article 90(6) and (7)).

Doctrine: For the bibliography, see the final comment on Article 91.

Author: Mayeul Hiéramente.

³ Kreß and Prost, 2022, para. 21; Cazala, 2012, p. 1870; Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003, p. 119 (<https://www.legal-tools.org/doc/8d1442/>).

Article 91(4)

4. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (c). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

Article 91(4) accords the Court the right to request consultation with regards to any requirements envisaged in Article 91(2)(c). It was meant to reassure those States objecting to such a clause in the first place.¹ Due to the fact that not all States insist on information in the sense of paragraph 2 c), the Court was given the right to actively engage the States – on a case-by-case basis or generally – and request information on the national surrender proceedings. It is up to the Court to decide which States to contact and when to enter into such consultations.² Such consultations would focus on any requirements the national laws envisage for surrender and extradition proceedings (Kreß and Prost, 2022, para. 23). States Parties are bound by the Statute to explain to the Court the relevant requirements. Such consultations will allow the Court to plan future requests and to verify if the requested State acted in conformity with its co-operation obligations in a certain case (Kreß and Prost, 2022, para. 24; Meißner, 2003, p. 118). The Court might also indicate where it considers a reduction of the requirements warranted.³ It would be up to the requested State to decide whether or not it is willing to make any concessions.

¹ Claus Kreß and Kimberly Prost, “Article 91”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 22; William A. Schabas, *The International Criminal Court. A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1307 (<https://www.legal-tools.org/doc/b7432e/>).

² Kreß and Prost, 2022, para. 24; Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003, p. 118 (<https://www.legal-tools.org/doc/8d1442/>).

³ Julien Cazala, “Article 91”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1871 (<https://www.legal-tools.org/doc/872bf2/>).

In the practice of the Court, non-State Parties have been invited⁴ as well as requested⁵ to enter into consultations pursuant to Article 91(4).

Cross-reference:

Rule 187.

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law. Vol III: International Criminal Procedure*, Oxford University Press, 2016 (<https://www.legal-tools.org/doc/995606/>).
2. Julien Cazala, “Article 91”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, pp. 1863–1871.
3. Claus Kreß and Kimberly Prost, “Article 91”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, pp. 2519–2524.
4. Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003 (<https://www.legal-tools.org/doc/872bf2/>).
5. Dine Rinoldi and Nicoletta Parisi, “International Cooperation and Judicial Assistance between States Parties and the International Criminal Court”, in Flavia Lattanzi and William A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, vol. 1, 1999, pp. 339–390 (<https://www.legal-tools.org/doc/f1a609/>).
6. William A. Schabas, *The International Criminal Court. A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1304–1307 (<https://www.legal-tools.org/doc/b7432e/>).
7. Bert Swart, “Arrest and Surrender”, in Antonio Cassese, Paola Gaeta and John Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford, 2002, pp. 1639–1703 (<https://www.legal-tools.org/doc/01addc/>).

⁴ ICC, *Prosecutor v. Hussein*, Pre-Trial Chamber II, Request for Arrest and Surrender of Abdel Raheem Muhammad Hussein to the United Arab Emirates, 22 December 2016, ICC-02/05-01/12-36 (<https://www.legal-tools.org/doc/d79b58/>).

⁵ ICC, *Prosecutor v. Al-Werfalli*, Pre-Trial Chamber I, Request to Libya for cooperation in the arrest and surrender of Mahmoud Mustafa Busayf Al-Werfalli, 21 August 2017, ICC-01/11-01/17-3 (<https://www.legal-tools.org/doc/bf9e7d/>).

8. Kimberly Prost, “The Surprises of Part 9 of the Rome Statute on International Cooperation and Judicial Assistance”, in *Journal of International Criminal Justice*, 2018, vol. 16, no. 2, pp. 363–382.

Author: Mayeul Hiéramente.

Article 92

Provisional Arrest

General Remarks:

To arrest suspects of criminal deeds such as genocide, crimes against humanity and war crimes is a difficult task and requires a certain flexibility and rapidity on the side of the Court. Article 92 is meant to provide such flexibility and grants the Court the right to ask for a provisional request of the person suspected of crimes falling under the jurisdiction of the Court. The provision is closely linked with Article 58(5) which envisages that “the Court may request the provisional arrest” of a person in accordance with Part 9. Article 92 is complemented by Rules 188 and 189. The way the provision is drafted corresponds to many extradition treaties such as the United Nations Model Treaty on Extradition.¹ It remains to be seen if the provision will be of great relevance to the Court’s day-to-day business. Article 91 grants the Court substantial leeway to accelerate the “normal” arrest and surrender process and thereby leaves little room for the exceptional case of a provisional arrest.

Preparatory Works:

The current provision greatly resembles Draft Article 89.² It was not subject to much debate at the Rome Conference.³ The draft version contained an additional paragraph regarding the protection of witnesses which is now included in Article 87(4) and applies to all co-operation requests (Schabas, 2016, p. 1309). A notable difference is the fact the Article 92 does not provide any time-limit for a subsequent surrender request while the draft Article envisaged a statutory solution. The draft notes that some delegations proposed a 30-day period, some a 40-day period and some a 60-day time

¹ Claus Kreß and Kimberly Prost, “Article 92”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 2.

² Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, UN Doc. A/CONF.183/2/Add.1, 14 April 1998 (<https://www.legal-tools.org/doc/816405/>).

³ Kreß and Prost, 2022, para. 1. Regarding the drafts prepared by the International Law Commission, see William A. Schabas, *The International Criminal Court. A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1309 (<https://www.legal-tools.org/doc/b7432e/>), with further references.

period. It was finally agreed that the time period should be determined in the Rules of Procedure and Evidence (Schabas, 2016, p. 1309). Rule 188 now provides for a time-period of 60 days.

Doctrine: For the bibliography, see the final comment on Article 92.

Author: Mayeul Hiéramente.

Article 92(1)

1. In urgent cases, the Court may request the provisional arrest of the person sought, pending presentation of the request for surrender and the documents supporting the request as specified in Article 91.

Article 92 envisages that the Court, represented by the Pre-Trial Chamber,¹ may request the provisional arrest of the person. It does not stipulate a corresponding obligation of the requested State. Such obligation is included in Article 59(1) which explicitly refers to requests for provisional arrest.² The provision only applies in “urgent cases”. The term itself is not defined by the Statute. It is, however, clear from the context that urgency under Article 92 requires that the arrest of the person would be impossible or at least less likely if the Court were to proceed with a “normal” arrest and surrender request (Meißner, 2003, p. 176; Swart, 2002, p. 1692). Kreß and Prost note that this might be the case where the person poses a danger to the community, took steps to conceal his or her location or identity or where there is reason to believe that the person intends to flee (Kreß and Prost, 2022, para. 3; Meißner, 2003, p. 177). Any danger to witnesses and victims caused by the person would certainly also qualify for a provisional arrest (Cazala, 2012, Article 92, p. 1874). The urgency is to be determined only by the Court (Meißner, 2003, p. 177).

¹ William A. Schabas, *The International Criminal Court. A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1310 (<https://www.legal-tools.org/doc/b7432e/>); Bert Swart, “Arrest and Surrender”, in Antonio Cassese, Paola Gaeta and John Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 1692 (<https://www.legal-tools.org/doc/01addc/>); see also, Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003, p. 178 (<https://www.legal-tools.org/doc/8d1442/>), who suggests that the Prosecutor should make the request.

² Meißner, 2003, p. 177; Claus Kreß and Kimberly Prost, “Article 92”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 2; Julien Cazala, “Article 92”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1874 (<https://www.legal-tools.org/doc/872bf2/>).

The *Bemba* case serves as an excellent example. The Prosecutor³ successfully argued that Mr. Bemba was present in Belgium but intended to leave the country on the 25 May 2008 via airplane to the Democratic Republic of Congo or an unknown location. The Prosecutor requested an expedited decision on the application for an arrest warrant and, in the event of a successful application, a request for provisional arrest. The Chamber followed the argument by the Prosecutor and decided – some hours later – for the immediate issuance of an arrest warrant⁴ and a request under Article 92.⁵ It provided additional information to the Belgian authorities to assist them in their national proceedings.⁶ The Chamber was aware of the fact that it could not provide a comprehensive written explanation of its decision to issue the arrest warrant on such short notice and decided that the (written) analysis of the facts should follow. The comprehensive decision was rendered on 10 June 2008⁷ and the warrant of arrest was replaced on this basis.⁸ The Court then made a formal request under Articles 89 and 91.⁹ The Court thereby acted as envisaged by the drafters of the ICC Statute by returning to the normal process.

³ ICC, *Prosecutor v. Bemba*, Prosecutor, Prosecutor’s Application for Request for Provisional Arrest under Article 92, 23 May 2008, ICC-01/05-01/08-28, para. 5 (<https://www.legal-tools.org/doc/c62174/>).

⁴ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber III, Urgent Warrant of Arrest for Jean-Pierre Bemba Gombo, 23 May 2008, ICC-01/05-01/08-1-tENG-Corr (<https://www.legal-tools.org/doc/fb0728/>).

⁵ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber III, Demande d’arrestation provisoire de M. Jean-Pierre Bemba Gombo adressée au Royaume de Belgique, 23 May 2008, ICC-01/05-01/08-3 (<https://www.legal-tools.org/doc/4639e6/>).

⁶ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber III, Recommendations Adressées à la Chambre des Mises en Accusation de La Cour d’Appel de Bruxelles en vertu de l’Article 59 du Statut de Rome, 3 June 2008, ICC-01/05-01/08-13 (<https://www.legal-tools.org/doc/be3783/>).

⁷ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber III, Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, 10 June 2008, ICC-01/05-01/08-14-tENG (<https://www.legal-tools.org/doc/fb80c6/>).

⁸ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber III, Warrant of Arrest for Jean-Pierre Bemba Gombo replacing the Warrant of Arrest issued on 23 May 2008, 10 June 2008, ICC-01/05-01/08-15-tENG (<https://www.legal-tools.org/doc/85b5a1/>).

⁹ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber III, Demande d’arrestation et de Remise de Jean-Pierre Bemba Gombo adressée au Royaume de Belgique, 10 June 2008, ICC-01/05-01/08-16 (<https://www.legal-tools.org/doc/7ba722/>).

The provisional arrest is only sought to avoid the delays of a request under Article 89.¹⁰

Doctrine: For the bibliography, see the final comment on Article 92.

Author: Mayeul Hiéramente.

¹⁰ See Schabas, 2016, p. 1310; see also, for example, ICC, *Prosecutor v. Harun and Kushayb*, Pre-Trial Chamber I, Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007, ICC-02/05-01/07-1 (<https://www.legal-tools.org/doc/0b8412/>); *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the Prosecutor’s Application for a Warrant of Arrest against Callixte, Mbarushimana, 28 September 2010, ICC-01/04-01/10-1 (<https://www.legal-tools.org/doc/04d4fa/>); *Prosecutor v. Gaddafi et al.*, Pre-Trial Chamber I, Decision on the “Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif al-Islam Gaddafi and Abdullah Al-Senussi, 27 June 2011, ICC-01/11-01/11-1 (<https://www.legal-tools.org/doc/094165/>); *Prosecutor v. Blé Goudé*, Pre-Trial Chamber III, Warrant of Arrest for Charles Blé Goudé, 21 December 2011, ICC-02/11-02/11-1 (<https://www.legal-tools.org/doc/de90c7/>); *Prosecutor v. Abdel Raheem Muhammad Hussein*, Pre-Trial Chamber II, Request for the Arrest and Surrender of Abdel Raheem Muhammad Hussein to the United Arab Emirates, 22 December 2016, ICC-02/05-01/12-36 (<https://www.legal-tools.org/doc/d79b58/>); *Prosecutor v. Al-Werfalli*, Pre-Trial Chamber I, Second Warrant of Arrest, 4 July 2018, ICC-01/11-01/17-13 (<https://www.legal-tools.org/doc/3275b0/>); *Prosecutor v. Yekatom*, Pre-Trial Chamber II, Public Redacted Version of ‘Warrant of Arrest for Alfred Yekatom’, ICC-01/14-01/18-1-US-Exp, 11 November 2018, 17 November 2018, ICC-01/14-01/18-1-Red (<https://www.legal-tools.org/doc/00c4fc/>).

Article 92(2)

- 2. The request for provisional arrest shall be made by any medium capable of delivering a written record and shall contain:**
- (a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;**
 - (b) A concise statement of the crimes for which the person's arrest is sought and of the facts which are alleged to constitute those crimes, including, where possible, the date and location of the crime;**
 - (c) A statement of the existence of a warrant of arrest or a judgment of conviction against the person sought; and**
 - (d) A statement that a request for surrender of the person sought will follow.**

Article 92(2) defines the necessary content of a request differently than Article 91(2). The two provisions overlap only partially. Sub-paragraph a) is identical to 91(2)(a) and requires the Court to provide sufficient information to identify the person (for example, name, birth date, photography, aliases) and its location. The Court needs to submit sufficient information regarding the “probable” location of the person. Given the circumstances of an urgent request for provisional arrest, it can be expected that the Registrar, in consultation with the Prosecutor, compiles a complete dossier that allows the State to act immediately and secure the arrest. Sub-paragraphs b) and c) show that the Court is not required to transmit a copy of the arrest warrant. Both Article 58(5) and Article 92(2)(c) make nonetheless clear that the issuance of an arrest warrant by the (Pre-Trial Chamber of the) Court is a pre-condition for any request under Article 92. This can be an ‘arrest warrant light’ as issued by Pre-Trial Chamber III in the Bemba case.¹ The Prosecutor can request the Chamber to issue an arrest warrant as a basis for as subsequent request for provisional arrest.²

¹ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber III, Urgent Warrant of Arrest for Jean-Pierre Bemba Gombo, 23 May 2008, ICC-01/05-01/08-1-tENG-Corr (<https://www.legal-tools.org/doc/fb0728/>); for criticism of the accelerated approach, see *Prosecutor v. Bemba*, The Defence, Public Redacted Version – Application Challenging the Admissibility of the Case pursuant to Articles 17 and 19(2)(a) of the Rome Statute, 25 February 2010, ICC-01/05-01/08-704-Red3-tENG, paras. 187 ff. (<https://www.legal-tools.org/doc/41e9ac/>).

² Unclear, therefore, ICC, *Prosecutor v. Barasa*, Pre-Trial Chamber II, Warrant of arrest for Walter Osapiri Barasa, 2 August 2013, ICC-01/09-01/13-1-Red2, para. 27 (<https://www.legal-tools.org/doc/25ee9d/>).

While it suffices that the Court provides a statement of the existence of a warrant of arrest, it will often make sense to directly transmit the copy of the arrest warrant as it probably contains a “concise statement of the crimes”, the “facts which are alleged to constitute those crimes” as well as the date and location of the crime,³ information to be included in the request by virtue of sub-paragraph b). The Court opted for such an approach in the *Bemba* case.⁴ The need for a concise statement regarding the facts and the crime is common extradition practice.⁵ The requirement in sub-paragraph d) to include a statement that a request for the surrender of the person sought will follow, is a pure formality but serves as a reminder that Article 92 envisages a return to the standard procedure. Provisional arrest is only an interim measure (Kreß and Prost, 2022, para. 10). The most important difference in comparison with Article 91(2) is the absence of any requirement to provide additional material or evidence.⁶ This is meant to facilitate and streamline the provisional arrest process. The request has to be made through the normal channels designated in accordance with Article 87(1).⁷

Doctrine: For the bibliography, see the final comment on Article 92.

Author: Mayeul Hiéramente.

³ Julien Cazala, “Article 92”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1876 (<https://www.legal-tools.org/doc/872bf2/>).

⁴ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber III, Demande d’arrestation provisoire de M. Jean-Pierre Bemba Gombo adressée au Royaume de Belgique, 23 May 2008, ICC-01/05-01/08-3 (<https://www.legal-tools.org/doc/4639e6/>).

⁵ Claus Kreß and Kimberly Prost, “Article 92”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 8.

⁶ Bert Swart, “Arrest and Surrender”, in Antonio Cassese, Paola Gaeta and John Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 1693 (<https://www.legal-tools.org/doc/01addc/>).

⁷ Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003, p. 178 (<https://www.legal-tools.org/doc/8d1442/>); but see, Cazala, 2012, p. 1875.

Article 92(3)

3. A person who is provisionally arrested may be released from custody if the requested State has not received the request for surrender and the documents supporting the request as specified in Article 91 within the time limits specified in the Rules of Procedure and Evidence. However, the person may consent to surrender before the expiration of this period if permitted by the law of the requested State. In such a case, the requested State shall proceed to surrender the person to the Court as soon as possible.

The provision specifies, in the interest of the requested State, that the person may be released from custody if the Court fails to provide a comprehensive arrest and surrender request – this includes, *inter alia*, the arrest warrant and the supporting material referred to in Article 91(2)(c) – within the limits specified in Rule 188 (60 days). The requested State faces no obligation to release the person by virtue of the Statute¹ and is – contrary to some extradition treaties (Rinoldi and Parisi, p. 352) – entitled to keep a potentially dangerous person in custody on the basis of its national laws. Nonetheless, the idea behind the provision is also to accord a degree of protection to the arrested person and to streamline the process.² At the Rome Conference it was decided that the time limit should be defined in the Rules of Procedure and Evidence to allow for more flexibility and possible changes in the futures (Kreß and Prost, 2022, para. 12; Cazala, 2012, p. 1877). The drafters of Rule 188 opted for the longest time limit discussed at Rome and determined that it should be 60 days from the date of the provisional arrest (for an overview see Cazala, 2012, p. 1878).

¹ Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003, p. 180 (<https://www.legal-tools.org/doc/8d1442/>); Dine Rinoldi and Nicoletta Parisi, “International Cooperation and Judicial Assistance between States Parties and the International Criminal Court”, in Flavia Lattanzi and William A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, vol. 1, 1999, p. 352 (<https://www.legal-tools.org/doc/27edd7/>); Claus Kreß and Kimberly Prost, “Article 92”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 11.

² Kreß and Prost, 2022, para. 11; Julien Cazala, “Article 92”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1877 (<https://www.legal-tools.org/doc/872bf2/>).

The ICC Statute also incorporated a clause that allows the arrested person and the requested State to shorten the proceedings and to agree to a simplified surrender. The concept of simplified surrender is common to many extradition treaties and is based on the Model Treaty on Extradition (Kreß and Prost, 2022, para. 13).³ Given the conditions that some of the arrested persons face in the requested States, it is far from unlikely that such a consent will be given.⁴ The arrested person has, however, no subjective right to a simplified surrender. Article 92 (3) requires that the simplified surrender be permitted by the national law of the requested State. Even if these conditions are met the requested State might object to a surrender by virtue of Article 95 or request a formal arrest and surrender request pursuant to Rule 189 (Rinoldi and Parisi, 1999, p. 352; Meißner, 2003, pp. 179 ff.). In general, the requested State should proceed as soon as possible. After all, the purpose of the provision is to shorten the time spent in national custody and to facilitate the surrender proceedings for the Court (Kreß and Prost, 2022, para. 14; Schabas, 2016, p. 1311). Finally, it should be noted that the simplified surrender process is only applicable if the consent is given before the expiration of the time limit. The requested State remains free to organise a prompt surrender even where consent is given at a later stage.

Doctrine: For the bibliography, see the final comment on Article 92.

Author: Mayeul Hiéramente.

³ United Nations, Model Treaty on Extradition, 14 December 1990 (<https://www.legal-tools.org/doc/43b6b5/>).

⁴ Rinoldi and Parisi, 1999, p. 352; William A. Schabas, *The International Criminal Court. A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1311 (<https://www.legal-tools.org/doc/b7432e/>).

Article 92(4)

4. The fact that the person sought has been released from custody pursuant to paragraph 3 shall not prejudice the subsequent arrest and surrender of that person if the request for surrender and the documents supporting the request are delivered at a later date.

The last paragraph is meant to clarify that any release from custody due to the expiration of the time limit shall not be prejudicial for a subsequent arrest and surrender. It allows the Court to prepare a comprehensive arrest and surrender request containing all the documentation required by Article 91 and to submit such request even where it failed to do so in the time limit envisaged in Rule 188. This is a well-accepted principle in State to State practice.¹ The person sought for arrest and surrender by the Court should not benefit from any (minor) procedural flaws to block the proceedings. The provision highlights, however, that only a request pursuant to Articles 89 and 91 suffices to require a second arrest. A subsequent provisional arrest – at least to the requested State (Cazala, 2012, p. 1879) – is not permitted (Kreß and Prost, 2022, para. 15).

Cross-references:

Rules 188 and 189.

Doctrine:

1. Julien Cazala, “Article 92”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, pp. 1873–1880.
2. Claus Kreß and Kimberly Prost, “Article 92”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, pp. 2525–2528.

¹ Claus Kreß and Kimberly Prost, “Article 92”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 15; Julien Cazala, “Article 92”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1879 (<https://www.legal-tools.org/doc/872bf2/>).

3. Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003 (<https://www.legal-tools.org/doc/872bf2/>).
4. Dine Rinoldi and Nicoletta Parisi, “International Cooperation and Judicial Assistance between States Parties and the International Criminal Court”, in Flavia Lattanzi and William A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, vol. 1, 1999, pp. 339–390 (<https://www.legal-tools.org/doc/fla609/>).
5. William A. Schabas, *The International Criminal Court. A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1308–1311 (<https://www.legal-tools.org/doc/b7432e/>).
6. Bert Swart, “Arrest and Surrender”, in Antonio Cassese, Paola Gaeta and John Jones (eds.), *The Rome Statute of the International Criminal Court. A Commentary*, Oxford University Press, 2002, pp. 1639–1703 (<https://www.legal-tools.org/doc/01addc/>).

Author: Mayeul Hiéramente.

Article 93(1)

Other Forms of Cooperation

1. States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:

Article 93(1)(a-l) deals with general assistance between the Court and State Parties aside from surrender of persons. It provides a detailed and broad list of the various types of assistance in relation to investigations or prosecutions. The wording does not focus solely on legal assistance but refers broadly to any type of assistance, and could for example cover infrastructure to conduct inquiries on the territory of the requested State. To a great extent the types of assistance was drawn from the UN Model Treaty on Mutual Assistance in Criminal Matters and the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.¹ Most of the listed measures of assistance are self-explanatory and require no particular comment.

Doctrine: For the bibliography, see the final comment on Article 93.

Author: Karin Pålé-Bartes.

¹ Model Treaty on Mutual Assistance in Criminal Matters, UN Doc. A/RES/45/117, 14 December 1990 (<https://www.legal-tools.org/doc/44a7b5/>); United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 19 December 1988 (<https://www.legal-tools.org/doc/e37039/>).

Article 93(1)(a)

(a) The identification and whereabouts of persons or the location of items;

The wording “identification and whereabouts of persons” make no distinction between a person being a suspect, a victim or a witness. The use of the expression “location of items” in the same subparagraph restricts the cooperation to mobile objects only.

Doctrine: For the bibliography, see the final comment on Article 93.

Author: Karin Pâle-Bartes.

Article 93(1)(b)

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

“Evidence taking and the production of evidence” could cover any form of evidence. However, it was the understanding during the negotiations that modern intrusive and coercive measures should not be covered by the clause. Instead these measures are dealt with *in littera k)* and *l)*.

Doctrine: For the bibliography, see the final comment on Article 93.

Author: Karin Pålé-Bartes.

Article 93(1)(c)

(c) The questioning of any person being investigated or prosecuted;

Although the inquiry of a person being investigated or prosecuted is already covered by subparagraph (b), it is made clear by subparagraph (c) that the Court may request the questioning of an investigated or accused person. The obligation under the subparagraph includes an obligation to actually obtain evidence from the person through compulsion or otherwise. The subparagraph does not stipulate how the inquiry should be conducted.

Doctrine: For the bibliography, see the final comment on Article 93.

Author: Karin Pâle-Bartes.

Article 93(1)(d)

(d) The service of documents, including judicial documents;

The word “documents” cover all forms of writs and judicial records as well as any other documentation. The means of transmission of the documents is not referred to in the Article but instead it is open to the Court to specify in the request the desired form of transmission.

Cross-reference:

Regulation 110.

Doctrine: For the bibliography, see the final comment on Article 93.

Author: Karin Pâle-Bartes.

Article 93(1)(e)

(e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;

Even though the list of forms of legal assistance is broad, it is worth noting that the Article does not oblige States Parties to compel witnesses before the Court if so requested. The non-inclusion of a State obligation to compel testimony at trial has been considered a weakness of the co-operation schema. Subparagraph (e) only requires the States Parties to assist in facilitating the voluntary appearance of persons as witnesses or experts before the Court, that is to encourage a witness or an expert to appear before the Court. When it comes to bearing the costs for a witness or an expert Article 100 deals with this particular issue.

According to one view there is, on top of the absence of a State duty to compel a witness to appear and to testify before the Court, an individual right of persons not to appear and testify before the Court. This right is considered to derive from paragraph 7. Under this provision a person in custody in the requested state may be transferred to the Court only if the person consents and the same must *a fortiori* be true for all other witnesses the argument goes. The view has been criticized for giving far too much prominence to a provision that deals with a very specific procedural scenario.

Even if individuals may not be forced to testify, Article 93(1) however sets out an effective framework for obtaining evidence. For example States may be required to assist in “execution of searches and seizure”, “provision of records and documents, including official records and documents and identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeit” (sub-paragraphs (h), (i) and (k)).

Cross-references:

Rules 74 and 190.

Doctrine: For the bibliography, see the final comment on Article 93.

Author: Karin Pålé-Bartes.

Article 93(1)(f)

(f) The temporary transfer of persons as provided in paragraph 7;

Subparagraph (f) makes a reference to the temporary transfer of persons as provided in paragraph 7. Since this was not a concept that many States were familiar or comfortable with, a separate paragraph 7 was created to deal with the procedure for this type of assistance.

Doctrine: For the bibliography, see the final comment on Article 93.

Author: Karin Pålé-Bartes.

Article 93(1)(g)

(g) The examination of places or sites, including the exhumation and examination of grave sites;

According to subparagraph (g) States Parties are obliged to comply with requests to examine sites and places on its territory, including exhumation and examination of grave sites. This is probably one of the most important and common types of assistance which the Court may seek.

Doctrine: For the bibliography, see the final comment on Article 93.

Author: Karin Pâle-Bartes.

Article 93(1)(h)

(h) The execution of searches and seizures;

The Court may request searches and seizure according to subparagraph (h). Such requests will be executed according to the procedures of the national law of the requested State. All States must have a procedure in place for search and seizure according to Article 88.

Doctrine: For the bibliography, see the final comment on Article 93.

Author: Karin Pålé-Bartes.

Article 93(1)(i)

(i) The provision of records and documents, including official records and documents;

Further the Court may demand the transmission of records and documents of States Parties. This is a general mandate for the production of all types of documents and records and follows from subparagraph (i).

Doctrine: For the bibliography, see the final comment on Article 93.

Author: Karin Pålé-Bartes.

Article 93(1)(j)

(j) The protection of victims and witnesses and the preservation of evidence;

Subparagraph (j) deals with the protection of victims and witnesses and the preservation of evidence. In cases under the investigation or prosecution by the ICC the Court is primarily responsible for the protection of victims and witnesses. However, such protection may require the assistance of States Parties, for example when a victim or a witness lives in that State. If the national law does not provide for protection programs the State Party may be obliged to adopt new measures to protect victims and witnesses.

Doctrine: For the bibliography, see the final comment on Article 93.

Author: Karin Pålé-Bartes.

Article 93(1)(k)

(k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and

Subparagraph (k) deals with identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes. These measures are an essential part of modern international co-operation. The provision obligates States Parties to have mechanism in place which will allow for the freezing of any of the listed items. The purpose of conducting such freezing or seizure of assets is first of all to facilitate enforcement should the accused person be convicted and an order of forfeiture be imposed as part of the sentence. But freezing of assets is also important in the process of arrest and surrender, in that it helps to disrupt support networks of suspects.¹

Doctrine: For the bibliography, see the final comment on Article 93.

Author: Karin Pâle-Bartes.

¹ The question of legal assistance according to the paragraph has been raised, for example, in ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Demande adressée à la République démocratique du Congo en vue d'obtenir l'identification, la localisation, le gel et la saisie des biens et avoirs de m. Thomas Lubanga Dyilo, 9 March 2006, ICC-01/04-01/06-22-tENG (<https://www.legal-tools.org/doc/8fe2d4/>); *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Request to States Parties to the Rome Statute for the Identification, Tracing and Freezing or Seizure of the Property and Assets of Mr Thomas Dyilo, 31 March 2006, ICC-01/04-01/06-62-tEN (<https://www.legal-tools.org/doc/0d5f2c/>); and *Prosecutor v. Bemba*, Pre-Trial Chamber III, Request for cooperation to Initiate an Investigation Addressed to the Competent Authorities of the Republic of Portugal, 17 November 2008, ICC-01/05-01/08-254 (<https://www.legal-tools.org/doc/dedcce/>).

Article 93(1)(l)

(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.

Subparagraph (l) also recognizes the availability of other forms of legal assistance not specified in the list as long as there is not a prohibition under the law of the requested State. In practice this may not be a simple matter. The fact that something is “not prohibited” by national law does not automatically mean that it is permitted and although a form of co-operation “is not prohibited” the State Party might have no legislation enabling it to effect compliance. In *Banda and Jerbo*, the Trial Chamber stated that “as the type of assistance is not specified under this paragraph, it would not be appropriate to place a general obligation on a State to comply with such requests, when the nature of the obligation cannot be specified. Thus, the obligation is limited to that assistance which is not prohibited under national law”.¹

Assistance has to be provided on the basis of a request presented by the Court. The statute does not call for a direct or spontaneous transfer of information from a national authority to the Court or vice versa. On the other hand such a transfer may be helpful and is not prohibited by Article 93(1).

Doctrine: For the bibliography, see the final comment on Article 93.

Author: Karin Pålé-Bartes.

¹ ICC, *Prosecutor v. Banda and Jerbo*, Trial Chamber IV, Decision on “Defence Application pursuant to Articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan”, 1 July 2011, ICC-02/05-03/09-169 (<https://www.legal-tools.org/doc/891c96/>).

Article 93(2)

2. The Court shall have the authority to provide an assurance to a witness or an expert appearing before the Court that he or she will not be prosecuted, detained or subjected to any restriction of personal freedom by the Court in respect of any act or omission that preceded the departure of that person from the requested State.

Bilateral and multilateral treaties in the field of mutual legal assistance usually provide for an assurance to a witness or an expert that they will not be prosecuted or otherwise detained with respect to an act or omission preceding their departure from the requested State. According to paragraph (2) the Court is merely empowered to provide such an assurance at its discretion. It has been described as a power likely to be used to obtain evidence from lower-level alleged perpetrators who are reluctant to testify against their superiors. In *Katanga and Ngudjolo*, the Trial Chamber stated that the position of an accused who chooses to testify in his own defence cannot be systematically equated to that of any other witness.¹ The Trial Chamber found that Article 93(2) and Rule 74 were not applicable to the accused and rejected the request.

Cross-reference:

Rule 191.

Doctrine: For the bibliography, see the final comment on Article 93.

Author: Karin Pålé-Bartes.

¹ ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber, Decision on the request of the Defence for Mathieu Ngudjolo to obtain assurances with respect to self-incrimination for the accused, 13 September 2011, ICC-01/04-01/07-3153, para. 1 (<https://www.legal-tools.org/doc/5e1944/>).

Article 93(3)

3. Where execution of a particular measure of assistance detailed in a request presented under paragraph 1, is prohibited in the requested State on the basis of an existing fundamental legal principle of general application, the requested State shall promptly consult with the Court to try to resolve the matter. In the consultations, consideration should be given to whether the assistance can be rendered in another manner or subject to conditions. If after consultations the matter cannot be resolved, the Court shall modify the request as necessary.

There are only three limited exceptions when States Parties can deny a request for co-operation presented by the Court (paragraphs 4–6). Article 93 has therefore been considered to be a rather strong regime for co-operation. Compared to a lot of other mutual assistance treaties it is worth mentioning that assistance may not be refused because the offense is characterized as a political, military or fiscal offense. There are no general provisions allowing for refusal when the execution of the request would be contrary to the public order or sovereignty or public interest of the State.

Paragraph 3 provides that where a particular measure sought in a specific request is prohibited by existing national law the requested State would have to comply with the request, unless it successfully convinces the Court that the requested measure violates a fundamental principle of general application. This means that not any prohibition can be referred to. The prohibition must rather possess a constitutional or quasi-constitutional status. Under those circumstances the requested State and the Court would consult in order to resolve the conflict. The State must consider whether co-operation can be provided subject to specified conditions or in an alternative manner. The provision emphasizes the presumption that both the Court and the State will act in good faith and try to find acceptable solutions.

Doctrine: For the bibliography, see the final comment on Article 93.

Author: Karin Påle-Bartes.

Article 93(4)

4. In accordance with Article 72, a State Party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security.

A State Party can deny a request for assistance if it concerns the production of documents or disclosure of evidence relating to its national security according to subparagraph 4. The subject of national security is considered in this commentary under Article 72.

Cross-reference:

Article 72.

Doctrine: For the bibliography, see the final comment on Article 93.

Author: Karin Pâle-Bartes.

Article 93(5)

5. Before denying a request for assistance under paragraph 1 (l), the requested State shall consider whether the assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later date or in an alternative manner, provided that if the Court or the Prosecutor accepts the assistance subject to conditions, the Court or the Prosecutor shall abide by them.

Article 93(1)(l) requires a State to comply with a request for assistance if compliance is not prohibited by its own national law. If a state denies such a request, it must, according to paragraph 5, consider whether co-operation can be provided subject to specific conditions, or at a later date, or in an alternative manner. The Court is not obliged to accept any conditions offered by the requested State. However, if the Court agrees to a particular condition it must abide that condition.

Doctrine: For the bibliography, see the final comment on Article 93.

Author: Karin Pålle-Bartes.

Article 93(6)

6. If a request for assistance is denied, the requested State Party shall promptly inform the Court or the Prosecutor of the reasons for such denial.

If a State denies a request for assistance it is, according to paragraph 6, to inform the Court or the Prosecutor promptly of the reasons.

Doctrine: For the bibliography, see the final comment on Article 93.

Author: Karin Pålé-Bartes.

Article 93(7)

7. (a) The Court may request the temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance. The person may be transferred if the following conditions are fulfilled:

(i) The person freely gives his or her informed consent to the transfer; and

(ii) The requested State agrees to the transfer, subject to such conditions as that State and the Court may agree.

(b) The person being transferred shall remain in custody. When the purposes of the transfer have been fulfilled, the Court shall return the person without delay to the requested State.

The possibility of temporary transfer of a person in custody is featured in many mutual legal assistance schemes. Under paragraph 7 it is possible for a State to transfer an individual who is in custody for purposes of identification or to testify or provide other forms of assistance if the person is notified about the purpose of the transfer and its legal and factual consequences and the person consents to the transfer.

Further the State must also agree to the transfer. The transfer of a person in custody always raises security issues and in some cases, the security risk may be too great to permit the transfer. In most cases the Court can request the taking of evidence from the person under paragraph 1(b), as an alternative.

The paragraph does not provide grounds for denial of transfer; but the general obligation to co-operate would require the clear and serious reason for such a refusal.

The person who is transferred remains in custody and is, according to the paragraph, returned without delay to the State once the purposes of transfer has been completed. In *Katanga and Ngudjolo*, however, the Trial Chamber considered whether an immediate application of Article 93(7)) would not constitute a violation of three detained witnesses right to apply for asylum.¹ If the witnesses were to be returned to the Democratic Repub-

¹ ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber, Decision on an Amicus Curiae application and on the “Requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d’asile” (Articles 68 and 93(7) of the Statute), 9 June 2011, ICC-01/04-01/07-3003-tENG (‘*Katanga and Ngudjolo*, 9 June 2011’) (<https://www.legal-tools.org/doc/e411d5/>).

lic of Congo immediately, it would become impossible for them to exercise their right to apply for asylum in the Netherlands. As matters stood at the time, The Chamber was unable to apply Article 93(7) of the Statute in conditions which are consistent with internationally recognized human rights, as required by Article 21(3). The Chamber considered that it was incumbent upon the Registrar to authorise contact between the detained witnesses and their Dutch Counsel within the detention centre as soon as possible (*Katanga and Ngudjolo*, 9 June 2011, paras. 72–73 and 78).

The paragraph does not cover the situation of temporary transfer of a person who is serving a sentence imposed by the Court. The Rules of Procedure and Evidence, Rule 193, specify, that the paragraph shall not apply when it comes to the temporary transfer of a person who is serving a sentence imposed by the Court for the purpose of testifying or for other matters related to legal assistance. In such a case it would not be possible for the State to authorize the transfer to the Court.

Cross-references:

Rules 192 and 193.

Doctrine: For the bibliography, see the final comment on Article 93.

Author: Karin Pålé-Bartes.

Article 93(8)

8. (a) *The Court shall ensure the confidentiality of documents and information, except as required for the investigation and proceedings described in the request.*

(b) *The requested State may, when necessary, transmit documents or information to the Prosecutor on a confidential basis. The Prosecutor may then use them solely for the purpose of generating new evidence.*

(c) *The requested State may, on its own motion or at the request of the Prosecutor, subsequently consent to the disclosure of such documents or information. They may then be used as evidence pursuant to the provisions of Parts 5 and 6 and in accordance with the Rules of Procedure and Evidence.*

Further paragraph (8) creates a possibility of confidentiality with respect to documents and information. If a state requires confidentiality the Prosecutor may use such documents or information only for the purpose of generating new evidence. The first trial before the Court, *Lubanga*, was nearly aborted entirely because documents were provided to the Prosecutor on this basis. However, it is possible for the requested State to subsequently agree to disclosure of the documents and information that it has furnished on a confidential basis. These may then be submitted as evidence in the trial.

Doctrine: For the bibliography, see the final comment on Article 93.

Author: Karin Pålé-Bartes.

Article 93(9)

9. (a) (i) In the event that a State Party receives competing requests, other than for surrender or extradition, from the Court and from another State pursuant to an international obligation, the State Party shall endeavour, in consultation with the Court and the other State, to meet both requests, if necessary by postponing or attaching conditions to one or the other request.

(ii) Failing that, competing requests shall be resolved in accordance with the principles established in Article 90.

(b) Where, however, the request from the Court concerns information, property or persons which are subject to the control of a third State or an international organization by virtue of an international agreement, the requested States shall so inform the Court and the Court shall direct its request to the third State or international organization.

Paragraph 9 deals with a procedure in the case of competing requests. If both requests cannot be met satisfactorily, the issue is to be resolved in accordance with the principles set out in Article 90 of the Statute, which deals with competing requests for extradition and surrender.

Cross-reference:

Article 90.

Doctrine: For the bibliography, see the final comment on Article 93.

Author: Karin Pâle-Bartes.

Article 93(10)

10. (a) The Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State.

(b) (i) The assistance provided under subparagraph (a) shall include, inter alia:

a. The transmission of statements, documents or other types of evidence obtained in the course of an investigation or a trial conducted by the Court; and

b. The questioning of any person detained by order of the Court;

(ii) In the case of assistance under subparagraph (b) (i) a:

a. If the documents or other types of evidence have been obtained with the assistance of a State, such transmission shall require the consent of that State;

b. If the statements, documents or other types of evidence have been provided by a witness or expert, such transmission shall be subject to the provisions of Article 68.

(c) The Court may, under the conditions set out in this paragraph, grant a request for assistance under this paragraph from a State which is not a Party to this Statute.

Paragraph 10 makes some provisions for the Court to assist a State Party that is conducting an investigation or a trial with respect to conduct that constitutes a crime within the jurisdiction of the Court or “a serious crime under the national law of the requesting State”. The provision makes it possible even for States not Parties to the Statute to seek assistance by the Court. Under such circumstances the Court has the complete discretion to comply with such a request or not. Paragraph 10 does not cover a request for assistance to the Court by international organizations as they do not normally have the power to conduct criminal investigations and proceedings. However, Article 93 does not prohibit the Court from disclosing information to an international organization. The compliance with such a request is at the discretion of the Court.

A request for co-operation has been rejected when there is or has not been an ongoing investigation with respect to either “conduct” constituting a crime set out in Article 5 of the Statute, or in relation to a “serious crime

under the national law of the requesting State”. This was the case in *Situation in Kenya*.¹

Cross-references:

Articles 88 and 100.

Rule 194.

Regulation 108.

Doctrine:

1. Annalisa Ciampi, “Other Forms of Cooperation”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court*, Oxford University Press, 2002, pp. 1705–47 (<https://www.legal-tools.org/doc/01addc/>).
2. Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilms-hurst, *An Introduction to International Criminal Law and Procedure*, 2nd. ed., Cambridge University Press, 2010, pp. 509–30.
3. Frederik Harhoff and Phakiso Mochoko, “International Cooperation and Judicial Assistance”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, 2001, pp. 637–70 (<https://www.legal-tools.org/doc/e34f81/>).
4. Claus Kieß and Kimberly Prost, “Article 93 – Other Forms of Cooperation”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich, 2016, pp. 2079–2102 (<https://www.legal-tools.org/doc/040751/>).
5. Mark Klamberg, *Evidence in International Criminal Trials*, Martinus Nijhoff Publishers, Leiden, 2013, pp. 235, 242, 244–246, 253, 257, 276 and 462 (<https://www.legal-tools.org/doc/0d524b/>).
6. Karel de Mester *et al.*, “Non-Custodial Coercive Investigative Acts”, in Göran Sluiter, Håkan Friman, Suzannah Linton, Salvatore Zappalà and Sergey Vasiliev (eds.), *International Criminal Procedure: Principles*

¹ ICC, *Situation in Kenya*, Pre-Trial Chamber, Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence, 29 June 2011, ICC-01/09-63 (<https://www.legal-tools.org/doc/ed9407/>).

- and Rules*, Oxford University Press, 2013, pp. 292–298 (<https://www.legal-tools.org/doc/bcad4c/>).
7. Phakiso Mochoko, “International Cooperation and Judicial Assistance”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations and Results*, Kluwer Law International, The Hague, 1999, pp. 305–17 (<https://www.legal-tools.org/doc/d71078/>).
 8. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1015–1025 (<https://www.legal-tools.org/doc/b7432e/>).
 9. Göran Sluiter, *International Criminal Adjudication and the Collection of Evidence: Obligations of States*, Intersentia, Antwerpen/Oxford/New York, 2002 (<https://www.legal-tools.org/doc/86d97b/>).

Author: Karin Pålé-Bartes.

Article 94

Postponement of Execution of a Request in Respect of Ongoing Investigation or Prosecution

General Remarks:

The provision takes note of the fact that a co-operation request by the Court might negatively impact ongoing investigations or prosecutions by the national judicial system. It accommodates the needs of the requested State by granting a temporary right to refuse co-operation with the Court. The relevance of this provision has been comparatively minor so far. Together with Articles 89 (2), Article 89 (4) and Article 95 it allows for the postponement of co-operation in the sovereign interest of the requested State.¹

Preparatory Work:

The final version of Article 94 is the result of long negotiations that involved different approaches to requests for judicial assistance ('other forms of assistance'). The final version of the provision only emerged late in the proceedings² and clarified three major points: it was decided that the provision would be worded in a way to articulate that a co-operation request could only be delayed but not refused altogether.³ The conditions for such a postponement were explicitly laid down in a separate provision that was then placed after Article 93 dealing with judicial assistance.⁴ It was further emphasized that the timing should be agreed upon by the requested State and the Court to avoid unnecessary delays (Kreß and Prost, 2022, para. 3).

Doctrine: For the bibliography, see the final comment on Article 94.

Author: Mayeul Hiéramente.

¹ Julien Détais, "Article 94", in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1893 (<https://www.legal-tools.org/doc/872bf2/>).

² William A. Schabas, *The International Criminal Court. A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1329 (<https://www.legal-tools.org/doc/b7432e/>).

³ Schabas, 2016, p. 1329; Claus Kreß and Kimberly Prost, "Article 94", in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 2.

⁴ Schabas, 2016, p. 1329; Détais, 2012, p. 1894; see Report of the Working Group on International Cooperation and Judicial Assistance, UN Doc. A/CONF.183/C.1/WGIC/L.11/ADD.2, 13 July 1998, Draft Article 90(a) and fn. 6 (<https://www.legal-tools.org/doc/7d6344/>).

Article 94(1): Immediate Execution

1. If the immediate execution of

Analysis:

Article 94 (1) provides for a right to postpone the co-operation. Paragraph 2 envisages a residual right of the Prosecutor to preserve evidence. It is addressed to all States.¹

Immediate Execution

The fact that Article 94 (1) refers to an “immediate execution” and immediate assistance highlights that co-operation requests pursuant to Article 93 are to be executed without any delay. The complex and often transnational nature of the crimes as well as the intricacies of investigations into such crimes require that the Court can rely on the States Parties to gather evidence.

Doctrine: For the bibliography, see the final comment on Article 94.

Author: Mayeul Hiéramente.

¹ Claus Kreß and Kimberly Prost, “Article 94”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 7; Julien Détais, “Article 94”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1894 (<https://www.legal-tools.org/doc/872bf2/>).

Article 94(1): Request

a request

Article 94(1) refers to a request but does not specify the type of the request. The reference in Article 94(1) suggests that the provision addresses a cooperation request under Article 93 which regulates the “assistance” in relation to investigations or prosecutions. Pre-Trial Chamber I¹ compared the scope of application of Article 94(1) and Article 89(4) and analysed:

Upon comparing the text of the two provisions and with a view to giving independent content to each, the Chamber considers that the relationship between articles 94(1) and 89(4) of the Statute is as follows: (i) both articles relate to situations where a cooperation request creates interference with the requested State's domestic legal process, (ii) article 89(4) of the Statute 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 and (iii) article 94(1) allows for postponement of the request when such a situation arises, but only for requests other than requests for surrender. That article 94 only applies to cooperation requests other than surrender, such as those identified in article 93 of the Statute, is also supported by both the drafting history and learned commentators who have examined the issue.

Prior to this decision, the Prosecutor discussed a sequencing of the (entire) international and national investigations pursuant to Article 94.² Commentators agree with the assessment by the Pre-Trial Chamber³ and it

¹ ICC, *Prosecutor v. Saif al-Islam Gaddafi and Al Senussi*, Pre-Trial Chamber I, Decision on Libya's Submissions Regarding the Arrest of Saif al-Islam Gaddafi, 7 March 2012, ICC-01/11-01/11-72, para. 15 (<https://www.legal-tools.org/doc/ceaea3/>); see also *Prosecutor v. Blé Goudé*, Pre-Trial Chamber I, Decision on Côte d'Ivoire's request to postpone the surrender of Charles Blé Goudé to the Court, 3 March 2014, ICC-02/11-02/11-41, paras. 7–8 (<https://www.legal-tools.org/doc/5ebb30/>).

² See ICC, *Prosecutor v. Saif al-Islam Gaddafi and Al Senussi*, OTP, Prosecutor's Submission on the Prosecutor's recent trip to Libya, 25 November 2011, ICC-01/11-01/11-31, para. 8 (<https://www.legal-tools.org/doc/d0ad46/>).

³ Dapo Akande, “Classification of Armed Conflicts: Relevant Legal Concepts”, in Elizabeth Wilmschurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, 2012, p. 322 (<https://www.legal-tools.org/doc/415188/>); Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck,

seems to be accepted that the State cannot invoke Article 94 to postpone a surrender request by the Court.

Doctrine: For the bibliography, see the final comment on Article 94.

Author: Mayeul Hiéramente.

Munich, 2003, p. 138 (<https://www.legal-tools.org/doc/8d1442/>); Claus Kreß and Kimberly Prost, “Article 94”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 1; William A. Schabas, *The International Criminal Court. A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1329 (<https://www.legal-tools.org/doc/b7432e/>); Nicola Palmer, “The Place of Consultation in the International Criminal Court’s Approach to Complementarity and Cooperation”, in Olympia Bekou and Daley J. Birkett (eds.), *Cooperation and the International Criminal Court. Perspectives from Theory and Practice*, Brill Nijhoff, Leiden, Boston, 2016, p. 217 (<https://www.legal-tools.org/doc/880a24/>); Dine Rinoldi and Nicoletta Parisi, “International Cooperation and Judicial Assistance between States Parties and the International Criminal Court”, in Flavia Lattanzi and William A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, vol. 1, 1999, p. 370 (<https://www.legal-tools.org/doc/27edd7/>); Kai Ambos, *Treatise on International Criminal Law. Vol III: International Criminal Procedure*, Oxford University Press, 2016, p. 615 (<https://www.legal-tools.org/doc/995606/>).

Article 94(1): Interference with Ongoing Investigation or Prosecution

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

The requested State is not free to invoke any reason for the postponement of the execution of co-operation request. By virtue of Article 88 it has to avoid that circumstances arise in which a co-operation request cannot be immediately executed. The obligation entails that national laws regulating measures of judicial assistance allow for an effective co-operation even in an event of parallel investigations by national authorities. The co-operation regime put in place by the States has to take into consideration potential effects on national proceedings – no matter at which stage¹ – by minimizing the likelihood of interference with ongoing investigations. The interference has to be substantial and can ultimately be assessed only by the State itself.² Some of the forms of co-operation enumerated in Article 93(1) are less prone to interference with national investigations if conceived by the national law as secret investigation measures. For example: it is unlikely that a State will be able to invoke Article 94(1) 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 (Article 93(1)(b)), the examination of places of or sites, including the exhumation and examination of grave sites (Article 93(1)(g)), the provision of records and documents, including official records and documents (Article 93(1)(i)), the protection of victims and witnesses and the preservation of evidence (Article 93(1)(j)), the identification and tracing of proceeds, property and assets and instrumentalities (Article 93(1)(k)) as well as other type of assistance such as wire-tapping and other technical measures of surveillance. The State has to make such assessment on a case-by-case basis. Meißner also notes that on

¹ Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003, p. 237 (<https://www.legal-tools.org/doc/8d1442/>).

² Julien Détais, “Article 94”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1895 (<https://www.legal-tools.org/doc/872bf2/>).

many occasions copies of the original evidence might be provided (Meißner, 2003, p. 237).

Article 94(1) stipulates that only an investigation or prosecution for a case different from the case forming the basis of the request allows the requested State to postpone the execution. It is, however, conceivable that the national investigations focus on the same conduct and that the State has or intends to challenge the admissibility of the case. If the State already challenged the admissibility, it can invoke Article 95.³ Otherwise it will have to execute the co-operation request but might seek consultation with the Court pursuant to Article 97. The Article is mute as to the nature of the national investigation. A literal reading of the provision suggests that any type of (criminal) investigation, the (lack of) gravity of the criminal conduct investigated notwithstanding, would allow the requested State to postpone the execution of the request. Kreß and Prost convincingly argue that as a consequence of the general obligation to co-operate with the Court enshrined in Article 86, the State Party should seriously examine whether a postponement is justified.⁴ Investigations into criminal offenses of minor gravity should not allow the State to significantly delay the execution of the request by the ICC for investigations into crimes as defined in Articles 6 to 8. A categorical exclusion of certain types of investigations or crimes is, however, not warranted (see also Détails, 2012, p. 1895).

Doctrine: For the bibliography, see the final comment on Article 94.

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³ See Dapo Akande, “Classification of Armed Conflicts: Relevant Legal Concepts”, in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, 2012, p. 322 (<https://www.legal-tools.org/doc/415188/>), and Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003, p. 239 (<https://www.legal-tools.org/doc/8d1442/>) regarding the relationship between Articles 94 and 95.

⁴ Claus Kreß and Kimberly Prost, “Article 94”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 4.

Article 94(1): Postponement

the requested State may postpone the execution of the request for a period of time agreed upon with the Court. However, the postponement shall be no longer than necessary to complete the relevant investigation or prosecution in the requested State. Before making a decision to postpone, the requested State should consider whether the assistance may be immediately provided subject to certain conditions.

Article 94(1) allows the requested State to postpone the execution of the co-operation request. It cannot refuse co-operation altogether.¹ A refusal to provide judicial assistance can be based on Article 93(4). The Statute further imposes a duty to seek the agreement of the Court (Kreß and Prost, 2022, para. 5; see also Détais, 2012, p. 1896 and Meißner, 2003, p. 238, who limit the agreement to the duration of the postponement). Schabas notes that the wording of Article 94(1) lacks clarity in this regard. The provision fails to specify the consequences of a failure of the Court and the State to come to an agreement.² Article 94(2) even seems to accord the State the right to make a unilateral “decision” in this regard (Schabas, 2016, p. 1330). Schabas nonetheless argues that absent any agreement, the State is in no position to invoke a postponement (Schabas, 2016, p. 1330). Kreß and Prost also argue that the Court remains the ultimate arbiter if the requested State “clearly acts unreasonably” (Kreß and Prost, 2022, para. 3; Meißner, 2003, p. 238; see Schabas, 2016, p. 1330 raising the question what should be done if the Court acts unreasonably). Détais is willing to

¹ William A. Schabas, *The International Criminal Court. A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1329 (<https://www.legal-tools.org/doc/b7432e/>); Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003, p. 237 (<https://www.legal-tools.org/doc/8d1442/>); Kai Ambos, *Treatise on International Criminal Law. Vol III: International Criminal Procedure*, Oxford University Press, 2016, p. 615 (<https://www.legal-tools.org/doc/995606/>).

² Claus Kreß and Kimberly Prost, “Article 94”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 5; see also Julien Détais, “Article 94”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1896 (<https://www.legal-tools.org/doc/872bf2/>), and Meißner, 2003, p. 238, who limit the agreement to the duration of the postponement.

grant the State a considerable margin of appreciation as to the existence of an interference and the necessity of the postponement (Détails, 2012, p. 1895; see also Meißner, 2003, p. 238) and considers the time limit imposed as the only formal control mechanism for the Court (Détails, 2012, p. 1896). The Statute provides guidance as to the time limit of such postponement. It denies the State the right to postpone the execution of the request for a longer period than necessary for the completion of the investigation and prosecution by the national authorities (Kreß and Prost, 2022, para. 6). Given the lengths of many criminal proceedings this will hardly be an acceptable outcome for the Court (Détails, 2012, p. 1896). Furthermore, the State has to assess, in consultation with the Court (Kreß and Prost, 2022, para. 7; Détails, 2012, p. 1895), if it can provide judicial assistance to the Court subject to conditions. An immediate execution of the request takes priority over an unconditioned co-operation (Meißner, 2003, p. 237).

Doctrine: For the bibliography, see the final comment on Article 94.

Author: Mayeul Hiéramente.

Article 94(2)

2. If a decision to postpone is taken pursuant to paragraph 1, the Prosecutor may, however, seek measures to preserve evidence, pursuant to Article 93, paragraph 1 (j).

The second paragraph is meant to allow the Prosecutor to seek measures to preserve evidence to avoid any lasting prejudice to the Court's investigation. Every postponement entails the risk that evidence will disappear or will be beyond the reach of the State in question.¹ Article 94(2) only refers to Article 93(1)(j) which itself lacks a definition of what measures ought to be taken as a matter of preservation.² The lines between 'taking of evidence' and 'preservation' are blurry and difficult to determine. Many measures enumerated in Article 93(1) contain an element of preservation. The Prosecutor may – but is not obliged³ – seek preservation measures to protect its ongoing investigations. If the Prosecutor abstains from such a request, the State should nonetheless make sure that the postponement of the original request does not frustrate the investigative efforts by the Court.⁴ The consequences of Article 94(2) are not entirely clear. *Détails* remarks that the wording does not suggest that paragraph 2 is to be construed as a legal basis that mandates execution of the preservation request. The legal obligation to co-operate and the corresponding right of the Court to request such co-operation is, however, directly enshrined in Article 93(1)(j). It is for that reason that only States Parties face an obligation to co-operate in the preservation of evidence (*Détails*, 2012, p. 1897). Article 94(2) clarifies that objections to an immediate execution as provided for in Article 94(1) shall not be made in case of a preservation request. *Meißner* argues that preservation measures are entirely excluded from the scope of application of paragraph 1 (*Meißner*, 2003, p. 238). If this is indeed the

¹ Claus Kreß and Kimberly Prost, "Article 94", in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 8.

² Claus Kreß and Kimberly Prost, "Article 93", in Ambos (ed.), 2022, para. 36.

³ Julien *Détails*, "Article 94", in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1896 (<https://www.legal-tools.org/doc/872bf2/>).

⁴ Jörg *Meißner*, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003, p. 239 (<https://www.legal-tools.org/doc/8d1442/>).

case, a restrictive interpretation of “preservation”, that focuses solely on investigatory measures that lack a significant potential of interference with national investigations, is warranted.

Cross-references:

Articles 89(2)(4) and 95.

Doctrine:

1. Dapo Akande, “The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC”, in *Journal of International Criminal Justice*, 2012, vol. 10, no. 2, pp. 293–324.
2. Kai Ambos, *Treatise on International Criminal Law. Vol III: International Criminal Procedure*, Oxford University Press, 2016 (<https://www.legal-tools.org/doc/995606/>).
3. Julien Détais, “Article 94”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, pp. 1893–1897 (<https://www.legal-tools.org/doc/cdde69/>).
4. Claus Kreß and Kimberly Prost, “Article 94”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, pp. 2562–2564.
5. Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003 (<https://www.legal-tools.org/doc/872bf2/>).
6. Nicola Palmer, “The Place of Consultation in the International Criminal Court’s Approach to Complementarity and Cooperation”, in Olympia Bekou and Daley J. Birkett (eds.), *Cooperation and the International Criminal Court. Perspectives from Theory and Practice*, Brill Nijhoff, Leiden, Boston, 2016, pp. 210–226 (<https://www.legal-tools.org/doc/880a24/>).
7. Dine Rinoldi and Nicoletta Parisi, “International Cooperation and Judicial Assistance between States Parties and the International Criminal Court”, in Flavia Lattanzi and William A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, vol. 1, 1999, pp. 339–390 (<https://www.legal-tools.org/doc/27edd7/>).

8. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1328–1330 (<https://www.legal-tools.org/doc/b7432e/>).

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Article 95

Postponement of Execution of a Request in Respect of an Admissibility Challenge

where there is an admissibility challenge under consideration by the Court pursuant to Article 18 or 19, the requested State may postpone the execution of a request under this Part pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to Article 18 or 19.

General Remarks:

Article 95 supplements Article 89(2) and Article 94(1) and allows the requested State to postpone the execution of a co-operation request by the Court. It addresses the specific but highly relevant situation of an admissibility challenge pursuant to Articles 18 and 19 which contain (partially) corresponding provisions that impose a freeze of investigations by the Prosecutor.¹ The provision is a cornerstone of the complementarity regime of the Statute and allows the State to prevent a *fait accompli*. The provision is meant to serve the sovereign interests of the requested State and not the individual.

Preparatory Works:

The inclusion of a ground of refusal – temporary or absolute – was, in general, subject to much debate. Some States favoured a right to refuse or postpone co-operation in case of ongoing domestic investigations into the same matter² while others suggested a stricter co-operation regime to strengthen the effectiveness of Part 9 (Kreß and Prost, 2022, para. 1). The current compromise emphasizes the need for consultation between the Court and the requested State and forces the State to actively seek an admissibility ruling if it intends to invoke the right to postpone the execution

¹ Dapo Akande, “Classification of Armed Conflicts: Relevant Legal Concepts”, in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, 2012, p. 316 (<https://www.legal-tools.org/doc/415188/>).

² See Claus Kreß and Kimberly Prost, “Article 95”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 1; Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, UN Doc. A/CONF.183/2/Add.1, 14 April 1998, p. 144 (<https://www.legal-tools.org/doc/816405/>).

of the request (Kreß and Prost, 2022, para. 1). This serves the general objective of the Statute to address complementarity issues as early as possible.³ It was originally linked to Article 53.⁴

Doctrine: For the bibliography, see the final comment on Article 95.

Author: Mayeul Hiéramente.

³ Akande, 2012, p. 316; Kreß and Prost, 2022, para. 1; William A. Schabas, *The International Criminal Court. A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1331 (<https://www.legal-tools.org/doc/b7432e/>).

⁴ Julien Détais, “Article 95”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1900 (<https://www.legal-tools.org/doc/872bf2/>).

Article 95: Admissibility Challenge

Where there is an admissibility challenge

Analysis:

Article 95 focuses solely on the postponement of the execution of a cooperation request in light of an admissibility challenge.

Challenge:

The prerequisite for a postponement by the requested State is the existence of an admissibility challenge. The provision does not require that the requested State itself has challenged the admissibility of the case. It suffices that an admissibility ruling is pending. This could, inter alia, be the case if the individual brought an admissibility challenge pursuant to Article 19(2)(a) or if another State objected to proceedings by the Court by virtue of Article 19(2)(b) arguing that it has jurisdiction and is investigating the case.¹ An admissibility challenge is case specific.² Despite the use of the term “challenge”, a requested State should also have the right to invoke Article 95 in the unlikely situation the Court is making a determination regarding the admissibility of a case on its own motion (Article 19(1)). Such a situation might occur where the Court is made aware, for example, through a national *ne bis in idem* challenge as envisaged in Article 89(2), of facts that suggest the inadmissibility of the case (see Akande, 2012, p. 320). If it is beyond doubt that the Pre-Trial Chamber is seized with the matter and an admissibility ruling is pending, there is no reason to deny the requested State the possibility to postpone the execution of the cooperation request. Such interpretation is supported by the fact that Article 95 also refers to Article 18 which does not contain an admissibility chal-

¹ Dapo Akande, “Classification of Armed Conflicts: Relevant Legal Concepts”, in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, 2012, p. 316 (<https://www.legal-tools.org/doc/415188/>); Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003, p. 156 (<https://www.legal-tools.org/doc/8d1442/>).

² Claus Kreß and Kimberly Prost, “Article 95”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 11.

lenge *stricto sensu*. A determination by the Prosecutor that a case is inadmissible does not suffice.³

Doctrine: For the bibliography, see the final comment on Article 95.

Author: Mayeul Hiéramente.

³ Kreß and Prost, 2022, para. 3; but see also, Julien Détais, “Article 95”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1900 (<https://www.legal-tools.org/doc/872bf2/>).

Article 95: Under Consideration

under consideration

The provision requires that the admissibility challenge is already under consideration. Article 95 therefore requires that the challenge is brought to the attention of the Court. The mere intention or announcement of a future admissibility challenge is insufficient.¹ Pre-Trial Chamber I notes:

Consequently, Article 95 of the Statute only applies when there is an admissibility challenge under consideration. Though Libya has announced that an admissibility challenge is forthcoming, there is currently no such challenge before the Chamber. Therefore, the Chamber holds that Article 95 of the Statute cannot serve as a legal basis for Libya's Second Postponement Request.²

The Pre-Trial Chamber explicitly states that the formal requirements (Rule 58) and possible delays applying to Article 19 proceedings constitute no ground for postponement (*Gaddafi and Al Senussi*, 4 April 2012, para. 17). In an application for leave to appeal based on Article 82(1)(d)³ the Government of Libya argued that by communicating its intention to bring an admissibility challenge regarding Saif al-Islam Gaddafi (and Abdullah al-Senussi) it had satisfied the conditions enshrined in Article 95. It referred to Rule 58 arguing that the provision envisages a “request” as well as an “application” with a request preceding the finalized application and sufficing for a postponement under Article 95 (*Gaddafi and Al Senussi*, 10 April

¹ William A. Schabas, *The International Criminal Court. A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1332 (<https://www.legal-tools.org/doc/b7432e/>).

² ICC, *Prosecutor v. Saif al-Islam Gaddafi and Al Senussi*, Pre-Trial Chamber I, Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif al-Islam Gaddafi, 4 April 2012, ICC-01/11-01/11-100, para. 18 (*Gaddafi and Al Senussi*, 4 April 2012') (<https://www.legal-tools.org/doc/0000b9/>).

³ ICC, *Prosecutor v. Saif al-Islam Gaddafi and Al Senussi*, Government of Libya's Leave to Appeal the “Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif al-Islam Gaddafi”, 10 April 2012, ICC-01/11-01/11-102 (*Gaddafi and Al Senussi*, 10 April 2012') (<https://www.legal-tools.org/doc/39838c/>); no objection from the Prosecutor, see *Prosecutor v. Saif al-Islam Gaddafi and Al Senussi*, OTP, Prosecution's Response to “Government of Libya's Leave to Appeal the ‘Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif al-Islam Gaddafi’”, 16 April 2012, ICC-01/11-01/11-110, para. 5 (<https://www.legal-tools.org/doc/a03e91/>).

2012, para. 11). The interpretation by the Pre-Trial Chamber would penalize the requested State by de facto forcing it to make a premature application with incomplete legal and factual materials and evidence (para. 22). The Libyan Government invoked the exceptional circumstances the country was facing at the time (paras. 5–6). The Libyan Government also appealed the Pre-Trial Chamber decision directly based on Article 82(1)(a).⁴ The appeal was rejected as it did not pertain directly to admissibility.⁵ A decision on the application for leave to appeal was not rendered since the issue was considered moot after Pre-Trial Chamber I granted the Article 95 postponement in the Gaddafi case in its decision dated 1 June 2012.⁶ In the al-Senussi case, Pre-Trial Chamber I also informed the Libyan authorities of the need for a formal application if they intend to refuse a surrender request⁷ and reiterated its views as to the formal requirements of an admissibility challenge as a prerequisite of a postponement under Article 95.⁸ The Pre-Trial Chamber further clarified its position and stated: “the Chamber observes that an incomplete challenge which needs to be supplemented in due course cannot be considered as having been “properly made within the terms of article 19 of the Statute and Rule 58 of the Rules”. In this regard, the Chamber finds of relevance the finding of the Appeals Chamber that a

⁴ ICC, *Prosecutor v. Saif al-Islam Gaddafi and Al Senussi*, Government of Libya’s Appeal against the “Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif al-Islam Gaddafi”, 10 April 2012, ICC-01/11-01/11-103, paras. 15 ff. (<https://www.legal-tools.org/doc/65bb9b/>).

⁵ ICC, *Prosecutor v. Saif al-Islam Gaddafi and Al Senussi*, Appeals Chamber, Decision on “Government of Libya’s Appeal against the ‘Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif al-Islam Gaddafi’” of 10 April 2012, 25 April 2012, ICC-01/11-01/11-126, para. 15 (<https://www.legal-tools.org/doc/11d158/>).

⁶ ICC, *Prosecutor v. Saif al-Islam Gaddafi and Al Senussi*, Pre-Trial Chamber I, Decision on the postponement of the execution of the request for surrender of Saif al-Islam Gaddafi pursuant to article 95 of the Rome Statute, 1 June 2012, ICC-01/11-01/11-163, para. 42 (<https://www.legal-tools.org/doc/ae7c48/>).

⁷ ICC, *Prosecutor v. Saif al-Islam Gaddafi and Al Senussi*, Pre-Trial Chamber I, Decision requesting Libya to provide observations concerning the Court’s request for arrest and surrender of Abdullah al-Senussi, 18 January 2013, ICC-01/11-01/11-254, para. 11 (<https://www.legal-tools.org/doc/ba5519/>).

⁸ ICC, *Prosecutor v. Saif al-Islam Gaddafi and Al Senussi*, Pre-Trial Chamber I, Decision on the “Urgent Application on behalf of Abdullah al-Senussi for Pre-Trial Chamber to order the Libyan authorities to comply with their obligations and the orders of the ICC, 6 February 2013, ICC-01/11-01/11-269, paras. 30, 34, 35 (*Gaddafi and al-Senussi*, 6 February 2013’) (<https://www.legal-tools.org/doc/c26753/>).

State has the duty to ensure that its admissibility challenge is sufficiently substantiated by evidence, as it has no right to expect to be allowed to present any additional evidence after the initial challenge” (*Gaddafi and al-Senussi*, 6 February 2013, para. 32). The Libyan government applied for leave to appeal which was rejected by the Pre-Trial Chamber arguing that the conditions of Article 82(1)(d) were not met.⁹ In a subsequent decision, Pre-Trial Chamber I confirmed that even an application that was submitted 7 months later and therefore not “at the earliest opportunity” as intended by Article 19 (5) could be considered a valid admissibility challenge that allows for a postponement under Article 95.¹⁰ It remains to be seen if such delay would be tolerated in circumstances other than the one Libya was facing at the time.¹¹ The Chamber recognized in principle that an abusive admissibility challenge could automatically result in an illegitimate postponement (*Gaddafi and al-Senussi*, 14 June 2013, para. 35).

Doctrine: For the bibliography, see the final comment on Article 95.

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⁹ ICC, *Prosecutor v. Saif al-Islam Gaddafi and Al Senussi*, Pre-Trial Chamber I, Decision on the “Government of Libya’s Application for Leave to Appeal the “Decision on the ‘Urgent Application on behalf of Abdullah al-Senussi for Pre-Trial Chamber to order the Libyan authorities to comply with their obligations and the orders of the ICC’”, 25 February 2013, ICC-01/11-01/11-287, para. 36 (<https://www.legal-tools.org/doc/bb8117/>).

¹⁰ ICC, *Prosecutor v. Gaddafi and Al Senussi*, Pre-Trial Chamber I, Decision on Libya’s postponement of the execution of the request for arrest and surrender of Abdullah al-Senussi pursuant to Article 95 of the Rome Statute and related Defence request to refer Libya to the UN Security Council, 14 June 2013, ICC-01/11-01/11-354, paras. 31 ff. (*Gaddafi and Al Senussi*, 14 June 2013’) (<https://www.legal-tools.org/doc/a400f4/>).

¹¹ See a critical assessment by Claus Kreß and Kimberly Prost, “Article 95”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, paras. 14 ff.

Article 95: Requested State

the requested State may

Article 95 allows for a discretionary decision on the part of the State. An admissibility challenge has no automatic consequences on the co-operation request. The postponement cannot be triggered by the individual in question.¹ The wording of Article 95 further illustrates that the State is taking the decision to postpone. The provision does not envisage the need for a decision by the Court.² In case of a dispute regarding the application of Article 95, the State is not entitled to make a unilateral decision. It is for the Court to decide whether the conditions set out in Article 95 are met.³ Contrary to Article 94, the conditions for a postponement are solely in the sphere of the Court.⁴ In case of a postponement of a request for surrender (see below), the competent organ is the Chamber that issued the request for arrest and surrender.⁵

Pre-Trial Chamber I decided that a State may invoke Article 95 even in case of a Security Council referral pursuant to Article 13(b) (*Gaddafi*

¹ See also, ICC, *Prosecutor v. Saif Al-Islam Gaddafi*, Pre-Trial Chamber I, Public Redacted Version of ‘Prosecution Response to ‘Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17 (1)(c), 19 and 20(3) of the Rome Statute’’, filed on 28 September 2018 (ICC-01/11-01/11-653-Conf), 11 October 2018, ICC-01/11-01/11-653-Red (<https://www.legal-tools.org/doc/5af850/>).

² ICC, *Prosecutor v. Saif al-Islam Gaddafi and Al Senussi*, Pre-Trial Chamber I, Decision on Libya’s postponement of the execution of the request for arrest and surrender of Abdullah al-Senussi pursuant to Article 95 of the Rome Statute and related Defence request to refer Libya to the UN Security Council, 14 June 2013, ICC-01/11-01/11-354, paras. 25 ff. (*Gaddafi and Al Senussi*, 14 June 2013’) (<https://www.legal-tools.org/doc/a400f4/>); Claus Kreß and Kimberly Prost, “Article 95”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 13.

³ *Gaddafi and Al Senussi*, 14 June 2013, paras. 25 ff.; Kreß and Prost, 2022, para. 13; William A. Schabas, *The International Criminal Court. A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1332 (<https://www.legal-tools.org/doc/b7432e/>).

⁴ Julien Détais, “Article 95”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1901 (<https://www.legal-tools.org/doc/872bf2/>).

⁵ ICC, *Prosecutor v. Saif al-Islam Gaddafi and Al Senussi*, Pre-Trial Chamber I, Decision on the postponement of the execution of the request for surrender of Saif al-Islam Gaddafi pursuant to article 95 of the Rome Statute, 1 June 2012, ICC-01/11-01/11-163, para. 37 (*Gaddafi and Al Senussi*, 1 June 2012’) (<https://www.legal-tools.org/doc/ae7c48/>).

and al-Senussi, 1 June 2012, paras. 27 ff.; see also *Gaddafi and al-Senussi*, 14 June 2013, para. 20; *Détails*, 2012, Article 95, p. 1899). The Chamber did not address the question whether a State that is obliged to co-operate with the Court by virtue of a binding UN Security Council resolution (Articles 25, 103 of the UN Charter) might be forced to comply with an enhanced co-operation regime including primacy of the Court's investigation.

Doctrine: For the bibliography, see the final comment on Article 95.

Author: Mayeul Hiéramente.

Article 95: Postponement

postpone the execution of a

The requested State is allowed to postpone the execution of a co-operation request. The postponement is not subject to any conditions. The requested States remains free to continue its own investigation into the *same* conduct or wait for a determination by the Court. This allows the requested State to minimize the impact and costs of the co-operation by the Court until a definite legal assessment regarding the co-operation obligations in the specific case. The Office of Public Counsel for the Defence raised the question whether it would be appropriate to continue investigations into a *different* matter during the postponement. Pre-Trial Chamber I did not pronounce itself on this issue.¹ but indicated that the continuation of domestic proceedings in general does not constitute ground to revoke the postponement.² The wording of Article 95 does not suggest such limitations.³ Any activities by the national justice system might, however, factor into the overall assessment of the admissibility as they might indicate a pattern as envisaged in Article 17(1)(a). Same applies for other behaviour in violation of the State's international obligations (*Gaddafi and al-Senussi*, 14 June 2013, para. 35). The Pre-Trial Chamber implicitly recognized that the State is not obliged to provide a reason for the postponement and stated that the Court has no discretion in the matter (para. 25). The Pre-Trial Chamber partially accepted the leave to appeal by the Defence. The appeal was dismissed as moot⁴ after a finding of inadmissibility of the *al-Senussi* case.

¹ ICC, *Prosecutor v. Saif al-Islam Gaddafi and Al Senussi*, Pre-Trial Chamber I, Decision on “Urgent Defence Request”, 1 March 2013, ICC-01/11-01/11-291, para. 24 (<https://www.legal-tools.org/doc/68b012/>); *Prosecutor v. Saif al-Islam Gaddafi and Al Senussi*, Pre-Trial Chamber I, Decision on the admissibility of the case of Saif al-Islam Gaddafi, 31 May 2013, ICC-01/11-01/11-344-Red (<https://www.legal-tools.org/doc/339ee2/>).

² ICC, *Prosecutor v. Saif al-Islam Gaddafi and Al Senussi*, Pre-Trial Chamber I, Decision on Libya's postponement of the execution of the request for arrest and surrender of Abdullah al-Senussi pursuant to Article 95 of the Rome Statute and related Defence request to refer Libya to the UN Security Council, 14 June 2013, ICC-01/11-01/11-354, para. 36 (*Gaddafi and Al Senussi*, 14 June 2013') (<https://www.legal-tools.org/doc/a400f4/>).

³ See ICC, *Prosecutor v. Saif al-Islam Gaddafi and Al Senussi*, Appeals Chamber, Decision on the request for suspensive effect and the request to file a consolidated reply, 22 November 2013, ICC-01/11-01/11-480, para. 16 (<https://www.legal-tools.org/doc/11a20e/>).

⁴ ICC, *Prosecutor v. Saif al-Islam Gaddafi and Al Senussi*, Appeals Chamber, Decision on the appeal of Mr. al-Senussi against the Pre-Trial Chamber's “Decision on Libya's postpone-

Furthermore, it should be noted that the State may only temporarily postpone the co-operation⁵ and thus must ensure “that all necessary measures are taken during the postponement in order to ensure the possibility of an immediate execution” of the request should the case be found admissible.⁶ The postponement concerns only the specific request (*Gaddafi and Al Senussi*, 1 June 2012, para. 41). The State might, however, object to other requests in the same manner.

The postponement ends automatically with the decision on the admissibility challenge.⁷ If the Court confirms the admissibility of the case, the requested State has to comply with the co-operation request. In the event of an appeal against the *affirmative* admissibility decision, the co-operation request cannot be postponed unless a suspensive effect of the appeal is granted.⁸ Reference to ongoing investigations does, however, not suffice to grant the suspensive effect.⁹ In case of an appeal against a decision negating the admissibility, Article 95 continues to apply (Meißner, 2003, p. 157).

ment of the execution of the request for arrest and surrender of Abdullah al-Senussi pursuant to article 95 of the Rome Statute and related Defence request to refer Libya to the UN Security Council, 11 September 2014, ICC-01/11-01/11-571 (<https://www.legal-tools.org/doc/5a1a17/>).

- ⁵ William A. Schabas, *The International Criminal Court. A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1334 (<https://www.legal-tools.org/doc/b7432e/>).
- ⁶ ICC, *Prosecutor v. Saif al-Islam Gaddafi and Al Senussi*, Pre-Trial Chamber I, Decision on the postponement of the execution of the request for surrender of Saif al-Islam Gaddafi pursuant to article 95 of the Rome Statute, 1 June 2012, ICC-01/11-01/11-163, para. 40 (“*Gaddafi and Al Senussi*, 1 June 2012”) (<https://www.legal-tools.org/doc/ae7c48/>).
- ⁷ *Gaddafi and Al Senussi*, 1 June 2012, para. 40; ICC, *Prosecutor v. Simone Gbagbo*, Pre-Trial Chamber, Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo, 11 December 2014, ICC-02/11-01/12-47-Red, para. 80 (<https://www.legal-tools.org/doc/ef697a/>); Schabas, 2016, p. 1334.
- ⁸ ICC, *Prosecutor v. Saif al-Islam Gaddafi and Al Senussi*, Appeals Chamber, Decision on suspensive effect and related issues, 18 July 2013, ICC-01/11-01/11-387, para. 27 (<https://www.legal-tools.org/doc/f30597/>); Schabas, 2016, p. 1334; Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003, p. 157 (<https://www.legal-tools.org/doc/8d1442/>).
- ⁹ *Gaddafi and Al Senussi*, 18 July 2013, paras. 23 ff.; ICC, *Prosecutor v. Simone Gbagbo*, Appeals Chamber, Decision on Côte d’Ivoire’s request for suspensive effect of its appeal against the “Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo” of 11 December 2014, 20 January 2015, ICC-02/11-01/12-56, paras. 14 ff. (<https://www.legal-tools.org/doc/4d94ed/>).

Doctrine: For the bibliography, see the final comment on Article 95.

Author: Mayeul Hiéramente.

Article 95: Pending Determination

request under this Part pending a determination by the Court,

The provision fails to specify the nature of the request that may be postponed. The fact that Article 95 is placed after Articles 93 and 94 seems to indicate that it is meant to address “other forms of co-operation”. The second part of Article 95 refers to the collection of *such* evidence which also suggests a more restrictive scope of application.¹ The drafting history provides no definite answer either but it confirms the intentional placement of the Article after the corresponding provision on judicial assistance (Schabas, 2016, p. 1333). The Office of Public Counsel for the Defence had further argued that the existence of Article 89 (2) suggests a duplication not intended by the drafters of the Statute.² The wording and placement are, however, far from clear and there seems to be a broad consensus that Article 95, which broadly refers to a “request under this Part”, encompasses requests for arrest and surrender (Article 89(1)) as well as judicial assistance under Article 93.³ Kreß and Prost note that this has practical benefits in that it might avoid (substantial) costs of a surrender process that would have to be reversed in case of inadmissibility of the case (Kreß and Prost, 2022, para. 8). Pre-Trial Chamber I concurred with the assessment by the

¹ William A. Schabas, *The International Criminal Court. A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1333 (<https://www.legal-tools.org/doc/b7432e/>); Claus Kreß and Kimberly Prost, “Article 95”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 6.

² ICC, *Prosecutor v. Saif al-Islam Gaddafi and Al Senussi*, Public Redacted Version of the “Response to the Request to Postpone the Surrender of Mr. Saif al Islam Gaddafi pursuant to Article 95 of the Statute”, 11 May 2012, ICC-01/11-01/11-141-Red (<https://www.legal-tools.org/doc/da6717/>); see Dapo Akande, “Classification of Armed Conflicts: Relevant Legal Concepts”, in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, 2012, pp. 319 ff. (<https://www.legal-tools.org/doc/415188/>).

³ Akande, 2012, p. 318; Kreß and Prost, 2022, para. 4; Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003, p. 158 (<https://www.legal-tools.org/doc/8d1442/>); Dine Rinoldi and Nicoletta Parisi, “International Cooperation and Judicial Assistance between States Parties and the International Criminal Court”, in Flavia Lattanzi and William A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, vol. 1, 1999, p. 371 (<https://www.legal-tools.org/doc/27edd7/>).

Libyan Government⁴ and the Prosecutor⁵ and confirmed the applicability of Article 95 to requests for arrest and surrender.⁶ The Pre-Trial Chamber stated:

Regardless of its placement, the ordinary meaning of the terms “a request under this Part”, as well as a systematic reading of this provision with its related complementarity norms, support the interpretation that Article 95 encompasses all requests for cooperation under Part IX, including requests for arrest and surrender made before or after the admissibility challenge (*Gaddafi and Al Senussi*, 1 June 2012, para. 32).

Regarding the reference to “such evidence” the Chamber notes:

The word “such” therefore refers to the evidence that, despite the suspension, the Prosecutor may be exceptionally authorised to collect pursuant to articles 18(6) and 19(8)(a) and (b) of the Statute. In other words, Article 95 of the Statute mirrors the safeguards that the Prosecutor may seek to obtain pursuant to those provisions and which are intended to make the suspension of the investigation and the corresponding postponement by the State less strict.

The Chamber further highlighted the importance of the complementary principle that Article 95 serves to protect (para. 36; see also Kreß and Prost, 2022, para. 7) and argued:

It would be untenable for the Court to insist on compliance with a request for arrest and surrender, even at the risk of hampering the national proceedings, while its own investiga-

⁴ See, for example, ICC, *Prosecutor v. Saif al-Islam Gaddafi and Al Senussi*, Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, 1 May 2012, ICC-01/11-01/11-130-Red, paras. 105–106 (<https://www.legal-tools.org/doc/f94e71/>); *Prosecutor v. Saif al-Islam Gaddafi and Al Senussi*, Government of Libya’s Leave to Appeal the “Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif al-Islam Gaddafi”, 10 April 2012, ICC-01/11-01/11-102 (<https://www.legal-tools.org/doc/39838c/>).

⁵ ICC, *Prosecutor v. Saif al-Islam Gaddafi and Al Senussi*, OTP, Prosecution’s Response to Government of Libya’s Request for the Postponement of the Surrender of Saif al-Islam Gaddafi brought within their application to challenge the admissibility of the case under Article 19, 11 May 2012, ICC-01/11-01/11-142, paras. 11 ff. (<https://www.legal-tools.org/doc/223ed5/>).

⁶ ICC, *Prosecutor v. Saif al-Islam Gaddafi and Al Senussi*, Pre-Trial Chamber I, Decision on the postponement of the execution of the request for surrender of Saif al-Islam Gaddafi pursuant to article 95 of the Rome Statute, 1 June 2012, ICC-01/11-01/11-163 (*Gaddafi and Al Senussi*, 1 June 2012’) (<https://www.legal-tools.org/doc/ae7c48/>).

tion is suspended (*Gaddafi and Al Senussi*, 1 June 2012, para. 34).

It should be noted, however, that Article 95 does not require any interference with national proceedings. Furthermore, it is worth noting that the jurisprudence of the Court has focused so far on the postponement of a request to surrender. It remains somewhat unresolved whether Article 95 might also allow the postponement of the execution of the arrest or even a provisional arrest pursuant to Article 92. The wording of Article 95 provides no answers in this regard. The Statute itself does not allow for a clear-cut response. Article 19(9) emphasizes that an admissibility challenge shall not affect the validity of a warrant issued by the Court. A postponement of the request for an arrest does, however, not call into question the validity of the arrest warrant but merely reduces its practical effect in the requested State. The warrant issued pursuant to Article 58 as well as the request for arrest based on Article 89(1) remain valid. It is therefore difficult to argue that requests for arrest are *per se* excluded from the scope of application of Article 95. The nature of Article 95 itself sets, however, limits. Pre-Trial Chamber I (*Gaddafi and al-Senussi*, 1 June 2012, para. 40; see also Meißner, 2003, p. 159) rightly remarked that all necessary measures have to be taken during the postponement to ensure an execution once the admissibility of the case is determined by the Court. A postponement should not lead to a permanent refusal. If the State were to refuse the arrest of the individual and thereby permanently frustrate the Court's proceedings, it would hardly be compatible with the obligations stemming from Articles 86 and 89. Furthermore, it will be in the interest of the requested State to keep the individual in custody to strengthen its admissibility challenge. If the requested State is, however, able to guarantee that the person will be arrested in the event of an *affirmative* admissibility ruling, Article 95 should accord the requested State the possibility to postpone the request for arrest (Kreß and Prost, 2022, para. 9; Meißner, 2003, p. 159). Meißner argues that the Prosecutor, despite the reference in Article 95 to "collection of such *evidence* pursuant to article 18 or 19" should also be allowed to request measures to "prevent the absconding of persons" (Meißner, 2003, p. 159). Akande highlights that such measures have to be taken in co-operation which in turn suggests that the State cannot be compelled (Akande, 2012, p. 318).

Doctrine: For the bibliography, see the final comment on Article 95.

Author: Mayeul Hiéramente.

Article 95: Specific Order Pursuant to Articles 18 or 19

unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence to article 18 or 19.

The provision further specifies that a postponement of the execution of a co-operation request should not hinder the collection of important evidence. Article 95 refers to Articles 18(6) and 19(8) which allow the Prosecutor to seek authority of the Court for certain investigative measures.¹ The reference to Articles 18 and 19 goes beyond the preservation requirements stipulated in Article 94(2)² but imposes other limitations.³ The Prosecutor requires approval of the Chamber (Détails, 2012, p. 1901). The broader authority accorded to the Prosecutor is legitimate. After all, Article 95 contains no explicit reference to a potential interference with national investigations, which is the reason Article 94(2) imposes stricter limitations on the Prosecutor.

Cross-references:

Articles 18(6), 89(2) and (4) and 94.

Doctrine:

1. Dapo Akande, “The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC”, in *Journal of International Criminal Justice*, 2010, vol. 10, no. 2, pp. 293–324.
2. Julien Détails, “Article 95”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, pp. 1899–1902 (<https://www.legal-tools.org/doc/872bf2/>).

¹ Dapo Akande, “Classification of Armed Conflicts: Relevant Legal Concepts”, in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, 2012, p. 318 (<https://www.legal-tools.org/doc/415188/>).

² Claus Kreß and Kimberly Prost, “Article 95”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, para. 19.

³ Julien Détails, “Article 95”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, pp. 1901–1902 (<https://www.legal-tools.org/doc/872bf2/>).

3. Claus Kreß and Kimberly Prost, “Article 95”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2022, pp. 2565–2569.
4. Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003 (<https://www.legal-tools.org/doc/8d1442/>).
5. Dine Rinoldi and Nicoletta Parisi, “International Cooperation and Judicial Assistance between States Parties and the International Criminal Court”, in Flavia Lattanzi and William A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, vol. 1, 1999, pp. 339–390 (<https://www.legal-tools.org/doc/27edd7/>).
6. William A. Schabas, *The International Criminal Court. A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1331–1334 (<https://www.legal-tools.org/doc/b7432e/>).

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Article 96

Contents of Request for Other Forms of Assistance under Article 93

General Remarks:

Article 96 provides practical information relating to Article 93 which deals with “other forms of cooperation”. It provides detailed instruction to the contents of requests, therefore is procedural in nature and content.¹ In this regard Article 96 is similar to Article 91 (“contents of request for arrest and surrender”), and they share certain common paragraphs (that is, the common paragraph 1 of both articles, and the shared text of Article 91(4) and Article 96(3)).

Article 96 is derived from Article 90 (“other forms of cooperation”) paragraph 8 of the Draft Statute for the International Criminal Court, which was presented in the 1998 Report of the Preparatory Committee on the Establishment of an International Criminal Court.² Article 90 of the draft Statute was a comprehensive clause which later became Article 93 in the final ICC Statute. The final ICC Statute makes Article 90(8) a separate provision with some modification. For instance, the former subparagraph 90(8)(b) concerning the protection of victims, witnesses and their families is deleted in the final Article 96 (Report of the Preparatory Committee, 14 April 1998), replaced by the clause on State Parties’ obligation to consult (Article 96(3)) and the applicability of this provision to requests made to the Court (Article 96(4)).

Doctrine: For the bibliography, see the final comment on Article 96.

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¹ Claus Kreß and Kimberly Prost, “Article 96 – Contents of Request for Other Forms of Assistance Under Article 93”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2nd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2008, p. 1595 (<https://www.legal-tools.org/doc/a9e9f7/>).

² Report of the Preparatory Committee on the Establishment of the International Criminal Court, UN Doc. A/CONF.183/2/Add.1, 14 April 1998 (‘Report of the Preparatory Committee, 14 April 1998’) (<https://www.legal-tools.org/doc/816405/>).

Article 96(1)

1. A request for other forms of assistance referred to in Article 93 shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in Article 87, paragraph 1 (a).

Paragraph 1 corresponds to Article 91(1) dealing with contents of request for arrest and surrender. Pursuant to this paragraph, the request should be in writing in principle. Only in urgent cases may the request be transmitted by other medium capable of delivering a written record. In doing so, State Parties bear the obligation to ensure that the request should be confirmed “through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession” as prescribed in Article 87(1)(a).¹

It should be noted that, the prescription on channels in Article 87(1)(a) deals with requests issued by the Court. Therefore a request submitted by a State Party or a non-State Party to the Court pursuant to Article 93(10) of the Statute does not require such confirmation.

Doctrine: For the bibliography, see the final comment on Article 96.

Author: Zhang Yueyao.

¹ Claus Kreß and Kimberly Prost, “Article 96 – Contents of Request for Other Forms of Assistance Under Article 93”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2nd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2008, p. 1595 (<https://www.legal-tools.org/doc/a9e9f7/>).

Article 96(2)

2. The request shall, as applicable, contain or be supported by the following:

The list in paragraph 2 has fully adopted the list of Article 90(8)(a)(ii) in the ICC Preparatory Committee Draft Statute, with minor changes.¹ For example, the final Article 96 paragraph 2 reads as “contain or be supported by the following” instead of “contain the following” in Draft Article 90. The change of terms here, together with the inclusion of paragraph 3 of this provision, reflects that the Court is aware of its incapacity to cover all information needed, therefore sets less strict obligation to the Court and the obligation to provide additional information is left to the requested State.

The contents of the list are also inspired by Article 5 of the Annex to the UN Model Treaties on Extradition and Mutual Assistance in Criminal Matters, whose contents are all covered by the list of Article 96.² The difference is that in the Model Treaty, the inclusion of the listed contents is obligatory,³ whereas in Article 96 the obligation is less strict because of the proviso “as applicable”, and “or be supported by”.

Doctrine: For the bibliography, see the final comment on Article 96.

Author: Zhang Yueyao.

¹ Report of the Preparatory Committee on the Establishment of the International Criminal Court, UN Doc. A/CONF.183/2/Add.1, 14 April 1998 (<https://www.legal-tools.org/doc/816405/>).

² United Nations Model Treaty on Mutual Assistance in Criminal Matters, UN Doc. A/RES/45/117, 14 December 1990, Article 5 (<https://www.legal-tools.org/doc/2e7ee6/>); United Nations Model Treaty on Extradition, UN Doc. A/RES/45/116, 14 December 1990 (<https://www.legal-tools.org/doc/43b6b5/>).

³ Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, UN Doc. A/CONF. 144/28/Rev.1, 27 August 1990, p. 80 (<https://www.legal-tools.org/doc/658aba/>).

Article 96(2)(a)

(a) A concise statement of the purpose of the request and the assistance sought, including the legal basis and the grounds for the request;

The request should state the object of the request and describe what assistance is requested in Article 93(1). The request should also include the text of relevant laws and the reasons for requiring them.¹

Doctrine: For the bibliography, see the final comment on Article 96.

Author: Zhang Yueyao.

¹ See United Nations Model Treaties on Extradition and Mutual Assistance in Criminal Matters, UN Doc. A/RES/45/117, 14 December 1990, Article 5, para. 1(c) and (e) (<https://www.legal-tools.org/doc/2e7ee6/>).

Article 96(2)(b) and (c)

- (b) As much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided;*
- (c) A concise statement of the essential facts underlying the request;*

Sub-paragraphs (b) and (c) are important for efficient execution of the request. Statement of essential facts underlying the request would help the requested States decide what measures to adopt in domestic legal sphere. When deciding whether the detailed information provided in sub-paragraph (b) should be included in the request, the Court and the State Party making the request are subject to the general requirement “as applicable”.

Doctrine: For the bibliography, see the final comment on Article 96.

Author: Zhang Yueyao.

Article 96(2)(d)

(d) The reasons for and details of any procedure or requirement to be followed;

If the court requests certain measures to be taken or procedures to be adopted, it shall provide a reason for demanding such measures and procedures, and specify in detail. The provision does not specify what details should be provided, but reference to Article 5 of the Model Treaty reflects that such details may include a statement as to whether sworn or affirmed evidence or statements are required, and time-limit within which compliance with the request is desired.¹

Doctrine: For the bibliography, see the final comment on Article 96.

Author: Zhang Yueyao.

¹ United Nations Model Treaties on Extradition and Mutual Assistance in Criminal Matters, UN Doc. A/RES/45/117, 14 December 1990, Article 5, para. 1(c) and (e) (<https://www.legal-tools.org/doc/2e7ee6/>).

Article 96(2)(e)

(e) Such information as may be required under the law of the requested State in order to execute the request;

The law of the requested State may have certain procedural or, evidentiary requirements on the execution of the request. In such cases the Court should provide the required information in the request. A similar clause is Article 91(2)(c) on the request for arrest and surrender, except that Article 91(2)(c) requires that the domestic requirements of the requested States should not be more burdensome than relevant applicable requirements in existing treaties. The ‘less burdensome’ requirement in Article 91(2)(c) intends to reduce the obligation imposed on the Court, which could better serve the overall aim of Part 9 as to facilitate the execution of the request and co-operation. This sub-paragraph, together with sub-paragraph (f), serves as transitional clauses to paragraph 3.

Doctrine: For the bibliography, see the final comment on Article 96.

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Article 96(2)(f)

(f) Any other information relevant in order for the assistance sought to be provided.

Sub-paragraph (f) work as compromise clauses, in case that additional information is needed to execute a request. It is also a transitional clause to paragraph 3, once such information is required, State Parties shall consult with the Court on domestic requirements.

Doctrine: For the bibliography, see the final comment on Article 96.

Author: Zhang Yueyao.

Article 96(3)

3. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (e). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

Paragraph 3 parallels Article 91(4), obliging State Parties to advise the Court of the requirements of its national law, on the condition that the Court so requests. The intention is to reduce the burden of the Court in preparation of the materials required in support of the request. When the Court requests certain information under paragraph 2(e), State Parties have the obligation to respond and advise the Court on such information. Upon receiving requests from the Court, State Parties can either advise generally to provide an overview of their domestic law requirements, or specifically over a specific matter.

Doctrine: For the bibliography, see the final comment on Article 96.

Author: Zhang Yueyao.

Article 96(4)

4. The provisions of this article shall, where applicable, also apply in respect of a request for assistance made to the Court.

Pursuant to paragraph 4, the provisions of this Article shall in principle apply in requests to the Court under Article 93(10). At the same time, the proviso “where applicable” sets limitation to the applicability. For instance, paragraph 3 is not applicable given the clear prescription of obligator being State Parties.

Cross-reference:

Rule 194.

Doctrine:

1. Claus Kreß and Kimberly Prost, “Article 96 – Contents of Request for Other Forms of Assistance Under Article 93”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich, 2016, pp. 2111–2114 (<https://www.legal-tools.org/doc/040751/>).
2. Gabrielle Kirk McDonald, “Trial procedures and practices”, in Gabrielle Kirk McDonald and Olivia Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law*, Kluwer Law International, The Hague, 2000, pp. 551–620.

Author: Zhang Yueyao.

Article 97

Consultations

General Remarks:

Article 97 is a clause which may be used to resolve problems that may arise in relation to requests for co-operation under Part 9. This Article intends to serve the overall purpose of Part 9 of the ICC Statute to facilitate the execution of the request and promote co-operation. It recognizes that in practice requests sent to State Parties may still be insufficient in content or not executable. State Parties have the obligation to consult with the Court “without delay” if execution problems arise. This Article only applies to the requests issued by the Court to State Parties. Requests of assistance issued to the Court under Article 93(10) are not eligible for such consultation.

Doctrine: For the bibliography, see the final comment on Article 97.

Author: Zhang Yueyao.

Article 97(1)

Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter. Such problems may include, inter alia:

The intention of this Article is to promptly resolve the problems of the requests to an executable condition, and ensure good faith co-operation between State Parties and the Court. Article 93(5) reflects similar arrangement: it obliges the requested State Party to look for alternative measures to provide assistance before denying a request, provided that the Court or the Prosecutor accepts the alternative measure. State Parties and the Court would therefore negotiate over the measures to be taken and potential modifications to the request. In this way a consultation-like mechanism between the State Party and the Court is established in actuality, although without explicit terms. Article 97 is thus also applicable to the circumstances under Article 93(4) and (5).

Paragraphs (a)-(c) provides examples of problems relating to the execution of a request from the Court.

Doctrine: For the bibliography, see the final comment on Article 97.

Author: Zhang Yueyao.

Article 97(1)(a)

(a) Insufficient information to execute the request;

A State Party shall promptly consult with the Court if there is lack of information. The standard to determine such lack of information is set in the general requirement of Articles 87, the lists of Articles 91 and 96(2).

Doctrine: For the bibliography, see the final comment on Article 97.

Author: Zhang Yueyao.

Article 97(1)(b)

(b) In the case of a request for surrender, the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant;

When the requested State Party finds that pursuant to the request, despite best efforts, the person sought cannot be located or is not the person named in the warrant, it is necessary that both sides should promptly confirm the information of the request and determine if additional information could be provided, or corrections should be made. It is important particularly for the person mistakenly arrested or detained under the request for surrender.

Doctrine: For the bibliography, see the final comment on Article 97.

Author: Zhang Yueyao.

Article 97(1)(c)

(c) The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State.

When the requested State identifies that execution of the request conflicts with its obligation under a pre-existing treaty, the State Party is obliged to consult with the Court for a resolution between the competing obligations.

Paragraph (c) is derived from Article 87 paragraph 3(e) in the Draft Statute, stating that “if compliance with the request would put [the requested State] in breach of an existing obligation [arising] from [a peremptory norm of] general international law [treaty] obligation undertaken to Another State”, the circumstance constitutes one of the grounds for State Parties to deny a request for surrender, transfer or extradition.¹ Article 90(2)(f) in the Draft Statute also provides that if “compliance with the request would put it in breach of an existing [international law treaty] obligation undertaken to Another State [non-State party]”, there is a possible ground to deny a request for assistance (Report of the Preparatory Committee, 14 April 1998, p. 144). The final ICC Statute has not kept this term and the scope of grounds of denial is limited to national security only, in order to reinforce the obligation of State Parties to comply with the Court’s request. It takes a co-operative approach to resolve the potential problems regarding competing obligations of State Parties. There is no indication as to the consequences if the requested State and the Court fail to reach a resolution, but in actuality this clause has not confronted much criticism.²

Doctrine:

1. Claus Kreß and Kimberly Prost, “Article 97 – Consultations”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich, 2016, pp. 2115–2116 (<https://www.legal-tools.org/doc/040751/>).

¹ Report of the Preparatory Committee on the Establishment of the International Criminal Court, UN Doc. A/CONF.183/2/Add.1, 14 April 1998, p. 134 (‘Report of the Preparatory Committee, 14 April 1998’) (<https://www.legal-tools.org/doc/816405/>).

² Claus Kreß and Kimberly Prost, “Article 97 – Consultations”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2nd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2008, p. 1599 (<https://www.legal-tools.org/doc/a9e9f7/>).

2. Roy S. Lee, “*Creating an International Criminal Court-Of Procedures and Compromises*”, in Herman A. M. von Hebel, Johan G. Lammers and Jolien Schukking (eds.), *Reflections on the International Criminal Court*, T.M.C. Asser Press, The Hague, 1999, pp. 141–52.

Author: Zhang Yueyao.

Article 98

Cooperation with Respect to Waiver of Immunity and Consent to Surrender

General Remarks:

Article 98 is placed in Part 9 of the ICC Statute, which deals with international co-operation and judicial assistance. The Article represents an effort to solve conflicts that may arise between international criminal justice and the international obligations of the States Parties of the ICC.

Article 98 was not among the Articles given most attention during the drafting process of the ICC Statute, but it has proven to be one of the more controversial Articles of the Statute.¹ Situations may arise where an international obligation of a State Party is in conflict with the obligation to co-operate with the ICC and Article 98 provides the States Parties with a possibility to rank its international obligations higher than its obligations to co-operate with the ICC. Whether a conflict between a request for co-operation from the ICC and an international obligation of the requested state is at hand or not is however ultimately determined by the Court on a case-by-case basis.² If a conflict of obligations is at hand the Court has a responsibility to try to achieve co-operation with the third state (subparagraph 1) or the sending state (subparagraph 2).

Article 98 also influences the effects following Article 27. Immunities enjoyed by a state official shall not, according to Article 27, bar the ICC from exercising jurisdiction over that state official. The application of Article 98 may however result in the opposite effect and may under certain circumstances in fact bar the ICC from exercising jurisdiction over a state official.

Doctrine: For the bibliography, see the final comment on Article 98.

Author: Camilla Adell.

¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2016, pp. 1343 (<https://www.legal-tools.org/doc/1435ae/>).

² Claus Kreß and Kimberly Prost, “Article 98 – Cooperation with Respect to Waiver of Immunity and Consent to Surrender”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 2119 (<https://www.legal-tools.org/doc/a9e9f7/>).

Article 98(1)

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

Article 98(1) is applicable to the situation where a State Party of the ICC would have to act inconsistently with its obligations under international law concerning state or diplomatic immunity of a person or property of a third state. The application of the Article requires two definitions to be made. First, “obligations under international law” means that the Article covers international immunities that exist by virtue of customary international law, treaty or general principles of law. Consequently the Article covers both immunity *ratione materiae* and immunity *ratione personae*. Immunities that exist by virtue of international agreements are however not covered by Article 98(1) but rather by Article 98(2).¹ Secondly, the term “third state” must be defined in order to determine the scope of application of Article 98(1).

Doctrine: For the bibliography, see the final comment on Article 98.

Author: Camilla Adell.

¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2010, p. 1346 (<https://www.legal-tools.org/doc/1435ae/>).

Article 98(1): Third State

with respect to the State or diplomatic immunity of person or property of a third State

Article 98(1) uses another wording than Article 98(2) when it refers to “third state” rather than “sending state”. To fully understand the scope of Article 98(1) the meaning of the term “third state” must be discussed. According to Article 2(1)(h) of the Vienna Convention on the Law of the Treaties, “third state” is a state that is not party to the treaty at hand. However, the drafters of a treaty are free to give the term “third state” another meaning. The meaning of “third state” in Article 98(1) should, according to the literature, be interpreted as meaning “state other than the requested state” since it would otherwise give rise to consequences that were not intended by the drafters.¹

Relationship with Article 27(2):

The third state could be both a State Party to the ICC and a non-State Party. This gives rise to two different situations that must be kept apart. When a third state is a State Party Article 27(2) is applicable and in line with that article the state parties has waived the immunity accorded to their state officials by international law (see the commentary to Article 27(2)).

In a situation where the third state is not a State Party to the ICC Statute, conflicting obligations may arise. Article 98(1) is applicable in those situations. Whether there is a conflict with the international obligations of the requested state and the request from the Court, will be determined on the basis of customary international law (Kreß and Prost, 2016, p. 2126). Customary international law distinguishes between immunity *ratione materiae* and immunity *ratione personae* where the first attaches to state officials performing state actions and the second attaches to the office of certain high-ranking state officials (namely the head of state, head of government and the foreign minister of a state). It is now well established

¹ See Claus Kreß and Kimberly Prost, “Article 98 – Cooperation with Respect to Waiver of Immunity and Consent to Surrender”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 2124 (<https://www.legal-tools.org/doc/040751/>); William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2016, p. 1345 (<https://www.legal-tools.org/doc/b7432e/>).

that immunity *ratione materiae* cannot shield a person from responsibility for international crimes (see the commentary to Article 27(2)). The status of immunity *ratione personae* is however not altogether clear, but the Appeals Chamber has recently found that customary international law does not provide for immunity *ratione personae vis-à-vis* an international court.² Consequently, according to the Appeals Chamber the ICC has jurisdiction over incumbent high-ranking state officials that are nationals of a non-State Party that has not voluntarily waived the immunity of its state officials.

When a State Party is to fulfil a request for co-operation by the Court the question of whether that would mean that the requested state might violate its international obligations may arise. Whether that is possible or not depends on whether the State Party should be seen as using its own domestic jurisdiction, or if it should be considered using the jurisdiction of the ICC when carrying out a request for co-operation. According to a decision by the Pre-Trial Chamber (see below), a State Party should be considered to be an extension of the Court and thereby using the jurisdiction of the ICC instead of its own domestic jurisdiction when fulfilling a request for co-operation. This enables state parties to carry out requests for co-operation, without violating its international obligations, where the subject of the request is the national of a non-Party State.

Pre-Trial Chamber Decisions:

In a decision on 4 March 2009 the Pre-Trial Chamber I reached the conclusion that the then incumbent president of Sudan, Omar Al Bashir, did not enjoy immunity from proceedings before the Court.³ In a complementing decision of 12 December 2011⁴ a different composed Pre-Trial Chamber I concluded that a State Party of the ICC must co-operate with respect to the arrest and surrender of president Al Bashir (who at the time of the decision

² ICC, *Prosecutor v. Al Bashir*, Appeals Chamber, Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019, ICC-02/05-01/09-397-Corr, paras. 103 and 113 (*‘Al Bashir, 6 May 2019’*) (<https://www.legal-tools.org/doc/0c5307/>).

³ See ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-3 (<https://www.legal-tools.org/doc/e26cf4/>), and the commentary to Article 27(2).

⁴ ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber, 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, 12 December 2011, ICC-02/05-01/09-139 (*‘Al Bashir, 12 December 2011’*) (<https://www.legal-tools.org/doc/476812/>).

was incumbent president of Sudan) and that Article 98(1) was not applicable to the present situation (*Al Bashir*, 12 December 2011, para. 43). In that specific situation the state of Malawi had refused to co-operate with the ICC with respect to the arrest and surrender of president Al Bashir with by stating that such co-operation would be in breach with its international obligations. The Pre-Trial Chamber reached its conclusion by arguing that a State Party to the ICC is an instrument of the *jus puniendi* of the Court (para. 46). In other words, the Court argued that a State Party that receives a request for co-operation does not use its own domestic jurisdiction when enforcing that request but rather the international jurisdiction of the ICC. Consequently, if one agrees with the view that incumbent high ranking state officials does not enjoy immunity *ratione personae* with regard to international proceedings regarding international crimes (a conclusion that also was reached by the Pre-Trial Chamber in the decision, see para. 36) there is no conflict of obligations as described in Article 98(1) at hand. This is clearly the view of the ICC and Kreß is also of this opinion as he argues that the requested state acts on behalf of the ICC.⁵

The Pre-Trial Chamber also argued in its decision that a State Party that denies the arrest and surrender of an incumbent high ranking state official because of immunity reasons is acting contrary to the purpose of the ICC Statute. States Parties have accepted the ICC Statute by ratifying it and should, in the view of the Pre-Trial Chamber, not act contrary to it (*Al Bashir*, 12 December 2011, para. 41).

It has later been clarified by Pre-Trial Chamber II that Article 98(1) is an Article that addresses the Court and that it does not give the States Parties any right to refuse to comply with a request for co-operation from the Court.⁶ In the same decision, the Pre-Trial Chamber acknowledged that Article 98(1) prevents the Court from requesting a State Party to arrest and surrender a person enjoying immunity, for example a head of state of a non-State Party to the ICC Statute, without first obtaining a waiver of immunity for that person (*Al Bashir*, 6 July 2017, para. 82). In that situation,

⁵ Claus Kreß, “The International Criminal Court and Immunities under International Law for States Not Party to the Court’s Statute”, in Morten Bergsmo and Ling Yan (eds.), *State Sovereignty and International Criminal Law*, FICHL Publication Series No. 15, Torkel Opsahl Academic EPublisher, Beijing, 2012, p. 257 (<https://www.legal-tools.org/doc/82ec96/>).

⁶ ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber II, Decision under Article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, 6 July 2017, ICC-02/05-01/09-302, para. 100 (*Al Bashir*, 6 July 2017’) (<https://www.legal-tools.org/doc/68ffc1/>).

which regarded the then incumbent head of state of Sudan, a non-State Party to the ICC Statute, the Pre-Trial Chamber did however conclude that Al Bashir did not enjoy any immunity since the United Nations Security Council Resolution that referred the situation in Darfur to the Court imposed an obligation on Sudan to co-operate fully with the Court and thereby made Sudan an analogous State Party to the ICC Statute (para. 88). As Sudan could not claim vis-à-vis the Court that Al Bashir enjoyed immunity from proceedings before the Court because of his capacity as head of state, Sudan had the obligation to arrest and surrender him to the Court (para. 92). Consequently, the Pre-Trial Chamber found that Article 98(1) was not applicable with regard to the Court's request to arrest and surrender Al Bashir as there was no immunity that needed to be waived (para. 93).

Appeals Chamber's Judgment of 6 May 2019:

The Appeals Chamber has further clarified that Article 98(1) is only a procedural rule which does not generate or preserve any immunities in a judgment.⁷ The Appeals Chamber also stated that Article 98(1) does not provide a basis for the presumption that any immunities exist (*Al Bashir*, 6 May 2019, para. 130–131; see also the commentary on Article 27(2) regarding the Appeals Chamber's finding regarding immunities under customary international law).

Doctrine: For the bibliography, see the final comment on Article 98.

Author: Camilla Adell.

⁷ ICC, *Prosecutor v. Al Bashir*, Appeals Chamber, Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019, ICC-02/05-01/09-397-Corr ('*Al Bashir*, 6 May 2019') (<https://www.legal-tools.org/doc/0e5307/>).

Article 98(2)

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

Article 98(2) applies to both bilateral and multilateral agreements between states, and some argue that Article 98(2) especially has so-called status of forces agreements in mind. Status of forces agreements are agreements of rights and responsibilities of states when one state stations forces in the territory of another state. It was agreed during the drafting process of the ICC Statute that such agreements may create a kind of immunity¹ That Article 98(2) does not concern immunities but rather international agreements has been confirmed by the Appeals Chamber in *Al Bashir*.²

In order for Article 98(2) to be applicable, that is in order for a conflict between the request from the ICC and the obligations of the state to arise, the state must be part of the agreement that creates the obligations that would be in conflict with the request for co-operation from the ICC.³ Kreß and Prost also argues that Article 98(2) only applies to agreements that already existed when the receiving state ratified the ICC Statute (Kreß and Prost, 2016, pp. 2142–2144).

Cross-references:

Article 27.

Rule 195.

¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2016, pp. 1349–1350 (<https://www.legal-tools.org/doc/b7432e/>).

² ICC, *Prosecutor v. Al Bashir*, Appeals Chamber, Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019, ICC-02/05-01/09-397-Corr, para. 159 (<https://www.legal-tools.org/doc/0c5307/>).

³ Claus Kreß and Kimberly Prost, “Article 98 – Cooperation with Respect to Waiver of Immunity and Consent to Surrender”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, p. 2142 (<https://www.legal-tools.org/doc/a9e9f7/>).

Doctrine:

1. Claus Kreß, “The International Criminal Court and Immunities under International Law for States Not Party to the Court’s Statute”, in Morten Bergsmo and LING Yan (eds.), *State Sovereignty and International Criminal Law*, FICHL Publication Series No. 15, Torkel Opsahl Academic EPublisher, Beijing, 2012, pp. 223–65 (<https://www.toaep.org/ps-pdf/15-bergsmo-ling/>).
2. Claus Kreß and Kimberly Prost, “Article 98 – Cooperation with Respect to Waiver of Immunity and Consent to *Surrender*”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich, 2016, pp. 2117–2146 (<https://www.legal-tools.org/doc/040751/>).
3. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1342–1353 (<https://www.legal-tools.org/doc/b7432e/>).
4. Otto Triffterer and Christoph Burchard, “Article 27 – Irrelevance of Official Capacity”, in Otto Triffterer and Kai Ambos (eds.), 2016, pp. 1037–1055.

Author: Camilla Adell.

Article 99

Execution of Requests under Articles 93 and 96

General Remarks:

Article 99 regulates the execution of requests under Articles 93 and 96, that is, requests for co-operation other than arrest and surrender. This provision reflects an attempt to strike a balance between the need of efficient and effective investigation, and States' concerns in relation to sovereignty. It reflects and follows, to a large extent, the basic principles of mutual legal assistance between States. On the other hand, it also largely deviates from the inter-State legal assistance regime by providing for the possibility of direct execution by the Prosecutor. Thus, two different situations of execution are provided for in Article 99. One is the execution by national authorities according to the national law of the requested State, which is the traditional manner for execution of a co-operation request between States. The other is the direct execution of the Prosecutor under certain circumstances.

Doctrine: For the bibliography, see the final comment on Article 99.

Author: Zhang Binxin.

Article 99(1)

1. Requests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request, including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process.

This provision deals with the law governing the execution of requests under Articles 93 and 96. The basic principle it sets out is that such execution should be governed by the law of the requested State. The provision stipulates, at the same time, that the Court may specify some particular manner of execution. In such case, the manner specified by the Court shall be followed, unless it is prohibited by the law of the requested State. This formula follows the general principle and common practice of mutual legal assistance between States.¹

While specifying that the execution shall be in accordance with the law of the requested State, the provision does not make clear which is the organ that shall actually carry out the execution activities. In so far as it follows the common practice in mutual legal assistance, it should normally be the national authorities of the requested State that execute the request. The situations where the Prosecutor may execute a request directly are governed by Article 99(4), or, when the Court has not secured co-operation from the State, in accordance with Article 57(3)(d).

Although the execution is to be governed by the national law of the requested State, the Court can specify the manner of execution in the request, and this shall be followed, “unless prohibited” by the national law. The provision gives one example of the manner of execution that could possibly be specified in the request, namely, “permitting persons specified in the request to be present at and assist in the execution process”. This and similar manner of execution could be important to guarantee the admissi-

¹ United Nations Model Treaty on Extradition and Mutual Assistance in Criminal Matters, UN Doc. A/RES/45/117, 14 December 1990, Article 6 (<https://www.legal-tools.org/doc/44a7b5/>); United Nations Model Treaty on Extradition, UN Doc. A/RES/45/116, 14 December 1990 (<https://www.legal-tools.org/doc/43b6b5/>); European Convention on Mutual Assistance in Criminal Matters, 20 April 1959, European Treaty Series No. 30, Article 3 (<https://www.legal-tools.org/doc/e73b50/>).

bility of evidence before the Court in later stage of the proceedings. According to Article 69(7), evidence obtained by means of a violation of the Statute or internationally recognized human rights may not be admissible. Therefore, in the situation where the national law of the requested State does not accord with international human rights standards or the standards set out in the Statute, it would be very important for the request to be executed in the manner specified by the Court in the request.

The requirement of the request being executed in the manner specified therein is qualified by the wording of “unless prohibited” by the national law. The problem thus arises only when there is a prohibition in the national law. Mere absence of relevant procedure in the national law cannot be a ground for refusing co-operation requests. This interpretation is further supported by Article 88, which requires that States Parties shall ensure that they have procedures in their national law “for all of the forms of cooperation”. Even if the specified manner were indeed “prohibited” by the national law, this would not necessarily grant the requested State a right to an outright refusal of execution.

According to Article 96(3), the requested State has an obligation to consult with the Court “regarding any requirements under its national law that may apply” in order to execute a request for assistance. Furthermore, Article 97 lays down a general obligation of consultations on the part of the State Party if “it identifies problems which may impede or prevent the execution of the request”.²

Doctrine: For the bibliography, see the final comment on Article 99.

Author: Zhang Binxin.

² Annalisa Ciampi, “Other Forms of Cooperation”, in Antonio Cassese, Paola Gaeta and John Jones (eds.), *The Rome Statute of the International Criminal Court. A Commentary*, Oxford University Press, 2002, p. 1732 (<https://www.legal-tools.org/doc/01addc/>).

Article 99(2)

2. In the case of an urgent request, the documents or evidence produced in response shall, at the request of the Court, be sent urgently.

According to this provision, in the case of an urgent request, the requested State “shall” send documents or evidence urgently. No room for discretion is left to the State in this regard.

Doctrine: For the bibliography, see the final comment on Article 99.

Author: Zhang Binxin.

Article 99(3)

3. Replies from the requested State shall be transmitted in their original language and form.

This provision requires that the replies have to be transmitted in their original language and form. There is no need to translate them into the official working languages of the Court.

Doctrine: For the bibliography, see the final comment on Article 99.

Author: Zhang Binxin.

Article 99(4)

4. Without prejudice to other articles in this Part, where it is necessary for the successful execution of a request which can be executed without any compulsory measures, including specifically the interview of or taking evidence from a person on a voluntary basis, including doing so without the presence of the authorities of the requested State Party if it is essential for the request to be executed, and the examination without modification of a public site or other public place, the Prosecutor may execute such request directly on the territory of a State as follows:

This provision deals with the situation where the Prosecutor may execute a request under Article 93 directly on the territory of a State, and in certain circumstances, even without the presence of the national authorities. This is clearly an exceptional manner of execution, which is qualified by strict conditions. The chapeau of paragraph 4 sets out two conditions for such direct execution by the Prosecutor.

First, it must be “necessary” for the successful execution of a request. The provision does not specify how to interpret “necessary” or who can make the determination. In any case, this requirement sets out an objective condition that has to be met before the Prosecutor can execute the request directly. Such direct execution must be required by the situation of the particular case, but not subject solely to the wish of the Prosecutor.

The second condition limits the manner of direct execution. The power of the Prosecutor to execute a request directly is only limited to non-compulsory measures. Compulsory measures, such as search and seizure or the exhumation of a grave site, are not covered by this provision. Traditionally, compulsory measures can only be conducted by national authorities, but the provision does not preclude the possibility that the State authorises the Prosecutor to conduct compulsory measures directly.

The provision gives two examples of such non-compulsory measures. One is the voluntary interview or taking evidence from a person, the other is the examination of a public site. The interview and examination of a person can further be executed without the presence of the national authorities “if it is essential for the request to be executed”. There are various scenarios when direct action by the Prosecutor and the non-presence of the national authorities become “essential”. The witnesses may be intimi-

dated by the presence of the national authorities. The national authority might seek to unduly influence the testimony of the witnesses.¹ This provision thus guarantees that the Prosecutor has the means to effectively collect evidence that would meet the requirement of the evidential rules of the Court. The examination of a public site or other public place is subject to the condition that such examination would not involve any modification of the site.

Doctrine: For the bibliography, see the final comment on Article 99.

Author: Zhang Binxin.

¹ ICC, *Prosecutor v. Kenyatta*, OTP, Public Redacted Version of the Corrigendum of the Second Updated Document Containing the Charges, 10 May 2013, ICC-01/09-02/11-732-AnxA-Corr-Red, para. 15 (<https://www.legal-tools.org/doc/7ada41/>).

Article 99(4)(a)

(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;

The two subparagraphs stipulate two different situations where the Prosecutor may act directly. Subparagraph (a) deals with the situation of non-cooperative State Party on the territory of which the crime is alleged to have been committed, when the case has already been determined as admissible. Under such circumstance, the Prosecutor may directly execute the Court's request after "*all possible consultations*" (emphasis added) with the requested State. Subparagraph (b), on the other hand, stipulates that the Prosecutor may execute such request "following consultations" with the State. Thus, under subparagraph (a) the Prosecutor is only obliged to consult with the State Party when "possible". It might happen when consultations are not possible and do not take place at all, considering that this subparagraph deals with situations concerning unco-operative requested State.¹ Yet under such circumstances, the need for the Prosecutor to act directly, for example to interview witnesses without the presence of national authorities, may be all the more important.

Regulation 108(2) of the Regulations of the Court stipulates that the requested State may apply for a ruling concerning the legality of the request in case of a request under Article 99(4) "within 15 days from the day on which the requested State is informed of or became aware of the direct execution". Thus, the requested State can invoke the right to challenge the legality of the request not after the consultations fail, but after the direct execution. This further confirms that the Prosecutor may proceed to direct execution under Article 99(4) when it deems that "all possible consultations" have been exhausted. On the other hand, the requested State is given a chance to challenge such decision before a competent Chamber after the direct execution takes place.

¹ Annalisa Ciampi, "Other Forms of Cooperation", in Antonio Cassese, Paola Gaeta and John Jones (eds.), *The Rome Statute of the International Criminal Court. A Commentary*, Oxford University Press, 2002, p. 1738 (<https://www.legal-tools.org/doc/01addc/>).

Doctrine: For the bibliography, see the final comment on Article 99.

Author: Zhang Binxin.

Article 99(4)(b)

(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 subparagraph deals with cases other than that referred to in subparagraph (a), that is, when the requested State is not the territorial State where the crime alleged was committed. This may happen when, for example, some witnesses have left the country where the crime was allegedly committed. It is not unusual that the Prosecutor’s investigative activities take place in several countries, including countries other than the territorial State. Depending on the particular stage and situation, the Prosecutor might conduct investigations outside of the territorial State for the purpose of protecting victims and witnesses.¹

In such cases, unlike under subparagraph (a), the Prosecutor has an obligation to consult with the requested State. The request can only be executed directly “following consultations”. Furthermore, here the Prosecutor’s power to execute the request directly is subject to a further objective standard of “any reasonable conditions or concerns” of the requested State. Thus, while in the situation of subparagraph (a) the Prosecutor could proceed after “possible” consultations, here there is an objective standard of “reasonable” conditions and concerns to be met. The provision does not specify who is to make the decision as to whether the conditions or concerns raised by the State Party are reasonable. It seems that the Prosecutor, being the organ that consults with the State and the one most familiar with the situation, would make the decision. Thus, the provision seems to grant the Prosecutor the power to proceed when it deems the conditions or concerns raised by the requested State unreasonable.

Once the Prosecutor executes the request directly, subparagraph (b) further provides that the requested State Party “*shall*, without delay, consult

¹ ICC OTP, “Statement to the United Nations Security Council on the situation in the Libyan Arab Jamahiriya, pursuant to UNSCR 1970 (2011)”, 16 May 2012, para. 3; ICC OTP, “Fourth Report of the Prosecutor to the UN Security Council Pursuant to UNSCR 1593 (2005)”, 14 December 2006, p. 3.

with the Court” (emphasis added). The word “shall” suggests that this is a requirement rather than a right on the State’s part. Thus, should any problems arise with regard to the direct execution, the State has an obligation to further consult with *the Court*, with the purpose of solving the matter. The provision does not specify which organ of the Court the State shall consult with. It might well be still the Prosecutor, when, for example, the State has agreed with the execution but later identifies problems during the execution process.

Should such consultations fail and no further consultations be possible, it would meet the requirement of exhaustion of consultations under Regulation 108(2) of the Regulations of the Court. In that case, the requested State would be able to seek a ruling concerning the legality of the direct execution before the competent Chamber after it became aware of such execution.

Doctrine: For the bibliography, see the final comment on Article 99.

Author: Zhang Binxin.

Article 99(5)

5. Provisions allowing a person heard or examined by the Court under Article 72 to invoke restrictions designed to prevent disclosure of confidential information connected with national security shall also apply to the execution of requests for assistance under this Article.

This provision is to reaffirm that measures and procedures designed to protect national security information under Article 72 also apply to the execution of requests under Article 99. As Article 99 says nothing about national security information, and Article 72 applies “in any case” where the State considers the disclosure of such information at issue, Article 72 would apply to the execution of requests even without this provision. It is nevertheless included in Article 99 and leaves no ambiguity on the matter, which might have been considered necessary due to the utter importance and sensitivity of this issue. Thus, when concerns or objections concerning national security information are raised, relevant provisions in Article 72 will govern the matter. This applies to the execution by national authorities as well as direct execution by the Prosecutor. In the latter case, national security concerns might well be raised during the consultations or as “reasonable conditions and concerns” under subparagraph 4 by the requested State.

Doctrine:

1. Annalisa Ciampi, “Other Forms of Cooperation”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court*, Oxford University Press, 2002, pp. 1732, 1738 (<https://www.legal-tools.org/doc/01addc/>).
2. Claus Kreß and Kimberly Prost, “Article 99”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich, 2016, pp. 2147–2154 (<https://www.legal-tools.org/doc/040751/>).
3. Rod Rastan, “Testing Co-operation: The International Criminal Court and National Authorities”, in *Leiden Journal of International Law*, 2008, vol. 21, no. 2, pp. 431–56.
4. Alex Whiting, “Dynamic Investigative Practice at the International Criminal Court”, in *Law and Contemporary Problems*, 2013, vol. 76, p. 163.

Author: Zhang Binxin.

Article 100

Costs

General Remarks:

Article 100 deals with the costs of executing a request. It divides the responsibility to bear the relevant costs in line with the traditional principles of mutual legal co-operation and assistance between States.¹ Thus, generally the costs involved in the requested actions are borne by the requesting party, while ordinary functioning costs are borne by the requested State, the national authorities of which would execute the requests.

Doctrine: For the bibliography, see the final comment on Article 100.

Author: Zhang Binxin.

¹ Model Treaty on Mutual Assistance in Criminal Matters, UN Doc. A/RES/45/117, 14 December 1990, Article 20 (<https://www.legal-tools.org/doc/44a7b5/>).

Article 100(1)

1. The ordinary costs for execution of requests in the territory of the requested State shall be borne by that State, except for the following, which shall be borne by the Court:

In the situation of a request for co-operation from the Court, paragraph one stipulates that the “ordinary costs” for the execution of such a request shall be borne by the State on whose territory the execution takes place. It then lists the costs that do not belong to “ordinary costs” and should be borne by the Court. This is an exhaustive list, including five categories of clearly specified costs, and one catch-all clause which covers all other “extraordinary costs”.

Doctrine: For the bibliography, see the final comment on Article 100.

Author: Zhang Binxin.

Article 100(1)(a)

(a) Costs associated with the travel and security of witnesses and experts or the transfer under Article 93 of persons in custody;

The first category of costs listed is that associated with the travel and security of witnesses and experts or the transfer of persons. If the meeting and interview of witnesses and experts involve the travel of these persons, such costs shall be borne by the requesting party, here the Court. When security measures are needed to protect the witnesses, this would also be an extra burden to the requested State, outside of the “ordinary costs” of the functioning of relevant national authorities, and thus should be borne by the Court. The transfer of persons here refers to that under Article 93, not the surrender of a person, which is governed by subparagraph (e), according to which the costs for the transport of persons being surrendered to the Court should also be borne by the Court itself.

Doctrine: For the bibliography, see the final comment on Article 100.

Author: Zhang Binxin.

Article 100(1)(b)

(b) Costs of translation, interpretation and transcription;

Costs of translation, interpretation and transcription are to be borne by the Court. As made clear by Article 99, replies to the requests from the Court shall be transmitted in their original language. There is no requirement for translation on the part of the requested State. If the Court needs translation or interpretation, when interviewing witnesses, for example, such costs shall be borne by the Court.

Doctrine: For the bibliography, see the final comment on Article 100.

Author: Zhang Binxin.

Article 100(1)(c)

(c) Travel and subsistence costs of the judges, the Prosecutor, the Deputy Prosecutors, the Registrar, the Deputy Registrar and staff of any organ of the Court;

The Court shall, without doubt, bear the costs for the travel and subsistence costs of judges, the Prosecutor, the Registrar and other staff of the Court. When the Court seeks the opinion from an expert through a request, the costs thus involved shall also be borne by the Court.

Doctrine: For the bibliography, see the final comment on Article 100.

Author: Zhang Binxin.

Article 100(1)(f)

(f) Following consultations, any extraordinary costs that may result from the execution of a request.

Lastly, paragraph 1 contains a catch-all clause, which stipulates that “any extraordinary costs that may result from the execution” shall be borne by the Court. This is to include “extraordinary costs” that are not covered by the above-mentioned specifically listed categories. This clause guarantees that as long as the costs are not “ordinary costs” that the normal execution activities of the relevant national authorities would usually involve, such costs shall be borne by the Court. In the *Kenyatta* case, the Government of Kenya requested that the ICC Prosecution reimburse it for the costs of certain proceedings in its national court. These proceedings were concerned with the issuance of a preliminary injunction prohibiting a national judge from taking evidence for the purpose of the ICC.¹ Although it is unclear whether or not these costs constitute “extraordinary costs” under Article 100(1)(f), this serves as an example when such problems may arise.

For such “extraordinary costs”, subparagraph (f) provides for a consultation process. The Court will only bear the costs after consultations with the State. As usually it is the national authorities that carry out the execution acts, the Court may not always be aware of or be very clear about the costs of various activities involved. The requirement of consultations guarantees that the Court would not be caught in surprise when the State asks the Court to bear the costs of an extraordinary nature after the spending.

The same principle also applies to the costs for the enforcement of sentences according to Rule 208 of the Rules of Procedure and Evidence. Thus, the ordinary costs for the enforcement of sentences shall be borne by the State in the territory of which the enforcement takes place, and other costs shall be borne by the Court.

¹ ICC, *Prosecutor v. Kenyatta*, OTP, Public redacted version of the 8 May 2013 Prosecution response to the “Government of Kenya’s Submissions on the Status of Cooperation with the International Criminal Court, or, in the alternative, Application for Leave to file Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence” (ICC-01/09-02/11-713), 10 May 2013, ICC-01/09-02/11-733-Red, paras. 21–23 (<https://www.legal-tools.org/doc/684004/>).

Doctrine: For the bibliography, see the final comment on Article 100.

Author: Zhang Binxin.

Article 100(2)

2. The provisions of paragraph 1 shall, as appropriate, apply to requests from States Parties to the Court. In that case, the Court shall bear the ordinary costs of execution.

Paragraph 2 makes it clear that the provisions of paragraph 1 also apply to requests from States Parties to the Court. According to Article 93(10), the Court's assistance to States Parties includes mainly transmission of evidence obtained by the Court and the questioning of any person detained by order of the Court. If the Court agrees to co-operate with the requesting State Party, it will then bear the ordinary costs for executing such requests.

Cross-references:

Rule 208(1)(c, d, e).

Doctrine:

1. Claus Kreß and Kimberly Prost, "Article 100", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich, 2016, pp. 2155–2157 (<https://www.legal-tools.org/doc/040751/>).
2. Rod Rastan, "Testing Co-operation: The International Criminal Court and National Authorities", in *Leiden Journal of International Law*, 2008, vol. 21, no. 2, pp. 431–56.

Author: Zhang Binxin.

Article 101

Rule of Speciality

General Remarks:

Article 101 contains the rule of specialty which restricts the requesting jurisdiction to bringing proceedings only with respect to the crimes for which the person was surrendered.

The basis for the rule of speciality is States' sovereignty as the requesting State can only exercise jurisdiction if the requested State cooperates. If the requested by virtue of its sovereignty could refuse extradition for certain offences, it should also have the right to exclude offences being included in the proceedings in the requesting jurisdiction after extradition.¹

There are different views on whether the rule of speciality is a rule of customary international law. Justice Miller delivered the opinion of the US Supreme Court in the *Rauscher* case after having carefully examined the terms and history of the Webster Ashburton Treaty of 1842; the practice of nations in regards to extradition treaties; the case law from the states; and the writings of commentators, and reached the following conclusion:

[A] person who has been brought within the jurisdiction of the court *by virtue of proceedings under an extradition treaty*, can only be tried for one of the offences described in that treaty, and for the offence with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings.²

However, statutes of the *ad hoc* tribunals do obtain a rule of speciality. The Appeals Chamber in *Kovačević* stated that “if there exists such a customary international law principle, it is associated with the institution of

¹ Peter Wilkitzki, “Article 101 – Postponement of Execution of a Request in Respect of an Admissibility Challenge”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich, 2016, p. 2159 (<https://www.legal-tools.org/doc/040751/>).

² United States, Supreme Court, *United States v. Rauscher*, Judgment, 6 December 1886, 119 U.S. 407, p. 430. See also *United States v. Alvarez-Machain*, Judgment, 15 June 1992, 504 U.S. 655.

extradition as between states and does not apply in relation to the operations of the International Tribunal”.³

Schabas explains the existence of Article 101 in the ICC Statute with the tension between the ‘horizontal’ and ‘vertical’ view of the relationship between the States and the ICC. The inclusion of Article 101 is expression of the vision of the ICC’s surrender regimes to be analogous to that of extradition between sovereign States.⁴

Preparatory Works:

Article 55 of the ILC Draft Statute is very similar to the provision finally adopted and stated that “[a] person transferred to the Court under Article 53 shall not be subject to prosecution or punishment for any crime other than that for which the person was transferred”.⁵ The rule of speciality is to be found in Article 92 of the Preparatory Committee Draft Statute.⁶

Doctrine: For the bibliography, see the final comment on Article 101.

Author: Mark Klamberg.

³ ICTY, *Prosecutor v. Kovačević*, Appeals Chamber, Decision Stating Reasons for Appeals Chamber’s Order of 29 May 1998, 2 July 1998, IT-01-42-A, para. 37 (<https://www.legal-tools.org/doc/84b8e5/>).

⁴ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1362–1363 (<https://www.legal-tools.org/doc/b7432e/>).

⁵ Report of the International Law Commission on the work of its forty-sixth session (2 May–22 July 1994), UN Doc. A/49/10, 2 September 1994 (<https://www.legal-tools.org/doc/f73459/>).

⁶ Report of the Preparatory Committee on the Establishment of an International Criminal Court, A/CONF.183/2, 14 April 1998 (<https://www.legal-tools.org/doc/732f58/>).

Article 101(1)

1. A person surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered.

The first paragraph expresses the rule of speciality in a way similar to multilateral extradition treaties.

The provision only applies to “conduct committed prior to surrender”, which means that the Court is not limited to speciality considerations in relation to offence committed after the person has been surrendered to the Court. This clause may become relevant in the unlikely scenario that the person is released pending trial and commits crimes or commits crimes while in detention.¹

In the *Muthaura et al.* case, the Single Judge stated that the rationale of Article 101 of the Statute is to protect State sovereignty.² The Defence argued that “Article 101 does not make any distinction between a person, who is arrested pursuant to an arrest warrant, and a person, who voluntarily surrenders to the Court pursuant to a summons to appear”. To the contrary, the Single Judge observed that the application of the rule of speciality is limited to the scenarios in which the person is arrested and is surrendered as a result of a request submitted by the Court to the State. This distinction between a person who is surrendered and a person who voluntarily appears before the Court can be reduced from the statutory provisions, such as Articles 58(5) and 61(1) of the Statute.

¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1365 (<https://www.legal-tools.org/doc/b7432e/>).

² ICC, *Prosecutor v. Muthaura et al.*, Pre-Trial Chamber, Decision on the “Preliminary Motion Alleging Defects in the Documents Containing the Charges (DCC) and List of Evidence (LoE) and Request that the OTP be ordered to re-file an Amended DCC & LoE” and the “Defence Request for a Status Conference Concerning the Prosecution’s Disclosure of 19* August 2011 and the Document Containing the Charges and Article 101 of the Rome Statute”, 12 September 2011, ICC-01/09-02/11-315, para. 16 (<https://www.legal-tools.org/doc/8c4b2e/>).

Doctrine: For the bibliography, see the final comment on Article 101.

Author: Mark Klamberg.

Article 101(2)

2. The Court may request a waiver of the requirements of paragraph 1 from the State which surrendered the person to the Court and, if necessary, the Court shall provide additional information in accordance with Article 91. States Parties shall have the authority to provide a waiver to the Court and should endeavour to do so.

The State that surrenders the person may waive the rule of speciality which corresponds well with established extradition standards and the rationale underlying the rule.

Cross-references:

Rules 196 and 197.

Doctrine:

1. Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilms-hurst, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2014, p. 95.
2. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1362–1366 (<https://www.legal-tools.org/doc/b7432e/>).
3. Peter Wilkitzki, “Article 101 – Postponement of Execution of a Request in Respect of an Admissibility Challenge”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich, 2016, pp. 2158–2169 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Article 102

Use of Terms

For the purposes of this Statute:

(a) “surrender” means the delivering up of a person by a State to the Court, pursuant to this Statute.

(b) “extradition” means the delivering up of a person by one State to another as provided by treaty, convention or national legislation.

General Remarks:

The Article clarifies the Statute’s terminological distinction between delivering up a person in the interstate context (extradition) and in the relationship “State to Court” (surrender). With the term “extradition” follows in general a lot of safe guards for the individual. For example, many States prohibit the extradition of their nationals. Article 102 is an attempt to address potential difficulties in this area by specifying that transfer of a person by a State to the Court is not extradition but surrender.

The Article does not oblige States Parties to make use of the same terminological distinction in their respective national legislation since the opening wording is “for the purpose of this Statute”.

Doctrine:

1. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, Oxford, 2016, pp. 1367–1370 (<https://www.legal-tools.org/doc/b7432e/>).
2. Claus Kreß and Kimberly Prost, “Article 102 – Use of Terms”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich, 2016, pp. 2170–2171 (<https://www.legal-tools.org/doc/040751/>).

Author: Karin Pålé-Bartes.

PART 10. ENFORCEMENT

Article 103

Role of States in Enforcement of Sentences of Imprisonment

General Remarks:

International criminal law is intended ‘to put an end to impunity’ so that the enforcement of sentences represents the fulfilment of its mission. Although rarely at the centre of political and academic interest, the manner how sentences passed by international criminal tribunals are enforced is a crucial determinant of the legitimacy of the whole enterprise of international criminal justice.¹

Notably, the execution of long-term custodial sentences poses special problems since international courts up to now lack executive organs, thus depending on the co-operation of states. Accordingly, enforcement of sentences is just one form of necessary co-operation and, interestingly, it usually is the field of co-operation where the legal position of the international tribunal is at its weakest. States are extremely reluctant to make a general commitment to the burdensome and costly task of enforcing long-term prison sentences of international criminals. As a result, the enforcement regime still appears to be the least advanced part of international criminal justice, plagued by a number of structural problems which the conclusion of the ICC Statute could defuse in part but not resolve either.

The ICC Statute makes a terminological distinction reflected in its regulatory scheme between “Cooperation” in Part 9 – encompassing co-operation before and during trial – and “Enforcement” in Part 10 which

¹ Barbora Holá and Joris van Wijk, “Life after Conviction at International Criminal Tribunals”, in *Journal of International Criminal Justice*, 2014, vol. 12, pp. 110 ff., 132; Claus Kreß and Göran Sluiter, “Imprisonment”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 2, Oxford University Press, 2002, pp. 1752 ff., 1820; Jan Christoph Nemitz, “Execution of Sanctions Imposed by Supranational Criminal Tribunals”, in Roelof Haveman and Olaoluwa Olusanya (eds.), *Sentencing and Sanctioning in Supranational Criminal Law*, Intersentia, Antwerp, 2006, p. 144; Mary Margaret Penrose, “Spandau Revisited: The Question of Detention for International War Crimes”, in *New York Law School Journal of Human Rights*, 2000, vol. 16, p. 557 (‘Penrose, “Spandau Revisited”, 2000’).

covers co-operation after trial. In sharp contrast to the co-operation regime which with regard to States Parties has a fairly hierarchical or vertical structure, the enforcement regime is based on voluntariness – this has been deplored as a step back from the resolve that the prosecution of international crimes is a matter of joint concern of the international community (Kreß and Sluiter, 2002, pp. 1818 ff.).

The ICC does not operate an international prison for persons sentenced by the Court, but relies on States to enforce its judgments. Unlike the scheme of the International Military Tribunal at Nuremberg (joint enforcement of the prison sentences by the four Allied powers in a prison in Berlin-Spandau) and the International Military Tribunal for the Far East (enforcement of the prison sentences initially by the USA as occupying power and later by Japan in Sugamo prison in Tokyo), the approach of the Rome Statute may be described as ‘decentralized’, largely identical to the regime of the UN *ad hoc* tribunals, namely ICTY and ICTR. Although there were some expressions of sympathy for an international prison,² delegations in Rome favoured the ‘traditional’ scheme of the *ad hoc* tribunals, presumably as it can rely on existing national infrastructures (Kreß and Sluiter, 2002, pp. 1817 ff.). However, this type of “*ad hoc* approach to imprisonment”³ has been subject to criticism, as it puts the Court in a “penitentiary predicament”,⁴ since there is no general legal obligation of States

² Eleventh Report on the Draft Code of Crimes against Peace and Security of Mankind by Mr. Doudou Thiam, Special Rapporteur, UN Doc. A/CN.4/449, 25 March 1995, para. 121 (<https://www.legal-tools.org/doc/7cc5dc/>); Report of the International Law Commission on the work of its forty-sixth session (2 May-22 July 1994), UN Doc. A/49/10, 2 September 1994, pp. 66 *vf.* (<https://www.legal-tools.org/doc/f73459/>); cf. ICTY, *Prosecutor v. Erdemović*, Trial Chamber, Sentencing Judgment, 29 November 1996, IT-96-22-T, para. 71 (<https://www.legal-tools.org/doc/eb5c9d/>): “institutional lacuna”; Denis Abels, *Prisoners of the International Community: The Legal Position of Persons Detained at International Criminal Tribunals*, T.M.C. Asser Press/Springer, The Hague/Berlin/Heidelberg, 2012, pp. 504–506; Róisín Mulgrew, “On the Enforcement of Sentences Imposed by International Courts”, in *Journal of International Criminal Justice*, 2009, vol. 7, pp. 395 *vf.*; Mary Margaret Penrose, “Lest We Fail: The Importance of Enforcement in International Criminal Law”, in *American University International Law Review*, 2000, vol. 15, p. 390; Penrose, “Spandau Revisited”, 2000, pp. 583–587; cf. also Kai Ambos, *Treatise on International Criminal Law*, vol. 3, Oxford University Press, Oxford, 2016, p. 637.

³ Inés Mónica Weinberg de Roca and Christopher M. Rassi, “Sentencing and Incarceration in the Ad Hoc Tribunals”, in *Stanford Journal of International Law*, 2008, vol. 44, p. 44.

⁴ Gerard A. M. Strijards and Robert O. Harmsen, “Article 103”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, Article 103 *mgn.* 18; Da-

Parties to recognize and enforce prison sentences of the ICC, so that the Court is (almost) entirely dependent on the goodwill of States (cf. Ambos, 2016, p. 636 ff.; Strijards and Harmsen, 2016, Article 103 mgn. 18). Others argue that the ‘lottery’ which State will be designated in a particular case affects both the equality and uniformity of the enforcement of international sentences, for example due to significantly different understandings of a “life sentence”⁵ or living standards.⁶

Yet, the ultimate responsibility for the enforcement of its sentences rests at all times with the Court, as is reflected in the supervisory powers (*vis-à-vis* “primacy”, Strijards and Harmsen, 2016, Article 103 mgn. 7–15; Kreß and Sluiter, 2002, pp. 1819–1821) accorded to it throughout Part 10. These powers are generally vested in the Presidency (Rule 199) and, in contrast to the *ad hoc* tribunals, in the Appeals Chamber with respect to the reduction of the sentence (Article 110, Rule 223). The enforcement regime in Articles 103–111 is applicable *mutatis mutandis* to offences against the administration of justice (Article 70), as provided in Rule 163(1). However, there seems to be much more leeway for States of enforcement, as Articles 104, 105, 106, 108 and 110 that lay down the Court’s core supervisory powers are not applicable to sentences of imprisonment under Article 70 by virtue of Rule 163(3). The sentences of imprisonment handed down in the first Article 70 proceedings at the ICC have been considered served due to the considerable length of the time the convicted had already spent in detention.⁷

Preparatory Work:

During the negotiations in Rome it was proposed that States should be bound by the Court’s designation as State of enforcement,⁸ but this sugges-

vid Tolbert, “The International Tribunal for the Former Yugoslavia and the Enforcement of Sentences”, in *Leiden Journal of International Law*, 1998, vol. 11, p. 658.

⁵ Klaus Hoffmann, “Some Remarks on the Enforcement on International Sentences in Light of the Galic case at the ICTY”, in *Zeitschrift für Internationale Strafrechtsdogmatik*, 2011, pp. 838 ff., 841.

⁶ Cf. Alexander Zahar and Göran Sluiter, *International Criminal Law – A Critical Introduction*, Oxford University Press, 2008, p. 319.

⁷ ICC, *Prosecutor v. Bemba et al.*, Trial Chamber VII, Decision Re-sentencing Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba and Mr Jean-Jacques Mangenda Kabongo, 17 September 2018, ICC-01/05-01/13-2312, pp. 50, 51 (<https://www.legal-tools.org/doc/1a7f80/>).

⁸ Report of the Preparatory Committee on the Establishment of the International Criminal Court, UN Doc. A/CONF.183/2/Add.1, 14 April 1998, p. 151, Article 94, Option 1

tion was rejected by the majority of delegations as too “inflexible”⁹ and because States shied away from the burdens and risks involved.¹⁰ Therefore, as opposed to the general duty to co-operate with the Court (Article 86) and the obligation to enforce fines, forfeiture and reparation orders (Article 75(5), 109), States’ participation in enforcement of custodial services is entirely voluntarily (Schabas, 2016, p. 1375), even after having declared their general willingness to enforce (Article 103(1)(a)) and later being designated as potential State of enforcement by the Court (Article 103(1)(c)).

It was further discussed whether States should be allowed to attach conditions to their willingness to accept prisoners. Although this could further distort the uniformity of the enforcement of international sentences, the majority of delegations favoured the possibility of conditions in order to enhance the willingness of States to volunteer for enforcement (cf. Strijards and Harmsen, 2016, Article 103 mgn. 24). For this reason, the proposal was eventually adopted¹¹ and has become Article 103(1)(b). However, as a compromise, the State of enforcement has to notify the Court according to Article 103(2)(a) at least 45 days before the exercise of such a condition which could materially affect the punishment. Furthermore, Article 97 did not contain any reference to interests of the sentenced person. A Syrian proposal to include the option to transfer the sentenced person “to the State of his or her choice”¹² was declined. However, for human rights

(<https://www.legal-tools.org/doc/816405/>); Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN Doc. A/50/22, 7 September 1995, para. 239 (<https://www.legal-tools.org/doc/b50da8/>).

⁹ Trevor Pascal Chimimba, “Chapter 11 – Establishing An Enforcement Regime”, in Roy S. Lee, (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999–2002, p. 350; Kreß and Sluiter, 2002, p. 1787; Antonio Marchesi, “The Enforcement of Sentences of the International Criminal Court”, in Flavia Lattanzi and William A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, il Sirente, Ripa Fagnano Alto, 1999, pp. 427–430.

¹⁰ Cf. Irene Gartner, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in Horst Fischer, Claus Kress and Sascha Luder (eds.), *International and National Prosecution of Crimes Under International Law*, Berlin Verlag, Berlin, 2001, p. 441.

¹¹ Chimimba, 1999–2002, p. 350; Kimberly Prost, “Chapter 14 – Enforcement”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, p. 675.

¹² Proposal Submitted by the Syrian Arab Republic, Article 97: Transfer of the Person upon Completion of the Sentence, UN Doc. A/CONF.183/C.1/WGE/L.5, 1 July 1998 (<https://www.legal-tools.org/doc/797063/>).

concerns,¹³ the Committee of the Whole later added the requirement to take “into account any wishes of the person”.¹⁴

Doctrine: For the bibliography, see the final comment on Article 103.

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

¹³ Cf. Chimimba, 1999–2002, pp. 353 ff. and William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, Oxford, 2016, p. 1397; both referring to Report of the Drafting Committee to the Committee of the Whole, Part 10, UN Doc. A/CONF.183/DC/C.1/L.86, 16 July 1998, p. 4 fn. 1 (<https://www.legal-tools.org/doc/d61f4e/>).

¹⁴ Draft Statute for the International Criminal Court, Part 10, UN Doc. A/CONF.183/C.1/L.76/Add.10, 17 July 1998 (<https://www.legal-tools.org/doc/6558c7/>).

Article 103(1)(a)

1. (a) A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.

The wording “a State designated” was deliberately chosen to include non-State Parties as possible States of enforcement, although such a situation does not seem very likely.¹ It must be taken into account, however, that non-States Parties are not bound by the provisions of the Statute and its Part 10 so that the conclusion of an enforcement agreement (cf. Rule 200(5)) might be indispensable before including the State on the list (or even making a designation under Article 103(1)(c)).

The State of enforcement shall be designated from a list of States that have indicated their willingness to accept sentenced persons. Such a declaration upon ratification of the Statute has been made by at least nine States Parties: Andorra, Czech Republic, Honduras, Liechtenstein, Lithuania, Luxembourg, Slovakia, Spain and Switzerland.² All of them have attached conditions to this declaration, which are discussed below. In addition, all eleven Enforcement Agreements that have entered into force to date note in their preamble the willingness of the respective State to receive prisoners. It is important to note that this still does not impose the obligation to actually accept convicted persons on the State.³ In this way, the States listed below have declared their interest to join the list (cf. also Ambos, 2016, p. 639). For details on the maintenance of the list see comment on Rule 200.

Although the Statute itself does not provide for this, Rule 200(5) and the Court’s practice follow the model of the *ad hoc* tribunals by concluding bilateral agreements with willing states in which the conditions and procedure of acceptance are set out. A Model Enforcement Agreement (‘MEA’) is used which integrates all relevant provisions from the Statute, Rules and

¹ Kai Ambos, *Treatise on International Criminal Law*, vol. 3, Oxford University Press, Oxford, 2016, pp. 636 ff.; Kimberly Prost, “Chapter 14 – Enforcement”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, p. 679.

² The Declarations are archived on the United Nations Treaty Collection web site.

³ Cf. ICC, Report of the Court on Cooperation, ICC-ASP/12/35, 9 October 2013, para. 34; William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1378 ff. (<https://www.legal-tools.org/doc/b7432e/>).

Regulations. If a State expresses its interest in joining the list, negotiations based on the MEA are initiated.⁴ As of August 2022, 14 States Parties have concluded an Enforcement Agreement with the Court: Argentina, Austria, Belgium, Colombia, Denmark, Finland, France, Georgia, Mali, Norway, Serbia, Slovenia, Sweden and the United Kingdom, 12 of them have entered into force. For details on the practice of the Court with regard to enforcement agreements, cf. Rule 200(5).

The wording seems to imply that only States on the list may be designated, thereby excluding *ad hoc* agreements for enforcement⁵ of the kind practiced by the ICTY and the IRMCT with regard to Germany.⁶ Since States on the list have to accept the designation according to Article 103(1)(c) in each individual case anyway (by what may be called an ‘*ad hoc* agreement’), it is submitted that the designation of States not on the list should be possible to satisfy the needs of States that prefer not to express a general willingness to enforce the Court’s sentences for whatever reasons. This is now also the approach of the Presidency, as the Court has concluded two *ad hoc* Enforcement Agreements with the Democratic Republic of the Congo for Thomas Lubanga Dyilo⁷ and Germain Katanga.⁸

The decision of the Presidency to designate a specific State is not subject to appeal, as it is not included in the exhaustive list of appealable decisions in Article 82(1). As opposed to some jurisprudence of the *ad hoc* tribunals regarding aspects of the enforcement as relevant for the sentencing judgment and thus substantive matters,⁹ the designation is generally

⁴ Hiram Abtahi and Steven Arrigg Koh, “The Emerging Enforcement Practice of the International Criminal Court”, in *Cornell International Law Journal*, 2012, vol. 45, pp. 7 ff.

⁵ Cf. Claus Kreß and Göran Sluiter, “Imprisonment”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 2, Oxford University Press, 2002, p. 1790 fn. 198.

⁶ Agreements of 17 October 2000: *Tadić*; cf. Nemitz, 2006, pp. 138 ff.); 14 November 2002 (*Kunarac*); 16 December 2008 (*Galić I*); 16 June 2011 (*Tarčulovski*); 28 July 2014 (*Đorđević*); 11 February 2015 (*Galić II*); 26 June 2015 (*Popović*); 26 June 2015 (*Beara*). The agreements are accessible on the web sites of the ICTY and the IRMCT.

⁷ ICC, *Prosecutor v. Lubanga*, Presidency, Decision Designating a State of enforcement, Annex, 8 December 2015, ICC-01/04-01/06-3185-Anx, Article 9 (<https://www.legal-tools.org/doc/31h7sm/>).

⁸ ICC, *Prosecutor v. Lubanga*, Presidency, Decision designating a State of enforcement, 8 December 2015, ICC-01/04-01/07-3626-Anx, Annex I, Art. 9 (<https://www.legal-tools.org/doc/fae14f/>).

⁹ Cf. ICTY, *Prosecutor v. Erdemović*, Trial Chamber, Sentencing Judgment, 29 November 1996, IT-96-22-T, para. 70 (<https://www.legal-tools.org/doc/eb5c9d/>); *Prosecutor v. Mrđa*,

seen as an administrative decision after the sentence has already become final.¹⁰ A sentenced person has therefore no right to appeal the designation and will have to rely on his or her right to initiate proceedings under Article 104.¹¹

Cross-references:

Rules 163, 198, 199, 200, 207, 208, and 225.

Regulation 114.

Doctrine: For the bibliography, see the final comment on Article 103.

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Trial Chamber, Sentencing Judgment, 31 March 2004, IT-02-59-S, para. 109 (<https://www.legal-tools.org/doc/d61b0f/>).

¹⁰ Cf. for the RSCSL: *Prosecutor v. Taylor*, Residual SCSL, *Prosecutor v. Taylor*, Presidency, Decision on Charles Ghankay Taylor’s Motion for Termination of Enforcement of Sentence in the United Kingdom and for the Transfer to Rwanda and on Defence Application for Leave to Appeal Decision on Motion for Termination of Enforcement of Sentence in the United Kingdom and for the Transfer to Rwanda, 21 May 2015, RSCSL-03-03-ES, paras. 20 ff. (<https://www.legal-tools.org/doc/e7a83f/>).

¹¹ For a critique see Denis Abels, *Prisoners of the International Community: The Legal Position of Persons Detained at International Criminal Tribunals*, T.M.C. Asser Press/Springer, The Hague/Berlin/Heidelberg, 2012, pp. 501–504; cf. also Michael Stiel and Carl-Friedrich Stuckenberg, “Aut iustitia aut pax? Enforcement of International Prison Sentences in (Former) Conflict Areas”, in Martin Böse, Michael Bohlander, André Kilp and Otto Lagodny (eds.), *Justice Without Borders – Essays in Honour of Wolfgang Schomburg*, Brill, Leiden, 2018, pp. 453–455.

Article 103(1)(b)

(b) At the time of declaring its willingness to accept sentenced persons, a State may attach conditions to its acceptance as agreed by the Court and in accordance with this Part.

The practice of attaching conditions to a declaration of willingness to enforce (for example nationality, residence of the convict in the declaring State) has already been known to the *ad hoc* tribunals.¹

Conditions attached must be consistent with the Statute. However, this does not create a very high threshold: Given the wording of Article 105(1), even the duration of the sentence may be ‘subject to conditions’, a result that is subject to criticism,² but arguably the only plausible interpretation of the wording.³ The Court therefore has a considerable latitude to agree on a great variety of conditions and it is likely that the Presidency will make only sparse use of its power to disagree with a certain condition, except, for example, in case a State should want to reserve the right to fall below the standards required by Article 106 (Kreß and Sluiter, 2002, pp. 1788, 1794; see also comment on Article 106). If the Presidency does not agree with the proposed conditions, it need not include that State on the list, see Rule 200(2).

Except for Article 105(2) and 106(1) and (2), there is no further guidance regarding the acceptability of conditions, neither in the Statute nor in the RPE nor in the Regulations.⁴ This lacuna has caused concerns that States might abuse conditions (such as a reservation of ‘national inter-

¹ Report of the international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, UN Doc. A/51/292, S/1996/665, 18 August 1996, para. 189 (<https://www.legal-tools.org/doc/22c74d/>); William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1374 ff. (<https://www.legal-tools.org/doc/b7432e/>).

² Cf. Kai Ambos, *Treatise on International Criminal Law*, vol. 3, Oxford University Press, 2016, p. 644 fn. 93.

³ Cf. Claus Kreß and Göran Sluiter, “Imprisonment”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 2, Oxford University Press, 2002, p. 1794; Schabas, 2016, p. 1381.

⁴ Schabas, 2016, pp. 1381 ff.; Gerard A. M. Strijards, “Article 103 – Role of States in Enforcement of Sentences of Imprisonment”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2nd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2008, Article 103 mgn. 24.

est' in the relevant prison facility) to withdraw via the backdoor from enforcement obligations they previously agreed upon.⁵ However, an analysis of the conditions attached by States to date does not support this concern.⁶ The majority of States having declared their willingness legitimately insist on ties to the sentenced person such as citizenship (Andorra, Czech Republic, Honduras, Liechtenstein, Lithuania, Luxembourg, Slovakia, Switzerland) or residence (Czech Republic, Liechtenstein, Luxembourg, Slovakia, Switzerland). Some require conformity with their national legislation on the maximum duration of sentences (Andorra, Honduras, Luxembourg, Spain) or a national conversion procedure (Slovakia). One has to bear in mind that States may apply conditions other than those expressed in the list when deciding whether to accept the designation in a particular case (cf. Article 103(1)(c)). Thus, the conditions on the list are not exhaustive. Other possible conditions could include the applicability of domestic law relating to pardon, conditional release and commutation of sentence.⁷ Given the fact that the Court retains the ultimate control over the length of the sentence it seems too harsh to conclude that this is inconsistent with the Statute⁸ or other administrative issues, such as the maximum capacity of a special secured facility.⁹

Doctrine: For the bibliography, see the final comment on Article 103.

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⁵ Gerard A. M. Strijards and Robert O. Harmsen, "Article 103", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, Article 103 mgn. 24.

⁶ Cf. Hiran Abtahi and Steven Arrigg Koh, "The Emerging Enforcement Practice of the International Criminal Court", in *Cornell International Law Journal*, 2012, vol. 45, p. 9 with respect to enforcement agreements.

⁷ Strijards and Harmsen, 2016, Article 103 mgn. 24, cf. also the Agreement between the Kingdom of Denmark and the International Criminal Court on the Enforcement of Sentences of the International Criminal Court, ICC-PRES/12-02-12, 5 July 2012, Article 12(3)–(5) (<https://www.legal-tools.org/doc/cc1900/>).

⁸ Cf. however Róisín Mulgrew, *Towards the Development of the International Penal System*, Cambridge University Press, 2013, pp. 77 ff.

⁹ Report of the Preparatory Committee on the Establishment of the International Criminal Court, 14 April 1998, UN Doc. A/CONF.183/2/Add.1, p. 152 (<https://www.legal-tools.org/doc/816405/>); Report of the Intersessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands: Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/AC.249/1998/L.13, 5 February 1998, p. 162 (<https://www.legal-tools.org/doc/7ba9a4/>); Strijards and Harmsen, 2016, Article 103 mgn. 24.

Article 103(1)(c)

(c) A State designated in a particular case shall promptly inform the Court whether it accepts the Court's designation.

Even after having been designated from the list, the State in question reserves the right to reject the designation by the Court in a particular case.¹ The advantages of having the list are therefore quite limited. It may only give the Presidency the “most concrete idea” which State to approach in a particular case (Kreß and Sluiter, 2002, p. 1790) and have some significance for the designation decision itself, as Rule 201(b) attaches some weight to it under the criterion of “equitable distribution” in Article 103(3)(a).

In case of acceptance of the designation Rules 206–208 apply, in case of rejection Rule 205 applies.

Cross-references:

Rule 205 and 206.

Doctrine: For the bibliography, see the final comment on Article 103.

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¹ Hirad Abtahi and Steven Arrigg Koh, “The Emerging Enforcement Practice of the International Criminal Court”, in *Cornell International Law Journal*, 2012, vol. 45, pp. 6–10; Claus Kreß and Göran Sluiter, “Imprisonment”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 2, Oxford University Press, 2002, p. 1787: system of “double-consent”.

Article 103(2)

2. (a) The State of enforcement shall notify the Court of any circumstances, including the exercise of any conditions agreed under paragraph 1, which could materially affect the terms or extent of the imprisonment. The Court shall be given at least 45 days' notice of any such known or foreseeable circumstances. During this period, the State of enforcement shall take no action that might prejudice its obligations under article 110.

(b) Where the Court cannot agree to the circumstances referred to in subparagraph (a), it shall notify the State of enforcement and proceed in accordance with Article 104, paragraph 1.

According to Article 103(2)(a), the State of enforcement has to notify the Court of any circumstances that would materially affect the imprisonment, namely the exercise of a condition previously agreed upon by the Court. This is a corollary of the Court's supervisory powers regarding the enforcement of its sentences. For known or foreseeable circumstances, the notification shall be made at least 45 days in advance. This shall provide the Court with sufficient time to decide whether it can approve such action and, if necessary, to find a solution agreeable for both.¹ In the negative, Article 103(2)(b) enables the Court to prepare for a change of the State of enforcement pursuant to Article 104(1). Given the narrow time limit in this case for the complex process of selecting a new State of enforcement and preparing for the transfer of the sentenced person thereto, the Court might depend on the residual duty of the host State to detain the prisoner for the time being.²

The Presidency's power to decide whether the exercise of a condition is appropriate seems somewhat surprising, if one imagines a condition which affects the duration of the sentence – this is admissible under Article

¹ Gerard A. M. Strijards and Robert O. Harmsen, "Article 103", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, (<https://www.legal-tools.org/doc/040751/>), Article 103 mgn. 25.

² In analogy to Article 103(4), proposed by Claus Kreß and Göran Sluiter, "Imprisonment", in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 2, Oxford University Press, 2002, p. 1795 fn. 224 and provided for in Article 50(2) of the Headquarters Agreement between the International Criminal Court and the Host State, ICC-BD/04-01-08, 1 March 2008 (<https://www.legal-tools.org/doc/45e340/>).

105(1) – for example, to apply national legislation on early release or the exercise of the constitutional right of its head of state to pardon a prisoner. Article 110 and Rule 224 regard matters of reduction of the sentence as substantive questions and therefore entrust them to three judges of the Appeals Chamber (cf. Rule 224(1)). If, on the other hand, the State of enforcement wishes to make a similar decision, the Presidency is the reviewing organ, according to Article 103(2) and Rule 199 (cf. Kreß and Sluiter, 2002, p. 1795 fn. 225).

Doctrine: For the bibliography, see the final comment on Article 103.

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Article 103(3)

3. In exercising its discretion to make a designation under paragraph 1, the Court shall take into account the following:

(a) The principle that States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution, as provided in the Rules of Procedure and Evidence;

(b) The application of widely accepted international treaty standards governing the treatment of prisoners;

(c) The views of the sentenced person;

(d) The nationality of the sentenced person;

(e) Such other factors regarding the circumstances of the crime or the person sentenced, or the effective enforcement of the sentence, as may be appropriate in designating the State of enforcement.

The decision which State to designate is at the Presidency's discretion. Article 103(3) provides a non-exhaustive list of factors to be taken into account:

1. The equitable distribution of prisoners among interested States shall be taken into account. This notion is elaborated in Rule 201 (for details, see comment on this rule).
2. The application of widely accepted international treaty standards regarding the treatment of prisoners is another criterion. It should be noted that the reference to "treaty" standards considerably limits the scope of applicable provisions. The details are dealt with in the commentary on Article 106. Given the importance the Statute itself attaches to conformity with those standards (Article 106(1) and (2)), foreseeable non-compliance should generally preclude the designation of a particular State¹ in contrast to the less strict requirement of the Practice Directions of ICTR and SCSL.²

¹ Claus Kieß and Göran Sluiter, "Imprisonment", in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 2, Oxford University Press, 2002, p. 1788.

² "If possible": ICTR, "Practice Direction on the Procedure for Designation of the State in which a Convicted Person is to serve his/her sentence of imprisonment", 23 September 2008, para. 3(vi) ('ICTR-Practice Direction, 2008') (<https://www.legal-tools.org/doc/cc1f18/>); SCSL Practice Direction, 2009, para. 4(viii) ('SCSL-Practice Direction, 2009').

3. The views of the sentenced person are to be taken into account. At the *ad hoc* tribunals, it was completely left to the discretion of the President whether he wanted to conduct a hearing with the sentenced person.³ Under the ICC Statute, there is no doubt that the sentenced person must have an opportunity to present his or her views on the designation⁴ which should be seriously taken into account,⁵ although his or her consent is not required.⁶ The two public designation decisions to date give emphasis to the fact that the sentenced persons expressed a desire to be transferred to the respective State of enforcement.⁷ Rule 203 outlines the relevant procedure.
4. The criterion of the sentenced person's nationality does not necessarily point in one direction. Enforcement in the State of nationality of the sentenced person would be clearly preferable regarding his or her rehabilitation. However, such a designation bears the risk that the sentenced person will be regarded either a 'hero' or, in the case of a

³ ICTY, *Prosecutor v. Kvočka et al.*, Presidency, Decision on Request of Zoran Žigić, 31 May 2006, IT-98-30/1-ES, para. 2 (<https://www.legal-tools.org/doc/znx29/>); Klaus Hoffmann, "Some Remarks on the Enforcement on International Sentences in Light of the Galic case at the ICTY", in *Zeitschrift für Internationale Strafrechtsdogmatik*, 2011, p. 839; ICTY, "Practice Direction on the Procedure for the International Tribunal's Designation of the State in Which a Convicted Person is to Serve His/Her Sentence of Imprisonment", 1 September 2009, IT/137/Rev. 1, para. 5 ('ICTY-Practice Direction, 2009') (<https://www.legal-tools.org/doc/4b71d5/>); ICTR-Practice Direction 2008, para. 4; IRMCT, "Practice Direction on the Procedure for Designation of the State in Which a Convicted Person is to Serve His or Her Sentence of Imprisonment", 24 April 2014, MICT/2 Rev. 1, para. 5 ('IRMCT-Practice Direction, 2014') (<https://www.legal-tools.org/doc/c4311b/>); SCSL, "Practice direction for designation of state for enforcement of sentence", 10 July 2009, para. 5 (<https://www.legal-tools.org/doc/667323/>).

⁴ Gerard A. M. Strijards and Robert O. Harmsen, "Article 103", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, (<https://www.legal-tools.org/doc/040751/>), Article 103 mgn. 28.

⁵ Harmen van der Wilt, "The transfer of the execution of the International Criminal Court in light of inter-State practice", in Róisín Mulgrew and Denis Abels (eds.), *Research handbook on the International Penal System*, Edward Elgar Publishing, Northampton, 2016, pp. 203–205.

⁶ Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN Doc. A/50/22, 7 September 1995, para. 240 (<https://www.legal-tools.org/doc/b50da8/>).

⁷ ICC, *Prosecutor v. Katanga*, Presidency, Decision designating a State of enforcement, ICC-01/04-01/07-3626, 8 December 2015, p. 4 ('*Katanga*, 8 December 2015') (<https://www.legal-tools.org/doc/8d5ad5/>); *Prosecutor v. Lubanga*, Presidency, Decision designating a State of Enforcement, ICC-01/04-01/06-3185, 8 December 2015, p. 4 ('*Lubanga*, 8 December 2015') (<https://www.legal-tools.org/doc/fae14f/>).

regime change, a traitor in the eyes of his fellow citizens, both undesirable situations to be avoided when entrusting the enforcement of an international sentence to a particular State (cf. Kreß and Sluiter, 2002, pp. 1788 ff.). The Presidency in its two public designation decisions to date has taken an optimistic view and refrained from discussing the latter aspects.⁸

5. The discretion of the Presidency is rather broad, as there is no guidance in the Rules of Procedure and Evidence what these other factors could be (Kreß and Sluiter, 2002, pp. 1788 ff.).

However, the practice directions of the *ad hoc* tribunals, the IRMCT and the SCSL provide some additional criteria that could be applied at the ICC as well. Those include:

- whether the convict is expected to serve as a witness in further proceedings (ICTY-Practice Direction, 2009, para. 4(b), (c); ICTR-Practice Direction, 2008, para. 3(ii), (iii); IRMCT-Practice Direction, 2014, para. 4(b), (c); SCSL-Practice Direction 2009, para. 4(ii), (iii));
- medical reports (ICTY-Practice Direction, 2009, para. 4(d); ICTR-Practice Direction, 2008, para. 3(iv); IRMCT-Practice Direction, 2014, para. 4(d); SCSL-Practice Direction, 2009, para. 4(iv));
- the language skills of the convict (ICTY-Practice Direction, 2009, para. 4(e)); ICTR-Practice Direction, 2008, para. 3(v); IRMCT-Practice Direction, 2014, para. 4(e); SCSL-Practice Direction, 2009, para. 4(v);)
- the possibility of family visits, notably the financial resources of the prisoner's relatives (ICTY-Practice Direction, 2009, para. 4(a); ICTR-Practice Direction, 2008, para. 3(i); IRMCT-Practice Direction, 2014, para. 4(a); SCSL-Practice Direction, 2009, para. 4(i)). This ought to be given "particular consideration" (ICTY-Practice Direction, 2009, para. 5; ICTR-Practice Direction, 2008, para. 4; IRMCT-Practice Direction, 2014, para. 5; SCSL-Practice Direction, 2009, para. 5 even highlights the "desirability" of a placement in a State easily accessible for relatives). See in this regard the reference to the maintenance of family ties in the two public designation deci-

⁸ *Katanga*, 8 December 2015, p. 4; *Lubanga*, 8 December 2015, p. 4; cf. ICC, Report of the Court on Cooperation, ICC-ASP/12/35, 9 October 2013, para. 37.

sions of the ICC Presidency (*Katanga*, 8 December 2015, p. 4; *Lubanga*, 8 December 2015, p. 4);

- whether the sentenced person may be able to stay in the State of enforcement after release in case he or she cannot return to his home country for security reasons (IRMCT-Practice Direction, 2014, para. 4(h)).

While the State in which the crime was committed was rejected as place of enforcement in case of the ICTY,⁹ ICTR and SCSL do not preclude or, on the contrary, even favour such a designation.¹⁰ Apparently, also the ICC Presidency is of the view that enforcement in the State in which the crimes were committed is preferable (*Katanga*, 8 December 2015, p. 4). This criterion has implications similar to the nationality of the sentenced person.

The (undesired) relocation of a prisoner into another environment according to Article 104(1), possibly with major cultural and linguistic differences, may present an obstacle to his rehabilitation and thus aggravate his sentence. Therefore, the likelihood of a later transfer to another State of enforcement should bear considerable weight already in the designation phase.

Cross-references:

Rule 201, 203 and 204.

Doctrine: For the bibliography, see the final comment on Article 103.

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

⁹ Cf. ICTY, *Prosecutor v. Erdemović*, Trial Chamber, Sentencing Judgment, 29 November 1996, IT-96-22-T, para. 70 (<https://www.legal-tools.org/doc/eb5c9d/>); Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 88(1993), UN Doc. S/25704, 3 May 1993, para. 121 (<https://www.legal-tools.org/doc/c2640a/>).

¹⁰ Article 26 ICTR Statute; cf. Report of the Secretary-General pursuant to Paragraph 5 of Security Council Resolution 955 (1994), UN Doc. S/1995/134, 13 February 1995, para. 19 (<https://www.legal-tools.org/doc/b38d4d/>); Article 22(1) SCSL Statute; cf. Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, para. 49 (<https://www.legal-tools.org/doc/4af5d2/>).

Article 103(4)

4. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State, in accordance with the conditions set out in the headquarters agreement referred to in Article 3, paragraph 2. In such a case, the costs arising out of the enforcement of a sentence of imprisonment shall be borne by the Court.

If no other State of enforcement can be found, the host State acts as a “residual custodian on behalf of the Court”.¹ It is the understanding of the Dutch Government that it is obliged to enforce the sentence and not only to make “a prison facility available” to the Court.² Details are regulated in the agreement with the host State which merely repeats the provisions of Part 10 (Article 49(4) of the Headquarters Agreement) and therefore does not add anything substantial (Strijards and Harmsen, 2016, Article 103 mgn. 30).

At first glance, one could be tempted to regard this option as the nucleus of a future international prison, especially in light of the fact that many prisoners of the *ad hoc* tribunals serve their entire sentence or a large part of it at those tribunals’ detention units,³ which led to the warning that this option might become the rule rather than the exception.⁴ However, Ar-

¹ Gerard A. M. Strijards and Robert O. Harmsen, “Article 103”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, Article 103 mgn. 29.

² Denis Abels, *Prisoners of the International Community: The Legal Position of Persons Detained at International Criminal Tribunals*, T.M.C. Asser Press/Springer, The Hague/Berlin/Heidelberg, 2012, pp. 459–461.

³ Richard Culp, *Enforcement and Monitoring of Sentences in the Modern War Crimes Process: Equal Treatment before the Law?*, 2011, p. 13; Róisín Mulgrew, “On the Enforcement of Sentences Imposed by International Courts”, in *Journal of International Criminal Justice*, 2009, vol. 7, p. 393; Jan Christoph Nemitz, “Execution of Sanctions Imposed by Supranational Criminal Tribunals”, in Roelof Haveman and Olaoluwa Olusanya (eds.), *Sentencing and Sanctioning in Supranational Criminal Law*, Intersentia, Antwerp, 2006, p. 137; Dirk van Zyl Smit, “International Imprisonment”, in *International and Comparative Law Quarterly*, 2005, vol. 54, p. 367; Inés Mónica Weinberg de Roca and Christopher M. Rassi, “Sentencing and Incarceration in the Ad Hoc Tribunals”, in *Stanford Journal of International Law*, 2008, vol. 44, p. 47.

⁴ Trevor Pascal Chimimba, “Chapter 11 – Establishing An Enforcement Regime”, in Roy S. Lee, (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999–2002, p. 351.

ticle 103(4) only eases the Court’s predicament to find a suitable enforcement State and does not solve it because resort to the host State comes at a price, as the Court will bear the costs of such imprisonment (see below), and is not a permanent solution because the Netherlands were particularly nervous about this provision⁵ and consequently, the Headquarters Agreement requires the Court to “endeavour” to seek another State of enforcement.⁶ Therefore, on the one hand, the residual duty cannot be used to avoid the complex designation process under Article 103(1)-(3) altogether. Only when the remaining time to be served is less than six months, the Court will first consider whether the sentence may be enforced in the Court’s detention centre instead of designating another enforcement State (Article 50(1) of the Headquarters Agreement; cf. Abels, 2012, p. 496). On the other hand, the Court would not be bound to give priority to another State willing to enforce when it deems the transfer thereto completely inappropriate.⁷

The costs of enforcement in this situation are borne by the Court, as an exception from the general rule set out in Rule 208. This provision had been insisted upon by the Netherlands (Chimimba, 1999–2002, p. 351) and seems fair insofar as the sentence is not enforced by the host State after accepting an individual designation (Article 103(1)(c)).

Cross-references:

Article 104.

Rules 198–208.

Regulation 114.

Doctrine:

1. Denis Abels, *Prisoners of the International Community: The Legal Position of Persons Detained at International Criminal Tribunals*, T.M.C. Asser Press/Springer, The Hague/Berlin/Heidelberg, 2012.

⁵ Cf. Dutch declaration on the Rome Conference emphasizing the “exceptional character” of the residual duty, Declaration by the Delegation of the Kingdom of the Netherlands, UN Doc. A/CONF.183/12, 17 July 1998 (<https://www.legal-tools.org/doc/476ac9/>).

⁶ Headquarters Agreement between the International Criminal Court and the Host State, ICC-BD/04-01-08, 1 March 2008, Article 49(1), (3) (<https://www.legal-tools.org/doc/45e340/>).

⁷ Claus Kreß and Göran Sluiter, “Imprisonment”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 2, Oxford University Press, 2002, pp. 1790 ff.

2. Hiram Abtahi, “L’exécution de la peine”, in Hervé Ascensio, Emmanuel Decaux and Alain Pellet (eds.), *Droit pénal international*, 2nd ed., A. Pedone, Paris, 2012, pp. 989–96.
3. Hiram Abtahi and Steven Arrigg Koh, “The Emerging Enforcement Practice of the International Criminal Court”, in *Cornell International Law Journal*, 2012, vol. 45, no. 1, pp. 1–23.
4. Kai Ambos, *Treatise on International Criminal Law*, vol. 3, Oxford University Press, 2016, pp. 635–659 (Chapter VIII).
5. Trevor Pascal Chimimba, “Chapter 11 – Establishing An Enforcement Regime”, in Roy S. Lee, (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999/2002, pp. 345–56.
6. Richard Culp, *Enforcement and Monitoring of Sentences in the Modern War Crimes Process: Equal Treatment before the Law?*, 2011.
7. Irene Gartner, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in Horst Fischer, Claus Kress and Sascha Luder (eds.), *International and National Prosecution of Crimes Under International Law*, Berlin Verlag, Berlin, 2001, pp. 423–45.
8. Klaus Hoffmann, “Some Remarks on the Enforcement on International Sentences in Light of the Galic case at the ICTY”, in *Zeitschrift für Internationale Strafrechtsdogmatik*, 2011, pp. 838–42.
9. Barbora Holá and Joris van Wijk, “Life after Conviction at International Criminal Tribunals”, in *Journal of International Criminal Justice*, 2014, vol. 12, pp. 109–132.
10. André Klip, “Enforcement of Sanctions Imposed by the International Criminal Tribunals for Rwanda and the Former Yugoslavia”, in *European Journal of Crime, Criminal Law and Criminal Justice*, 1997, vol. 5, pp. 144–64.
11. Claus Kreß and Göran Sluiter, “Imprisonment”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 2, Oxford University Press, 2002, pp. 1757–1821.
12. Antonio Marchesi, “The Enforcement of Sentences of the International Criminal Court”, in Flavia Lattanzi and William A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, il Sirente, Ripa Fagnano Alto, 1999, pp. 427–45.

13. Róisín Mulgrew, “On the Enforcement of Sentences Imposed by International Courts”, in *Journal of International Criminal Justice*, 2009, vol. 7, pp. 373–96.
14. Róisín Mulgrew, *Towards the Development of the International Penal System*, Cambridge University Press, 2013.
15. Jan Christoph Nemitz, “Execution of Sanctions Imposed by Supranational Criminal Tribunals”, in Roelof Haveman and Olaoluwa Olusanya (eds.), *Sentencing and Sanctioning in Supranational Criminal Law*, Intersentia, Antwerp, 2006, pp. 125–44.
16. Faustin Z. Ntoubandi, “Article 103”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour pénale internationale, Commentaire Article par Article*, vol. 2, A. Pedone, Paris, 2012, pp. 1959–65.
17. Mary Margaret Penrose, “Lest We Fail: The Importance of Enforcement in International Criminal Law”, in *American University International Law Review*, 2000, vol. 15, pp. 321–394.
18. Mary Margaret Penrose, “Spandau Revisited: The Question of Detention for International War Crimes”, in *New York Law School Journal of Human Rights*, 2000, vol. 16, pp. 553–91.
19. Kimberly Prost, “Chapter 14 – Enforcement”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 673–703.
20. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1373–1385 (Art. 103) (<https://www.legal-tools.org/doc/b7432e/>).
21. Michael Stiel and Carl-Friedrich Stuckenberg, “Aut iustitia aut pax? Enforcement of International Prison Sentences in (Former) Conflict Areas”, in Martin Böse, Michael Bohlander, André Kilp and Otto Lagodny (eds.), *Justice Without Borders – Essays in Honour of Wolfgang Schomburg*, Brill, Leiden, 2018, pp. 435–56.
22. Gerard A. M. Strijards and Robert O. Harmsen, “Article 103”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 2176–83 (<https://www.legal-tools.org/doc/040751/>).

23. David Tolbert, “The International Tribunal for the Former Yugoslavia and the Enforcement of Sentences”, in *Leiden Journal of International Law*, 1998, vol. 11, pp. 655–669.
24. Harmen van der Wilt, “The transfer of the execution of the International Criminal Court in light of inter-State practice”, in Róisín Mulgrew and Denis Abels (eds.), *Research handbook on the International Penal System*, Edward Elgar Publishing, Northampton, 2016, pp. 193–210.
25. Dirk van Zyl Smit, “International Imprisonment”, in *International and Comparative Law Quarterly*, 2005, vol. 54, pp. 357–86.
26. Inés Mónica Weinberg de Roca and Christopher M. Rassi, “Sentencing and Incarceration in the Ad Hoc Tribunals”, in *Stanford Journal of International Law*, 2008, vol. 44, pp. 1–62.
27. Alexander Zahar and Göran Sluiter, *International Criminal Law – A Critical Introduction*, Oxford University Press, 2008.

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

Article 104

Change in Designation of State of Enforcement

General Remarks:

The option to transfer the sentenced person back into the Court's custody or to another State of enforcement was developed by the *ad hoc* tribunals in their bilateral enforcement agreements,¹ for the hypothesis that national sentence reduction measures could not be agreed upon by the Court.² Only one person convicted by the ICTY has been relocated so far. Radislav Krstić was moved upon his request from a prison in the United Kingdom first back to the UN Detention Unit and later to Poland.³ However, the motion of Charles Taylor for relocation from the UK to Rwanda has been denied by the RSCSL. The Court argued that his situation was not comparable to that of Krstić.⁴ Recently, ICTR convicts serving their sentences in Mali have been transferred by the IRMCT to Benin to serve the remainder of their sentences there.⁵ One may only speculate about the reasons for this, as the decisions refer to the content of a confidential memorandum.

¹ Cf., being the first one, Agreement between the Government of the Italian Republic and the United Nations on the Enforcement of Sentences of the ICTY, 6 February 1997, Article 9(2) (<https://www.legal-tools.org/doc/c40033/>).

² Antonio Cassese, *International Criminal Law*, 3rd. ed., Oxford University Press, 2013, p. 397.

³ Cf. IRMCT, *Prosecutor v. Krstić*, Presidency, Order designating the State in which Radislav Krstić is to serve the remainder of his sentence, 19 July 2013, MICT-13-46-ES.1/D3-D1 (<https://www.legal-tools.org/doc/6dfbc5/>).

⁴ Cf. RSCSL, *Prosecutor v. Taylor*, Trial Chamber, Decision on Public with Public and Confidential Annexes Charles Ghankay Taylor's Motion for Termination of Enforcement of Sentence in the United Kingdom and for the Transfer to Rwanda, 30 January 2015, RSCSL-03-01 ES, mgn. 114–120 (<https://www.legal-tools.org/doc/ad6b62/>).

⁵ IRMCT, *Prosecutor v. Alfred Musema*, Presidency, Order designating State in which Alfred Musema is to serve the remainder of his sentence, 19 December 2018, MICT-12-15-ES.1 (<https://www.legal-tools.org/doc/l9vv7e/>); *Prosecutor v. Hassan Ngeze*, Presidency, Order designating State in which Hassan Ngeze is to serve the remainder of his sentence, 19 December 2018, MICT-13-37-ES.2 (<https://www.legal-tools.org/doc/9zs5mt/>); *Prosecutor v. Dominique Ntawukulilyayo*, Presidency, Order designating State in which Dominique Ntawukulilyayo is to serve the remainder of his sentence, 19 December 2018, MICT-13-34-ES (<https://www.legal-tools.org/doc/kpvj5g/>); *Prosecutor v. Laurent Semanza*, Presidency, Order designating State in which Laurent Semanza is to serve the remainder of his sentence, 19 December 2018, MICT-13-36-ES.2 (<https://www.legal-tools.org/doc/jos27r/>).

The provision was not present in any of the preceding drafts but was added during the Rome Conference⁶ because some delegations made its inclusion the condition to accept Article 106 on supervision,⁷ as Article 104 ensures that the Court retains ultimate control over the enforcement of the sentence.⁸ In fact, changing the enforcement State is the only power the Court has to influence the modalities of enforcement and ensure compliance with prescribed standards, since it lacks the authority to order modifications of the conditions of detention (a provision to that effect, still contained in the Draft Statute,⁹ was dropped during the negotiations; Kreß and Sluiter, 2002, pp. 1799 ff.). Simultaneously, transferring the sentenced person is the ultimate form of remedy he or she may apply for in the decentralized enforcement system of the ICTY, ICTR and ICC (Kreß and Sluiter, 2002, p. 1808). The character as an individual right is underscored by Article 104(2). There is, however, no clear priority of the transfer procedure under Article 104 over domestic remedies available to the prisoner (cf. Article 106(2)). It is expected that the Presidency will await the outcome of any procedures at the national level before making its decision (Kreß and Sluiter, 2002, pp. 1808 ff.). This fundamental provision is repeated in all 12 Enforcement Agreements in force.¹⁰ The same is the case for the two *ad-*

⁶ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2016, p. 1386.

⁷ Report of the Working Group on Enforcement, UN Doc. A/CONF.183/C.1/WGE/L.14, 8 July 1998, fn. 241 to Article 106 II (<https://www.legal-tools.org/doc/488dd6/>).

⁸ Claus Kreß and Göran Sluiter, “Imprisonment”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 2, Oxford University Press, 2002, p. 1791.

⁹ Report of the Preparatory Committee on the Establishment of the International Criminal Court, UN Doc. A/CONF.183/2/Add.1, 14 April 1998, Article 96(2), Option 1 (<https://www.legal-tools.org/doc/816405/>).

¹⁰ Namely, in the following Agreements on the Enforcement of Sentences of the International Criminal Court: Argentina, 18 April 2017, ICC-PRES/19-01-17, Article 9(1) (<https://www.legal-tools.org/doc/asov9b/>); Austria, 27 October 2005, ICC-PRES/01-01-05, Article 13 (<https://www.legal-tools.org/doc/ae5d4c/>); Belgium, 8 December 2004, ICC-PRES/16-03-14, Article 14 (<https://www.legal-tools.org/doc/e017a3/>); Denmark, 22 November 2017, ICC-PRES/12-02-12, Article 14 (<https://www.legal-tools.org/doc/cc1900/>); Finland, 24 March 2011, ICC-PRES/07-01-11, Article 13 (<https://www.legal-tools.org/doc/a1972d/>); Georgia, 24 January 2019, ICC-PRES/27-01-19, Article 9(1) (<https://www.legal-tools.org/doc/bcl3pz/>); Mali, 24 March 2016, ICC-PRES/11-01-12, Article 9 (<https://www.legal-tools.org/doc/e9891a/>); Norway, 6 August 2016, ICC-PRES/18-02-16, Article 13 (<https://www.legal-tools.org/doc/3vdl75/>); Serbia, 28 May 2011, ICC-PRES/09-03-11, Article 13 (<https://www.legal-tools.org/doc/42dca5/>); Slovenia, 1 April 2022 ICC-PRES/28-01-22, Article 9 (<https://www.legal-tools.org/doc/a4031r/>); Sweden, 24

hoc Enforcement Agreements with the Democratic Republic of the Congo for Thomas Lubanga Dyilo¹¹ and Germain Katanga.¹²

Bearing in mind the difficulties of an (undesired) relocation of the sentenced person (cf. commentary on Article 103(3)(e)), it is submitted that the exercise of this competence of last resort should be avoided as far as possible and restricted to exceptional and unforeseeable circumstances.

Doctrine: For the bibliography, see the final comment on Article 104.

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April 2017, ICC-PRES/20-02-17, Article 10(1) (<https://www.legal-tools.org/doc/98f0zs/>); and the United Kingdom, 8 December 2007, ICC-PRES/04-01-07, Article 12 (<https://www.legal-tools.org/doc/d70d91/>).

¹¹ Article 9; ICC, *Prosecutor v. Lubanga*, Decision designating a State of enforcement, Annex, 8 December 2015, ICC-01/04-01/06-3185-Anx (<https://www.legal-tools.org/doc/fae14f/>).

¹² Article 9; ICC, *Prosecutor v. Katanga*, Decision designating a State of enforcement, Annex, 8 December 2015, ICC-01/04-01/07-3626-Anx (<https://www.legal-tools.org/doc/0c7d33/>).

Article 104(1)

1. The Court may, at any time, decide to transfer a sentenced person to a prison of another State.

Criteria for the exercise of this power are not provided in the ICC Statute or the Rules of Procedure and Evidence,¹ but could well include the following:

1. if the Court is notified of the upcoming exercise of a condition in accordance with Article 103(2)(a) and cannot agree to this;²
2. or if the conditions of imprisonment fall below the necessary standard (Kreß and Sluiter, 2002, p. 1791);
3. or if unacceptable security standards in the State of enforcement are revealed, in particular by an escape of the prisoner (cf. commentary on Article 111).

The Court may decide to transfer the prisoner “at any time”.

Cross-references:

Rules 202, 205, 209.

Doctrine: For the bibliography, see the final comment on Article 104.

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

¹ Gerard A. M. Strijards and Robert O. Harmsen, “Article 103”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, Article 104 mgn. 2.

² Claus Kreß and Göran Sluiter, “Imprisonment”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 2, Oxford University Press, 2002, pp. 1791, 1795; Strijards and Harmsen, 2016, Article 104 mgn. 2.

Article 104(2)

2. A sentenced person may, at any time, apply to the Court to be transferred from the State of enforcement.

Article 104(2) sets forth the right of the sentenced person to apply to the Court for the exercise of its power under Article 104(1). This would have been the case even without a specific provision in the Statute.¹ Article 104(2) is to be read together with Article 106(3) which provides for the prisoner's right to confidential communication with the Court regarding his or her conditions of imprisonment.

The convict may apply "at any time". This clarifies that applications may be made repeatedly (Strijards and Harmsen, 2016, Article 104 mgn. 2) and without any time limits, as opposed to Rule 224(3).

Cross-references:

Article 103(2), 106.

Rules 209, 210.

Doctrine:

1. Antonio Cassese, *International Criminal Law*, 3rd. ed., Oxford University Press, 2013, pp. 396–99.
2. Claus Kreß and Göran Sluiter, "Imprisonment", in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 2, Oxford University Press, 2002, pp. 1757–1821.
3. Faustin Z. Ntoubandi, "Article 104", in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour pénale internationale, Commentaire Article par Article*, vol. 2, A. Pedone, Paris, 2012, pp. 1967–69.
4. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1386–87 (Article 104) (<https://www.legal-tools.org/doc/b7432e/>).

¹ Gerard A. M. Strijards and Robert O. Harmsen, "Article 104", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, Article 104 mgn. 2 (<https://www.legal-tools.org/doc/040751/>).

5. Gerard A. M. Strijards and Robert O. Harmsen, “Article 104”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 2187–89 (<https://www.legal-tools.org/doc/040751/>).

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Article 105

Enforcement of the Sentence

General Remarks:

It is a ‘matter of principle’ that the sentence imposed by the Court is binding on States Parties, as the State of enforcement is acting on behalf of the international community.¹ The provision is closely connected with Article 110 which provides for an international procedure to reduce the sentence.² This principle is also in line with inter-State prisoner exchange treaties (Clark, 2016, mgn. 1). During the negotiations in Rome, this exclusive power of the Court to determine the sentence was favoured over the general applicability of national procedures, subject to the consent of the Court in each individual case, as was the practice of the ad hoc tribunals (Kreß and Sluiter, 2002, p. 1791 ff.; Schabas, 2016, p. 1389). The latter approach could have tempted trial judges to include in their considerations possible reviews of their sentence in the State of enforcement, as it occurred at the ICTY,³ and thus would have led to considerable inequality (Schabas, 2016, p. 1389).

However, the wording of Article 105(1) includes a qualification. It explicitly refers to conditions accepted by the Presidency according to Article 103(1)(b) that may deviate from the obligation of the State of enforcement to respect the duration of the sentence, and therefore makes an

¹ Klaus Hoffmann, “Some Remarks on the Enforcement on International Sentences in Light of the Galic case at the ICTY”, in *Zeitschrift für Internationale Strafrechtsdogmatik*, 2011, p. 839; cf. ICTY, *Prosecutor v. Erdemović*, Trial Chamber, Sentencing Judgment, 29 November 1996, IT-96-22-T, para. 71 (<https://www.legal-tools.org/doc/eb5c9d/>); Roger S. Clark, “Article 105”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, mgn. 1.

² Claus Kreß and Göran Sluiter, “Imprisonment”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 2, Oxford University Press, 2002, pp. 1792–1794; William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1388 (<https://www.legal-tools.org/doc/b7432e/>).

³ Cf. ICTY, *Prosecutor v. Stakić*, Trial Chamber, Judgment, 31 July 2003, IT-97-24-T, p. 253 ff. (<https://www.legal-tools.org/doc/32ecfb/>) imposing a detailed review obligation on the State of enforcement to review the sentence after 20 years, which was later successfully appealed.

‘exceptional case scenario’ possible.⁴ This is difficult to reconcile with the general principle of non-modification of an international sentence,⁵ but the qualification is the corollary of the decision to allow conditional acceptance of prisoners (cf. commentary on Article 103(1)(b)) and will not cause serious problems in practice, as the Court’s prior consent to such conditions is required in every case (Clark, 2016, Article 105 mgn. 2; Ntoubandi, 2012, p. 1973).

Doctrine: For the bibliography, see the final comment on Article 105.

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

⁴ Kreß and Sluiter, 2002, p. 1792; cf. Faustin Z. Ntoubandi, “Article 105”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour pénale internationale, Commentaire Article par Article*, 2nd. ed., A. Pedone, Paris, 2012, p. 1972: “dualist regime”.

⁵ Kimberly Prost, “Chapter 14 – Enforcement”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, p. 675; cf. also Kai Ambos, *Treatise on International Criminal Law*, vol. 3, Oxford University Press, 2016, p. 644 fn. 93.

Article 105(1)

1. Subject to conditions which a State may have specified in accordance with Article 103, paragraph 1 (b), the sentence of imprisonment shall be binding on the States Parties, which shall in no case modify it.

2. The Court alone shall have the right to decide any application for appeal and revision. The State of enforcement shall not impede the making of any such application by a sentenced person.

Article 105(1) sets forth the general rule that sentences pronounced by the Court are “binding”. This means that a possible *exequatur* procedure is limited to the decision between accepting or rejecting the designation, and national law on pardon, parole, commutation or early release is not to be applied.¹ An acceptance of the designation with modifications affecting the duration or nature of the sentence would be in breach of Article 105(1). States Parties therefore have to ensure that they have their “legislative and administrative house in order”.²

It is doubtful whether Article 105(1) also applies to States Parties other than the State of enforcement by establishing a negative duty to refrain from any possible interferences with the enforcement process (Marchesi, 1999, p. 437).

Article 105(1) is repeated in all 12 Enforcement Agreements which have entered into force so far,³ as well as in the two *ad hoc* Enforcement

¹ Claus Kieß and Göran Sluiter, “Imprisonment”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 2, Oxford University Press, 2002, pp. 1792 ff.

² Roger S. Clark, “Article 105”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, Article 105 mgn. 3.

³ Cf. the Agreements on the Enforcement of Sentences of the International Criminal Court between the Court and Argentina, 18 April 2017, ICC-PRES/19-01-17, Article 7(1) (<https://www.legal-tools.org/doc/asov9b/>); Austria, 27 October 2005, ICC-PRES/01-01-05, Article 4(1) (<https://www.legal-tools.org/doc/0f5f9e/>), Belgium, 8 December 2004, ICC-PRES/16-03-14, Article 4(1) (<https://www.legal-tools.org/doc/e017a3/>), Denmark, ICC-PRES/12-02-12, Article 4(1) (<https://www.legal-tools.org/doc/cc1900/>); Finland, 24 March 2011, ICC-PRES/07-01-11, Article 4(1) (<https://www.legal-tools.org/doc/a1972d/>); Georgia, 24 January 2019, ICC-PRES/27-01-19, Article 7(1) (<https://www.legal-tools.org/doc/bcl3pz/>); Mali, ICC-PRES/11-01-12, Article 1(3) (<https://www.legal-tools.org/doc/e9891a/>); Norway, 6 August 2016, ICC-PRES/18-02-16, Article 4(1) (<https://www.legal-tools.org/doc/3vd175/>); Serbia, 28 May 2011, ICC-PRES/09-03-11, Arti-

Agreements with the Democratic Republic of the Congo for Thomas Lubanga Dyilo and Germain Katanga.⁴ Including the present provision in an enforcement agreement is imperative in case a non-State Party would be chosen as State of enforcement, as the sentence would not be binding by way of Article 105(1), which only refers to “States Parties”.

Doctrine: For the bibliography, see the final comment on Article 105.

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cle 4(1) (<https://www.legal-tools.org/doc/42dca5/>); Slovenia, 1 April 2022, ICC-PRES/28-01-22, Article 7(1) (<https://www.legal-tools.org/doc/a4o31r/>); Sweden, 24 April 2017, ICC-PRES/20-02-17, Article 8(1) (<https://www.legal-tools.org/doc/98f0zs/>); and the United Kingdom, 8 December 2007, ICC-PRES/04-01-07, Article 4(1) (<https://www.legal-tools.org/doc/d70d91/>).

⁴ Article 7(3); ICC, *Prosecutor v. Lubanga*, Decision designating a State of enforcement, Annex, 8 December 2015, ICC-01/04-01/06-3185-Anx (<https://www.legal-tools.org/doc/fae14f/>) and Article 7(1), *Prosecutor v. Katanga*, Decision designating a State of enforcement, Annex, 8 December 2015, ICC-01/04-01/07-3626-Anx-tENG (<https://www.legal-tools.org/doc/ef5b7e/>).

Article 105(2)

2. The Court alone shall have the right to decide any application for appeal and revision. The State of enforcement shall not impede the making of any such application by a sentenced person.

The Court reserves the exclusive right to decide on any issues “surrounding the original conviction”.¹ The first sentence of Article 105(2) prohibits any procedures to modify the conviction or sentence in the State of enforcement, the wording “appeal and revision” was only inserted to create consistency with Part 8.²

Since Article 105(1) already covers appeal and revision procedures, Article 105(2) sent. 1 seems superfluous at first sight. However, the latter’s prohibition is unqualified, as the reference to conditions under Article 103(1)(b) is omitted there. It follows that a condition which allows for national review of the original conviction is not acceptable under any circumstances. The provision is repeated in all 12 Enforcement Agreements currently in force,³ as well as in the two *ad hoc* Enforcement Agreements with

¹ Roger S. Clark, “Article 105”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, mgn. 4.

² William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1389 (<https://www.legal-tools.org/doc/b7432e/>).

³ That is, the Agreements on the Enforcement of Sentences of the International Criminal Court between the Court and Argentina, 18 April 2017, ICC-PRES/19-01-17, Article 7(3) (<https://www.legal-tools.org/doc/asov9b/>); Austria, 27 October 2005, ICC-PRES/01-01-05, Article 11(1) (<https://www.legal-tools.org/doc/0f5f9e/>); Belgium, 8 December 2004, ICC-PRES/16-03-14, Article 12(1) (<https://www.legal-tools.org/doc/e017a3/>); Denmark, ICC-PRES/12-02-12, Article 11(1) (<https://www.legal-tools.org/doc/cc1900/>); Finland, 24 March 2011, ICC-PRES/07-01-11, Article 11(1) (<https://www.legal-tools.org/doc/a1972d/>); Georgia, 24 January 2019, ICC-PRES/27-01-19, Article 7(3) (<https://www.legal-tools.org/doc/bcl3pz/>); Mali, ICC-PRES/11-01-12, Article 6(2) (<https://www.legal-tools.org/doc/e9891a/>); Norway, 6 August 2016, ICC-PRES/18-02-16, Article 10(2) (<https://www.legal-tools.org/doc/3vd175/>); Serbia, 28 May 2011, ICC-PRES/09-03-11, Article 11(1) (<https://www.legal-tools.org/doc/42dca5/>); Slovenia, 1 April 2022, ICC-PRES/28-01-22, Article 7(3) (<https://www.legal-tools.org/doc/a4o31r/>); Sweden, 24 April 2017, ICC-PRES/20-02-17, Article 8(4) (<https://www.legal-tools.org/doc/98f0zs/>); and the United Kingdom, 8 December 2007, ICC-PRES/04-01-07, Article 10 (<https://www.legal-tools.org/doc/d70d91/>).

the Democratic Republic of the Congo for Thomas Lubanga Dyilo and Germain Katanga.⁴

The second sentence in Article 105(2) requires the State of Enforcement not to impede the making of an application for appeal or revision. While it seems highly unlikely for a prisoner already transferred to the State of enforcement to make an application for appeal in light of Rule 202, the situation could well arise with regard to revision procedures. Some authors submit that, despite the wording (“shall not impede”), there is even a positive obligation of the State to facilitate the communication of the prisoner with the Court in this respect.⁵ While the provision is only repeated in some Enforcement Agreements,⁶ the second sentence of Article 105(2) will nevertheless apply to them without being explicitly repeated in the Agreement.

Cross-references:

Articles 103(1)(b), 110.

Doctrine:

1. Roger S. Clark, “Article 105”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 2190–91 (<https://www.legal-tools.org/doc/040751/>).
2. Klaus Hoffmann, “Some Remarks on the Enforcement on International Sentences in Light of the Galic Case at the ICTY”, in *Zeitschrift für Internationale Strafrechtsdogmatik*, 2011, pp. 838–42.
3. Claus Kreß and Göran Sluiter, “Imprisonment”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the In-*

⁴ Article 7(3); ICC, *Prosecutor v. Lubanga*, Decision designating a State of enforcement, Annex, 8 December 2015, ICC-01/04-01/06-3185-Anx-tENG (<https://www.legal-tools.org/doc/ef5b7e/>) and Article 7(3), *Prosecutor v. Katanga*, Decision designating a State of enforcement, Annex, 8 December 2015, ICC-01/04-01/07-3626-Anx (<https://www.legal-tools.org/doc/0c7d33/>).

⁵ Kai Ambos, *Treatise on International Criminal Law*, vol. 3, Oxford University Press, 2016, pp. 644 ff.; Clark, 2016, mgn. 5.

⁶ See above fn. 3: Argentina, Article 7(3); Belgium, Article 12(1); Denmark, Article 11; Finland, Article 11(1); Georgia, Article 7(3); Mali, Article 6(2); Norway, Article 10(2); Serbia, Article 11(1); Slovenia, 1 April 2022, ICC-PRES/28-01-22, Article 7(3) (<https://www.legal-tools.org/doc/a4031r/>); and Sweden, Article 8(4) – as well as the two *ad hoc* Enforcement Agreements concluded with the DRC (Article 7(3), respectively).

- ternational Criminal Court: A Commentary*, vol. 2, Oxford University Press, 2002, pp. 1757–1821.
4. Antonio Marchesi, “The Enforcement of Sentences of the International Criminal Court”, in Flavia Lattanzi and William A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, Il Sirente, Ripa Fagnano Alto, 1999, pp. 427–45.
 5. Faustin Z. Ntoubandi, “Article 105”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour pénale internationale, Commentaire Article par Article*, 2nd. ed., A. Pedone, Paris, 2012, pp. 1971–74.
 6. Kimberly Prost, “Chapter 14 – Enforcement”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, PP. 673–703.
 7. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1388–1390 (Article 105) (<https://www.legal-tools.org/doc/b7432e/>).

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

Article 106

Supervision of Enforcement of Sentences and Conditions of Imprisonment

General Remarks:

Article 106 endeavours to strike a balance between two equally valid interests. On the one hand, as a matter of principle the State of enforcement's prison infrastructure is used, so it seems quite natural that its national law should govern the day-to-day-life in prison – otherwise the Court would have had to set up its own prison norms.¹ On the other hand, there is the need for the Court to guarantee a certain uniformity of prison conditions and thereby ensuring equal treatment of all international prisoners.² The compromise enshrined in Article 106 is that the Court exercises general penitentiary supervision (para. 1), whereas the national law of the State of enforcement and its application by the competent authorities govern the daily life in prison without interference by the Court, but have to comply with certain minimum standards (para. 2). It remains dubious, how precisely “supervision” is to be understood, cf. the comment to Article 106(1).

Doctrine: For the bibliography, see the final comment on Article 106.

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1393 (<https://www.legal-tools.org/doc/b7432e/>).

² Kimberly Prost, “Chapter 14 – Enforcement”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, p. 675; cf. Trevor Pascal Chimimba, “Chapter 11 – Establishing An Enforcement Regime”, in Roy S. Lee, (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999–2002, pp. 351 f. and options for Article 96(2) in Report of the Preparatory Committee on the Establishment of the International Criminal Court, 14 April 1998, UN Doc. A/CONF.183/2/Add.1, p. 153 (<https://www.legal-tools.org/doc/816405/>).

Article 106(1)

1. The enforcement of a sentence of imprisonment shall be subject to the supervision of the Court and shall be consistent with widely accepted international treaty standards governing treatment of prisoners.

In contrast to paragraph 2, which deals with the day-to-day execution of the sentence in a national prison, para. 1 refers to the administration of the sentence as a whole by the Court. Clark argues that it would be inconsistent with the relevant international standards (*in concreto*: Article 7 ICCPR – for details on the applicable law cf. the comment to Article 106(2)) if the convict for example were sentenced to hard labour wearing a ball and chain.¹ This is obviously true – nonetheless it remains dubious whether such a sentence would not a priori be excluded by Articles 77(1), 21(3).

The Court is designated as the body to supervise any decisions in the execution of the sentence, as ‘enforcement’, it is argued, must be understood to include not only the enforcement of the sentence as such but also the modalities of this enforcement (the “conditions of enforcement”, Article 106(2)), which is indicated by the reference to “standards governing the treatment of prisoners” in both paragraphs and further supported by Rule 211(1)(a).²

Article 106(1) is silent on the question which powers the Court has for the exercise of that function. However, the Presidency is vested with the right to request all relevant information, especially from the State of enforcement, in Rule 211. If it deems it necessary after careful assessment of all available information, it may transfer the prisoner to another State of enforcement pursuant to Article 104(1), which can be understood as the ultimate form of exercising ‘supervision’. Reflecting the drafting history, where a proposal to grant the Court the power to make decisions on every

¹ Roger S. Clark, “Article 106”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, mgn. 4 (<https://www.legal-tools.org/doc/a9e9f7/>).

² Claus Kreß and Göran Sluiter, “Imprisonment”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 1804 ff. (<https://www.legal-tools.org/doc/01addc/>).

aspect of prison life, if deemed appropriate,³ was clearly rejected (Kreß and Sluiter, 2002, pp. 1805 ff.), the supervisory powers of the Court are limited to this ‘all or nothing’-approach. It has been argued, however, that if the State of enforcement fails to respect the sentence as such (for example, arbitrarily releases the prisoner in violation of Articles 105(1), 110(1)), the supervisory powers of the Court should also entail the possibility to make a formal finding to that extent, in case of a State Party pursuant to Article 87(7), but that such a finding is not authorized due to the clear intention of the States Parties (see above) in case the conditions of detention are inconsistent with the applicable human rights standards and the State therefore in breach of its obligation under Article 106(2) (Kreß and Sluiter, 2002, p. 1805). It might appear doubtful, however, that the fact of the Court’s having been denied the power to modify the conditions of detention necessitates the conclusion that it cannot make a finding regarding a breach of Article 106(2) either.

The *ad hoc* tribunals’ Rules of Procedure and Evidence (Rule 104 RPE ICTY and RPE ICTR, respectively Rule 128 RPE IRMCT) allowed for supervision of their sentences by the tribunals themselves or a body designated by them.⁴ Although the ICC Statute and the RPE do neither envisage regular inspections nor the possibility that the Court may seek the assistance from other monitoring bodies, all Enforcement Agreements now in force provide for periodic inspections either by the International Committee of the Red Cross,⁵ by the European Committee for the Prevention of

³ Report of the Preparatory Committee on the Establishment of the International Criminal Court, 14 April 1998, UN Doc. A/CONF.183/2/Add.1, p. 153 (<https://www.legal-tools.org/doc/816405/>).

⁴ Cf. André Klip, “Enforcement of Sanctions Imposed by the International Criminal Tribunals for Rwanda and the Former Yugoslavia”, in *European Journal of Crime, Criminal Law and Criminal Justice*, 1997, vol. 5, p. 150 ff.; Richard Culp, *Enforcement and Monitoring of Sentences in the Modern War Crimes Process: Equal Treatment before the Law?*, John Jay College of Criminal Justice Human Rights Seminar Series 2010-2011, 2011, pp. 5–8 (<https://www.legal-tools.org/doc/0a1ca9/>).

⁵ See the Agreements on the Enforcement of Sentences of the International Criminal Court: Argentina, 18 April 2017, ICC-PRES/19-01-17, Article 4(8) (<https://www.legal-tools.org/doc/asov9b/>); Belgium, 8 December 2004, ICC-PRES/16-03-14, Article 7 (<https://www.legal-tools.org/doc/e017a3/>), Denmark, ICC-PRES/12-02-12, Article 7 (<https://www.legal-tools.org/doc/cc1900/>); Finland, 24 March 2011, ICC-PRES/07-01-11, Article 7 (<https://www.legal-tools.org/doc/a1972d/>); Georgia, 24 January 2019, ICC-PRES/27-01-19, Article 4(9) (<https://www.legal-tools.org/doc/bcl3pz/>); Mali, ICC-PRES/11-01-12, Article 4(b) (<https://www.legal-tools.org/doc/e9891a/>); Norway, 6 August 2016, ICC-PRES/18-02-16, Article 6 (<https://www.legal-tools.org/doc/3vdl75/>); Serbia, 28 May 2011,

Torture and Inhuman or Degrading Treatment or Punishment,⁶ or by the Court “or any entity designated by it”.⁷ Entrusting the ICRC with inspections continues the practice of the *ad hoc* tribunals (see above) and is in line with the fact that the Court has concluded an agreement with the ICRC regarding the detainees at its own Detention Centre, but also envisaging the incorporation of the ICRC as monitoring body in the Court’s Enforcement Agreements with interested States.⁸

Doctrine: For the bibliography, see the final comment on Article 106.

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

ICC-PRES/09-03-11, Article 7 (<https://www.legal-tools.org/doc/42dca5/>); Slovenia, 1 April 2022, ICC-PRES/28-01-22, Article 4(9) (<https://www.legal-tools.org/doc/a4o31r/>); Sweden, 24 April 2017, ICC-PRES/20-02-17, Article 4(8) (<https://www.legal-tools.org/doc/98f0zs/>); as well as the two *ad hoc* Enforcement Agreements with the DRC for Thomas Lubanga Dyilo (ICC, *Prosecutor v. Lubanga*, Presidency, Decision designating a State of enforcement, Annex, 8 December 2015, ICC-01/04-01/06-3185-Anx, Article 4(3) (<https://www.legal-tools.org/doc/fae14f/>)) and Germain Katanga (ICC, *Prosecutor v. Katanga*, Presidency, Decision designating a State of enforcement, Annex, 8 December 2015, ICC-01/04-01/07-3626-Anx, Article 4(8) (<https://www.legal-tools.org/doc/0c7d33/>)).

⁶ See the Agreements on the Enforcement of Sentences of the International Criminal Court with Slovenia, 1 April 2022, ICC-PRES/28-01-22, Article 4(9) (<https://www.legal-tools.org/doc/a4o31r/>), and the United Kingdom, 8 December 2007, ICC-PRES/04-01-07, Article 6 (<https://www.legal-tools.org/doc/d70d91/>).

⁷ Agreement on the Enforcement of Sentences of the International Criminal Court with Austria, 27 October 2005, ICC-PRES/01-01-05, Article 7 (<https://www.legal-tools.org/doc/0f5f9e/>).

⁸ Agreement between the International Criminal Court and the International Committee of the Red Cross on Visits to Persons deprived of Liberty Pursuant to the Jurisdiction of the International Criminal Court, ICC-PRES/02-01-06, 13 April 2006 (<https://www.legal-tools.org/doc/fe9881/>).

Article 106(2): Conditions of Imprisonment

2. The conditions of imprisonment shall be governed by the law of the State of enforcement and shall be consistent with widely accepted international treaty standards governing treatment of prisoners;

Paragraph 2 requires that the national law which governs the conditions of imprisonment must be consistent with widely accepted international treaty standards governing treatment of prisoners. This serves the interest of the prisoner and guarantees a certain degree of uniformity, although inequalities of national laws above the international standards remain.¹

Whereas the ICTY's sentencing judgment in the *Erdemović* case² required conformity with "minimum principles of humanity and dignity which constitute the inspiration for the international standards governing the protection of the rights of convicted persons" and referred comprehensively to human rights treaties like Article 10 of the International Covenant on Civil and Political Rights and regional instruments as well as to recommendatory standards like the Standard Minimum Rules for the Treatment of Prisoners³ and others,⁴ many delegations at the Rome Conference were not prepared to accept the application of these very detailed and ambitious⁵

¹ Denis Abels, *Prisoners of the International Community: The Legal Position of Persons Detained at International Criminal Tribunals*, T.M.C. Asser Press/Springer, The Hague/Berlin/Heidelberg, 2012, p. 464 (<https://www.legal-tools.org/doc/5dc0ec/>).

² ICTY, *Prosecutor v. Erdemović*, Trial Chamber, Sentencing Judgment, 29 November 1996, IT-96-22-T, para. 74 (<https://www.legal-tools.org/doc/eb5c9d/>).

³ United Nations Standard Minimum Rules for the Treatment of Prisoners, UN Doc. A/RES/70/175, 17 December 2015 (<https://www.legal-tools.org/doc/29e244/>).

⁴ Basic Principles for the Treatment of Prisoners, UN Doc. A/RES/45/111, 14 December 1990 (<https://www.legal-tools.org/doc/21d527/>); UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN Doc. A/RES/43/173, 9 December 1988 (<https://www.legal-tools.org/doc/d8cfd/>); cf. United Nations Office of Drugs and Crime, *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice*, 2006.

⁵ United Nations Standard Minimum Rules for the Treatment of Prisoners, UN Doc. A/RES/70/175, 17 December 2015, Preliminary Observation No. 2 (<https://www.legal-tools.org/doc/29e244/>): "it is evident that not all of the rules are capable of application in all places and at all times"; Gerard A. M. Strijards and Robert O. Harmsen, "Article 103", in Otto Triffterer and Kai Ambos (eds.), *Commentary on the Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, mgn. 27 (<https://www.legal-tools.org/doc/a9e9f7/>).

standards which may or may not yet have acquired the status of customary international law.⁶ The compromise was reached to omit any reference to soft law standards⁷ and require compliance only with the hard law of “widely accepted international treaty standards governing treatment of prisoners” now laid down in Article 106(1) and (2). Thus, the negotiating history shows that this choice of words was intended to exclude the applicability of soft law like recommendatory minimum rules which the ad hoc Tribunals used to refer to.⁸ There is some ambiguity as to the criterion “widely accepted” which appears less demanding than “universally recognized” (cf. Article 7(1)(h)) or “internationally recognized” (cf. Article 21(3)) but may exclude standards only contained in regional treaties. It is equally unclear what the role of standards extant in customary international law is, as it is not mentioned in Article 106(2) (Kreß and Sluiter, 2002, p. 1803).

Which human rights instruments were specifically meant was left open (Kreß and Sluiter, 2002, p. 1799). Those will certainly include the UN Convention against Torture and Article 10 of the ICCPR. While some authors declare the Standard Minimum Rules for the Treatment of Prisoners inapplicable with respect to the drafting history,⁹ it is submitted by others,

⁶ Roger S. Clark, “Article 106”, in Otto Triffterer and Kai Ambos (eds.), 2016, Article 106 mgn. 2; Claus Kreß and Göran Sluiter, “Imprisonment”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 1798 ff., 1802 (<https://www.legal-tools.org/doc/01addc/>); Faustin Z. Ntoubandi, “Article 106”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1975 ff. (<https://www.legal-tools.org/doc/872bf2/>); William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1391 ff. (<https://www.legal-tools.org/doc/b7432e/>).

⁷ As contemplated, for example, in Report of the International Law Commission on the work of its forty-sixth session (2 May 1994–22 July 1994), UN Doc. A/49/10, p. 139 (<https://www.legal-tools.org/doc/f73459/>).

⁸ But see Christoph J. M. Safferling, *Towards an International Criminal Procedure*, Oxford University Press, 2001, p. 350 (<https://www.legal-tools.org/doc/890965/>) who rejects a literal reading; in a similar vein, Kai Ambos, *Treatise on International Criminal Law. Vol III: International Criminal Procedure*, Oxford University Press, 2016, pp. 639–640 (<https://www.legal-tools.org/doc/995606/>).

⁹ See above; Trevor Pascal Chimimba, “Chapter 11 – Establishing An Enforcement Regime”, in Roy S. Lee, (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999–2002, pp. 352 ff. (<https://www.legal-tools.org/doc/225cdb/>); Compare, Strijards and Harmsen, 2016, mgn. 27; Alexander Zahar and Göran

however, that the essence of some soft law instruments has already been assimilated into the interpretation of general treaty provisions such as the ICCPR by means of the jurisprudence of the Human Rights Committee.¹⁰ In addition, 11 out of 12 Enforcement Agreements currently in force (with Argentina, Austria, Belgium, Denmark, Finland, Georgia, Mali, Serbia, Slovenia and Sweden) as well as the two *ad hoc* Enforcement Agreements with the Democratic Republic of the Congo for Thomas Lubanga Dyilo and Germain Katanga “recall” the Standard Minimum Rules for the Treatment of Prisoners, the Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment and the Basic Principles for the Treatment of Prisoners in their preambles as examples for an open-ended reference (Strijards and Harmsen, Art. 103 mgn. 27). The Agreement with the United Kingdom incorporates the obligations of the United Kingdom under the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950.¹¹

Doctrine: For the bibliography, see the final comment on Article 106.

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

Sluiter, *International Criminal Law – A Critical Introduction*, Oxford University Press, 2008, p. 320 (<https://www.legal-tools.org/doc/b27edd/>).

¹⁰ General Comment No. 21: Right of everyone to take part in cultural life (Article 15, para. 1(a) of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/21, 21 December 2009, paras. 5, 13 (<https://www.legal-tools.org/doc/aba310/>); Human Rights Committee, *Mukong v. Cameroon*, Views, 21 July 1994, Communication No. 458/1991, para. 9.3; *Gorij-Dinka v. Cameroon*, Views, 17 March 2005, Communication No. 1134/2002, para. 5.2; Abels, 2012, pp. 171 ff., 497 f.; Clark, 2016, Article 106 mgn. 2; Krefß and Sluiter, 2002, p. 1802; Safferling, 2001, p. 344; Schabas, 2016, p. 1393 (<https://www.legal-tools.org/doc/b7432e/>); Dirk van Zyl Smit, “International Imprisonment”, in *International and Comparative Law Quarterly*, 2005, vol. 54, p. 376.

¹¹ Agreement on the Enforcement of Sentences of the International Criminal Court with the United Kingdom, 8 December 2007, ICC-PRES/04-01-07, Article 5 (<https://www.legal-tools.org/doc/d70d91/>).

Article 106(2): Conditions Comparable to Other Prisoners

in no case shall such conditions be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.

The clause that international prisoners should not be treated different from ‘ordinary’ domestic prisoners convicted of similar offences was incorporated to guarantee that there would be no ill-treatment of ICC inmates.¹ Others see the provision as another manifestation of the principle of complementarity: If the ICC Statute accepts the primacy of genuine national prosecution, there should not be a different treatment of those first convicted by the ICC and later transferred back to domestic jurisdictions to serve their sentence.²

“Similar offences” should be read to relate to the gravity of the offense, for example homicide, not to the legal characterization, to provide for the necessary latitude to treat former political leaders different from low-level offenders.³ Differences in treatment for other reasons are not prohibited.⁴

¹ Cf. Trevor Pascal Chimimba, “Chapter 11 – Establishing An Enforcement Regime”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999–2002, p. 353 (<https://www.legal-tools.org/doc/225cdb/>).

² Roger S. Clark, “Article 106”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, mgn. 6 (<https://www.legal-tools.org/doc/040751/>); cf. Denis Abels, *Prisoners of the International Community: The Legal Position of Persons Detained at International Criminal Tribunals*, T.M.C. Asser Press/Springer, The Hague/Berlin/Heidelberg, 2012, p. 464 (<https://www.legal-tools.org/doc/5dc0ec/>).

³ Claus Kreß and Göran Sluiter, “Imprisonment”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 1803 (<https://www.legal-tools.org/doc/01addc/>).

⁴ Kreß and Sluiter, 2002, pp. 1803 ff.; for typical differences between national and international prisoners, see Róisín Mulgrew, “On the Enforcement of Sentences Imposed by International Courts”, in *Journal of International Criminal Justice*, 2009, vol. 7, pp. 385 ff.

Following from Article 106(2), all relevant national complaint procedures must be available to the prisoner.⁵ It is submitted, that this should also include regional human rights mechanisms, where applicable, such as provided for example by the European Convention on Human Rights (Kreß and Sluiter, 2002, p. 1808). To date courts have been reluctant to receive applications of international prisoners,⁶ but there seems to be some development.⁷

Some authors expect that the prohibition of more favourable treatment for international prisoners will lead to an improvement of conditions in national prisons, as their treatment must also be consistent with international standards.⁸ Whereas the prohibition of discrimination is justified, the prohibition of preferential treatment may, although well-intended, turn out to be problematic. It has been observed (Abels, 2012, p. 464; cf. Ambos, 2016, p. 643: “insoluble dilemma”) that this presumably excludes a sizable number of States from the group of prospective custodial States, that is all those states which have not yet managed to procure the required conditions of detention to the entirety of their own prison population.⁹

Doctrine: For the bibliography, see the final comment on Article 106.

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

⁵ Compare, Kai Ambos, *Treatise on International Criminal Law. Vol III: International Criminal Procedure*, Oxford University Press, 2016, p. 644 (<https://www.legal-tools.org/doc/995606/>).

⁶ United States, Supreme Court, *Hirota v. MacArthur et al.*, Decision, 20 December 1948, 338 U.S. 197 (<https://www.legal-tools.org/doc/qortzq/>); European Commission on Human Rights, *Hess v. United Kingdom*, Decision, 28 May 1975, Application No. 6231/73, DR. 2, 72.

⁷ Cf. European Court of Human Rights, *Soering v. The United Kingdom*, Judgment, 7 July 1989, Application No. 14038/88 (<https://www.legal-tools.org/doc/de16c7/>).

⁸ Kreß and Sluiter, 2002, p. 1803; Dirk van Zyl Smit, “International Imprisonment”, in *International and Comparative Law Quarterly*, 2005, vol. 54, p. 376; Ambos, 2016, pp. 643 ff.; cf. Roger S. Clark, “Article 107”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2nd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2008, mgn. 6 (<https://www.legal-tools.org/doc/a9e9f7/>).

⁹ But see Antonio Marchesi, “The Enforcement of Sentences of the International Criminal Court”, in Flavia Lattanzi and William A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, Editrice Il Sirente, 1999, p. 438 (<https://www.legal-tools.org/doc/fla609/>), who reads this as: not more favourable “provided that these [conditions] are consistent with the standards set by international law”.

Article 106(3)

3. Communications between a sentenced person and the Court shall be unimpeded and confidential.

Since the prisoner is the prime source of information on his living conditions, a secured channel of communication to the Court is enshrined in Article 106(3). The provision is to be read together with Article 104(2), which provides for a right to request transfer to another State of enforcement at any time.¹ As proposals for a qualification “subject to any overriding security considerations”² were rejected at the Rome Conference, the provision is to be applied without exceptions.³ It is submitted, that there is even a positive obligation for the State of enforcement to facilitate communications between the prisoner and the Court.⁴

Cross-references:

Article 104.

Rules 211 and 216.

Regulation 113.

Doctrine:

1. Denis Abels, *Prisoners of the International Community: The Legal Position of Persons Detained at International Criminal Tribunals*, T.M.C. Asser Press/Springer, The Hague/Berlin/Heidelberg, 2012
2. Hiram Abtahi and Steven Arrigg Koh, “The Emerging Enforcement Practice of the International Criminal Court”, in *Cornell International Law Journal*, 2012, vol. 45, pp. 1–23.

¹ Cf. Claus Kreß and Göran Sluiter, “Imprisonment”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 1808 (<https://www.legal-tools.org/doc/01addc/>).

² Supervision and Administration of Sentence: Working Paper on Article 96, 4 July 1998, UN Doc. A/CONF.183/C.1/WGE/L.9 (<https://www.legal-tools.org/doc/de85a0/>).

³ Kreß and Sluiter, 2002, pp. 1801 ff.; William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1394 (<https://www.legal-tools.org/doc/b7432e/>).

⁴ Roger S. Clark, “Article 106”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, Article 106 mgn. 7 (<https://www.legal-tools.org/doc/a9e9f7/>).

3. Kai Ambos, *Treatise on International Criminal Law*, vol. 3, Oxford University Press, 2016, pp. 635–59 (Chapter VIII).
4. Trevor Pascal Chimimba, “Chapter 11 – Establishing an Enforcement Regime”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999/2002, pp. 345, 356.
5. Roger S. Clark, “Article 106”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 2192–95 (<https://www.legal-tools.org/doc/040751/>).
6. Richard Culp, *Enforcement and Monitoring of Sentences in the Modern War Crimes Process: Equal Treatment before the Law?*, Human Rights Seminar Series, John Jay College of Criminal Justice, 7 April 2011 (<https://www.legal-tools.org/doc/0a1ca9/>).
7. Irene Gartner, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in Horst Fischer, Claus Kreß and Sascha Rolf Lüder (eds.), *International and National Prosecution of Crimes Under International Law*, Berlin Verlag, Berlin, 2001, pp. 423–45.
8. André Klip, “Enforcement of Sanctions Imposed by the International Criminal Tribunals for Rwanda and the Former Yugoslavia”, in *European Journal of Crime, Criminal Law and Criminal Justice*, 1997, vol. 5, pp. 144–64.
9. Claus Kreß and Göran Sluiter, “Imprisonment”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 2, Oxford University Press, 2002, pp. 1757–1821.
10. Antonio Marchesi, “The Enforcement of Sentences of the International Criminal Court”, in Flavia Lattanzi and William A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, il Sirente, Ripa Fagnano Alto, 1999, pp. 427–45.
11. Róisín Mulgrew, “On the Enforcement of Sentences Imposed by International Courts”, in *Journal of International Criminal Justice*, 2009, vol. 7, pp. 373–96.
12. Faustin Z. Ntoubandi, “Article 106”, Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour pénale internationale, Commentaire Article par Article*, vol. 2, A. Pedone, Paris, 2012, pp. 1975–79.

13. Kimberly Prost, “Chapter 14 – Enforcement”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 673–703.
14. Nigel S. Rodley and Matt Pollard, *The Treatment of Prisoners Under International Law*, 3rd. ed., Oxford University Press, 2009.
15. Christoph J. M. Safferling, *Towards an International Criminal Procedure*, Oxford University Press, 2001.
16. William A. Schabas, *The International Criminal Court*, 2nd. ed., Oxford University Press, 2016, pp. 1391–1394 (Article 106) (<https://www.legal-tools.org/doc/b7432e/>).
17. Gerard A. M. Strijards and Robert O. Harmsen, “Article 103”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 2173–86 (<https://www.legal-tools.org/doc/040751/>).
18. Dirk van Zyl Smit, “International Imprisonment”, in *International and Comparative Law Quarterly*, 2005, vol. 54, pp. 357–86.
19. Alexander Zahar and Göran Sluiter, *International Criminal Law: A Critical Introduction*, Oxford University Press, 2008.

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Article 107

Transfer of the Person upon Completion of Sentence

General Remarks:

Article 107 deals with the conflicting interests that may arise between the enforcing state and the rights of a sentenced person upon completion of sentence. However, there is no real solution provided by this provision that merely describes the issue.¹ This is not surprising, as the question had not yet posed severe problems to the ad hoc tribunals when the ICC Statute entered into force.

Since then, experience has shown that in relation to international criminal tribunals and courts one may expect two scenarios (Schabas, 2016, p. 1395 ff.). The first scenario is that the prisoner wishes to return to his or her State of nationality where he or she will be welcomed as a hero. This has been the case especially with prisoners sentenced by the ICTY.² The second scenario concerns the situation that there has been a shift in power and/or a national upheaval where the released person does not want to return. If no other state is willing to accept him or her, the person will have become “effectively stateless”.³ This has been a particular difficulty for a couple of persons that had been acquitted by the ICTR,⁴ but compara-

¹ Johannes Rochner, *Strafvollstreckung und Strafvollzug im internationalen Strafrecht*, Verlag Dr. Kovač, Hamburg, 2014, p. 318; William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1397 (<https://www.legal-tools.org/doc/b7432e/>); compare also, Joris van Wijk, “When International Criminal Justice Collides with Principles of International Protection: Assessing the Consequences of ICC Witnesses Seeking Asylum, Defendants Being Acquitted, and Convicted Being Released”, in *Leiden Journal of International Law*, 2013, vol. 26, p. 190.

² Barbora Holá and Joris van Wijk, “Life after Conviction at International Criminal Tribunals”, in *Journal of International Criminal Justice*, 2014, vol. 12, pp. 129 f. (<https://www.legal-tools.org/doc/32ce20/>), on the cases of *Plavšić* and *Šljivančanin*.

³ Roger S. Clark, “Article 107”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, mgn. 3 (<https://www.legal-tools.org/doc/a9e9f7/>).

⁴ ICTR, *Prosecutor v. Ntagerura*, Appeals Chamber, Decision on Motion to appeal the President’s Decision of 31 March 2008 and the Decision of Trial Chamber III of 15 May 2008, 18 November 2008, ICTR-99-46-A28, paras. 2, 18 (*Ntagerura*, 18 November 2008’) (<https://www.legal-tools.org/doc/fa5fa4/>); *Prosecutor v. Zigiranyirazo*, Motion for Damages for Violations of the Fundamental Rights of Protais Zigiranyirazo and Motion for Judicial Cooperation with the Kingdom of Belgium, 24 February 2012, ICTR-2001-01-073-A, paras.

ble situations have also arisen for prisoners sentenced by both ICTR (cf. van Wijk, 2013, p. 188 on the *Bagaragaza* case) and ICTY.⁵ States of enforcement may thus face the realistic scenario of being unable to remove a person upon completion of sentence (Clark, 2016, mgn. 5; Schabas, 2016, p. 1397) in case there is a concrete danger that a person would face torture or other serious human rights violations.⁶ Apparently, this led to the inclusion of a possible stay of the prisoner after completion of his or her sentence as a criterion for the designation of the State of enforcement.⁷

Thus, the ICC will have to develop a notion of “residual responsibility” as the ICTR did for acquitted persons (*Ntagerura*, 18 November 2008, paras. 14, 19). One commentator invokes States Parties’ obligations pursuant to Article 86 ICC Statute (Schabas, 2016, p. 1397), but it remains dubious how far such an obligation in relation to former prisoners may go, if existent.⁸

83 ff. (<https://www.legal-tools.org/doc/0c4989/>); *Prosecutor v. Nzuwonemeye*, Appeals Chamber, Decision on the Appeal of the Single Judge’s Decision of 22 October 2018, 17 April 2019, MICT-13-43, paras. 2, 17, 27–30 (<https://www.legal-tools.org/doc/squ8vj/>); Resolution 2029 (2011), UN Doc. S/RES/2029 (2011), 21 December 2011, para. 5 (<https://www.legal-tools.org/doc/858de4/>); Report of the 6134th Meeting of the United Nations Security Council, UN Doc. S/PV.6134, 4 June 2009, p. 8; cf. also van Wijk, 2013, p. 189, fn. 78.

⁵ Cf. ICTY, *Prosecutor v. Delić*, Presidency, Decision on Hazim Delić’s Motion for Commutation of Sentence, 24 June 2008, IT-96-21-ES, para. 15 (<https://www.legal-tools.org/doc/d679ba/>); *Prosecutor v. Tadić*, Presidency, Decision of the President on the Application for Pardon or Commutation of Sentence of Duško Tadić, 17 July 2008, IT-91-1-ES, para. 14 (<https://www.legal-tools.org/doc/01079f/>); cf., on the latter case, in detail, Rochner, 2014, pp. 232 ff.

⁶ Marchesi, 1999, p. 440; cf. European Court of Human Rights, *Othman (Abu Qatada) v. United Kingdom*, Judgment, 17 January 2012, Application No. 8139/09 (<https://www.legal-tools.org/doc/2f9ee4/>); See also van Wijk, 2013, pp. 173 ff. on the asylum requests of witnesses in the Bemba trial.

⁷ Practice Direction on the Procedure for Designation of the State in Which a Convicted Person is to Serve His or Her Sentence of Imprisonment, 24 April 2014, MICT/2 Rev. 1, para. 4(h) (<https://www.legal-tools.org/doc/c4311b/>).

⁸ Cf. in the context of Article 28 ICTR Statute: *Ntagerura*, 18 November 2008, para. 15; ICTR, *Prosecutor v. Zigiranyirazo*, Appeals Chamber, Decision on Protais Zigiranyirazo’s Request to Appeal Trial Chamber III’s Decision of 18 June 2012, 26 February 2013, ICTR-2001-01-073-A, para. 11 (<https://www.legal-tools.org/doc/0c1935/>).

Preparatory Works:

A provision resembling the present Article 107 appeared as a proposal during the sessions of the Preparatory Committee in December 1997⁹ and formed Article 97 of the Committee's Report.¹⁰

Article 97 referred to “the State of the person's nationality” as one of the options, which was broadened into “a State which is obliged to receive him or her” during the Rome Conference.¹¹

Furthermore, Article 97 did not contain any reference to interests of the sentenced person. A Syrian proposal to include the option to transfer the sentenced person “to the State of his or her choice”¹² was declined. However, for human rights concerns¹³ the Committee of the Whole later added the requirement to take “into account any wishes of the person”.¹⁴

Doctrine: For the bibliography, see the final comment on Article 107.

Author: Michael Stiel.

⁹ Decisions Taken by the Preparatory Committee at its Session Held from 1 to 12 December 1997, UN Doc. A/AC.249/1997/L.9/Rev.1, 19 December 1997, Annex IV, p. 62 (<https://www.legal-tools.org/doc/787a4d/>).

¹⁰ Report of the Preparatory Committee on the Establishment of the International Criminal Court, UN Doc. A/CONF.183/2/Add.1, 14 April 1998, pp. 153 ff. (<https://www.legal-tools.org/doc/816405/>).

¹¹ Report of the Working Group on Enforcement, 15 July 1998, UN Doc. A/CONF.183/C.1/WGE/L.14 (<https://www.legal-tools.org/doc/48bef7/>).

¹² Proposal on Article 97, Transfer of the Person Upon Completion of Sentence, submitted by the Syrian Arab Republic, UN Doc. A/CONF.183/C.1/WGE/L.5, 1 July 1998 (<https://www.legal-tools.org/doc/797063/>).

¹³ Cf. Trevor Pascal Chimimba, “Chapter 11 – Establishing an Enforcement Regime”, in Roy S. Lee, (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999–2002, pp. 353 ff. (<https://www.legal-tools.org/doc/225cdb/>); and Schabas, 2016, p. 1397, both referring to Report of the Drafting Committee to the Committee of the Whole: Part 10, Enforcement, UN Doc. A/CONF.183/DC/C.1/L.86, 16 July 1998, p. 4, fn. 1 (<https://www.legal-tools.org/doc/d61f4e/>).

¹⁴ Draft Statute for The International Criminal Court: Part 10, Enforcement, UN Doc. A/CONF.183/C.1/L.76/Add.10, 16 July 1997 (<https://www.legal-tools.org/doc/6558c7/>).

Article 107(1)

1. Following completion of the sentence, a person who is not a national of the State of enforcement may, in accordance with the law of the State of enforcement, be transferred to a State which is obliged to receive him or her, or to another State which agrees to receive him or her, taking into account any wishes of the person to be transferred to that State, unless the State of enforcement authorizes the person to remain in its territory.

It follows from the words “in accordance with the law of the State of enforcement” that the State of enforcement must have appropriate domestic legislation to deal with these details.¹ It is submitted that the reference to national law may also be understood as reminding the State of Enforcement of its human rights obligations when considering the expulsion of the former prisoner.

Four situations may be differentiated (cf. also Marchesi, 1999, p. 439 ff.):

First, Article 107(1) elaborates on the situation of a “person who is not a national of the State of enforcement”. This wording implies, *argumentum e contrario*, that a State enforcing an international sentence against one of its own citizens is expected to grant the prisoner the right to stay,² which is in line with Article 12 of the 1976 International Covenant on Civil and Political Rights. Albeit rare, there have been instances in the jurisprudence of the *ad hoc* tribunals,³ and the first two convicts at the ICC have also been transferred to their country of nationality for enforcement of their

¹ Roger S. Clark, “Article 107”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, mgn. 2 (<https://www.legal-tools.org/doc/a9e9f7/>); Antonio Marchesi, “The Enforcement of Sentences of the International Criminal Court”, in Flavia Lattanzi and William A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, Editrice Il Sirente, 1999, p. 440 (<https://www.legal-tools.org/doc/fla609/>).

² Clark, 2016, mgn. 1; Claus Kreß and Göran Sluiter, “Imprisonment”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 1814 ff. (<https://www.legal-tools.org/doc/01addc/>); William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1397 ff. (<https://www.legal-tools.org/doc/b7432e/>).

³ Cf. ICC, *Prosecutor v. Ruggiu*, Presidency, Decision on the Enforcement of Sentence, 13 February 2008, ICTR-97-32-A26, para. 13 (<https://www.legal-tools.org/doc/7518f9/>).

sentence; the third convict, Al-Mahdi, however, was transferred to a prison facility in the United Kingdom.⁴

Second, the provision then elaborates on the options “unless the State of enforcement authorizes the person to remain in its territory”. It may be the case that the prisoner, albeit a non-national of the State of enforcement, has been successfully integrated into the prison population while serving his long-term sentence or has other ties with the State of enforcement. In those cases, the most preferable solution would be that the respective State permits the person to stay (Clark, 2016, mgn. 5). However, given the experience of the *ad hoc* tribunals, such generosity to a former war criminal or *génocidaire* cannot be expected to be a very likely situation. There will be little sympathy with a convicted offender not wanting to be returned to the area of commission because he fears stigmatization or further prosecution for other crimes (Schabas, 2016, p. 1396). It is unclear whether protection under the 1951 Convention Relating to the Status of Refugees has been forfeited by the perpetrator pursuant to the exclusion clause of Article 1(f)(a) of said Convention⁵ or if the prisoner may again be entitled to refugee status having now served his or her sentence.⁶ In fact the ICC Statute does not impose an obligation on the State of enforcement to provide what amounts to asylum for former criminals that are not nationals of the said State (Clark, 2016, mgn. 5). It must be noted, however, that the real risk of ill-treatment might still prohibit the return of the former prisoner to another State, as outlined above – even if protection under the Refugee Convention is not granted.⁷ The Statute is silent on this particular possibility. It has

⁴ ICC, *Prosecutor v. Katanga*, Presidency, Decision designating a State of enforcement, 8 December 2015, ICC-01/04-01/07-3626, p. 4 (<https://www.legal-tools.org/doc/8d5ad5/>); *Prosecutor v. Lubanga*, Presidency, Decision designating a State of Enforcement, 8 December 2015, ICC-01/04-01/06-3185, p. 4 (<https://www.legal-tools.org/doc/fae14f/>); ICC, “Ahmad Al Faqi Al Mahdi transferred to a UK prison facility to serve sentence”, 3 May 2019, press release, ICC-CPI-20190503-PR1451 (<https://www.legal-tools.org/doc/f9c041/>).

⁵ Cf. Johannes Rochner, *Strafvollstreckung und Strafvollzug im internationalen Strafrecht*, Verlag Dr. Kovač, Hamburg, 2014, p. 266; Joris van Wijk, “When International Criminal Justice Collides with Principles of International Protection: Assessing the Consequences of ICC Witnesses Seeking Asylum, Defendants Being Acquitted, and Convicted Being Released”, in *Leiden Journal of International Law*, 2013, vol. 26, p. 188.

⁶ Cf. the considerations in: UNHCR, “Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees”, 4 September 2003, para. 73 (<https://www.legal-tools.org/doc/9ypis8/>).

⁷ Cf. UNHCR, “Guidelines on International Protection”, 4 September 2003, UN Doc. HCR/GIP/03/05, para. 8 (<https://www.legal-tools.org/doc/182f3x/>).

been suggested that this is not an attempt to overrule human rights law but was deliberately left out in order not to discourage States from agreeing to enforce a sentence (Marchesi, 1999, p. 440).

Third, in case the State of enforcement decides to expel the former prisoner, who is a non-national, “a State which is obliged to receive him or her” may be chosen. Which obligations are meant is not elaborated upon. The notion may, it is argued, include the State of nationality⁸ but this is not entirely clear, as a refusal to let a national re-enter the country is not completely excluded under international human rights law (Schabas, 2016, p. 1398, referring to Article 12(4) ICCPR: “not *arbitrarily* deprived”). It is further argued that the State originally surrendering the former prisoner to the ICC is a State that has a duty to receive the former prisoner from the State of enforcement, if no other State assumes responsibility,⁹ thereby restoring the status quo ante. However, the practice of the *ad hoc* tribunals regarding acquitted persons seems to suggest the contrary, arguing that such a duty would amount to an interference with the immigration policies of a sovereign state.¹⁰

Fourth, “Another State which agrees to receive him or her” might include successor States¹¹ or the rare case of States acting out of political or humanitarian reasons (cf. Clark, 2016, mgn. 3).

The decision shall be made “taking into account any wishes of the person”. Yet, it is unclear in which of the previously outlined situations the wishes of the former prisoner shall play a role. While a literal reading of the provision would suggest that those can be neglected in the case of a State being obliged to receive the individual (Ambos, 2016, p. 648), the

⁸ Clark, 2016, mgn. 3; Kreß and Sluiter, 2002, p. 1815; Compare, Kai Ambos, *Treatise on International Criminal Law. Vol III: International Criminal Procedure*, Oxford University Press, 2016, p. 648 (<https://www.legal-tools.org/doc/995606/>), who sees a “certain priority” for that State.

⁹ Cf. Kreß and Sluiter, p. 1816; ICTR, *Prosecutor v. Zigiranyirazo*, Motion for Damages for Violations of the Fundamental Rights of Protais Zigiranyirazo and Motion for Judicial Cooperation with the Kingdom of Belgium, 24 February 2012, ICTR-2001-01-073-A, paras. 143 ff. (<https://www.legal-tools.org/doc/0c4989/>).

¹⁰ ICTR, *Prosecutor v. Zigiranyirazo*, Appeals Chamber, Decision on Protais Zigiranyirazo’s Request to Appeal Trial Chamber III’s Decision of 18 June 2012, 26 February 2013, ICTR-2001-01-073-A, paras. 9 ff. (<https://www.legal-tools.org/doc/0c1935/>).

¹¹ Cf. the situation in the territory of the former Yugoslavia as illustrated in ICTY, *Prosecutor v. Tadić*, Presidency, Decision of the President on the Application for Pardon or Commutation of Sentence of Duško Tadić, 17 July 2008, IT-91-1-ES, paras. 14 ff. (<https://www.legal-tools.org/doc/01079f/>).

travaux préparatoires suggest, it is argued, that the wishes are to be taken into account in all situations (Clark, 2016, mgn. 4; Kreß and Sluiter, 2002, p. 1815). Given the wording, the views must only be “taken into account”, which means that the person has no right that these views prevail (cf. Ambos, 2016, p. 648; Schabas, 2016, p. 1398 f.). However, the former prisoner may have a legitimate preference for another country than his State of nationality in case of double citizenship or if strong ties exist to another State (cf. Kreß and Sluiter, p. 1815 ff.). It is argued that the concerns of a person who has now completely served his or her sentence should prevail (Clark, 2016, mgn. 4; Kreß and Sluiter, p. 1815 ff.) and make the difference between several possible States (Marchesi, 1999, p. 440). The obligation of States of enforcement to take the former prisoner’s views into account may be seen as the most important part of an otherwise only declaratory provision (cf. Schabas, 2016, p. 1398).

Doctrine: For the bibliography, see the final comment on Article 107.

Author: Michael Stiel.

Article 107(2)

2. If no State bears the costs arising out of transferring the person to another State pursuant to paragraph 1, such costs shall be borne by the Court.

The second paragraph contains an implicit hope that some State will pay for the transfer, either the State of nationality out of responsibility for the return of its own citizen or the State of Enforcement that bears the costs willingly to be able to expel the former criminal. If, however, no State is ready to pay the expenses, they will be borne by the Court. While the costs for a “one way economic class ticket” will not be a substantial cost factor, this may be different for the bureaucracy costs involved.¹ However, it is argued, that the latter category of costs may not be “costs arising out of transferring the person to another State”, as expenses associated with internal decision-making are entirely the responsibility of the respective State.

Doctrine: For the bibliography, see the final comment on Article 107.

Author: Michael Stiel.

¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1399 (<https://www.legal-tools.org/doc/b7432e/>).

Article 107(3)

3. Subject to the provisions of Article 108, the State of enforcement may also, in accordance with its national law, extradite or otherwise surrender the person to a State which has requested the extradition or surrender of the person for purposes of trial or enforcement of a sentence.

Article 107(3) requires yet again that there is sufficient legislation to deal with the details of the extradition in the State of enforcement.¹ Again, domestic human rights obligations must be respected.

The paragraph confirms the right of the State of enforcement to comply with requests for extradition and surrender, while at the same time subjecting it to the provisions of Article 108 if conduct prior to the transfer of the sentenced person is concerned.² Hence, the Court acts as an ‘arbiter’ between the possibly conflicting obligations under bilateral extradition schemes and under the ICC Statute (Clark, 2016, mgn. 9).

Cross-references:

Article 108.

Rules 212–215.

Regulations 115, 117.

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, vol. 3, Oxford University Press, 2016, pp. 635–659 (Chapter VIII).
2. Trevor Pascal Chimimba, “Chapter 11 – Establishing An Enforcement Regime”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, pp. 345–356, Kluwer, The Hague, 2002.

¹ Roger S. Clark, “Article 107”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, mgn. 8 (<https://www.legal-tools.org/doc/a9e9f7/>).

² Claus Kieß and Göran Sluiter, “Imprisonment”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 1816 (<https://www.legal-tools.org/doc/01addc/>); William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1399 (<https://www.legal-tools.org/doc/b7432e/>).

3. Roger S. Clark, “Article 107”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 2212–13 (<https://www.legal-tools.org/doc/040751/>).
4. Barbora Holá and Joris van Wijk, “Life after Conviction at International Criminal Tribunals – An Empirical Overview”, in *Journal of International Criminal Justice*, 2014, vol. 12, pp. 109–32.
5. Claus Kreß and Göran Sluiter, “Imprisonment”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 2, Oxford University Press, 2002, pp. 1757–1821.
6. Antonio Marchesi, “The Enforcement of Sentences of the International Criminal Court”, in Flavia Lattanzi and William A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, Il Sirente, Ripa Fagnano Alto, 1999, pp. 427–45.
7. Johannes Rochner, *Strafvollstreckung und Strafvollzug im internationalen Strafrecht*, Verlag Dr. Kovač, Hamburg, 2014.
8. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1395–99 (<https://www.legal-tools.org/doc/b7432e/>).
9. Joris van Wijk, “When International Criminal Justice Collides with Principles of International Protection: Assessing the Consequences of ICC Witnesses Seeking Asylum, Defendants Being Acquitted, and Convicted Being Released”, in *Leiden Journal of International Law*, 2013, vol. 26, pp. 173–91.

Author: Michael Stiel.

Article 108

Limitation on the Prosecution or Punishment of other Offences

General Remarks:

The provision is modelled after the principle of specialty which is firmly embedded in the inter-State practice on extradition and often regarded as part of customary international law. Whether the principle also governs the inter-State transfer of prisoners is less clear.¹ The original rationale from the extradition context is to limit the infringement of the extraditing State's sovereignty by strict control of what the receiving state may do – in tandem with the principles of reciprocity and double criminality. Obviously, this rationale is not applicable here because no infringement of sovereignty is at issue – unlike the case of surrender, cf. Article 101 – since the ICC is neither a sovereign State nor a court of general jurisdiction.² Only from the perspective of the surrendering State, the enforcement of the Court's sentence in another State amounts to re-extradition (Kreß and Sluiter, 2002, pp. 1810, 1813), yet Article 108 ignores the surrendering State completely (this is partly remedied by Rule 214(4), which requires its consultation, and Regulation 115, which calls for respect of the principles of international law on re-extradition).

Hence, the inclusion of this rule of specialty must be justified by other grounds in light of the interests at stake in the enforcement of a custodial sentence of the Court. It is submitted here that Article 108 serves to control and prevent such interferences that could frustrate the enforcement of the particular sentence or are otherwise incompatible with the aims of interna-

¹ Irene Gartner, "The Rules of Procedure and Evidence on Co-operation and Enforcement", in Horst Fischer, Claus Kreß and Sascha Luder (eds.), *International and National Prosecution of Crimes Under International Law*, Berlin Verlag, Berlin, 2001, p. 438 (<https://www.legal-tools.org/doc/2d6196/>); Claus Kreß and Göran Sluiter, "Imprisonment", in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 1809 (<https://www.legal-tools.org/doc/01addc/>).

² William A. Schabas, "Article 108", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, mgn. 7 ('Schabas, 2016, Article 108') (<https://www.legal-tools.org/doc/040751/>); William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1404 (<https://www.legal-tools.org/doc/b7432e/>); cf. Kreß and Sluiter, 2002, p. 1809 ff.

tional criminal justice. The provision's *raison d'être* cannot be left undetermined because it is essential for the criteria upon which the Court may approve or reject a request for criminal prosecution, punishment or extradition (cf. Schabas, 2016, Article 108, mgn. 7). While holding that there is no right to appeal a decision of the Presidency under Article 108 at present, the Appeals Chamber has suggested an amendment of the ICC Statute to permit such appellate review.³ No such amendment has been considered by the Assembly of States Parties to date. The Presidency has, however, determined that it has the power to reconsider its previous decisions on Article 108 in light of new arguments or facts⁴ even after the sentenced person has fully served its term of imprisonment.

Preparatory Work:

The provision is an innovation, since the *ad hoc* tribunals' statutes do not contain a comparable rule and the tribunals never had to assess the issue in the context of a sentence being actually enforced before the adoption of the ICC Statute (cf. Schabas, 2016, Article 108, mgn. 1 with fn. 1). It was introduced late in the drafting process and was adopted without much alteration (see Kreß and Sluiter, 2002, p. 1810; Schabas, 2016, Article 108, mgn. 2–3). There was some resistance against the rule of specialty in general and minor controversies arose whether the Presidency or the Court should decide on exceptions (Schabas, Article 108, 2016, mgn. 3; Schabas, 2016, p. 1401) – which is immaterial now since Rules 199, 214 and 215 entrust the Presidency with the Court's decision – and about the nature of the hearing (Gartner, 2001, pp. 438 ff.). Meanwhile, the President of the IRMCT has derived a comparable principle of specialty from the general power to supervise the enforcement of sentences enshrined in Article 25(2) of its Statute.⁵

³ ICC, *Prosecutor v. Katanga*, Appeals Chamber, Decision on the admissibility of Mr Katanga's appeal against the "Decision pursuant to article 108(1) of the Rome Statute", 9 June 2016, ICC-01/04-01/07-3697, paras. 16 ff. (<https://www.legal-tools.org/doc/cdc248/>).

⁴ ICC, *Prosecutor v. Katanga*, Presidency, Decision on 'Defence Application for Reconsideration of the Presidency "Decision pursuant to article 108(1) of the Rome Statute"' (ICC-01/04-01/07-3821-Red), 26 June 2019, ICC-01/04-01/07-3833, paras. 23–26 (<https://www.legal-tools.org/doc/53f6f9/>).

⁵ IRMCT, *Prosecutor v. Žigić*, Presidency, Decision on Zoran Žigić's request to withhold consent for the execution of the Republic of Austria's extradition decision, 12 December 2014, MICT-14-81-ES.1, paras. 11–14 (<https://www.legal-tools.org/doc/nlhm4a/>).

Doctrine: For the bibliography, see the final comment on Article 108.

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

Article 108(1): Sentenced Person in Custody

1. A sentenced person in the custody

Article 108(1) sets out a general prohibition of prosecution or extradition of the sentenced person for conduct prior to that person's delivery to the State of enforcement which can be lifted by the approval of the Court on the request of the State of enforcement. The relevant procedure is elaborated in Rules 214 and 215.

The wording of the English version of Article 108(1) appears to be broader than the French version which uses the term “*détenu*”. It has been argued that a person “in custody” is not necessarily a prisoner.¹ or detainee but could also be a person provisionally released or even a fugitive (Schabas, 2016, mgn. 5). There seems to be agreement that only a broad reading in accordance with Article 33(d) of the Vienna Convention on the Law of Treaties conforms to the provision's rationale.² It is doubtful, however, whether a fugitive still is “in custody”. Arguably, Article 111 is the applicable *lex specialis* in that case, but the question seems rather theoretical, as in practice states would wait until the fugitive has been arrested.

Doctrine: For the bibliography, see the final comment on Article 108.

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

¹ A term used in earlier versions and later abandoned, William A. Schabas, “Article 108”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, mgn. 5 (<https://www.legal-tools.org/doc/040751/>).

² Schabas, 2016, Article 108 mgn. 5; Claus Kreß and Göran Sluiter, “Imprisonment”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 1811 (<https://www.legal-tools.org/doc/01addc/>).

Article 108(1): State of Enforcement

State of enforcement

State of enforcement means the State having accepted the Court's designation according to Article 103.¹ It is also only the State of enforcement which can make the request in the case of extradition and not the "third State" which requested the State of enforcement to extradite the person, possibly on the basis of a bilateral extradition treaty (Schabas, 2016, mgn. 6). After the request is made, there may be direct communication between the Court and the third State (cf. Rule 214(3)).

Doctrine: For the bibliography, see the final comment on Article 108.

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

¹ William A. Schabas, "Article 108", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, mgn. 4 (<https://www.legal-tools.org/doc/040751/>).

Article 108(1): Prior Conduct

any conduct engaged in prior to that person's delivery

Conduct after the person's delivery to the State of enforcement is not covered and can be prosecuted and punished according to the enforcement State's national law without the Court's prior approval. Nevertheless, Rule 216 obliges the State of enforcement to inform the Presidency about any important events including a subsequent prosecution, as a supplement to the Court's supervisory power pursuant to Article 106 and relocation power under Article 104(1). One may doubt, however, whether the extradition to a third State for conduct following the delivery should in fact be admissible without the Court's consent; admittedly, such cases, though theoretically possible, are most unlikely. More likely are instances of prosecution and punishment for offences committed during incarceration; the disciplinary aspect is covered by Article 106, but the question whether an additional prison sentence shall be executed only after having served the full sentence pronounced by the Court (cf. Rule 215(2)) is unresolved. Given the State's undertaking to execute the sentence as pronounced by the Court and following the model of Rule 215(2), it is submitted that the international sentence has to be served in full before any additional sentence in the State of enforcement can be executed. This approach is supported by Rule 216: only prosecution by the State of enforcement subsequent to the prisoner's transfer is mentioned, arguably as enforcement (of a sentence for such conduct) will not take place.

The restriction to prior conduct is said to be in line with usual practice and the legitimate interests underlying the specialty principle¹ – this reasoning appears questionable since the specialty principle is applied out of its usual context here. The restriction could be justified if Article 108 is regarded as an extension or complement of the rule of specialty enshrined in Article 101 (see comment to Article 108), assuming that the defendant is regularly surrendered to the Court by a State other than the State of enforcement.

¹ Claus Kreß and Göran Sluiter, "Imprisonment", in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 1811 (<https://www.legal-tools.org/doc/01addc/>).

The use of the term “delivery” is not in line with other provisions of the Statute which use “transfer” but there is no indication that this verbal difference reflects any substantive distinction,² since Rule 214(1) also employs the term “transfer”.

Doctrine: For the bibliography, see the final comment on Article 108.

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

² William A. Schabas, “Article 108”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, mgn. 4 (<https://www.legal-tools.org/doc/040751/>).

Article 108(1): Prosecution or Punishment

prosecution or punishment

The prohibition is limited to criminal proceedings, so that all other types of proceedings, for example for civil claims¹ or a ruling on ineligibility to hold public office² are admissible subject to notification according to Rule 216 (“important event concerning the sentenced person”), if appropriate.

Doctrine: For the bibliography, see the final comment on Article 108.

Authors: Michael Stiel and Carl-Friedrich Stuckenberg

¹ Faustin Z. Ntoubandi, “Article 108”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1987 (<https://www.legal-tools.org/doc/872bf2/>); William A. Schabas, “Article 108”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, mgn. 4 (<https://www.legal-tools.org/doc/040751/>).

² ICC, *Prosecutor v. Bemba et al.*, Appeals Chamber, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against the Decision of Trial Chamber VII of 17 September 2018 entitled ‘Decision Re-sentencing Mr Jean-Pierre Bemba Gombo, Mr Aime Kilolo Musamba and Mr Jean-Jacques Mangenda Kabongo’, 27 November 2019, ICC-01/05-01/13-2351, para. 155 (<https://www.legal-tools.org/doc/xo2w2h/>).

Article 108(1): Approval by the Court

unless [...] approved by the Court

Neither the Statute nor the Rules provide any guidance which criteria the Court shall resort to when making its decision. The usual considerations of States in extradition contexts are not pertinent here; instead, criteria must be derived from the Statute and the Court's functions and prerogatives.¹ The request must be denied if the principle *ne bis in idem*² or human rights norms (Article 21(3); for example, a violation of the right to a fair trial, cf. *Katanga*, 7 April 2016, para. 30) would be violated or if granting the request would contribute to such violations; evolving human rights norms may be sufficient (Kreß and Sluiter, 2002, p. 1812; Schabas, 2016, Article 108, mgn. 7). The Presidency should therefore deny a request which could lead to the application of the death penalty (*Katanga*, 7 April 2016, para. 28) or other cruel or degrading forms of punishment or intolerable detention conditions³ or would in some way abuse the Court's process. By addressing the parties' arguments on the merits, the Presidency has recently accepted that violations of the right to an expeditious trial,⁴ to be notified of the charges (*Katanga*, 26 June 2019, paras. 38–40) and to proper legal representation (paras. 44–47) might in exceptional circumstances necessitate reconsideration of an Article 108 decision. The Court may attach conditions to its approval in order to ensure the observance of fundamental hu-

¹ Claus Kreß and Göran Sluiter, "Imprisonment", in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 1812 (<https://www.legal-tools.org/doc/01addc/>); William A. Schabas, "Article 108", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, mgn. 7 ('Schabas, 2016, Article 108') (<https://www.legal-tools.org/doc/040751/>).

² Article 20; ICC, *Prosecutor v. Germain Katanga*, Presidency, Decision pursuant to article 108(1) of the Rome Statute, 7 April 2016, ICC-01/04-01/07-3679, paras. 21–25 ('*Katanga*, 7 April 2016') (<https://www.legal-tools.org/doc/6565f5/>).

³ Kreß and Sluiter, 2002, pp. 1812 f.; Schabas, 2016, Article 108, mgn. 7; William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1404 (<https://www.legal-tools.org/doc/b7432e/>).

⁴ ICC, *Prosecutor v. Germain Katanga*, Presidency, Decision on 'Defence Application for Reconsideration of the Presidency "Decision pursuant to article 108(1) of the Rome Statute"' (ICC-01/04-01/07-3821-Red), 26 June 2019, ICC-01/04-01/07-3833, paras. 32–34 ('*Katanga*, 26 June 2019') (<https://www.legal-tools.org/doc/53f6f9/>).

man rights.⁵ Absent such grounds for refusal, it has been argued that the Court should deny a request only “in exceptional cases” (Schabas, 2016, Article 108, mgn. 7; Schabas, 2016, p. 1404). This is apparently also the approach of the Presidency that relies on the principle of complementarity and argues that the Court “was not established to be an international court of human rights, sitting in judgment over domestic legal systems to ensure that they are compliant with international standards of human rights”.⁶

Doctrine: For the bibliography, see the final comment on Article 108.

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

⁵ Schabas, 2016, Article 108, mgn. 7; compare, *Katanga*, 7 April 2016, para. 28; critical on the Presidency’s approach to solely rely on diplomatic assurances, Patryk I. Labuda, “Complementarity Compromised? The ICC Gives Congo the Green Light to Re-Try Katanga”, in *Opinio Juris*, 11 April 2016.

⁶ *Katanga*, 7 April 2016, para. 31; critical on the Presidency’s approach, Keilin Anderson and Adaena Sinclair-Blakemore, “*Ne bis in idem, nulla poena sine lege* and Domestic Prosecutions of International Crimes in the Aftermath of a Trial at the International Criminal Court”, in *International Criminal Law Review*, 2021, vol. 21, pp. 47 ff., and Labuda, 2016.

Article 108(2)

2. The Court shall decide the matter after having heard the views of the sentenced person.

The sentenced person shall be heard before the Court decides on the request. It is controversial whether Article 108(2) can be regarded as formulating an individual right to specialty protecting the sentenced person¹ or not.² The controversy seems to a great extent immaterial since the Presidency only has to hear the sentenced person and take his view into account and not to obtain his consent. The Statute does not prescribe how the hearing shall be conducted. Proposals for a mandatory oral hearing were rejected at the negotiations as not in line with inter-State practice which relies on written statements of the prisoner.³ The consensus reflected in the corresponding Rules is that a written consultation is usually sufficient, since Rule 214(1)(d) directs the requesting State of enforcement to transmit a “protocol containing the views of the sentenced person” and Rule 214(6) states that the Presidency “may decide to conduct a hearing”. One commentator has suggested that a fully fledged adversarial hearing would not be inconceivable which could even involve amici curiae if human rights issues are at stake (Schabas, 2016, Article 108, mgn. 9; Schabas, 2016, p. 1404).

¹ Faustin Z. Ntoubandi, “Article 108”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1987 (<https://www.legal-tools.org/doc/872bf2/>); William A. Schabas, “Article 108”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, mgn. 1, 8 (‘Schabas, 2016, Article 108’) (<https://www.legal-tools.org/doc/040751/>); William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1400, 1404 (<https://www.legal-tools.org/doc/b7432e/>).

² Claus Kreß and Göran Sluiter, “Imprisonment”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 1811 (<https://www.legal-tools.org/doc/01addc/>).

³ Irene Gartner, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in Horst Fischer, Claus Kreß and Sascha Luder (eds.), *International and National Prosecution of Crimes Under International Law*, Berlin Verlag, Berlin, 2001, pp. 438 ff. (<https://www.legal-tools.org/doc/2d6196/>); Kimberly Prost, “Chapter 14 – Enforcement”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 690 ff. (<https://www.legal-tools.org/doc/e34f81/>).

Doctrine: For the bibliography, see the final comment on Article 108.

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

Article 108(3)

3. Paragraph 1 shall cease to apply if the sentenced person remains voluntarily for more than 30 days in the territory of the State of enforcement after having served the full sentence imposed by the Court, or returns to the territory of that State after having left it.

The prohibition of paragraph 1 ceases to apply in two hypotheses after the Court's sentence is fully served: first, when the released prisoner remains voluntarily for more than 30 days in the territory of the State of enforcement, and secondly, when he returns to that territory after having left it. This is said to be consistent with inter-State practice in bilateral extradition matters and justified because the former prisoner is deemed to have “voluntarily” relinquished the protection of the specialty rule,¹ even if he or she may not have known about this exception.² On the contrary, no such “voluntary” waiver exists if the person remains in the enforcement State's territory because no other State lets him enter. The second hypothesis does not contain a voluntariness requirement so that it seems that the specialty rule would not apply even if the person returns to the State of enforcement because he has been forcibly expelled from the State he wanted to enter,³ although it is not clear that this inexplicable difference, which runs counter to principle, was really intended by the drafters.⁴

¹ William A. Schabas, “Article 108”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, mgn. 10 (‘Schabas, 2016, Article 108’) (<https://www.legal-tools.org/doc/040751/>); William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1404 (<https://www.legal-tools.org/doc/b7432e/>).

² Karin Calvo-Goller, *The Trial Proceedings of the International Criminal Court: ICTY and ICTR Precedents*, Martinus Nijhoff Publishers, 2005, p. 338 ff. (<https://www.legal-tools.org/doc/9cc9cc/>).

³ Faustin Z. Ntoubandi, “Article 108”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article*, A. Pedone, Paris, 2012, p. 1988 (<https://www.legal-tools.org/doc/872bf2/>); Schabas, 2016, Article 108, mgn. 10.

⁴ In this sense Claus Kieß and Göran Sluiter, “Imprisonment”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 1813 (<https://www.legal-tools.org/doc/01addc/>).

Cross-references:

Rules 214, 215 and 216.

Regulation 115.

Doctrine:

1. Keilin Anderson and Adaena Sinclair-Blakemore, “*Ne bis in idem, nulla poena sine lege* and Domestic Prosecutions of International Crimes in the Aftermath of a Trial at the International Criminal Court”, in *International Criminal Law Review*, 2021, vol. 21, pp. 35–66
2. Irene Gartner, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in Horst Fischer, Claus Kreß and Sascha Rolf Lüder (eds.), *International and National Prosecution of Crimes Under International Law*, Berlin Verlag, Berlin, 2001, pp. 423–45.
3. Claus Kreß and Göran Sluiter, “Imprisonment”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 2, Oxford University Press, 2002, pp. 1757–1821.
4. Patryk I. Labuda, “Complementarity Compromised? The ICC Gives Congo the Green Light to Re-Try Katanga”, in *OpinioJuris*, 11 April 2016.
5. Faustin Z. Ntoubandi, “Article 108”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour pénale internationale, Commentaire Article par Article*, vol. 2, A. Pedone, Paris, 2012, pp. 1985–88.
6. Kimberly Prost, “Chapter 14 – Enforcement”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 673–703.
7. William A. Schabas, “Article 108”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 2199–2204 (<https://www.legal-tools.org/doc/040751/>).
8. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1400–1405 (Article 108) (<https://www.legal-tools.org/doc/b7432e/>).

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

Article 109

Enforcement of Fines and Forfeiture Measures

General Remarks:

Article 77(2) allows the Court to impose fines and order the forfeiture of proceeds, property and assets derived directly or indirectly from a crime in addition to custodial sentences. These powers represent a relative innovation on the international level,¹ although the Court has rarely used them as of yet,² as the Trial Chambers declined to impose a fine or forfeiture order on many of the individuals sentenced so far by the Court, usually relying on the fact that they are indigent.³ Provisional measures are regulated in Article 93(1)(k), the enforcement regime is contained in Article 109. The provision is applicable to reparation orders by way of referral from Article 75(5), but not to fines authorized under Article 70(3) for offences against the administration of justice.

In sharp contrast to the consensual nature of the enforcement of prison sentences, Article 109 erects an obligatory regime for the enforcement

¹ See Hiram Abtahi and Steven Arrigg Koh, “The Emerging Enforcement Practice of the International Criminal Court”, in *Cornell International Law Journal*, 2012, vol. 45, no. 1, pp. 4 f. (<https://www.legal-tools.org/doc/2217b4/>); Claus Kreß and Göran Sluiter, “Imprisonment”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 1823 f. (<https://www.legal-tools.org/doc/01addc/>); cf. also Kai Ambos, *Treatise on International Criminal Law. Vol III: International Criminal Procedure*, Oxford University Press, 2016, pp. 654 f. (<https://www.legal-tools.org/doc/995606/>), on possible explanations.

² Cf. ICC, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Trial Chamber VII, Decision Re-sentencing Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba and Mr Jean-Jacques Mangenda Kabongo, 17 September 2018, ICC-01/05-01/13-2312, pp. 50, 51 (<https://www.legal-tools.org/doc/1a7f80/>).

³ Cf. ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on Sentence pursuant to Article 76 of the Statute, 10 July 2012, ICC-01/04-01/06-2901, para. 106 (<https://www.legal-tools.org/doc/c79996/>); *Prosecutor v. Katanga*, Trial Chamber II, Décision relative à la peine (article 76 du Statut), 23 May 2014, ICC-01/04-01/07-3484, para. 169 (<https://www.legal-tools.org/doc/7e1e16/>); *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Trial Chamber VIII, Judgment and Sentence, 27 September 2016, ICC-01/12-01/15-171, para. 110 (<https://www.legal-tools.org/doc/042397/>); *Prosecutor v. Ntaganda*, Trial Chamber VI, Sentencing judgment, 7 November 2019, ICC-01/04-02/06-2442, paras. 240, 247 (<https://www.legal-tools.org/doc/yyw2ef/>); *Prosecutor v. Ongwen*, Trial Chamber IX, Sentence, 6 May 2021, ICC-02/04-01/15-1819-Red, para. 397 (<https://www.legal-tools.org/doc/vj1y8k/>).

of fines and forfeiture orders, apparently a left-over of the rejected general recognition clause contained in earlier drafts.⁴ The present provision could be agreed upon as the Court depends on the co-operation of a specific State in such cases (Kreß and Sluiter, 2002, p. 1831). This approach renders the ICC's "dual enforcement regime" (Abtahi and Arrigg Koh, 2012, p. 3) lamentably inconsistent; nonetheless, the obligatory nature of Article 109 is to be welcomed (Kreß and Sluiter, 2002, p. 1831).

It was debated whether the ICC Statute should provide for the direct recognition and enforcement of fines and forfeiture orders or whether the States Parties shall give effect to the Court's decisions in accordance with their national law.⁵ It is unclear what 'direct enforcement' implicates (apart from the suppression of a separate recognition procedure like exequatur proceedings or a conversion requirement): Since enforcement as such needs a legally ordered procedure, either the Statute and Rules have to provide some form of *loi uniforme* to be employed (cf. Schabas, 2016, Article 109, mgn. 5; Schabas, 2016, p. 1409) – which would have been a very demanding and ambitious task – or, failing that, the domestic *lex loci executionis* is applied, possibly with some qualifications. Article 109 has chosen the latter approach which is in line with the sparse inter-State practice in this field (Kreß and Sluiter, 2002, pp. 1824–1826).

The Statute does not provide for the case that all enforcement measures with regard to a fine imposed by the Court fail, a controversial issue at the negotiations (see Kreß and Sluiter, 2002, pp. 1827 f.). Instead, Rule 146(5) authorizes the Presidency in cases of "continued willful non-payment" of a fine and "as a last resort", to extend the term of imprisonment by up to a quarter of the original term or five years, whichever is less, provided the extension does not lead to a total prison term of more than 30 years. A term of life imprisonment may not be extended. This is a remarkable power of the Presidency that is normally restricted to enforce sentences

⁴ For the negotiating history, see Kreß and Sluiter, 2002, pp. 1826–1828; William A. Schabas, "Article 109", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, mgn. 2–4 ('Schabas, 2016, Article 109') (<https://www.legal-tools.org/doc/040751/>); William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1406–8 (<https://www.legal-tools.org/doc/b7432e/>).

⁵ Cf. Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, UN Doc. A/50/22, 7 September 1995, p. 44, para. 237 (<https://www.legal-tools.org/doc/b50da8/>); Schabas, 2016, Article 109, mgn. 4.

pronounced by the Chambers.⁶ It is subject to heavy criticism with regard to the *nulla poena sine lege* principle enshrined in Article 23.⁷ In any way, the increase of a sentence of imprisonment may cause domestic legality problems in some States of enforcement (Young, 2016, pp. 118–20).

Doctrine: For the bibliography, see the final comment on Article 109.

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

⁶ Abtahi and Arrigg Koh, 2012, pp. 21 f.; Rebecca Young, “Fines and Forfeiture in International Criminal Justice”, in Róisín Mulgrew and Denis Abels (eds.), *Research Handbook on the International Penal System*, Edward Elgar Publishing, Northampton, 2016, pp. 122–25.

⁷ Cf. Róisín Mulgrew, *Towards the Development of the International Penal System*, Cambridge University Press, 2013, pp. 16 ff.; for a defense, see Young, 2016, pp. 122–23.

Article 109(1): Give Effect

States parties shall give effect to fines or forfeitures ordered by the Court under Part 7,

Article 109(1) obliges the States Parties to enforce fines and forfeiture orders imposed by the Court. The words “give effect” (stricter in French: “font exécuter”) have been understood to exclude any modification of the amounts of fines and forfeiture orders.¹ Accordingly, Rule 220 provides that the Presidency shall remind States Parties thereof.

States Parties are not expected to initiate enforcement measures on their own but only on the request of the Presidency which according to Rule 217 shall seek co-operation and enforcement measures “in accordance with Part 9”. With regard to fines under Article 77, Rule 146(5) makes clear that the Presidency will first ask the sentenced person to pay voluntarily and resort to enforcement measures only in case of non-compliance.

Doctrine: For the bibliography, see the final comment on Article 109.

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

¹ Report of The Working Group on Enforcement, 14 July 1998, UN Doc. A/CONF.183/C.1/WGE/L.14/Add.1/Corr.1, fn. to draft Article 93 (<https://www.legal-tools.org/doc/48bef7/>); Claus Kreß and Göran Sluiter, “Imprisonment”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 1827 (<https://www.legal-tools.org/doc/01addc/>).

Article 109(1): Without Prejudice to Rights of Bona Fide Third Parties

without prejudice to the rights of bona fide third parties

The only ground for refusal to enforce fines and forfeiture orders mentioned in the Statute is prejudice to the “rights of bona fide third parties”, an expression nowhere defined in the Statute or Rules of Procedure and Evidence. Hence, it seems that national courts have to determine which rights are relevant and when a party qualifies as bona fide, which not only deviates from inter-State practice but may result in an uneven application.¹ It has been submitted that the Presidency should be competent to make a finding that a national court has abused that argument in a concrete case (Kreß and Sluiter, 2002, p. 1830 fn. 25) and that the Court itself might intervene in national proceedings in order to contest the priority given to a third party creditor (Schabas, 2016, Article 109, mgn. 8, Schabas, 2016, p. 1410 ff.). Arguably, there should be some mechanism to provide guidance and enhance uniformity on this issue, assuming that in the future large sums could be at stake.

The restriction applies to both forfeiture orders as well as fines although the corresponding proviso is spelled out only in Article 77(2)(b) for forfeiture orders and not in Article 77(2)(a) relating to fines, as such a distinction was never mentioned during the negotiations (Schabas, 2016, Article 109, mgn. 9, Schabas, 2016, p. 1410).

Considering that the enforcement under Article 109(1) is stricter than the execution of provisional measures under Article 93(1)(k) where a “fundamental legal principle of general application” represents an additional ground for refusal pursuant to Article 93(3), commentators have, for the sake of consistency, suggested to interpret Article 109(1) accordingly (Kreß

¹ Claus Kreß and Göran Sluiter, “Imprisonment”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 1830 (<https://www.legal-tools.org/doc/01addc/>); William A. Schabas, “Article 109”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, mgn. 7 (‘Schabas, 2016, Article 109’) (<https://www.legal-tools.org/doc/040751/>); William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1409 ff. (<https://www.legal-tools.org/doc/b7432e/>).

and Sluiter, 2002, p. 1829). This proposal is underscored by Rule 217.² Alternatively, one might argue that “fundamental legal principles of general application” can often already be taken into account in the determination of the “rights of bona fide third parties”.

Doctrine: For the bibliography, see the final comment on Article 109.

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

² Irene Gartner, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in Horst Fischer, Claus Kreß and Sascha Luder (eds.), *International and National Prosecution of Crimes Under International Law*, Berlin Verlag, Berlin, 2001, p. 443 (<https://www.legal-tools.org/doc/2d6196/>).

Article 109(1): National Procedure

in accordance with the procedure of their national law

States shall apply their *lex fori* when enforcing fines and forfeiture orders of the Court. This is analogous to the application of national law to the enforcement of prison sentences under Article 106(2) and without alternative here, since there is no extant international legal regime on the enforcement of fines. The provision does not explicitly require States parties to adjust their legislation if it proves inadequate but it is submitted that the provision has to be interpreted in that way in light of its object and purpose (Article 31(1) of the Vienna Convention on the Law of Treaties) which is made explicit for Part 9 in Articles 86, 88 and 89, the latter one only clarifying the applicability of the respective national procedure.¹ Rule 217 supports this view, as the Presidency shall act in accordance with Part 9 “for the enforcement of fines” (see commentary on Rule 217). The opposite construction – that Article 109 obliges only those States parties which already have suitable legislation – would render the provision largely ineffective, considering that at least some minimal implementing legislation would be needed in most cases.²

¹ Irene Gartner, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in Horst Fischer, Claus Kreß and Sascha Luder (eds.), *International and National Prosecution of Crimes Under International Law*, Berlin Verlag, Berlin, 2001, p. 443 (<https://www.legal-tools.org/doc/2d6196/>); Claus Kreß and Göran Sluiter, “Imprisonment”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 1829 (<https://www.legal-tools.org/doc/01addc/>); Faustin Z. Ntoubandi, “Article 109”, Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour pénale internationale, Commentaire Article par Article*, vol. 2, A. Pedone, Paris, 2012, p. 1991; William A. Schabas, “Article 109”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, mgn. 6 (<https://www.legal-tools.org/doc/040751/>); William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1409 (<https://www.legal-tools.org/doc/b7432e/>); but see Manuel Galvis Martínez, “Forfeiture of Assets at the International Criminal Court”, in *Journal of International Criminal Justice*, 2014, vol. 12, p. 209.

² Cf. for example Germany, Law on Cooperation with the International Criminal Court, 21 June 2002, Articles 43–45 (<https://www.legal-tools.org/doc/325861/>).

Doctrine: For the bibliography, see the final comment on Article 109.

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

Article 109(2)

2. If a State Party is unable to give effect to an order for forfeiture, it shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties.

Article 109(2) directs the State Party to proceed to value confiscation if it is unable to give effect to a forfeiture order, not a fine, according to Article 109(1). The inability envisaged here is not the lack of adequate procedures in the national law since a State Party is obliged to adjust its national law in conformity with the Statute.¹ Rather, the inability refers to legal or factual obstacles like the rights of bona fide third parties, possibly also specific types of property immune from seizure under national law (Kreß and Sluiter, 2002, p. 1830; Schabas, 2016, Article 109, mgn. 11; Schabas, 2016, p. 1411), or the case of real property mentioned in paragraph 3. Assets may also be unrealizable because they are subject to sanctions ordered by the Security Council or because the costs of preservation and maintenance exceed their value.²

Again, the rights of bona fide third parties have to be respected, the determination of which is left to the national courts. This may lead to the problems set out above (see comment on 109(1)). In the case of rights of bona fide third parties hindering the seizure of property under Article 109(1), it is difficult to see how a value confiscation by, for instance, judicial sale would be feasible.³ It must be noted that value confiscation is not foreseen as a provisional measure in Article 93(1)(k).⁴

¹ See comment on 109(1); Claus Kreß and Göran Sluiter, “Imprisonment”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 1829 ff. (<https://www.legal-tools.org/doc/01addc/>); Unclear in William A. Schabas, “Article 109”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, mgn. 10 (‘Schabas, 2016, Article 109’) (<https://www.legal-tools.org/doc/040751/>); William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1410 ff. (<https://www.legal-tools.org/doc/b7432e/>).

² For example, see Manuel Galvis Martínez, “Forfeiture of Assets at the International Criminal Court”, in *Journal of International Criminal Justice*, 2014, vol. 12, pp. 211 ff.

³ Irene Gartner, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in Horst Fischer, Claus Kreß and Sascha Luder (eds.), *International and National Prosecution*

Doctrine: For the bibliography, see the final comment on Article 109.

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of Crimes Under International Law, Berlin Verlag, Berlin, 2001, p. 444 (<https://www.legal-tools.org/doc/2d6196/>).

⁴ Cf. Kai Ambos, *Treatise on International Criminal Law. Vol III: International Criminal Procedure*, Oxford University Press, 2016, p. 656 (<https://www.legal-tools.org/doc/995606/>); Martínez, 2014, pp. 208 ff.

Article 109(3)

3. Property, or the proceeds of the sale of real property or, where appropriate, the sale of other property, which is obtained by a State Party as a result of its enforcement of a judgement of the Court shall be transferred to the Court.

Any property a State Party obtains as a result of the enforcement of a fine, forfeiture order, reparation order, or measure of value confiscation must be transferred to the Court, even where the Court awards reparations on an individual basis (cf. Rule 218(4) and Regulation 116). The Court may then order such property to be transferred to the Trust Fund for Victims according to Article 79(2).

Cross-references:

Articles 75(5), 77, 79 and 93(1)(k), (3).

Rules 146(5), 212, 217, 218, 219, 220, 221 and 222.

Regulations 113, 116 and 117.

Doctrine:

1. Hiram Abtahi and Steven Arrigg Koh, “The Emerging Enforcement Practice of the International Criminal Court”, in *Cornell International Law Journal*, 2012, vol. 45, pp. 1–23.
2. Kai Ambos, *Treatise on International Criminal Law*, vol. 3, Oxford University Press, 2016, pp. 635–59 (Chapter VIII).
3. Trevor Pascal Chimimba, “Chapter 11 – Establishing an Enforcement Regime”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999/2002, pp. 345–56.
4. Manuel Galvis Martínez, “Forfeiture of Assets at the International Criminal Court”, in *Journal of International Criminal Justice*, 2014, vol. 12, pp. 193–217.
5. Irene Gartner, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in Horst Fischer, Claus Kreß and Sascha Rolf Lüder (eds.), *International and National Prosecution of Crimes Under International Law*, Berlin Verlag, Berlin, 2001, pp. 423–45.

6. Claus Kreß and Göran Sluiter, “Fines and Forfeiture Orders”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 2, Oxford University Press, 2002, pp. 1823–38.
7. Róisín Mulgrew, *Towards the Development of the International Penal System*, Cambridge University Press, 2013.
8. Faustin Z. Ntoubandi, “Article 109”, Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour pénale internationale, Commentaire Article par Article*, vol. 2, A. Pedone, Paris, 2012, pp. 1989–93.
9. Kimberly Prost, “Chapter 14 – Enforcement”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 673–703.
10. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1406–1411 (Article 109) (<https://www.legal-tools.org/doc/b7432e/>).
11. William A. Schabas, “Article 109”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 2205–9 (<https://www.legal-tools.org/doc/040751/>).
12. Rebecca Young, “Fines and forfeiture in international criminal justice”, in Róisín Mulgrew and Denis Abels (eds.), *Research handbook on the International Penal System*, Edward Elgar Publishing, Northampton, 2016, pp. 102–29.

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Article 110

Review by the Court Concerning Reduction of Sentence

General Remarks:

Article 110 addresses the possibility to reduce the sentence after a substantial part of it has been enforced already. The main *rationale* behind this is to promote the reintegration of the prisoner into society.¹ However, this idea is more than a practical consideration. Social reinsertion and reformation of prisoners is a universal human rights requirement of any penitentiary system, cf. International Covenant on Civil and Political Rights, Article 10(3).²

The idea of encouraging the detainee to act in accordance with the law by offering him the perspective of a life in freedom emerged during the nineteenth century, when the purpose of punishment was no longer seen only in retaliation and atonement, but also in general and special prevention. Sentence reduction or early release (for example under parole) exist in most domestic legal orders, however, the forms and conditions vary.³ Precedents can also be found in international criminal law. At the International Military Tribunal for the Far East, all convicts, irrespective of their sentence, were released within one year following their conviction, as Japan considered the IMTFE a form of victor's vengeance and humiliation of the defeated.⁴ In Germany, on the other hand, those tried by the International Military Tribunal served their sentences entirely (Bassiouni, 2008, pp. 603 ff., 605, with further references). With respect to those tried by the subsequent proceedings under Control Council Law No. 10, the United States was the only ally which had developed a formal Advisory Board on Clemency for War Criminals (Bassiouni, 2008, p. 605). Criteria applied by this

¹ Cf., for example, Germany, Federal Constitutional Court, Judgment, 14 June 1993, case no. 2 BvR 157/93, *Neue Juristische Wochenschrift* 1994, 378.

² See also William A. Schabas, *The International Criminal Court: A Commentary*, 2nd. ed., Oxford University Press, 2016, p. 1413 (<https://www.legal-tools.org/doc/b7432e/>).

³ A comparative study is provided by Hans-Heinrich Jescheck and Stephan Baedeker (eds.), *Die Freiheitsstrafe und ihre Surrogate im deutschen und ausländischen Recht*, Nomos, Baden-Baden, 1984, pp. 2133 ff.

⁴ M. Cherif Bassiouni, *International Criminal Law, vol. 3: International Enforcement*, Martinus Nijhoff Publishers, Leiden, 2008, pp. 603 ff., 605 (<https://www.legal-tools.org/doc/65ab0e/>), with further references.

board were “the subordinate authority and responsibility” of the defendant, the “courage to resist criminal orders at personal risk” as well as health conditions or other special circumstances of the detainee.⁵

Unlike at the IRMCT, where a sentence reduction of two thirds of seven days was granted in a contempt of court case in which even legal aid was granted for 15 hours,⁶ the possibility of a sentencing reduction review is not available for offences against the administration of justice before the ICC (Article 70).⁷

Both the ICTY and the ICTR Statutes provide a section on “pardon or commutation of sentences” (Article 28 ICTY Statute and Article 27 ICTR Statute) and respective Rules of Procedures and Evidence (Rule 125 ICTY RPE and Rule 126 ICTR RPE) as well as Practice Directions. With the installation of the United Nations Mechanism for International Criminal Tribunals, these rules have been further specified by a common Practice Direction for both tribunals.⁸ When compared to the *ad hoc* tribunals, under the ICC the possibilities for early release are more restricted: instead of pardon, parole or commutation of sentences only reduction of sentence is possible under the narrow terms of Article 110. The inclusion of pardon still formed part in the preparatory works, but was eventually omitted, due to many delegations’ objection to the interference of the ICC in the administration of political decision-making process of the states (cf. *infra*).

The Statute of the Special Court for Sierra Leone (Article 23) and of the Special Tribunal for Lebanon (Article 30) provide for a similar rule. However, the Law on the Establishment of the Extraordinary Chambers of Cambodia has no such regulation. Rather the contrary, pardon and amnes-

⁵ “Statement of the High Commissioner for Germany, 31 January 1951, Upon Announcing his Final Decision Concerning Requests for Clemency for War Criminals Convicted at Nuernberg”, in *Trials of the Major War Criminals before the International Criminal Tribunal*, Vol. XV, 1948, pp. 1176–79.

⁶ IRMCT, *Prosecutor v. Hartmann*, Decision of the President on the Urgent Request for Legal Aid, 29 March 2016, MICT-15-57, para. 15.

⁷ Rule 163(3) RPE. See also ICC, *Prosecutor v. Bemba et al.*, Trial Chamber VII, Decision on Mr. Bemba’s Application for Release, 12 June 2018, ICC-01/05-01/13-2291, para. 6 (<https://www.legal-tools.org/doc/9ddeb8/>).

⁸ IRMCT, Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons convicted by the ICTR, the ICTY or the Mechanism (MICT/3), 5 July 2012, MICT/3 (<https://www.legal-tools.org/doc/244989/>), last amended by MICT/3/Rev.3, 15 May 2020 (‘IRMCT, Practice Direction on Pardon, Commutation of Sentence, and Early Release’) (<https://www.legal-tools.org/doc/3z6h3u/>).

ties are explicitly excluded under Article 40 of the Law on EECC. The Statute of the Extraordinary African Chambers does not foresee any such provision either. The Law on Specialist Chambers and Specialist Prosecutor's Office of the Kosovo Specialist Chambers provides in its Article 51 that the judgments shall not be subject to any pardon.⁹ However, the length of sentence may be modified, altered or commuted (Article 51(2)).

From a dogmatic viewpoint, sentence reduction is, like commutation of sentence, an adjustment of the judgment with regards to the sentence (that is a decision relating to the merits), whereas early release or pardon refers to the possibility of the detained person to spend (for example conditionally) the remainder of his or her sentence in liberty.¹⁰ As a consequence, the decision is not taken by the Presidency, but by three judges of the Appeals Chamber (cf. Rule 224(1) RPE).

The dogmatic classification as 'sentence reduction' leads to another unfortunate consequent difference, in comparison to other international tribunals: the concept of conditional release, common in most if not all domestic jurisdictions, but increasingly also present in early release decisions of the IRMCT,¹¹ is more difficult to justify for the concept of sentence reduction: if the sentence is reduced, the reduction is definite and not dependent on the fulfilment of any conditions. This, coupled with the lack of a formal procedure of the sentenced person to apply for a sentence reduction before the purely mathematical two-third threshold has been reached, makes the possibility of leaving prison before the full sentence has been served significantly more difficult in ICC proceedings than in IRMCT or SCSL proceedings.

⁹ Law on Specialist Chambers and Specialist Prosecutor's Office of the Kosovo Specialist Chambers, 3 August 2015, No.05/L-053, Article 51(1) (<https://www.legal-tools.org/doc/8b71e3/>).

¹⁰ That is a procedural decision, cf. Piet Hein Van Kempen, "Early Release in the Context of International Human Rights Law. Commentary", in André Klip and Göran Sluiter (eds.), *Annotated Leading Cases of International Tribunals. The International Tribunal for Rwanda 2006–2007*, vol. 25, Intersentia, Antwerp/Oxford/Portland, 2010, p. 954 (<https://www.legal-tools.org/doc/993b3a/>). Unlike commutation or sentence reduction, (conditional) early release, this does not change the length of the sentence; rather, any breach of conditions will result in the sentenced person to be returned to prison to serve the rest of his or her sentence, IRMCT, Prosecutor v. Milomir Stakić, Decision on Sentence Remission and Early Release of Milomir Stakić, 31 December 2020, MICT-13-60-ES, para. 34 (<https://www.legal-tools.org/doc/noucwi/>).

¹¹ Cf. Peter Robinson, "Summary of Decisions of the International Residual Mechanism for Criminal Tribunals", 2022, p. 227 f. with further references.

One of the main criteria to consider a prisoner eligible for sentence reduction or early release is his social reinsertion, in particular the improbability of reoffending. However, in the context of war crimes, this criterion will in most cases be met as prisoners are in their vast majority first offenders and generally unlikely to recommit the war crimes they were convicted of again if socio-economic conditions have changed. If criminal law only pursued preventive purposes, in such conditions war offenders could be released immediately after their conviction. However, punishment not only aims at special and general prevention but also at retribution, deterrence, reprobation, rehabilitation, national reconciliation, protection of society and restoration of peace.¹²

With regards to its relationship to Articles 103 and 104, one should bear in mind that the international review mechanism provided for under Article 110 is the general rule that only applies if no specific conditions were agreed upon in the Enforcement Agreement pursuant to Articles 103(1) and (2).¹³

Preparatory Works:

In the ILC Draft Statute for an International Criminal Court, pardon, parole or commutation of sentence was regulated under Article 60.¹⁴ The terms pardon and commutation were taken from the ICTY and the ICTR Statutes. Parole was added as another possible variation of early release. Under Article 60 of the ILC draft statute, the principle that a prisoner should not be released before expiry of the sentence was only stipulated under para. 5. This suggests that it was an exception to the rule of early release. Moreover, the draft provision allowed the Court to delegate the decision power on pardon, commutation or parole to the custodial state. This could, however, create injustice as domestic provisions on these questions greatly vary. In the final draft of the Preparatory Committee, Article 100 governing “Pardon, parole and commutation of sentences (early release)” provided two

¹² See ICTR, *Prosecutor v. Seromba*, Trial Chamber III, Judgment, 13 December 2006, ICTR-2001-66-I, para. 376 (<https://www.legal-tools.org/doc/e0084d/>); cf. also Schabas, 2016, p. 1413.

¹³ Klaus Hoffmann, “Some Remarks on the Enforcement of International Sentences in Light of the Galíć Case at the ICTY”, in *Zeitschrift für Internationale Strafrechtsdogmatik*, 2011, vol. 10, p. 840 (<https://www.legal-tools.org/doc/4a0851/>) with further references.

¹⁴ Report of the Commission to the General Assembly on the work of its forty-sixth session, in Yearbook of the International Law Commission, UN Doc. A/CN.4/SER.A/1994/Add.1, 22 July 1994, (<https://www.legal-tools.org/doc/390052/>).

options, the second of which was close to the finally adopted Article 110 ICC Statute.¹⁵ However, the minimum period for life sentences was set at 20 years, not 25, as in the present rule. Concerns were also raised that pardon would involve political considerations. “Pardon, parole and commutation of sentences” was thus eventually replaced by the single “reduction of sentence”. In addition, at the Preparatory Committee it was discussed to introduce a mandatory review in consideration of the severity of sentences, which was eventually included in paras. 3 and 5 of the present Article 110.

Doctrine: For the bibliography, see the final comment on Article 110.

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¹⁵ Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/2, 14 April 1998, pp. 155 ff. (<https://www.legal-tools.org/doc/732f58/>).

Article 110(1)

1. The State of enforcement shall not release the person before expiry of the sentence pronounced by the Court.

Paragraph 1 stipulates the principle that the sentenced person should only be released after having served its sentence. Paragraphs 2 and following regulate the exceptions to this general rule, that is reduction of sentence. Further, paragraph 1 clarifies that it is the ICC who determines the length of the sentence; national authorities cannot release a convict before the sentence has expired. The same principle was applied at the *ad hoc* tribunals (cf. Article 28 ICTY Statute and Article 27 ICTR Statute).

Doctrine: For the bibliography, see the final comment on Article 110.

Author: Anna Oehmichen.

Article 110(2)

2. The Court alone shall have the right to decide any reduction of sentence, and shall rule on the matter after having heard the person.

It is the Court who decides upon any reduction of sentences. The exclusive power of decision of the Court as opposed to the enforcing state on this matter is also regulated in the respective enforcement agreements.¹

However, in some agreements, it is regulated that if national authorities find further enforcement impossible for practical or legal reasons, the Court shall make arrangements for the transfer of the sentenced person (for example, ICC-Finland Agreement, Article 16). It is argued that in such a case, the State ought to better not accept a prisoner in the first place, if certain minimum sentences are incompatible with the practical or legal requirements in that state.²

¹ Agreement between the International Criminal Court and the Federal Government of Austria on the enforcement of sentences of the International Criminal Court, 27 October 2005, ICC-PRES/01-01-05, Article 11(2) (<https://www.legal-tools.org/doc/0f5f9e/>); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the International Criminal Court on the enforcement of sentences imposed by the International Criminal Court, ICC-PRES/04-01-07, 8 December 2007, Article 10 (<https://www.legal-tools.org/doc/d70d91/>); Agreement between the Kingdom of Denmark and the International Criminal Court on the Enforcement of Sentences of the International Criminal Court, 22 November 2017, ICC-PRES/12-02-12, Article 12 (<https://www.legal-tools.org/doc/cc1900/>); Agreement between the International Criminal Court and the Government of the Republic of Finland on the Enforcement of Sentences of the International Criminal Court, 24 March 2011, ICC-PRES/07-01-11, Article 11(3) ('ICC-Finland Agreement') (<https://www.legal-tools.org/doc/a1972d/>); Agreement between the Republic of Serbia and the International Criminal Court on the Enforcement of Sentences of the International Criminal Court, 28 May 2011, ICC-PRES/09-03-11, Article 11(3) (<https://www.legal-tools.org/doc/42dca5/>); Agreement between the International Criminal Court and the Government of the Kingdom of Belgium on the Enforcement of Sentences of the International Criminal Court, 8 December 2004, ICC-PRES/06-01-10, Article 12(2) (<https://www.legal-tools.org/doc/24f3d9/>); Accord entre la Cour pénale internationale et le gouvernement de la République du Mali concernant l'exécution des peines prononcées par la Cour, 24 March 2016, ICC-PRES/11-01-12, Article 6(2) (<https://www.legal-tools.org/doc/e9891a/>); see also ICC, "ICC President to sign enforcement of sentences agreement during his visit to Colombia", 16 March 2011, Press Release ICC-CPI-20110516-MA102.

² Damien Scalia, "Article 110", in Paul De Hert, Mathias Holvoet, Jean Flamme and Olivia Struyven (eds.), *Code of International Criminal Law and Procedure, Annotated*, Larcier, Ghent, 2013, p. 493 with further references.

The responsibility for the enforcement of sentences is generally entrusted to the Presidency (see Rule 199 RPE), however, the reduction of sentences is decided by three judges of the Appeals Chamber, cf. Rule 224 RPE.

Also in the case of ICTY and ICTR, it is the tribunal that decides on pardon, commutation of sentence or early release (cf. Article 28(2) ICTY Statute and Article 27(2) ICTR Statute, see also Rule 124 RPE ICTY-Rule 125 RPE ICTR).

Although the ICC, like the *ad hoc* tribunals, delegates the detention of sentenced persons to the national states, it retains much more control over the enforcement of sentences than is the case at the *ad hoc* tribunals.³ Nonetheless, one should keep in mind that sentence remissions or reductions are also regarded as a tool of prisoner management in domestic systems. If detainees would be entitled to such reductions under national law, the ICC would be likely to grant such reduction in line with the domestic law, in order to avoid discrimination *vis-à-vis* fellow prisoners.⁴

A novelty as compared to ICTY/ICTR is that the review hearing is now regulated in the statute itself. In the case of ICTY, this was only regulated in the relevant practice direction.⁵ The hearing shall be conducted by three judges of the Appeals Chamber, appointed by that Chamber, unless they decide otherwise in a particular case, for exceptional reasons (Rule 224(1) RPE). Not only the sentenced person and his or her counsel and, if applicable, interpreter, as well as the Prosecutor, but also the State of enforcement and the victims or their legal representatives may participate in this hearing or submit written observations (Rule 224(1) RPE). Conversely, the IRMCT's Practice Direction on this matter only foresees a hearing of

³ William A. Schabas, *The International Criminal Court: A Commentary*, 2nd. ed., Oxford University Press, 2016, pp. 1373–1375 (<https://www.legal-tools.org/doc/b7432e/>).

⁴ Cf. ICTY, *Prosecutor v Jelusic*, Presidency, Decision of the President on Sentence Remission for Goran Jelusic, 28 May 2013, IT-95-10-ES, para. 20 (<https://www.legal-tools.org/doc/b39545/>).

⁵ ICTY, Practice Direction on the procedure for the determination of applications for pardon, commutation of sentence, and early release of persons convicted by the International Tribunal, 16 September 2010, IT/146/Rev.3, para. 5 (<https://www.legal-tools.org/doc/f05549/>); cf. also IRMCT, Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons convicted by the ICTR, the ICTY or the Mechanism (MICT/3/Rev.3), 15 May 2020, MICT/3/Rev.3 (<https://www.legal-tools.org/doc/3z6h3u/>).

the sentenced person. For further details on the procedure (see Commentary on Rule 224 of the RPE).

Doctrine: For the bibliography, see the final comment on Article 110.

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Article 110(3)

3. When the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time.

Stipulating a mandatory review of the sentence after a certain minimum period of time is a requirement under human rights law.¹ The Committee of Ministers of the Council of Europe recommended already in 1976 that Member States should ensure that the cases of all prisoners be examined as early as possible to determine whether or not a conditional release could be granted.² Moreover, the European Court of Human Rights has consistently held that the imposition of an irreducible life sentence on an adult may raise an issue under Article 3 European Convention on Human Rights (see, *inter alia*, *Kafkaris v. Cyprus*, 12 February 2008, para. 97 with further references).

The possibility to reduce sentences was also provided for at other international tribunals. For instance, Rule 124 of the RPE of the Special Court for Sierra Leone provides for early release after two-thirds of the sentence (but does not make any provision for life-long sentences as the Statute does not provide for life-long sentence, cf. Article 19 SCSL Statute). Also the *ad hoc* tribunals granted sentence reductions (commutation of sentences or early release). However, the period of imprisonment before review was not regulated at the *ad hoc* tribunals until 2020, when the Practice Direction generally established eligibility for early release only upon having served two-thirds of one's sentence.³ As a consequence, the decision

¹ ECHR, *Kafkaris v. Cyprus*, Judgment, 12 February 2008, App.no. 21906/04, paras. 68 ff. ('*Kafkaris v. Cyprus*, 12 February 2008') (<https://www.legal-tools.org/doc/c57871/>); Damien Scalia, "Article 110", in Paul De Hert, Mathias Holvoet, Jean Flamme and Olivia Struyven (eds.), *Code of International Criminal Law and Procedure, Annotated*, Larcier, Ghent, 2013, p. 492 with further references (<https://www.legal-tools.org/doc/3f10e0/>); Piet Hein Van Kempen, "Early Release in the Context of International Human Rights Law. Commentary", in André Klip and Göran Sluiter (eds.), *Annotated Leading Cases of International Tribunals. The International Tribunal for Rwanda 2006–2007*, vol. 25, Intersentia, Antwerp/Oxford/Portland, 2010, pp. 957 ff. (<https://www.legal-tools.org/doc/993b3a/>).

² Council of Europe, Resolution (76)2 on the treatment of long-term prisoners, 17 February 1976 (<https://www.legal-tools.org/doc/r2694j/>).

³ IRMCT, Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons convicted by the ICTR, the

depended initially upon the state in which the prisoner served his sentence, and thus on the relevant domestic law, before the tribunals established a general practice of two-thirds (ICTY) or three quarters (ICTR) in their case law.⁴

With regards to *fixed-term sentences*, the rule of the ICC to grant a first review after two-thirds of the sentence follows the practice of the ICTY,⁵ although the latter preserved somewhat more flexibility, granting in some cases review both earlier according to the provisions under national law in case of exceptionally substantial co-operation with the prosecution,⁶ or later, for example because of exceptional gravity of the crime,⁷ than the two-thirds threshold. The ICC's case law has meanwhile made clear that serving two thirds of the sentence does not lead to automatic release; there is no 'presumption of early release' after two thirds.⁸ In the *Katanga* case, a prison sentence of 12 years was reduced by only three years, eight months,

ICTY or the Mechanism (MICT/3/Rev.3), 15 May 2020, MICT/3/Rev.3, para. 8 (<https://www.legal-tools.org/doc/3z6h3u/>).

⁴ Cf. ICTY, *Prosecutor v. Stakić*, Appeals Chamber, Judgment, 22 March 2006, IT-97-24-A, paras. 388–393 (<https://www.legal-tools.org/doc/09f75f/>).

⁵ Cf. for example ICTY, *Prosecutor v. Tarculovski*, Decision on Early Release of Johan Tarculovski, 23 June 2011, IT-04-82- ES ('*Tarculovski*, 23 June 2011') (<https://www.legal-tools.org/doc/448539/>); *Prosecutor v. Banović*, Decision of the President on Commutation of Sentence, 3 September 2008, IT-02-65/1-ES (<https://www.legal-tools.org/doc/5218b9/>); *v. Erdemović*, Order issuing a public redacted version of decision of the President on early release, 15 July 2008, IT-96-22-ES (<https://www.legal-tools.org/doc/deae14/>); *Prosecutor v. Furundžija*, Order of the President on the Application for the Early Release of Anto Furundžija, 29 July 2004, IT-95-17/1 (<https://www.legal-tools.org/doc/29f368/>); *Prosecutor v. Došen*, Order of the President on the early release of Damir Došen, 28 February 2003, IT-95-8-S (<https://www.legal-tools.org/doc/0c6876/>); *Prosecutor v. Simić*, Order of the President on the Application for the Early Release of Milan Simic, 27 October 2003, IT-95-9/2 (<https://www.legal-tools.org/doc/3a6a41/>); *Prosecutor v. Kupreskić et al.*, Decision of the president on the application for pardon or commutation of sentence of Vladimir Santic, 16 February 2009, IT-95-16-ES ('*Kupreskić et al.*, 16 February 2009') (<https://www.legal-tools.org/doc/8f294b/>).

⁶ ICTY, *Prosecutor v. Obrenović*, Presidency, Decision of President on Early Release of Dragan Obrenović, 21 September 2011, IT-02-60/2-ES, para. 28 (<https://www.legal-tools.org/doc/2dd00a/>). Cf. also *Kupreskić et al.*, 16 February 2009, para. 8.

⁷ ICTY, *Prosecutor v. Blagojević*, Presidency, Decision of the President on Early Release of Vidoje Blagojevic, 3 February 2012, IT-02-60-ES, para. 25 (<https://www.legal-tools.org/doc/59765e/>).

⁸ ICC, *Prosecutor v. Lubanga*, Decision on the review concerning reduction of sentence of Mr. Thomas Lubanga Dyilo, 22 September 2015, ICC-01/04-01/06-3173, para. 27 ('*Lubanga*, 22 September 2015') (<https://www.legal-tools.org/doc/88b3f6/>).

for defendant who co-operated by withdrawing appeal, acknowledging guilt, and apologizing to victims.⁹ *Al Mahdi* was granted a sentence reduction of two years in a sentence totalling nine years, based on the views expressed by the Republic of Mali and a significant number of victims.¹⁰

Conversely, the ICTR's practice was, before the IRMCT became competent for them, to consider prisoners eligible to apply for early release only after they had served three-quarters of their sentence.¹¹ However, the IRMCT ruled that, "given that the early release practice of the ICTR was derived by reference to the long-established relevant jurisprudence and practice of the ICTY, and taking into account the *lex mitior* principle [...] all convicts supervised by the Mechanism should be considered eligible for early release upon the completion of two-thirds of their sentences, irrespective of the tribunal that convicted them".¹²

In view of clarity and certainty of the law, the decision of the ICC legislator to fix the two-thirds limit should be welcomed. It provides prisoners clearer guidance, which may contribute to their rehabilitation. Moreover, disparities that were observed at the ICTY and ICTR practice, due to

⁹ ICC, *Prosecutor v. Katanga*, Appeals Chamber, Decision on the review concerning reduction of sentence of Mr Germain Katanga, 13 November 2015, ICC-01/04-01/07-3615, para. 116 (<https://www.legal-tools.org/doc/f36347/>).

¹⁰ ICC, *Prosecutor v. Al Mahdi*, Appeals Chamber, Decision on the Review concerning the Reduction of Sentence for Mr. Ahmad Al Faqi Al Mahdi, 25 November 2021, ICC-01/12-01/15-434-Red3, para. 77 (<https://www.legal-tools.org/doc/nj5osm/>).

¹¹ See, for example ICTR, *Prosecutor v. Muvunyi*, Presidency, Decision on Tharcisse Muvunyi's Application for Early Release, 6 March 2012, ICTR-00-59A-T, para. 12 (<https://www.legal-tools.org/doc/bce053/>); *Prosecutor v. Bagaragaza*, Presidency, Decision on the Early Release of Michel Bagaragaza, 24 October 2011, ICTR-05-86-S, para. 15 (<https://www.legal-tools.org/doc/0719fb/>); *Prosecutor v. Rugambarara*, Presidency, Decision on the Early Release Request of Juvenal Rugambarara (P), 8 February 2012, ICTR-00-59, paras. 7, 17 (<https://www.legal-tools.org/doc/a7cfec/>).

¹² IRMCT, *Prosecutor v. Paul Bisengimana*, Presidency, Decision of the President on Early Release of Paul Bisengimana and on Motion to File a Public Redacted Application, 11 December 2012, MICT-12-07, para. 20 (<https://www.legal-tools.org/doc/c9adfb/>); *Prosecutor v. Serushago*, Presidency, Decision of the President on Early Release of Omar Serushago, 13 December 2012, MICT-12-28-ES, para. 16 (<https://www.legal-tools.org/doc/cf44a8/>); *Prosecutor v. Kayishemana et al.*, Presidency, Decision of the President on the Early Release of Obed Ruzindana, 13 March 2014, MICT-12-10, para. 14 (<https://www.legal-tools.org/doc/8b331e/>).

diverging and conflicting domestic provisions on early release can thus be reduced.¹³

However, it is worthy to bear in mind that the two-thirds period is not universal. While most domestic systems provide for the possibility of early release, there is great variety as to the specific modalities. For instance, Austrian, Beninese, Macedonian and UK law provides for release after serving half of one's sentence.¹⁴ In Germany this is also possible for first offenders, while the general rule is two-thirds (cf. Sections 57(1) and (2) of the German Criminal Code). Belgian law even provides for early release after one third has been served.¹⁵ Under Spanish law, good behaviour credits earned can be added to the time already served, so that the general two-thirds period may be shortened (cf. *Kupreskić et al*, 16 February 2009, para. 8). At the *ad hoc* tribunals, different national regimes have led to great disparities among ICTY and ICTR prisoners. While the majority of jurisdictions in which the ICTY's convicts are serving their sentences require that two-thirds of the sentence be served prior to release in many African countries where ICTR convicts serve their sentence no such rules exist (for a comparison, cf. Weinberg de Roca and Rassi 2008, pp. 29, 30). Under the ICC Statute, the first review of life-time convicts shall take place after 25 years have been served. This threshold has no precedent in international criminal law.

¹³ Cf. Ines Monica Weinberg de Roca and Christopher M. Rassi, "Sentencing and Incarceration in the Ad Hoc Tribunals", in *Stanford Journal of International Law*, 2008, vol. 44, no. 1, pp. 25 ff. (<https://www.legal-tools.org/doc/d6112d/>); Klaus Hoffmann, "Some Remarks on the Enforcement of International Sentences in Light of the Galić Case at the ICTY", in *Zeitschrift für Internationale Strafrechtsdogmatik*, 2011, vol. 10, pp. 838 ff. (<https://www.legal-tools.org/doc/4a0851/>).

¹⁴ Cf. IRMCT, *Prosecutor v. Zigić*, Presidency, Public Redacted Version of the 10 November 2014 Decision of the President on the Early Release of Zoran Zigić, 23 December 2014, MICT-14-81-ES.1, para. 4 (<https://www.legal-tools.org/doc/ghjb0g/>); *Prosecutor v. Ntakirutimana*, Presidency, Public Redacted Version of the 26 March 2014 Decision of the President on the Early Release of Gérard Ntakirutimana, 24 April 2014, MICT-12-17-ES, para. 10 (<https://www.legal-tools.org/doc/1807f1/>); *Tarčulovski*, 23 June 2011, para. 12; *Prosecutor v. Krajišnik*, Presidency, Decision of President on Early Release of Momcilo Krajišnik, 11 July 2011, IT-00-39-ES, para. 20 (<https://www.legal-tools.org/doc/59e0a2/>).

¹⁵ Cf. ICTY, *Prosecutor v. Zelenović*, Presidency, Decision of President on Early Release of Dragan Zelenović, 21 October 2011, IT-96-23/2-ES, para. 15 (<https://www.legal-tools.org/doc/7bda07/>).

At the *ad-hoc* tribunals, the Statutes and RPE did not provide for a clear time frame in the case of life imprisonment. In *Galić*,¹⁶ the IRMCT, six months after the decision to deny early release had already been taken, laid out some considerations to this question regarding ICTY, ICTR and IRMCT convicts, confirming the general possibility of early release for life time convicts, however, without setting out any coherent standard. On the one hand, it was stated that the “treatment of similarly-situated prisoners” required that two-thirds of a life time were more than two-thirds of the highest fixed-term sentence imposed by the ICTR, the ICTY, or the Mechanism, which amounted to more than 30 years (*Galić*, 23 June 2015, para. 36, referring to *Kajelijeli*, who had been sentenced to 45 years). On the other, the IRMCT also clarified that there was nonetheless no “time-based restriction on when a convicted person who is serving his or her sentence under the supervision of the Mechanism may seek review of his or her sentence”, and confirmed that the eligibility threshold recognized by the Mechanism in this case should “in no way preclude review or possible release prior to” the convict reaching that threshold (para. 39). However, in the subsequent decisions of 18 January 2017, 26 June 2019, and 24 March 2021 regarding *Galić*, the IRMCT President continued to apply the 30-year threshold as the earliest possible moment for early release.¹⁷ This threshold has since been considered by the IRMCT as general pre-requisite for eligibility of early release in case of life sentences.¹⁸ In light of subsequent higher fixed sentences of 47 years by the ICTR,¹⁹ the IRMCT did not increase this 30 year threshold in its subsequent case law,²⁰ but, nonetheless, emphasised that this case-specific determination would not set a precedent for other persons serving a life sentence (*Musema*, 7 August 2019, p. 4), and that the impact, if any, of that sentencing decision would “be addressed

¹⁶ IRMCT, *Prosecutor v. Galić*, Presidency, Reasons for the President’s Decision to Deny the Early Release of Stanislav Galić and Decision on Prosecution Motion, 23 June 2015, MICT-14-83-ES (‘*Galić*, 23 June 2015’) (<https://www.legal-tools.org/doc/de38d8/>).

¹⁷ IRMCT, *Prosecutor v. Galić*, (Public Redacted) Decisions of the President on the early release of Stanislav Galić, 18 January 2017 (<https://www.legal-tools.org/doc/7sl80g/>), 26 June 2019 (<https://www.legal-tools.org/doc/2f0udz/>), 24 March 2021 (<https://www.legal-tools.org/doc/k7q9ca/>), MICT-14-83-ES.

¹⁸ IRMCT, see early release decisions in *Popović, Milan Lukić, and Beara*.

¹⁹ See ICTR, *Prosecutor v. Nyiramasuhuko et al.*, Judgement, 14 December 2015, ICTR-98-42-A, para. 3539 (<https://www.legal-tools.org/doc/93cee1/>).

²⁰ See, for example, IRMCT, *Prosecutor v. Musema*, Decision on the Application of Alfred Musema related to Early Release, 7 August 2019, MICT-12-15-ES.1, p. 4 (‘*Musema*, 7 August 2019’) (<https://www.legal-tools.org/doc/phihzb/>).

if and when required”.²¹ However, the IRMCT also recognised that “in compelling or exceptional circumstances”, early release may be granted before expiry of the two-thirds threshold.²² In the case of *Beara*, where the Mechanism had been informed by the domestic authorities of the severe deterioration of the convict’s state of health and urged for an expeditious decision on early release, the president deviated from the 30-year-threshold, noting that, after the serving only 13 years, “this is a particularly early point in a lengthy sentence”,²³ and noting that “the severity of *Beara*’s health condition, and the rapid deterioration of his health, have presently become irreconcilable with having his prison sentence executed at a correctional facility” (*Beara*, 16 June 2017, para. 45). Based on the fact that his life expectancy had become “highly abbreviated”, he was released on humanitarian grounds, but, another precedent, it should be a *conditional* release.²⁴ It is notable that while the IRMCT had been informed by the domestic authorities about *Beara*’s health situation in January 2017 and urgently requested for a speedy decision, the decision was apparently not rendered until 16 June 2017, while Mr. *Beara* deceased already on 8 February 2017; a fact completely left aside in that decision. It may be based on this experience that the IRMCT’s practice directions have meanwhile been amended and now provide explicitly for conditional release and allow the President to dispense with the procedural steps to the extent required to meet the urgency and accelerate the consultation with other Judges.²⁵ In the

²¹ IRMCT, *Prosecutor v. Popović*, Decision on the Early Release of Vujadin Popović, 30 December 2020, MICT-15-85-ES.2, p. 4, with further references (<https://www.legal-tools.org/doc/a4ejei/>).

²² IRMCT, *Prosecutor v. Lukić*, Decision on the Application for Early Release of Milan Lukić, 24 June 2022, MICT-13-52-ES.1, p. 4, with further references in note 22 (<https://www.legal-tools.org/doc/uhr4y/>).

²³ IRMCT, *Prosecutor v. Beara*, Public redacted version of 7 February 2017 Decision of the President on Early Release of Ljubiša Beara, 16 June 2017, MICT-15-85-ES.3, para. 27 (*Beara*, 16 June 2017) (<https://www.legal-tools.org/doc/x5vrov/>).

²⁴ *Beara*, 16 June 2017, para. 47; see also IRMCT, *Prosecutor v. Ćorić*, Further Redacted Public Redacted Version of the Decision of the President on the Early Release of Valentin Ćorić and Related Motions, 16 January 2019, MICT-17-112-ES.4, para. 73 (<https://www.legal-tools.org/doc/w0hp4u/>), as well as *Prosecutor v. Aloys Simba*, Interim Order for Further Submissions, 23 October 2018, MICT-14-62-ES.1 (<https://www.legal-tools.org/doc/pf9ue2/>).

²⁵ IRMCT, Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons convicted by the ICTR, the ICTY or the Mechanism (MICT/3/Rev.3), 15 May 2020, MICT/3/Rev.3, paras. 20–218

case of Brđanin, though at the time of writing this comment the decision was not yet public, has apparently been released and shortly after died in Banja Luka.²⁶

Another indication of what early release may mean for life time prisoners convicted by the international tribunals was given much earlier, in the ruling of the ICTY in *Stakić*, in which the Trial Chamber stated in relation to the sentence of life imprisonment: “The then competent court [...] shall review this sentence and if appropriate suspend the execution of the remainder of the punishment of imprisonment for life and grant early release, if necessary on probation, if: (1) 20 years have been served [...]”.²⁷

It is further notable that unlike at the *ad hoc* tribunals, where early release can be triggered by either a notification of eligibility of the enforcing state or a direct petition of the convict (IRMCT, Practice Direction on Pardon, Commutation of Sentence, and Early Release, paras. 2–3), at the ICC the review takes place automatic and mandatory once the threshold of having served two-thirds of a fixed-term sentence or 25 years in case of a life sentence has been met. As a consequence, this threshold is considered as a trigger mechanism for the commencement of the sentence review, as opposed to a trigger for automatic release (cf. also *Lubanga*, 22 September 2015, paras. 20, 27; *Katanga*, 13 November 2015, para. 113).

For the ICC, the question remains whether the time frame imposed by the Statute also applies when release is requested on compassionate or humanitarian grounds, for example, severe illness.²⁸ Moreover, it is worth consideration whether this provision, establishing a mandatory review *proprio motu*, deprives the sentenced person from his own right to file an application for sentence reduction directly, for instance, also before the two-thirds have been served. At the *ad hoc* tribunals, the right of the sentenced person to apply for early release at any time was established in the Practice Direction. Moreover, exceptional or compelling reasons could warrant a

(‘IRMCT, Practice Direction on Pardon, Commutation of Sentence, and Early Release’) (<https://www.legal-tools.org/doc/3z6h3u/>).

²⁶ Azem Kurtic, “Freed Bosnian Serb War Criminal Radoslav Brđjanin Dies”, *Balkan Transitional Justice*, 7 September 2022.

²⁷ ICTY, *Prosecutor v. Stakić*, Trial Chamber, Judgment, 31 July 2003, IT-97-24-T, pp. 253–254 (<https://www.legal-tools.org/doc/32ecfb/>).

²⁸ Fernández-Pacheco Estrada, “What We Talk About When We Talk About Early Release in International Criminal Law: The *Sui Generis* Nature of the Reduction of Sentence Under the Rome Statute”, in *International Criminal Law Review*, 2022, vol. 22, pp. 551, 565.

sentence reduction even before two thirds of the sentence had been served, and the sentenced person was able to file for a review of his sentence at any time proactively. The strict wording of Article 110 and Rules 223, 224 do not foresee such possibility. Rather, Article 110(3), second sentence, quite explicitly states that a review shall not take place before that time, and Article 110(5) and Rule 224(3) foresee the next review, as a rule, at intervals of three years. However, Rule 224(3) specifies that, once the first review has taken place, in case of a significant change in circumstances, the sentenced person may be permitted to apply for a review before another three years have passed. *Argumentum ex contrario* the right to request a review before two thirds or 25 years of a life sentence have been served apparently is not intended by the legislator. However, the right to be heard or to actively participate in his criminal proceedings is not only a general principle of international law, deriving from the principle of fair trial,²⁹ which should imply the right to file motions at any time. In addition, exceptional circumstances (for example, the near death of the prisoner) or significant changes of circumstances may always warrant a sentence reduction on humanitarian grounds even before the formal automatic review mechanism under Article 110(3) has been triggered (see, especially, *Beara*, 16 June 2017). In such case, the application may be considered promptly, and without triggering the multi-step and resource-intensive process of requesting, receiving, translating, sharing and considering additional information before determining whether the application should be denied as premature³⁰ or granted. In light of the European Court of Human Rights' case law, according to which continued detention of a seriously ill prisoner whose medical needs could not be dealt adequately in prison amounted to inhuman and degrad-

²⁹ This right is inferred from Article 6(3)(b) ECHR; see, for example, ECtHR, *Foucher v. France*, Application no. 22209/93, 18 March 1997, para. 36 (<https://www.legal-tools.org/doc/745bcd/>); *Maestri and Others v. Italy*, Application no. 20903/15, 8 July 2021, paras. 56–58 (<https://www.legal-tools.org/doc/7hqays/>); *Botten v. Norway*, Judgment, 19 February 1996, Reports 1996-I, p. 145, para. 53 (<https://www.legal-tools.org/doc/z6re8c/>); ACHPR, Article 7; ICCPR, Article 14; UDHR, Article 10; ACHR, Article 13; see also Convention on the Rights of the Child, Article 12.

³⁰ Cf. IRMCT, *Prosecutor v. Stakić*, Decision on Sentence Remission and Early Release of Milimir Stakić, 31 December 2020, MICT-13-60-ES, para. 43 (<https://www.legal-tools.org/doc/noucwi/>); IRMCT, *Prosecutor v. Stakić*, Decision on Sentence Remission and Early Release of Milimir Stakić, 22 December 2021, MICT-13-60-ES, para. 30 (<https://www.legal-tools.org/doc/i2apm5/>); IRMCT, *Prosecutor v. Prlić*, Decision on the Early Release of Jadranko Prlić, 23 March 2021, MICT-17-112-ES.2, p. 4 (<https://www.legal-tools.org/doc/g4942z/>).

ing treatment under Article 3 ECHR,³¹ at least in cases where prisoners suffering from a severe deterioration of health which makes them unfit for prison they should not only be allowed to file an application for early release, but the ICC should, after notified of such situation by the national authorities, act *ex officio* expeditiously and humanely. Based on the experience of the IRMCT (cf. *Beara*, 16 June 2017), it might be necessary to establish a special injunction procedure for such cases that can be triggered both by the individual or the national authorities.

The burden of proof to establish the factors justifying a reduction does not lie exclusively with the sentenced person (*Katanga*, 13 November 2015, para. 21). This is the case because the convicted person might not have access to all relevant information (*Lubanga*, 22 September 2015, para. 32).

The mandatory review also ensures equal treatment of prisoners serving their sentences in different countries, so that even if the prisoner may not be eligible for release under the domestic law of the custodial State, the ICC shall in any event review whether sentence reduction may apply.³²

It is not explicitly regulated whether release can also be granted in the event the two thirds of a sentence have already been served before the decision has become final (for example pending appeal). At the ICTY, in the case of *Gvero*, release was granted after *Gvero* had been convicted in first instance and had already by then served more than four fifths of his sentence. The period to lodge an appeal had not yet expired at the moment of his release.³³ However, in the case of *Ndindiliyimana*, the IRMCT denied an application for early release for a person pending appeal, on the basis that the IRMCT had not assumed power yet over the enforcement as

³¹ ECtHR, *Mouisel v. France*, Application no. 6726301, 14 November 2002, para. 48 (<https://www.legal-tools.org/doc/2c84ce/>).

³² For the ICTY, cf. also *Prosecutor v Krnojelac*, Presidency, Decision of the President on the Application for Pardon or Commutation of Sentence of Milorad Krnojelac, 23 July 2009, IT-97-25-ES (<https://www.legal-tools.org/doc/1075d1/>); case in which release was ordered after serving two-thirds of sentence, even though the convict was not eligible for release under Italian law.

³³ ICTY, *Prosecutor v. Gvero*, Presidency, Decision of President on Early Release of Milan Gvero, 28 June 2010, IT-05-88-ES (<https://www.legal-tools.org/doc/2436b5/>).

the judgment had not become final yet and it was up to the Appeals Chamber to decide upon provisional release.³⁴

In view of the length of proceedings at the international tribunals, especially the ICC, the mandatory review should take place independent of potential appeals. Article 81(3)(a) clarifies that a convicted person shall remain in custody pending appeal unless the time in custody exceeds the sentence of imprisonment imposed. In the latter case, the person shall be released (Article 81(3)(b)). If only the convicted person appeals, and if the review leads to a sentence reduction so that the time in prison exceeds the (reduced) sentence, the prisoner will be released and has the choice whether to wait for the appeals decision which can, in any event, not amend the sentence to his or her detriment (prohibition against *reformatio in peius*, cf. Article 83(2))³⁵ or to file a written notice of discontinuance of the appeal (Rule 152(1) RPE). However, if the appeal was lodged exclusively or additionally from the side of the OTP, the release may be subject to the conditions set out in Article 81(3)(c).

The review should not depend on the question whether the prisoner has already been transferred to a domestic prison or is still held at the ICC's Detention Centre. It is likely that the principles established by the ad hoc tribunals can be applied here as well. The ICTY ruled that fairness dictates early release also for persons serving their sentence at the United Nations Detention Unit ('UNDU').³⁶ Other cases where early release at the UNDU was granted include Blaskić, Kolundžija, Kos, Mucić, Simić, Miroslav Tadić, Simo Zaric and Kvočka (cf. Weinberg de Roca and Rassi, 2008, pp. 25 ff., with further references). Similarly, the ICTR President relied on his inherent powers and applied the provisions governing early release also to persons still detained at the United Nations detention Facility in Arusha.³⁷

³⁴ IRMCT, *Prosecutor v. Nindiliyimana et al.*, Decision on Innocent Sagahutu's Notice of Eligibility for Early Release and the Prosecution's Objection thereto, 16 September 2013, MICT-13-43 (<https://www.legal-tools.org/doc/f0e17e/>).

³⁵ See Robert Cryer, Håkan Friman, Daryll Robinson and Elizabeth Wilmshurst (eds.), *An Introduction to International Criminal Law and Procedure*, 2nd ed., Cambridge University Press, 2010, p. 471 (<https://www.legal-tools.org/doc/f691a2/>).

³⁶ ICTY, *Prosecutor v. Strugar*, Presidency, Decision of the President on the Application for Pardon or Commutation of Sentence for Pavle Strugar, 16 January 2009, IT-01-42-ES, para. 9 (<https://www.legal-tools.org/doc/a3c065/>).

³⁷ For the first application see ICTR, *Prosecutor v. Ruggiu*, Presidency, Decision of the President on the Application for Early Release of Georges Ruggiu, 12 May 2005, ICTR-97-32-S

Doctrine: For the bibliography, see the final comment on Article 110.

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(<https://www.legal-tools.org/doc/24a904/>); cf. also *Prosecutor v. Rutaganira*, Presidency, Decision on Request for Early Release, 2 June 2006, ICTR -95-IC-T (<https://www.legal-tools.org/doc/efc6a0/>); *Prosecutor v. Imanishimwe*, Presidency, Decision on Samuel Imanishimwe's Application for Early Release, 30 August 2007, ICTR-99-46-S (<https://www.legal-tools.org/doc/e03863/>).

Article 110(4)

4. In its review under paragraph 3, the Court may reduce the sentence if it finds that one or more of the following factors are present:

(a) The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions;

(b) The voluntary assistance of the person in enabling the enforcement of the judgements and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims; or

(c) Other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules of Procedure and Evidence.

In paragraph 4, the Statute lists relevant factors to be taken into account when deciding on a reduction of sentence. While the first two factors are explicitly phrased in the Article, the “other factors” mentioned under subparagraph c) are further explained under Rule 223 RPE. Whereas conducting the review is mandatory, the decision whether to grant early release is a discretionary one (“may”).¹ The only requirement is that at least one of the factors mentioned in Article 110(4) is present. In consequence and in light of the Chamber’s discretionary power, reduction of sentence is already permissible if only one of these factors is present. On the other hand, the presence of one factor does not mean that sentence reduction must be granted. Similarly, the presence of a factor mitigating against sentence reduction does not preclude the exercise of discretion. Rather, the factors must be considered and weighed against one another (*Lubanga*, 22 September 2015, para. 22). At the *ad hoc* tribunals, the factors relevant for the decision of early release were not part of the Statute (cf. Article 28 ICTY Statute and Article 27 ICTR Statute) but only regulated in the RPE (Rule 125 RPE ICTY and Rule 126 RPE ICTR). The ICTY and ICTR Statutes only very generally refer to the “interests of justice” and the “general principles of law” (Articles 28 and 27, respectively). At the SCSL, Article 2 of the Practice Direction on the Conditional Early Release provided further

¹ Cf. also ICC, *Prosecutor v. Lubanga*, Decision on the review concerning reduction of sentence of Mr. Thomas Lubanga Dyilo, 22 September 2015, ICC-01/04/01/06, para. 21 (*‘Lubanga*, 22 September 2015’) (<https://www.legal-tools.org/doc/88b3f6/>).

criteria for eligibility for conditional early release, including some requirements that leave worrisome discretion to the authorities, such as “respect for the fairness of the process by which he was convicted” and “positive contribution to peace and reconciliation in Sierra Leone and the region”.² Most of these requirements relate to the specific situation of Sierra Leone. It is therefore doubtful in how far they may be applied analogously to cases of the ICC. Some of them may be considered for the interpretation of Rule 223(c) or (d) RPE.

According to the wording of Article 110(4) and Rule 223 as well as the ICC’s case law, the list of factors enumerated in these two provisions should be exhaustive. The explicit reference to the RPE as well as the clear guidance of Rule 223 RPE that “one or more of the following factors [must be] present” clarifies that the list of Article 110(4), read in conjunction with Rule 223, is – unlike Rule 125 ICTY RPE and Rule 126 ICTR RPE – exhaustive.³ This is a regrettable difference to the ad hoc tribunals, as important non-listed factors, for example, humanitarian reasons, can no longer be taken into account, or need to be then classified under any of the existent reasons (for example, Rule 223(e): individual circumstances of the sentenced person).

The factors listed under Article 110 (early and continuing willingness to co-operate with the court, voluntary assistance in enabling the enforcement, as well as other factors “establishing a clear and significant change of circumstances”) are all focused on the present and future, not on the past. They give regard to special preventative considerations rather than retaliation. This understanding is in line with the general principle that the execution of sentences should be mainly oriented towards rehabilitation and reinsertion, while criteria of retaliation and atonement have already been taken into account when determining the length of the sentence. Domestic constitutional law confirms this approach.⁴ Moreover, the first two

² SCSL, “Practice Direction on the Conditional Early Release of Persons convicted by the Special Court for Sierra Leone”, 1 October 2013 (<https://www.legal-tools.org/doc/0260c4/>).

³ *Lubanga*, 22 September 2015, para. 25; confirmed by *Prosecutor v. Katanga*, Appeals Chamber, Decision on the Review concerning Reduction of Sentence of Mr. Germain Katanga, ICC-01/04/01/07, 13 November 2015, para. 19 (*Katanga*, 13 November 2015’) (<https://www.legal-tools.org/doc/f36347/>). See also IRMCT, *Prosecutor v. Dragoljub Kunarac*, Decision on Dragoljub Kunarac’s Application for Early Release, 31 December 2020, MICT-15-88-ES.1, para. 33 (<https://www.legal-tools.org/doc/pxvk81/>).

⁴ Under German constitutional law, for example, the decision on reduction of sentence should be limited to special preventive considerations, while matters relevant for the determination

factors are both linked directly to and support the work of the Court. It is likely that their predominant role in the Statute (as opposed to the RPE) is a result of the practical difficulties the ICC faces when investigating in other countries, and thus reflects the ICC's strong need for co-operation of convicts in order to satisfactorily fulfil its tasks.

In light of the case law of the international tribunals, it was in the beginning unclear whether factors that already played a role for the sentencing decision may again be taken into account when deciding on a reduction of sentence (for example gravity of the crime⁵ or admission of guilt in the context of a plea agreement).⁶ The wording of Article 110(4)(c) referring to changes of the situation suggests that these factors should be considered only to the extent that they continued to exist and thus influenced the enforcement of sentence, also in the period after the sentencing decision (cf. below Commentary on Article 110(4)(a)). This interpretation has recently been confirmed by the ICC's case law. The ICC has now clari-

of guilt (for example gravity of the crime) may not be considered (with regard to German Criminal Code, 13 November 1998, Section 57 (<https://www.legal-tools.org/doc/e71bdb/>), cf. Germany, Federal Constitutional Court, Judgment, 14 June 1993, Case No. 2 BvR 157/93, *Neue Juristische Wochenschrift* 1994, 378.

⁵ The ICTR ruled on this matter in a contradictory manner: On the one hand, a request for early release was denied where mitigating factors were already taken into account when determining the length of the sentence (ICTR, *Prosecutor v Rutaganira*, Presidency, Decision on Request for Early Release, 2 June 2006, ICTR-95-IC-T (<https://www.legal-tools.org/doc/efc6a0/>)). On the other, in a different case, the request was also denied, after serving 10 of a 12-year sentence, where gravity of crimes were greater than mitigating factors, although gravity had also been decisive for the sentencing decision (cf. ICTR, Presidency, *Prosecutor v Imanishimwe*, Decision on Samuel Imanishimwe's Application for Early Release, 30 August 2007, ICTR-99-46-S (<https://www.legal-tools.org/doc/e03863/>)). Similarly, at the ICTY, in the case of *Radic*, due to lack of integration in prison and high gravity of crimes, the convict from Omarska camp would only be released after serving three quarters, rather than two thirds of his sentence (ICTY, *Prosecutor v Radic*, Decision of the President on Early Release of Mlado Radic, 13 February 2012, IT-98-30/1-ES, para. 30 (<https://www.legal-tools.org/doc/39a3dd/>)). A low gravity of the crimes played, on the other hand, in favour of the early release decision in the case of *Kubura*, cf. ICTY, *Prosecutor v Hadzihasanovic and Kubura*, Presidency, Decision of the President on Amir Kubura's Request for Early Release, 11 April 2006, IT-01-47-T, para. 8 (<https://www.legal-tools.org/doc/91a732/>)).

⁶ Cf. IRMCT, *Prosecutor v Ranko Cesić*, Public redacted version of the 30 April 2014 decision of the President on the early release of Ranko Cesić, 28 May 2014, MICT-14-66-ES (<https://www.legal-tools.org/doc/cc45ad/>). See also IRMCT, *Prosecutor v Kunarac*, Decision on Dragoljub Kunarac's Application for Early Release, 31 December 2020, MICT-15-88-ES.1, para. 38 (<https://www.legal-tools.org/doc/pxvk81/>), justifying this by arguing that mitigating factors such as co-operation with the prosecutor or showing remorse were also taken into account at both stages.

fied that a factor that was relevant for the determination of sentence (for example gravity of the crimes) is not a factor to be considered again when deciding on the reduction of sentence (*Lubanga*, 22 September 2015, para. 24). Moreover, the ICC meanwhile clarified that the gravity of the crime is not a factor that in itself weighs for or against reduction of sentence. Rather, the gravity of the crime is an integral and mandatory part of the original sentence imposed (*Lubanga*, 22 September 2015, para. 24, with reference to Art. 78 (1) of the Statute and Rule 145 (1) (c) RPE).

The burden to establish the presence of the relevant factors rests upon the reviewing chamber. This is because – unlike at the *ad hoc* tribunals – the review of the sentence is triggered by a mandatory *propriu motu* review and not upon the individual request of the sentenced person.⁷ Moreover, the convicted person might not have access to all relevant information (*Lubanga*, 22 September 2015, para. 32).

Doctrine: For the bibliography, see the final comment on Article 110.

Author: Anna Oehmichen.

⁷ *Lubanga*, 22 September 2015, para. 32; see also ICC, *Prosecutor v. Katanga*, Appeals Chambers, Decision on the Review concerning Reduction of Sentence of Mr. Germain Katanga, 13 November 2015, ICC-01/04/01/07, para. 21 (<https://www.legal-tools.org/doc/f36347/>).

Article 110(4)(a)

(a) The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions;

The first factor to take into account is the degree of co-operation shown by the prisoner with the court, the investigations and prosecutions. This prominent position within the provision indicates the importance the ICC attaches to this factor, and reflects the ICC's problematic need to rely on the co-operation of its own convicts – in contrast to the *ad hoc* tribunals, where this factor was the one last mentioned, after gravity, treatment of similarly-situated prisoners, and the demonstration of rehabilitation (cf. Rule 125 ICTY RPE and Rule 126 ICTR RPE). Accordingly, at the international tribunals, this factor has never been attributed much significance; the majority of released prisoners had in fact never co-operated.¹

To distinguish this sub-section from sub-section (b), which addresses co-operation in relation to other cases (“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”), sub-section (a) should be read as referring only to the co-operation regarding the sentenced person's *own* case.

According to the ICC's case law, continued adherence to the convicted person's admission of guilt, his continued compliance with the terms of the Agreement and his co-operation post sentence, were indications of an early and continuing willingness to co-operate with the Court's investigations and prosecutions that warranted consideration for early release.² In the *Mahdi* case, the ICC clarified that it was not sufficient to co-operate, but that the co-operation also needed to contribute to the efficient administration of justice at the Court (*Al Mahdi*, 25 November 2021, para. 24).

¹ For details, see Filip Vojta, “Imprisonment for International Crimes”, 2020, p. 290.

² ICC, *Prosecutor v. Al Mahdi*, Appeals Chamber, Decision on the review concerning the reduction of sentence of Mr Ahmad Al Faqi Al Mahdi, 25 November 2021, ICC-01/12-01/15, para. 31 (*Al Mahdi*, 25 November 2021') (<https://www.legal-tools.org/doc/nj5osm/>).

In the *Lubanga* case, the ICC ruled that active participation in reparation proceedings, did not constitute a factor under Article 110(4)(a).³

“Substantial cooperation with the Prosecutor” (thus not willingness) was already a relevant factor at the *ad hoc* tribunals (cf. Rule 125 RPE ICTY and Rule 126 RPE ICTR). The ICTY case law shows, on the one hand, that co-operation with the OTP did come into play in many cases.⁴ In the case of *Obrenović*, release was even granted eight months before two thirds had been passed thanks to the exceptionally substantial co-operation with the prosecution.⁵ Submitting to interviews with the prosecution and providing documents qualified as co-operation with the prosecution.⁶ However, testifying as a defence witness would not constitute co-operation with the prosecution.⁷ Similarly, testifying in one’s own defence and otherwise participating in one’s own proceedings would not constitute co-operation with

³ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Second Decision on the review concerning reduction of sentence of Mr Thomas Lubanga Dyilo, 3 November 2017, ICC-01/04-01/06, para. 44 (<https://www.legal-tools.org/doc/050046/>).

⁴ Cf. for example ICTY, *Prosecutor v. Banović*, Presidency, Decision of the President on Commutation of Sentence, 3 September 2008, IT-02-65/1-ES, para. 14 (*‘Banović*, 3 September 2008’) (<https://www.legal-tools.org/doc/5218b9/>); *Prosecutor v. Erdemović*, Presidency, Order issuing a public redacted version of decision of the President on early release, 15 July 2008, IT-96-22-ES (<https://www.legal-tools.org/doc/deae14/>); *Prosecutor v. Rajić*, Presidency, Decision of the President on Early Release of Ivaca Rajić, 22 August 2011, IT-95-12-ES, para. 23 (<https://www.legal-tools.org/doc/2b355d/>); *Prosecutor v. Došen*, Presidency, Order of the President on the early release of Damir Došen, 28 February 2003, IT-95-8-S, p. 3 (<https://www.legal-tools.org/doc/0c6876/>); *Prosecutor v. Tadić*, Presidency, Decision of the President on the Application for Pardon or Commutation of Sentence of Miroslav Tadić, 3 November 2004, IT-95-9 (<https://www.legal-tools.org/doc/a1fa39/>). In some cases, less than substantial co-operation was nevertheless entitled to some consideration (IRMCT, *Prosecutor v. Lukić*, Decision on the Application for Early Release of Sreten Lukić, 7 October 2021, MICT-14-67-ES.4, para. 76 (<https://www.legal-tools.org/doc/ppa3vn/>); IRMCT, *Prosecutor v. Pavković*, Decision on the Application for Early Release of Nebojša Pavković, 18 May 2022, MICT-14-67-ES.2, para. 69 (<https://www.legal-tools.org/doc/ero2n1/>)).

⁵ ICTY, *Prosecutor v. Obrenović*, Presidency, Decision of President on Early Release of Dragan Obrenović, 21 September 2011, IT-02-60/2-ES, para. 28 (<https://www.legal-tools.org/doc/2dd00a/>).

⁶ IRMCT, *Prosecutor v. Lazarević*, Decision of the President on the Early Release of Vladimir Lazarević, 3 December 2015, MICT-14-67-ES3, para. 22 (<https://www.legal-tools.org/doc/0ef2f5/>).

⁷ IRMCT, *Prosecutor v. Galić*, Decision of the President on the Early Release of Stanislav Galić, 18 January 2017, MICT-14-83-ES, para. 33 (<https://www.legal-tools.org/doc/7sl80g/>); *Prosecutor v. Galić*, Decision on the Early Release of Stanislav Galić, 26 June 2019, No. MICT-14-83-ES, para. 40 (<https://www.legal-tools.org/doc/2f0udz/>).

the prosecution.⁸ On the other, there were also cases in which early release was granted although such a co-operation could not be established. For example, in the case of Jokić, the defendant had even been found in contempt of the Tribunal for refusing to testify at an ICTY trial.⁹ Moreover, in many cases the co-operation with the authorities was considered as a neutral factor, as co-operation had not been sought by part of the OTP.¹⁰ Also in the *Tadić* case, the ICTY ruled that the ICTY prosecution was in no position to comment on the convicted person's behaviour while in prison,¹¹ in particular, as it had not sought any such co-operation after the conviction (*Tadić*, 17 July 2008, para. 18). At the ICTR it seems that co-operation with the prosecution was generally an important factor for early release after serving three quarters of sentence.¹²

⁸ IRMCT, *Prosecutor v. Đorđević*, Decision on the Applications for Early Release of Vlastimir Đorđević, 30 November 2021, MICT-14-76-ES, para. 81 (<https://www.legal-tools.org/doc/bqedpe/>).

⁹ ICTY, *Prosecutor v. Dragan Jokić*, Decision of the President on the Application for Pardon or Commutation of Sentence of Drajan Jokić, 13 January 2010, IT-02-60-ES ('*Jokić*, 13 January 2010') (<https://www.legal-tools.org/doc/94ee42/>).

¹⁰ For example, IRMCT, *Prosecutor v. Kayishemana et al.*, Presidency, Decision of the President on the Early Release of Obed Ruzindana, para. 21, MICT-12-10 (<https://www.legal-tools.org/doc/8b331e/>); ICTY, *Prosecutor v. Krajišnik*, Presidency, Decision of the President on Early Release of Momcilo Krajišnik, 2 July 2013, IT-00-39-ES, para. 29 (<https://www.legal-tools.org/doc/6842fd/>); *Prosecutor v. Blagojević*, Presidency, Decision of the President on Early Release of Vidoje Blagojević, 3 February 2012, IT-02-60-ES, para. 24 (<https://www.legal-tools.org/doc/59765e/>); *Prosecutor v. Stakić*, Presidency, Decision of President on Early Release of Milomir Stakic, 15 July 2011, IT-97-24-ES, para. 37 (<https://www.legal-tools.org/doc/8ab0c2/>); *Prosecutor v. Tarculovski*, Presidency, Decision of President on Early Release of Johan Tarculovski, 23 June 2011, IT-04-82-ES, para. 26 (<https://www.legal-tools.org/doc/448539/>); *Prosecutor v. Strugar*, Presidency, Decision of the President on the Application for Pardon or Commutation of Sentence of Pavle Strugar, 16 January 2009, IT-01-42-ES, para. 13 (<https://www.legal-tools.org/doc/a3c065/>); *Prosecutor v. Krnojelac*, Presidency, Decision on the Application for Pardon or Commutation of Sentence, 9 July 2009, IT-97-25-ES, para. 21 (<https://www.legal-tools.org/doc/1075d1/>); *Prosecutor v. Bala*, Presidency, Decision of President on Application of Haradin Bala for Sentence Remission, 15 October 2010, IT-03-66-ES, para. 27 (<https://www.legal-tools.org/doc/105155/>).

¹¹ ICTY, *Prosecutor v. Tadić*, Presidency, Decision of the President on the Application for Pardon or Commutation of Sentence of Dusko Tadic, 17 July 2008, IT-97-24-ES, para. 10 ('*Tadic*, 17 July 2008') (<https://www.legal-tools.org/doc/01079f/>).

¹² ICTR, *Prosecutor v. Bagaragaza*, Presidency, Decision on the Early Release of Michel Bagaragaza, 24 October 2011, ICTR-05-86-S, para. 13 (<https://www.legal-tools.org/doc/0719fb/>); *Prosecutor v. Rugambarara*, Presidency, Decision on the Early Release Request of Juvenal Rugambarara (P), 8 February 2012, ICTR-00-59 (<https://www.legal-tools.org/doc/a7cfee/>).

The co-operation with the authorities is a factor that will necessarily be considered already at the level of sentencing. Therefore, it is questionable in how far this factor should play such a prominent role again when it comes to the reduction of sentences, in particular in the case of plea agreements where substantial co-operation with the prosecution is a prerequisite for the agreed sentence.

In its decisions reviewing Thomas Lubanga's and Germain Katanga's sentences, the ICC concurred with the Prosecutor's submission that "ordinarily any cooperation that took place before conviction and was already considered at sentencing and does not continue post-conviction should not be considered again to reduce the sentence". However, it emphasized that the fact that a person's co-operation or assistance has not continued post-conviction and was taken into account in the original sentence may not always result in the automatic non-consideration of these acts, as the full impact of a person's co-operation or assistance, even where it does not continue after the conviction, may only become apparent post-sentence.¹³ The ICC's clear standpoint on this issue is to be welcomed, in particular as this question was not at all clear at the *ad hoc* tribunals. For instance, in the case of *Jelisić*, the ICTY qualified the entering into a guilty plea as a factor weighing in favour of a decision on remission of sentence, although the OTP's report denied any co-operation with the Prosecution both during and after trial.¹⁴ On the other hand, under the SCSL's Practice Direction on the Conditional Early Release, which gives very detailed regulations on early release requirements and conditions, the Registrar shall request from the Prosecutor a report, "outlining [...] any information relevant [...] of any

¹³ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Decision on the review concerning reduction of sentence of Mr. Thomas Lubanga Dyilo, 22 September 2015, ICC-01/04/01/06, para. 30 (<https://www.legal-tools.org/doc/88b3f6/>); *Prosecutor v. Katanga*, Appeals Chamber, Decision on the Review concerning Reduction of Sentence of Mr. Germain Katanga, 13 November 2015, ICC-01/04/01/07, para. 26 (<https://www.legal-tools.org/doc/f36347/>).

¹⁴ ICTY, *Prosecutor v. Jelisić*, Presidency, Decision of the President on Sentence Remission for Goran Jelisić, 28 May 2013, IT-95-10-ES, paras. 32, 33 (<https://www.legal-tools.org/doc/b39545/>); see also IRMCT, *Prosecutor v. Bisengimana*, Decision of the President on Early Release of Paul Bisengimana and on Motion to File a Public Redacted Application, 11 December 2012, MICT-12-07, para. 30 (<https://www.legal-tools.org/doc/c9adfb/>); *Prosecutor v. Češić*, Decision of the President on Early Release of Ranko Češić, 28 May 2014, MICT-14-66-ES, para. 24 (<https://www.legal-tools.org/doc/cc45ad/>).

co-operation the Convicted Person has provided to the Prosecutor that was not a consideration in sentencing”.¹⁵

Moreover, the general idea to consider only post-conviction co-operation under this factor is in line with the clear wording of Article 110(4)(a): “early and continuing willingness to cooperate” suggests that co-operation before the conviction is not sufficient; further co-operation during the time serving one’s sentence is required. Furthermore, this interpretation is also supported from a systematic and/or contextual viewpoint: As Article 110(4)(c) refers to “other” factors that establish a clear and significant change of circumstances, it just provides another example of a factor that establishes such clear and significant change, implying that the factors mentioned under Articles 110(4)(a) and 110(4)(b) equally establish this change.

In the *Katanga* case, the ICC further clarified that the “cooperation” referred to as a mitigating circumstance pursuant to Rule 145(2)(a)(ii) of the RPE and referred to in Article 110(4)(a) of the Statute may, as a general matter, be understood as having the same meaning. To the extent that a Trial Chamber qualified an accused’s conduct during trial as “cooperation”, within the meaning of Rule 145(2)(a)(ii) of the RPE, a panel conducting a sentence review would not generally revisit this initial determination (*Katanga*, 13 November 2015, para. 28).

In the latter decision, the ICC further had occasion to rule on the question whether the decision of a convict not to lodge an appeal against his sentencing decision could be interpreted as a form of continuous co-operation. The ICC held that the co-operation “must contribute to the efficient administration of justice at the Court”. Under this aspect, the decision not to appeal one’s sentence decision could be considered as “continuous cooperation” if it was taken “as a result of acknowledging that he or she is guilty of the crimes committed and publicly apologizing therefor”, thereby preventing an unnecessary prolongation of the proceedings (*Katanga*, 13 November 2015, para. 34). The ICC argued that the non-execution of one’s right to appeal “furthermore brings finality to the proceedings against him or her and allows the reparations phase of a case to commence in a timely

¹⁵ SCSL, “Practice Direction on the Conditional Early Release of Persons convicted by the Special Court for Sierra Leone”, 1 October 2013, Article 5(g) (<https://www.legal-tools.org/doc/0260c4/>).

manner, a factor which is of particular importance in the context of the ICC” (para. 34).

In any event, the demonstrated will to co-operate during detention, for example the will to testify before the Court in another case, will be taken into account (cf. for example *Banović*, 3 September 2008, para. 14). Similarly, it is likely that a refusal to testify will not play in favour of the decision (however, cf. *Jokić*, 13 January 2010, where early release was granted notwithstanding contempt proceedings following the refusal to testify at an ICTY trial).

It is important that it is the (demonstrated) willingness to co-operate that may weigh in favour of release, not the actually effected (and successful) co-operation; whether co-operation will actually be possible would be a question out of reach for the detainee, and it would be unfair if a lack of co-operation would weigh against him while no authority wanted the latter from him. Convicts who do not have the opportunity to show such willingness, for example if their role was of such minor nature that they will not have any significant knowledge they could share, will have little or no chance to profit from this factor. It is likely that in such cases, as at the ICTY, this factor will be considered as a neutral one.

Doctrine: For the bibliography, see the final comment on Article 110.

Author: Anna Oehmichen.

Article 110(4)(b)

(b) The voluntary assistance of the person in enabling the enforcement of the judgements and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims; or

It is new to explicitly regulate this criterion in international criminal law. Voluntary assistance can consist in voluntary surrender as well as in locating assets. At the ICTY, voluntary assistance in enabling enforcement was taken into account in a case where the prisoner surrendered voluntarily to the ICTY.¹ Neither the *ad hoc* tribunals nor the Special Courts for Sierra Leone and Lebanon foresee explicitly this criterion in their respective provisions governing early release. Moreover, cases may fall under this provision where people, prior to their own indictment, act as head-hunters or informants or otherwise collaborate with the justice authorities in catching fugitive suspects. However, if applied in this sense one should bear in mind the risk that people turn in their political opponents, motivated not so much by the interests of justice as one might wish.

In the *Lubanga* case, the question was raised whether alleged attempts of the sentenced person to interfere with witnesses in another case (*Ntaganda*), thereby not enabling, but rather obstructing the efficient administration of justice, was a factor to be taken into account under Article 110(4)(b) (then weighing obviously against sentence reduction).² This question raises actually two separate issues: (1) Are mere allegations or suspicions, substantiated by only some factual indications, sufficient basis to be taken into account when reviewing the sentence? (2) Is witness interference of the sentenced person regarding another case generally a factor that should be taken into account under Article 110(4)(b)? The ICC's Reviewing Chamber chose not to answer any of these questions, by claiming

¹ ICTY, *Prosecutor v. Simić*, Presidency, Order of the President on the Application for the Early Release of Milan Simić, 27 October 2003, IT-95-9/2 (<https://www.legal-tools.org/doc/3a6a41/>); ICTY, *Prosecutor v. Tadić*, Decision of the President on the Application for Pardon or Commutation of Sentence of Miroslav Tadić, 3 November 2004, IT-95-9 (<https://www.legal-tools.org/doc/a1fa39/>).

² Cf. ICC, *Prosecutor v. Lubanga*, Decision on the review concerning reduction of sentence of Mr. Thomas Lubanga Dyilo, 22 September 2015, ICC-01/04-01/06-3173, paras. 38 ff. ('*Lubanga*, 22 September 2015') (<https://www.legal-tools.org/doc/88b3f6/>).

that, “mindful of the preliminary nature of the allegations”, before addressing these allegations and whether they demonstrated interference in another case, it had to first establish whether there was any supportive evidence not for witness interference, but for “voluntary assistance”, within the meaning of Article 110(4)(b), on part of Mr. Lubanga. By answering the latter to the negative, it found that there was no need to address the allegations of interference in the *Ntaganda* case (*Lubanga*, 22 September 2015, para. 40). Bluntly put, this statement is both contradictory and disappointing. It is contradictory because if indeed the allegations of interference were of no relevance to the present case, one may wonder why the Chamber did not follow Mr. Lubanga’s request to declare the filings inadmissible in the first place.³ Second, it is regrettable that the ICC missed the chance to discuss the important (and likely recurring) issue whether mere allegations or suspicions of certain conduct may influence the decision to review the sentence. The presumption of innocence should impede the judges from basing their decisions on sentence reductions on unsubstantiated allegations or suspicions. The decision on sentence reduction should, as any judicial decision, be based on factual indications that must be transparent and verifiable for the defence.

Doctrine: For the bibliography, see the final comment on Article 110.

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³ Cf. ICC, *Prosecutor v. Lubanga*, Decision on Mr Lubanga’s request to have two filings from the Prosecutor declared inadmissible, 19 August 2015, ICC-01/04-01/06-3165 (<https://www.legal-tools.org/doc/525135/>).

Article 110(4)(c)

(c) Other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules of Procedure and Evidence.

This rather vague criterion gives the court a considerable degree of discretion and flexibility. While the first two factors concern exclusively the individual behavior of the detainee, these other “factors” may also include aspects outside of the sphere of the detainee, for example the impact of his release on society.

As sub-section c) makes reference to the Rules of Procedure and Evidence, the “other factors” referred to here are those listed under Rule 223 RPE (conduct during detention, prospect of resocialization, consequences of release for social stability, positive conduct towards victims and impact of release on them, as well as individual circumstances such age, sickness and others). The wording “other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence” is formulated in such an open manner that it could also comprise additional factors not mentioned in Rule 223 (for example political circumstances, or the fact that the prisoner agrees to his deportation to his home country.¹ However, the explicit reference to the RPE as well as the clear guidance of Rule 223 RPE that “one or more of the following factors [must be] present” clarifies that the list of Article 110(4), read in conjunction with Rule 223, is – unlike Rule 125 ICTY RPE-Rule 126 ICTR RPE – exhaustive.² Moreover, the ICC concluded from the fact that the factors under Rule 223 (b) and (c) of the RPE were going to be considered for the first time that it was necessary to find that there were changed circumstances in relation to the

¹ Cf. ICTY, *Prosecutor v Tadić*, Presidency, Decision of the President on the Application for Pardon and Commutation of Sentence of Dusko Tadić, 17 July 2008, IT-94-1-ES (<https://www.legal-tools.org/doc/01079f/>); *Prosecutor v Vasilijević*, Presidency, Decision of President on Application for Pardon and Commutation of Sentence of Mitar Vasilijević, 12 March 2010, IT-98-32-ES (<https://www.legal-tools.org/doc/98b8b7/>).

² See also ICC, *Prosecutor v Lubanga*, Appeals Chamber, Decision on the Review concerning Reduction of Sentence of Mr. Thomas Lubanga Dyilo, 22 September 2015, ICC-01/04-01/06-3173, para. 25 (*Lubanga*, 22 September 2015’) (<https://www.legal-tools.org/doc/88b3f6/>); confirmed by *Prosecutor v Katanga*, Appeals Chamber, Decision on the Review concerning Reduction of Sentence of Mr. Germain Katanga, ICC-01/04-01/07, 13 November 2015, para. 19 (*Katanga*, 13 November 2015’) (<https://www.legal-tools.org/doc/f36347/>).

other factors listed in Rule 223 ((a), (d) and (e)) from the time that the sentence was imposed (*Lubanga*, 22 September 2015, para. 28; confirmed by *Katanga*, 13 November 2015, para. 19).

The ICC further clarified that factors not referred to in Article 110(4) or Rule 223 are not considered as relevant factors. Specifically, the fact that a sentenced person has served two thirds of his or her sentence does not present a relevant factor under the ICC regime, as, unlike at the *ad hoc* tribunals, the two-thirds threshold is no more than the trigger mechanism for the automatic sentence review (*Lubanga*, 22 September 2015, para. 27).

The word “clear” is defined as “free from doubt”, “unambiguous” and “very obvious” while “significant” is defined as “large enough to be noticed or have an effect” or “of a measurable large amount”.³

In the *Lubanga* case, the Prosecution submitted that Lubanga failed to establish this criterion of “changed circumstances”, based on his suspected involvement in witness interference in the *Ntaganda* case.⁴ The Reviewing Chamber decided to address the allegations of witness interference within the context of Article 110(4)(b) (see *supra* comment on sub-section (b)), and saw no reason to discuss this issue separately under Article 110(4)(c), as it shares the commentator’s view that Article 110(4)(c) makes exhaustive reference to the factors mentioned under Rule 223 of the RPE, without leaving discretion to consider any other factors not mentioned therein (see above). In the second review decision, the Appeals Chamber did consider Mr. Lubanga’s proposal to organise a public ceremony at which he could meet the victims and offer apologies a change of circum-

³ *Katanga*, 13 November 2015, para. 47; ICC, *Prosecutor v. Al Mahdi*, Appeals Chamber, Decision on the review concerning the reduction of sentence of Mr Ahmad Al Faqi Al Mahdi, 25 November 2021, ICC-01/12-01/15, para. 16 (<https://www.legal-tools.org/doc/nj5osm/>).

⁴ ICC, *Prosecutor v. Lubanga*, OTP, Public redacted version of Prosecution’s third notice regarding potentially relevant information to Thomas Lubanga Dyilo’s sentence review, 14 August 2015, ICC-01/04-01/06-3160-Conf-Ex, 20 August 2015, ICC-01/04-01/06-3160-Red2 (<https://www.legal-tools.org/doc/00d240/>); see also *Prosecutor v. Lubanga*, OTP, Public Annex 1 and Public Redacted Annex 2 to 4, Third public redacted version of Prosecution’s submissions regarding Thomas Lubanga Dyilo’s sentence review, 10 July 2015, ICC-01/04-01/06-3150-Conf-Exp, 25 September 2015, ICC-01/04-01/06-3150-Red4, para. 3 (<https://www.legal-tools.org/doc/adb74d/>).

stances of not sufficient significance to justify an alteration of his sentence.⁵

In the *Al Mahdi* case, the ICC Appeals Chamber further specified that in so far as the factors listed in Rule 223(a), (d) and (e) were considered by a trial chamber already when imposing an appropriate sentence, it was necessary to find that there is a “clear and significant change of circumstances” in relation to these factors from the time that the sentence was imposed.⁶

While apologizing to victims would qualify as a change of circumstances, read in conjunction with Rule 223(d), a letter of the defendant indicating his wish to apologize to the victims did not constitute a change in circumstances since it referred to future actions that had not yet been taken (*Lubanga*, 3 November 2017 paras. 56, 85). The reduction of sentence as a remedy for a human rights violation finds no basis in either Article 110(4) or Rule 223 (para. 92). However, depending on the nature and gravity of such a human rights violation, it could qualify as a factor of individual circumstances of the sentenced person (Rule 223(e)).

Doctrine: For the bibliography, see the final comment on Article 110.

Author: Anna Oehmichen.

⁵ ICC, *Prosecutor v. Lubanga*, Second Decision on the review concerning reduction of sentence of Mr Thomas Lubanga Dyilo, 3 November 2017, ICC-01/04-01/06-3375, para. 85 (*‘Lubanga*, 3 November 2017’) (<https://www.legal-tools.org/doc/050046/>).

⁶ ICC, *Prosecutor v. Al Mahdi*, Appeals Chamber, Decision on the review concerning the reduction of sentence of Mr Ahmad Al Faqi Al Mahdi, 25 November 2021, ICC-01/12-01/15-434-Red3, para. 16 (<https://www.legal-tools.org/doc/nj5osm/>).

Article 110(5)

5. If the Court determines in its initial review under paragraph 3 that it is not appropriate to reduce the sentence, it shall thereafter review the question of reduction of sentence at such intervals and applying such criteria as provided for in the Rules of Procedure and Evidence.

Another novelty of the ICC Statute consists in the statutory regular mandatory review in case sentence reduction is denied after the two-thirds or 25-year period. The details are regulated in Rule 224(3)-(5) RPE. Three judges of the Appeal Chamber shall review the question on reduction of sentences every three years, unless in the initial review decision a shorter period is established or upon application of the sentenced person in case of a “significant change of circumstances”, cf. Rule 224(3). Moreover, upon denial of an early release decision and where the sentenced person has less than four years and a half left to serve his total sentence, the ICC ruled that the next review should take place two years after the negative sentence review decision.¹ While in the first review, a hearing of the sentenced person is mandatory (cf. Article 110(2)), in any subsequent review the three judges of the Appeals Chamber are only obliged to invite written representations from the concerned parties (that is, sentenced person or his or her counsel, the prosecutor, the State of enforcement and, to the extent possible, the victims or their legal representatives). In addition to these, a hearing is not mandatory but optional (Rule 224(4)). The decision and the reasons for the review decision shall be communicated to all those who participated in the review proceedings as soon as possible, Rule 224(5).

This provision differs from the previous practice at the *ad hoc* tribunals, where in case release was considered inappropriate, the decision should specify the date on which the person would next become eligible for early release.² Unlike at the ICC, the period for the next review is not fixed

¹ ICC, *Prosecutor v. Lubanga*, Decision on the review concerning reduction of sentence of Mr Thomas Lubanga Dyilo, 22 September 2015, ICC-01/04-01/06-3173, para. 79 (<https://www.legal-tools.org/doc/88b3f6/>).

² IRMCT, Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons convicted by the ICTR, the ICTY or the Mechanism (MICT/3), 5 July 2012, MICT/3, para. 10 (‘IRMCT, Practice Direction on Pardon, Commutation of Sentence, and Early Release’) (<https://www.legal-tools.org/>)

and may depend on the domestic law of the State where the sentenced person serves his or her sentence.³

Remedies:

It is not clear whether the decision on sentence reduction is appealable. A legal basis for such an appeal could be Article 82(1)(b). However, under that provision, strictly speaking only decisions granting or denying release of the person being investigated or prosecuted can be appealed, so it would not apply to the convicted person. On the other hand, if Article 82(1)(b) should not apply in this case, the Statute would provide no other possibility of appeal against such decisions.⁴ At the IRMCT, the President’s decision on pardon, commutation of sentence or early release shall not be appealable.⁵ Similarly, the decision on conditional early release by the SCSL was not subject to appeal.⁶ However, one should keep in mind that contrary to the ICTY, the ICTR, and the SCSL, the ICC Statute does not provide for “early release” but for “sentence reduction”, which is more of a substantive than a procedural decision and, for this reason, not taken by the President, but by three judges of the Appeals Chamber after a hearing (cf. Rule 224(1) RPE, see also above). It is therefore arguable that the decision whether the sentence should be reduced is, in the case of the ICC, indeed subject to appeal. In any event, the principle of fair trial requires such an appeal and it is therefore desirable to regulate in any subsequent legislative amendments or by case law.⁷

doc/244989/). However, this is no longer regulated in the revised Practice Direction of 15 May 2020 (MICT/3/Rev.3).

³ IRMCT, Practice Direction on Pardon, Commutation of Sentence, and Early Release, para. 10.

⁴ Nerlich, 2016, pp. 1959–1960 with further references.

⁵ Cf. IRMCT, Practice Direction on Pardon, Commutation of Sentence, and Early Release, para. 12; see also ICTR, *Prosecutor v. Rutaganira*, Decision on Appeal of a Decision of the President on Early Release, 24 August 2006, ICTR-95-IC-A (<https://www.legal-tools.org/doc/a5b74a/>).

⁶ Cf. SCSL, “Practice Direction on the Conditional Early Release of Persons convicted by the Special Court for Sierra Leone”, 1 October 2013, Articles 2(F), 8(E) (<https://www.legal-tools.org/doc/0260c4/>).

⁷ See also Fernández-Pacheco Estrada, “What We Talk About When We Talk About Early Release in International Criminal Law: The *Sui Generis* Nature of the Reduction of Sentence Under the Rome Statute”, in *International Criminal Law Review*, 2022, vol. 22, p. 567.

Cross-references:

Articles 77, 103 and 104.

Rules 223 and 224.

Doctrine:

1. Hiram Abtahi and Steven Arrigg Koh, “The Emerging Enforcement Practice of the International Criminal Court”, in *Cornell International Law Journal*, 2012, vol. 45 (<https://www.legal-tools.org/doc/2217b4/>).
2. M. Cherif Bassiouni, *International Criminal Law*, vol. 3: *International Enforcement*, Martinus Nijhoff Publishers, Leiden, 2008, pp. 603–11 (<https://www.legal-tools.org/doc/65ab0e/>).
3. Robert Cryer, Håkan Friman, Daryll Robinson and Elizabeth Wilms-hurst (eds.), *An Introduction to International Criminal Law and Procedure*, 2nd. ed., Cambridge University Press, 2010 (<https://www.legal-tools.org/doc/f691a2/>).
4. Klaus Hoffmann, “Some Remarks on the Enforcement of International Sentences in Light of the Galić Case at the ICTY”, in *Zeitschrift für Internationale Strafrechtsdogmatik* (ZIS), 2011, vol. 10, pp. 838–842 (<https://www.legal-tools.org/doc/4a0851/>).
5. Claus Kress and Göran Sluiter, “Chapter 44 – Imprisonment”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 2nd. ed., Oxford University Press, 2002, pp. 1757–1821.
6. Valerie Oosterveld, “The International Criminal Court and the Closure of the Time-Limited International Hybrid Criminal Tribunals”, in *Loyola University Chicago International Law Review*, 2010, vol. 13, p. 4 (<https://www.legal-tools.org/doc/ce6f7f/>).
7. Christoph Safferling, *Towards an International Criminal Procedure*, Oxford University Press, 2001, pp. 363–65 (<https://www.legal-tools.org/doc/890965/>).
8. Damien Scalia, “Article 110”, in Paul De Hert, Mathias Holvoet, Jean Flamme and Olivia Struyven (eds.), *Code of International Criminal Law and Procedure*, Annotated, Larcier, Ghent, 2013, pp. 492–93 (<https://www.legal-tools.org/doc/3f10e0/>).
9. Damien Scalia, “Long-Term Sentences in International Criminal Law, Do They Meet the Standards Set Out by the European Court of Human

-
- Rights?”, in *Journal of International Criminal Justice*, 2011, vol. 9, no. 3, p. 669 (<https://www.legal-tools.org/doc/150f95/>).
10. William A. Schabas, *The International Criminal Court: A Commentary*, 2nd. ed., Oxford University Press, 2016, pp. 1412–1424 (<https://www.legal-tools.org/doc/b7432e/>).
 11. Volker Nerlich, “Article 82 – Appeal Against Other Decisions”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich, 2016, pp. 1954–1964 (<https://www.legal-tools.org/doc/040751/>).
 12. Gerard A. M. Strijards and Robert O. Harmsen, “Article 103 – Role of States in Enforcement of Sentences of Imprisonment”, in Otto Triffterer and Kai Ambos (eds.), 2016, pp. 2173–2186.
 13. Gerard A. M. Strijards and Robert O. Harmsen, “Article 110 – Review by the Court Concerning Reduction of Sentence”, in Otto Triffterer and Kai Ambos (eds.), 2016, pp. 2210–2211.
 14. Piet Hein Van Kempen, “Early Release in the Context of International Human Rights Law. Commentary”, in André Klip and Göran Sluiter (eds.), *Annotated Leading Cases of International Tribunals. The International Tribunal for Rwanda 2006–2007*, vol. 25, Intersentia, Antwerp/Oxford/Portland, 2010, pp. 954–62.
 15. Ines Monica Weinberg de Roca and Christopher M. Rassi, “Sentencing and Incarceration in the Ad Hoc Tribunals”, in *Stanford Journal of International Law*, 2008, vol. 44, no. 1, pp. 24–29 (<https://www.legal-tools.org/doc/d6112d/>).
 16. Filip Vojta, “Imprisonment for International Crimes”, 2020.
 17. Fernández-Pacheco Estrada, “What We Talk About When We Talk About Early Release in International Criminal Law: The *Sui Generis* Nature of the Reduction of Sentence Under the Rome Statute”, in *International Criminal Law Review*, 2022, vol. 22, pp. 539–567.

Author: Anna Oehmichen.

Article 111

Escape

General Remarks:

The provision concerns the situation of a sentenced person escaping imprisonment and fleeing the State of enforcement. It combines two approaches, a “horizontal” and a “vertical” one, to reach the return of the sentenced person into custody as fast as possible. It is within the discretion of the State of enforcement to either seek the surrender of the fugitive from the State where he or she is currently located by means of existing bilateral or multilateral extradition treaties (for example the well-established framework of the European Convention on Extradition,¹ comprising 50 States to date; the European arrest warrant,² which considerably restricts the grounds to refuse extradition; bilateral extradition treaties with non-States Parties). The State of enforcement may, however, decide to request the Court’s intervention in accordance with the provisions on international co-operation and judicial assistance (cf. Articles 89; 91(1), (3); 92).

Up to date, no case of escape of a person imprisoned after conviction by an international tribunal has been reported. However, the situation envisaged by Article 111 seems not to be completely theoretical: One former detainee of the ICTY, who had been transferred to Bosnia and Herzegovina according to Rule 11 *bis*³ and received his sentence there, managed to escape while attending a dentist’s office in 2007. He stayed at large until early 2012, before he was rearrested by the Bosnian authorities.⁴

Given the Court’s authority to supervise the enforcement (cf. Articles 105 and 110), Article 111 is a provision of merely declaratory character.⁵

¹ European Convention on Extradition, 13 December 1957, CETS No. 024 (<https://www.legal-tools.org/doc/24f14e/>).

² EU, Framework Decision on the European Arrest Warrant and the Surrender Procedures between Member States, 13 June 2002, 2002/584/JHA (<https://www.legal-tools.org/doc/34dae8/>).

³ ICTY, *Prosecutor v. Stanković*, Appeals Chamber, Decision on Rule 11bis referral, 1 September 2005, IT-96-23/2 (<https://www.legal-tools.org/doc/f60b0a/>).

⁴ Organization for Security and Co-Operation in Europe, “OSCE Head of Mission welcomes the arrest of Radovan Stanković”, press release, 23 January 2012 (available on the OSCE’s web site).

⁵ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1425 (<https://www.legal-tools.org/doc/b7432e/>).

This assessment is supported by the drafting history: The International Law Commission Draft⁶ did not contain any provision regarding escape from a penitentiary institution. During the sessions of the Preparatory Commission, an elaborate proposal headed “Art. Y”⁷ on the issue was discussed. It was eventually simplified to a single, bracketed sentence (Article 101) in the Commission’s final draft,⁸ underscoring the Court’s authority to request the surrender of the fugitive according to Part 9 and to transfer the person to another State of enforcement. At the Rome Conference, the State’s possibility to act by means of its own and potentially more effective arrangements with other States was made explicit.⁹

The provision does not cover a situation in which the sentenced person is at large in the territory of the State of enforcement itself. Then, however, the State has to comply with its duty to respect the sentence (established by accepting the designation under Article 103), and will re-establish custody as fast as possible (cf. Schabas, 2016, p. 1426).

Punishment for the escape (cf. for example Articles 434–27 of the French Penal Code) and conduct connected therewith remains to be determined according to the national law of the State of enforcement, as Article 70 does not establish the jurisdiction of the Court for such offences and Article 108 bars only the prosecution for acts committed prior to the transfer of the sentenced person.¹⁰ However, this does not exempt the Court from its supervisory function under Article 106.

⁶ Report of the International Law Commission on the work of its forty-sixth session, 2 May 1994–22 July 1994, UN Doc. A/49/10, 2 September 1994, p. 69 (<https://www.legal-tools.org/doc/f73459/>).

⁷ Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/51/22, 14 September 1996, p. 297 (<https://www.legal-tools.org/doc/e75432/>).

⁸ Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/2, 14 April 1998 (<https://www.legal-tools.org/doc/732f58/>).

⁹ Claus Kreß and Göran Sluiter, “Imprisonment”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 2, Oxford University Press, 2002, p. 1796.

¹⁰ Kreß and Sluiter, 2002, p. 1797; Schabas, 2016, pp. 1426, 1428; cf. Faustin Z. Ntoubandi, “Article 111”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour pénale internationale, Commentaire Article par Article*, vol. 2, A. Pedone, Paris, 2012, p. 2001.

Doctrine: For the bibliography, see the final comment on Article 111.

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

Article 111: Escape

If a convicted person escapes from custody and flees the State of enforcement, that State may, after consultation with the Court, request the person's surrender from the State in which the person is located pursuant to existing bilateral or multilateral arrangements, or may request that the Court seek the person's surrender, in accordance with Part 9.

The State of enforcement “may” request the surrender of the sentenced person, which implies a certain latitude whether it wants to act on its own (and follow the ‘horizontal’ approach) or refer the matter (‘vertically’) to the Court.¹ Arguably, a bona fide exercise of this discretion requires the State to choose the path of action which appears to be the most promising to re-establish custody and the least burdensome to the convict.² In practice, the State of enforcement will exercise its discretion in consultation with the Court as prescribed by Rule 225(1).

The wording “pursuant to existing [...] arrangements” might lead to the conclusion that informal post-facto agreements to surrender the fugitive are excluded. However, it is argued that the wording should not be interpreted in such a way: In order to bring the sentenced person back into custody most efficiently and as it is reflected in the wording of Rule 225(2) (“pursuant to either international agreements or its national legislation”), such agreements should not be excluded (cf. Schabas, 2016, p. 1427). This seems particularly important as not all extradition agreements may be directly applicable to sentences imposed not by the requesting State but an international Court.³

¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1426 (<https://www.legal-tools.org/doc/b7432e/>); Gerard A. M. Strijards and Robert O. Harmsen, “Article 111”, in Otto Triffterer and Kai Ambos (eds.), *Commentary on the Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, mgm. 1 (‘Schabas, 2016, Article 111’).

² Cf. Claus Kreß and Göran Sluiter, Imprisonment, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 2, Oxford University Press, 2002, p. 1797.

³ Cf. France’s concerns in its Proposal submitted by France concerning part 10 of the Rome Statute of the International Criminal Court concerning enforcement, PCNICC/1999/WGRPE(10)DP.1, 18 November 1999, p. 13 (<https://www.legal-tools.org/doc/960039/>).

If the State of enforcement decides not to seek the surrender of the sentenced person itself, it is to refer the matter to the Court. The State's discretion therefore is limited to a decision between the 'horizontal' and 'vertical' approach (cf. Kreß and Sluiter, 2002, p. 1797). Action by the Court is imperative if the location of the fugitive is unknown, given the obligation of all States Parties to co-operate with the Court.

Doctrine: For the bibliography, see the final comment on Article 111.

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

Article 111: Direction of Delivery

It may direct that the person be delivered to the State in which he or she was serving the sentence or to another State designated by the Court.

The second sentence of the provision concerns the destination of a sentenced person handed over to the Court under the ‘vertical’ approach. It may order the direct redelivery to the State of enforcement.¹ However, if the Court deems it appropriate, it may also have the sentenced person being transferred directly to another State, therewith preparing a change of the State of enforcement under Articles 103 and 104. Rule 225(3) provides further details on this issue.

Cross-references:

Article 86.

Rule 225.

Doctrine:

1. Claus Kreß and Göran Sluiter, “Imprisonment”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 2, Oxford University Press, 2002, pp. 1757–821.
2. Faustin Z. Ntoubandi, “Article 111”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour pénale internationale, Commentaire Article par Article*, vol. 2, A. Pedone, Paris, 2012, pp. 1999–2001.
3. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1425–28 (Article 111) (<https://www.legal-tools.org/doc/b7432e/>).
4. Gerard A. M. Strijards and Robert O. Harmsen, “Article 111”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich, 2016, pp. 2212–2213 (<https://www.legal-tools.org/doc/040751/>).

¹ Claus Kreß and Göran Sluiter, “Imprisonment”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 2, Oxford University Press, 2002, pp. 1796–1797.

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

PART 11.
ASSEMBLY OF STATES PARTIES

Article 112

Assembly of States Parties

General Remarks:

Although national courts are independent they all depend on political institutions in relation to issues such as financing and management. The same applies to international tribunal and courts. The United Nations Security Council, General Assembly and Secretariat all had a role in relation to the *ad hoc* tribunals. During the negotiations of the Rome Statute, the question of the Assembly of States Parties was part of the discussions on the overall question of the relationship between the United Nations and the Court. Considering that the ICC is independent of and a distinct organisation in relation to the UN another option was sought. Considering that the Court is based on treaty it is logical that the political body is a gathering of states parties, which is normal for other treaty regimes.

Article 112 deals with participation of States Parties as well as non-States Parties, functions of the Assembly, establishment of a Bureau, decision making, non-co-operation with the Court and default in payment of dues.

Preparatory Works:

The first proposal for a general assembly of states parties was raised in the French Working Paper on the Draft Statute of the Court in 1996.¹

Doctrine: For the bibliography, see the final comment on Article 112.

Author: Mark Klamberg.

¹ Draft Statute of the International Criminal Court, Working Paper submitted by France, UN Doc. A/AC.249/L.3, 7 August 1996 (<https://www.legal-tools.org/doc/4d28ee/>).

Article 112(1)

1. An Assembly of States Parties to this Statute is hereby established. Each State Party shall have one representative in the Assembly who may be accompanied by alternates and advisers. Other States which have signed this Statute or the Final Act may be observers in the Assembly.

Paragraph 1 deals with participation in the Assembly and distinguishes between States Parties who have an inherent right to participate and other states. Other States that have signed the Statute or the Final Act may be observers in the Assembly.

Each State Party shall be represented by one representative, who may be accompanied by alternates and advisers. Each Observer State may be represented in the Assembly by one designated representative, who may be accompanied by alternates and advisers. The representative may designate an alternate or an adviser to act in his or her capacity (Rule 23 of the Rules of Procedure of the Assembly of States Parties).

Rule 92 of the Rules of Procedure of the Assembly of States Parties provides that representatives designated by entities, intergovernmental organizations and other entities that have received a standing invitation from the General Assembly of the United Nations pursuant to its relevant resolutions to participate, in the capacity of observers, in its sessions and work have the right to participate as observers, without the right to vote, in the deliberations of the Assembly. Similarly, representatives designated by regional intergovernmental organizations or other international bodies invited to the Rome Conference, accredited to the Preparatory Commission for the International Criminal Court or invited by the Assembly may participate as observers, without the right to vote, in the deliberations of the Assembly.

Even states that have not signed the Statute or the Final Act may be present during the work of the Assembly. Rule 94 of the Rules of Procedure of the Assembly of States Parties provides that “At the beginning of each session of the Assembly, the President may, subject to the approval of the Assembly, invite a given State which is not a party and does not have observer status to designate a representative to be present during the work of

the Assembly. A representative who is so designated may be authorized by the Assembly to make a statement”.¹

Doctrine: For the bibliography, see the final comment on Article 112.

Author: Mark Klamberg.

¹ ICC ASP, Rules of Procedure of the Assembly of States Parties, 3 September 2002, ICC-ASP/1/3, Rule 94 (<https://www.legal-tools.org/doc/15918d/>).

Article 112(2)(a)

2. The Assembly shall:

(a) Consider and adopt, as appropriate, recommendations of the Preparatory Commission;

The Preparatory commission was established at the Rome Conference 1998 pursuant to Resolution F of the Final Act.¹ The Preparatory Commission was tasked to prepare proposals for practical arrangements for the establishment and coming into operation of the Court, which were all transmitted together with a report of the Commission to the Assembly of States. Pursuant to Resolution F the Commission was in existence until the conclusion of the first meeting of the Assembly of States Parties.

Doctrine: For the bibliography, see the final comment on Article 112.

Author: Mark Klamberg.

¹ Final Act of the United Nations Diplomatic Conference of the Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/10, 17 July 1998 (<https://www.legal-tools.org/doc/75f516/>).

Article 112(2)(b)

(b) Provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court;

This paragraph provides for the oversight function of the Assembly over the predominant representatives of the Court including the Presidency, the Prosecutor and the Registrar. There was some controversy during the negotiations whether the term “administration” covers judicial administrations in addition to the operations of the Court. Some delegations argued that this oversight should be narrow in the sense that there was no intrusive oversight into the Court’s judicial administration. Considering the negotiating history, the term “administration” should not include judicial activities of the Court.¹

Doctrine: For the bibliography, see the final comment on Article 112.

Author: Mark Klamberg.

¹ S. Rama Rao and Philipp Ambach, “Article 112 – Assembly of States Parties”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich, 2016, p. 2200 (<https://www.legal-tools.org/doc/040751/>).

Article 112(2)(c)

(c) Consider the reports and activities of the Bureau established under paragraph 3 and take appropriate action in regard thereto;

When it is not in session, the responsibilities of the Assembly are direct by the Bureau of Assembly established under paragraph 3. The Assembly is to consider the reports and activities of the Bureau and take appropriate action in regard thereto.

Doctrine: For the bibliography, see the final comment on Article 112.

Author: Mark Klamberg.

Article 112(2)(d)

(d) Consider and decide the budget for the Court;

The Assembly is to consider and decide the budget for the Court. It may be read together with paragraph 5(g) of Resolution F of the Final Act,¹ which provides that Preparatory Commission shall prepare a budget for the first financial year. Rule 90 of the Rules of Procedure of the Assembly of States Parties confirms that the Assembly shall decide on the budget, which shall comprise the expenses of the Court and the Assembly, including its Bureau and subsidiary bodies.²

As in the case of other international organizations it is reasonable that in practice the budget is prepared by and originates from the Court, more specifically the Registrar. Paragraph 2 omits any provision that the Assembly should consult with the Registrar. However, Rule 34 provides that the President of the Court, the Prosecutor and the Registrar or their representatives may participate, as appropriate, in meetings of the Assembly and of the Bureau. This means that the Statute provides an opportunity for the Registrar to give input concerning the Court's financial requirements.

Doctrine: For the bibliography, see the final comment on Article 112.

Author: Mark Klamberg.

¹ Final Act of the United Nations Diplomatic Conference of the Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/10, 17 July 1998 (<https://www.legal-tools.org/doc/75f516/>).

² ICC ASP, Rules of Procedure of the Assembly of States Parties, 3 September 2002, ICC-ASP/1/3, Rule 90 (<https://www.legal-tools.org/doc/15918d/>).

Article 112(2)(e)

(e) Decide whether to alter, in accordance with Article 36, the number of judges;

The Assembly of States have the authority to alter the number of judges. The method and procedure in altering the number of judges should be in accordance the provisions of appointing judges contained in Article 36.

Doctrine: For the bibliography, see the final comment on Article 112.

Author: Mark Klamberg.

Article 112(2)(f)

(f) Consider pursuant to Article 87, paragraphs 5 and 7, any question relating to non-cooperation;

Where a State Party fails to comply with a request to co-operate by the Court, the Court has the power pursuant to Article 87(5) and (7) to make a judicial finding and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

It is not clear whether the Assembly of States Parties can raise the issue of non-compliance on its own initiative.¹

Doctrine: For the bibliography, see the final comment on Article 112.

Author: Mark Klamberg.

¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1440 (<https://www.legal-tools.org/doc/b7432e/>).

Article 112(2)(g)

(g) Perform any other function consistent with this Statute or the Rules of Procedure and Evidence.

Paragraph (g) is residual and allows the Assembly of States Parties to perform any other function consistent with this Statute or the Rules of Procedure and Evidence. Several other provisions in the ICC Statute set out responsibilities for the Assembly of States Parties, including Articles 2, 3, 9, 36(2)(c)(i), 36(4), 36(6), 42(4), 43(4) 44(3)(4), 46(2), 49, 51, 79(1), 79(3), 113, 117, 119(2) and 121(2)(3).

Doctrine: For the bibliography, see the final comment on Article 112.

Author: Mark Klamberg.

Article 112(3)(a)

3. (a) The Assembly shall have a Bureau consisting of a President, two Vice-Presidents and 18 members elected by the Assembly for three-year terms.

The Statute provides that the Assembly shall have a Bureau consisting of 21 members with a President, two Vice-Presidents and eighteen members elected by the Assembly for three-year terms. It is normal for international institutions to have a bureau with administrative responsibilities operating when the Assembly is not in session.

Doctrine: For the bibliography, see the final comment on Article 112.

Author: Mark Klamberg.

Article 112(3)(b)

(b) The Bureau shall have a representative character, taking into account, in particular, equitable geographical distribution and the adequate representation of the principal legal systems of the world.

In the choice between having a bureau based on the doctrine of principal legal systems or the principle of geographical representation, both criteria are to be equally considered.

Doctrine: For the bibliography, see the final comment on Article 112.

Author: Mark Klamberg.

Article 112(3)(c)

(c) The Bureau shall meet as often as necessary, but at least once a year. It shall assist the Assembly in the discharge of its responsibilities.

The bureau shall assist the Assembly in the discharge of its responsibilities set out in paragraph 2. In addition, paragraph 6 provides that the Bureau has the competence to convene special sessions of the Assembly on its own initiative.

Doctrine: For the bibliography, see the final comment on Article 112.

Author: Mark Klamberg.

Article 112(4)

4. The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy.

The Assembly may establish “subsidiary bodies [...] in order to enhance its efficiency and economy”. Four such bodies have been established: the Committee on Budget and Finance; the Staff Pension Committee; the Trust Fund for Victims (Article 79); and the Oversight Committee on Permanent Premises.¹

Doctrine: For the bibliography, see the final comment on Article 112.

Author: Mark Klamberg.

¹ See William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1443 (<https://www.legal-tools.org/doc/b7432e/>).

Article 112(5)

5. The President of the Court, the Prosecutor and the Registrar or their representatives may participate, as appropriate, in meetings of the Assembly and of the Bureau.

Although paragraph 5 provides the President of the Court, the Prosecutor and the Registrar or their representatives may participate in meetings of the Assembly and of the Bureau, it is silent whether they do so as members or as observers. One argument raised by some delegations during the negotiations in favour of restricting their roles to observers was the interest to avoid confusing the Court's judicial functions with the political and administrative role of the Assembly.¹

Doctrine: For the bibliography, see the final comment on Article 112.

Author: Mark Klamberg.

¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1447 (<https://www.legal-tools.org/doc/b7432e/>).

Article 112(6)

6. The Assembly shall meet at the seat of the Court or at the Headquarters of the United Nations once a year and, when circumstances so require, hold special sessions. Except as otherwise specified in this Statute, special sessions shall be convened by the Bureau on its own initiative or at the request of one third of the States Parties.

The Assembly shall meet at the seat of the Court or at the Headquarters of the United Nations once a year. In addition, special sessions may be held “when circumstances so require”. The Assembly may hold special sessions and fix the date of commencement and the duration of each such special session.

Special sessions of the Assembly may also be convened by the Bureau on its own initiative or at the request of one third of the States Parties pursuant to Rule 8 of the Rules of Procedure of the Assembly of States Parties.¹

Doctrine: For the bibliography, see the final comment on Article 112.

Author: Mark Klamberg.

¹ ICC ASP, Rules of Procedure of the Assembly of States Parties, 3 September 2002, ICC-ASP/1/3, Rule 8 (<https://www.legal-tools.org/doc/15918d/>).

Article 112(7)

7. Each State Party shall have one vote. Every effort shall be made to reach decisions by consensus in the Assembly and in the Bureau. If consensus cannot be reached, except as otherwise provided in the Statute:

The general rule is that decisions are made by consensus. In the event of failure to reach consensus different alternatives of adopting decisions are set out depending on the character of the decision, as set in sub-paragraphs (a) and (b).

There is a saving clause “except as otherwise provided in the Statute” which means that other provisions of the Statute will prevail over the general rules set laid down by paragraph 7. There are at least two areas where different rules apply: (i) election and removal of judges (Articles 36(6)(a) and 46(2)(a)); and (ii) amendments to the ICC Statute and convening a review conference (Articles 121(4), 122(2), 123(2)).

Doctrine: For the bibliography, see the final comment on Article 112.

Author: Mark Klamberg.

Article 112(7)(a)

(a) Decisions on matters of substance must be approved by a two-thirds majority of those present and voting provided that an absolute majority of States Parties constitutes the quorum for voting;

Decisions on matters of substance must be approved by a two-thirds majority of those present and voting. If the question arises whether a matter is one of procedure or of substance, the President shall rule on the question.¹

The expression “States Parties present and voting” means States Parties present and casting an affirmative or negative vote. States Parties which abstain from the voting shall be considered as not voting (Rules of Procedure of the Assembly of States Parties, Rule 66).

Doctrine: For the bibliography, see the final comment on Article 112.

Author: Mark Klamberg.

¹ ICC ASP, Rules of Procedure of the Assembly of States Parties, 3 September 2002, ICC-ASP/1/3, Rule 64(2) (<https://www.legal-tools.org/doc/15918d/>).

Article 112(7)(b)

(b) Decisions on matters of procedure shall be taken by a simple majority of States Parties present and voting.

Rule 65 of the Rules of Procedure of the Assembly of States Parties confirms that Decisions on amendments to proposals relating to matters of substance, and on parts of such proposals put to the vote separately, shall be made by a two-thirds majority of the States Parties present and voting.¹

The expression “States Parties present and voting” means States Parties present and casting an affirmative or negative vote. States Parties which abstain from the voting shall be considered as not voting (Rules of Procedure of the Assembly of States Parties, Rule 66).

Doctrine: For the bibliography, see the final comment on Article 112.

Author: Mark Klamberg.

¹ ICC ASP, Rules of Procedure of the Assembly of States Parties, 3 September 2002, ICC-ASP/1/3, Rule 65 (<https://www.legal-tools.org/doc/15918d/>).

Article 112(8)

8. A State Party which is in arrears in the payment of its financial contributions towards the costs of the Court shall have no vote in the Assembly and in the Bureau if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The Assembly may, nevertheless, permit such a State Party to vote in the Assembly and in the Bureau if it is satisfied that the failure to pay is due to conditions beyond the control of the State Party.

This paragraph aims at promoting financial responsibility of the States Parties towards the Court by paying their contributions.

Doctrine: For the bibliography, see the final comment on Article 112.

Author: Mark Klamberg.

Article 112(9)

9. The Assembly shall adopt its own rules of procedure.

The Assembly shall adopt its own rules of procedure. Paragraph 5(h) in the Resolution F of the Final Act¹ provides that the Preparatory Commission shall prepare a proposal for the Rules of Procedure of the Assembly of States Parties. The Rules of Procedure were adopted by consensus by the Assembly of States Parties.²

Doctrine: For the bibliography, see the final comment on Article 112.

Author: Mark Klamberg.

¹ Final Act of the United Nations Diplomatic Conference of the Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/10, 17 July 1998 (<https://www.legal-tools.org/doc/75f516/>).

² Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, ICC-ASP/1/3, 3–10 September 2002 (<https://www.legal-tools.org/doc/b427fd/>).

Article 112(10)

10. The official and working languages of the Assembly shall be those of the General Assembly of the United Nations.

The official and working languages of the Assembly shall be those of the General Assembly of the United Nations, currently: Arabic, Chinese, English, French, Russian and Spanish.

Doctrine:

1. S. Rama Rao, “Financing of the Court, Assembly of States Parties and the Preparatory Commission”, in Roy S. Lee, (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999, pp. 399–420 (<https://www.legal-tools.org/doc/d71078/>).
2. S. Rama Rao and Philipp Ambach, “Article 112 – Assembly of States Parties”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich, 2016, pp. 2215–2245 (<https://www.legal-tools.org/doc/040751/>).
3. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1431–1454 (<https://www.legal-tools.org/doc/b7432e/>).

Author: Mark Klamberg.

PART 12. FINANCING

Article 113

Financial Regulations

Except as otherwise specifically provided, all financial matters related to the Court and the meetings of the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be governed by this Statute and the Financial Regulations and Rules adopted by the Assembly of States Parties.

General Remarks:

The financing of the Court was discussed during the negotiations of the ICC Statute. Two broad and different approaches emerged: should the Court be funded by the State Parties or by the United Nations from a special account following the example of peacekeeping operations? Could individuals and private organizations provide additional funding? Even if the main funding would be provided by the State Parties it was discussed whether the United Nations should pay in relation to situations referred to the Court by the UN Security Council. The scheme agreed is contained in Part 12 of the Statute which provides that funds would include contributions by the States as well as those provided by the United Nations, in particular in relation to the expenses incurred due to referrals by the Security Council.

The Preparatory Commission for the International Criminal Court prepared Draft Financial Regulations.¹ The draft used as models both the UN financial regulations and the financial regulations of the International Tribunal for the Law of the Sea, as proposed by the tribunal, but not yet adopted by the Assembly of States Parties. Since the International Criminal Tribunals for the former Yugoslavia and Rwanda apply the UN financial regulations *per se* they could not provide additional models or precedents.²

¹ Report of the Preparatory Committee for the International Criminal Court, Addendum, Part II, Draft Financial Regulations, UN Doc. PCNICC/2001/1/Add.2, 8 January 2002 (<https://www.legal-tools.org/doc/942d18/>).

² Georg Witschel, “Financial Regulations and Rules of the Court”, in *Fordham International Law Journal*, 2001, vol. 25, no. 3, p. 667 (<https://www.legal-tools.org/doc/1d73b7/>).

The Financial Regulations were adopted by Assembly of States Parties at its first session in September 2002.³

Analysis:

The Financial Regulations and Rules are not mentioned in the ICC Statute, not even in Article 21 on applicable law. It may appear unlikely that the Financial Regulations and Rules which concerns administration may come in conflict with the substantive law of the Statute, however in case of conflict the Statute should arguably prevail.⁴

The Registrar has the primary responsibility for managing the Court's finances (regulation 1.4, Rule 101(1)(b)).

Doctrine:

1. S. Rama Rao, "Financing of the Court, Assembly of States Parties and the Preparatory Commission", in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999, pp. 399–420 (<https://www.legal-tools.org/doc/d71078/>).
2. S. Rama Rao, "Article 113 – Financial Regulations", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich, 2016, pp. 2247–2251 (<https://www.legal-tools.org/doc/040751/>).
3. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, Oxford, 2016, pp. 1457–1460 (<https://www.legal-tools.org/doc/b7432e/>).
4. Georg Witschel, "Financial Regulations and Rules of the Court", in *Fordham International Law Journal*, 2001, vol. 25, no. 3, pp. 665–73 (<https://www.legal-tools.org/doc/1d73b7/>).

Author: Mark Klamberg.

³ Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, ICC-ASP/1/3, 3–10 September 2002 (<https://www.legal-tools.org/doc/b427fd/>).

⁴ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1138 (<https://www.legal-tools.org/doc/b7432e/>).

Article 114

Payment of Expenses

Expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be paid from the funds of the Court.

This provision provides that the expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be paid from the funds of the Court. Article 114 is an attempt to avoid a practice as set out in the United Nations Convention on the Law of the Sea where the Secretary-General pays for the meetings of States Parties and other bodies out of the UN general budget.¹

The term “funds” in Article 114 should be distinguished from the same term used in Article 79. The later provision concerns the Trust fund for the benefit of the victims.

Doctrine:

1. Mahmouh H. Arsanjani, “Financing”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 315–29 (<https://www.legal-tools.org/doc/01addc/>).
2. S. Rama Rao, “Financing of the Court, Assembly of States Parties and the Preparatory Commission”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999, pp. 399–420 (<https://www.legal-tools.org/doc/d71078/>).
3. S. Rama Rao, “Article 114 – Payment of Expenses”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich, 2016, p. 2252 (<https://www.legal-tools.org/doc/040751/>).

¹ Mahmouh H. Arsanjani, “Financing”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 324 (<https://www.legal-tools.org/doc/01addc/>); William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1142 (<https://www.legal-tools.org/doc/b7432e/>).

4. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1461–1463 (<https://www.legal-tools.org/doc/b7432e/>).

Author: Mark Klamberg.

Article 115

Funds of the Court and of the Assembly of States Parties

The expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources:

(a) Assessed contributions made by States Parties;

(b) Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.

General Remarks:

Article 115 complements what has been set forth in Article 114, namely that the Court has two sources of financing: assessed contributions made by States Parties and funds provided by the United Nations. As noted in the comment on Article 113 this is a compromise between the two main approaches set against each other during the negotiations of the ICC Statute: whether the Court should be funded by the State Parties or by the United Nations from a special account. Article 115 also confirms that the Assembly of States Parties is the budgetary authority. Pursuant to Rule 90 of the Rules of Procedure of the Assembly of States Parties the Assembly “shall decide on the budget, which shall comprise the expenses of the Court and the Assembly, including its Bureau and subsidiary bodies”.

Analysis:

This provision does not exclude other sources of income such as fines, reimbursement for services rendered, bank interest and rental of premises. However, the word “funds” used in Articles 114 and 115 relate to revenues which are used for approved expenses creating a ‘closed system’.¹ This should be distinguished from voluntary contributions which are regulated in Article 116.

¹ Maarten Halff, David Tolbert and Renan Villacis, “Article 115 – Funds of the Court and of the Assembly of States Parties”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich, 2016, p. 2254 (<https://www.legal-tools.org/doc/040751/>).

Article 115(a) provides that the primary source of income is assessed contributions made by States Parties which are regulated in more detail in Article 117.

Article 115(b) implies that there are situations in which the UN should contribute to the Court's funds. This is particularly motivated in relation to Security Council referrals which may be considered as services rendered by the Court to the UN. However, the two referrals by the Security Council to the Court have explicitly excluded that possibility. Resolution 1593 referring the Situation in Darfur, Sudan to the Court “[r]ecognizes that none of the expenses incurred in connection with the referral including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the ICC Statute and those States that wish to contribute voluntarily”.² Resolution 1970 on the Situation in Libya contains an identical provision ruling out provision of funds by the United Nations to the Court.³

Doctrine:

1. Mahmoush H. Arsanjani, “Financing”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 315–29 (<https://www.legal-tools.org/doc/01addc/>).
2. S. Rama Rao, “Financing of the Court, Assembly of States Parties and the Preparatory Commission”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999, pp. 399–420 (<https://www.legal-tools.org/doc/d71078/>).
3. Maarten Halff, David Tolbert and Renan Villacis, “Article 115 – Funds of the Court and of the Assembly of States Parties”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich, 2016, pp. 2253–2262 (<https://www.legal-tools.org/doc/040751/>).

² Resolution 1593 (2005), UN Doc. S/RES/1593, 31 March 2005, para. 7 (<https://www.legal-tools.org/doc/4b208f/>).

³ Resolution 1970 (2011), UN Doc. S/RES/1970, 26 February 2011, para. 8 (<https://www.legal-tools.org/doc/00a45e/>).

4. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1464–1469 (<https://www.legal-tools.org/doc/b7432e/>).

Author: Mark Klamberg.

Article 116

Voluntary Contributions

Without prejudice to Article 115, the Court may receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties.

General Remarks:

It is common practice that international organizations accept voluntary contributions. Such contributions may distort the priorities of an organisation, provide wealthier and more powerful states an advantage which may come in conflict with the ideal of an independent court. In addition to the funds listed in Article 115, Article 116 provides that the Court may receive and utilize, as additional funds, voluntary contributions from governments, international organizations, individuals, corporations and other entities.

Analysis:

Considering that voluntary contributions are not covered by Article 115 they are not “funds of the Court and of the Assembly of States Parties” within the meaning of Article 115. While Articles 114 and 115 set up a ‘closed system’ with approved funds and approved expenses, voluntary contributions do not form part of the same calculus.

Regulation 7.2 of the ICC Financial Regulations and Rules provides that “[v]oluntary contributions, gifts and donations, whether or not in cash, may only be accepted by the Registrar, provided that they are consistent with the nature and functions of the Court and the criteria to be adopted by the Assembly of States Parties on the subject, in accordance with Article 116 of the Rome Statute. Acceptance of contributions which directly or indirectly involve additional financial liability for the Court shall require the prior consent of the Assembly of States Parties”.¹ When donors specify purposes for which the voluntary contributions are to be used, it follows that when the Court accepts such contributions, they shall be treated as trust funds or special accounts (Regulation 7.3). When no purpose is specified for a voluntary contribution, such contributions shall be treated as mis-

¹ ICC, Financial Regulations and Rules, 21 November 2008, Regulation 7.2 (<https://www.legal-tools.org/doc/449800/>).

cellaneous income and reported as ‘gifts’ in the accounts of the financial period (Regulation 7.4).²

Doctrine:

1. Mahmoud H. Arsanjani, “Financing”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 315–29 (<https://www.legal-tools.org/doc/01addc/>).
2. S. Rama Rao, “Financing of the Court, Assembly of States Parties and the Preparatory Commission”, in Roy S. Lee, (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999, pp. 399–420 (<https://www.legal-tools.org/doc/d71078/>).
3. Maarten Halff, David Tolbert and Renan Villacis, “Article 116 – Voluntary Contributions”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich, 2016, pp. 2263–2266 (<https://www.legal-tools.org/doc/040751/>).
4. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1470–1472 (<https://www.legal-tools.org/doc/b7432e/>).

Author: Mark Klamberg.

² See also ICC, Presidency, Guidelines on the Establishment of Trust Funds of the International Criminal Court, ICC/PRES/D/G/2020/002, 12 June 2020 (<https://www.legal-tools.org/doc/swb7kb/>).

Article 117

Assessment of Contributions

The contributions of States Parties shall be assessed in accordance with an agreed scale of assessment, based on the scale adopted by the United Nations for its regular budget and adjusted in accordance with the principles on which that scale is based.

General Remarks:

As noted in the comment on Article 115(a), assessed contributions by States Parties is one of two sources of funds for the Court. Article 117 concerns how the burden of funding for this source is to be distributed between the States Parties. It acknowledges the principle of differential assessment, using the United Nations scale of assessments.¹

Analysis:

The ICC Statute does not specify which body has the authority to adopt and adjust the scale of assessments. However, Rule 91 of the ICC Assembly of States Parties Rules of Procedure and Regulation 5.2 of the ICC Financial regulations and Rules provide that the scale shall be adopted by the Assembly of States Parties.²

Regulation 5.2 further specifies that the “scale shall be based on the scale adopted by the United Nations for its regular budget, and adjusted in accordance with the principles on which that scale is based, in order to take into account the differences in membership between the United Nations and the Court”. The UN scale of assessments is based on a complex formula which takes into account the population of the country and its gross national income and political adjustments (Woeste and Thomma, 2012, p. 597). Considering that not all UN member states are parties to the ICC Statute, the UN scale of assessments cannot be applied directly to the

¹ Peter Woeste and Thomas Thomma, “Article 17”, in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus (eds.), *The Charter of the United Nations: A Commentary*, 3rd. ed., Oxford University Press, 2012, pp. 597–605 (<https://www.legal-tools.org/doc/0e8ce6/>).

² ICC, Rules of Procedure of the Assembly of States Parties, in Official Records of the First Session, ICC-ASP/1/3, 3 September 2002, Article 91 (<https://www.legal-tools.org/doc/b427fd/>); ICC, Financial Regulations and Rules, 21 November 2008, Regulation 5.2 (<https://www.legal-tools.org/doc/449800/>).

Court. Thus, Article 117 and Regulation 5.2 provides for an adjustment following the same principles.

Doctrine:

1. Mahmoud H. Arsanjani, “Financing”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jonas *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 315–29 (<https://www.legal-tools.org/doc/01addc/>).
2. S. Rama Rao, “Financing of the Court, Assembly of States Parties and the Preparatory Commission”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999, pp. 399–420 (<https://www.legal-tools.org/doc/d71078/>).
3. Maarten Halff, David Tolbert and Renan Villacis, “Article 117 – Assessment of contribution”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich, 2016, pp. 2267–2270 (<https://www.legal-tools.org/doc/040751/>).
4. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1473–1475 (<https://www.legal-tools.org/doc/b7432e/>).
5. Peter Woeste and Thomas Thomma, “Article 17”, in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus (eds.), *The Charter of the United Nations: A Commentary*, 3rd. ed., Oxford University Press, 2012, pp. 576–620 (<https://www.legal-tools.org/doc/0c8ce6/>).

Author: Mark Klamberg.

Article 118

Annual Audit

The records, books and accounts of the Court, including its annual financial statements, shall be audited annually by an independent auditor.

General Remarks:

Several international organizations, such as the United Nations and the European Court of Human rights have no provision in their constitutive documents requiring external audit, although it belongs to sound management practice. Article 118 is thus arguably superfluous as it would be required even in the absence of the present provision.¹

Analysis:

The term “independent auditor” became a compromise during the negotiations of the provision in the context of other proposals including “UN auditors”, “external auditors” and “internal auditors”.²

Regulation 12 of the ICC Financial regulations and Rules provides that the Assembly of States Parties shall appoint an Auditor, which may be an internationally recognized firm of auditors or an Auditor General or an official of a State Party with an equivalent title.³ The Auditor shall be appointed for a period of four years and its appointment may be renewed. The Court also has an Office of Internal Audit (Regulation 110.1).

Doctrine:

1. Mahmouh H. Arsanjani, “Financing”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford, 2002, pp. 315–29 (<https://www.legal-tools.org/doc/01addc/>).

¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1476 (<https://www.legal-tools.org/doc/b7432e/>).

² S. Rama Rao, “Article 118 – Annual Audit”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich, 2016, p. 2271 (<https://www.legal-tools.org/doc/040751/>).

³ ICC, Financial Regulations and Rules, 21 November 2008, Regulation 12 (<https://www.legal-tools.org/doc/449800/>).

2. S. Rama Rao, “Financing of the Court, Assembly of States Parties and the Preparatory Commission”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999, pp. 399–420 (<https://www.legal-tools.org/doc/d71078/>).
3. S. Rama Rao, “Article 118 – Annual Audit”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich, 2016, p. 2271 (<https://www.legal-tools.org/doc/040751/>).
4. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1476–1478 (<https://www.legal-tools.org/doc/b7432e/>).

Author: Mark Klamberg.

PART 13.
FINAL CLAUSES

Article 119

Article 119 Settlement of Disputes

General Remarks:

Multilateral conventions often contain a dispute settlement clause with agreement that disputes are submitted to a third party, a common arbiter is the International Court of Justice. Article 119 is different in the sense that it contains an intermediary stage where the Assembly of States may intervene in disputes.¹

Preparatory Works:

The International Law Commission stated in its 1994 Report that “[t]he court will of course have to determine its own jurisdiction [...], and will accordingly have to deal with any issues of interpretation and application of the statute which arise in the exercise of that jurisdiction”.²

There was a clear will during the negotiations that the Court needed to have the competence to determine the limits of its jurisdiction. It is important for the independence of the court. Some States expressed during the negotiations the belief that any disagreement or difference of opinion of any kind concerning the Court was for it alone to decide. Other States took the view that there might be different classes of disagreements where if for some would more appropriate with modes of settlement than other than the Court.³

¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1483 (<https://www.legal-tools.org/doc/b7432e/>).

² Report of the International Law Commission on the work of its forty-sixth session, 2 May 1994–22 July 1994, UN Doc. A/49/10, 2 September 1994, p. 70 (<https://www.legal-tools.org/doc/f73459/>).

³ Tuiloma Neroni Slade and Roger S. Clark, “Preamble and Final Clauses”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999, p. 429 (<https://www.legal-tools.org/doc/d71078/>); Roger S. Clark, “Article 119 – Settlement of Disputes”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich, 2016, pp. 2274–2275 (<https://www.legal-tools.org/doc/040751/>).

The final draft report of the Preparatory committee contained four options in Article 108 on how to settle disputes: (i) disputes should be settled by the decision of the Court; (ii) disputes on the interpretation or application of the Statute which is not resolved through negotiations should be referred to the Assembly of States Parties which shall make recommendations on further means of settlement of the dispute; (iii) disputes concerning the judicial functions of the Court shall be settled by the decision of the Court; and (iv) no provision on dispute settlement.⁴

Article 119 is a compromise and contains two distinct approaches to settlement of dispute depending on the nature of the dispute. While the first paragraph concerns disputes “concerning the judicial functions”, the second paragraph deals with “[a]ny other dispute”.

Doctrine: For the bibliography, see the final comment on Article 119.

Author: Mark Klamberg.

⁴ Report of the Preparatory Committee on the Establishment of an International Criminal Court, A/CONF.183/2, 14 April 1998 (<https://www.legal-tools.org/doc/732f58/>).

Article 119(1)

1. Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.

Both paragraphs 1 and 2 use the word “dispute”. Disputes can involve disagreement on points of law as well as facts.

The expression ‘judicial function’ also appears in Articles 39(2)(a) and 40(2) where it seems to have the meaning proceedings or trials. This includes more than merely procedural decisions but all rulings of the Court concerning the ICC Statute.¹

Clark suggests a non-exhaustive list the following areas of disagreement that fall within “judicial functions”:²

1. questions of jurisdiction and interpretation of the definitions of crimes within the jurisdiction of the Court (Articles 5–8, 11 and 19);
2. whether the preconditions to the exercise of jurisdiction have been met (Article 12);
3. issues of admissibility (Articles 17 and 19);
4. whether the case is one of *ne bis in idem* (Article 20);
5. questions involving what law applies (Article 21);
6. issues involving the judges, excusing of judges and disqualifying them (Articles 40 and 41);
7. disqualification of the Prosecutor or a Deputy prosecutor (Article 42);
8. some issues involving the Registry (Article 43 overlapping with the Assembly of States Parties);
9. removal of the Registrar or Deputy Registrar from office (Articles 46(1) and (3));

¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1162–1163 (<https://www.legal-tools.org/doc/b7432e/>).

² Roger S. Clark, “Article 119 – Settlement of Disputes”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich, 2016, pp. 2276–2277 (<https://www.legal-tools.org/doc/040751/>).

10. discipline of a judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar (Article 47 and Rule 30);
11. some questions involving privileges and immunities (Article 48);
12. questions involving the Rules of Procedure and Evidence (Article 51);
13. interpretation and application of the Regulations of the Court (Article 52);
14. review of a Prosecutor not to proceed (Article 53(3));
15. rulings on various pre-trial situations (Articles 56–61);
16. making ruling on contentious issue during a trial (Articles 62–75), at sentencing (Articles 76–78), and in proceedings for appeal or revision (Articles 81–85);
17. proceedings for appeal or revision;
18. questions concerning co-operation with and judicial assistance to the Court (Articles 86–101); and
19. questions of the modalities of enforcement of sentences (Articles 103–111).

Doctrine: For the bibliography, see the final comment on Article 119.

Author: Mark Klamberg.

Article 119(2)

2. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.

Paragraph 2 resembles dispute resolution clauses familiar to multilateral treaties. At first disputes should be settled through negotiations where a time limit of three months is set. After that time, the disputes shall in case of failure to reach a settlement “be referred to the Assembly of States Parties”. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice. However, Article 119(2) cannot be compared to Article IX of the Genocide Convention. Parties to the dispute still have to consent to the jurisdiction of the ICJ.

Doctrine:

1. Roger S. Clark, “Article 119 – Settlement of Disputes”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich, 2016, pp. 2274–2282 (<https://www.legal-tools.org/doc/040751/>).
2. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1481–1488 (<https://www.legal-tools.org/doc/b7432e/>).
3. Tuiloma Neroni Slade and Roger S. Clark, “Preamble and Final Clauses”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999, pp. 421–50 (<https://www.legal-tools.org/doc/d71078/>).

Author: Mark Klamberg.

Article 120

Reservations

No reservations may be made to this Statute.

General Remarks:

Article 120 briefly stipulates that States acceding to the Statute may not make reservations. The provision appears to be concise, clear and easy to apply, but it contains a number of difficulties, which has, despite the provision in Article 120, resulted in cumbersome decisions whether declarations lodged by States acceding to the Statute would be permitted.

The possibility for a State to make use of reservations whereby it purports to exclude or to modify the legal effect of certain provisions of treaties when signing, ratifying, accepting, approving or acceding to a treaty, is governed by Articles 19 to 23 of the Vienna Convention on the Law of Treaties. During the beginning of the last century the unanimity principle prevailed. A reservation required the acceptance of all State parties to be valid. If one State objected to the reservation, the unanimity principle resulted in the reserving State being prevented from becoming a party to the treaty. A change in doctrine occurred in mid-2000s following the ICJ advisory opinion in the *Genocide* case.¹ A greater emphasis was put on the principle of universality, under which a larger number of state parties to treaties is highly valued.

This shift from unanimity to universality meant that it is sufficient that a single State party accepts the reservation by the acceding State, for the latter State to become a party to the treaty. The universality principle is considered to enable a larger number of States to accede to treaties; even if the text of the treaty contains regulations acceding states may have difficulty in accepting. A flexible system for reservations to treaties was introduced and was later codified in the 1969 VCLT. In other words, a State can accede to treaties on the precondition of a reservation that modifies or excludes treaty provisions, provided that at least one State party to the treaty accepts the reservation. However, this would only be possible if the reservation is not prohibited by the treaty; the treaty provides that only specified

¹ ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 28 May 1951, ICJ Reports 15, p. 15 (<https://www.legal-tools.org/doc/52868f/>).

reservations, which do not include the reservation in question, may be made; or in other cases, the reservation is incompatible with the object and purpose of the treaty (Article 19 VCLT).

The increasing number of human rights treaties since the mid-2000s, and the doctrine shift in terms of possibilities to formulate reservations has resulted in a growing number of accessions to international treaties. However, the possibility to formulate reservations has in many cases been misused in that obviously impermissible reservations have been formulated. Since objections to reservations must come from the other treaty parties, there might be several different reactions towards the same reservation. This has been especially frequent regarding treaties on human rights and has resulted in it being unclear to what rules treaty parties are bound, which off course is very unsatisfying.² The accelerating problem of impermissible reservations led to the issue being considered by the International Law Commission.³

One way to overcome the above-mentioned misuse of the possibility of formulating reservations is the possibility for States to object to the reservations under Article 20 VCLT. This has been done extensively under various treaties, but this could be a cumbersome way to address the problem, even if it achieves the effect that the reserving State withdraws its reservation. There is also a risk of remaining disputes regarding issues of admissibility of the reservation. Should there exist an established monitoring mechanism under the treaty, the question regarding the permissibility of the reservation can be settled by this system, provided it is an international court or another supervisory organ competent to decide on these questions. In the case of statutes where an international tribunal is established and given the task to monitor the implementation of a treaty, the tribunal may adjudicate on questions of jurisdictions, and thus also indirectly decide on the permissibility of a potentially unauthorized reservation. The latter has occurred in the European Court of Human Rights, *inter alia*, when the court ruled regarding the admissibility of an interpretative declaration for-

² Sia Spiliopoulou Åkermark and Olle Mårsäter, “Otillåtna reservationer – Maldivernas reservation mot kvinnodiskrimineringskonventionen”, in *Mennesker og rettigheter*, 1995, vol. 13, no. 4, pp. 384–385.

³ Report of the International Law Commission, sixty-third session, Addendum, UN Doc. A/66/10/Add.1, 12 August 2011 (<https://www.legal-tools.org/doc/3f8db5/>).

mulated by Switzerland, and declared that it had a modifying effect on the treaty.⁴

Preparatory Works:

In order to avoid the problems of assessing reservations, and safeguarding the integrity of treaties, it could, during the development of treaties, be considered to restrict the possibility to formulate reservations by clearly specifying which reservations may be made, or stipulating that no reservations may be formulated (cf. Article 19 VCLT).

At the Rome Conference, the latter solution was finally chosen and in order to preserve the integrity of the Statute, Article 120 stipulates, very concisely, that reservations under the treaty are impermissible.

Analysis:

By clearly formulating a prohibition to make reservations, it can be concluded that reservations *per se* have no legal effect under the Statute. States can nevertheless formulate interpretative and other declarations. These kinds of statements are not that easy to define, but an *e contrario* reading, of the definition of reservations in Article 2(1)(d) VCLT can be used in order to distinguish them from reservations. If the declaration does not purport to exclude or to modify the legal effect of certain provisions in the treaty in relation to the declaring State, it does not constitute a reservation; hence the declaration is not covered by the prohibition in Article 120 and is allowed. This interpretation of the declaration should be done with due observance of rules regarding interpretation of treaties (cf. Articles 31–32 VCLT). In other words, a properly worded declaration lacks the qualifying legal effects attached to reservations. The problematic aspect of declarations in this context is that it is not too unusual that states seek to indirectly modify the content of treaties by seeking a legal effect in formulating an improper declaration.

If the declaration has the legal effect to exclude or modify provisions of the treaty, it constitutes a disguised reservation. States are usually not required to comment on or object to declarations, and this has not been done against most of the approximately 80 declarations submitted under the Statute (see Status of Multilateral Treaties Deposited with the Secretary-General).

⁴ ECtHR, *Belilos v. Switzerland*, Judgment, 29 April 1988, Application No. 10328/83 (<https://www.legal-tools.org/doc/a14623/>).

However, there may be reason to treat all declarations as potential reservations, and, where necessary, object to them. Uruguay formulated, when ratifying the Statute on 28 June 2002, a declaration with the wording “as a State Party to the Rome Statute, the Eastern Republic of Uruguay shall ensure its application to the full extent of the powers of the State insofar as it is competent in that respect and in strict accordance with the Constitutional provisions of the Republic”. This declaration received, in contrast to other declarations under the Statute, objections from other States. Finland, Germany, the Netherlands, Sweden, Ireland, United Kingdom, Denmark and Norway objected in various ways against Uruguay’s declaration, either through outright objections under the VCLT or by communication to the Secretary-General, to the effect that Uruguay’s declaration in fact constituted a reservation. The objections formulated in response to Uruguay’s declaration resulted in a decision by the country to withdraw the declaration on 26 February 2008 (see Status of Multilateral Treaties Deposited with the Secretary-General).

A relevant question is whether states must object to these types of impermissible reservations. One view is that such reservations are invalid, another is that the validity of reservations is dependent on the acceptance of the reservation by other states.⁵ The view is divided, but a reasonable argument is that regarding reservations under treaties which explicitly does not allow formulation of reservations, it is not necessary to object in accordance with Articles 20 and 21 VCLT, since these reservations *per se* are to be seen as impermissible and the act of formulating the reservation would be an incorrect action by the reserving State that cannot be cured by other State Parties acceptance of the reservation. It is admitted that the question is more complicated when the treaty in question explicitly allows for the formulation of reservations. State practice regarding objections differs, which is also shown in the above-mentioned case of Uruguay’s declaration under the Statute. Finland, the Netherlands, Sweden and Ireland concluded in their respective objections that the impermissible reservation was severable, a legal effect of objections not envisaged in Article 21 VCLT, while the other objecting States seemingly followed the rules stipulated in Articles 20–21 VCLT without any conclusion regarding the severability of the reservation (see Status of Multilateral Treaties Deposited with the Secretary-General).

⁵ Malcolm N. Shaw, *International Law*, 7th. ed., Cambridge University Press, 2014, p. 667; Spiliopoulou Åkermark and Mårsäter, 1995, pp. 385–387.

Whether Article 120 will have the effect of preventing States from seeking to modify or exclude regulations under the Statute, depends on how the rules regarding reservations will be developed and interpreted in the future. This applies in particular to their customary development.

Doctrine:

1. Gerhard Hafhner, “Article 120 – Reservations”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich, 2016, pp. 2283–2297 (<https://www.legal-tools.org/doc/040751/>).
2. William A. Schabas, *The International Criminal Court, A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1489–1497 (<https://www.legal-tools.org/doc/b7432e/>).
3. Malcolm N. Shaw, *International Law*, 7th. ed., Cambridge University Press, 2014.
4. Sia Spiliopoulou Åkermark and Olle Mårsäter, “Otillåtna reservationer – Maldivernas reservation mot kvinnodiskrimineringskonventionen”, in *Mennesker og rettigheter*, 1995, vol. 13, no. 4, pp. 382–99.

Author: Olle Mårsäter.

Article 121

Amendments

General Remarks:

During the negotiations of the ICC Statute some states wanted to amend the Statute as soon as the Statute came into force. This was important for states that wanted to include additional crimes such as terrorism, drug trafficking and the use of weapons of mass destruction. Other states wanted to go more slowly. The compromise was no amendments could be considered until seven years after the entry into force of the Statute.

There was also discussion on the required majority for making amendments. Most delegations accepted that a qualified majority would suffice. The ultimate resolution in paragraphs 3–6 of Article 121 will make amendments very difficult.¹

Doctrine: For the bibliography, see the final comment on Article 121.

Author: Mark Klamberg.

¹ Tuiloma Neroni Slade and Roger S. Clark, “Preamble and Final Clauses”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999, pp. 433–434 (<https://www.legal-tools.org/doc/d71078/>).

Article 121(1)

1. After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties.

This provision prevents any amendments until seven years after the entry into force of the Statute, that means 1 July 2009. The text of any proposed amendment is be submitted to the Secretary-General of the United Nations as the depositary of the treaty and who will notify all States Parties.

Doctrine: For the bibliography, see the final comment on Article 121.

Author: Mark Klamberg.

Article 121(2)

2. No sooner than three months from the date of notification, the Assembly of States Parties, at its next meeting, shall, by a majority of those present and voting, decide whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants.

This provision provides that a majority of members of the Assembly of States Parties present and voting shall decide whether to take up the proposal. Article 121(3) expresses a preference adoption by consensus, if this cannot be reached an amendment shall require the support of a two-thirds majority of States Parties.

Doctrine: For the bibliography, see the final comment on Article 121.

Author: Mark Klamberg.

Article 121(3)

3. The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.

The States Parties should endeavour to adopt amendment by consensus. If this cannot be reached a two-thirds majority of States Parties is required. This higher than what is generally required for decisions on matters of substance, where it is enough with a two-thirds majority of those States Parties *present and voting* (Article 112(7)(a)) whereas the requirement for amendment of the Rome Statute requires the affirmative support of *all* States Parties. This means that amendments can be blocked by a combination of States Parties voting no, abstaining or by not being present during the vote together making up one-third plus one state.

Doctrine: For the bibliography, see the final comment on Article 121.

Author: Mark Klamberg.

Article 121(4)

4. Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.

If the States Parties adopt an amendment under paragraph 3, paragraph 4 provides that an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them. Other rules apply when dealing amendments of the substantive crimes of the Court (to which sub-paragraph 5 applies) and certain minor institutional changes (to which Article 122 applies).

Doctrine: For the bibliography, see the final comment on Article 121.

Author: Mark Klamberg.

Article 121(5)

5. Any amendment to Articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

The general rule on the entry into force of amendments is set out in Article 121(4). Article 121(5) is an exception and applies to amendment to Articles 5, 6, 7 and 8 with consequence that amendments concerning crimes within the jurisdiction of the Court only applies to states that have accepted amendments to this Articles. This is also consistent with sub-paragraph 6 which allows withdrawals in relation to amendments under sub-paragraph 4 but not under sub-paragraph 5

During the adoption of the provision there was a ‘technical error’ which was corrected after the Rome conference. Initially, this provision only had a reference to Article 5 but later during the negotiations there was intent to clarify that this provision would apply also to Articles 6–8. If the provision would only apply to Article 5, the effect would be that rules of entry into force in sub-paragraph 5 would only apply to new crimes (for example adding terrorism or drug offences) meaning that amendments would apply only to accepting States Parties while as sub-paragraph 4 would apply to changes in Articles 6–8 meaning that such changes would apply to all States Parties. The provision was corrected with the effect that sub-paragraph 5 applies to Articles 5–8 with no objections from the States Parties.¹

The matter of state consent in relation to amendments became a major issue when inclusion of the crime of aggression was negotiated, there were four different interpretations of how Article 5(2) should be interpreted in conjunction with Article 121:

¹ Roger S. Clark, “Article 121 – Amendments”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich, 2016, pp. 2302–2303 (<https://www.legal-tools.org/doc/040751/>); William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1503–1504 (<https://www.legal-tools.org/doc/b7432e/>).

1. under the ‘adoption model’, the Court can exercise its jurisdiction over the crime of aggression in accordance with Article 12 of the ICC Statute once the new provisions have been adopted at an Assembly of States Parties meeting or at a Review Conference;
2. the ‘Article 121(5) model with a negative understanding’ is situated at the other end of the spectrum. This interpretation precludes the ICC from exercising its jurisdiction over the crime of aggression when either the State Party of nationality of the alleged offenders or the State Party on whose territory the crime is alleged to have been committed, has not accepted the provision(s) on the crime of aggression;
3. according to the ‘Article 121(5) model with a positive understanding’, the second sentence of Article 121(5) of the ICC Statute only has the limited effect of placing non-accepting States Parties on precisely the same footing as non-States Parties for the purpose of the application of Article 12(2) of the ICC Statute. It avoids the problem of an unfair discrimination between non-accepting States Parties and non-States Parties;
4. the ‘Article 121(4) model’ treats the provision(s) on the crime of aggression as an amendment to the ICC Statute, but for at least one of the reasons set out above, not as an “amendment to Articles 5, 6, 7 and 8 of this Statute” within the meaning of Article 121(5) of the ICC Statute.

In order to resolve the matter, there was agreement before the Kampala conference to formulate a ‘special entry-into-force mechanism’. The solution is to be found in Article 15 *bis* and can be described as ‘softly’ consent based compared to the ‘strictly’ consent-based ‘Article 121(5) model with a negative understanding’ Article 15(4) *bis* by adding an opt-out option.²

Doctrine: For the bibliography, see the final comment on Article 121.

Author: Mark Klamberg.

² Claus Kreß and Leonie von Holtzendorff, “The Kampala Compromise on the Crime of Aggression”, in *Journal of International Criminal Justice*, 2010, vol. 8, no. 5, pp. 1196–1199, 1214 (<https://www.legal-tools.org/doc/95212b/>).

Article 121(6)

6. If an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect, notwithstanding Article 127, paragraph 1, but subject to Article 127, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.

A state which does not accept an amendment that has been adopted under Article 121(4) may withdraw from the Statute at any time within one year after entry force of such amendment. This provision is an exception from the general right to withdraw under Article 127(1) which takes effect only after one year of the notification. Withdrawals under Article 121(6) take effect immediately.

Doctrine: For the bibliography, see the final comment on Article 121.

Author: Mark Klamberg.

Article 121(7)

7. The Secretary-General of the United Nations shall circulate to all States Parties any amendment adopted at a meeting of the Assembly of States Parties or at a Review Conference.

The Secretary-General of the United Nations shall as depositary of the treaty circulate to all States Parties any amendment adopted at a meeting of the Assembly of States Parties or at a Review Conference.

Cross-reference:

Article 127.

Doctrine:

1. Roger S. Clark, “Article 121 – Amendments”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich, 2016, pp. 2298–2304 (<https://www.legal-tools.org/doc/040751/>).
2. Claus Kreß and Leonie von Holtzendorff, “The Kampala Compromise on the Crime of Aggression”, in *Journal of International Criminal Justice*, 2010, vol. 8, pp. 1179–1217.
3. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1498–1508 (<https://www.legal-tools.org/doc/b7432e/>).
4. Tuiloma Neorni Slade and Roger S. Clark, “Preamble and Final Clauses”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999, pp. 421–50.

Author: Mark Klamberg.

Article 122

Amendments to Provisions of an Institutional Nature

General Remarks:

While Article 121 provides for amendments in general, Article 122 provides for a simplified procedure in relation to amendments of an institutional nature. With Article 122 it is enough that two thirds of the members of the Assembly of States Parties approves – there is no requirement that the States Parties need to ratify amendments. Moreover, there is nothing in Article 122 similar to that in Article 121 prohibiting changes during the first seven years of the life of the Court.

Preparatory Works:

There was initial resistance during the negotiations to introduce a simplified amendment procedure in the final clauses. However, when negotiating Article 36 there was agreement that a simplified procedure was needed when increase the number of judges. Hence, Article 36(2) provides for such a procedure – it is enough that two thirds of the members of the Assembly of States Parties approves an increase of judges and there is no need for the States Parties to ratify changes in this regard. The idea to have a simplified amendment procedure in the final clauses was reintroduced and Article 122 applies for such a procedure to a number of other instances.¹

Doctrine: For the bibliography, see the final comment on Article 122.

Author: Mark Klamberg.

¹ Tuiloma Neroni Slade and Roger S. Clark, “Preamble and Final Clauses”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999, pp. 438–440 (<https://www.legal-tools.org/doc/d71078/>); William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1509–1510 (<https://www.legal-tools.org/doc/b7432e/>); Roger S. Clark, “Article 122 – Amendments to Provisions of an Institutional Nature”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich, 2016, p. 2305 (<https://www.legal-tools.org/doc/040751/>).

Article 122(1)

1. Amendments to provisions of this Statute which are of an exclusively institutional nature, namely, Article 35, Article 36, paragraphs 8 and 9, Article 37, Article 38, Article 39, paragraphs 1 (first two sentences), 2 and 4, Article 42, paragraphs 4 to 9, Article 43, paragraphs 2 and 3, and Articles 44, 46, 47 and 49, may be proposed at any time, notwithstanding Article 121, paragraph 1, by any State Party. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations or such other person designated by the Assembly of States Parties who shall promptly circulate it to all States Parties and to others participating in the Assembly.

Article 122(1) contains an exhaustive list on the provisions of the ICC Statute that may be amended by the simplified procedure:

- Article 35, service of judges;
- Article 36, paragraphs 8 and 9, criteria for selecting judges and term of office;
- Article 37, judicial vacancies;
- Article 38, the Presidency of the Court;
- Article 39, paragraph 1 (first two sentences), the Court shall organize itself into Appeals Division, Trial Division and Pre-Trial Division with a certain number of judges in each division;
- Article 39, paragraph 2, the Appeals Chamber shall be composed of all the judges of the Appeals Division; the functions of the Trial Chamber shall be carried out by three judges of the Trial Division; the functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge;
- Article 39, paragraph 4, Judges assigned to the Appeals Division shall serve only in that division. However, judges may be temporary attached from the Trial Division to the Pre-Trial Division or vice versa;
- Article 42, paragraphs 4 to 9, election, excuse and disqualification of the Prosecutor and Deputy Prosecutors;
- Article 43, paragraphs 2 and 3, the Registry shall be headed by the Registrar;

- Article 44, staff of Prosecutor and Registrar;
- Article 46, removal of judge, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar from office;
- Article 47, disciplinary measures for judges, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar;
- Article 49, salaries, allowances and expenses.

The provision provides that changes to provisions may be proposed at any time under the simplified procedure in contrast to the seven-year time limit in Article 121(1). However, no amendments under the simplified procedure were submitted during the first seven years of the Court which makes this difference irrelevant.

Doctrine: For the bibliography, see the final comment on Article 122.

Author: Mark Klamberg.

Article 122(2)

2. Amendments under this Article on which consensus cannot be reached shall be adopted by the Assembly of States Parties or by a Review Conference, by a two-thirds majority of States Parties. Such amendments shall enter into force for all States Parties six months after their adoption by the Assembly or, as the case may be, by the Conference.

Amendments under Article 122 are done with a two-thirds majority of States Parties. The amendment is either adopted by the Assembly of States Parties or by a Review Conference. Once the amendments are adopted, there is no need for ratification or accession. There is no requirement corresponding to Article 121(7) that the Secretary-General of the United Nations shall circulate to all States Parties any amendment adopted at a meeting of the Assembly of States Parties or at a Review Conference. The amendment enters into force for all States Parties six months after their adoption by the Assembly or Review Conference.

Doctrine:

1. Roger S. Clark, “Article 122 – Amendments to Provisions of an Institutional Nature”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich, 2016, pp. 2305–2307 (<https://www.legal-tools.org/doc/040751/>).
2. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1509–1511 (<https://www.legal-tools.org/doc/b7432e/>).
3. Tuiloma Neroni Slade and Roger S. Clark, “Preamble and Final Clauses”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, the Hague, 1999, pp. 421–50.

Author: Mark Klamberg.

Article 123

Review of the Statute

General Remarks:

In addition to the amendment procedure under Article 121, Article 123 sets up a review procedure which has a set time when a first meeting must take place. Article 123 also seeks to ensure that adequate attention would be given to re-examine the crimes under the jurisdiction of the Court.

Preparatory Works:

Article 21 of the 1993 Draft Statute of the ILC Working group provided that “[a] Review Conference shall be held, at the request of at least [...] States Parties after this Statute has been in force for at least five years”.¹

There was no similar provision in the ILC Draft Statute of 1994. Article 111 of the 1998 Preparatory Committee Draft Statute provided that after the expiry of certain number of years to be decided from the entry into force of the Statute, the meeting of the Assembly of States Parties may decide, by a two-thirds majority to convene a special meeting of the Assembly of States Parties to review the Statute.

At the Rome Conference the idea of a Review Conference was used to postpone debates on contentious issues.

Doctrine: For the bibliography, see the final comment on Article 123.

Author: Mark Klamberg.

¹ “Report of the Working Group on a Draft Statute for an International Criminal Court”, in Yearbook of the International Law Commission, Vol. 2, UN Doc. A/CN.4/SER.A/1993/Add.1 (Part 2), 23 July 1993 (<https://www.legal-tools.org/doc/a06e09/>).

Article 123(1)

1. Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in Article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.

The first paragraph provides that the first review is to include, but is not to be limited to, the list of crimes in Article 5. The reference to Article 5 expresses the intent to expand the subject-matter jurisdiction of the Court, more specifically to cover the crime of aggression. Article 5(2) provided that “[t]he Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime”.

The reason for the limit of seven years before amendments are possible, was presumably to test how reliably the ICC functions.

The review conference is the same as for the Assembly of States Parties. Article 112 provides that each State Party shall have one representative in the Assembly.

The word “convenes” does not suggest that the Review Conference need to be held seven years after the entry into force of the Statute, only that it is convened by the UN Secretary General at that time and that the conference is held within a reasonable deadline thereafter. The Secretary General sent a letter 7 August 2009 where he convened the conference in Kampala, Uganda. The first Review Conference was held in Kampala from 31 May to 11 June 2010.

The Review Conference adopted resolution 5 which added three war crimes to Article 8, paragraph 2(e), namely the following:

- (xiii) Employing poison or poisoned weapons;
- (xiv) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xv) 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.¹

The Conference also adopted Resolution 6 which defines the crimes of aggression in the new provision Article 8 *bis* and new Articles 15 *bis* and 15 *ter* that sets out the conditions under which the Court shall exercise jurisdiction with respect to the crime of aggression.² The resolution also amended the Elements of Crimes accordingly. New sub-paragraph 25(3) *bis* clarifies that in respect of the crime of aggression, the provisions of Article 25 shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State. There were some minor changes to Articles 9(1) and 20(3) (Resolution RC/Res.6, 11 June 2010).

Doctrine: For the bibliography, see the final comment on Article 123.

Author: Mark Klamberg.

¹ ICC ASP, Amendments to Article 8 of the Rome Statute, 10 June 2010, Resolution RC/Res.5 ('Resolution RC/Res.5, 11 June 2010') (<https://www.legal-tools.org/doc/de6c31/>).

² ICC ASP, The crime of aggression, 11 June 2010, Resolution RC/Res.6 (<https://www.legal-tools.org/doc/0d027b/>).

Article 123(2)

2. At any time thereafter, at the request of a State Party and for the purposes set out in paragraph 1, the Secretary-General of the United Nations shall, upon approval by a majority of States Parties, convene a Review Conference.

After the first Review Conference, the UN Secretary-General shall at the request of a State Party and upon approval by a majority of States Parties, convene a subsequent Review Conference.

Doctrine: For the bibliography, see the final comment on Article 123.

Author: Mark Klamberg

Article 123(3)

3. The provisions of Article 121, paragraphs 3 to 7, shall apply to the adoption and entry into force of any amendment to the Statute considered at a Review Conference.

The paragraph provides that the same rules that apply for amendments done through the Assembly of States Parties shall apply to the adoption and entry into force of any amendment done through the Review Conference.

Doctrine:

1. Roger S. Clark, “Article 123 – Review of the Statute”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich, 2016, pp. 2308–11 (<https://www.legal-tools.org/doc/040751/>).
2. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1512–17 (<https://www.legal-tools.org/doc/b7432e/>).
3. Tuiloma Neroni Slade and Roger S. Clark, “Preamble and Final Clauses”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999, pp. 421–50.

Author: Mark Klamberg.

Article 124

Transitional Provision

Notwithstanding Article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in Article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with Article 123, paragraph 1.

General Remarks:

Article 124 stipulates that a State may formulate a declaration declaring that it does not accept the jurisdiction of the Court with respect of war crimes alleged to have been committed by its nationals or on its territory over a period of seven years after the entry into force of the Statute for the State concerned. A declaration under Article 124 may be withdrawn at any time.

Analysis:

According to Article 120 it is not possible for states to modify or exclude any content in the Statute by using reservations. The disadvantage of taking a rigid stance towards State's desire to modify their obligations may have an effect of excluding the possibility for states to undertake obligations under the Statute. By allowing time limited declarations relating to the jurisdiction of the Court an opt out model was introduced in the Statute, resulting in a compromise between unanimity and universality. The use of opt out clauses can facilitate both the negotiating process and attract hesitant future State parties. The treaty basis for opt out clauses can be found in Article 17 of the Vienna Convention on the Law of Treaties. Article 17(1) VCLT stipulates that "Without prejudice to Articles 19 to 23, the consent of a State to be bound by part of the treaty is effective only if the treaty so permits or the other contacting States so agree". As can be seen, this partial acceptance has strong similarities with reservations.¹

¹ Sia Spilioupoulou Åkermark and Olle Mårsäter, "Treaties and the Limits of Flexibility", in *Nordic Journal of International Law*, 2005, vol. 74, pp. 523–27.

Article 124 can be seen as an exception to the rigid stance taken under Article 120. The regulation was criticized during the Rome Conference resulting in the decision that the provision should be reviewed at the first Review Conference in 2010. Two States, Colombia and France have made use of the possibility of formulating a declaration under Article 124. Upon ratification France declared that “[the French Republic] does not accept the jurisdiction of the Court with respect to the category of crimes referred to in Article 8 when a crime is alleged to have been committed by its nationals or on its territory”. The French declaration was withdrawn on 13 August 2008 (see Status of Multilateral Treaties Deposited with the Secretary-General on the UN Treaty Collection’s web site).

Cross-references:

Articles 8, 11 and 120.

Doctrine:

1. Sia Spilioupoulou Åkermark and Olle Mårsäter, “Treaties and the Limits of Flexibility”, in *Nordic Journal of International Law*, 2005, vol. 74, pp. 509–40.
2. Andreas Zimmerman, “Article 124 – Transitional Provisions”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich, 2016, pp. 2312–17 (<https://www.legal-tools.org/doc/040751/>)

Author: Olle Mårsäter.

Article 125

Signature, ratification, acceptance, approval or accession

General Remarks:

This Article is a standard-form final clause that received little discussion during the negotiations of the Statute.

Preparatory Works:

A text corresponding to the final version of Article 125 was circulated at the final session of Preparatory Committee.¹

Doctrine: For the bibliography, see the final comment on Article 125.

Author: Mark Klamberg.

¹ See Article 112 of the Draft Statute, in Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/2, 14 April 1998 (<https://www.legal-tools.org/doc/732f58/>).

Article 125(1)

1. This Statute shall be open for signature by all States in Rome, at the headquarters of the Food and Agriculture Organization of the United Nations, on 17 July 1998. Thereafter, it shall remain open for signature in Rome at the Ministry of Foreign Affairs of Italy until 17 October 1998. After that date, the Statute shall remain open for signature in New York, at United Nations Headquarters, until 31 December 2000.

Signature signifies the adoption and authentication of the text. Signature of the ICC Statute is subject to ratification, acceptance or approval, which means that signature alone does not establish consent to be bound. However, signature expresses the intent to ratify and creates an obligation of good faith “to refrain from acts which would defeat the object and purpose of a treaty” (Article 18 of the Vienna Convention on the Law of Treaties). The Statute was open for signature until 31 December 2000.

Two states, the United States and Israel, have signed the Statute but later (6 May 2002 and 28 August 2002, respectively) declared their intent not to ratify the Statute. These declarations have been referred to as ‘un-signing’ the ICC Statute. However, signature is an act that cannot be revoked. The effect of signature can be altered by declarations such as those formulated by the United States and Israel.¹

Doctrine: For the bibliography, see the final comment on Article 125.

Author: Mark Klamberg.

¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1525 (<https://www.legal-tools.org/doc/b7432e/>).

Article 125(2)

2. This Statute is subject to ratification, acceptance or approval by signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

Ratification involves two distinct procedural steps: the first the act of the appropriate organ of the State; the second is the international procedure which brings a treaty – in this case the ICC Statute – into force by a deposit of ratification with the Secretary-General of the United Nations. All three terms “ratification”, “acceptance” and “approval” are colloquially referred to as ‘ratification’. States use different terms for constitutional and historical reasons.¹

Doctrine: For the bibliography, see the final comment on Article 125.

Author: Mark Klamberg.

¹ Ian Brownlie, *Principles of Public International Law*, 7th. ed., Oxford University Press, 2008, pp. 582–583, William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1525 (<https://www.legal-tools.org/doc/b7432e/>).

Article 125(3)

3. This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Ratification is not the only way to become a State Party. States which did not sign the ICC Statute may accede the Statute and become a State Party.

Doctrine:

1. Ian Brownlie, *Principles of Public International Law*, 7th. ed., Oxford University Press, 2008, pp. 581–83.
2. Roger S. Clark, “Article 125 – Signature, Ratification, Acceptance, Approval or Accession”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich, 2016, pp. 2318–2319 (<https://www.legal-tools.org/doc/040751/>)
3. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1522–1529 (<https://www.legal-tools.org/doc/b7432e/>).
4. Tuiloma Neroni Slade and Roger S. Clark, “Preamble and Final Clauses”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999, pp. 421–50.

Author: Mark Klamberg.

Article 126

Entry into force

General Remarks:

Although this article is a standard-form final clause, it did contain the difficult issue on the number of parties needed to bring the Statute into force.

Preparatory Works:

The 1994 International Law Commission Draft Statute stated that “[t]he statute of the court is intended to reflect and represent the interests of the international community as a whole in relation to the prosecution of certain most serious crimes of international concern. In consequence, the statute and its covering treaty should require a substantial number of States parties before it enters into force”.¹

The number of sixty first appeared in the Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court in 1995.²

Article 114 of the Preparatory Committee Draft Statute followed with the same number.³

Some states favoured during the negotiations in Rome a lower number. Other states argued that for the institution have legitimacy it should have a decent number of parties. This is even more logical considering that the Court with the consent of the territorial State would have jurisdiction over crimes committed on that territory by nationals of non-State Parties.⁴

Doctrine: For the bibliography, see the final comment on Article 126.

Author: Mark Klamberg.

¹ Report of the International Law Commission on the work of its forty-sixth session, 2 May 1994–22 July 1994, UN Doc. A/49/10, 2 September 1994, p. 146 (<https://www.legal-tools.org/doc/f73459/>).

² Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, UN Doc. A/50/22, 7 September 1995, para. 15 (<https://www.legal-tools.org/doc/b50da8/>).

³ Report of the Preparatory Committee on the Establishment of an International Criminal Court, A/CONF.183/2, 14 April 1998 (<https://www.legal-tools.org/doc/732f58/>).

⁴ Tuiloma Neroni Slade and Roger S. Clark, “Preamble and Final Clauses”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999, p. 444 (<https://www.legal-tools.org/doc/d71078/>).

Article 126(1)

1. This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

The Statute shall enter into force on sixty days after the deposit of the sixtieth instrument of ratification, acceptance, approval or accession. Sixty days is fairly standard waiting period in modern treaty practice for the entry into force of the Statute.¹

The number of ratifications reached sixty on 13 April 2002 and thus the Statute entered into force of 1 July 2002. The entry into force is relevant for several other provisions. Article 11(1) provides that the Court has jurisdiction only with respect to crimes committed after the entry into force. Upholding the principle of legality and non-retroactivity, Article 24(1) states that no person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute. Further, pursuant to Article 121(1) amendments are only possible after the expiry of seven years from the entry into force of the Statute. The date of the first Review Conference is also set in relation to the entry into force of the Statute according to Article 123.²

Doctrine: For the bibliography, see the final comment on Article 126.

Author: Mark Klamberg.

¹ Tuiloma Neroni Slade and Roger S. Clark, “Preamble and Final Clauses”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999, p. 445 (<https://www.legal-tools.org/doc/d71078/>)

² William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1532 (<https://www.legal-tools.org/doc/b7432e/>).

Article 126(2)

2. For each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.

For a State ratifying, accepting, approving or acceding to the Statute after the deposit of the sixtieth instrument of ratification – that is, the 13 April 2002 – the entry into force for that State occurs on the first day of the month after the sixtieth day following the deposit by such State.

This date is relevant for Article 11(2) which provides that if a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State. There are two exceptions where the Court may exercise jurisdiction for crimes committed before the ratification of that State – but still limited to acts committed after 1 July 2002: (i) if that State has made a declaration under Article 12(3); (ii) jurisdiction has been established by the UN Security Council under Article 13(b).

A State may also upon ratification of the Rome Statute make a declaration in accordance with Article 124 and opt out for a period of seven years from the jurisdiction of the Court in relation to war crimes.

Cross-references:

Articles 11(1), 24(1), 121(1) and 123.

Doctrine:

1. Roger S. Clark, “Article 126 – Entry Into Force”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich, 2016, pp. 2320–2321 (<https://www.legal-tools.org/doc/040751/>)
2. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1530–1533 (<https://www.legal-tools.org/doc/b7432e/>).
3. Tuiloma Neroni Slade and Roger S. Clark, “Preamble and Final Clauses”, in Roy S. Lee (ed.), *The International Criminal Court: The Making*

of the Rome Statute, Kluwer Law International, The Hague, 1999, pp.
421–50.

Author: Mark Klamberg.

Article 127

Withdrawal

General Remarks:

Article 127 deals with withdrawal. It differs from the right to withdraw under Article 121(6). While Article 121(6) allows withdrawal under a narrow set of circumstances when the Statute has been amended, Article 127 is entirely open-ended. There is no limitation on what grounds a State may withdraw under Article 127. The benefit for withdrawing under Article 121(6) is the immediate effect while withdrawal under Article 127 takes a year from the date of notification of withdrawal.

Preparatory Works:

There was no dispute during the negotiations that States would have the right to withdraw. Article 98 of the Draft Statute contained in the Zutphen Report was very concise.¹

The discussion focused on paragraph 2 which concerns past obligation, that is obligations that arose from the Statute while the State was a Party to the Statute. Article 115 of the Draft Statute adopted by Preparatory Committee in 1998 contained a draft provision of withdrawal almost identical to the adopted provision.²

Doctrine: For the bibliography, see the final comment on Article 127.

Author: Mark Klamberg.

¹ Report of the Intersessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands: Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/AC-249/1998/L-13, 5 February 1998 (<https://www.legal-tools.org/doc/7ba9a4/>).

² Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/2, 15 June-17 July 1998 (<https://www.legal-tools.org/doc/732f58/>).

Article 127(1)

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

Paragraph 1 provides that a withdrawal takes effect one year after the date of receipt of the notification of withdrawal. However, States are allowed to specify a later date in its notification.

The Secretary-General of the United Nations exercises the depositary function in receiving notifications of withdrawal.

Doctrine: For the bibliography, see the final comment on Article 127.

Author: Mark Klamberg.

Article 127(2)

2. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

The first sentence of the second paragraph captures the principle of Article 70 of the Vienna Convention on the Law of Treaties that past obligations survive withdrawal from the treaty regime: “the termination of a treaty [...] does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination”.

The second sentence deals with an example of this principle, namely co-operation in connection with investigations and prosecution.

The last part of the second sentence “nor shall it prejudice” makes it clear by the words “any matter which was already under consideration by the Court” that a State whose nationals have been put under the jurisdiction of the Court by a State referral or by a Prosecutor acting *proprio motu* cannot terminate such proceedings by withdrawing from the Statute. Thus, when a State finds it, or its leaders targeted by investigations or prosecution, the ICC Statute seeks to prevent that withdrawal is used as a means of avoiding its jurisdiction.

Cross-reference:

Article 12.

Doctrine:

1. Roger S. Clark, “Article 127 – Withdrawal”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich, 2016, pp. 2322–2324 (<https://www.legal-tools.org/doc/040751/>)

2. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1534–1536 (<https://www.legal-tools.org/doc/b7432e/>).
3. Tuiloma Neroni Slade and Roger S. Clark, Preamble and Final Clauses, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999, pp. 421–50.

Author: Mark Klamberg.

Article 128

Authentic Texts

The original of this Statute, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

General Remarks:

Article 128 reiterates the equal authenticity principle concerning multilateral treaties stated in the Vienna Convention on the Law of Treaties. Article 33(4) of the VCLT states when the principle is applied “the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted”.

Preparatory Works:

This provision causes no controversy whatsoever and was adopted exactly on the basis of the Secretariat’s draft.¹

Analysis:

The languages listed are the official United Nations languages. The Secretary-General of the United Nations shall as a depositary send certified copies of the Statute to “all States”, a formula that also includes states that are not United Nations members.

Doctrine:

1. Roger S. Clark, “Article 128 – Authentic Texts”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich, 2016, p. 2325 (<https://www.legal-tools.org/doc/040751/>).
2. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1537–1540 (<https://www.legal-tools.org/doc/b7432e/>).
3. Tuiloma Neroni Slade and Roger S. Clark, “Preamble and Final Clauses”, in Roy S. Lee (ed.), *The International Criminal Court: The Making*

¹ Tuiloma Neroni Slade and Roger S. Clark, “Preamble and Final Clauses”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999, p. 448.

of the Rome Statute, Kluwer Law International, The Hague, 1999, pp.
421–450.

Author: Mark Klamberg.

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