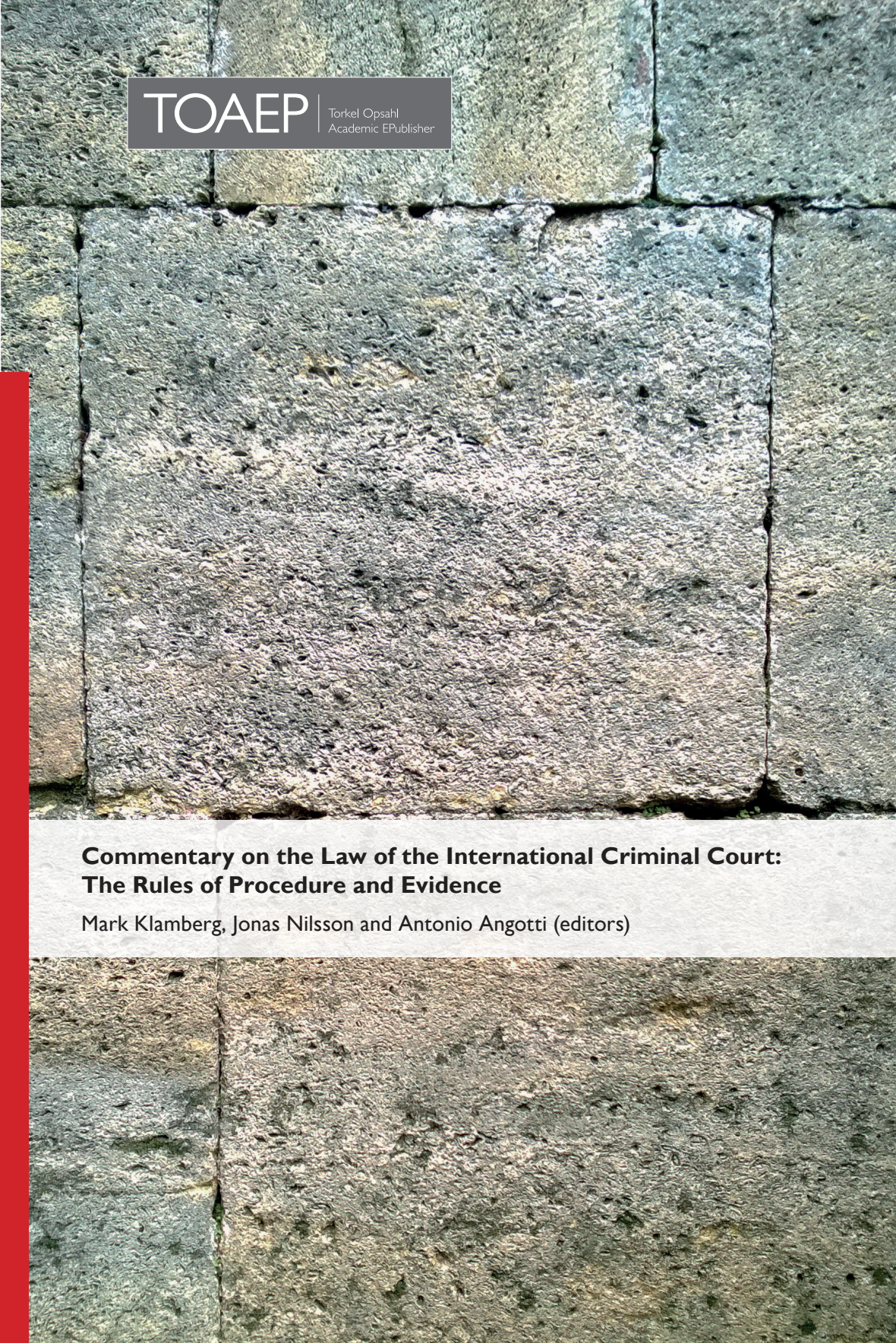


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**Commentary on the Law of the International Criminal Court:
The Rules of Procedure and Evidence**

Mark Klamberg, Jonas Nilsson and Antonio Angotti (editors)

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**Mark Klamberg, Jonas Nilsson
and Antonio Angotti (editors)**

**2023
Torkel Opsahl Academic EPublisher
Brussels**

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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 Judios in the Juderia 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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ISBNs: 978-82-8348-208-9 (print) and 978-82-8348-209-6 (e-book).

PREFACE BY THE EDITORS

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.

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 this volume of CLICC, please make the reference to the page and note in this way:

Mark Klamberg, "Rule 114", in Mark Klamberg, Jonas Nilsson and Antonio Angotti (eds.), *Commentary on the Law of the International Criminal Court: The Rules of Procedure and Evidence*, Torkel Opsahl Academic EPublisher, Brussels, 2023, p. z.

If you wish to make a reference to the online version of CLICC (Rules of Procedure and Evidence), please do it in this way:

Mark Klamberg, "Rule 114", in Mark Klamberg, Jonas Nilsson and Antonio Angotti (eds.), *Commentary on the Law of the International Criminal Court: The Rules of Procedure and Evidence*, Lexsitus-CLICC (<http://cilrap-lexsitus.org/en/rpe/clicc/114/>, 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. Arabic and French versions are already available in Lexsis 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 Lexsis 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/ddefac/)
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	Extraordinary Chambers in the Courts of Cambodia
ECCC Internal Rules	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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CHAPTER 1. GENERAL PROVISIONS

Rule 1

In the present document:

- “*article*” refers to articles of the Rome Statute;
- “*Chamber*” refers to a Chamber of the Court;
- “*Part*” refers to the Parts of the Rome Statute;
- “*Presiding Judge*” refers to the Presiding Judge of a Chamber;
- “*the President*” refers to the President of the Court;
- “*the Regulations*” refers to the Regulations of the Court;
- “*the Rules*” refers to the Rules of Procedure and Evidence.

This rule, as its title and the introductory words indicate, is intended only to state the meanings with which terms are used in the Rules of Procedure and Evidence of the International Criminal Court.

The RPE have a different structure than the ICC Statute. In order to avoid confusion it was agreed during the negotiations of the RPE under Rule 1 on use of Terms that terms such as ‘articles’ and ‘parts’ should be reserved to refer exclusively to divisions and provisions of the ICC Statute.¹ Instead the RPE uses terms such as ‘rules’ and ‘chapters’.

The ICC Statute is the main instrument regulating the functioning of the Court. The main subsidiary instrument for judicial activities is the RPE, adopted by the Assembly of States Parties under Article 51 of the ICC Statute. Other instruments include Elements of Crimes adopted by the ASP under Article 9, the Regulations of the Court adopted by the Judges pursuant to Article 52, Staff regulations pursuant to Article 44 and the Financial Regulations and Rules pursuant to Article 113. Article 52(1) indicates that the Regulations shall be consistent with the ICC Statute and the RPE.

Doctrine:

1. Silvia A. Fernández de Gurmendi, “The Elaboration of the Rules of Procedure and Evidence”, in Roy S. Lee and Håkan Friman (eds.), *The*

¹ Silvia A. Fernández de Gurmendi, “The Elaboration of the Rules of Procedure and Evidence”, 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. 244 (<https://www.legal-tools.org/doc/e34f81/>).

International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence, Transnational Publishers, Ardsley, 2001, pp. 235–257 (<https://www.legal-tools.org/doc/e34f81/>).

2. Christopher Staker and Dov Jacobs, “Article 52”, 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. 49–62 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Rule 2

The Rules have been adopted in the official languages of the Court established by article 50, paragraph 1. All texts are equally authentic.

Article 50 provides that the official languages of the Court shall be Arabic, Chinese, English, French, Russian and Spanish. This requirement is primarily relevant for the work of the Assembly of States Parties.¹

Preparatory works:

The International Law Commission draft (1994 ILC Final Report) declared English and French to be the working languages of the Court, that is, the official languages of the United Nations, French and English. At the Rome conference a distinction was made between official and working languages and the addition of the other official languages of the UN: Arabic, Russian, Chinese and Spanish (Schabas, 2016, pp. 802–803).

Doctrine:

1. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 634–641 (<https://www.legal-tools.org/doc/b7432e/>).

Author: Mark Klamberg.

¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 803.

Rule 3

- 1. Amendments to the rules that are proposed in accordance with article 51, paragraph 2, shall be forwarded to the President of the Bureau of the Assembly of States Parties.*
- 2. The President of the Bureau of the Assembly of States Parties shall ensure that all proposed amendments are translated into the official languages of the Court and are transmitted to the States Parties.*
- 3. The procedure described in sub-rules 1 and 2 shall also apply to the provisional rules referred to in article 51, paragraph 3.*

Article 51(2) provides that Rule amendments can be proposed by: any State Party; the judges acting in absolute majority, or the Prosecutor, and enter into force when adopted by a two-thirds majority of the Assembly of States Parties.

The procedure of amending rules entails that the proposal is forwarded to the President of the Bureau of the Assembly of States Parties. Further, the proposed amendments are translated into the official languages of the Court and are transmitted to the States Parties. Pursuant to Rule 3(1) this procedure also applies to provisional rules adopted by the judges under Article 51(3).

Author: Mark Klamberg.

CHAPTER 2.

COMPOSITION AND ADMINISTRATION OF THE COURT

Section I. General Provisions Relating to the Composition and Administration of the Court

Rule 4¹

1. The judges shall meet in plenary session after having made their solemn undertaking, in conformity with rule 5. At that session the judges shall elect the President and Vice-Presidents.

2. The judges shall meet subsequently in plenary session at least once a year to exercise their functions under the Statute, the Rules and the Regulations and, if necessary, in special plenary sessions convened by the President on his or her own motion or at the request of one half of the judges.

3. The quorum for each plenary session shall be two-thirds of the judges.

4. Unless otherwise provided in the Statute or the Rules, the decisions of the plenary sessions shall be taken by the majority of the judges present. In the event of an equality of votes, the President, or the judge acting in the place of the President, shall have a casting vote.

5. The Regulations shall be adopted as soon as possible in plenary sessions.

¹ As amended by resolution ICC-ASP/10/Res.1.

Rule 4 adds details to Article 38 of the ICC Statute which concerns the election and function of the Presidency.

Paragraph 1 of the rule was amended by resolution ICC-ASP/10/Res.1 of 20 December 2011,¹ whereas the old rule required the judges to meet in plenary “not later than two months after their election”, current Rule 4(1) provides that they “shall meet in plenary session after having made their solemn undertaking”. As indicated by resolution ICC-ASP/10/Res.1, the amendment aims to enhance the efficiency and effectiveness of the Court.

Paragraph 5 provides that the regulations of the Court shall be adopted as soon as possible in plenary sessions. This paragraph relates to Article 52

¹ ICC ASP, Amendments to rule 4 of the Rules of Procedure and Evidence, ICC-ASP/10/Res.1, 20 December 2011 (<https://www.legal-tools.org/doc/fl5c3c/>).

which provides that the judges shall adopt, by an absolute majority, the Regulations of the Court necessary for its routine functioning. The original regulations of the Court were adopted by the judges of the Court on 26 May 2004. They have subsequently been amended four times: (i) as amended on 14 June and 14 November 2007, date of entry into force of amendments: 18 December 2007; (ii) as amended on 2 November 2011, date of entry into force of amendments: 29 June 2012; (iii) as amended on 10 February 2016, date of entry into force of amendments: 10 February 2016; (iv) as amended on 6 December 2016, date of entry into force of amendments: 6 December 2016 ; (v) as amended on 12 July 2017, date of entry into force of amendments: 20 July 2017; and (vi) as amended on 12 November 2018, date of entry into force of amendments: 15 November 2018.

Doctrine:

1. Frank Jarasch, “The Rules of Procedure and Evidence Concerning the Composition and Administration of the International Criminal Court”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd, ed, Berliner Wissenschafts-Verlag, 2004, pp. 155–172 (<https://www.legal-tools.org/doc/95e5f9/>).

Author: Mark Klamberg.

Rule 4 *bis*²

1. Pursuant to article 38, paragraph 3, the Presidency is established upon election by the plenary session of the judges.

2. As soon as possible following its establishment, the Presidency shall, after consultation with the judges, decide on the assignment of judges to divisions in accordance with article 39, paragraph 1.

² As amended by resolution ICC-ASP/10/Res.1.

Rules 4 and 4 *bis* add details to Articles 38 and 39 of the ICC Statute which, *inter alia*, concern the assignment of judges to divisions.

Rule 4 *bis* was introduced by Resolution ICC-ASP/10/Res.1 of 20 December 2011,¹ whereas the old Rule 4 required the judges to meet in plenary “not later than two months after their election” and at that session assign judges to divisions, current Rule 4 *bis* requires the Presidency, as soon as possible following its establishment and after consultation with the judges, to decide on the assignment of judges to divisions. As indicated by resolution ICC-ASP/10/Res.1 the amendment aims to enhance the efficiency and effectiveness of the Court.

Assignment under Rule 4 *bis* is not only used when the Presidency is established, but also when a new judge is elected.²

Author: Mark Klamberg.

¹ ICC ASP, Amendments to rule 4 of the Rules of Procedure and Evidence, ICC-ASP/10/Res.1, 20 December 2011 (<https://www.legal-tools.org/doc/f15c3c/>).

² See ICC, *Situation in the Democratic Republic of the Congo*, Decision assigning Judge Raul Pangalangan to the Pre-Trial Division, Presidency, 15 July 2015, ICC-01/04-637 (<https://www.legal-tools.org/doc/008949/>).

Rule 5

1. As provided in article 45, before exercising their functions under the Statute, the following solemn undertakings shall be made: (a) In the case of a judge: “I solemnly undertake that I will perform my duties and exercise my powers as a judge of the International Criminal Court honourably, faithfully, impartially and conscientiously, and that I will respect the confidentiality of investigations and prosecutions and the secrecy of deliberations.”; (b) In the case of the Prosecutor, a Deputy Prosecutor, the Registrar and the Deputy Registrar of the Court: “I solemnly undertake that I will perform my duties and exercise my powers as (title) of the International Criminal Court honourably, faithfully, impartially and conscientiously, and that I will respect the confidentiality of investigations and prosecutions.”

2. The undertaking, signed by the person making it and witnessed by the President or a Vice-President of the Bureau of the Assembly of States Parties, shall be filed with the Registry and kept in the records of the Court.

Rule 5 describes the undertakings of the senior officials of the International Criminal Court, including the judges, the Prosecutor, a Deputy Prosecutor, the Registrar and the Deputy Registrar of the Court. The obligation to make a solemn undertaking for these officials are required by Article 45 of the ICC Statute. In contrast to some domestic legal systems where judges are required to swear an oath on a religious text, the ICC’s solemn declaration is non-denominational.

The solemn undertaking emphasize that the officials carry out their work honourably, faithfully, impartially and conscientiously, and with respect of the confidentiality of investigations and prosecutions and the secrecy of deliberations. In the drafting process of the ICC Statute there was a detailed proposal in the Zutphen draft based on a French proposal.¹ Paragraph 2 of the Zutphen draft stated that “In performing their duties, the officers of the Court and the staff of the Court shall not seek or accept instructions from any Government or any authority outside the Court. They shall refrain from any act incompatible with their status and shall be accountable

¹ Magda Karagiannakis, “Article 45”, 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. 1297 (<https://www.legal-tools.org/doc/040751/>).

only to the Court”. Paragraph 3 stated that “The States Parties undertake to respect the exclusive international character of the duties of the officers of the Court and the staff of the Court and not to seek to influence them in the performance of their duties”. These were deleted during the negotiations of the ICC Statute on the ground that details could be elaborated in the Rules.² The proposal of Zutphen draft did not find it ways into the ICC rules. Instead, expressions ‘honourably’ and ‘faithfully’ were adopted which may also be found in the Rules of the ICJ and the rules of the *ad hoc* tribunals.

Doctrine:

1. Frank Jarasch, “The Rules of Procedure and Evidence Concerning the Composition and Administration of the International Criminal Court”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 157–158 (<https://www.legal-tools.org/doc/95e5f9/>).
2. Magda Karagiannakis, “Article 45”, 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. 1296–1298 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

² 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/>); Karagiannakis, 2016, p. 1297.

Rule 6

1. Upon commencing employment, every staff member of the Office of the Prosecutor and the Registry shall make the following undertaking: “I solemnly undertake that I will perform my duties and exercise my powers as (title) of the International Criminal Court honourably, faithfully, impartially and conscientiously, and that I will respect the confidentiality of investigations and prosecutions.”; The undertaking, signed by the person making it and witnessed, as appropriate, by the Prosecutor, the Deputy Prosecutor, the Registrar or the Deputy Registrar, shall be filed with the Registry and kept in the records of the Court.

2. Before performing any duties, an interpreter or a translator shall make the following undertaking: “I solemnly declare that I will perform my duties faithfully, impartially and with full respect for the duty of confidentiality.”; The undertaking, signed by the person making it and witnessed by the President of the Court or his or her representative, shall be filed with the Registry and kept in the records of the Court.

While Article 45 and Rule 5 concern the principal officers, sub-paragraph 1 Rule 6 describes the solemn undertakings of the staff of the Office of the Prosecutor and the Registry upon commencement of employment. Sub-paragraph 2 contains a similar undertaking by interpreters and translators. The undertakings are to be filed with the Registry and kept in the records of the Court.

Doctrine:

1. Frank Jarasch, “The Rules of Procedure and Evidence Concerning the Composition and Administration of the International Criminal Court”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 157–158 (<https://www.legal-tools.org/doc/95e5f9/>).
2. Magda Karagiannakis, “Article 45”, 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. 1296–1298. (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Rule 7(1)

1. Whenever the Pre-Trial Chamber designates a judge as a single judge in accordance with article 39, paragraph 2(b)(iii), it shall do so on the basis of objective pre-established criteria.

The functions of the Pre-Trial Chamber shall be carried out either by the full chamber or by a designated single judge. The present rule states that the designation of a single judge shall be done “on the basis of objective pre-established criteria” which is set in Regulation 47(1). A single judge does not constitute a Pre-Trial Chamber, rather some functions could be exercised by a single judge.

Cross-references:

Article 39, paragraph 2 (b) (iii)

Regulation 47(1)

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. 101 (<https://www.legal-tools.org/doc/995606/>).
2. Jules Deschênes, “Article 39”, 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. 1250, para. 6. (<https://www.legal-tools.org/doc/040751/>).
3. Socorro Flores Liera, “The Elaboration of the Rules of Procedure and Evidence”, 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. 310–312 (<https://www.legal-tools.org/doc/e34f81/>).

Author: Mark Klamberg.

Rule 7(2)

2. The designated judge shall make the appropriate decisions on those questions on which decision by the full Chamber is not expressly provided for in the Statute or the Rules.

The rule does not specify which rules a single judge can rule on. This is already made clear in Article 57(2). Thus, sub-rule 2 states that the single judge may make the appropriate decisions on those questions on which decision by the full Chamber “is not expressly provided for in the Statute or the Rules”.

Thus, the judges have not been granted full discretion to decide for which specific tasks a single judge can be designated. According to Article 57(2)(a), orders or rulings of the Pre-Trial Chamber issued under Articles 15 (review of investigation), 18 (admissibility), 19 (jurisdiction), 54, paragraph 2 (investigative steps without agreement on co-operation), 61, paragraph 7 (confirmation of charges), and 72 (national security information) must be concurred in by a majority of its judges. All questions on which decision by the full Chamber is not expressly provided for in the Statute or the Rules shall be decided by the single judge (Article 57(2)(b) and Rule 7(2)).¹

Cross-references:

Articles 15, 18, 19, 54, paragraph 2, Article 57(2), 61, paragraph 7, and 72

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. 102 (<https://www.legal-tools.org/doc/995606/>).
2. Jules Deschênes, “Article 39”, 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. 1250, para. 6. (<https://www.legal-tools.org/doc/040751/>).
3. Socorro Flores Liera, “The Elaboration of the Rules of Procedure and Evidence”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and*

¹ See, for example, ICC, *Prosecutor v. Kony et al.*, Decision designating a Single Judge on Victim’s issues, 22 November 2006, ICC-02/04-01/05-130 (<https://www.legal-tools.org/doc/1a93cb/>).

Evidence, Transnational Publishers, Ardsley, 2001, pp. 310–312
(<https://www.legal-tools.org/doc/e34f81/>).

Author: Mark Klamberg.

Rule 7(3)

3. *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.*

Sub-rule 3 provides that the Pre-Trial Chamber has the right to decide at any moment that the functions of a single judge may be exercised by the full Chamber.

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. 102 (<https://www.legal-tools.org/doc/995606/>).
2. Jules Deschênes, “Article 39”, 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. 1250, para. 6. (<https://www.legal-tools.org/doc/040751/>).
3. Socorro Flores Liera, “The Elaboration of the Rules of Procedure and Evidence”, 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. 310–312 (<https://www.legal-tools.org/doc/e34f81/>).

Author: Mark Klamberg.

Rule 8

- 1. The Presidency, on the basis of a proposal made by the Registrar, shall draw up a draft Code of Professional Conduct for counsel, after having consulted the Prosecutor. In the preparation of the proposal, the Registrar shall conduct the consultations in accordance with rule 20, sub-rule 3.*
- 2. The draft Code shall then be transmitted to the Assembly of States Parties, for the purpose of adoption, according to article 112, paragraph 7.*
- 3. The Code shall contain procedures for its amendment.*

Rule 8 deals with an issue that is not mentioned in the ICC Statute, namely a Code of Professional Conduct for counsel. Based on the experience of the UN *ad hoc* tribunals such a code would appear necessary. Rule 8 provides that the Presidency based on a proposal made by the Registrar, after consultation with Prosecutor, shall submit a draft Code to the Assembly of States Parties. The task of drafting a Code of Professional Conduct for counsel is within the responsibility of the Presidency for the proper administration of the Court pursuant to Article 38(3) of the ICC Statute.

Rule 20(3) provides that for purposes such as the development of a Code of Professional Conduct in accordance with Rule 8, the Registrar shall consult, as appropriate, with any independent representative body of counsel or legal associations, including any such body the establishment of which may be facilitated by the Assembly of States Parties.

The Assembly of States Parties adopted a Code of Professional Conduct for counsel on its third plenary meeting on 2 December 2005, by consensus.¹

Cross-references:

Article 112(7)

Rule 20(3).

¹ ICC ASP, Code of Professional Conduct for counsel, ICC-ASP/4/Res.1, 2 December 2005 (<https://www.legal-tools.org/doc/f9ed33/>).

Doctrine:

1. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 708 (<https://www.legal-tools.org/doc/b7432e/>).
2. Socorro Flores Liera, “The Elaboration of the Rules of Procedure and Evidence”, 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. 158 (<https://www.legal-tools.org/doc/e34f81/>).

Author: Mark Klamberg.

*Section II. The Office of the Prosecutor***Rule 9**

In discharging his or her responsibility for the management and administration of the Office of the Prosecutor, the Prosecutor shall put in place regulations to govern the operation of the Office. In preparing or amending these regulations, the Prosecutor shall consult with the Registrar on any matters that may affect the operation of the Registry.

Rule 9 concerns the operation and functioning of the Office of the Prosecutor. The rule reaffirms the independence of the Prosecutor by giving him or her authority over the management and administration of the Office. There was general agreement during the discussion of Rule 9 that the Prosecutor had such authority. However, there was some disagreement whether the rule was needed since the same competences of the Prosecutor are explicitly stated in Article 42(2) of the ICC Statute.¹

The rule provides that, after consultations with the Registry, the Prosecutor should put in place regulations to govern the operation of the Office. Draft regulations for the Office of the Prosecutor were prepared by its preparatory team and circulated already in June 2003.² Interim regulations were adopted in September 2003, based on the draft regulations of the preparatory team. In addition to being subordinated to the ICC Statute and the Rules of Procedure and Evidence, the drafters of the regulations sought to enable transparency of decision-making and consistency of the Court's proceedings.³ Fuller regulations entered into force six years later, on 23 April 2009.⁴

¹ Medard Rwelamira, "Composition and Administration of the Court", 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. 260 (<https://www.legal-tools.org/doc/e34f81/>).

² William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 742 (<https://www.legal-tools.org/doc/b7432e/>).

³ Carlos Vasconcelos, "Draft Regulations of the Office of the Prosecutor", in Morten Bergsmo, Klaus Rackwitz and Song Tianying (eds.), *Historical Origins of International Criminal Law: Volume 5*, Torkel Opsahl Academic EPublisher, Brussels, 2017, pp. 801, 807 (<https://www.toaep.org/ps-pdf/24-bergsmo-rackwitz-song/>).

⁴ ICC, Regulations of the Office of the Prosecutor, ICC-BD/05-01-09, 23 April 2009 (<https://www.legal-tools.org/doc/a97226/>).

Doctrine:

1. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 742 (<https://www.legal-tools.org/doc/b7432e/>).
2. Morten Bergsmo, Frederik Harhoff and Dan Zhu, “Article 42”, 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. 1271–1272. (<https://www.legal-tools.org/doc/040751/>).
3. Medard Rwelamira, “Composition and Administration of the Court”, 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. 260 (<https://www.legal-tools.org/doc/e34f81/>).
4. Carlos Vasconcelos, “Draft Regulations of the Office of the Prosecutor”, in Morten Bergsmo, Klaus Rackwitz and Song Tianying (eds.), *Historical Origins of International Criminal Law: Volume 5*, Torkel Opsahl Academic EPublisher, Brussels, 2017, pp. 801–949 (<https://www.toaep.org/ps-pdf/24-bergsmo-rackwitz-song/>).

Author: Mark Klamberg.

Rule 10

The Prosecutor shall be responsible for the retention, storage and security of information and physical evidence obtained in the course of the investigations by his or her Office.

Rule 10 concerns the retention, storage and security of information and physical evidence. The rule builds on the protection in Articles 54 and 57 of the ICC Statute and Rules 81 and 82. This obligation is particularly important during the investigations in order to protect victims, witnesses as well as the integrity of the investigation.

Doctrine:

1. Medard Rwelamira, “Composition and Administration of the Court”, 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. 260–261 (<https://www.legal-tools.org/doc/e34f81/>).

Author: Mark Klamberg.

Rule 11

Except for the inherent powers of the Prosecutor set forth in the Statute, inter alia, those described in articles 15 and 53, the Prosecutor or a Deputy Prosecutor may authorize staff members of the Office of the Prosecutor, other than those referred to in article 44, paragraph 4, to represent him or her in the exercise of his or her functions.

According to Rule 11, the Prosecutor may authorize staff, other than gratis personnel, to represent him or her in the exercise of his or her functions. The exclusion of the ‘inherent powers’ as contemplated by Articles 15 and 53, seems to target the discretionary powers of the Prosecutor with regard to the selection of situations and cases. Underlying this rule is the Prosecutor’s independence.

Cross-reference:

Article 42.

Doctrine:

1. Frank Jarasch, “The Rules of Procedure and Evidence Concerning the Composition and Administration of the International Criminal Court”, in Horst Fischer *et al.* (eds.) *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 159 (<https://www.legal-tools.org/doc/95e5f9/>).
2. Medard Rwelamira, “Composition and Administration of the Court”, 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. 261–262 (<https://www.legal-tools.org/doc/e34f81/>).

Author: Karel De Meester.

*Section III. The Registry**Subsection I. General Provisions Relating to the Registry***Rule 12**

1. As soon as it is elected, the Presidency shall establish a list of candidates who satisfy the criteria laid down in article 43, paragraph 3, and shall transmit the list to the Assembly of States Parties with a request for any recommendations.

2. Upon receipt of any recommendations from the Assembly of States Parties, the President shall, without delay, transmit the list together with the recommendations to the plenary session.

3. As provided for in article 43, paragraph 4, the Court, meeting in plenary session, shall, as soon as possible, elect the Registrar by an absolute majority, taking into account any recommendations by the Assembly of States Parties. In the event that no candidate obtains an absolute majority on the first ballot, successive ballots shall be held until one candidate obtains an absolute majority.

4. If the need for a Deputy Registrar arises, the Registrar may make a recommendation to the President to that effect. The President shall convene a plenary session to decide on the matter. If the Court, meeting in plenary session, decides by an absolute majority that a Deputy Registrar is to be elected, the Registrar shall submit a list of candidates to the Court.

5. The Deputy Registrar shall be elected by the Court, meeting in plenary session, in the same manner as the Registrar.

Rules 12–15 contain general provisions relating to the Registry which underpin Article 43 of the ICC Statute. Rule 12 concerns the qualifications and election of the Registrar and the Deputy Registrar.

Despite its title, Rule 12 does not add additional provisions regarding the qualifications of the Registrar or the Deputy Registrar. Sub-rule 1 only contains a reference to the criteria laid down in Article 43(3). Instead, the rule specifies the procedure of electing the Registrar and the Deputy Registrar.

Sub-rules 1–3 deal with the election of the Registrar. It is the Presidency who shall initiate the process “as soon as it is elected”. The Presidency shall establish a list of candidates who satisfy the criteria laid down in Article 43, paragraph 3, and shall transmit the list to the Assembly of States Parties with a request for any recommendations. The Court, meeting in plenary

session, shall, as soon as possible, elect the Registrar by an absolute majority, taking into account any recommendations by the Assembly of States Parties. Past elections indicate that the Assembly of States Parties is reluctant to recommend particular candidates.¹

Sub-rule 4 provides that a Deputy Registrar shall be elected only if there is a need. Pursuant to sub-rule 5 the Deputy Registrar shall be elected by the Court.

Doctrine:

1. Gerard Dive, “The Registry”, 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. 263–264 (<https://www.legal-tools.org/doc/e34f81/>).
2. Frank Jarasch, “The Rules of Procedure and Evidence Concerning the Composition and Administration of the International Criminal Court”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 159 (<https://www.legal-tools.org/doc/95e5f9/>).
3. Magda Karagiannikis, “Article 43”, 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. 1284, paras. 12–13 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

¹ Magda Karagiannikis, “Article 43”, 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. 1284 (<https://www.legal-tools.org/doc/040751/>).

Rule 13

- 1. Without prejudice to the authority of the Office of the Prosecutor under the Statute to receive, obtain and provide information and to establish channels of communication for this purpose, the Registrar shall serve as the channel of communication of the Court.**
- 2. The Registrar shall also be responsible for the internal security of the Court in consultation with the Presidency and the Prosecutor, as well as the host State.**

Rule 13 provides additional details to Article 43, paragraphs 1 and 2.

The first sub-rule provides that the Registrar shall serve as the channel of communication of the Court without prejudice to the authority of the Office of the Prosecutor under Article 42.

The second sub-rule designates the Registrar as the person responsible for the internal security of the Court in consultation with the Presidency and the Prosecutor, as well as the host State. The word ‘internal’ has been added to qualify ‘security’ in order to clarify the division of responsibility between the Court itself and the host state, whereby the latter is responsible for the security outside the premises of the Court.

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. 112 (<https://www.legal-tools.org/doc/995606/>).
2. Gerard Dive, “The Registry”, 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. 264–265 (<https://www.legal-tools.org/doc/e34f81/>).
3. Frank Jarasch, “The Rules of Procedure and Evidence Concerning the Composition and Administration of the International Criminal Court”, in Horst Fischer *et al.* (eds.) *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 159 (<https://www.legal-tools.org/doc/95e5f9/>).
4. Magda Karagiannikis, “Article 43”, 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. 1282, para. 8. (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Rule 14

1. In discharging his or her responsibility for the organization and management of the Registry, the Registrar shall put in place regulations to govern the operation of the Registry. In preparing or amending these regulations, the Registrar shall consult with the Prosecutor on any matters which may affect the operation of the Office of the Prosecutor. The regulations shall be approved by the Presidency.

2. The regulations shall provide for defence counsel to have access to appropriate and reasonable administrative assistance from the Registry.

Sub-rule 14(1) authorizes the Registrar to adopt regulations in consultation with the Prosecutor to facilitate the Registry's operations.

Sub-rule 2 concerns the Registrar's function in relation to the defence counsel. The Registrar shall provide administrative assistance for the defence counsel. This is of particular importance in an international setting. The Registrar's assistance concerns measures of administrative nature. Assistance of judicial nature, for example a request for judicial assistance from a state, is instead to be provided by a Chamber of the Court,¹ see Parts 5 and 9 of the ICC Statute.

Doctrine:

1. Gerard Dive, "The Registry", 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. 264–266 (<https://www.legal-tools.org/doc/e34f81/>).
2. Frank Jarasch, "The Rules of Procedure and Evidence Concerning the Composition and Administration of the International Criminal Court", in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 160 (<https://www.legal-tools.org/doc/95e5f9/>).

Author: Mark Klamberg.

¹ Gerard Dive, "The Registry", 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. 265 (<https://www.legal-tools.org/doc/e34f81/>).

Rule 15

- 1. The Registrar shall keep a database containing all the particulars of each case brought before the Court, subject to any order of a judge or Chamber providing for the non-disclosure of any document or information, and to the protection of sensitive personal data. Information on the database shall be available to the public in the working languages of the Court.**
- 2. The Registrar shall also maintain the other records of the Court.**

Rule 15 concerns a matter not regulated in the ICC Statute. The rule provides that the Registrar shall keep a database containing all the particulars of each case brought before the Court, subject to any order of a judge or Chamber providing for the non-disclosure of any document or information, and to the protection of sensitive personal data. Sub-rule 2 provides that the Registrar shall also maintain the other records of the Court. The responsibility for the Registrar to keep records is also addressed in Rules 121(10) and 137.

The scope of the submission of evidence to the Chambers, and thus also what should be inserted into the record by the Registry, is controversial. Pre-Trial Chamber I in *Lubanga* initially adopted a disclosure system which involved that Incriminating Evidence or the Exculpatory Evidence disclosed by the prosecution to the defence should be channelled through the Registry and that “the interim system of disclosure [...] must apply to any evidence or material that the prosecution might be prepared to disclose to the defence” including inspection”.¹ However, the interim system of disclosure was challenged by both parties, in particular the part of the interim decision that disclosure will take place via the Registry of the Court. As a result, the process of disclosure was later changed to be conducted *inter partes*. Further, the processes of (i) disclosure before the confirmation hearing *vis-à-vis* the opposing party and (ii) communication to the Pre-Trial Chamber of the evidence that the parties intend to present at the aforementioned hearing were considered two distinct features of the Court’s criminal procedure.² The *Bemba* Pre-Trial Chamber ruled in contrast that “all evidence is to be

¹ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision Requesting further Observations from the Prosecution and the Duty Counsel for the Defence on the System of Disclosure, 27 March 2006, ICC-01/04-01/06-58 (<https://www.legal-tools.org/doc/aa79da/>).

² ICC, *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 (<https://www.legal-tools.org/doc/052848/>).

registered into the record of the case by the Registry”.³ Judge Trendafilova, a member of the *Bemba* Pre-Trial Chamber, repeated the same approach in *Ruto et al.* and *Muthaura et al.*⁴ In *Abu Garda*, Judge Tarfusser of Pre-Trial Chamber I followed *Bemba* when he stated that the Chamber should have access “to all the evidence exchanged between the Prosecutor and the Defence, regardless of whether the parties intend to rely on it for the purposes of the confirmation hearing. As a consequence, it is necessary that the Pre-Trial Chamber have access to all the exculpatory material gathered by the Prosecutor”.⁵

The rule is inspired by the equivalent provisions in the ICTY and ICTR Rules, Rule 36 in the ICTY and ICTR rules, respectively. The term ‘record book’ has been replaced by ‘database’. The ICC rule also differs as it provides that “sensitive personal data” shall be protected as a default, that is, even without an explicit court order to that effect.⁶

The information in the database shall be available to the public but may be subjected to a limitation by an order of a judge or a chamber providing for the non-disclosure of any document or information. Confidentiality of information could be ordered for purposes such as protection of an ongoing investigation (Article 54), protection of witnesses and victims (Article 68), national security information (Article 72) commitments towards States or other entities who have provided information (Article 54 and 93).

Cross-references:

Rules 121(10) and 137.

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, para. 55 (<https://www.legal-tools.org/doc/15c802/>).

⁴ 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 (<https://www.legal-tools.org/doc/351827/>); *Prosecutor v. Muthaura et al.*, Pre-Trial Chamber II, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 6 April 2011, ICC-01/09-01/11-48, paras. 5 and 7 (<https://www.legal-tools.org/doc/12b91f/>).

⁵ ICC, *Prosecutor v. Abu Garda*, Pre-Trial Chamber I, Decision Scheduling a Hearing on Issues relating to Disclosure between the Parties, 30 May 2009, ICC-02/05-02/09-18, para. 10 (<https://www.legal-tools.org/doc/c6fb9f/>).

⁶ Gérard Dive, “The Registry”, 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. 266 (<https://www.legal-tools.org/doc/e34f81/>).

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, pp. 511–513 (<https://www.legal-tools.org/doc/995606/>).
2. Gérard Dive, “The Registry”, 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. 266–267 (<https://www.legal-tools.org/doc/e34f81/>).
3. Frank Jarasch, “The Rules of Procedure and Evidence Concerning the Composition and Administration of the International Criminal Court”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 160 (<https://www.legal-tools.org/doc/95e5f9/>).
4. Mark Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Martinus Nijhoff Publishers, Leiden, 2013, pp. 318–323 (<https://www.legal-tools.org/doc/0d524b/>).

Author: Mark Klamberg.

*Subsection 2. Victims and Witnesses Unit***Rule 16**

1. In relation to victims, the Registrar shall be responsible for the performance of the following functions in accordance with the Statute and these Rules:

(a) Providing notice or notification to victims or their legal representatives;

(b) Assisting them in obtaining legal advice and organizing their legal representation, and providing their legal representatives with adequate support, assistance and information, including such facilities as may be necessary for the direct performance of their duty, for the purpose of protecting their rights during all stages of the proceedings in accordance with rules 89 to 91;

(c) Assisting them in participating in the different phases of the proceedings in accordance with rules 89 to 91;

(d) Taking gender-sensitive measures to facilitate the participation of victims of sexual violence at all stages of the proceedings.

2. In relation to victims, witnesses and others who are at risk on account of testimony given by such witnesses, the Registrar shall be responsible for the performance of the following functions in accordance with the Statute and these Rules:

(a) Informing them of their rights under the Statute and the Rules, and of the existence, functions and availability of the Victims and Witnesses Unit;

(b) Ensuring that they are aware, in a timely manner, of the relevant decisions of the Court that may have an impact on their interests, subject to provisions on confidentiality.

3. For the fulfilment of his or her functions, the Registrar may keep a special register for victims who have expressed their intention to participate in relation to a specific case.

4. Agreements on relocation and provision of support services on the territory of a State of traumatized or threatened victims, witnesses and others who are at risk on account of testimony given by such witnesses may be negotiated with the States by the Registrar on behalf of the Court. Such agreements may remain confidential.

Article 43(6) requires that the Registrar shall set up a Victims and Witnesses Unit within the Registry. Sub-section 2 of the Rules of Procedure and

Evidence contains two kinds of rules. Rule 16 entails a broad description of the Registrar's general obligations relating to victims, witnesses and other persons at risk on account of testimony given by such witnesses. Rules 17 to 19 describe the functions of the Unit, its responsibilities and the expertise that it should possess. Although Rule 16 only mentions the "Victims and Witnesses Unit", the provision addresses the Registry as a whole.

While sub-rule 1 refers to "victims", sub-rule 2 refers to "victims, witnesses and others who are at risk on account of testimony given by such witnesses". There are more functions listed under sub-rule 1, however it should be noted that several of the functions in sub-rule 1 supplement provisions elsewhere in the Rules, including Rules 89 to 92 on the participation of victims in the Court's proceedings. In *Lubanga*, Pre-Trial Chamber I found that measures such as witness familiarization is not only admissible but mandatory.¹ Moreover, the Chamber found that, according to Article 43(6) of the ICC Statute and Rules 16 and 17 of the Rules, the VWU, in consultation with the party that proposes the relevant witness, is the organ of the Court competent to carry out the practice of witness familiarisation from the moment the witness arrives at the seat of the Court to give oral testimony. In *Lubanga*, Trial Chamber I concurred with the approach of Pre-Trial Chamber I.² Subsequently, the Trial Chamber directed the VWU to facilitate the witness familiarisation process.³ In *Lubanga*, Trial Chamber II made a reference to Rule 16(1)(c) when it instructed the Registry to provide the Legal Representatives of victims and the Trust Fund for Victims with all the necessary and appropriate aid and assistance for the purpose of locating and identifying victims potentially eligible for reparations in the instant case.⁴

¹ ICC, *Prosecutor v. Lubanga*, Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 November 2006, ICC-01/04-01/06-679, paras. 7, 23 and 24 (<https://www.legal-tools.org/doc/dd3a88/>).

² ICC, *Prosecutor v. Lubanga*, 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. 33 (<https://www.legal-tools.org/doc/ac1329/>).

³ ICC, *Prosecutor v. Lubanga*, Decision regarding the Protocol on the practices to be used to prepare witnesses for trial, 23 May 2008, ICC-01/04-01/06-1351, paras. 38, 44 (<https://www.legal-tools.org/doc/3b3c3d/>).

⁴ ICC, *Prosecutor v. Lubanga*, Order instructing the Registry to provide aid and assistance to the Legal Representatives and the Trust Fund for Victims to identify victims potentially eligible for reparations, 15 July 2016, ICC-01/04-01/06-3218-tENG (<https://www.legal-tools.org/doc/e5077e/>).

Sub-rule 3 provides that for the fulfilment of his or her functions, the Registrar may keep a special register for victims who have expressed their intention to participate in relation to a specific case.

Sub-rule 4 authorizes the Registrar to negotiate on behalf of the Court, agreements on relocation and provision of support services on the territory of a State of traumatized or threatened victims, witnesses and others who are at risk on account of testimony given by such witnesses.

Doctrine:

- 1 Gérard Dive, “The Registry”, 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. 267–271 (<https://www.legal-tools.org/doc/e34f81/>).
- 2 Frank Jarasch, “The Rules of Procedure and Evidence Concerning the Composition and Administration of the International Criminal Court”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 160–161 (<https://www.legal-tools.org/doc/95e5f9/>).

Author: Mark Klamberg.

Rule 17(1)

1. The Victims and Witnesses Unit shall exercise its functions in accordance with article 43, paragraph 6.

Rule 17 supplements Article 43(6) with setting out more specific functions of the Victims and Witnesses Unit. The Victims and Witnesses Unit shall exercise its functions under the authority of the Registrar as indicated in reference to Article 43(6) of sub-rule 1.

Doctrine: For the bibliography, see the final comment on Rule 17.

Author: Mark Klamberg.

Rule 17(2)

2. The Victims and Witnesses Unit shall, inter alia, perform the following functions, in accordance with the Statute and the Rules, and in consultation with the Chamber, the Prosecutor and the defence, as appropriate:

(a) With respect to all witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses, in accordance with their particular needs and circumstances:

(i) Providing them with adequate protective and security measures and formulating long- and short-term plans for their protection;

(ii) Recommending to the organs of the Court the adoption of protection measures and also advising relevant States of such measures;

(iii) Assisting them in obtaining medical, psychological and other appropriate assistance;

(iv) Making available to the Court and the parties training in issues of trauma, sexual violence, security and confidentiality;

(v) Recommending, in consultation with the Office of the Prosecutor, the elaboration of a code of conduct, emphasizing the vital nature of security and confidentiality for investigators of the Court and of the defence and all intergovernmental and non-governmental organizations acting at the request of the Court, as appropriate;

(vi) Cooperating with States, where necessary, in providing any of the measures stipulated in this rule;

(b) With respect to witnesses:

(i) Advising them where to obtain legal advice for the purpose of protecting their rights, in particular in relation to their testimony;

(ii) Assisting them when they are called to testify before the Court;

(iii) Taking gender-sensitive measures to facilitate the testimony of victims of sexual violence at all stages of the proceedings.

Although the Victims and Witnesses Unit is under the authority of the Registrar, it has some independence which is indicated in the *chapeau* of sub-rule 2 where it is left for the unit to consult with the Chamber, the Prosecutor

and the defence, as appropriate. Sub-rule 2 reiterates the three categories mentioned in Article 43(6): (i) all witnesses, (ii) victims who appear before the Court, and (iii) others who are at risk on account of testimony given by such witnesses. This provision was introduced to limit the Unit's responsibilities, but may leave room for a broader Group of clients if the Registrar so decided.¹ In *Lubanga*, Pre-Trial Chamber I found that measures such as witness familiarization is not only admissible but mandatory.² Moreover, the Chamber found that, according to Article 43(6) of the ICC Statute and Rules 16 and 17 of the Rules, the VWU, in consultation with the party that proposes the relevant witness, is the organ of the Court competent to carry out the practice of witness familiarisation from the moment the witness arrives at the seat of the Court to give oral testimony. In *Lubanga*, Trial Chamber I concurred with the approach of Pre-Trial Chamber I.³ Subsequently, the Trial Chamber directed the VWU to facilitate the witness familiarisation process.⁴

Doctrine: For the bibliography, see the final comment on Rule 17.

Author: Mark Klamberg.

¹ Gérard Dive, "The Registry", 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. 282 (<https://www.legal-tools.org/doc/e34f81/>).

² ICC, *Prosecutor v. Lubanga*, Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 November 2006, ICC-01/04-01/06-679, paras. 7, 23 and 24 (<https://www.legal-tools.org/doc/dd3a88/>).

³ ICC, *Prosecutor v. Lubanga*, 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. 33 (<https://www.legal-tools.org/doc/ac1329/>).

⁴ ICC, *Prosecutor v. Lubanga*, Decision regarding the Protocol on the practices to be used to prepare witnesses for trial, 23 May 2008, ICC-01/04-01/06-1351, paras. 38, 44 (<https://www.legal-tools.org/doc/3b3c3d/>).

Rule 17(3)

3. In performing its functions, the Unit shall give due regard to the particular needs of children, elderly persons and persons with disabilities. In order to facilitate the participation and protection of children as witnesses, the Unit may assign, as appropriate, and with the agreement of the parents or the legal guardian, a child-support person to assist a child through all stages of the proceedings.

Sub-rule 3 contains two elements. The first sentence gives a general recommendation that the Unit shall give due regard to the particular needs of children, elderly persons and persons with disabilities. The second sentence is more specific, providing that the Victims and Witnesses Unit may in order to facilitate the participation and protection of children as witnesses assign a child-support person to assist a child through all stages of the proceedings. This person is not meant to replace the parents, but only to assist a child through the proceedings.¹

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. 174 (<https://www.legal-tools.org/doc/995606/>).
2. Gerard Dive, “The Registry”, 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. 271–274 (<https://www.legal-tools.org/doc/e34f81/>).
3. Frank Jarasch, “The Rules of Procedure and Evidence Concerning the Composition and Administration of the International Criminal Court”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 160–163 (<https://www.legal-tools.org/doc/95e5f9/>).
4. Magda Karagiannikis, “Article 43”, 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. 1284–1288 (<https://www.legal-tools.org/doc/040751/>).

¹ Gérard Dive, “The Registry”, 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. 274 (<https://www.legal-tools.org/doc/e34f81/>).

Author: Mark Klamberg.

Rule 18

For the efficient and effective performance of its work, the Victims and Witnesses Unit shall:

- (a) Ensure that the staff in the Unit maintain confidentiality at all times;*
- (b) While recognizing the specific interests of the Office of the Prosecutor, the defence and the witnesses, respect the interests of the witness, including, where necessary, by maintaining an appropriate separation of the services provided to the prosecution and defence witnesses, and act impartially when cooperating with all parties and in accordance with the rulings and decisions of the Chambers;*
- (c) Have administrative and technical assistance available for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses, during all stages of the proceedings and thereafter, as reasonably appropriate;*
- (d) Ensure training of its staff with respect to victims' and witnesses' security, integrity and dignity, including matters related to gender and cultural sensitivity;*
- (e) Where appropriate, cooperate with intergovernmental and non-governmental organizations.*

General Remarks:

The Victims and Witness Unit is a section within the Registry tasked with the provision of protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and other who are at risk on account of testimony given by such witnesses. Rule 18 further defines these responsibilities, clarifying that the VWU must co-operate with all those participating in the proceedings, but must remain impartial and defend the witnesses' interests. The assistance provided by the VWU starts prior to the person's appearance before the Court and continues after said appearance. VWU staff co-operates with other organizations and is especially trained for the fulfilment of its responsibilities.

Analysis:

Rule 18(b) specifically mandates the VWU to "respect the interests of the witness" and to "act impartially when cooperating with all parties", while

recognising the specific interests of the Office of the Prosecutor, the defence and the witnesses. The Prosecutor is responsible under the Statute to ensure that appropriate measures are taken to protect the safety of victims and witnesses. At the same time, Article 43(6) of the Statute and Rules 16 to 19 of the Rules of Procedure and Evidence envisage the VWU as a unit with specific expertise in protection matters, which has a responsibility, *inter alia*, to provide protective appropriate protective measures and security arrangements, respecting the interests of the witness and acting impartially.¹

This is of particular relevance in relation to the protective measure of relocation, given its significant and potential long-term consequences on the life of an individual witness. Assigning responsibility for relocation to the VWU ensures that all witnesses, whether ultimately appearing for the Prosecutor, the defence or otherwise, are treated equally - and by those with relevant expertise - in matters that will significantly affect their interests. Those interests are to be specifically respected by the VWU, which will not be influenced, even unintentionally, when deciding upon whether relocation is appropriate to protect a particular witness, by the additional pressing interest of a party to the case of needing itself to secure the evidence of the witness concerned. This could, in certain circumstances, render the long-term well-being of that witness to be a secondary concern. At the same time, the VWU must recognise the specific interests of, and co-operate with, the parties. Any disagreement with the VWU about the relocation of a witness should ultimately be decided by the Chamber dealing with the case - and should not be resolved by the unilateral and unchecked action of the calling party (*Katanga and Ngudjolo*, 26 November 2008, paras. 92–93).

Cross-references:

Article 43(6).

Doctrine:

1. Gérard Dive, “Composition and Administration of the Court: The Registry”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*,

¹ 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. 79–80 (<https://www.legal-tools.org/doc/7c6b2d/>).

Transnational Publishers, Ardsley, 2001, pp. 267–269, 274–275
(<https://www.legal-tools.org/doc/e34f81/>).

Author: Enrique Carnero Rojo.

Rule 19

In addition to the staff mentioned in article 43, paragraph 6, and subject to article 44, the Victims and Witnesses Unit may include, as appropriate, persons with expertise, inter alia, in the following areas:

- (a) Witness protection and security;*
- (b) Legal and administrative matters, including areas of humanitarian and criminal law;*
- (c) Logistics administration;*
- (d) Psychology in criminal proceedings;*
- (e) Gender and cultural diversity;*
- (f) Children, in particular traumatized children;*
- (g) Elderly persons, in particular in connection with armed conflict and exile trauma;*
- (h) Persons with disabilities;*
- (i) Social work and counselling;*
- (j) Health care;*
- (k) Interpretation and translation.*

General Remarks:

Rule 19 grants the Victims and Witness Unit the possibility to resort to external personnel in order to fulfil the responsibilities attributed to the VWU by Rule 18. Said staff may, exceptionally, include gratis personnel offered by States Parties, pursuant to Article 44(4) of the Rome Statute.

Analysis:

The Registry must submit in advance of the trial a comprehensive list of professionals who are available to assist the relevant witnesses before, during and after their testimony, in addition to the support staff of the Victims and Witnesses Unit. The list should include professionals with diverse relevant expertise, including psychologists. The Registry should take all necessary steps to secure fair gender representation and the list should reflect the language and cultural background of the witnesses that it is anticipated will be called during the trial.¹

¹ 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. 39 (<https://www.legal-tools.org/doc/8367f1/>).

Cross-references:

Articles 43(6), 44

Rules 17–18

Doctrine:

1. 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/>).
2. Gérard Dive, “Composition and Administration of the Court: The Registry”, 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. 262–284 (<https://www.legal-tools.org/doc/e34f81/>).
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*, vol. 2, Oxford University Press, 2002, pp. 1355–1370 (<https://www.legal-tools.org/doc/01addc/>).
4. Bruno Cathala, “Article 43: Le Greffe”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour pénale internationale: Commentaire article par article*, vol. 1, A. Pedone, Paris, 2012, pp. 1033–1071 (<https://www.legal-tools.org/doc/cdde69/>).
5. 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 Ghent, Brussels, 2013, pp. 322–343 (<https://www.legal-tools.org/doc/3f10e0/>).
6. 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. 1299–1354 (<https://www.legal-tools.org/doc/e0c5cd/>).

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*Subsection 3. Counsel for the Defence***Rule 20*****General remarks:***

The ICC Registrar has several important functions concerning the rights of the defence. During the Rome Conference, there was controversy about whether to have a separate ‘Office of the Defence’, that is, not within the Registry. Rather than providing for such a separate office, Rule 20 refers to general principles for the organization of the Registrar and certain functions that (s)he shall perform. Rule 20 underlines the important role that an organization of the Registrar has in a manner to recognize the independence of both the defence and defence counsel.¹ In turn, Rule 20 does not instruct the Registrar in detail how to organize the Registry to fulfil the purposes and functions set forth in Rule 20 (Dive, 2001, p. 278). Therefore, the establishment of a separate unit was not precluded provided that this is subject to administrative and financial accountability (pp. 278–279).

Doctrine: For the bibliography, see the final comment on Rule 20.

Author: Juan Pablo Pérez-León-Acevedo.

¹ Gerard Dive, “The Registry”, 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. 278 (<https://www.legal-tools.org/doc/e34f81/>).

Rule 20(1)

- 1. In accordance with article 43, paragraph 1, the Registrar shall organize the staff of the Registry in a manner that promotes the rights of the defence, consistent with the principle of fair trial as defined in the Statute. For that purpose, the Registrar shall, inter alia:***
- (a) Facilitate the protection of confidentiality, as defined in article 67, paragraph 1 (b);***
 - (b) Provide support, assistance, and information to all defence counsel appearing before the Court and, as appropriate, support for professional investigators necessary for the efficient and effective conduct of the defence;***
 - (c) Assist arrested persons, persons to whom article 55, paragraph 2, applies and the accused in obtaining legal advice and the assistance of legal counsel;***
 - (d) Advise the Prosecutor and the Chambers, as necessary, on relevant defence-related issues;***
 - (e) Provide the defence with such facilities as may be necessary for the direct performance of the duty of the defence;***
 - (f) Facilitate the dissemination of information and case law of the Court to defence counsel and, as appropriate, cooperate with national defence and bar associations or any independent representative body of counsel and legal associations referred to in sub-rule 3 to promote the specialization and training of lawyers in the law of the Statute and the Rules.***

Alongside other infra-statutory provisions, Rule 20 fleshes out the general mandate of the Registry, which consists in “administration and servicing of the Court” under Article 43(1) of the ICC Statute. This article is explicitly referred to in the said rule. Indeed, the responsibilities of the Registrar concerning the defence are laid down in Rule 20.

Rule 20(1)(a)-(f) lays down some of the Registrar’s functions and, thus, provided further guidance to the Regulations that the Registrar prepared (see Regulations 74–78) on administrative assistance to defence counsel, called for under Rule 14(2).¹

As part of the Registrar’s overall duty to assist persons in obtaining legal advice and the assistance of legal counsel under Rule 20(1)(c), and part

¹ Gerard Dive, “The Registry”, 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. 279 (<https://www.legal-tools.org/doc/e34f81/>).

of the Registry's mandate to provide assistance to a person entitled to legal assistance (Regulation 128(2) of the Regulations of the Registry), the Registrar has the duty of establishing and maintaining a roster under Regulation 73(1) of the Regulations of the Court, which has so far been implemented. In accordance with Regulation 73(2), besides the wishes of the person, the Registrar has considered and should consider the languages spoken, availability and geographical proximity of the counsel.² The Registrar is expected to make the roster of duty counsel and the list of counsel available in both working languages of the ICC and to guarantee that the above-mentioned roster and list clearly distinguish between those only willing to represent the defence, those only willing to represent victims, those willing to represent both the defence and victims and those who have indicated no preference (*Lubanga*, 29 June 2007, para. 55).

Doctrine: For the bibliography, see the final comment on Rule 20.

Author: Juan Pablo Pérez-León-Acevedo.

² ICC, *Prosecutor v. Lubanga*, Presidency, Decision on the “Demande urgente en vertu de la Règle 21-3 du Règlement de procédure et de preuves” and on the “Urgent Request for the Appointment of a Duty Counsel” filed by Thomas Lubanga Dyilo before the Presidency on 7 May 2007 and 10 May 2007, respectively, 29 June 2007, ICC-01/04-01/06-931-Conf-Exp (re-filed as public decision ICC-01/04-01/06-937 pursuant to ICC-01/04-01/06-935), paras. 49–51 (<https://www.legal-tools.org/doc/ef1fe3/>).

Rule 20(2)

2. The Registrar shall carry out the functions stipulated in sub-rule 1, including the financial administration of the Registry, in such a manner as to ensure the professional independence of defence counsel.

An important concern is the lack of a specific mechanism to review and evaluate the performance of the Office of Public Counsel for Defence ('OPCD') and the Office of Public Counsel for Victims. These offices fall within the Registry for administrative purposes only. Thus, the Registry cannot monitor or examine their substantive work for risk of trespassing on the OPCD's independence. The OPCD submits a report on its overall work to the Registrar on annual basis; however, the said report does not necessarily enable the Registrar to appraise the work of individual staff members.¹ Regulation 144 of the Regulations of the Registry provides for that "[t]he members of the Office shall not receive any instructions from the Registrar in relation to the discharge of their tasks as referred to in Regulations 76 and 77 of the Regulations of the Court". This regulation implements Rule 20(2). A review conducted by the Registry would breach the OPCD's substantive functions as an independent OPCD is a pivotal condition for conducting its mandate independently, namely, without any pressure and respecting the relationship between the OPCD and the defendants (International Bar Association, 2011, p. 31). Having said so, accountability and governance of the OPCD as an organ of the ICC are crucial to enhance its legitimacy and, thus, governance also applies to the OPCD provided that a system of governance does not compromise its independence (International Bar Association, 2011, pp. 31–32).

Doctrine: For the bibliography, see the final comment on Rule 20.

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¹ International Bar Association, *Fairness at the International Criminal Court*, London, 2011, p. 31 (<https://www.legal-tools.org/doc/6647a1/>).

Rule 20(3)

3. For purposes such as the management of legal assistance in accordance with rule 21 and the development of a Code of Professional Conduct in accordance with rule 8, the Registrar shall consult, as appropriate, with any independent representative body of counsel or legal associations, including any such body the establishment of which may be facilitated by the Assembly of States Parties.

Under Rule 20(3), the Registrar “shall consult, as appropriate” with any independent legal associations or body of counsel to manage legal assistance and develop a Code of Professional Conduct, which should take place in accordance with Rule 21(1).¹ Indeed, a Code of Professional Conduct for Counsel was adopted by the Assembly of States Parties via Resolution.²

The Office of Public Counsel for the Defence (‘OPCD’) was established within the Registry in accordance with Regulation 77 of the ICC Regulations which reads as follows: “The Registrar shall establish and develop an Office of Public Counsel for the defence for the purpose of providing assistance”. As a matter of principle, the defendant can select an OPCD member or the OPCD itself to act as his/her counsel in the proceedings provided that there is no conflict of interest.³ However, other than *ad hoc* or preliminary issues dealt with by the OPCD, external counsel and external defence support members have mainly conducted representation for specific defendants (Gut *et al.*, 2013, p. 1229).

Concerning the debate on the OPCD *vis-à-vis* an external representative body, proponents of the latter suggest the establishment of a representative body of counsels recognized by the Assembly of State Parties. Indeed, the International Criminal Bar, which was created in June 2002 to inter alia promote the development of an independent legal profession and practice at the ICC by providing assistance to the counsels who represent defendants at the ICC and facilitating communication between the bodies of the ICC and

¹ Gerard Dive, “The Registry”, 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. 279 (<https://www.legal-tools.org/doc/e34f81/>).

² ICC ASP, Code of Professional Conduct for counsel, ICC-ASP/4/Res.1, 2 December 2005 (<https://www.legal-tools.org/doc/f9ed33/>).

³ Till Gut *et al.*, “Defence Issues”, in Göran Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, p. 1229 (<https://www.legal-tools.org/doc/bcad4c/>).

lawyers, has pursued to achieve the said representative role.⁴ According to the International Criminal Bar, Rule 20(3) was included because the ICC drafters acknowledged the existence of an independent self-governing bar association as a key element to guarantee a fair and independent system of justice (International Bar Association, 2011, p. 35). Despite this, the Assembly of State Parties has not recognized the International Criminal Bar and, indeed, the latter has yet to receive full support from the lawyers on the ICC's List of Counsel. This situation evidences complexity and disagreements (International Bar Association, 2011, p. 35).

Cross-references:

Article 43(1);

Rules of Procedure and Evidence, Rules 14(2), 21(1);

Regulations of the Court, Regulations 73–78, 144;

Regulations of the Registry, Regulation 128(2).

Doctrine:

1. Gerard Dive, “The Registry”, 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. 262–284 (<https://www.legal-tools.org/doc/e34f81/>).
2. Till Gut *et al.*, “Defence Issues”, in Göran Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, pp. 1203–1297 (<https://www.legal-tools.org/doc/bcad4c/>).
3. International Bar Association, *Fairness at the International Criminal Court*, London, 2011 (<https://www.legal-tools.org/doc/6647a1/>).

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⁴ International Bar Association, *Fairness at the International Criminal Court*, London, 2011, p. 35 (<https://www.legal-tools.org/doc/6647a1/>).

Rule 21

General Remarks:

In accordance with Rules 20–21, ICC Statute Article 43 and Regulations of the Court 83–85 and 130–136, the Registry is primarily responsible for managing the ICC’s legal assistance scheme, including overseeing the scheme of legal assistance paid by the ICC and the determination of the matters relating to the qualification, appointment or assignment of counsel. Rule 21 lays down the matter of assignment of defence counsel.

Doctrine: For the bibliography, see the final comment on Rule 21.

Author: Juan Pablo Pérez-León-Acevedo.

Rule 21(1)

1. Subject to article 55, paragraph 2 (c), and article 67, paragraph 1 (d), criteria and procedures for assignment of legal assistance shall be established in the Regulations, based on a proposal by the Registrar, following consultations with any independent representative body of counsel or legal associations, as referred to in rule 20, sub-rule 3.

Rule 21(1) refers to a Registrar’s proposal for the Regulations in consultation with any representative body of counsel or legal associations.¹ Rule 21(1) limits the Registry’s ability to apply subjective criteria, namely, its own criteria and policies, without previous consultation with the legal profession, and the approval of the judges and the Assembly of States Parties.² Rule 21(1) also enables the ICC to enact further criteria for counsel in the Regulations and only regulates procedures concerning the assignment of legal assistance to indigent defendants, which is clearer in the French version (see Gut *et al.*, 2013, p. 1236).

Doctrine: For the bibliography, see the final comment on Rule 21.

Author: Juan Pablo Pérez-León-Acevedo.

¹ Gerard Dive, “The Registry”, 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. 282 (<https://www.legal-tools.org/doc/e34f81/>).

² See Till Gut *et al.*, “Defence Issues”, in Göran Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, p. 1222 (<https://www.legal-tools.org/doc/bcad4c/>).

Rule 21(2)

2. The Registrar shall create and maintain a list of counsel who meet the criteria set forth in rule 22 and the Regulations. The person shall freely choose his or her counsel from this list or other counsel who meets the required criteria and is willing to be included in the list.

Rule 21(2) provides that the person shall be free to choose counsel from the list or someone else who both meets the requirements and is willing to be included in the list. Indeed, any counsel to be assigned has to meet all the required criteria.¹ As a matter of principle, the accused is entitled to choose his/her counsel freely although the latter must meet certain minimum requirements and, thus, to increase the chances of proper, high-quality representation at the ICC.²

In principle, during investigation and trial, a person who faces charges or is accused has the right to counsel of his or her choice. Nevertheless, the Rules of Procedure and Evidence and the Regulations of the Court provide for that the choice of counsel is limited to counsel who are on the list kept by the Registry, who are qualified to practice at the ICC, or who fulfil the criteria and are willing to be included on the list.³ The ICC lacks an official bar and admission to practice at the ICC is linked to inclusion in the ICC's list of counsel alongside with domestic bar membership (Rule 21(2); Regulation 75; Gut *et al.*, 2013, p. 1256).

When a person needs urgent legal representation and has not yet secured legal assistance or when his/her counsel is unavailable and in order to guarantee the right to a fair and expeditious trial, duty counsel is provided (in accordance with Regulation 73(2) of the Court), which may be affected when duty counsel is appointed in contravention of the Regulations or when the appointment of duty counsel is unreasonably refused.⁴

¹ Gérard Dive, "The Registry", 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. 282–283 (<https://www.legal-tools.org/doc/e34f81/>).

² Kai Ambos, *Treatise on International Criminal Law*, vol. 3: *International Criminal Procedure*, Oxford University Press, 2016, p. 144 (<https://www.legal-tools.org/doc/995606/>).

³ Rule 21(2); Regulation 75; Till Gut *et al.*, "Defence Issues", in Göran Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, p. 1210 (<https://www.legal-tools.org/doc/bcad4c/>).

⁴ ICC, *Prosecutor v. Lubanga*, Presidency, Decision on the "Demande urgente en vertu de la Règle 21-3 du Règlement de procédure et de preuves" and on the "Urgent Request for the

Although the right to legal representation and to select one's own counsel is provided for under Article 67(1)(d) of the ICC Statute and Rule 21(2), such right is not absolute and is subject to certain limitations (*Lubanga*, 29 June 2007, para. 25). This is even more limited when a duty counsel is appointed (Regulation 73 of the Regulations of the Court) and the ICC has to decide whether the person's interests demand that (s)he be represented by the duty counsel appointed by the ICC. Regulation 73 provides for that when appointing duty counsel, although the Registrar should consider the concerned person's wishes, the Registrar and not the person for whom duty counsel is being appointed adopts the final decision. Since the duty counsel is appointed when a person needs urgent legal representation, the Registrar would generally have to decide with some urgency in appointing duty counsel. The Registrar may consider the concerned person's views; however, the Registrar does not need to follow them in all circumstances and, thus, (s)he may override the said wishes if there are reasonable and valid grounds to proceed in this manner. Moreover, Regulation 73 actually introduces limitations to a person's choice of duty counsel such as availability and geographical proximity. Two factors underlie a different degree of involvement by a person in the appointment process from that in the procedure for the assignment of counsel of his/her choice under Article 67(1)(d) of the ICC Statute and Rule 21(2). These factors are the limited mandate granted to the duty counsel and the urgency with which duty counsel would normally be needed (*Lubanga*, 29 June 2007, paras. 26–27).

Article 71 of the ICC Statute and Rule 171 establish sanctions and procedures for removing a counsel from exercising functions at the ICC. In turn, Chapter 4 of the ICC Code of Professional Conduct for Counsel provides for the procedural and evidentiary rules for disciplinary procedure, including matters of admissibility and the organization of the disciplinary procedure. The ICC Code of Professional Conduct for Counsel includes duties towards clients that are similar to those available in other national and international codes and incorporates accepted principles of legal ethics relating to duties owed to the court (Gut *et al.*, 2013, p. 1256).

Appointment of a Duty Counsel" filed by Thomas Lubanga Dyilo before the Presidency on 7 May 2007 and 10 May 2007, respectively, 29 June 2007, ICC-01/04-01/06-931-Conf-Exp (re-filed as public decision ICC-01/04-01/06-937 pursuant to ICC-01/04-01/06-935), para. 16 (<https://www.legal-tools.org/doc/ef1fe3/>).

Doctrine: For the bibliography, see the final comment on Rule 21.

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Rule 21(3)

3. A person may seek from the Presidency a review of a decision to refuse a request for assignment of counsel. The decision of the Presidency shall be final. If a request is refused, a further request may be made by a person to the Registrar, upon showing a change in circumstances.

The Registrar acts under the authority of the President who is a member of the Presidency which is responsible for the ICC's proper administration. Explicit powers have been granted upon the Presidency to review the Registrar's decisions concerning the assignment of counsel, including decisions that reject requests for the assignment of counsel to a person under Rule 21(3). The appointment of duty counsel is not explicitly laid down in Rule 21(3); however, the Presidency's power (under Rule 21(3)) to review the Registrar's decision refusing a request for the assignment of a counsel would include a situation in which the Registrar rejected a request for the appointment of duty counsel under Regulation 73(2).¹

Doctrine: For the bibliography, see the final comment on Rule 21.

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¹ ICC, *Prosecutor v. Lubanga*, Presidency, Decision on the “Demande urgente en vertu de la Règle 21-3 du Règlement de procédure et de preuves” and on the “Urgent Request for the Appointment of a Duty Counsel” filed by Thomas Lubanga Dyilo before the Presidency on 7 May 2007 and 10 May 2007, respectively, 29 June 2007, ICC-01/04-01/06-931-Conf-Exp (re-filed as public decision ICC-01/04-01/06-937 pursuant to ICC-01/04-01/06-935), para. 17 (<https://www.legal-tools.org/doc/ef1fe3/>).

Rule 21(4) and 21(5)

4. A person choosing to represent himself or herself shall so notify the Registrar in writing at the first opportunity.

5. Where a person claims to have insufficient means to pay for legal assistance and this is subsequently found not to be so, the Chamber dealing with the case at that time may make an order of contribution to recover the cost of providing counsel.

Rule 21(4) states that an individual who prefers representing him(her)self without a counsel needs to inform the Registrar of this in writing at the earliest opportunity. Rule 21(5) establishes that a Chamber may order a person who claims to have insufficient means to pay for legal assistance to contribute to recover the cost of providing counsel for him/her if it is subsequently found not to be so. The consequence of this finding is to withdraw the assistance; however, Rule 21 does not address matters such as the withdrawal of an assignment and the withdrawal or replacement of an assigned counsel.¹ Nevertheless, Regulation 78 (Withdrawal of defence counsel) establishes that: “Prior to withdrawal from a case, defence counsel shall seek the leave of the Chamber”. In turn, the Regulations of the Court flesh out the scheme of legal assistance paid by the ICC, namely, Regulations 83 (General scope of legal assistance paid by the Court), 84 (Determination of means), and 85 (Decisions on payment of legal assistance). Under Regulation 84(2) of the Regulations of the Court, the Registry cannot take into account the assets of family members of the defendant in order to determine his or her indigence unless “direct or indirect enjoyment or power to freely dispose” of these assets or property has been transferred to the family member by the accused.

Concerning the substantive allocation of legal aid, the ICC Registry has adopted a lump system that, under Regulation 83(1) of the Regulations of the Court, includes “all costs [which are] reasonably necessary as determined by the Registrar for an effective and efficient defence”.

Cross-references:

Articles 43, 55, 67(1)(d) and 71;

Rules of Procedure and Evidence, Rules 20, 171;

¹ Gérard Dive, “The Registry”, 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. 282 (<https://www.legal-tools.org/doc/e34f81/>).

Regulations of the Court, Regulations 75, 78, 83–85, 130–136.

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, vol. 3: *International Criminal Procedure*, Oxford University Press, 2016, p. 144 (<https://www.legal-tools.org/doc/995606/>).
2. Gérard Dive, “The Registry”, 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. 262–284 (<https://www.legal-tools.org/doc/e34f81/>).
3. Till Gut *et al.*, “Defence Issues”, in Göran Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, pp. 1203–1297 (<https://www.legal-tools.org/doc/bcad4c/>).

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Rule 22(1)

1. A counsel for the defence shall have established competence in international or criminal law and procedure, as well as the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings. A counsel for the defence shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court. Counsel for the defence may be assisted by other persons, including professors of law, with relevant expertise.

Rule 22(1) provides for admission requirements for the defence counsel, which reflects the fact that the accused's right to choose a counsel is not absolute. The requirements laid down under Rule 22(1) are compulsory for all those who plan to appear as defence counsel before the ICC. Additionally, under Regulation 69(2)(b) candidates need to produce a certificate from a national bar association attesting professional qualifications, right to practice, and disciplinary standing. This regulation clarifies a Rule 22(1) implied requirement under which a defence counsel needs to be a current member of a national bar. Under Regulations 71 and 72, the Registrar with the Presidency's review holds the power to admit candidates to the list of counsel in accordance with the said requirements.

Concerning the criteria for appointing counsel and duty counsel laid out in Rule 22(1) and Regulations 70 and 72 of the Regulations of the Court, the following is examined. First, concerning competence, the inclusion of a person on the list of counsel means his/her fitness to represent in the ICC proceedings as a counsel for the defence or for victims. A sound knowledge of international criminal law is expected.¹ Second, regarding languages spoken, it is expected that the (duty) counsel possesses an excellent command of the working language to be used (primarily) in the proceedings or, at least, to be able to communicate in such working language and, ideally, the ability to work in other working language used in the respective proceedings (*Lubanga*, 29 June 2007, paras. 35–36 and 53). Third, as for availability and

¹ ICC, *Prosecutor v. Lubanga*, Presidency, Decision on the “Demande urgente en vertu de la Règle 21-3 du Règlement de procédure et de preuves” and on the “Urgent Request for the Appointment of a Duty Counsel” filed by Thomas Lubanga Dyilo before the Presidency on 7 May 2007 and 10 May 2007, respectively, 29 June 2007, ICC-01/04-01/06-931-Conf-Exp (re-filed as public decision ICC-01/04-01/06-937 pursuant to ICC-01/04-01/06-935), paras. 33–34 and 53 (<https://www.legal-tools.org/doc/ef1fe3/>).

geographical proximity, the fact that a person appointed as duty counsel appears in cases before other courts would not necessarily hinder his/her ability to appear as duty counsel at the ICC proceedings. Actually, the duty counsel is expected to have other commitments. Factors to assess the availability of the duty counsel consist in: (i) the mandate of the person to be appointed; (ii) applicable deadlines; and (iii) the nature of the position or tasks that the person discharges in his or her ordinary capacity. Concerning physical presence in The Hague, it would be expected for a person receiving legal assistance to see his/her counsel in person (paras. 37–38 and 53).

With regard to competence, languages spoken, availability and geographical proximity, the duty counsel is responsible to ensure that any information provided to the Registry is correct. Indeed, under Article 13 of the Code of Professional Conduct for Counsel, the duty counsel holds the duty to refuse to represent a person at the ICC when: (i) there is a conflict of interest; (ii) the counsel is incapable of dealing with the matter diligently; and (iii) the counsel considers that (s)he lacks the required expertise.² Unless the duty counsel knew or ought to have known of the existence of discrepancies or irregularities, the Registrar is not expected to verify all information provided by each person who applies for his/her inclusion on the list of counsel and/or who accepts an appointment as duty counsel or an assignment as counsel (*Lubanga*, 29 June 2007, para. 39).

The appointment of one or more defence counsel, whether duty or not, is not inconsistent with the ICC's legal framework and, actually, may be called for in specific circumstances in the interests of justice. The existence of relevant and sufficient grounds, for example pressing deadlines, to appoint two duty counsels needs to be considered (*Lubanga*, 29 June 2007, para. 41). Depending on the circumstances of the case, these grounds may have existed even if the applicant had expressed preference for only one duty counsel (para. 42).

With regard to the appointment process, it is preferable that the Registrar responds the applicant's request for assistance by providing him/her with the names of those persons identified by the Registry as fulfilling the duty counsel requirements. The principle of neutrality is not affected by the provision of such assistance as the process of establishing a roster of duty counsel (the Registrar is required to do so) involves a selection process from

² ICC ASP, Code of Professional Conduct for counsel, ICC-ASP/4/Res.1, 2 December 2005, Article 13 (<https://www.legal-tools.org/doc/f9ed33/>).

the list of counsel. Nevertheless, depending on the circumstances of the case, the fact that the Registrar does not provide the applicant with the names of counsel previously identified to act as duty counsel does not necessarily affect the fulfilment of the requirement under Regulation 73 (*Lubanga*, 29 June 2007, para. 44).

Concerning Rule 22(1), the meaning of “established competence in international or criminal law and procedure” can be literally interpreted as expertise in national criminal law and procedure suffices regardless of the level of knowledge of international criminal law. Nevertheless, whether expertise is available in the national jurisdictions of “situations” before the ICC may be put into question. Setting a high threshold would probably exclude local defence counsels contradicting the ICC’s intention to be more inclusive of local expertise.³ However, to guarantee the legal professional competence and skills of the defence counsel is pivotal to ensure that the ICC can work in an efficient manner and that the accused’s rights are properly represented (Sarvarian, 2013, p. 200).

The appointment of defence counsels who have been former staff member at the Office of the Prosecutor led to some issues concerning whether the Code of Professional Conduct for Counsel or OTP internal provisions needed an amendment. The appointment of former OTP staff members, Ibrahim Yillah to the defence team in *Banda and Jerbo*, and Essa Faal to *Muthaura and Kenyatta* (Situation in Kenya 2) caused the said problematic situation.

There is no prohibition of appointment of a former staff member of the OTP as a defence counsel and the OTP in its employment contracts has not introduced clauses barring staff from seeking employment with the defence upon termination of OTP contracts.⁴ Nevertheless, Article 16(1) of the Code of Professional Conduct for Counsel demands counsel to warrant the no presence of conflict of interest and makes the counsel responsible for refusing an appointment to the defence team if, among others, the appointment constitutes a conflict of interest. Counsel is also barred from representing a client if he/she was “involved or [was] privy to confidential information as

³ Arman Sarvarian, *Professional Ethics at the International Bar*, Oxford University Press, 2013, p. 200 (<https://www.legal-tools.org/doc/27cb50/>).

⁴ ICC, *Prosecutor v. Muthaura et al.*, Pre-Trial Chamber II, Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence, 20 July 2011, ICC-01/09-02/11-185, para. 27 (<https://www.legal-tools.org/doc/a8fcd8b/>).

a staff member of the Court relating to the case in which counsel seeks to appear”. Furthermore, counsel is expected to ensure both that the defence team and his/her work complies with the Code and that measures adopted by the defence are not prejudicial to the proceedings.⁵

In the two aforementioned cases, the Trial Chambers applied the *de minimis* threshold that demands evidence that the attorney “became aware of more than *de minimis* confidential information relevant to the case under consideration”.⁶ In turn, the Appeals Chamber concluded that for an impediment to representation to arise under the fact that counsel was “privy to confidential information” as an ICC staff member within the meaning of Article 12(1)(b) of the Code of Professional Conduct for Counsel, counsel need to have had knowledge of confidential information concerning the case in which he/she seeks to appear.⁷

Whether the Code would need to be amended, for further clarification, remains open to debate. In any event, although the Appeals Chamber has interpreted the said provisions, it has not been prescriptive as for what may constitute an appropriate number of years before prosecuting counsel should be authorized to be part of a defence team after leaving the OTP. The OTP should hence adopt internal guidelines to address these matters (International Bar Association, 2012, p. 21).

In accordance with Regulation 68 of the Regulations of the Court, persons assisting counsel as mentioned in Rule 22(1) may “include persons who can assist in the presentation of the case before a Chamber”, that is, the

⁵ International Bar Association, *Counsel Matters at the International Criminal Court: A Review of Key Developments Impacting Lawyers Practising before the ICC*, November 2012, p. 20 (<https://www.legal-tools.org/doc/e31009/>).

⁶ *Muthaura et al.*, 20 July 2011, paras. 17, 20–24; ICC, *Prosecutor v. Banda and Jerbo*, Trial Chamber IV, Decision on the Prosecution’s Request to Invalidate the Counsel to the Defence, 30 June 2011, ICC-02/05-03/09-168, paras. 14–16 (<https://www.legal-tools.org/doc/a0e853/>). See also *Prosecutor v. Bemba*, Trial Chamber III, 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-Conf, para. 42 (<https://www.legal-tools.org/doc/15d8d6/>).

⁷ ICC, *Prosecutor v. Banda and Jerbo*, Appeals Chamber, Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber IV of 30 June 2011 Entitled ‘Decision on the Prosecution’s Request to Invalidate the Appointment of Counsel to the Defence’, 11 November 2011, ICC-02/05-03/09-252, paras. 6–7 (<https://www.legal-tools.org/doc/843f6a/>); and *Prosecutor v. Muthaura et al.*, 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. 11 (<https://www.legal-tools.org/doc/57e327/>).

typical counsel, and that the Regulations of the Registry shall determine “the criteria to be met by these persons”. In turn, Regulation 124 of the Regulations of the Registry establishes that: “Persons who assist counsel in the presentation of the case before a Chamber, as referred to in regulation 68 of the Regulations of the Court, shall have either five years of relevant experience in criminal proceedings or specific competence in international or criminal law and procedure”. Therefore, these persons are not required to be admitted to practice law to appear before the ICC and no explicit requirement of practical experience as opposed to academic expertise is laid down.⁸

Doctrine: For the bibliography, see the final comment on Rule 22.

Author: Juan Pablo Pérez-León-Acevedo.

⁸ Till Gut *et al.*, “Defence Issues”, in Göran Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, p. 1236 (<https://www.legal-tools.org/doc/bcad4c/>).

Rule 22(2) and 22(3)

2. Counsel for the defence engaged by a person exercising his or her right under the Statute to retain legal counsel of his or her choosing shall file a power of attorney with the Registrar at the earliest opportunity.

3. In the performance of their duties, Counsel for the defence shall be subject to the Statute, the Rules, the Regulations, the Code of Professional Conduct for Counsel adopted in accordance with rule 8 and any other document adopted by the Court that may be relevant to the performance of their duties.

Rules 22(2) and 22(3) are fundamentally technical and address the official registration of the counsel by the Registrar as well as the general obligation of the defence counsel to respect relevant rules on performance of his or her duties.¹

Cross-references:

Article 55,

Regulations of the Court, Regulations 67, 68, 69(2)(b);

Regulations of the Registry, Regulation 124;

Code of Professional Conduct for Counsel, Articles 12(1)(b), 13 and 16(1).

Doctrine:

1. Gerard Dive, “The Registry”, 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. 262–284 (<https://www.legal-tools.org/doc/e34f81/>).
2. Till Gut *et al.*, “Defence Issues”, in Göran Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, pp. 1203–1297 (<https://www.legal-tools.org/doc/bcad4c/>).
3. International Bar Association, *Counsel Matters at the International Criminal Court: A Review of Key Developments Impacting Lawyers Practising before the ICC*, November 2012 (<https://www.legal-tools.org/doc/e31009/>).

¹ Gerard Dive, “The Registry”, 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. 284 (<https://www.legal-tools.org/doc/e34f81/>).

4. Arman Sarvarian, *Professional Ethics at the International Bar*, Oxford University Press, 2013 (<https://www.legal-tools.org/doc/27cb50/>).

Author: Juan Pablo Pérez-León-Acevedo.

*Section IV. Situations that May Affect the Functioning of the Court**Subsection 1. Removal from Office and Disciplinary Measures***Rule 23**

A judge, the Prosecutor, a Deputy Prosecutor, the Registrar and a Deputy Registrar shall be removed from office or shall be subject to disciplinary measures in such cases and with such guarantees as are established in the Statute and the Rules.

Rule 23 sets out the general principle for the sub-section on removal from office and disciplinary measures, a sub-section is underpinned by Articles 41, 46 and 47. It merely states that removal from office and disciplinary measures shall be done in accordance with the Statute and the Rules of Procedure and Evidence. Many delegations argued that the rule is repetitive and therefore superfluous. It was agreed that while the rule was stating the obvious, it was harmless and should be included.¹

Cross-references:

Articles 41, 46 and 47

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. 138 (<https://www.legal-tools.org/doc/995606/>).
2. Cate Steains, “Situations That May Affect the Functioning of the Court”, 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. 285 (<https://www.legal-tools.org/doc/e34f81/>).
3. Frank Jarasch, “The Rules of Procedure and Evidence Concerning the Composition and Administration of the International Criminal Court”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 165 (<https://www.legal-tools.org/doc/95e5f9/>).

¹ Cate Steains, “Situations That May Affect the Functioning of the Court”, 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. 285 (<https://www.legal-tools.org/doc/e34f81/>).

4. Magda Karagiannikis, “Article 46”, 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. 1301. (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Rule 24

1. For the purposes of article 46, paragraph 1 (a), “serious misconduct” shall be constituted by conduct that:

(a) If it occurs in the course of official duties, is incompatible with official functions, and causes or is likely to cause serious harm to the proper administration of justice before the Court or the proper internal functioning of the Court, such as:

(i) Disclosing facts or information that he or she has acquired in the course of his or her duties or on a matter which is sub judice, where such disclosure is seriously prejudicial to the judicial proceedings or to any person;

(ii) Concealing information or circumstances of a nature sufficiently serious to have precluded him or her from holding office;

(iii) Abuse of judicial office in order to obtain unwarranted favourable treatment from any authorities, officials or professionals; or

(b) If it occurs outside the course of official duties, is of a grave nature that causes or is likely to cause serious harm to the standing of the Court.

2. For the purposes of article 46, paragraph 1 (a), a “serious breach of duty” occurs where a person has been grossly negligent in the performance of his or her duties or has knowingly acted in contravention of those duties. This may include, inter alia, situations where the person:

(a) Fails to comply with the duty to request to be excused, knowing that there are grounds for doing so;

(b) Repeatedly causes unwarranted delay in the initiation, prosecution or trial of cases, or in the exercise of judicial Powers.

Rule 24 supplements Article 46(1) which provides that a judge, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar shall be removed from office if a decision to this effect is made in accordance with paragraph 2, in cases where that person: is found to have committed serious misconduct or a serious breach of his or her duties under the Statute. The rule defines “serious misconduct” and “serious breach of duty”.

Sub-rule 1 distinguishes between “serious misconduct” in the course of official duties and outside the course of official duties. The sub-rule lists three examples of “serious misconduct” in the course of official duties not for acts outside the course of official duties: (i) disclosing confidential facts,

where such disclosure is seriously prejudicial to the judicial proceedings or to any person; (ii) concealing information that would have precluded him or her from holding office, and (iii) abuse of office in order to obtain unwarranted favourable treatment. During the negotiations, the delegations perceived that it would be virtually impossible to formulate examples that would encapsulate clearly the type of conduct to be covered outside the course of official duties.¹

Sub-rule 2 defines “serious breach of duty” with two examples: (i) the failure to request to be excused, where there are grounds for doing so and (ii) repeatedly causing unwarranted delay in the initiation, prosecution or trial of cases. Since the sanction for “serious breach of duty” is removal from office, the threshold is intended to be high.

Rule 26 and Regulation 119 provides that all complaints against a judge, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar concerning conduct defined under Rule 24 shall be submitted directly to the Presidency, which shall notify the person against whom the complaint has been directed of that complaint.

Cross-references:

Article 46(1), Rule 26, Regulation 119.

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. 110 (<https://www.legal-tools.org/doc/995606/>).
2. Cate Steains, “Situations That May Affect the Functioning of the Court”, 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. 285–289 (<https://www.legal-tools.org/doc/e34f81/>).
3. Frank Jarasch, “The Rules of Procedure and Evidence Concerning the Composition and Administration of the International Criminal Court”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of*

¹ Cate Steains, “Situations That May Affect the Functioning of the Court”, 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. 288–289 (<https://www.legal-tools.org/doc/e34f81/>).

Crimes Under International Law, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 165–166 (<https://www.legal-tools.org/doc/95e5f9/>).

4. Magda Karagiannikis, “Article 46”, 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. 1301–1303 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Rule 25

1. For the purposes of article 47, “misconduct of a less serious nature” shall be constituted by conduct that:

(a) If it occurs in the course of official duties, causes or is likely to cause harm to the proper administration of justice before the Court or the proper internal functioning of the Court, such as:

(i) Interfering in the exercise of the functions of a person referred to in article 47;

(ii) Repeatedly failing to comply with or ignoring requests made by the Presiding Judge or by the Presidency in the exercise of their lawful authority;

(iii) Failing to enforce the disciplinary measures to which the Registrar or a Deputy Registrar and other officers of the Court are subject when a judge knows or should know of a serious breach of duty on their part; or

(b) If it occurs outside the course of official duties, causes or is likely to cause harm to the standing of the Court.

2. Nothing in this rule precludes the possibility of the conduct set out in sub-rule 1 (a) constituting “serious misconduct” or “serious breach of duty” for the purposes of article 46, paragraph 1 (a).

Rule 25 follows the same model as the previous rule as it supplements Article 47 which provides that a judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar who has committed misconduct of a less serious nature than that set out in Article 46, paragraph 1, shall be subject to disciplinary measures, in accordance with the Rules of Procedure and Evidence.

Rule 25 follows the previous rule in distinguishing between two sorts of conduct, here misconduct of a less serious nature in the course of official duties and outside the course of official duties. Three examples of misconduct of a less serious nature in the course of official duties are given: (i) interfering in the exercise of the functions of a judge, Prosecutor, Registrar, or Deputy Prosecutor or Registrar; (ii) failing to comply with request made by the Presiding Judge or the Presidency in the exercise of their lawful duty; or (iii) (in the case of judges) failing to enforce disciplinary measures when the judge is aware or should be aware of a serious breach of duty on their part.

During the negotiations it was agreed that the examples given in Rule 25 could under certain circumstances constitute serious misconduct rather than misconduct of a less serious nature. For that purpose, sub-rule 2 was

added in order to clarify that the examples in Rule 25 could, in certain circumstances, constitute “serious misconduct” or “serious breach of duty”.

Rule 26 and Regulation 119 provides that all complaints against a judge, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar concerning conduct defined under Rule 25 shall be submitted directly to the Presidency, which shall notify the person against whom the complaint has been directed of that complaint.

Cross-references:

Article 47, Rule 26, Regulation 119.

Doctrine:

1. Cate Steains, “Situations That May Affect the Functioning of the Court”, 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. 290–292 (<https://www.legal-tools.org/doc/e34f81/>).
2. Frank Jarasch, “The Rules of Procedure and Evidence Concerning the Composition and Administration of the International Criminal Court”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 166–167 (<https://www.legal-tools.org/doc/95e5f9/>).
3. Magda Karagiannikis, “Article 47”, 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. 1307–1308 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Rule 26³

- 1. For the purposes of article 46, paragraph 1, and article 47 of the Statute, any complaint concerning any conduct defined under rules 24 and 25 shall include the grounds on which it is based and, if available, any relevant evidence, and may also include the identity of the complainant. The complaint shall remain confidential.*
- 2. All complaints shall be transmitted to the Independent Oversight Mechanism which may also initiate investigations on its own motion. Any person submitting such complaints may also elect to submit a copy to the Presidency of the Court for information purposes only.*
- 3. The Independent Oversight Mechanism shall assess complaints and set aside those complaints which are manifestly unfounded. Where a complaint is set aside as manifestly unfounded, the Independent Oversight Mechanism shall provide its reasons in a report which shall be transmitted to the Assembly of States Parties and the Presidency.*
- 4. All other complaints shall be investigated by the Independent Oversight Mechanism. The Independent Oversight Mechanism shall transmit the results of any investigation, together with its recommendations, to the Assembly of States Parties and any other competent organ(s) as set out in articles 46 and 47 of the Statute, and rules 29 and 30.*

³ As amended by resolution ICC-ASP/17/Res.2.

Rule 26 concerns handling of complaints that may lead to removal of office of a judge, the Prosecutor, the Registrar or a Deputy Prosecutor or disciplinary measures for the same officials. The rule provides that all complaints shall be transmitted to the Independent Oversight Mechanism. The Independent Oversight Mechanism may also initiate proceedings on its own motion.

The rule was amended by the Assembly of State Parties on 11 December 2018 transferring the responsibilities in this process from the Presidency to the Independent Oversight Mechanism.¹ It was described as “a more

¹ ICC ASP, Resolution on amendments to rule 26 of the Rules of Procedure and Evidence, ICC-ASP/17/Res.2, 11 December 2018 (<https://www.legal-tools.org/doc/mhkgg7/>).

permanent solution by aligning the Rules of Procedure and Evidence of the Court with the mandate of the Independent Oversight Mechanism”.²

The Independent Oversight Mechanism shall, according to sub-rule 3, set aside manifestly unfounded complaints and provide its reasons in a report which shall be transmitted to the Assembly of States Parties and the Presidency. The purpose of this sub-rule is to prevent harassment of top officials. In the case concerning allegations that the former Prosecutor Luis Moreno Ocampo, had committed sexual assault against a journalist, the panel of judges found that the complaint was “manifestly unfounded”, although not malicious. The Prosecutor subsequently dismissed Palme, an ICC Media Relations Officer, who made the allegations. Ocampo claimed that Palme had made the allegations with “obvious malicious intent”. The ILO Administrative Tribunal did not find that the complainant acted with malicious intent.³

In case the Independent Oversight Mechanism decides that a complaint against a judge, the Registrar or Deputy Registrar is not manifestly unfounded, it shall pursuant to sub-rule 4 investigate the complaint and transmit the results of any investigation, together with its recommendations, to the Assembly of States Parties and any other competent organ(s) as set out in Articles 46 and 47 of the Statute, and Rules 29 and 30.

A decision as to the removal from office of a judge, the Prosecutor or a Deputy Prosecutor under Article 46(1) shall, pursuant to Article 46(2), be made by the Assembly of States Parties. Rule 30 provides that in the case of a judge, the Registrar or a Deputy Registrar, any decision to impose a disciplinary measure shall be taken by the Presidency. In the case of the Prosecutor, any decision concerning disciplinary measure shall be taken by an absolute majority of the Bureau of the Assembly of States Parties.

Cross-references:

Articles 46, Rule 30.

² ICC ASP, Report of the Working Group on Amendments, ICC-ASP/17/35, 29 November 2018, para. 18 (<https://www.legal-tools.org/doc/ceidsz/>).

³ ILO Administrative Tribunal, *Palme v. ICC*, Judgment No 2757, 9 July 2008, paras. 5, 14 and 16 (<https://www.legal-tools.org/doc/73bd48/>); Frédéric Mégret, “Accountability and Ethics”, in Luc Reydam, Jan Wouters, Cedric Ryngaert (eds.), *International Prosecutors*, 2012, Oxford University Press, pp. 458–459, 480; Jenia Iontcheva Turner, “Accountability of International Prosecutors”, in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2014, p. 395 (<https://www.legal-tools.org/doc/729159/>).

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. 110 (<https://www.legal-tools.org/doc/995606/>).
2. Cate Steains, “Situations That May Affect the Functioning of the Court”, 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. 292 (<https://www.legal-tools.org/doc/e34f81/>).
3. Frank Jarasch, “The Rules of Procedure and Evidence Concerning the Composition and Administration of the International Criminal Court”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 167 (<https://www.legal-tools.org/doc/95e5f9/>).
4. Magda Karagiannikis, “Article 46”, 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. 1303–1305 (<https://www.legal-tools.org/doc/040751/>).
5. Frédéric Mégret, “Accountability and Ethics”, in Luc Reydam, Jan Wouters, Cedric Ryngaert (eds.), *International Prosecutors*, 2012, Oxford University Press, pp. 458, 459 and 480.
6. Jenia Iontcheva Turner, “Accountability of International Prosecutors”, in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, 2014, p. 395 (<https://www.legal-tools.org/doc/729159/>).

Author: Mark Klamberg.

Rule 27

- 1. In any case in which removal from office under article 46 or disciplinary measures under article 47 is under consideration, the person concerned shall be so informed in a written statement.**
- 2. The person concerned shall be afforded full opportunity to present and receive evidence, to make written submissions and to supply answers to any questions put to him or her.**
- 3. The person may be represented by counsel during the process established under this rule.**

Rule 27 flows from Article 46(4) which provides that a judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar whose conduct or ability to exercise the functions of the office as required by this Statute is challenged under this Article shall have full opportunity to present and receive evidence and to make submissions in accordance with the Rules of Procedure and Evidence. The person in question shall not otherwise participate in the consideration of the matter.

Sub-rule 1 provides that the person concerned shall be informed in a written statement whenever removal from office under Article 46 or disciplinary measures under Article 47 is under consideration. The purpose of this sub-rule is to ensure that the persons against whom the allegations have been made are given due notice of the allegations.

There was considerable debate during the negotiations on sub-rule 2 and the questions of submissions, whether the person concerned could defend himself or herself by way of both written and oral submissions. In the end the delegations favoured that the person concerned should only be able to make written submissions.¹

Cross-references:

Article 46(4).

Doctrine:

1. Cate Steains, “Situations That May Affect the Functioning of the Court”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal*

¹ Cate Steains, “Situations That May Affect the Functioning of the Court”, 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. 293 (<https://www.legal-tools.org/doc/e34f81/>).

Court: Elements of Crimes and Rules of Procedure and Evidence, Transnational Publishers, Ardsley, 2001, pp. 293–294 (<https://www.legal-tools.org/doc/e34f81/>).

2. Frank Jarasch, “The Rules of Procedure and Evidence Concerning the Composition and Administration of the International Criminal Court”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 167 (<https://www.legal-tools.org/doc/95e5f9/>).

Author: Mark Klamberg.

Rule 28

Where an allegation against a person who is the subject of a complaint is of a sufficiently serious nature, the person may be suspended from duty pending the final decision of the competent organ.

Rule 28 acknowledges that in certain situations the gravity of the complaint might demand, in the interests of correctness, the Court's reputation and efficiency of the proceedings, and might require the suspension from duty of the person concerned. The rule applies to situations of serious misconduct/serious breach of duty as well as to situations involving misconduct of a less serious nature which reflects the difficulties to draw an absolute distinction between the two categories of misconduct. There were different views during the negotiations on whether the person concerned loses remuneration during the suspension. In the end there is no reference to remuneration in the text of Rule 28.¹

Cross-references:

Articles 46 and 47

Doctrine:

1. Cate Steains, "Situations That May Affect the Functioning of the Court", 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. 293–294 (<https://www.legal-tools.org/doc/e34f81/>).
2. Frank Jarasch, "The Rules of Procedure and Evidence Concerning the Composition and Administration of the International Criminal Court", in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 167 (<https://www.legal-tools.org/doc/95e5f9/>).

Author: Mark Klamberg.

¹ Cate Steains, "Situations That May Affect the Functioning of the Court", 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. 294 (<https://www.legal-tools.org/doc/e34f81/>).

Rule 29

- 1. In the case of a judge, the Registrar or a Deputy Registrar, the question of removal from office shall be put to a vote at a plenary session.*
- 2. The Presidency shall advise the President of the Bureau of the Assembly of States Parties in writing of any recommendation adopted in the case of a judge, and any decision adopted in the case of the Registrar or a Deputy Registrar.*
- 3. The Prosecutor shall advise the President of the Bureau of the Assembly of States Parties in writing of any recommendation he or she makes in the case of a Deputy Prosecutor.*
- 4. Where the conduct is found not to amount to serious misconduct or a serious breach of duty, it may be decided in accordance with article 47 that the person concerned has engaged in misconduct of a less serious nature and a disciplinary measure imposed.*

Rules 29 and 30 supplements Articles 46 and 47, together they contain a detailed system of competences advising and deciding on the procedure in the event of a request for removal from office or for disciplinary measures. This system entails a two-stage procedure whereby the removal of a judge requires the support of two-thirds majority of the judges as well as Assembly of States Parties. This is a double safeguard to protect a judge from being subject to potential removal for political reasons by States Parties.¹

For the purpose of removal from office, Article 46 establishes the Assembly of States Parties as the ultimate arbiter and the basic procedure for such proceedings. While Article 46(2)(a) and (3) already establishes that a two-thirds majority of the judges are needed to adopt a recommendation for removal of a judge and an absolute majority of the judges are needed for in respect of the removal from office of the Registrar or Deputy Registrar shall be made by, sub-rule 1 adds that the question of removal from office shall be put to a vote at a plenary session. Sub-rules 2 and 3 concern notification. Sub-rule 4 provides a fall-back when the relevant organ finds that the person concerned has engaged in misconduct of a less serious nature and a disciplinary measure imposed.

¹ Magda Karagiannikis, “Article 46”, 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. 1304 (<https://www.legal-tools.org/doc/040751/>).

Cross-references:

Article 46.

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. 110 (<https://www.legal-tools.org/doc/995606/>).
2. Cate Steains, “Situations That May Affect the Functioning of the Court”, 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. 295–296 (<https://www.legal-tools.org/doc/e34f81/>).
3. Frank Jarasch, “The Rules of Procedure and Evidence Concerning the Composition and Administration of the International Criminal Court”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 167–168 (<https://www.legal-tools.org/doc/95e5f9/>).
4. Magda Karagiannikis, “Article 46”, 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. 1304 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Rule 30

- 1. In the case of a judge, the Registrar or a Deputy Registrar, any decision to impose a disciplinary measure shall be taken by the Presidency.**
- 2. In the case of the Prosecutor, any decision to impose a disciplinary measure shall be taken by an absolute majority of the Bureau of the Assembly of States Parties.**
- 3. In the case of a Deputy Prosecutor:(a) Any decision to give a reprimand shall be taken by the Prosecutor;(b) Any decision to impose a pecuniary sanction shall be taken by an absolute majority of the Bureau of the Assembly of States Parties upon the recommendation of the Prosecutor.**
- 4. Reprimands shall be recorded in writing and shall be transmitted to the President of the Bureau of the Assembly of States Parties.**

Rule 30 supplements Article 47, which provides that a judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar who has committed misconduct of a less serious nature shall be subject to disciplinary measures, in accordance with the Rules of Procedure and Evidence.

During the negotiations of the ICC Statute there was disagreement on what the reference to rules of procedure and evidence meant, did it only mean that procedural rules should be developed or did it also entail elaboration on substantive provisions? In the end, two rules were created, Rule 30 concerning procedure and Rule 32 specifying the available disciplinary measures.¹

Sub-rule 1 provides that any decision to impose a disciplinary measure in respect of a judge, the Registrar or a Deputy Registrar shall be taken by the Presidency. In order to safeguard the independence of the Prosecutor, sub-rule 2 provides that any decision to impose a disciplinary measure shall be taken by an absolute majority of the Bureau of the Assembly of States Parties. Sub-rule 3 confers on the prosecutor to issue reprimands on the Deputy Prosecutor, while any decision to impose a pecuniary sanction for the Deputy Prosecutor shall be taken by an absolute majority of the Bureau of the Assembly of States Parties upon the recommendation of the Prosecutor.

¹ Cate Steains, “Situations That May Affect the Functioning of the Court”, 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. 296–297 (<https://www.legal-tools.org/doc/e34f81/>).

Sub-rule 4 assures that there is a written record of reprimands when these have been issued as disciplinary measures.

Cross-references:

Article 47, Rule 32

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, pp. 138 and 546 (<https://www.legal-tools.org/doc/995606/>).
2. Cate Steains, “Situations That May Affect the Functioning of the Court”, 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. 296–298 (<https://www.legal-tools.org/doc/e34f81/>).
3. Frank Jarasch, “The Rules of Procedure and Evidence Concerning the Composition and Administration of the International Criminal Court”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 167–168 (<https://www.legal-tools.org/doc/95e5f9/>).
4. Magda Karagiannikis, “Article 47”, 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. 1309 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Rule 31

Once removal from office has been pronounced, it shall take effect immediately. The person concerned shall cease to form part of the Court, including for unfinished cases in which he or she was taking part.

Rule 31 ensures that the person concerned is removed from office with immediate effect. The principle of having the same judges hearing a specific case is thus subject to an exception in the event of removal of that judge. Article 46 and Rule 31 concerns a different situation compared to Article 36(10), the later provision concerns the normal end of a judge's term.

Cross-references:

Article 46

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. 110 (<https://www.legal-tools.org/doc/995606/>).
2. Cate Steains, "Situations That May Affect the Functioning of the Court", 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. 296–298 (<https://www.legal-tools.org/doc/e34f81/>).
3. Frank Jarasch, "The Rules of Procedure and Evidence Concerning the Composition and Administration of the International Criminal Court", in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 167–168 (<https://www.legal-tools.org/doc/95e5f9/>).

Author: Mark Klamberg.

Rule 32

The disciplinary measures that may be imposed are: (a) A reprimand; or (b) A pecuniary sanction that may not exceed six months of the salary paid by the Court to the person concerned.

Rule 32 provides that the disciplinary measures that may be imposed are a reprimand or a pecuniary sanction that may not exceed six months of the salary paid by the Court to the person concerned.

During the negotiations the reference in sub-rule (a) to reprimand was uncontroversial. There was more debate on whether there should be a record of the reprimands.¹ That issue is resolved in Rule 30(4) which provides that reprimands, when issued as a disciplinary measure, shall be recorded in writing and shall be transmitted to the President of the Bureau of the Assembly of States Parties.

Sub-rule (b) caused greater controversy during the negotiations. Some delegations argued that a pecuniary sanction up to six months of the salary was excessive but in the end this was retained (Steains, 2001, p. 299).

Cross-references:

Article 47, Rule 30(4).

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, pp. 110 and 546 (<https://www.legal-tools.org/doc/995606/>).
2. Cate Steains, “Situations That May Affect the Functioning of the Court”, 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. 299 (<https://www.legal-tools.org/doc/e34f81/>).
3. Frank Jarasch, “The Rules of Procedure and Evidence Concerning the Composition and Administration of the International Criminal Court”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of*

¹ Cate Steains, “Situations That May Affect the Functioning of the Court”, 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. 299 (<https://www.legal-tools.org/doc/e34f81/>).

Crimes Under International Law, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 168 (<https://www.legal-tools.org/doc/95e5f9/>).

4. Magda Karagiannikis, “Article 47”, 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. 1308 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Subsection 2. Excusing, Disqualification, Death and Resignation

Rule 33

- 1. A judge, the Prosecutor or a Deputy Prosecutor seeking to be excused from his or her functions shall make a request in writing to the Presidency, setting out the grounds upon which he or she should be excused.**
- 2. The Presidency shall treat the request as confidential and shall not make public the reasons for its decision without the consent of the person concerned.**

Rule 33 flows from Articles 41(1) and 42(6). The rule concerns the procedure in cases of excuse covering three categories of individuals (judges, the Prosecutor, deputy prosecutors). The concept of ‘excuse’ should not be confused with that of ‘disqualification’. Excuse only applies when a judge, the Prosecutor or Deputy prosecutor himself or herself initiates the proceeding by requesting to be excused. Disqualification on the other hand concerns the situation when a complaint is brought by a third party on the grounds for the impartiality of the person in question.¹ Disqualification is dealt with in Articles 41(2) and 42(7)–(8).

One example of excusal may be found in *Katanga and Ngudjolo*. The Appeals Chamber noted:

the request for excusal filed before the Presidency on 24 June 2009 by Judges Akua Kuenyehia and Anita Usacka (“judges”), pursuant to article 41(1) of the Statute and rule 33 of the Rules of Procedure and Evidence (“Rules”), wherein the judges requested to be excused from sitting on the appeal on the basis of their previous involvement in the pretrial phase of the case against Mr Germain Katanga (hereinafter “case”), in the course of which the judges *inter alia* issued a warrant of arrest for Mr Germain Katanga and confirmed the charges against him.²

As a result, the Appeals Chamber decided to temporarily attach Judge Ekaterina Trendafilova, assigned to the Pre-Trial Division, and Judge Joyce

¹ Cate Steains, “Situations That May Affect the Functioning of the Court”, 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. 300 (<https://www.legal-tools.org/doc/e34f81/>).

² ICC, *Prosecutor v. Katanga and Ngudjolo*, Decision replacing judges in the Appeals Chamber, 3 July 2009, ICC-01/04-01/07-1266 (<https://www.legal-tools.org/doc/318d1c/>).

Aluoch, assigned to the Trial Division, to the Appeals Chamber for the purpose of the appeal.

Sub-rule 2 provides for confidentiality in situations of ‘excuse’.

Cross-references:

Articles 41(1) and 42(6).

Doctrine:

1. Cate Steains, “Situations That May Affect the Functioning of the Court”, 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. 300–301 (<https://www.legal-tools.org/doc/e34f81/>).
2. Frank Jarasch, “The Rules of Procedure and Evidence Concerning the Composition and Administration of the International Criminal Court”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 168 (<https://www.legal-tools.org/doc/95e5f9/>).
3. John R.W.D. Jones, “Duties of Officials”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court*, Oxford University Press, 2002, p. 248 (<https://www.legal-tools.org/doc/01addc/>).
4. Hiram Abtahi and Rebecca Young, “Article 41”, 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. 1258–1260 (<https://www.legal-tools.org/doc/040751/>).
5. Morten Bergsmo, Frederik Harhoff and Dan Zhu, “Article 42”, in Triffterer and Ambos (eds.), 2016, p. 1274.

Author: Mark Klamberg.

Rule 34(1)

1. In addition to the grounds set out in article 41, paragraph 2, and article 42, paragraph 7, the grounds for disqualification of a judge, the Prosecutor or a Deputy Prosecutor shall include, inter alia, the following:

The present rule provides a non-exhaustive list containing examples of concrete grounds for disqualification, namely:

- (a) Personal interest in the case, including a spousal, parental or other close family, personal or professional relationship, or a subordinate relationship, with any of the parties;
- (b) Involvement, in his or her private capacity, in any legal proceedings initiated prior to his or her involvement in the case, or initiated by him or her subsequently, in which the person being investigated or prosecuted was or is an opposing party;
- (c) Performance of functions, prior to taking office, during which he or she could be expected to have formed an opinion on the case in question, on the parties or on their legal representatives that, objectively, could adversely affect the required impartiality of the person concerned;
- (d) Expression of opinions, through the communications media, in writing or in public actions, that, objectively, could adversely affect the required impartiality of the person concerned.

During the negotiations of the Preparatory Commission, the following grounds for disqualification were excluded: (i) membership of an organization or an institution and (ii) nationality.¹

Doctrine: For the bibliography, see the final comment on Rule 34.

Author: Mark Klamberg.

¹ Cate Steains, “Situations That May Affect the Functioning of the Court”, 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. 306–307 (<https://www.legal-tools.org/doc/e34f81/>).

Rule 34(1)(a)

(a) Personal interest in the case, including a spousal, parental or other close family, personal or professional relationship, or a subordinate relationship, with any of the parties;

Sub-rule 1(a) concerns personal interest in the case. The inclusion of the “close” before “family, personal or professional relationship” was during the negotiations of the Preparatory Commission considered important in order to establish an appropriate threshold for making such relationships a ground for disqualification.

Doctrine: For the bibliography, see the final comment on Rule 34.

Author: Mark Klamberg.

Rule 34(1)(b)

(b) Involvement, in his or her private capacity, in any legal proceedings initiated prior to his or her involvement in the case, or initiated by him or her subsequently, in which the person being investigated or prosecuted was or is an opposing party;

This sub-rule covers both legal proceedings instituted prior to the involvement of the judge, Prosecutor or Deputy Prosecutor and situations where the judge, Prosecutor or Deputy Prosecutor initiates legal proceedings subsequent to their involvement in the case. The use of the word “prior” is intentional in order to avoid enabling the accused to deliberately (and indefinitely) delay investigation or prosecution by initiating separate legal proceedings against one or more of the persons governed by this rule in order to trigger disqualifications proceedings.¹

Doctrine: For the bibliography, see the final comment on Rule 34.

Author: Mark Klamberg.

¹ Cate Steains, “Situations That May Affect the Functioning of the Court”, 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. 304 (<https://www.legal-tools.org/doc/e34f81/>).

Rule 34(1)(c)

(c) Performance of functions, prior to taking office, during which he or she could be expected to have formed an opinion on the case in question, on the parties or on their legal representatives that, objectively, could adversely affect the required impartiality of the person concerned;

During the negotiations of the Preparatory Commission there was a concern that the initial draft of the rule was too vague. Therefore, some key amendments were included in order to provide a more objective standard, including a limitation to functions performed prior to taking office, thus excluding functions performed by the judge, Prosecutor or Deputy Prosecutor pursuant to their duties under the ICC Statute.¹

Doctrine: For the bibliography, see the final comment on Rule 34.

Author: Mark Klamberg.

¹ Cate Steains, “Situations That May Affect the Functioning of the Court”, 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. 305 (<https://www.legal-tools.org/doc/e34f81/>).

Rule 34(1)(d)

(d) Expression of opinions, through the communications media, in writing or in public actions, that, objectively, could adversely affect the required impartiality of the person concerned.

The expressions “objectively”, “adversely affect” and “required impartiality” were amendments to the original draft of the sub-rule in order to raise the threshold when this sub-rule would be applicable.

Sub-rule 34(1)(d) has attracted attention in the Court’s practice.

In *Gaddafi*, the Appeals Chamber extended the notion of impartiality beyond actual bias. The Chamber stated that:

it is not necessary to establish an actual lack of impartiality on the part of the Prosecutor. Rather, the question before the Appeals Chamber is whether it reasonably appears that the Prosecutor lacks impartiality. In determining whether there is such an appearance of partiality, the Appeals Chamber considers that this determination should be based on the perspective of a reasonable observer, properly informed.

In the end, the Judges did not disqualify the Prosecutor, stating that “A reasonable observer [...] would have understood that the Prosecutor’s statements were based on the evidence available to him and that the judges would ultimately take the relevant decisions on the evidence”.¹

In *Lubanga*, the defence requested the disqualification of Judge Sang-Hyun Song as a judge of the Appeals Chamber on two factual grounds: (i) the existence of public statements by Judge Sang-Hyun Song expressing approval of the impugned decisions having regard to the existence of the crimes charged, the individual criminal responsibility of the Appellant and the sentence handed down to him; (ii) Judge Sang-Hyun Song’s activities in UNICEF, an organization accepted as *amicus curiae* in the case at bar, which has made representations before the Trial Chamber contradicting the

¹ ICC, *Prosecutor v. Gaddafi*, Appeals Chamber, Decision on the Request for Disqualification of the Prosecutor, 12 June 2012, ICC-01/11-01/11-175, paras. 20 and 34 (<https://www.legal-tools.org/doc/3ea916/>); Morten Bergsmo, Frederik Harhoff and Dan Zhu, “Article 42”, 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. 1275–1276 (<https://www.legal-tools.org/doc/040751/>).

Appellant in respect of matters pending before the Appeals Chamber.² The issue was resolved on 22 February 2013 when Judge Song requested to be excused from exercising any functions of the Presidency in respect of the Defence application.³

Doctrine: For the bibliography, see the final comment on Rule 34.

Author: Mark Klamberg.

² ICC, *Prosecutor v. Lubanga*, Presidency, Defence application for the disqualification of Judge Sang-Hyun Song, 20 February 2013, ICC-01/04-01/06-2981-tENG-Corr, para. 3 (<https://www.legal-tools.org/doc/cd524d/>).

³ ICC, *Prosecutor v. Lubanga*, Presidency, Notification concerning the “Corrigendum to Defence application for the disqualification of Judge Sang-Hyun Song” dated 20 February 2013, 11 March 2013, ICC-01/04-01/06-2996 (<https://www.legal-tools.org/doc/9274ff/>).

Rule 34(2)

2. Subject to the provisions set out in article 41, paragraph 2, and article 42, paragraph 8, a request for disqualification shall be made in writing as soon as there is knowledge of the grounds on which it is based. The request shall state the grounds and attach any relevant evidence, and shall be transmitted to the person concerned, who shall be entitled to present written submissions.

The present sub-rule expands upon the procedure set out in Articles 41(2) and 42(8) in cases of disqualification. The reference to the request for disqualification needing be made as soon as there is knowledge of the relevant grounds was inserted in order to facilitate the efficient resolution of such issues. The right of the person concerned “to present written submissions” reflects the procedure set out in Article 46(4).

Doctrine: For the bibliography, see the final comment on Rule 34.

Author: Mark Klamberg.

Rule 34(3)

3. Any question relating to the disqualification of the Prosecutor or a Deputy Prosecutor shall be decided by a majority of the judges of the Appeals Chamber.

The only additional detail added by the present sub-rule to Article 42(8) is that any question relating to the disqualification of the Prosecutor or a Deputy Prosecutor shall be decided by “a majority of the judges” of the Appeals Chamber.

This is not necessary in relation to the disqualification of a judge since Article 41(2) provides that disqualification of a judge shall be decided by an absolute majority of the judges.

Cross-references:

Article 41(2) and 42(7)–(8).

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, pp. 109–110 and 138 (<https://www.legal-tools.org/doc/995606/>).
2. Cate Steains, “Situations That May Affect the Functioning of the Court”, 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. 301–308 (<https://www.legal-tools.org/doc/e34f81/>).
3. Frank Jarasch, “The Rules of Procedure and Evidence Concerning the Composition and Administration of the International Criminal Court”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 168 (<https://www.legal-tools.org/doc/95e5f9/>).
4. Hiram Abtahi and Rebecca Young, “Article 41”, 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. 1260–1266 (<https://www.legal-tools.org/doc/040751/>).
5. Morten Bergsmo, Frederik Harhoff and Dan Zhu, “Article 42”, in Triffterer and Ambos (eds.), 2016, pp. 1274–1277.

6. Richard May and Marieke Wierda, *International Criminal Evidence*, Transnational Publishers, Ardsley, 2002, p. 31 (<https://www.legal-tools.org/doc/8fb20f>).

Author: Mark Klamberg.

Rule 35

Where a judge, the Prosecutor or a Deputy Prosecutor has reason to believe that a ground for disqualification exists in relation to him or her, he or she shall make a request to be excused and shall not wait for a request for disqualification to be made in accordance with article 41, paragraph 2, or article 42, paragraph 7, and rule 34. The request shall be made and the Presidency shall deal with it in accordance with rule 33.

The purpose of this rule is to avoid unnecessary interruption of the Court's proceedings. It also underpins Rule 24(2)(a) which provides that it is a "serious breach of duty" where the person concerned fails to comply with the duty to request to be excused, knowing that there are grounds for doing so. The words "reasons to believe" indicates that it is a subjective matter to make a request to be excused.

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, pp. 138–139 (<https://www.legal-tools.org/doc/995606/>).
2. Cate Steains, "Situations That May Affect the Functioning of the Court", 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. 308–309 (<https://www.legal-tools.org/doc/e34f81/>).
3. Frank Jarasch, "The Rules of Procedure and Evidence Concerning the Composition and Administration of the International Criminal Court", in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 169 (<https://www.legal-tools.org/doc/95e5f9/>).
4. Richard May and Marieke Wierda, *International Criminal Evidence*, Transnational Publishers, Ardsley, 2002, p. 31 (<https://www.legal-tools.org/doc/8fb20f/>).

Author: Mark Klamberg.

Rule 36

The Presidency shall inform, in writing, the President of the Bureau of the Assembly of States Parties of the death of a judge, the Prosecutor, a Deputy Prosecutor, the Registrar or a Deputy Registrar.

This rule deals with the procedure in the event of the death of a judge, the Prosecutor, a Deputy Prosecutor, the Registrar or a Deputy Registrar. The Presidency is responsible for the notifying the Bureau of the Assembly of States Parties in such event.

Cross-reference:

Article 37.

Doctrine:

1. Cate Steains, “Situations That May Affect the Functioning of the Court”, 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. 309 (<https://www.legal-tools.org/doc/e34f81/>).
2. Frank Jarasch, “The Rules of Procedure and Evidence Concerning the Composition and Administration of the International Criminal Court”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 169 (<https://www.legal-tools.org/doc/95e5f9/>).
3. Odo Annette Ogwuma, “Article 37”, 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. 1229 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Rule 37

1. A judge, the Prosecutor, a Deputy Prosecutor, the Registrar or a Deputy Registrar shall communicate to the Presidency, in writing, his or her decision to resign. The Presidency shall inform, in writing, the President of the Bureau of the Assembly of States Parties.

2. A judge, the Prosecutor, a Deputy Prosecutor, the Registrar or a Deputy Registrar shall endeavour to give notice of the date on which his or her resignation will take effect at least six months in advance. Before the resignation of a judge takes effect, he or she shall make every effort to discharge his or her outstanding responsibilities.

Rule 37 concerns the resignation of a judge, the Prosecutor, a Deputy Prosecutor, the Registrar or a Deputy Registrar. The rule involves the potential conflict between the interest to have minimal disruption to the functioning of the Court and the due interest of an official to resign on a short notice because of changes in his or her personal circumstances. The official concerned is encouraged, not required to give notice at least six months in advance.

Cross-references:

Article 37.

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. 138 (<https://www.legal-tools.org/doc/995606/>).
2. Cate Steains, “Situations That May Affect the Functioning of the Court”, 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. 309–310 (<https://www.legal-tools.org/doc/e34f81/>).
3. Fank Jarasch, “The Rules of Procedure and Evidence Concerning the Composition and Administration of the International Criminal Court”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 169 (<https://www.legal-tools.org/doc/95e5f9/>).
4. Odo Annette Ogwuma, “Article 37”, 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. 1229 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Subsection 3. Replacements and Alternate Judges

Rule 38

1. A judge may be replaced for objective and justified reasons, inter alia:

- (a) Resignation;***
- (b) Accepted excuse;***
- (c) Disqualification;***
- (d) Removal from office;***
- (e) Death.***

2. Replacement shall take place in accordance with the pre-established procedure in the Statute, the Rules and the Regulations.

In the *Kenya* cases, the Presidency considered as well-founded in the sense of Rule 38 a request citing, among others, the “unprecedented and unusually high workload”.¹ Subsequently in the *Kenyatta* case, the Presidency acceded to a judge’s request for excusal after having denied it twice before. In reconsidering its previous decision, the Presidency gave weight to the fact that the judge in question was a presiding judge in the *Ruto and Sang* case, which it agreed was complex, and to the impending start of another trial in which the same judge would be engaged. The decisive circumstance, however, was the election of a new judge who could serve as a replacement.²

Doctrine:

1. Socorro Flores Liera, “Single Judge, Replacements, and Alternate Judges”, 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. 312–313 (<https://www.legal-tools.org/doc/e34f81/>).

¹ ICC, *Prosecutor v. Ruto and Sang and Kenyatta*, Presidency, Decision replacing a judge in Trial Chamber V, 26 April 2013, ICC-01/09-01/11-706, p. 3 (<https://www.legal-tools.org/doc/c22e0d/>) and Annex II, Decision on the request to be excused from the exercise of judicial functions in Trial Chamber V, pursuant to article 41 of the Rome Statute, 26 April 2013, ICC-01/09-01/11-706-AnxII, p. 2 (<https://www.legal-tools.org/doc/9c5073/>).

² ICC, *Prosecutor v. Kenyatta*, Presidency, Decision replacing a judge in Trial Chamber V(b), 30 January 2014, ICC-01/09-02/11-890 (<https://www.legal-tools.org/doc/7be57d/>) and Annex I, Decision on the Renewed Request for withdrawal from the case of The Prosecutor v Uhuru Muigai Kenyatta, 30 January 2014, ICC-01/09-02/11-890-AnxI, pp. 4–5 (<https://www.legal-tools.org/doc/043a1b/>).

2. Frank Jarasch, “The Rules of Procedure and Evidence Concerning the Composition and Administration of the International Criminal Court”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 170 (<https://www.legal-tools.org/doc/95e5f9/>).

Author: Sergey Vasiliev.

Rule 39

Where an alternate judge has been assigned by the Presidency to a Trial Chamber pursuant to article 74, paragraph 1, he or she shall sit through all proceedings and deliberations of the case, but may not take any part therein and shall not exercise any of the functions of the members of the Trial Chamber hearing the case, unless and until he or she is required to replace a member of the Trial Chamber if that member is unable to continue attending. Alternate judges shall be designated in accordance with a procedure pre-established by the Court.

Where an alternate judge has been assigned to the Trial Chamber, Rule 39 requires him or her to “sit throughout all the proceedings and deliberations of the case” without taking part therein and without exercising functions of a regular member of the Chamber “unless and until he or she is required to replace” a judge who is unable to continue attending. The ICC’s legal framework does not provide for the exact procedure to be followed in the designation of alternate judges, in particular on who is competent to initiate this process. According to Rule 39, “[a]lternate judges shall be designated in accordance with a procedure ‘pre-established’ by the Court”, but the Court is yet to develop the relevant protocol. Further, Regulation 16 merely provides that alternate judges may be designated by the Presidency, on a case-by-case basis, first taking into account the availability of judges from the Trial Division that thereafter from the Pre-Trial Division.

Cross-references:

Article 74, Rule 39, and Regulation 16.

Doctrine:

1. Socorro Flores Liera, “Single Judge, Replacements, and Alternate Judges”, 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. 310–312 (<https://www.legal-tools.org/doc/e34f81/>).
2. Frank Jarasch, “The Rules of Procedure and Evidence Concerning the Composition and Administration of the International Criminal Court”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of*

Crimes Under International Law, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 170 (<https://www.legal-tools.org/doc/95e5f9/>).

3. 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. 1832 and 1834 (<https://www.legal-tools.org/doc/040751/>).

Author: Sergey Vasiliev.

*Section V. Publication, Languages and Translation***Rule 40**

- 1. For the purposes of article 50, paragraph 1, the following decisions shall be considered as resolving fundamental issues:**
 - (a) All decisions of the Appeals Division;**
 - (b) All decisions of the Court on its jurisdiction or on the admissibility of a case pursuant to articles 17, 18, 19 and 20;**
 - (c) All decisions of a Trial Chamber on guilt or innocence, sentencing and reparations to victims pursuant to articles 74, 75 and 76;**
 - (d) All decisions of a Pre-Trial Chamber pursuant to article 57, paragraph 3 (d).**
- 2. Decisions on confirmation of charges under article 61, paragraph 7, and on offences against the administration of justice under article 70, paragraph 3, shall be published in all the official languages of the Court when the Presidency determines that they resolve fundamental issues.**
- 3. The Presidency may decide to publish other decisions in all the official languages when such decisions concern major issues relating to the interpretation or the implementation of the Statute or concern a major issue of general interest.**

Rules 40–43 concerns publications, languages and translation. They are a compromise between states that during the negotiations that wanted to enhance the role of official languages other than the working languages of the ICC Statute (English and French according to Article 50(2)) and States that wanted to avoid overburdening and curb spending of the Court.¹

The rule sets out three different categories: decisions listed in sub-rule 1 shall always be published in all official languages (Arabic, Chinese, English, French, Russian and Spanish). Sub-rules 2 and 3 provides that the other decisions may be published in all official languages at the discretion of the Presidency. In practice there is not much difference between the second and third category because both depend on the discretion of the President,

¹ Frank Jarasch, “The Rules of Procedure and Evidence Concerning the Composition and Administration of the International Criminal Court”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 170 (<https://www.legal-tools.org/doc/95e5f9/>).

although the States by the inclusion of the second category appears to have attached a particular degree of importance.²

Since Article 50(1) provides that the judgements of the Court, as well as other decisions resolving fundamental issues before the Court, shall be published in the official languages, there is a need to define “decisions resolving fundamental issues”. Sub-rule 1 makes an attempt to give guidance by listing four kinds of decisions that shall be considered as resolving fundamental issues: (i) all decisions of the Appeals Division; (ii) all decisions of the Court on its jurisdiction or on the admissibility of a case pursuant to Articles 17, 18, 19 and 20; (iii) all decisions of a Trial Chamber on guilt or innocence, sentencing and reparations to victims pursuant to Articles 74, 75 and 76; (iv) all decisions of a Pre-Trial Chamber pursuant to Article 57, paragraph 3(d).

Sub-rule 2 provides that other issues such as decisions on confirmation of charges under Article 61, paragraph 7, and on offences against the administration of justice under Article 70, paragraph 3, shall be published in all the official languages of the Court when the Presidency determines that they resolve fundamental issues. Sub-rule 3 concerns other decisions which are also decided by the Presidency.

Cross-reference:

Article 50.

Doctrine:

1. Socorro Flores Liera, “Publications, languages, and translation”, 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. 314–316 (<https://www.legal-tools.org/doc/e34f81/>).
2. Frank Jarasch, “The Rules of Procedure and Evidence Concerning the Composition and Administration of the International Criminal Court”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of*

² Socorro Flores Liera, “Publications, languages, and translation”, 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. 315 (<https://www.legal-tools.org/doc/e34f81/>).

Crimes Under International Law, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 170–171 (<https://www.legal-tools.org/doc/95e5f9/>).

3. Magda Karaiannakis, “Article 50”, 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. 1326–1327 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Rule 41

1. For the purposes of article 50, paragraph 2, the Presidency shall authorize the use of an official language of the Court as a working language when:

(a) That language is understood and spoken by the majority of those involved in a case before the Court and any of the participants in the proceedings so requests; or

(b) The Prosecutor and the defence so request.

2. The Presidency may authorize the use of an official language of the Court as a working language if it considers that it would facilitate the efficiency of the proceedings.

The working languages of the Court is English and French. Article 50(2) provides that the Rules of Procedure and Evidence shall determine the cases in which other official languages (than English and French) may be used as working languages. This question may have significant financial implications, impact on the efficiency of the proceedings and be of great interest for the accused as well as for the victims.

Rule 41 lists the following cases: “(a) the language is understood and spoken by the majority of those involved in a case before the Court and any of the participants in the proceedings so requests; (b) The Prosecutor and the defence so request”. Even though a case meets the criteria in sub-rule 1(a) and (b), it is not mandatory for the Court to use a working language other than English or French in those cases. From the *chapeau* of the rule it follows that it still has to be authorised by the Presidency.

Sub-rule 2 adds flexibility, even in the absence of a request by any of the participants or a party, the Presidency may authorise the use of an official language of the Court as a working language if it considers that it would facilitate the efficiency of the proceedings.

Cross-reference:

Article 50(2)

Doctrine:

1. Socorro Flores Liera, “Publications, languages, and translation”, 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. 316–319 (<https://www.legal-tools.org/doc/e34f81/>).

2. Frank Jarasch, “The Rules of Procedure and Evidence Concerning the Composition and Administration of the International Criminal Court”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 170–171 (<https://www.legal-tools.org/doc/95e5f9/>).
3. Magda Karaiannakis, “Article 50”, 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. 1327–1328 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Rule 42

The Court shall arrange for the translation and interpretation services necessary to ensure the implementation of its obligations under the Statute and the Rules.

Rule 42 provides that the Court shall arrange for the necessary translation and interpretation services but does not add any specific obligation to the existing provisions. It follows that the Court must be provided with and then allocate adequate resources to meet its obligations under Article 50 and Rules 40–43.

Cross-reference:

Article 50.

Doctrine:

1. Frank Jarasch, “The Rules of Procedure and Evidence Concerning the Composition and Administration of the International Criminal Court”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 172 (<https://www.legal-tools.org/doc/95e5f9/>).
2. Magda Karaianakakis, “Article 50”, 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. 1331 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Rule 43

The Court shall ensure that all documents subject to publication in accordance with the Statute and the Rules respect the duty to protect the confidentiality of the proceedings and the security of victims and witnesses.

The Court shall ensure that all documents subject to publication in accordance with the Statute and the Rules respect the duty to protect the confidentiality of the proceedings and the security of victims and witnesses.

The Court has an obligation to take appropriate measures to protect the victims and witnesses' safety, well-being, dignity and privacy, pursuant to Articles 68(1) and (2) of the ICC Statute. Said protective measures include the redaction of sensitive information from documents disclosed among the participants, pursuant to Rule 81 of the Rules of Procedure and Evidence, and eventually made available to the public through the website of the Court, pursuant to Rule 15 of the Rules of Procedure and Evidence and Regulation 8 of the Regulations of the Court.

Cross-reference:

Article 50.

Doctrine:

1. Frank Jarasch, "The Rules of Procedure and Evidence Concerning the Composition and Administration of the International Criminal Court", in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 172 (<https://www.legal-tools.org/doc/95e5f9/>).
2. Socorro Flores Liera, "Publications, languages, and translation", 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. 314–320 (<https://www.legal-tools.org/doc/e34f81/>).
3. Magda Karaïnnakis, "Article 50", 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. 1331 (<https://www.legal-tools.org/doc/040751/>).

Author: Enrique Carnero Rojo.

CHAPTER 3.

JURISDICTION AND ADMISSIBILITY

Section I. Declarations and Referrals Relating to Articles 11, 12, 13 and 14

Rule 44

1. The Registrar, at the request of the Prosecutor, may inquire of a State that is not a Party to the Statute or that has become a Party to the Statute after its entry into force, on a confidential basis, whether it intends to make the declaration provided for in article 12, paragraph 3.

2. When a State lodges, or declares to the Registrar its intent to lodge, a declaration with the Registrar pursuant to article 12, paragraph 3, or when the Registrar acts pursuant to sub-rule 1, the Registrar shall inform the State concerned that the declaration under article 12, paragraph 3, has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in article 5 of relevance to the situation and the provisions of Part 9, and any rules thereunder concerning States Parties, shall apply.

This provision was intended by the drafters to limit a State's discretion in framing the "situation" that may be investigated in accepting the Court's jurisdiction on an *ad hoc* basis under Article 12, paragraph 3 of the ICC Statute.¹ This was done to avoid States that had not signed the Statute using the Court "opportunistically" (*Gbagbo*, 15 August 2012, para. 59). There had been concerns that the wording of the ICC Statute would allow the Court to be used by non-States Parties to selectively accept jurisdiction only in relation to certain crimes or parties (para. 59). Rule 44 therefore limits the scope of declarations under Article 12(3).

While States may seek to define the scope of their acceptance of jurisdiction, any such definition "cannot establish arbitrary parameters to a given situation" and must include all crimes that are relevant to that situation. It is for the Court to determine whether the scope of the acceptance under a

¹ 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, 15 August 2012, ICC-02/11-01/11-129, para. 59 (<https://www.legal-tools.org/doc/0d14c3/>).

State's declaration is consistent with the objective parameters of the situation (*Gbagbo*, 15 August 2012, para. 60).

A declaration made under Article 12(3) implies acceptance of all crimes within the jurisdiction of the Court relevant to the situation.² That is, an acceptance of jurisdiction will be made covering all crimes specified in Article 5 of the ICC Statute, rather than specific past events, during which such crimes were committed.³ The scope of a declaration is not limited to crimes that occurred in the past, or to crimes that occurred in a specific "situation". A State may accept the jurisdiction of the Court generally (*Gbagbo*, 12 December 2012, para. 84). A State may also limit the acceptance of jurisdiction, within the parameters of the Court's legal framework. However, unless such a stipulation is made, the acceptance of jurisdiction is not restricted, either in terms of crimes that pre-date the declaration or to specific "situations" pursuant to Article 13 of the Statute (paras. 81–84).

Cross-reference:

Article 12.

Doctrine:

1. Kai Ambos, "*Treatise on International Criminal Law*", Oxford University Press, 2016, p. 246,247, 249, 596.
2. John T. Holmes, "Jurisdiction and Admissibility", 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. 325–327 (<https://www.legal-tools.org/doc/e34f81/>).
3. Jürg Lindenmann, "The Rules of Procedure and Evidence on Jurisdiction and Admissibility", in Horst Fischer *et al.*, *International and National*

² ICC, *Situation in the Republic of Côte D'Ivoire*, Pre-Trial Chamber III, 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, 3 October 2011, ICC-02/11-14, para. 13 (<https://www.legal-tools.org/doc/7a6c19/>); see also *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, para. 13 (<https://www.legal-tools.org/doc/e0c0eb/>).

³ 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. 80 (<https://www.legal-tools.org/doc/649ff5/>).

Prosecution of Crimes Under International Law, Berliner Wissenschafts-Verlag, 2nd. ed., 2004, pp. 181–182.

4. William A. Schabas and Giulia Pecoralla, “Article 12”, 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. 684–688.

Author: Sophie Rigney.

Rule 45

A referral of a situation to the Prosecutor shall be in writing.

This provision only provides that communication should be in writing but does not provide any guidance on what the scope of the referral should be, who the written communication should come from, what it must say, or what form it must take.¹

Cross-reference:

Article 14.

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. 255 (<https://www.legal-tools.org/doc/995606/>).
2. Silvia Fernández De Gurmendi and Håkan Friman, “The rules of procedure and evidence and the regulations of the Court”, in José Doria, Hans-Peter Gasser and M. Cherif Bassiouni (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Igor Blishchenko*, Martinus Nijhoff, 2009, pp. 795–824 (<https://www.legal-tools.org/doc/2bee50/>).
3. John T. Holmes, “Jurisdiction and Admissibility”, 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. 327–328 (<https://www.legal-tools.org/doc/e34f81/>).
4. Jürg Lindenmann, “The Rules of Procedure and Evidence on Jurisdiction and Admissibility”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 182.
5. Antonio Marchesi and Eleni Chaitidou, “Article 14”, 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. 715.

¹ See Silvia Fernández De Gurmendi and Håkan Friman, “The rules of procedure and evidence and the regulations of the Court”, in José Doria, Hans-Peter Gasser and M. Cherif Bassiouni (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Igor Blishchenko*, Martinus Nijhoff, 2009, p. 820 (<https://www.legal-tools.org/doc/2bee50/>).

Author: Sophie Rigney.

*Section II. Initiation of Investigations Under Article 15***Rule 46**

Where information is submitted under article 15, paragraph 1, or where oral or written testimony is received pursuant to article 15, paragraph 2, at the seat of the Court, the Prosecutor shall protect the confidentiality of such information and testimony or take any other necessary measures, pursuant to his or her duties under the Statute.

This provision highlights the emphasis on protection and confidentiality of communications and testimony received by the Prosecutor, when reviewing information provided to them. Relying on this provision and its emphasis on confidentiality, The Office of the Prosecutor has a policy of maintaining the “confidentiality of the analysis process [...] in accordance with the duty to protect the confidentiality of senders, the confidentiality of information, submitted and the integrity of analysis or investigation”.¹ It follows that, in order to protect the confidentiality of materials provided under Article 15(1) and (2), any supporting material provided under Article 15(3) should be submitted to the Pre-Trial Chamber as a confidential attachment to the request for authorisation.

Doctrine:

1. John T. Holmes, “Jurisdiction and Admissibility”, 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. 329–330 (<https://www.legal-tools.org/doc/e34f81/>).
2. Jürg Lindenmann, “The Rules of Procedure and Evidence on Jurisdiction and Admissibility”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 182 (<https://www.legal-tools.org/doc/95e5f9/>).
3. Morten Bergsmo, Jelena Pejić and Dan Zhu, “Article 15”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos,

¹ ICC OTP, “Update on Communications Received by the Office of the Prosecutor of the ICC”, 10 February 2006, p. 4 (<https://www.legal-tools.org/doc/bv1hfq/>).

Munich/Oxford/Baden-Baden, 2016, p. 731 (<https://www.legal-tools.org/doc/040751/>).

4. ICC OTP, “Update on Communications Received by the Office of the Prosecutor of the ICC”, 10 February 2006 (<https://www.legal-tools.org/doc/bv1hfq/>).
5. ICC OTP, “Informal expert paper: Fact-finding and investigative functions of the office of the Prosecutor, including international co-operation”, 2003 (<https://www.legal-tools.org/doc/ba368d/>).

Author: Sophie Rigney.

Rule 47

1. The provisions of rules 111 and 112 shall apply, mutatis mutandis, to testimony received by the Prosecutor pursuant to article 15, paragraph 2.

2. When the Prosecutor considers that there is a serious risk that it might not be possible for the testimony to be taken subsequently, he or she may request the Pre-Trial Chamber to take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to appoint a counsel or a judge from the Pre-Trial Chamber to be present during the taking of the testimony in order to protect the rights of the defence. If the testimony is subsequently presented in the proceedings, its admissibility shall be governed by article 69, paragraph 4, and given such weight as determined by the relevant Chamber.

Sub-rule 1 provides that Rules 111–112 shall apply at the initial stage where testimony is received by the Prosecutor pursuant to Article 15(2), that is, when the Prosecutor is determining whether to initiate a *proprio motu* investigation. Rules 111–112 sets out detailed procedures for the recording of questioning.

Sub-rule 2 permits testimony to be received by the Prosecutor, and where the Prosecutor considers that there is a “serious risk” this testimony may not be available in future, that the Prosecutor may request the Pre-Trial Chamber to take measures to ensure the efficiency and integrity of the proceedings. Testimony taken under this provision may later be presented in proceedings (subject to the provisions of Article 69(4)).

This provision’s articulation of protecting the rights of the defence is complemented by Regulation 77, which articulates that the Office for the Public Counsel of Defence is vested with the task of “representing and protecting the rights of the defence during the initial stages of the investigation”, in particular in relation to this Rule.

It has been suggested that reliance on this paragraph could be used to “significantly shorten the presentation of evidence at the trial stage” and therefore shorten trial length.¹ Héctor Olásolo argues that, while there is not an express time-limit placed on the development of preliminary

¹ ICC OTP, “Informal expert paper: Measures available to the International Criminal Court to reduce the length of proceedings”, 2003 (<https://www.legal-tools.org/doc/7eba03/>).

examinations by the OTP under Rule 47, such examinations should be completed “within a reasonable time”.²

Cross-references:

Regulation 77.

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, pp. 154–155, 157, 392, 341, 495 (<https://www.legal-tools.org/doc/995606/>).
2. John T. Holmes, “Jurisdiction and Admissibility”, 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. 330 (<https://www.legal-tools.org/doc/e34f81/>).
3. Jürg Lindenmann, “The Rules of Procedure and Evidence on Jurisdiction and Admissibility”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 182–183 (<https://www.legal-tools.org/doc/95e5f9/>).
4. Héctor Olásolo, “The triggering procedure of the International Criminal Court, procedural treatment of the principle of complementarity, and the role of Office of the Prosecutor”, Guest Lecture Series of the Office of the Prosecutor, 26 March 2004 (<https://www.legal-tools.org/doc/c15ddb/>).
5. ICC OTP, “Informal expert paper: Measures available to the International Criminal Court to reduce the length of proceedings”, 2003 (<https://www.legal-tools.org/doc/7eba03/>).

Author: Sophie Rigney.

² Héctor Olásolo, “The triggering procedure of the International Criminal Court, procedural treatment of the principle of complementarity, and the role of Office of the Prosecutor”, Guest Lecture Series of the Office of the Prosecutor, 26 March 2004, p. 22 (<https://www.legal-tools.org/doc/c15ddb/>).

Rule 48

In determining whether there is a reasonable basis to proceed with an investigation under article 15, paragraph 3, the Prosecutor shall consider the factors set out in article 53, paragraph 1 (a) to (c).

This provision sets out the steps a Prosecutor must take, to determine whether there is a reasonable basis to proceed with an investigation. It states that a Prosecutor shall consider whether the information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed (Article 53(1)(a)); whether the case is or would be admissible under Article 17 (Article 53(1)(b)); and taking into account the gravity of the crime and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice (Article 53(1)(c)).¹ This rule clarifies that the provisions of Article 53(1) apply to investigations commenced proprio motu and not just by referral from the United Nations Security Council or a States Party.² This provision makes it clear that complementarity requirements under Article 17 must be considered in the pre-investigative phase of proprio motu investigations by the Prosecutor. At this stage, the admissibility assessment refers to the admissibility of one or more potential cases within the context of a situation (rather than a particular case against an identified accused) (*Situation in the Republic of Kenya*, 31 March 2010, para 48). Under this provision, the prosecutor must take “the interests of justice” into account, when determining whether there is a reasonable basis to proceed. The provision also obligates the Prosecutor to assess the interests of the victims as part of its determination of the interests of justice at this pre-investigation stage. In determining whether there is a reasonable basis to proceed, the Chamber will “bear in mind that the underlying purpose of the procedure in Articles 15(4) of the Statute is to prevent unwarranted, frivolous

¹ See ICC, *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, para 17 (<https://www.legal-tools.org/doc/e0c0eb/>).

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 23 (<https://www.legal-tools.org/doc/338a6f/>).

or politically motivated investigations” (*Situation in the Republic of Côte D’Ivoire*, 15 November 2011, para. 21).

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, pp. 265, 275, 337, 340 (<https://www.legal-tools.org/doc/995606/>).
2. Morten Bergsmo, Jelena Pejić and ZHU Dan, “Article 15”, 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. 733 (<https://www.legal-tools.org/en/doc/040751/>).
3. John T. Holmes, “Jurisdiction and Admissibility”, 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. 330–331 (<https://www.legal-tools.org/doc/e34f81/>).
4. Jürg Lindenmann, “The Rules of Procedure and Evidence on Jurisdiction and Admissibility”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 183.

Author: Sophie Rigney.

Rule 49

1. Where a decision under article 15, paragraph 6, is taken, the Prosecutor shall promptly ensure that notice is provided, including reasons for his or her decision, in a manner that prevents any danger to the safety, well-being and privacy of those who provided information to him or her under article 15, paragraphs 1 and 2, or the integrity of investigations or proceedings.

2. The notice shall also advise of the possibility of submitting further information regarding the same situation in the light of new facts and evidence.

This rule provides the process for notification of a decision on whether or not to proceed with an investigation. Héctor Olásolo frames this as a bundle of three rights: to have the OTP carry out a preliminary inquiry to obtain the necessary information of the proper assessment of the report of the alleged crime; to be informed of the OTP decision not to request the activation of the potential jurisdiction of the Court over the situation; and to transmit additional information to the OTP with regard to the situation, to have the OTP reconsider its decision not to proceed.¹

Notice must be given under Rule 49(1) in a way that protects the safety, well-being and privacy of those who provided the information, or the integrity of the investigations or proceedings. There is therefore an emphasis on maintaining the confidentiality of the analysis process and the reasons for the Prosecutor’s decision. Indeed, the Office of the Prosecutor relies upon this provision and its emphasis on confidentiality, for a policy of maintaining the confidentiality of the analysis process. In the majority of cases, where there has been a decision not to initiate an investigation on the basis of communications received, the Prosecution will submit its reasons for its decisions only to the senders of communications. When notifying of a decision on whether or not to proceed with an investigation, the Prosecutor will advise those who originally provided the information of their right under this rule to submit further information on the situation.

¹ Héctor Olásolo, “Expert consultation process on general issues relevant to the ICC Office of the Prosecutor: Issues Regarding the General Powers of the ICC Prosecutor under Article 42 of the Rome Statute”, 5 December 2003, p. 34 (<https://www.legal-tools.org/doc/a28b88/>).

Doctrine:

1. Morten Bergsmo, Jelena Pejić and ZHU Dan, “Article 15”, 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. 738 (<https://www.legal-tools.org/en/doc/040751/>).
2. John T. Holmes, “Jurisdiction and Admissibility”, 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. 331 (<https://www.legal-tools.org/doc/e34f81/>).
3. Jürg Lindenmann, “The Rules of Procedure and Evidence on Jurisdiction and Admissibility”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 183 (<https://www.legal-tools.org/doc/95e5f9/>).
4. Héctor Olásolo, “Expert consultation process on general issues relevant to the ICC Office of the Prosecutor: Issues Regarding the General Powers of the ICC Prosecutor under Article 42 of the Rome Statute”, 5 December 2003 (<https://www.legal-tools.org/doc/a28b88/>).
5. ICC OTP, “Update on Communications Received by the Office of the Prosecutor of the ICC”, 10 February 2006 (<https://www.legal-tools.org/doc/e97e28/>).

Author: Sophie Rigney.

Rule 50

General Remarks:

This provision provides for and regulates the participation of victims at this early stage in the pre-investigation process.

Doctrine: For the bibliography, see the final comment on Rule 50.

Author: Sophie Rigney.

Rule 50(1)

1. When the Prosecutor intends to seek authorization from the Pre-Trial Chamber to initiate an investigation pursuant to article 15, paragraph 3, the Prosecutor shall inform victims, known to him or her or to the Victims and Witnesses Unit, or their legal representatives, unless the Prosecutor decides that doing so would pose a danger to the integrity of the investigation or the life or well-being of victims and witnesses. The Prosecutor may also give notice by general means in order to reach groups of victims if he or she determines in the particular circumstances of the case that such notice could not pose a danger to the integrity and effective conduct of the investigation or to the security and well-being of victims and witnesses. In performing these functions, the Prosecutor may seek the assistance of the Victims and Witnesses Unit as appropriate.

This provision means that victims may contact the Court (particularly the OTP) with a view to triggering the Prosecutors' *proprio motu* investigation powers, prior to a situation or case pending before the Court, and irrespective of whether such a situation or case is pending. Moreover, if the Prosecutor considers it appropriate to exercise its *proprio motu* powers, victims may be involved in the proceedings conducted under Article 15, provided that they are known to the Court (either the Prosecutor or the Victims and Witnesses Unit). Victims are therefore "likely to play a significant role in the procedure leading to the Pre-Trial Chamber's decision as to whether the Prosecutor should be authorised to exercise his *proprio motu* powers".¹ The Regulations of the Registry provide that where the Prosecutor decides to give notice by general means in accordance with this rule, the Registry may take steps to ensure that victims are informed of this. (Regulation 103, Regulations of the Registry). The Registry has argued that victims should be given a detailed explanation of the types of information which might be provided, and that this information should be phrased in a clear way and placed prominently on the notice. Efforts to assist victims in understanding this process could include distributing information materials, providing a standard form, or conducting information sessions with victims and community leaders.

¹ ICC, *Situation in Uganda*, 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, p. 34 (<https://www.legal-tools.org/doc/d25664/>).

Doctrine: For the bibliography, see the final comment on Rule 50.

Author: Sophie Rigney.

Rule 50(2)

2. A request for authorization by the Prosecutor shall be in writing.

This provision does not specify any formal requirements for an authorisation, beyond the fact that it must be in writing. The Registry has not considered a signature to be a necessary requirement for this provision.¹

Doctrine: For the bibliography, see the final comment on Rule 50.

Author: Sophie Rigney.

¹ ICC, *Situation in the Republic of Côte d'Ivoire*, Registry, Annex A: Public-Registry methodology for conducting prima facie rule 85 assessments, 30 August 2011, ICC-02/11-11-AnxA-Red, p. 6 (<https://www.legal-tools.org/doc/115a29/>).

Rule 50(3)

3. Following information given in accordance with sub-rule 1, victims may make representations in writing to the Pre-Trial Chamber within such time limit as set forth in the Regulations.

Representations undertaken in accordance with this provision must be confined to those who qualify as “victims” within the meaning of Rule 85, bearing in mind the specific nature of the Article 15 proceedings. The purpose of representations at this stage and the limited scope of these proceedings should be considered.¹

Individual victim participants in Article 15 proceedings, as permitted under this Rule, will make representations that, to the extent possible, will include “sufficient information about the identity of any individuals who make representations in this context; the harm they suffered; and the link with any crimes coming within the jurisdiction of the Court”.² Collective representatives by community leaders will provide, to the extent possible, sufficient information about the community they represent; the harm suffered by members of that community; and the links to any crimes coming within the jurisdiction of the Court (*Situation in the Republic of Côte D’Ivoire*, 6 July 2011, para 10).

A Chamber may require the Court’s Victim Participation and Reparation Section of the Registry to undertake an initial prima facie assessment to ensure that only representations coming from sources who may be considered potentially victims under Rule 85 are sent to the Chamber for consideration. Such an initial assessment will be unrelated to applications made to participate in the proceedings (*Situation in the Republic of Côte D’Ivoire*, 6 July 2011, para 10).

¹ ICC, *Situation in the Republic of Kenya*, Pre-Trial Chamber II, Order to the Victims Participation and Reparation Section Concerning Victims’ Representations Pursuant to Article 15(3) of the Statute, 10 December 2009, ICC-01/09-4, paras. 7–8 (<https://www.legal-tools.org/doc/908205/>).

² ICC, *Situation in the Republic of Côte D’Ivoire*, Pre-Trial Chamber III, “Order to the Victims Participation and Reparations Section Concerning Victims’ Representations Pursuant to Article 15(3) of the Statute”, 6 July 2011, ICC-02/11-6, para. 10 (<https://www.legal-tools.org/doc/45f4fd/>).

Doctrine: For the bibliography, see the final comment on Rule 50.

Author: Sophie Rigney.

Rule 50(4)

4. The Pre-Trial Chamber, in deciding on the procedure to be followed, may request additional information from the Prosecutor and from any of the victims who have made representations, and, if it considers it appropriate, may hold a hearing.

In establishing the procedure for receiving victims' representations, a Trial Chamber must ensure that the proceedings are carried out in an expeditious manner.¹

Doctrine: For the bibliography, see the final comment on Rule 50.

Author: Sophie Rigney.

¹ ICC, *Situation in the Republic of Côte D'Ivoire*, Pre-Trial Chamber III, "Order to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to Article 15(3) of the Statute", 6 July 2011, ICC-02/11-6, para. 6 (<https://www.legal-tools.org/doc/45f4fd/>).

Rule 50(5)

5. The Pre-Trial Chamber shall issue its decision, including its reasons, as to whether to authorize the commencement of the investigation in accordance with article 15, paragraph 4, with respect to all or any part of the request by the Prosecutor. The Chamber shall give notice of the decision to victims who have made representations.

6. The above procedure shall also apply to a new request to the Pre-Trial Chamber pursuant to article 15, paragraph 5.

The Registry will assist the Trial Chamber to implement its obligations under Rule 50(5), to give notice of its decision under Article 15(4). Steps that may be taken to assist in this manner can include a general-information campaign for the benefit of the entire population in the relevant country, but focussing particularly on the affected communities; holding meetings with victims, victims' groups and the lawyers and associations who are representing them in this process; and writing directly to those victims whose addresses are known.¹

Cross-references:

Rule 85 and Regulation 103 of the Regulations of the Registry

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, pp. 180, 341–342 (<https://www.legal-tools.org/doc/995606/>).
2. Morten Bergsmo, Jelena Pejić and Dan Zhu, “Article 15”, 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. 738 (<https://www.legal-tools.org/doc/040751/>).
3. John T. Holmes, “Jurisdiction and Admissibility”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of*

¹ ICC, *Situation in the Republic of Côte D’Ivoire*, Pre-Trial Chamber III, Public 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. 209–210 (<https://www.legal-tools.org/doc/e0c0eb/>).

Crimes and Rules of Procedure and Evidence, Transnational Publishers, Ardsley, 2001, pp. 331–334 (<https://www.legal-tools.org/doc/e34f81/>).

4. Jürg Lindenmann, “The Rules of Procedure and Evidence on Jurisdiction and Admissibility”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 183–184 (<https://www.legal-tools.org/doc/95e5f9/>).

Author: Sophie Rigney.

Section III. Challenges and Preliminary Rulings Under Articles 17, 18 and 19

Rule 51

Information provided under article 17 *In considering the matters referred to in article 17, paragraph 2, and in the context of the circumstances of the case, the Court may consider, inter alia, information that the State referred to in article 17, paragraph 1, may choose to bring to the attention of the Court showing that its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct, or that the State has confirmed in writing to the Prosecutor that the case is being investigated or prosecuted.*

General Remarks:

Rule 51 of the Rules of Procedure and Evidence provides that the Court may consider information submitted by States which is relevant to the determination of ‘unwillingness’ under Article 17(2) of the Statute. Such information may include evidence showing that national courts meet internationally recognized norms and standards of independence and impartiality. The State may also submit information demonstrating that it has confirmed in writing to the Prosecutor that the same case is being investigated or prosecuted domestically.

Preparatory Works:

The drafting history reveals wide consensus amongst negotiating States regarding the Court’s authority to consider information submitted by a State in relation to its domestic proceedings for the purposes of assessing unwillingness under Article 17(2).¹ It was stressed however that the Court should retain discretion with regards to whether or not to consider such information, as concerns were raised that non-*bona fide* States may use the mechanism to obstruct the proceedings before the ICC. The inclusion of the wording “may consider”, “*inter alia*” and “in the context of the circumstance of the case”

¹ John T. Holmes, “Jurisdiction and Admissibility”, 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. 334 (<https://www.legal-tools.org/doc/e34f81/>).

was therefore designed to introduce some flexibility into the Court's assessment (Holmes, 2001, p. 334)

Analysis:

In *Al-Senussi*, Pre-Trial Chamber I relied on information provided by Libya under Rule 51 to assess the degree of independence and impartiality of its national judicial system. In assessing the unwillingness criterion, the Pre-Trial Chamber observed that the admissibility application filed by the Libyan Government included relevant information concerning domestic proceedings initiated against other members of the same government as the defendant.² In this regard, the Chamber noted that the trial of Mr. Al-Baghdadi Al-Mahmoudi, former Prime Minister, was “open to the public and the press [which] indicates a strong desire to [afford the defendant] a fair trial” (*Gaddafi and Al-Senussi*, 11 October 2013, para. 255). The Chamber also examined information regarding the outcome of domestic trials against high-profile political figures. It considered for instance “the acquittal of the former Foreign Minister, Abdul Ati El-Obeidi, and the former Secretary of the General People's Congress, Mohamed Al-Zway as indicative of the impartiality and independence of the Libyan judiciary” (para. 255).

In *Gaddafi*, the Appeals Chamber confirmed that information submitted under Rule 51 of the Rules concerning human rights standards may be broadly to Court's assessment as to whether the proceedings are or were conducted “independently or impartially” within the meaning of Article 17(2)(c). It refused however to accept the assertion that any violation of the accused's procedural rights would necessarily constitute a basis for a finding of unwillingness.³

Cross-reference:

Article 17(2).

² ICC, *Prosecutor v. Gaddafi and Al-Senussi*, Pre-Trial Chamber I, Decision on the admissibility of the case against Abdullah Al-Senussi, 11 October 2013, ICC-01/11-01/11-466-Red, para. 254 (*Gaddafi and Al-Senussi*, 11 October 2013') (<https://www.legal-tools.org/doc/af6104/>).

³ ICC, *Prosecutor v. Gaddafi and Al-Senussi*, 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. 220 (<https://www.legal-tools.org/doc/ef20c7/>).

Doctrine:

1. John T. Holmes, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court*, Oxford University Press, 2002, p. 677 (<https://www.legal-tools.org/doc/01addc/>).
2. John T. Holmes, “Jurisdiction and Admissibility”, 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. 345–346 (<https://www.legal-tools.org/doc/e34f81/>).
3. Frederick Harhoff and Phakiso Mochochoko, “International Cooperation and Judicial Assistance”, in Roy S. Lee and Håkan Friman (eds.), 2001, p. 655.

Author: Mohamed Abdou.

Rule 52(1)

1. Subject to the limitations provided for in article 18, paragraph 1, the notification shall contain information about the acts that may constitute crimes referred to in article 5, relevant for the purposes of article 18, paragraph 2.

Rule 52(1) obliges the Prosecution to provide States with information concerning the acts that might constitute crimes under Article 5 of the Statute.

The notion of ‘acts’ is utilised in the Statute to refer to the crime base elements of the various offences (see for example, Article 6, “For the purposes of the Statute, ‘genocide’ means any of the following acts [...]”).

The Appeals Chamber has cited the use of the term ‘acts’ in Rule 52(1) to conclude that the information available at this phase of the proceedings will necessarily be less precise than that which is required to satisfy the same person-same conduct test at the case stage of the proceedings:

Often, no individual suspects will have been identified at this stage, nor will the exact conduct nor its legal classification be clear. The relative vagueness of the contours of the likely cases in article 18 proceedings is also reflected in rule 52(1) of the Rules of Procedure and Evidence, which speaks of “information about the acts that may constitute crimes referred to in article 5, relevant for the purposes of article 18, paragraph 2” that the Prosecutor’s notification to States should contain.¹

Rule 52(1) allows the Prosecution to restrict the type of information provided in its notification, in accordance with the grounds set out in Article 18(1) (where necessary to protect persons, prevent the destruction of evidence, or prevent persons from absconding). The fact that Rule 52(1) expressly reiterates the grounds for non-disclosure set out in Article 18(1), suggests that the drafters did not intend to create any additional or further qualifications to the notification requirement. Article 18(1) does not envisage any possibility to omit notifying States altogether (for example, to address the

¹ 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/>)

scenario where the target of the investigations is the Head of State), and the Rules reinforce the intentional nature of this omission.

Doctrine: For the bibliography, see the final comment on Rule 52.

Author: Melinda Taylor.

Rule 52(2)

2. A State may request additional information from the Prosecutor to assist it in the application of article 18, paragraph 2. Such a request shall not affect the one month time limit provided for in article 18, paragraph 2, and shall be responded to by the Prosecutor on an expedited basis.

Pursuant to Rule 52(2), a State may request additional information from the Prosecution in order to assist it to determine whether to request the Prosecution to defer its investigations of these particular criminal acts to that State.

The fact that the State has requested such information, does not, however, affect the one-month deadline within which the States must submit its request for the Prosecution to defer its investigations and prosecutions to the State.

Although Rule 52(2) facilitates positive complementarity by creating a framework within which States can request information, which could, in turn, assist the State to conduct its own investigations (such as the location of the suspect, or identities of key witnesses), the explicit caveat that such a request does not affect the one month deadline underscores the fact that positive complementarity should not operate to the detriment of the ability of the ICC to ensure effective and expeditious proceedings.

Rule 52(2) thus embodies the overarching emphasis of the ICC legal framework on ensuring expeditious proceedings, and the corresponding obligation this places on Court participants to assert their rights in a diligent and timely manner.¹

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. 323 (<https://www.legal-tools.org/doc/995606/>).
2. John Holmes, “Jurisdiction and Admissibility”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and*

¹ ICC, *Prosecutor v. Katanga*, 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 42, fn. 89 (<https://www.legal-tools.org/doc/124fb3/>).

Rules of Procedure and Evidence, Transnational Publishers, Ardsley, 2001, pp. 338–340.

3. Jürg Lindenmann, “The Rules of Procedure and Evidence on Jurisdiction and Admissibility”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, Berliner Wissenschafts-Verlag, 2nd. ed., 2004, p. 185.
4. Daniel D. Ntanda Nsereko, “Article 18”, 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. 841–842.

Author: Melinda Taylor.

Rule 53

When a State requests a deferral pursuant to article 18, paragraph 2, that State shall make this request in writing and provide information concerning its investigation, taking into account article 18, paragraph 2. The Prosecutor may request additional information from that State.

Rule 53 specifies that if a State wishes the Prosecution to defer to its investigations, it must submit such a request in writing, and provide information concerning its investigations. This information must “take into account article 18, paragraph 2”.

It can be deduced from this explicit cross-reference to Article 18(2) that the request should contain sufficient information to enable the Prosecution to assess whether the State is investigating “criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States” (Article 18(2)).

Rule 53 also enables the Prosecution to request additional information from the State in question. Although the Prosecution ‘may’ request additional information, there is no obligation for the Prosecution to do so, nor is there any express right for the State to supplement a request for deferral, which lacks key details or information. ICC jurisprudence has affirmed, in the context of Article 19 admissibility challenges, that “a 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”.¹

The power of the Prosecutor to request additional information from States also raises the issue of whether this rule has any effect for a non-Party State, which is under no obligation to co-operate with the Court.

¹ ICC, *Prosecutor v. Gaddafi and Senussi*, Pre-Trial Chamber, 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, para. 32 (<https://www.legal-tools.org/doc/c26753/>), citing *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. 96 (<https://www.legal-tools.org/doc/c21f06/>).

On the one hand, if a non-State party refuses a Prosecution request for additional information, it might be appropriate for the Prosecution to draw adverse inferences if it refuses to do so, for the purposes of deciding whether the State in question is willing and able to investigate and prosecute the events in question.

This would be consistent with a recommendation in the ICC Informal Expert Paper on Complementarity that a State's record of co-operation with the ICC can be a relevant factor in the Court's assessment as to whether the State meets (or continues to meet) the admissibility criteria.²

Hall *et al.* has also argued that where information, which might be germane to the ICC's determination of admissibility, is within the custody of a State and the State fails to proffer it or grant the ICC access to it, it would be appropriate to draw adverse inferences against the State in question.³

On the other hand, it is also arguable that since a non-State party is under no obligation to engage with the Court in the first place, any decisions of the Prosecution or Pre-Trial Chamber concerning admissibility will have no legal effect concerning the State's ability to continue with its domestic investigation. The Prosecutor might thus decide that it is relatively futile to draw adverse inferences in order to justify continuing with the case, if the State has no intention of co-operating with the Court. Key considerations would presumably include whether the suspects and evidence are located on the territory of the non-State party, and whether there is a realistic prospect that the Prosecution could investigate the situation effectively, against the wishes of the State in question.

There is therefore a risk that political considerations could end up creating a two-tiered admissibility regime, whereby the Prosecutor might accept requests for deferrals from non-State parties, which are supported by less evidence, or less detailed evidence, than the Prosecutor has required in requests submitted by State parties.

² ICC, *Prosecutor v. Bemba*, Annex 9: Informal expert paper: The principle of complementarity in practice, 31 October 2003, ICC-01/05-01/08-721-Anx9, p. 18 (<https://www.legal-tools.org/doc/8mksx9/>).

³ Christopher K. Hall, Daniel D. Ntanda Nsereko and Manuel J. Ventura, "Article 19", 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. 862–863 and 875 (<https://www.legal-tools.org/doc/040751/>).

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. 323 (<https://www.legal-tools.org/doc/995606/>).
2. John Holmes, “Jurisdiction and Admissibility”, 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. 340–341 (<https://www.legal-tools.org/doc/e34f81/>).
3. Jürg Lindenmann, “The Rules of Procedure and Evidence on Jurisdiction and Admissibility”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 185 (<https://www.legal-tools.org/doc/95e5f9/>).
4. Daniel D. Ntanda Nsereko, “Article 18”, 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. 843 (<https://www.legal-tools.org/doc/040751/>).

Author: Melinda Taylor.

Rule 54(1)

1. An application submitted by the Prosecutor to the Pre-Trial Chamber in accordance with article 18, paragraph 2, shall be in writing and shall contain the basis for the application. The information provided by the State under rule 53 shall be communicated by the Prosecutor to the Pre-Trial Chamber.

Rule 54(1) specifies that if the Prosecutor wishes to contest a request for a deferral before the Pre-Trial Chamber, then it must submit such a request in writing, and provide the basis for its application to contest the deferral.

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

Author: Melinda Taylor.

Rule 54(2)

2. The Prosecutor shall inform that State in writing when he or she makes an application to the Pre-Trial Chamber under article 18, paragraph 2, and shall include in the notice a summary of the basis of the application.

Rule 54(2) obliges the Prosecutor to inform a State in writing if the Prosecutor has contested a request for deferral before the Pre-Trial Chamber. The Prosecutor is applied to furnish the State with a ‘summary’ of its application, but no more than that.

Since Article 18(1) allows the Prosecutor to withhold information from States that could impact on the protection of persons, the integrity of evidence, or the ability of the ICC to secure the arrest of suspects, the Prosecutor presumably has the right to redact any information concerning such matters, which might have been included the Prosecutor’s application.

The recognition of the Prosecutor’s ability to withhold such information would suggest that the Pre-Trial Chamber erred in ruling in the Gaddafi case that the Chamber was precluded from basing its decision on information that had been withheld from the State, which had requested to prosecute the case.¹

The Appeals Chamber also indicated in the related *Senussi* proceedings that it had taken into consideration a discrete *ex parte* document submitted by the Defence.²

Although these decisions concerned Article 19 proceedings, it would be illogical to allow the Prosecution to rely on *ex parte* information for the purposes of contesting an Article 18 request to defer an investigation, but not to do so in response to an Article 19 challenge to the admissibility of the case before the ICC.

¹ ICC, *Prosecutor v. Gaddafi and Senussi*, Pre-Trial Chamber, Decision on the OPCD “Request Pursuant to Regulation 23bis of the Regulations of the Court”, 18 July 2012, ICC-01/11-01/11-187-Red, para. 10 (<https://www.legal-tools.org/doc/0c74f1/>).

² ICC, *Prosecutor v. Gaddafi and Senussi*, 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”, ICC-01/11-01/11-565, 24 July 2014, para. 275 (<https://www.legal-tools.org/doc/ef20c7/>).

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. 323 (<https://www.legal-tools.org/doc/995606/>).
2. John Holmes, “Jurisdiction and Admissibility”, 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. 341 (<https://www.legal-tools.org/doc/e34f81/>).
3. Jürg Lindenmann, “The Rules of Procedure and Evidence on Jurisdiction and Admissibility”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 185 (<https://www.legal-tools.org/doc/95e5f9/>).
4. Daniel D. Ntanda Nsereko, “Article 18”, 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. 843–844 (<https://www.legal-tools.org/doc/040751/>).

Author: Melinda Taylor.

Rule 55

Proceedings concerning article 18, paragraph 2

Rule 55 of the RPE delineates the powers of the Pre-Trial Chamber and criteria for determining an application by the ICC Prosecutor not to defer the ICC proceedings.

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

Author: Melinda Taylor.

Rule 55(1)

1. The Pre-Trial Chamber shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings. It may hold a hearing.

Rule 55(1) vests the Pre-Trial Chamber with broad discretion for determining the procedure for resolving such an application. For example, whilst Rule 55(1) posits that the Chamber may hold a hearing, it is not obliged to do so.¹

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

Author: Melinda Taylor.

¹ See, by analogy, ICC, *Prosecutor v. Ruto*, 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. 110 (<https://www.legal-tools.org/doc/ac5d46/>).

Rule 55(2)

2. The Pre-Trial Chamber shall examine the Prosecutor’s application and any observations submitted by a State that requested a deferral in accordance with article 18, paragraph 2, and shall consider the factors in article 17 in deciding whether to authorize an investigation.

Rule 55(2) provides that the Pre-Trial Chamber shall examine the Prosecution’s application and any observations from the State, which requested the deferral.

It can therefore be extrapolated from Rule 55(2) that the State concerned has a right to file observations in response to the ICC Prosecution’s application.

If the situation was referred a State under Article 14, the referring State would have a right to challenge a decision by the Prosecutor not to initiate an investigation because the case is inadmissible. There would therefore appear to be good grounds for the Pre-Trial Chamber to allow a referring State to submit observations in connection with proceedings under Rule 55(2) – subject to confidentiality considerations.

The Appeals Chamber has also confirmed that victims, can in principle, participate in specific judicial proceedings at the situation phase, which impact on their personal interests.¹ In the *Kenya situation*, the Pre-Trial Chamber foreshadowed that judicial review of a decision of the Prosecution not to proceed with an investigation or prosecution could impact on the personal interests of victims.² In the *Situation in the Philippines*, Pre-Trial Chamber I recognised that the personal interests of victims would be impacted by such a determination and further decided that “the system as set forth by the Statute and the Rules in respect of proceedings pursuant to article

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 (<https://www.legal-tools.org/doc/dca981/>).

² ICC, *Situation in the Republic of Kenya*, Pre-Trial Chamber, Decision on Victims’ Participation in Proceedings Related to the Situation in the Republic of Kenya, 3 November 2010, ICC-01/09-24, para. 12 (<https://www.legal-tools.org/doc/0e64a3/>).

15 of the Statute provides a suitable model for collecting victims views and concerns in the context of Article 18(2) proceedings”.³

The Chamber is obliged to apply the criteria for admissibility, as set out in Article 17, in deciding upon the application (Rule 55(2)).

In the *Situation in Afghanistan*, in order to facilitate its ability to adjudicate the deferral request, the Pre-Trial Chamber ordered the Prosecutor to file both the materials received from domestic authorities and the Prosecutor’s assessment of the merits of the deferral request.⁴

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

Author: Melinda Taylor.

³ ICC, *Situation of Philippines*, Pre-Trial Chamber I, Order inviting observations and victims’ views and concerns, 14 July 2022, ICC-01/21-47, para. 14 (<https://www.legal-tools.org/doc/n5qj2v/>).

⁴ ICC, *Situation in Afghanistan*, Pre-Trial Chamber II, Order instructing the Prosecution to submit observations and relevant materials pursuant to article 18(2) of the Rome Statute and 54(1) of the Rules of Procedure and Evidence, 22 July 2022, ICC-02/17-194, para. 22 (<https://www.legal-tools.org/doc/eue6ws/>).

Rule 55(3)

3. *The decision and the basis for the decision of the Pre-Trial Chamber shall be communicated as soon as possible to the Prosecutor and to the State that requested a deferral of an investigation.*

Rule 55(3) embodies the recurring emphasis in the ICC Statute on resolving admissibility issues in an expeditious manner: it obliges the Chamber to communicate its decision (and the reasons for the decision) to the Prosecutor and the State, which requested the deferral, “as soon as possible”.

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, pp. 275, pp. 305, 323 (<https://www.legal-tools.org/doc/995606/>).
2. John Holmes, “Jurisdiction and Admissibility”, 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. 341–343 (<https://www.legal-tools.org/doc/e34f81/>).
3. Jürg Lindenmann, “The Rules of Procedure and Evidence on Jurisdiction and Admissibility”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 185–186 (<https://www.legal-tools.org/doc/95e5f9/>).
4. Daniel D. Ntanda Nsereko, “Article 18”, 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. 844 (<https://www.legal-tools.org/doc/040751/>).

Author: Melinda Taylor.

Rule 56(1)

1. Following a review by the Prosecutor as set forth in article 18, paragraph 3, the Prosecutor may apply to the Pre-Trial Chamber for authorization in accordance with article 18, paragraph 2. The application to the Pre-Trial Chamber shall be in writing and shall contain the basis for the application.

Rule 56(1) provides that if the Prosecutor decides to review a deferral to a State's investigation or prosecution, then it must follow the procedure set out in Article 18(2), and submit an application in writing, setting out the basis for the application.

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

Author: Melinda Taylor.

Rule 56(2)

2. Any further information provided by the State under article 18, paragraph 5, shall be communicated by the Prosecutor to the Pre-Trial Chamber.

The Prosecution must provide any further information communicated by the State pursuant to Article 18(5) to the Chamber. This refers to the periodic reports concerning the progress of investigations and prosecutions, which the Prosecutor can request from a State that the Prosecutor initially deferred to.

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

Author: Melinda Taylor.

Rule 56(3)

3. *The proceedings shall be conducted in accordance with rules 54, sub-rule 2, and 55.*

Rule 56(3) incorporates the requirement from Rule 54(2) that the Prosecution must inform the State in writing of the application to review the deferral, and provide a summary of the request for review. It also confirms that the review proceedings will be governed by the procedures set out in Rule 55.

Cross-reference:

Article 54.

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. 323 (<https://www.legal-tools.org/doc/995606/>).
2. Jürg Lindenmann, “The Rules of Procedure and Evidence on Jurisdiction and Admissibility”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, Berliner Wissenschafts-Verlag, 2nd. ed., 2004, p. 186.
3. Daniel D. Ntanda Nsereko, “Article 18”, 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. 845.

Author: Melinda Taylor.

Rule 57

An application to the Pre-Trial Chamber by the Prosecutor in the circumstances provided for in article 18, paragraph 6, shall be considered ex parte and in camera. The Pre-Trial Chamber shall rule on the application on an expedited basis.

According to Rule 57, a request by the Prosecution under Article 18(6) to conduct necessary investigative steps, pending a ruling by the Chamber on an application to contest a deferral, must be considered on an *ex parte* basis, and “in camera” (that is, closed session).

Since the Prosecution may wish to appeal a decision by the Chamber not to authorise such steps, there must be an official court record of any such proceedings (that is, a formal transcript of any *in camera* hearings).

The Pre-Trial Chamber is obliged to issue an expedited ruling on a request to take necessary investigative steps.

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. 323 (<https://www.legal-tools.org/doc/995606/>).
2. John Holmes, “Jurisdiction and Admissibility”, 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. 343–344 (<https://www.legal-tools.org/doc/e34f81/>).
3. Jürg Lindenmann, “The Rules of Procedure and Evidence on Jurisdiction and Admissibility”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, Berliner Wissenschafts-Verlag, 2nd. ed., 2004, pp. 186–187.
4. Daniel D. Ntanda Nsereko, “Article 18”, 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. 847.

Author: Melinda Taylor.

Rule 58(1)

1. A request or application made under article 19 shall be in writing and contain the basis for it.

Rule 58(1) provides that a request or application pertaining to a question of admissibility or jurisdiction must be presented in writing and should contain the basis for it.

In *Gaddafi*, the Pre-Trial Chamber held that adherence to the minimum requirements set out in Rule 58(1) was a necessary precondition to the postponement by a State of the execution of a surrender request pending the determination of an admissibility challenge under Article 95 of the ICC Statute.¹ In this regard, the Chamber observed that an incomplete challenge which is yet to be “supplemented by further critical submissions [...] in due course” cannot be considered as having been properly made within the terms of Article 19 of the ICC Statute and Rule 58(1) of the Rules of Procedure and Evidence. The challenging State must therefore ensure that its challenge is sufficiently substantiated by evidence at the time of filing and may not expect – as of right – to be afforded an opportunity to make further supplemental submissions at a more advanced stage of the proceedings.²

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

Author: Mohamed Abdou.

¹ ICC, *Prosecutor v. Gaddafi*, 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”, 1 June 2012, ICC-01/11-01/11-163, paras. 29–32 (<https://www.legal-tools.org/doc/ae7c48/>).

² *Gaddafi*, 1 June 2012, paras. 29–32. See also ICC, *Prosecutor v. Muthaura, Kenyatta and Ali*, 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, paras. 1 and 40 (<https://www.legal-tools.org/doc/c21f06/>).

Rule 58(2)

2. When a Chamber receives a request or application raising a challenge or question concerning its jurisdiction or the admissibility of a case in accordance with article 19, paragraph 2 or 3, or is acting on its own motion as provided for in article 19, paragraph 1, it shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings. It may hold a hearing. It may join the challenge or question to a confirmation or a trial proceeding as long as this does not cause undue delay, and in this circumstance shall hear and decide on the challenge or question first.

Rule 58(2) provides that, upon receipt of a jurisdictional or admissibility challenge or when acting *proprio motu*, the Court must decide on the appropriate procedure to be followed to rule on the matter. The pre-trial or trial chamber may decide to hold an oral hearing or join a challenge to a confirmation or a trial proceeding. This wide discretion is justified by the fact that the “participants as well as the subject-matter of proceedings under Article 19 of the Statute can vary considerably” and by the need to adapt the procedure before the Court to the specific circumstances of each case.¹

In exercising its discretion, the Court may either decide to limit its consideration to the evidence submitted at the time of filing of a challenge or authorize supplemental filings and allow the challenging party to submit additional evidence.² An oral hearing may be held to assist the Court in its determination of a challenge to jurisdiction or admissibility (*Muthaura, Kenyatta and Ali*, 30 August 2011, para. 108). The Court’s discretion also extends to determining the appropriate timing and sequencing of its decisions.

¹ ICC, *Prosecutor v. Muthaura, Kenyatta and Ali*, 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, Dissenting Opinion of Judge Anita Usacka, 20 September 2011, ICC-01/09-02/11-342, para. 17 (*‘Muthaura, Kenyatta and Ali, Dissenting Opinion of Judge Anita Usacka, 20 September 2011’*) (<https://www.legal-tools.org/doc/099750/>).

² ICC, *Prosecutor v. Muthaura, Kenyatta and Ali*, 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. 87 (*‘Muthaura, Kenyatta and Ali, 30 August 2011’*) (<https://www.legal-tools.org/doc/c21f06/>).

In *Muthaura et al.*, the Appeals Chamber relied on Rule 58(2) to dismiss Kenya's claim that the Pre-Trial Chamber ought to have decided first on its request for judicial assistance - under Article 95 of the Statute - before issuing its decision on admissibility. The Appeals Chamber observed that "even though the Pre-Trial Chamber could have first decided on the Request for Assistance and then the admissibility Challenge, it was not obliged to so" (para. 121).

Discretion under Rule 58(2) has also been utilized by the Court to grant the suspect procedural rights beyond those provided for in Rule 58(3) of the Rules of Procedure and Evidence. For instance, in *Kony et al.*, the Pre-Trial Chamber appointed a legal representative to represent the general interests of the defence despite the fact that the individual suspects were still at large and had not been surrendered to the Court.³ The Appeals Chamber underlined that such possibility lies within the discretion of the Pre-Trial Chamber. The broad discretion afforded to pre-trial and trial chambers in the conduct of proceedings under Rule 58(2) implies a narrow scope of review on appeal, with the Appeals Chamber interfering only in cases of abuse of discretion.⁴

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

Author: Mohamed Abdou.

³ 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, ICC-02/04-01/05-134, 1 February 2007, ICC-02/04-01/05-134 (<https://www.legal-tools.org/doc/03e64f/>)

⁴ *Muthaura, Kenyatta and Ali*, Dissenting Opinion of Judge Anita Usacka, 20 September 2011, para. 15. See also ICC, *Prosecutor v. Ruto et al.*, 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, para. 89 (<https://www.legal-tools.org/doc/3d65de/>); *Prosecutor v. Gaddafi*, 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, paras. 151–152 (<https://www.legal-tools.org/doc/ef20c7/>).

Rule 58(3) and (4)

3. The Court shall transmit a request or application received under sub-rule 2 to the Prosecutor and to the person referred to in article 19, paragraph 2, who has been surrendered to the Court or who has appeared voluntarily or pursuant to a summons, and shall allow them to submit written observations to the request or application within a period of time determined by the Chamber.

4. The Court shall rule on any challenge or question of jurisdiction first and then on any challenge or question of admissibility.

Rule 58(3) stipulates that the Court must transmit a request or application pertaining to admissibility or jurisdiction to the Prosecutor and to the suspect if he or she has been surrendered to the Court, or has appeared voluntarily or pursuant to a summons to appear. The identified parties must also be given the opportunity to submit written observations within a time limit determined by the Court.

In *Gaddafi*, the Appeals Chamber held that, under Rule 58(3), the suspect is entitled to participate and present written submissions in admissibility proceedings initiated by others, including States. Such automatic right to participate in proceedings does not however extend to all individuals in respect of whom a warrant of arrest or summons to appear has been issued, but is limited to the suspects who have been either surrendered to the Court or who have appeared before it.¹ As regards other suspects, the Court retains discretion whether or not to grant them participatory rights.

Rule 58(4) provides that challenges to jurisdiction shall be determined before challenges to admissibility. The provision reflects the importance of resolving jurisdictional matters as early as possible in the proceedings.²

¹ ICC, *Prosecutor v. Gaddafi and Senussi*, 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”, ICC-01/11-01/11-565, 24 July 2014, para. 146 (<https://www.legal-tools.org/doc/ef20c7/>).

² ICC, *Prosecutor v. Ntaganda*, Judgment on the appeal of Mr Bosco Ntaganda against the “Decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9”, 22 March 2016, ICC-01/04-02/06-1225, para. 18 (<https://www.legal-tools.org/doc/c57bf1/>).

Doctrine:

1. John T. Holmes, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones, *The Rome Statute of the International Criminal Court*, Oxford University Press, 2002, p. 677 (<https://www.legal-tools.org/doc/01addc/>).
2. John T. Holmes, “Jurisdiction and Admissibility”, 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. 345–346 (<https://www.legal-tools.org/doc/e34f81/>).
3. Frederik Harhoff and Phakiso Mochochoko, “International Cooperation and Judicial Assistance”, in Lee and Friman (eds.), 2001, p. 655.

Author: Mohamed Abdou.

Rule 59(1)

1. For the purpose of article 19, paragraph 3, the Registrar shall inform the following of any question or challenge of jurisdiction or admissibility which has arisen pursuant to article 19, paragraphs 1, 2 and 3:

- (a) Those who have referred a situation pursuant to article 13;**
- (b) The victims who have already communicated with the Court in relation to that case or their legal representatives.**

Rule 59(1) provides that in cases where the Court receives a request or a challenge regarding a question of jurisdiction or admissibility, the Registrar shall inform those who have referred a situation to the Court under Article 13 of the ICC Statute namely, the UN Security Council or the referring State, as the case may be, and the victims who have communicated with the Court in relation to the case or their legal representatives.

The Registrar’s notification to the Security Council or the referring State, as well as to the victims who have communicated with the Court, results from the automatic application of the rules. Such notice is to be distinguished from the Court’s discretion to grant further procedural rights to other participants under Rule 58(2). While the referring State is often the same as the State alleged to be conducting or to have conducted proceedings against the accused or the suspected person, this may not always be the case. There may therefore be cases where the Court deems it appropriate to consider submissions from a state other than the referring State. The latter possibility lies however within the Court’s discretion.

In *Yekatom*, the Appeals Chamber expanded the Court’s notice obligation finding that in cases where an accused person asserts that a State having jurisdiction is willing and able to investigate and/or prosecute the case the Court “must invite that State to submit its views”.¹ More generally, it ruled that:

any decision of the Trial Chamber that might imply or express a finding that a State Party has failed to discharge its obligation under the Rome Statute, engages an obligation on the part of

¹ ICC, *The Prosecutor v. Yekatom and Ngaïssona*, Public redacted version of “Judgment on Mr Yekatom’s appeal against Trial Chamber V’s Decision on the Yekatom Defence’s Admissibility Challenge”, 11 February 2021, ICC-01/14-01/18-678-Red, para. 1 (*‘Yekatom and Ngaïssona*, 11 February 2021’) (<https://www.legal-tools.org/doc/mpqdbm/>).

the Trial Chamber to give that State a reasonable opportunity to make submission before that decision is rendered”. The Appeals Chamber further clarified that the “State that is alleged to be exercising its jurisdiction must thus be given a reasonable opportunity to make whatever submissions it sees fit to make that may throw the light of good faith – whenever possible – on its inactivity, with the view to discharging the obligation of exercising jurisdiction that international law places upon it [...] (*Yekatom and Ngaissona*, 11 February 2021, paras. 45 and 47).

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

Author: Mohamed Abdou.

Rule 59(1)(a)

Those who have referred a situation pursuant to article 13;

In *Lubanga*, Pre-Trial Chamber I invited the Democratic Republic of the Congo and the victims in this case to make their submissions.¹

In *Muthaura et al.*, the Pre-Trial Chamber stated that “[t]he language of Article 19(3) of the ICC Statute and Rule 59(1)(a) of the Rules makes clear that a State shall be informed about an admissibility challenge and provided with a summary of its grounds only if the situation was received by way of a State Party referral as opposed to a *proprio motu* request submitted by the Prosecutor as is the present case. This approach suggests that the drafters intended to exclude States Parties from proceedings in a scenario such as the one *sub judice*. Thus, the Republic of Kenya cannot be considered as a participant in the instant proceedings and the argument as presented by the Government of Kenya must fail”.²

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

Author: Mohamed Abdou.

¹ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision inviting the Democratic Republic of the Congo and the Victims in the case to comment on the Proceedings pursuant to Article 19 of the Statute, 24 July 2006, ICC-01/04-01/06-206-tEN (<https://www.legal-tools.org/doc/9d0e36/>).

² ICC, *Prosecutor v. Muthaura et al.*, Pre-Trial Chamber II, Decision on the “Request by the Government of Kenya in respect of the Confirmation of Charges Proceedings”, 20 September 2011, ICC-01/09-02/11-340, para. 9 (<https://www.legal-tools.org/doc/79a169/>).

Rule 59(1)(b)

The victims who have already communicated with the Court in relation to that case or their legal representatives.

Rule 59 provides that the “victims who have communicated with the court” shall be authorized to participate in admissibility proceedings in accordance with Article 19(3). The phrase “victims who have communicated with the court” designates “those who submitted applications to participate in the proceedings in the present case”.¹ In order to ensure the protection of witnesses and victims as well as the proper and expeditious conduct of the admissibility proceedings, the Court usually appoints the Office of Public Counsel for Victims “to represent all those victims who have submitted applications to participate in the [admissibility] proceedings” and to submit written observations on their behalf within a time period determined by the Chamber (*Ruto et.al.*, 4 April 2011, para. 12).

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

Author: Mohamed Abdou

¹ ICC, *Prosecutor v. Ruto et.al.*, Pre-Trial Chamber II, 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. 12 (<https://www.legal-tools.org/doc/c6286c/>).

Rule 59(2)–(3)

2. The Registrar shall provide those referred to in sub-rule 1, in a manner consistent with the duty of the Court regarding the confidentiality of information, the protection of any person and the preservation of evidence, with a summary of the grounds on which the jurisdiction of the Court or the admissibility of the case has been challenged.

3. Those receiving the information, as provided for in sub-rule 1, may make representation in writing to the competent Chamber within such time limit as it considers appropriate.

Rule 59(2) requires that the Registrar’s notifications under Rule 59(1) be made in a manner consistent with the Court’s duty to ensure “the confidentiality of information, the protection of any person and the preservation of evidence”. Notifications must nonetheless include a summary of the grounds for the challenge made against the jurisdiction of the Court or the admissibility of a case. Rule 59(3) stipulates that entitled to receive a notification from the Registrar may make representations in writing to the relevant Chamber within the established time limit.

The scope of disclosure of documents to the victims and the Security Council has varied across the cases. In *Al-Gaddafi*, the Pre-trial Chamber considered that Rule 59(2) “will be satisfied if the Security Council and the [victims’ legal representatives] are notified of the public redacted version of the Article 19 Application, together with its public annexes, which are currently available in the record of the case”.¹ In *Al-Senussi*, the legal representative for victims was “provided with the confidential redacted version of the Admissibility Challenge” while the Security Council was “notified of the public redacted version of the Admissibility Challenge, together with its public annexes thereto”.² In *Gbagbo*, the legal representative of victims was

¹ ICC, *Prosecutor v. Gaddafi and Al-Senussi*, Pre-Trial Chamber I, Decision on the Conduct of the Proceedings Following the “Application on behalf of the Government of Libya pursuant to Article 19 of the Statute”, 4 May 2012, ICC-01/11-01/11-134, para. 14 (<https://www.legal-tools.org/doc/bfc19d/>).

² ICC, *Prosecutor v. Gaddafi and Al-Senussi*, Pre-Trial Chamber I, Decision on the Conduct of the Proceedings Following the “Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute”, 26 April 2013, ICC-01/11-01/11-325, para. 14 (<https://www.legal-tools.org/doc/f2522d/>).

denied access to confidential materials filed by the defence as part of its challenge to the jurisdiction of the Court.³

The Appeals Chamber clarified that Rule 59(2) aims not only to protect witnesses and victims and members of their families, but also other persons “at risk on account of the activities of the Court”.⁴

Doctrine:

1. John T. Holmes, “Jurisdiction and Admissibility”, 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. 345–346 (<https://www.legal-tools.org/doc/e34f81/>).
2. Frederik Harhoff and Phakiso Mochochoko, “International Cooperation and Judicial Assistance”, in Lee and Friman (eds.), 2001, p. 655.

Author: Mohamed Abdou.

³ ICC, *Prosecutor v. Gbagbo*, Pre-Trial Chamber I, Decision on OPCV requests for access to confidential documents in the record of the case, 27 June 2012, ICC-02/11-01/11-166, para. 14 (<https://www.legal-tools.org/doc/9b16b1/>).

⁴ 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. 54 (<https://www.legal-tools.org/doc/a76f99/>).

Rule 60

If a challenge to the jurisdiction of the Court or to the admissibility of a case is made after a confirmation of the charges but before the constitution or designation of the Trial Chamber, it shall be addressed to the Presidency, which shall refer it to the Trial Chamber as soon as the latter is constituted or designated in accordance with rule 130.

Rule 60 addresses the situation where a challenge to admissibility or jurisdiction is made after the confirmation of charges and prior to the designation or constitution of a trial chamber. In such instances, the challenge must be filed with the Presidency which shall refer it to the Trial Chamber upon its constitution or designation.

Pre-Trial Chamber II relied on Rule 60 to find that the defence lacked *locus standi* to challenge admissibility “at the pre-trial level” after the Chamber had issued its decision on the confirmation charges committing the accused for trial.¹ The Chamber determined that the pre-trial stage of a case ends upon either the expiry of the time limits for seeking leave to appeal the confirmation decision or, in cases where such leave is requested, upon rejection of leave to appeal by the pre-trial chamber (*Bemba*, 18 September 2009, para. 14).

Cross-reference:

Article 19.

Doctrine:

1. John T. Holmes, “Jurisdiction and Admissibility”, 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. 345–346 (<https://www.legal-tools.org/doc/e34f81/>).
2. Frederik Harhoff and Phakiso Mochochoko, “International Cooperation and Judicial Assistance”, in Lee and Friman (eds.), 2001, p. 655.

Author: Mohamed Abdou.

¹ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber II, Decision on the “Requête aux fins de divulgation des éléments pertinents relatifs à l’admissibilité”, 18 September 2009, ICC-01/05-01/08-529, para. 14 (*Bemba*, 18 September 2009’) (<https://www.legal-tools.org/doc/4c0321/>).

Rule 61

When the Prosecutor makes application to the competent Chamber in the circumstances provided for in article 19, paragraph 8, rule 57 shall apply.

Rule 61 provides that the Prosecutor may apply to the relevant chamber to seek provisional measures pending a ruling by the Court on a State's challenge to admissibility or jurisdiction. Such provisional measures may be authorized, as set out in Article 19(8) of the Statute, to (i) pursue necessary investigative steps, (ii) to take a statement or testimony from a witness or complete the collection and examination of evidence, (iii) or prevent the absconding of persons. The Prosecutor's request is in line with the procedure provided for in Rule 57 – it should be considered *ex parte* and *in camera*, and decided upon expeditiously by the relevant chamber.

Pre-Trial Chamber I clarified that the filing of an admissibility challenge by a State entails not only the suspension of the ICC investigation, but also enables the State concerned to postpone a request for the arrest and surrender of the defendant pending the determination of the admissibility challenge in accordance with Article 95 of the Statute.¹

Doctrine:

1. John T. Holmes, “Jurisdiction and Admissibility”, 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. 345–346 (<https://www.legal-tools.org/doc/e34f81/>).
2. Frederik Harhoff and Phakiso Mochochoko, “International Cooperation and Judicial Assistance”, in Lee and Friman (eds.), 2001, p. 655.

Author: Mohamed Abdou.

¹ 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, paras. 33–34, 41 (<https://www.legal-tools.org/doc/ae7c48/>).

Rule 62

- 1. If the Prosecutor makes a request under article 19, paragraph 10, he or she shall make the request to the Chamber that made the latest ruling on admissibility. The provisions of rules 58, 59 and 61 shall be applicable.*
- 2. The State or States whose challenge to admissibility under article 19, paragraph 2, provoked the decision of inadmissibility provided for in article 19, paragraph 10, shall be notified of the request of the Prosecutor and shall be given a time limit within which to make representations.*

Under Article 19(10) of the Statute, the Prosecutor may submit a request for review of an admissibility determination if he or she is satisfied “that new facts have risen which negate the basis on which the case had previously been found inadmissible under Article 17” by the Court. Such a request shall be presented to the Chamber that made the latest ruling on admissibility. The State or States which previously challenged admissibility before the Court should be notified of the Prosecutor’s request and be given the opportunity to make representations within a designated time limit.

To date, no application has been made by the Prosecutor pursuant to Article 19(10) of the Statute.

Doctrine:

1. John T. Holmes, “Jurisdiction and Admissibility”, 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. 345–346 (<https://www.legal-tools.org/doc/e34f81/>).
2. Frederik Harhoff and Phakiso Mochochoko, “International Cooperation and Judicial Assistance”, in Lee and Friman (eds.), 2001, p. 655.

Author: Mohamed Abdou.

CHAPTER 4. PROVISIONS RELATING TO VARIOUS STAGES OF THE PRO- CEEDINGS

Section I. Evidence

Rule 63

General provisions relating to evidence

General Remarks:

The ICC Statute has adopted a flexible approach to admissibility. 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. 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 the 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

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).

¹ Preparatory Commission for the International Criminal Court, Proposal submitted by France concerning the Rules of Procedure and Evidence: Part 3, section 1, subsection 2, 22 February 1999, Rule 37(1) (<https://www.legal-tools.org/doc/289d76/>).

² Donald. K. Piragoff and Paula Clarke, "Article 69", 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/>).

Doctrine: For the bibliography, see the final comment on Rule 63.

Author: Mark Klamberg.

Rule 63(1)

1. The rules of evidence set forth in this chapter, together with article 69, shall apply in proceedings before all Chambers.

Rule 63(1) provides that the rules of evidence, together with Article 69, apply in all proceedings before all chambers. Piragoff has pointed out that “this clarifies an ambiguity, as 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’”.¹

Doctrine: For the bibliography, see the final comment on Rule 63.

Author: Mark Klamberg.

¹ Donald K. Piragoff, “Evidence”, 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. 350 (<https://www.legal-tools.org/doc/e34f81/>).

Rule 63(2)

2. A Chamber shall have the authority, in accordance with the discretion described in article 64, paragraph 9, to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69.

Pursuant to Rule 63(2) the chamber has wide discretion to decide on the admissibility, relevance and probative value of evidence. As Piragoff explains Rule 63 is a compromise:

Common law systems tend to exclude or weed out irrelevant evidence, and inherently unreliable types of evidence, as a question of admissibility, while in civil law countries all evidence is generally admitted and its relevancy and probative value are considered freely together with the weight of the evidence. The compromise in the Rome Statute was to eschew generally the technical formalities of the common law system of admissibility of evidence in favour of the flexibility of the civil law system, provided that the Court has discretion to ‘rule on the relevance or admissibility of any evidence.’ Therefore the Court can either: 1) rule first whether evidence possess sufficient relevance to justify its admissibility, taking into account a number of factors mentioned in article 69, paragraph 4, and evaluate subsequently the weight of any admitted evidence as part of the evaluation process; or instead 2) admit evidence and consider relevance, admissibility and weight together as part of the evaluation of the admitted evidence, taking into account the same factors [...] Depending on which method of analytical reasoning a Chamber chose to implement in a particular situation, reliability may or may not be pertinent to determining relevance or admissibility.¹

Similarly, the *Bemba* Appeals Chamber has stated that the Trial Chamber has a choice. It may rule on the relevance and/or admissibility of each item of evidence when it is submitted, and then determine the weight to be attached to the evidence at the end of the trial. In that case, an item will be admitted into evidence only if the Chamber rules that it is relevant and/or admissible in terms of Article 69(4), taking into account “the probative value

¹ Donald K. Piragoff, “Evidence”, 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. 351 (<https://www.legal-tools.org/doc/e34f81/>).

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”. Alternatively, it may defer its consideration of these criteria until the end of the proceedings, making it part of its assessment of the evidence when it is evaluating the guilt or innocence of the accused person.²

Which is the more suitable approach? If the method of evaluating evidence involves the comparison and elimination of alternative narratives, a reasonable conclusion is to focus on relevance when admitting evidence and add assessment of reliability during the final analysis of weight at the end of the trial. However, this approach may be nuanced. For example, it is reasonable in certain situations that tainted evidence is excluded. An assessment of prejudice may be an additional component when admissibility is determined. In addition, special rules apply under Article 69(7) to evidence obtained by means of violations of the ICC Statute or human rights.³

Doctrine: For the bibliography, see the final comment on Rule 63.

Author: Mark Klamberg.

² 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. 37 (<https://www.legal-tools.org/doc/7b62af/>).

³ Mark Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Martinus Nijhoff Publishers, Leiden, 2013, p. 357 (<https://www.legal-tools.org/doc/0d524b/>).

Rule 63(3)

3. A Chamber shall rule on an application of a party or on its own motion, made under article 64, subparagraph 9 (a), concerning admissibility when it is based on the grounds set out in article 69, paragraph 7.

Article 69(4) grants the Chamber discretion, on an application of a party or on its own motion, to rule on admissibility or relevance of evidence. However, sub-rule 3 requires a ruling of the Chamber on exclusion of evidence under Article 69(7) which concerns evidence obtained by means of a violation of the ICC Statute or internationally recognized human rights.

Doctrine: For the bibliography, see the final comment on Rule 63.

Author: Mark Klamberg.

Rule 63(4)

4. Without prejudice to article 66, paragraph 3, a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence.

Sub-rule 4 deals with corroborating evidence, evidence that strengthens or confirms what other evidence shows, especially that which needs support. It may be relevant to issues concerning admissibility as well as evaluation of evidence. Civil law systems have applied the principle *unus testis, nullus testis* (one witness is no witness) whereby corroboration of evidence is required if it is to be admitted. However, this is no longer a feature of modern civil law systems. Some domestic systems require that the evidence of certain witnesses be corroborated in order to convict the accused. In this sense it is not an admissibility rule, but rather concerns evaluation of evidence.¹

Sub-rule 4 provides that as a general rule an ICC chamber shall not impose a legal requirement on corroboration. The question of whether to include a rule on corroboration in cases of sexual violence was subject to considerable discussion during the work of the Preparatory Commission for the International Criminal Court. Some participants opposed an inclusion on the basis that the general principle in Article 69(4) resolved the issue satisfactorily. Those in favour of such a rule pointed out the problem that in many legal systems victims of sexual violence were often treated inherently as suspects and their testimony had to be corroborated by other evidence. General rules were used in a discriminatory fashion by judges in some national legal systems. The purpose of Rule 63(4) is to prevent such stereotypical attitudes and reasoning.

Doctrine: For the bibliography, see the final comment on Rule 63.

Author: Mark Klamberg.

¹ Patricia Viseur Sellers, “Rule 89(C) and (D): At Odds or Overlapping with Rule 96 and Rule 95”, in Richard May *et al.* (eds.), *Essays on ICTY Procedure and Evidence: In Honour of Gabrielle Kirk McDonald*, Kluwer Law International, The Hague, 2001, p. 280 (<https://www.legal-tools.org/doc/6ccfc6/>).

Rule 63(5)

5. The Chambers shall not apply national laws governing evidence, other than in accordance with article 21

The reference to Article 21 in sub-rule 5 allows the Court to apply general principles of law derived from national laws of legal systems of the World. In *Lubanga* the Pre-Trial Chamber observed “that under Article 21(1)(c) of the ICC Statute, where Articles 21(1)(a) and (b) do not apply, it shall apply general principles of law derived by the Court from national laws. Having said that, the Chamber considers that the Court is not bound by the decisions of national courts on evidentiary matters”.¹

Cross-references:

Articles 64(9) and 69(4), (7) and (8)

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, pp. 447–448, 507, 518 (<https://www.legal-tools.org/doc/995606/>).
2. Donald. K. Piragoff, “Evidence”, 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. 350–357 (<https://www.legal-tools.org/doc/e34f81/>).
3. Mark Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Martinus Nijhoff Publishers, Leiden, 2013, pp. 179–182, 335–357 (<https://www.legal-tools.org/doc/0d524b/>).
4. Gilbert Bitti, “Article 64”, 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. 1619 (<https://www.legal-tools.org/doc/040751/>).
5. Donald. K. Piragoff and Paula Clarke, “Article 69”, in Triffterer and Ambos (eds.), 2016, pp. 1735–1741, 1745–1750.

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/>).

6. Patricia Viseur Sellers, “Rule 89(C) and (D): At Odds or Overlapping with Rule 96 and Rule 95”, Richard May *et al.* (eds.), *Essays on ICTY Procedure and Evidence: In Honour of Gabrielle Kirk McDonald*, Kluwer Law International, The Hague, 2001, p. 280 (<https://www.legal-tools.org/doc/6ccfc6/>).

Author: Mark Klamberg.

Rule 64

- 1. An issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to a Chamber. Exceptionally, when those issues were not known at the time when the evidence was submitted, it may be raised immediately after the issue has become known. The Chamber may request that the issue be raised in writing. The written motion shall be communicated by the Court to all those who participate in the proceedings, unless otherwise decided by the Court.**
- 2. A Chamber shall give reasons for any rulings it makes on evidentiary matters. These reasons shall be placed in the record of the proceedings if they have not already been incorporated into the record during the course of the proceedings in accordance with article 64, paragraph 10, and rule 137, sub-rule 1.**
- 3. Evidence ruled irrelevant or inadmissible shall not be considered by the Chamber.**

Rule 64(1) provides that issues relating to relevance or admissibility must be raised at the time when the evidence is submitted to a Chamber. Exceptionally, when those issues were not known at the time when the evidence was submitted, it may be raised immediately after the issue has become known.

The ‘submission’ of evidence within the meaning of Article 74(2) and Rule 64(1) should be distinguished from the mere filing of a list of evidence with the respective material.¹ The *Bemba* Appeals Chamber has in this regard stated that “evidence is ‘submitted’ if it is presented to the Trial Chamber by the parties on their own initiative or pursuant to a request by the Trial Chamber for the purpose of proving or disproving the facts in issue before the Chamber. [...] the submission of evidence must conform to the directions of the Presiding Judge or the manner agreed upon by the parties”.²

In *Lubanga*, there was a dispute on the numbering of defence exhibits and there was disagreement within Trial Chamber I whether a previous order

¹ Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. 456 (<https://www.legal-tools.org/doc/995606/>).

² 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. 43 (<https://www.legal-tools.org/doc/7b62af/>).

could be reconsidered with reference to Rule 64.³ The Majority of the Trial Chamber held that Rule 64 did not apply because its purpose is “to regulate substantive admissibility challenges” not administrative issues (*Lubanga*, 30 March 2011, paras. 10, 13 and 19). Instead the majority of Trial Chamber I corrected its order, which included the removal of documents previously admitted, with reference to (i) jurisprudence of Trial Chamber III, (ii) jurisprudence of the ad hoc tribunals providing that Trial Chambers have the inherent power to reconsider a previous decision, and (iii) the established position in many common law national legal systems that a Court can depart from earlier decisions that would usually be binding (paras. 14–18). Judge Blattman dissented and held that Rule 64(1), read in the context of the particular subsection of the Rules in which it is contained, and in light of its purpose, allows for the triggering of a new decision by the Chamber (*Lubanga*, 30 March 2011, Separate Opinion of Judge René Blattmann, paras. 21–22).

The last moment to raise issues relating to relevance or admissibility is when the evidence is presented, but it can also be done at an earlier stage.⁴

The ruling of a Pre-Trial Chamber is not binding upon a Trial Chamber. The Pre-Trial Chamber in *Lubanga* emphasized that “the admission of evidence [at the pre-trial stage] is without prejudice to the Trial Chamber’s exercise of its functions and powers to make a final determination as to the admissibility and probative value” of any evidence.⁵ Thus, the Pre-Trial Chamber may reassess Pre-Trial Chamber rulings on admissibility and relevance of evidence tendered at the pretrial stage by the parties.

Cross-reference:

Article 69(4).

³ ICC, *Prosecutor v. Lubanga*, Decision on the defence request to reconsider the “Order on numbering of evidence” of 12 May 2010, 30 March 2011, ICC-01/04-01/06-2705 (<https://www.legal-tools.org/doc/998892/>).

⁴ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on disclosure by the defence, 20 March 2008, ICC-01/04-01/06-1235, para. 36 (<https://www.legal-tools.org/doc/d372fb/>); see also *Prosecutor v. Lubanga*, Trial Chamber I, Decision on the admissibility of four documents, 13 June 2008, ICC-01/04-01/06-1399, para. 18 (<https://www.legal-tools.org/doc/2855e0/>).

⁵ 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. 90 (<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. 71 (<https://www.legal-tools.org/doc/67a9ec/>).

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. 456 (<https://www.legal-tools.org/doc/995606/>).
2. Mark Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Martinus Nijhoff Publishers, Leiden, 2013, pp. 340, 356, 359–362 (<https://www.legal-tools.org/doc/0d524b/>).

Author: Mark Klamberg.

Rule 65

- 1. A witness who appears before the Court is compellable by the Court to provide testimony, unless otherwise provided for in the Statute and the Rules, in particular rules 73, 74 and 75.*
- 2. Rule 171 applies to a witness appearing before the Court who is compellable to provide testimony under sub-rule 1.*

Rule 65 provides that the Court has the authority to compel a witness who a witness who appears before the Court to provide testimony, which should be distinguished from the authority to compel the attendance of a witness. The latter issue is regulated in Article 64(6)(b).

The placement of Rule 65 in Chapter 4 of the Rules of Procedure and Evidence (Provisions relating to various stages of the proceedings) indicates the provision applies to all stages of the proceedings, not only the trial stage.

In *Ruto et al.*, 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 co-operation. 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”.¹

Cross-references:

Articles 64(6)(b) and 69(1).

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, pp. 468, 629 (<https://www.legal-tools.org/doc/995606/>).
2. Claus Kreß, “Witnesses in Proceedings Before the International Criminal Court”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner

¹ ICC, *Prosecutor v. William Samoei Ruto and Joshua Arap 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/>).

- Wissenschafts-Verlag, 2004, pp. 317–318, 323–325 (<https://www.legal-tools.org/doc/95e5f9/>).
3. Håkan Friman, “State Cooperation with the International Courts and Tribunals”, in Robert Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, 3rd. ed., Cambridge University Press, 2014, p. 522 (<https://www.legal-tools.org/doc/9ab0aa/>).
 4. Mark Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Martinus Nijhoff Publishers, Leiden, 2013, p. 245 (<https://www.legal-tools.org/doc/0d524b/>).
 5. Donald. K. Piragoff, “Evidence”, 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. 399–400 (<https://www.legal-tools.org/doc/e34f81/>).
 6. Göran Sluiter, *International Criminal Adjudication and the Collection of Evidence: Obligations of States*, Intersentia, Antwerpen/Oxford/New York, 2002, pp. 254–255 (<https://www.legal-tools.org/doc/86d97b/>).

Author: Mark Klamberg.

Rule 66

- 1. Except as described in sub-rule 2, every witness shall, in accordance with article 69, paragraph 1, make the following solemn undertaking before testifying: “I solemnly declare that I will speak the truth, the whole truth and nothing but the truth.”*
- 2. A person under the age of 18 or a person whose judgement has been impaired and who, in the opinion of the Chamber, 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.*
- 3. Before testifying, the witness shall be informed of the offence defined in article 70, paragraph 1 (a).*

There was little discussion during the negotiations on Article 69(1) and the obligation of witnesses to give an undertaking as to the truthfulness of the evidence to be given by that witness. The form of the undertaking was left for the Rules of Procedure and Evidence.¹

The placement of Rule 66 in Chapter 4 of the Rules of Procedure and Evidence (Provisions relating to various stages of the proceedings) indicates that the provision applies to all stages of the proceedings, not only to the trial stage.

A victim is qualified as a witness and as such must take the declaration under Rule 66(1).²

During the drafting of sub-rule 2 there was agreement that the Court would have discretion to allow children or persons with an impairment to testify absent an undertaking.

¹ Donald. K. Piragoff and Paula Clarke, “Article 69”, 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. 1713–1714 (<https://www.legal-tools.org/doc/040751/>).

² Claus Kreß, “Witnesses in Proceedings Before the International Criminal Court”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 320 (<https://www.legal-tools.org/doc/95e5f9/>).

Cross-references:

Articles 69(1) and 70.

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. 468 (<https://www.legal-tools.org/doc/995606/>).
2. Claus Krefß, “Witnesses in Proceedings Before the International Criminal Court”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 317–318, 320–321 (<https://www.legal-tools.org/doc/95e5f9/>).
3. Donald. K. Piragoff and Paula Clarke, “Article 69”, 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. 1713–1714 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Rule 67

- 1. In accordance with article 69, paragraph 2, a Chamber may allow a witness to give *viva voce* (oral) testimony before the Chamber by means of audio or video technology, provided that such technology permits the witness to be examined by the Prosecutor, the defence, and by the Chamber itself, at the time that the witness so testifies.**
- 2. The examination of a witness under this rule shall be conducted in accordance with the relevant rules of this chapter.**
- 3. The Chamber, with the assistance of the Registry, shall ensure that the venue chosen for the conduct of the audio or video-link testimony is conducive to the giving of truthful and open testimony and to the safety, physical and psychological well-being, dignity and privacy of the witness.**

Article 69(2) of the ICC Statute clearly favours live, in-court testimony. However, the same provision permits the reception of evidence by means of audio or video technology. 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 *Katanga and Ngudjolo*, the Trial Chamber reminded:

all parties that, according to rule 67 of the Rules, live testimony by means of audio or video-link technology is subject to the authorisation of the Chamber and the precondition that the technology permits the witness to be examined by the parties and the Chamber at the same time the witness testifies. The Chamber will rule on any specific request for remote testimony on a case-by-case basis and order such measures as it deems necessary to ensure the rights of the accused to examine witnesses against them under the same conditions as the Prosecution, in accordance with article 67(1)(e).¹

The conditions and guidelines established by the ICTY may provide the ICC with important guidance.² However, in *Lubanga*, the ICC Trial

¹ ICC, *Katanga and Ngudjolo*, Trial Chamber II, Decision on a number of procedural issues raised by the Registry, 14 May 2009, ICC-01/04-01/07-1134, para. 36 (<https://www.legal-tools.org/doc/a42323/>).

² Donald. K. Piragoff and Paula Clarke, "Article 69", 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. 1728 (<https://www.legal-tools.org/doc/040751/>).

Chamber stressed in relation to a request for a witness to evidence via video-link that its “approach to the issue of witness protection is not necessarily the same as that taken by other international tribunals. Although it is useful to investigate the jurisprudence from other courts, it is in no sense binding”.³ This conforms with the principle that precedents from other courts are neither binding nor a distinct source of law (see Article 21). Instead the Trial Chamber observed that it had a broad discretion under Rule 67 and made its determination by balancing the objectives of fair trial and protection of victims (*Lubanga*, 10 February 2010, para. 15).

Cross-reference:

Article 69(1).

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. 468 (<https://www.legal-tools.org/doc/995606/>).
2. Mark Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Martinus Nijhoff Publishers, Leiden, 2013, pp. 461–462 (<https://www.legal-tools.org/doc/0d524b/>).
3. Donald. K. Piragoff and Paula Clarke, “Article 69”, 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. 1727–1728 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

³ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Redacted Decision on the defence request for a witness to give evidence via video-link, 10 February 2010, ICC-01/04-01/06-2285-Red, para. 14 (<https://www.legal-tools.org/doc/fd3f00/>).

Rule 68(1)

Rule 68⁴

Prior Recorded Testimony

1. *When the Pre-Trial Chamber has not taken measures under article 56, the Trial Chamber may, in accordance with article 69, paragraphs 2 and 4, and after hearing the parties, allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that this would not be prejudicial to or inconsistent with the rights of the accused and that the requirements of one or more of the following sub-rules are met.*

[...]

⁴ As amended by resolution ICC-ASP/17/Res.2.

General remarks:

Rule 68 concerns prior recorded testimony. Article 69(2) of the ICC Statute clearly favours live, in-court testimony. While Rule 67 that concerns testimony via live video-link still respects the principle of orality, Rule 68 involves the replacement of oral by written testimony.

In comparison, ICTY, ICTR and SCSL RPE Rule 71 provide for the modalities of receiving testimony through deposition. There is no specific provision on depositions in the ICC Statute and RPE. Instead, depositions may be covered by Rule 68 on prior-recorded testimony. However, for such evidence to be admissible, the requirements in ICC Rule 68 must be respected.¹

Rule 68 was substantially amended by the Assembly of States Parties on 27 November 2013.² The old Rule 68 was restrictive on the admissibility of prior recorded testimony, it allowed prior recorded testimony:

- (a) If the witness who gave the previously recorded testimony is not present before the Trial Chamber, both the Prosecutor and the defence had the opportunity to examine the witness during the recording; or
- (b) If the witness who gave the previously recorded testimony is present before the Trial Chamber, he or she

¹ Mark Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Martinus Nijhoff Publishers, Leiden, 2013, pp. 382 and 462 (<https://www.legal-tools.org/doc/0d524b/>).

² ICC ASP, Amendments to the Rules of Procedure and Evidence, ICC-ASP/12/Res. 7, 27 November 2013 (<https://www.legal-tools.org/doc/e50839/>).

does not object to the submission of the previously recorded testimony and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings.

This was similar to ICTY Rule 92 *ter* which allows evidence that goes to proof of the acts and conduct of the accused as charged in the indictment. The extensive amendment that has created present rule is more permitting and allows prior recorded testimony (i) when both the Prosecutor and the defence had the opportunity to examine the witness during the recording; (ii) the prior recorded testimony goes to proof of a matter other than the acts and conduct of the accused; (iii) the prior recorded testimony comes from a person who has subsequently died; or (iv) the prior recorded testimony comes from a person who has been subjected to interference. One of the reasons invoked for this amendment was to improve the efficiency of the proceedings.³

In *Ruto and Sang* the defence argued that the use of the amended rule in that case violated the non-retroactivity principle, an argument rejected by the Trial Chamber.⁴ Kenya subsequently raised the issues at the 2015 Assembly of State Parties meeting, Kenya requested “that the legislative intent of Rule 68 be placed before the Assembly for discussion and that a decision of the Assembly be taken to reaffirm the non-retroactive application of the rule to situations commenced before the 27 November 2013”.⁵ Kenya’s proposed text neither rejected outright nor adopted a proper ASP resolution (Ambos, 2016, p. 499). Ultimately, the Appeals Chamber reversed the Trial Chamber decision, stating that:

article 51(4) of the Statute concerns amendments to the Rules, which relate to proceedings before the Court, including the admission of evidence. The Appeals Chamber therefore finds that ‘detriment’ within the meaning of article 51(4) of the Statute is disadvantage, loss, damage or harm to the accused including, but not limited to, the rights of that person. [...] the date of the start of the trial is the appropriate point at which to determine

³ Yvonne McDermott, *Fairness in International Criminal Trials*, Oxford University Press, 2016, pp. 89–92.

⁴ ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V(a), Decision on Prosecution Request for Admission of Prior Recorded Testimony, 19 August 2015, ICC-01/09-01/11-1938-Corr-Red2, paras. 23–26 (<https://www.legal-tools.org/doc/d18042/>).

⁵ ICC ASP, List of supplementary items requested for inclusion in the agenda of the fourteenth session of the Assembly, Addendum 2, ICC-ASP/14/35/Add.2, 6 November 2015, p. 1.

“retroactivity”. The regime governing the introduction of prior recorded testimony at the commencement of the trial was changed during the course of the trial by reason of the amendment to rule 68 of the Rules Accordingly, the Appeals Chamber finds that amended rule 68 was applied retroactively in the ongoing trial proceedings within the meaning of article 51(4) of the Statute.⁶

Doctrine: For the bibliography, see the final comment on Rule 68.

Author: Mark Klamberg.

⁶ ICC, *Prosecutor v. Ruto and Sang*, Appeals Chamber, Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled “Decision on Prosecution Request for Admission of Prior Recorded Testimony”, 12 February 2016, ICC-01/09-01/11-2024, paras. 78–81 (<https://www.legal-tools.org/doc/5e0d03/>).

Rule 68(2)(a)

2. If the witness who gave the previously recorded testimony is not present before the Trial Chamber, the Chamber may allow the introduction of that previously recorded testimony in any one of the following instances:

(a) Both the Prosecutor and the defence had the opportunity to examine the witness during the recording.

Sub-rule 2(a) concerns the admissibility of prior recorded testimony when both the Prosecutor and the defence had the opportunity to examine the witness during the recording. As such, it corresponds to the old version of Rule 68(a) and thus the case law Before the amendment of Rule 68 remains relevant.

In *Lubanga*, the Prosecution applied for the admission of prior recorded statements of two witnesses in lieu of oral examination by the prosecution.¹ The Trial Chamber considered that the witnesses will be present in Court for examination by the defence and the Chamber, nothing indicated that the background evidence provided by the witnesses is materially in dispute and their testimony was not central to the core issues in the case. Thus, in interest of saving court time the Trial Chamber admitted the prior recorded statements under Rule 68(b)

In *Bemba*, Trial Chamber III stated that it may “depart from the general principle of giving evidence in person and explore the possibility of having evidence submitted in writing, as long as it is not prejudicial to, or inconsistent with, the rights of the accused. However, the introduction of such prior-recorded testimony remains an option which should be adopted only in specific and exceptional circumstances”.² The Chamber rejected the prosecutor’s application and among other arguments stated that it was not convinced that the prosecution had shown exceptional circumstances justifying

¹ ICC, *Prosecutor v. Lubanga*, 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, paras. 7 and 24 (<https://www.legal-tools.org/doc/5e9498/>).

² ICC, *Prosecutor v. Bemba*, Decision on the “Prosecution Application for Leave to Submit in Writing Prior-Recorded Testimonies by CAR-OTP-WWWW-0032, CAR-OTP-WWWW-0080, and CAR-OTP-WWWW-0108”, 16 September 2010, ICC-01/05-01/08-886, para. 7 (<https://www.legal-tools.org/doc/2abdab/>).

any derogation from the general principle of giving viva voce evidence (*Bemba*, 16 September 2010, para. 15).

Doctrine: For the bibliography, see the final comment on Rule 68.

Author: Mark Klamberg.

Rule 68(2)(b)

(b) The prior recorded testimony goes to proof of a matter other than the acts and conduct of the accused.

In such a case:

(i) In determining whether introduction of prior recorded testimony falling under sub-rule (b) may be allowed, the Chamber shall consider, inter alia, whether the prior recorded testimony in question:

- relates to issues that are not materially in dispute;*
- is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts;*
- relates to background information;*
- is such that the interests of justice are best served by its introduction; and*
- has sufficient indicia of reliability.*

(ii) Prior recorded testimony falling under sub-rule (b) may only be introduced if it is accompanied by a declaration by the testifying person that the contents of the prior recorded testimony are true and correct to the best of that person's knowledge and belief. Accompanying declarations may not contain any new information and must be made reasonably close in time to when the prior recorded testimony is being submitted.

(iii) Accompanying declarations must be witnessed by a person authorized to witness such a declaration by the relevant Chamber or in accordance with the law and procedure of a State. The person witnessing the declaration must verify in writing the date and place of the declaration, and that the person making the declaration:

- is the person identified in the prior recorded testimony;*
- assures that he or she is making the declaration voluntarily and without undue influence;*
- states that the contents of the prior recorded testimony are, to the best of that person's knowledge and belief, true and correct; and*
- was informed that if the contents of the prior recorded testimony are not true then he or she may be subject to proceedings for having given false testimony.*

Sub-rule 2(b) concerns prior recorded testimony that goes to proof of a matter other than the acts and conduct of the accused and as such is similar to ICTY Rule 92 *bis*. Thus, ICTY case law under the later rule may provide guidance for the ICC.

Doctrine: For the bibliography, see the final comment on Rule 68.

Author: Mark Klamberg.

Rule 68(2)(c)

(c) The prior recorded testimony comes from a person who has subsequently died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally. In such a case:

(i) Prior recorded testimony falling under sub-rule (c) may only be introduced if the Chamber is satisfied that the person is unavailable as set out above, that the necessity of measures under article 56 could not be anticipated, and that the prior recorded testimony has sufficient indicia of reliability.

(ii) The fact that the prior recorded testimony goes to proof of acts and conduct of an accused may be a factor against its introduction, or part of it.

Sub-rule 2(c) concerns prior recorded testimony that comes from a person who has subsequently died and as such is similar to ICTY Rule 92 *quater*. Thus, ICTY case law under the latter rule may provide guidance for the ICC.

Doctrine: For the bibliography, see the final comment on Rule 68.

Author: Mark Klamberg.

Rule 68(2)(d)

(d) The prior recorded testimony comes from a person who has been subjected to interference. In such a case:

(i) Prior recorded testimony falling under sub-rule (d) may only be introduced if the Chamber is satisfied that:

- the person has failed to attend as a witness or, having attended, has failed to give evidence with respect to a material aspect included in his or her prior recorded testimony;*
 - the failure of the person to attend or to give evidence has been materially influenced by improper interference, including threats, intimidation, or coercion;*
 - reasonable efforts have been made to secure the attendance of the person as a witness or, if in attendance, to secure from the witness all material facts known to the witness;*
 - the interests of justice are best served by the prior recorded testimony being introduced;*
- and*
- the prior recorded testimony has sufficient indicia of reliability.*

(ii) For the purposes of sub-rule (d)(i), an improper interference may relate, inter alia, to the physical, psychological, economic or other interests of the person.

(iii) When prior recorded testimony submitted under sub-rule (d)(i) relates to completed proceedings for offences defined in article 70, the Chamber may consider adjudicated facts from these proceedings in its assessment.

(iv) The fact that the prior recorded testimony goes to proof of acts and conduct of an accused may be a factor against its introduction, or part of it.

Sub-rule 2(d) concerns prior recorded testimony from a person who has been subjected to interference and as such is similar to ICTY Rule 92 *quinquies*. Thus, ICTY case law under the later rule may provide guidance for the ICC.

The Trial Chamber in *Ruto and Sang* noted in relation to sub-rule 2(d)(i) that “appearing and refusing to testify at all would satisfy” the requirement “failed to attend as a witness or, having attended, has failed to give evidence with respect to a material aspect included in his or her prior

recorded testimony”.¹ Moreover, it stated that “the requirement can be satisfied by persons who appear and either do not testify at all or recant fundamental aspects of their prior recorded testimony” (*Ruto and Sang*, 19 August 2015, para. 41).

Doctrine: For the bibliography, see the final comment on Rule 68.

Author: Mark Klamberg.

¹ ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V(a), Decision on Prosecution Request for Admission of Prior Recorded Testimony, 19 August 2015, ICC-01/09-01/11-1938-Corr-Red2, para. 40 (<https://www.legal-tools.org/doc/d18042/>).

Rule 68(3)

3. If the witness who gave the previously recorded testimony is present before the Trial Chamber, the Chamber may allow the introduction of that previously recorded testimony if he or she does not object to the submission of the previously recorded testimony and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings.

Sub-rule 3 concerns the admissibility of prior recorded testimony when the witness who gave the previously recorded testimony is present before the Trial Chamber. As such, it corresponds to the old version of Rule 68(b) and thus the case law before the amendment of Rule 68 remains relevant.¹

In *Bemba*, Order on the procedure relating to the submission of evidence, 31 May 2011, the Chamber considered when a party intends to submit as evidence the statement(s) of a witness called to testify. The Majority of the Chamber, Judge Ozaki dissenting, favours the submission into evidence of the entirety of the witnesses' statement(s), as opposed to excerpts, when considered necessary for the determination of the truth in accordance with Article 69(3) of the Statute and to ensure that information is not taken out of context, and consistent with the relevant provisions of the Statute and the Rules (*Ruto and Sang*, 19 August 2015, para. 11).

In *Katanga and Ngudjolo*, a motion to tender into evidence the excerpts of the statement was put by the Defence of Ngudjolo Chui after final questioning at the end of the testimony.² In the Chamber's view, the requirements of Rule 68(b) (now Rule 68(3)) were not fulfilled and the request was rejected.

Cross-reference:

Article 69(2).

¹ ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V(a), Decision on Prosecution Request for Admission of Prior Recorded Testimony, 19 August 2015, ICC-01/09-01/11-1938-Corr-Red2, para. 10 (<https://www.legal-tools.org/doc/d18042/>).

² ICC, *Katanga and Ngudjolo*, Decision on the Request of Defence for Mathieu Ngudjolo to admit into evidence extracts from the statement DRC-D02-0001-0750 of Witness DRC-D02-P-0148, 30 June 2011, ICC-01/04-01/07-3046, para. 7 (<https://www.legal-tools.org/doc/2177e7/>).

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, pp. 392, 465, 471, 488, 494–499, 505, 662 (<https://www.legal-tools.org/doc/995606/>).
2. Mark Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Martinus Nijhoff Publishers, Leiden, 2013, pp. 379, 382, 389, 411, 462, 476 (<https://www.legal-tools.org/doc/0d524b/>).
3. Claus Krefß, “Witnesses in Proceedings Before the International Criminal Court”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 362–363 (<https://www.legal-tools.org/doc/95e5f9/>).
4. Yvonne McDermott, *Fairness in International Criminal Trials*, Oxford University Press, 2016, pp. 89–92.
5. Donald. K. Piragoff and Paula Clarke, “Article 69”, 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. 1729 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Rule 69

The Prosecutor and the defence may agree that an alleged fact, which is contained in the charges, the contents of a document, the expected testimony of a witness or other evidence is not contested and, accordingly, a Chamber may consider such alleged fact as being proven, unless the Chamber is of the opinion that a more complete presentation of the alleged facts is required in the interests of justice, in particular the interests of the victims.

Rule 69 provides that the prosecutor and the defence may agree that an alleged fact contained in the charges, the contents of a document, the expected testimony of a witness or other evidence, is not contested. Accordingly, a Chamber may consider such alleged fact as proven, unless it opines that a more complete presentation of the alleged facts is required in the interests of justice, in particular the interests of the victims. This may be done in order to avoid witnesses being needlessly brought to Court when their evidence is not in dispute.¹ In addition, the Trial Chamber may order evidence to be introduced under Rule 69 as regards agreed facts, ICC Regulation 54(n).

There are several examples where Rule 69 has been used. In *Katanga and Ngudjolo*, the parties reached agreement about seven facts as to evidence which the Trial Chamber took note of.² In *Banda and Jerbo*, the Pre-Trial Chamber considered, in accordance with Rule 69, five facts as proven.³ In *Banda and Jerbo*, the Parties reached an agreement which covered a significant part of the factual allegations contained in the charges.⁴ The parties submitted that the accused persons would contest only the following three issues:

¹ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on agreements between the parties, 20 February 2008, ICC-01/04-01/06-1179, para. 11 (<https://www.legal-tools.org/doc/112e4a/>).

² ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, Decision on Agreements as to Evidence, 3 February 2011, ICC-01/04-01/07-2681 (<https://www.legal-tools.org/doc/b74a4c/>).

³ ICC, *Prosecutor v. Banda and Jerbo*, Pre-Trial Chamber I, Corrigendum of the “Decision on the Confirmation of Charges”, 8 March 2011, ICC-02/05-03/09-121-Corr-Red, para. 24 (<https://www.legal-tools.org/doc/5ac9eb/>).

⁴ ICC, *Prosecutor v. Banda and Jerbo*, Pre-Trial Chamber IV, Decision on the Joint Submission regarding the contested issues and the agreed facts, 28 September 2011, ICC-02/05-03/09-227, paras. 23–24 and 46 (<https://www.legal-tools.org/doc/b3f7b1/>).

1. Whether the attack on the MGS Haskanita on 29 September 2007 was unlawful;
2. If the attack is deemed unlawful, whether the Accused persons were aware of the factual circumstances that established the unlawful nature of the attack; and
3. Whether the African Union Mission in Sudan (AMIS) was a peace-keeping mission in accordance with the Charter of the United Nations.

The Trial Chamber considered that the agreement had the procedural effect of narrowing the scope of the issues to be addressed by the parties (and the participants) at trial. It also emphasized that it remained within its discretion to request additional evidence and/or submissions on the alleged facts if required in the interests of justice. It decided that: (i) the trial will proceed only on the basis of the contested issues; and (ii) the parties shall not present evidence or make submissions other than on the issues that are contested. The decision is remarkable because it has the consequence that the accused admit that they planned, designed, ordered, provided the troops and personally participated in attack at the MGS Haskanita that involved the death of 12 people, all personnel of AMIS, and at least 8 more sustained severe injuries. It is clearly an example where adversarial and inquisitorial elements are mixed.

Cross-references:

Article 69(3) and Regulation 54(n).

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, pp. 346, 432, 440, 506 (<https://www.legal-tools.org/doc/995606/>).
2. Mark Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Martinus Nijhoff Publishers, Leiden, 2013, pp. 389, 478, 479–480 (<https://www.legal-tools.org/doc/0d524b/>).
3. Donald. K. Piragoff and Paula Clarke, “Article 69”, 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. 1726–1727 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Rule 70

In cases of sexual violence, the Court shall be guided by and, where appropriate, apply the following principles:

General Remarks:

The ICC Statute, the Rules of Procedure and the Elements of Crimes all recognize the rights and interests of victims of sexual violence. Rules concerning the admissibility of evidence are interrelated to substantive criminal law, including definitions of crimes and of exculpatory evidence. This is obvious when it comes to a crime of sexual violence where evidence of lack of consent or evidence of consent may be presented. In some domestic systems lack of consent by the victims is a requirement in the elements of the definition of the crime. In other systems, consent is considered to be a defence.¹ Evidence in cases concerning sexual crimes is regulated in Rules 70–72.

Rule 70 applies to cases of “sexual violence”, which is a broader term than sexual assault in ICTY and ICTR Rules 96 (Piragoff, 2004, p. 399). It provides certain principles of evidence that should be applied in cases of sexual violence

Doctrine: For the bibliography, see the final comment on Rule 70.

Author: Mark Klamberg.

¹ Donald. K. Piragoff, “Procedural Justice Related to Crimes of Sexual Violence”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 386, 394 (<https://www.legal-tools.org/doc/95e5f9/>).

Rule 70(a)

(a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;

Sub-rule (a) concerns a situation in where the victim had a pre-existing capacity to consent but force, coercion or a coercive environment damaged it. The reference in sub-rule (a) to force, coercion and coercive environment is similar to ICTY and ICTR Rules 96(ii)(a). During the negotiations of the RPE some delegations opposed this rule, arguing that not all sexual activity during periods of occupation by foreign forces is non-consensual (Piragoff, 2001, pp. 382–383).¹ The principle may be understood to relate to admissibility in the event that evidence is admitted the principle may also guide the Chamber in its evaluation of the relevance, value and weight (Piragoff, 2001, pp. 399–400). As such the rule may be perceived as a clear exception to the general principle of “free evaluation of evidence”.²

Doctrine: For the bibliography, see the final comment on Rule 70.

Author: Mark Klamberg.

¹ Donald. K. Piragoff, “Evidence”, 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. 382–383 (<https://www.legal-tools.org/doc/e34f81/>).

² Mark Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Martinus Nijhoff Publishers, Leiden, 2013, p. 147 (<https://www.legal-tools.org/doc/0d524b/>).

Rule 70(b)

(b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;

The words “incapable of giving genuine consent” in sub-rule (b) are based on the meaning reflected in footnotes 16 and 51 in the Elements of Crime regarding crimes of sexual violence, namely: natural, induced or age-related incapacity. In other words, consent cannot be inferred by reason of any words or conduct of a victim due to natural, induced or age-related incapacity.

Doctrine: For the bibliography, see the final comment on Rule 70.

Author: Mark Klamberg.

Rule 70(c)

(c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence;

Sub-rule (c) is a corollary of principle (a) and also concerns situations of force, coercion and coercive environment. In such situations the silence of, or lack of resistance by the victim may be a result of paralysis.

Doctrine: For the bibliography, see the final comment on Rule 70.

Author: Mark Klamberg.

Rule 70(d)

(d) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.

Sub-rule (d) provides that credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness. Rule 71 provides the general rule that evidence of prior or subsequent sexual conduct of a victim or witness shall not be admitted. If such evidence in an exceptional case would be admitted, Rule 70(d) would provide that evidence of previous or subsequent sexual conduct could not be used to question the credibility, character or predisposition to sexual availability of a victim or witness.¹

Cross-reference:

Article 69(4).

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, pp. 507–508 (<https://www.legal-tools.org/doc/995606/>).
2. Mark Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Martinus Nijhoff Publishers, Leiden, 2013, p. 157 (<https://www.legal-tools.org/doc/0d524b/>).
3. Donald K. Piragoff, “Procedural Justice Related to Crimes of Sexual Violence”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 386–402, 409 (<https://www.legal-tools.org/doc/95e5f9/>).
4. Donald K. Piragoff, “Evidence”, 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. 374, 382–383 (<https://www.legal-tools.org/doc/e34f81/>).

¹ Donald K. Piragoff, “Evidence”, 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. 402 (<https://www.legal-tools.org/doc/e34f81/>).

5. Donald. K. Piragoff and Paula Clarke, “Article 69”, 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. 1717–1718 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Rule 71

In the light of the definition and nature of the crimes within the jurisdiction of the Court, and subject to article 69, paragraph 4, a Chamber shall not admit evidence of the prior or subsequent sexual conduct of a victim or witness.

The phrase “subject to article 69, paragraph 4” indicates that the rule is not absolute. The rule restricts or fetters a Chamber’s discretion or guides it towards a particular result. This flexibility in rare and exceptional cases is attached with a guarantee in Rule 70(d) against character assassination of the victim or witness.

Rule 71 is similar to ICTY and ICTR Rules 96(iv). There was some disagreement during the negotiations whether the ICC rule was of the same absolute nature as ICTY and ICTR Rules 96(iv).¹ A compromise was reached by introducing the words “subject to article 69, paragraph 4” which makes Rule 71 almost, but not completely, an absolute rule. Rule 71 should be read in conjunction with Rule 70(d). The introduction of Rule 70(d) was one of the elements that brought about the compromise on Rule 71 (Piragoff, 2004, pp. 403–407).

Rule 72 provides a screening procedure when there is an intention to introduce or elicit evidence that the victim consented to an alleged crime of sexual violence.²

Cross-reference:

Article 69(4).

¹ Donald K. Piragoff, “Procedural Justice Related to Crimes of Sexual Violence”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 403–407 (<https://www.legal-tools.org/doc/95e5f9/>).

² Donald K. Piragoff, “Evidence”, in Roy S. Lee, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 384–391 (<https://www.legal-tools.org/doc/e34f81/>); Mark Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Martinus Nijhoff Publishers, Leiden, 2013, pp. 407–408 (<https://www.legal-tools.org/doc/0d524b/>).

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. 508 (<https://www.legal-tools.org/doc/995606/>).
2. Mark Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Martinus Nijhoff Publishers, Leiden, 2013, pp. 407–408 (<https://www.legal-tools.org/doc/0d524b/>).
3. Donald. K. Piragoff, “Procedural Justice Related to Crimes of Sexual Violence”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 402–407 (<https://www.legal-tools.org/doc/95e5f9/>).
4. Donald. K. Piragoff, “Evidence”, 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. 384–391 (<https://www.legal-tools.org/doc/e34f81/>).
5. Donald. K. Piragoff and Paula Clarke, “Article 69”, 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. 1718 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Rule 72

1. Where there is an intention to introduce or elicit, including by means of the questioning of a victim or witness, evidence that the victim consented to an alleged crime of sexual violence, or evidence of the words, conduct, silence or lack of resistance of a victim or witness as referred to in principles (a) through (d) of rule 70, notification shall be provided to the Court which shall describe the substance of the evidence intended to be introduced or elicited and the relevance of the evidence to the issues in the case.

2. In deciding whether the evidence referred to in sub-rule 1 is relevant or admissible, a Chamber shall hear in camera the views of the Prosecutor, the defence, the witness and the victim or his or her legal representative, if any, and shall take into account whether that evidence has a sufficient degree of probative value to an issue in the case and the prejudice that such evidence may cause, in accordance with article 69, paragraph 4. For this purpose, the Chamber shall have regard to article 21, paragraph 3, and articles 67 and 68, and shall be guided by principles (a) to (d) of rule 70, especially with respect to the proposed questioning of a victim.

3. Where the Chamber determines that the evidence referred to in sub-rule 2 is admissible in the proceedings, the Chamber shall state on the record the specific purpose for which the evidence is admissible. In evaluating the evidence during the proceedings, the Chamber shall apply principles (a) to (d) of rule 70.

Rule 72 provides for in camera procedure to consider relevance or admissibility of evidence when the victim has been subjected force, threats or coercive circumstances. In such cases enquiries into the consent may tend to blame and re-traumatise the victim. Rule 72 provides a screening procedure when there is an intention to introduce or elicit evidence that the victim consented to an alleged crime of sexual violence.¹ Rule 71 is similar to ICTY and ICTR Rules 96(iii).

Cross-reference:

Article 69(4).

¹ Donald. K. Piragoff, “Procedural Justice Related to Crimes of Sexual Violence”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 411 (<https://www.legal-tools.org/doc/95e5f9/>).

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. 448 (<https://www.legal-tools.org/doc/995606/>).
2. Mark Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Martinus Nijhoff Publishers, Leiden, 2013, pp. 407–408 (<https://www.legal-tools.org/doc/0d524b/>).
3. Donald. K. Piragoff, “Procedural Justice Related to Crimes of Sexual Violence”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 409–421 (<https://www.legal-tools.org/doc/95e5f9/>).
4. Donald. K. Piragoff, “Evidence”, 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. 390–391 (<https://www.legal-tools.org/doc/e34f81/>).
5. Donald. K. Piragoff and Paula Clarke, “Article 69”, 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. 1718 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Rule 73

Privileged Communications and information

General Remarks:

Rule 73 supplements Article 69(5) which provides that the Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence. The rule involves tensions between the interest of admitting evidence to prevent impunity on the one hand and the interest of protecting the confidentiality of certain communications on the other hand.

The ICC has several explicit rules providing for privilege against disclosure, namely the privilege against self-incrimination, the lawyer-client privilege, the doctor-, psychiatrist-, psychologist-, counsellor or clergy-person privilege and privileges for ICRC officials, employees, information, documents or other evidence.

Doctrine: For the bibliography, see the final comment on Rule 73.

Author: Mark Klamberg.

Rule 73(1)

1. Without prejudice to article 67, paragraph 1 (b), communications made in the context of the professional relationship between a person and his or her legal counsel shall be regarded as privileged, and consequently not subject to disclosure, unless:

(a) The person consents in writing to such disclosure; or

(b) The person voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.

Rule 73(1) recognizes a privilege for all communications between lawyer and client, which consequently are not subject to disclosure at trial, unless the client consents to such disclosure or has voluntarily disclosed the communication to a third party who gives evidence of that disclosure. The recognition of the lawyer-client-privilege in Rule 73(1) did not cause major difficulties during the negotiations since it is widely recognized in virtually all domestic procedural systems to the extent it can be perceived as a general principle of international law.¹

The words “communications made in the context of the professional relationship” enables the Court not to recognize a privilege if the communication was made for other purposes than giving or receiving legal advice. In other words, communications are not protected by the privilege in situations where the participation of the lawyer in his or her client’s criminal activity is in question as opposed to professional legal activity which is protected (Kreß, 2004, pp. 336–338).

In *Mbarushimana*, the defence asserted that materials seized from the house of Mr. Mbarushimana, as well as the transcripts and original recordings of intercepted communications (collectively ‘specified materials’) may contain privileged information within the scope of Rule 73 of the Rules.² The Pre-Trial Chamber ordered the Prosecutor to cease all dealings with the

¹ Claus Kreß, “Witnesses in Proceedings Before the International Criminal Court”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 336 (<https://www.legal-tools.org/doc/95e5f9/>).

² ICC, *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision Temporarily Suspending Dealings with Transcripts and Original Recordings of Intercepted Communications and Materials Seized from the House of Mr. Callixte Mbarushimana, 25 February 2011, ICC-01/04-01/10-63 (<https://www.legal-tools.org/doc/b383fa/>).

specified materials and to quarantine these materials pending resolution of the issue. In *Mbarushimana*, the Pre-Trial Chamber considered that in order to minimise the risk of transmission of privileged communications to the Prosecutor in the process of registration of the remaining seized material, it is necessary that before giving the Prosecutor and the Defence access to these materials, the Registry conducts a search to identify potentially privileged communications.³

Doctrine: For the bibliography, see the final comment on Rule 73.

Author: Mark Klamberg.

³ ICC, *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the “Prosecution’s request for a review of potentially privileged material”, 4 March 2011, ICC-01/04-01/10-67 (<https://www.legal-tools.org/doc/90be79/>).

Rule 73(2)

2. Having regard to rule 63, sub-rule 5, communications made in the context of a class of professional or other confidential relationships shall be regarded as privileged, and consequently not subject to disclosure, under the same terms as in sub-rules 1 (a) and 1 (b) if a Chamber decides in respect of that class that:

(a) Communications occurring within that class of relationship are made in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure;

(b) Confidentiality is essential to the nature and type of relationship between the person and the confidant; and

(c) Recognition of the privilege would further the objectives of the Statute and the Rules.

Sub-rule 2 empowers the Court to recognize additional classes of privilege relationships based on three criteria: (i) when there is a reasonable expectation of privacy and non-disclosure; (ii) confidentiality is essential to the nature and type of relationship; and (iii) recognition of the privilege would further the objectives of the Statute and the Rules. Sub-rule 3 indicates the candidates for recognition of confidentiality.

Doctrine: For the bibliography, see the final comment on Rule 73.

Author: Mark Klamberg.

Rule 73(3)

3. In making a decision under sub-rule 2, the Court shall give particular regard to recognizing as privileged those communications made in the context of the professional relationship between a person and his or her medical doctor, psychiatrist, psychologist or counsellor, in particular those related to or involving victims, or between a person and a member of a religious clergy; and in the latter case, the Court shall recognize as privileged those communications made in the context of a sacred confession where it is an integral part of the practice of that religion.

Rule 73(3) provides that the Court shall recognize communications as privileged when made in the context of the professional relationship between a person and his or her medical doctor, psychiatrist, psychologist or counsellor, in particular those related to or involving victims, or between a person and a member of the clergy; and in the latter case, the Court shall recognize as privileged those communications made in the context of a sacred confession where it is an integral part of the practice of that religion.

Although the list in sub-rule 3, the Communication of more classes should arguably be recognized as worthy of protection, for example: in the relationship between a victim's counsellor of the Victims and Witnesses Unit and the Victim, journalist or spousal privilege.¹

In *Mbarushimana*, the Pre-Trial Chamber considered that communications between Mr. Mbarushimana and the member of a religious clergy over which the Defence maintains its claim of privilege under Rule 73(3) were made in the context of a relationship falling outside the scope of Rule 73(3), given that Mr. Mbarushimana was not acting in a personal capacity, the member of the religious clergy in question was not acting as a confidant

¹ Donald. K. Piragoff, "Evidence", 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. 397 (<https://www.legal-tools.org/doc/e34f81/>); Claus Krefß, "Witnesses in Proceedings Before the International Criminal Court", in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 338 (<https://www.legal-tools.org/doc/95e5f9/>); Karim A. A. Khan and Gissou Azarnia, "Evidentiary Privileges", in Karim A. A. Khan (ed.), *Principles of Evidence in International Criminal Justice*, Oxford University Press, 2010, pp. 567–569.

within the meaning of Rule 73(2) and the fact that he was a member of a religious clergy was incidental to the relationship.²

Doctrine: For the bibliography, see the final comment on Rule 73.

Author: Mark Klamberg.

² ICC, *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the review of potentially privileged material, 15 June 2011, ICC-01/04-01/10-237, p. 6 (<https://www.legal-tools.org/doc/e50449/>).

Rule 73(4)

4. The Court shall regard as privileged, and consequently not subject to disclosure, including by way of testimony of any present or past official or employee of the International Committee of the Red Cross (ICRC), any information, documents or other evidence which it came into the possession of in the course, or as a consequence, of the performance by ICRC of its functions under the Statutes of the International Red Cross and Red Crescent Movement, unless:

(a) After consultations undertaken pursuant to sub-rule 6, ICRC does not object in writing to such disclosure, or otherwise has waived this privilege; or

(b) Such information, documents or other evidence is contained in public statements and documents of ICRC.

Sub-rules 4–6 contain provisions on the privileged Communications with respect to the International Committee of the Red Cross. The rationale is that disclosure of information could seriously undermine the role and work of the ICRC, which depend on strict confidentiality.

The privilege relating to the ICRC has two exceptions: (a) the ICRC consents in writing to disclosure, or (b) the evidence is contained in public statements and documents of ICRC.

Sub-rule 4 differs from the class privileges in the preceding sub-rule since (i) it is a privilege of an organization and (ii) it is not dependant on the will of the confider (for example the prisoner of war who spoke to the ICRC).¹

Author: Mark Klamberg.

¹ Claus Kreß, “Witnesses in Proceedings Before the International Criminal Court”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 340 (<https://www.legal-tools.org/doc/95e5f9/>).

Rule 73(5)

5. Nothing in sub-rule 4 shall affect the admissibility of the same evidence obtained from a source other than ICRC and its officials or employees when such evidence has also been acquired by this source independently of ICRC and its officials or employees.

Evidence obtained from third parties, that is, a source other than ICRC and its officials or employees, which is also possessed by the ICRC is pursuant to sub-rule 5 admissible. However, this sub-rule does not prevent the ICRC from denying to disclose of the same evidence from itself.¹

Doctrine: For the bibliography, see the final comment on Rule 73.

Author: Mark Klamberg.

¹ Donald. K. Piragoff, “Evidence”, 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. 366–367 (<https://www.legal-tools.org/doc/e34f81/>).

Rule 73(6)

6. If the Court determines that ICRC information, documents or other evidence are of great importance for a particular case, consultations shall be held between the Court and ICRC in order to seek to resolve the matter by cooperative means, bearing in mind the circumstances of the case, the relevance of the evidence sought, whether the evidence could be obtained from a source other than ICRC, the interests of justice and of victims, and the performance of the Court's and ICRC's functions.

The privilege for the ICRC cannot be set by Court even if it is of great importance for case. Sub-rule 6 provides for consultations to be held between the Court and the ICRC in order to seek to resolve the matter.

Cross-references:

Article 69(5); Rule 65.

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. pp. 160, 542 (<https://www.legal-tools.org/doc/995606/>).
2. Karim A. A. Khan and Gissou Azarnia, “Evidentiary Privileges”, in Karim A. A. Khan (ed.), *Principles of Evidence in International Criminal Justice*, Oxford University Press, 2010, pp. 567–569.
3. Mark Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Martinus Nijhoff Publishers, Leiden, 2013, pp. 315–316 (<https://www.legal-tools.org/doc/0d524b/>).
4. Claus Kieß, “Witnesses in Proceedings Before the International Criminal Court”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 334–341 (<https://www.legal-tools.org/doc/95e5f9/>).
5. Donald K. Piragoff, “Evidence”, 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. 357–369, 397 (<https://www.legal-tools.org/doc/e34f81/>).

6. William A. Schabas and Yvonne McDermott, “Article 67”, 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/>).

Author: Mark Klamberg.

Rule 74

1. *Unless a witness has been notified pursuant to rule 190, the Chamber shall notify a witness of the provisions of this rule before his or her testimony.*
2. *Where the Court determines that an assurance with respect to self-incrimination should be provided to a particular witness, it shall provide the assurances under sub-rule 3, paragraph (c), before the witness attends, directly or pursuant to a request under article 93, paragraph (1) (e).*
3. (a) *A witness may object to making any statement that might tend to incriminate him or her.*
(b) *Where the witness has attended after receiving an assurance under subrule 2, the Court may require the witness to answer the question or questions.*
(c) *In the case of other witnesses, the Chamber may require the witness to answer the question or questions, after assuring the witness that the evidence provided in response to the questions:*
 - (i) *Will be kept confidential and will not be disclosed to the public or any State; and*
 - (ii) *Will not be used either directly or indirectly against that person in any subsequent prosecution by the Court, except under articles 70 and 71.*
4. *Before giving such an assurance, the Chamber shall seek the views of the Prosecutor, ex parte, to determine if the assurance should be given to this particular witness.*
5. *In determining whether to require the witness to answer, the Chamber shall consider:*
 - (a) *The importance of the anticipated evidence;*
 - (b) *Whether the witness would be providing unique evidence;*
 - (c) *The nature of the possible incrimination, if known; and*
 - (d) *The sufficiency of the protections for the witness, in the particular circumstances.*
6. *If the Chamber determines that it would not be appropriate to provide an assurance to this witness, it shall not require the witness to answer the question. If the Chamber determines not to require the witness to answer, it may still continue the questioning of the witness on other matters.*
7. *In order to give effect to the assurance, the Chamber shall:*
 - (a) *Order that the evidence of the witness be given in camera;*
 - (b) *Order that the identity of the witness and the content of the evidence given shall not be disclosed, in any manner, and provide that*

the breach of any such order will be subject to sanction under article 71;

(c) Specifically advise the Prosecutor, the accused, the defence counsel, the legal representative of the victim and any Court staff present of the consequences of a breach of the order under subparagraph (b);

(d) Order the sealing of any record of the proceedings; and

(e) Use protective measures with respect to any decision of the Court to ensure that the identity of the witness and the content of the evidence given are not disclosed.

8. Where the Prosecutor is aware that the testimony of any witness may raise issues with respect to self-incrimination, he or she shall request an in camera hearing and advise the Chamber of this, in advance of the testimony of the witness. The Chamber may impose the measures outlined in sub-rule 7 for all or a part of the testimony of that witness.

9. The accused, the defence counsel or the witness may advise the Prosecutor or the Chamber that the testimony of a witness will raise issues of self-incrimination before the witness testifies and the Chamber may take the measures outlined in subrule 7.

10. If an issue of self-incrimination arises in the course of the proceedings, the Chamber shall suspend the taking of the testimony and provide the witness with an opportunity to obtain legal advice if he or she so requests for the purpose of the application of the rule.

Rule 74 supplements Article 67(1)(g) which provides that the accused has the right “[n]ot 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 remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure.¹ A witness before the ICC may, following the example set by the *ad hoc* tribunals (ICTY and ICTR Rules 90(E)), object to making any statement that might tend to incriminate him or her.

During the negotiations there were differences among the delegations as to what should be the consequences of a refusal by the witness to answer a question. Some delegations wanted to include an absolute privilege, while other delegations wanted a mechanism for the Court to require a witness to

¹ See ECtHR, *John Murray v. the United Kingdom*, Judgment, 8 February 1996, Application no. 18731/91, para. 45 (<https://www.legal-tools.org/doc/bd8dfc/>).

answer.² With protections added an agreement was made that the Court may require the witness to answer questions (sub-rule 3). The evidence provided will be kept confidential and will not be disclosed to the public or any State and will not be used against that person in any subsequent prosecution by the Court, with exceptions for false testimony and misconduct (Rule 74(3)(c)(ii)) which may be sanctioned with fine or imprisonment under Articles 70 and 71 of the ICC Statute.

In *Katanga and Ngudjolo*, the Defence for Mr. Ngudjolo filed a motion requesting the Chamber to provide assurances with respect to self-incrimination to a number of Defence witnesses, including the accused himself.³ The Trial Chamber stated that “it is clear that the position of an accused who chooses to testify in his own defence cannot be systematically equated to that of any other witness [...] 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. The testimony of the accused may thus be used as evidence against them in the present case” (*Katanga and Ngudjolo*, 13 September 2011, paras. 5, 7–8). The Trial Chamber thus found that Article 93(2) and Rule 74 is not applicable to the accused and rejected the request.

Apart from the privilege against self-incrimination and spousal privilege concerning familial communications, Rule 75 also provides for privilege against incrimination by family members as witnesses.

Cross-references:

Article 55(1)(a), 67(1)(g), 69(7) and 93(1)(e); Rules 65 and 190

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, pp. 71, 472–473 (<https://www.legal-tools.org/doc/995606/>).
2. Mark Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Martinus Nijhoff Publishers, Leiden, 2013, pp. 56 and 315–316 (<https://www.legal-tools.org/doc/0d524b/>).

² Donald. K. Piragoff, "Evidence", in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crime and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, p. 393 (<https://www.legal-tools.org/doc/e34f81>).

³ ICC, *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. 1 (<https://www.legal-tools.org/doc/5e1944/>).

3. Claus Krefß, “Witnesses in Proceedings Before the International Criminal Court”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 326–330 (<https://www.legal-tools.org/doc/95e5f9/>).
4. Donald. K. Piragoff, “Evidence”, 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. 391–396 (<https://www.legal-tools.org/doc/e34f81/>).
5. William A. Schabas and Yvonne McDermott, “Article 67”, 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. 1672–1673 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Rule 75

- 1. A witness appearing before the Court, who is a spouse, child or parent of an accused person, shall not be required by a Chamber to make any statement that might tend to incriminate that accused person. However, the witness may choose to make such a statement.*
- 2. In evaluating the testimony of a witness, a Chamber may take into account that the witness, referred to in sub-rule 1, objected to reply to a question which was intended to contradict a previous statement made by the witness, or the witness was selective in choosing which questions to answer.*

Rule 75 provides that a family member has the dispensable right to refuse to testify if his or her testimony would incriminate family members.

National systems differ with respect to privilege against incrimination by family members as witnesses. The differences are not immediately linked to the divide between common law and civil law.¹

Sub-rule 1 restricts the family privilege to a spouse, child or parent of an accused person, which is a much narrower list than the ones to be found in several domestic systems (Kreß, 2004, p. 331).

Sub-rule 2 deals with the situation when a witness makes a selective use of the family privilege. In such cases the Court is allowed to draw appropriate inferences from such behaviour.

Cross-reference:

Rule 65.

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. 473 (<https://www.legal-tools.org/doc/995606/>).
2. Mark Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Martinus Nijhoff Publishers, Leiden, 2013, pp. 56 and 315–316 (<https://www.legal-tools.org/doc/0d524b/>).

¹ Claus Kreß, “Witnesses in Proceedings Before the International Criminal Court”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 331 (<https://www.legal-tools.org/doc/95e5f9/>).

3. Claus Kieß, “Witnesses in Proceedings Before the International Criminal Court”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 326–330 (<https://www.legal-tools.org/doc/95e5f9/>).
4. Donald. K. Piragoff, “Evidence”, 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. 396–399 (<https://www.legal-tools.org/doc/e34f81/>).

Author: Mark Klamberg.

*Section II. Disclosure***Rule 76: General Remarks*****General Remarks:***

The rules on disclosure seek to guarantee the person's right to a fair trial by ensuring that the Defence can properly prepare for the confirmation hearing.¹ It must be noted that the obligation of the Prosecutor to disclose material and information does not end once the charges are confirmed. If the Prosecutor in the course of investigations carried out after the confirmation hearing discovers further evidence on which he intends to rely at the trial or which is exonerating, said evidence must be disclosed to the suspect, as provided by the relevant provisions of the ICC Statute and the Rules of Procedure and Evidence.²

In *Katanga and Ngudjolo*, the Trial Chamber stated that “although the right to collect additional information after the deadline for disclosure has expired is not subject to the Chamber's authorisation, the right to submit this information as evidence in the trial proceedings after the lapse of that time limit is subject to such authorisation”.³

Doctrine: For the bibliography, see the final comment on Rule 76.

Author: Enrique Carnero Rojo, revised by Mark Klamberg.

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. 66 (<https://www.legal-tools.org/doc/052848/>).

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. 55 (<https://www.legal-tools.org/doc/7813d4/>).

³ ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, Decision on the “Prosecution's application for leave to appeal Trial Chamber II's ‘Decision on the disclosure of evidentiary material relating to the Prosecutor's site visit to Bogoro on 28,29 and 31 March 2009 (ICC-01/04-01/07-1305,1345,1401,1412, and 1456)’ of 7 October 2009”, 18 December 2009, ICC-01/04-01/07-1732, para. 16 (<https://www.legal-tools.org/doc/b01e75/>).

Rule 76(1): Scope of Evidence Disclosed to the Defence

1. The Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses.

Scope of evidence disclosed to the Defence:

Subject to any protective measures, the Prosecutor's duty under Rule 76(1) extends to all witnesses on whom the Prosecution intends to rely at the confirmation hearing, regardless of whether the Prosecution intends to call them to testify or to rely on the non-redacted or redacted versions of their statements, or summaries thereof.¹

The Prosecution provides copies of the statements to the Defence and thereafter files the originals in the record of the case (*Lubanga*, 15 May 2006, Annex I, para. 103).

The Trial Chamber in *Katanga and Ngudjolo* stressed the importance of ensuring that the Prosecutor presents in an organized and systematic manner the incriminatory evidence on which he intends to rely at trial.² To this end, it requested him to submit a model table showing how the charges confirmed by Pre-Trial Chamber I and the relevant modes of responsibility are linked to the facts alleged and to the evidence on which he intends to rely at trial. This will ensure that the accused have adequate time and facilities for the preparation of their defence, to which they are entitled under Article 67(1)(b). It will also enable the Presiding Judge to give appropriate directions for the conduct of the proceedings.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, paras. 94 and 100 (<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. 28 (<https://www.legal-tools.org/doc/c1ca24/>); *Prosecutor v. Gbagbo*, Pre-Trial Chamber III, Decision establishing a disclosure system and a calendar for disclosure, 24 January 2012, ICC-02/11-01/11-30, para. 43 (<https://www.legal-tools.org/doc/3637f7/>).

² ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, Order Instructing the Participants and the Registry to File Additional Documents, 10 December 2010, ICC-01/04-01/07-788-tENG, para. 7 (<https://www.legal-tools.org/doc/8e9461/>).

³ ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol, 13 March 2009, ICC-01/04-01/07-956, paras. 6 and 8 (<https://www.legal-tools.org/doc/ad5c46/>).

Prior statements:

In *Lubanga*, Pre-Trial Chamber I considered that the notion of “prior statements” in Rule 76 of the Rules includes statements taken by entities other than the Prosecution; that Rule 76 of the Rules does not limit the Prosecution’s disclosure obligations to prior statements “in the possession or control of the Prosecutor”; and that, therefore, the Prosecution is under an obligation to make its utmost effort to obtain the prior statements of those witnesses on whom the Prosecution intends to rely at the confirmation hearing which have been taken by other entities.⁴ However, the Defence Request for Materials did not refer to “prior statements” within the meaning of Rule 76. Hence, Pre-Trial Chamber I ordered the Registrar to immediately send a co-operation request to the United Nations in order to obtain notes of interviews of officials of the UN Mission in the Democratic Republic of the Congo.

Doctrine: For the bibliography, see the final comment on Rule 76.

Author: Enrique Carnero Rojo, revised by Mark Klamberg.

⁴ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on Defense Requests for Disclosure of Materials, 17 November 2006, ICC-01/04-01/06-718, p. 4 (<https://www.legal-tools.org/doc/fc1b60/>).

Rule 76(1): Adequate Time for the Defence

This shall be done sufficiently in advance to enable the adequate preparation of the defence.

This time limit is a concrete application of the broader right enshrined in Article 67(1)(b) of the Statute “to have adequate time [...] for the preparation of the defence”. The Prosecution must decide on the evidence on which it will rely during the confirmation hearing and provide a list thereof to the Defence no later than 30 days before the date of the hearing –this being extended to no later than 15 days before the date of the hearing in cases of “new evidence” or amended charges.¹ More generally, the Court has a responsibility to organize the conduct of the proceedings in a fair and expeditious manner with full respect to the rights of the Defence to meaningfully prepare for the case under consideration.²

In *Lubanga*, Trial Chamber I held that “[a] mere statement that disclosure was not effected due to an ‘oversight’, standing alone, is unacceptable reasoning for [the] breach of the [...] deadline set by the Trial Chamber”.³

Doctrine: For the bibliography, see the final comment on Rule 76.

Author: Enrique Carnero Rojo, revised by Mark Klamberg.

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. 105 (<https://www.legal-tools.org/doc/052848/>).

² ICC, *Prosecutor v. Ntaganda*, Pre-Trial Chamber II, Decision Establishing a Calendar for the Disclosure of Evidence Between the Parties, 17 May 2013, ICC-01/04-02/06-64, para. 28 (<https://www.legal-tools.org/doc/136d99/>).

³ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on prosecution’s requests to add items to the evidence to be relied on at trial filed on 21 April and 8 May 2008, 4 June 2008, ICC-01/04-01/06-1377, para. 27 (<https://www.legal-tools.org/doc/79cd01/>).

Rule 76(2)

2. The Prosecutor shall subsequently advise the defence of the names of any additional prosecution witnesses and provide copies of their statements when the decision is made to call those witnesses.

Rule 76(2) of the Rules requires the Prosecutor to subsequently advise the defence of the names of any additional prosecution witnesses and provide copies of their statements, subject to any protective measures.¹

Doctrine: For the bibliography, see the final comment on Rule 76.

Author: Enrique Carnero Rojo, revised by Mark Klamberg.

¹ ICC, *Prosecutor v. Gbagbo*, Pre-Trial Chamber III, Decision establishing a disclosure system and a calendar for disclosure, 24 January 2012, ICC-02/11-01/11-30, para. 43 (<https://www.legal-tools.org/doc/3637f7/>).

Rule 76(3)

3. The statements of prosecution witnesses shall be made available in original and in a language which the accused fully understands and speaks.

According to Rule 76(3) of the Rules, the Prosecutor is obliged to make available the statements of her witnesses “in original and in a language which the accused fully understands and speaks”. Thus, in cases where translations of some of the core evidence of the Prosecutor are called for, the Chamber usually establishes a calendar with a view to ensuring the fair and expeditious conduct of the proceedings.¹

In *Lubanga*, Pre-Trial Chamber I denied the request of Defence to order the Prosecution to provide in French all documents that the Prosecution is obligated to disclose to the Defence for purpose of the confirmation hearing, but ordered the Prosecution to file a French version of the Charging document and list of evidence.² Pre-Trial Chamber I made references the European Court of Human Rights (*Lubanga*, 4 August 2006, p. 5).

Doctrine: For the bibliography, see the final comment on Rule 76.

Author: Enrique Carnero Rojo, revised by Mark Klamberg.

¹ ICC, *Prosecutor v. Ntaganda*, Pre-Trial Chamber II, Decision Establishing a Calendar for the Disclosure of Evidence Between the Parties, 17 May 2013, ICC-01/04-02/06-64, para. 15 (<https://www.legal-tools.org/doc/136d99/>).

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/>).

Rule 76(4)

4. This rule is subject to the protection and privacy of victims and witnesses and the protection of confidential information as provided for in the Statute and rules 81 and 82.

As a general rule, statements must be disclosed to the Defence in full. Any restriction on disclosure to the Defence of the names or portions, or both, of the statements of the witnesses on which the Prosecution intends to rely at the confirmation hearing must be authorised by the Chamber under the procedure provided for in Rule 81 of the Rules of Procedure and Evidence.¹ The Pre-Trial Chamber is the ultimate guarantor of the Defence's timely access to the evidence on which the Prosecution intends to rely at the confirmation hearing and the materials in the possession or control of the Prosecution which are potentially exculpatory, have been obtained or belonged to the person or are otherwise material to the Defence preparation for the confirmation hearing because it is the ultimate guarantor of the respect for all other aspects of the person's right to a fair trial. For this reason, redactions in the said evidence and materials are the exception and not the general rule, are permissible only on a case-by-case basis and are subject to the approval of the Chamber. Accordingly, it amounts to an impermissible shift of the burden of proof from the Prosecution – which must convince the Pre-Trial Chamber of the need to authorise any redactions– to require the Defence to raise objections to proprio motu redactions by the Prosecution.² However, in some cases, Chambers have sanctioned an agreement between the parties pursuant to which the Prosecution may disclose incriminating evidence under Rule 76 with the redactions that it considers necessary and without an authorisation from the Chamber, provided that (i) simultaneously with such disclosure of redacted evidence, the Prosecutor provides to the Defence a document indicating the basis for redactions in the evidence disclosed, which shall also be filed in the record of the case; (ii) the Defence may seek further information from the Prosecutor regarding the redactions applied, the Prosecutor being

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. 101 (<https://www.legal-tools.org/doc/052848/>).

² ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Prosecution practice to provide to the defence redacted versions of evidence and materials without authorisation by the Chamber, 25 August 2006, ICC-01/04-01/06-355, p. 4 (<https://www.legal-tools.org/doc/1158ea/>).

obliged to respond to the Defence within two working days; and (iii) if disagreement persists, the Defence may seize the Chamber of the matter.³

Ex parte filings:

In practical terms, Chambers have usually ordered the Prosecution to make *ex parte* filings including the un-redacted material and showing good cause for its redaction (*Lubanga*, 25 August 2006, pp. 4–5).

Cross-references:

Article 67

Rules 81 and 82

Doctrine:

1. Helene Helen, “Disclosure of Evidence”, in Roy S. Lee and Håkan Fri-man (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 403–426 (<https://www.legal-tools.org/doc/e34f81/>).
2. Mark Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Leiden: Martinus Nijhoff Publishers, 2013, pp. 280–283, 303, 328 (<https://www.legal-tools.org/doc/0d524b/>).

Author: Enrique Carnero Rojo, revised by Mark Klamberg.

³ 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. 12 (<https://www.legal-tools.org/doc/62fa3c/>).

Rule 77: General Remarks

General Remarks:

Disclosure v. Inspection:

The disclosure process at the Court is carried out by recourse to two different modalities, that is, by providing the documents to the Defence (disclosure *stricto sensu*, Rule 76) and by permitting the Defence to inspect the documents at a given place (inspection, Rule 77).¹

Compulsory Disclosure Obligations:

Article 67(2) of the ICC Statute and Rule 77 of the Rules of Procedure and Evidence place mandatory disclosure obligations on the Prosecutor and at the same time do not contain any requirement that a suspect provide advance revelation of his or her defences in order to receive full prosecution disclosure. The Prosecutor is duty-bound to provide full disclosure even if the person elects to remain silent or does not raise a defence.² In other words, the Defence is entitled to full disclosure in relation to the case as a whole as known by the Prosecutor (subject to the statutory regime relating to restrictions on disclosure) and is fully entitled to rely on the right to remain silent, so that there cannot be any pressure on the suspect to testify or to raise defences at an early stage as a condition for obtaining prosecution disclosure (*Lubanga*, 11 July 2008, para. 55).

Scope of Evidence Allowed to the Defence for Inspection:

Pursuant to Rule 77, the materials that the Prosecution must allow the Defence to inspect are (i) the evidence on which the Prosecution intends to rely at the confirmation hearing other than the names and statements of the Prosecution's witnesses (*Lubanga*, Annex I, 15 May 2006, para. 100), (ii) materials in the possession or control of the Prosecution that were obtained from or belong to the suspect (para. 107), and (iii) materials in the possession or control of the Prosecution that are otherwise material to the Defence's preparation for the confirmation hearing (para. 107). The disclosure of

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. 108–109 ('*Lubanga*, Annex I, 15 May 2006') (<https://www.legal-tools.org/doc/052848/>).

² 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. 50 (<https://www.legal-tools.org/doc/f5bc1e/>).

documents to be used in questioning a witness is governed by Rules 77 and 78 of the Rules of Procedure and Evidence, although the questioning of a witness by a party not calling that witness is to some extent reactionary, and as such could entail on occasion the unanticipated use of documents.³

Extension of the Rule to Participating Victims:

Although inspection, as provided for in Rules 77 and 78 of the Rules, relates only to the Prosecution and the Defence, as a matter of general principle and in order to give effect to the rights accorded to victims under Article 68(3) of the Statute, the prosecution shall, upon request by the victims' legal representatives, provide individual victims who have been granted the right to participate with any materials within the possession of the prosecution that are relevant to the personal interests of victims which the Chamber has permitted to be investigated during the proceedings, and which have been identified with precision by the victims in writing.⁴ The overriding goal behind this approach appears to be to ensure that those victims authorised to participate are placed in a position to effectively exercise their rights pursuant to Article 68(3) of the Statute, but whatever the reasons, they have no impact at the pre-trial stage of a case.⁵

Doctrine: For the bibliography, see the final comment on Rule 77.

Author: Enrique Carnero Rojo, revised by Mark Klamburg.

³ 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. 34 (<https://www.legal-tools.org/doc/8367f1/>).

⁴ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on Victims' Participation, 18 January 2008, ICC-01/04-01/06-1119, para. 111 (<https://www.legal-tools.org/doc/4e503b/>).

⁵ 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. 96–97, 99 (<https://www.legal-tools.org/doc/285b52/>).

Rule 77: Restrictions on Disclosure

The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82,

Redactions without Judicial Authorisation:

The Prosecution may, in order to expedite proceedings, disclose documents to the Defence pursuant to Article 67(2) and Rule 77 with the redactions that it considers necessary and without an authorisation from the Chamber, provided that (i) the Prosecution does not intend to rely on the documents during the confirmation hearing, (ii) the disclosure process is conducted *inter partes*, and (iii) the Defence may request from the Chamber the lifting of the redactions prior to the confirmation hearing.¹

Author: Enrique Carnero Rojo, revised by Mark Klamberg.

¹ ICC, *Prosecutor v. Katanga and Ngudjolo*, 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, para. 143 (<https://www.legal-tools.org/doc/595408/>); *Prosecutor v. Gbagbo*, Pre-Trial Chamber III, Decision establishing a disclosure system and a calendar for disclosure, 24 January 2012, ICC-02/11-01/11-30, para. 51 (<https://www.legal-tools.org/doc/3637f7/>).

Rule 77: Manner and Timing of Inspection

permit the defence to inspect

Inspection Reports:

As soon as the Prosecution decides to rely on any of the materials referred to in Rule 77, it must permit the Defence to carry out an inspection of the originals of said materials on the premises of the Office of the Prosecution, and during or immediately after inspection, upon request of the Defence, the Prosecution must provide the Defence with an electronic copy of any such material.¹ A record of the *inter partes* exchanges pursuant to this provision must be filed by the Prosecution in the record of the case as soon as practicable after any such exchange has taken place (so-called ‘inspection reports’) in order to ensure legal certainty and consistency as to which materials have been exchanged between the parties. The ‘inspection reports’ must be signed by both parties and must include a list of the items subject to inspection, their reference numbers and a brief account of how the act of inspection took place and whether the Defence received the copies which it requested during the inspection (*Lubanga*, Annex I, 15 May 2006, paras. 73, 75, 76). Over time, the Court has decided that in order to place the Defence in a position to adequately prepare for the confirmation hearing the Prosecutor must provide a short explanation of the relevance of each item disclosed under Rule 77.²

Doctrine: For the bibliography, see the final comment on Rule 77.

Author: Enrique Carnero Rojo, revised by Mark Klamberg.

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. 113–114, 117 (<https://www.legal-tools.org/doc/052848/>).

² 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. 14 (<https://www.legal-tools.org/doc/62fa3c/>).

Rule 77: Inspection of Objects

any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor

Scope of evidence allowed to the Defence for inspection:

The Prosecution's obligation under Rule 77 of the Rules is limited to permitting the Defence to inspect only those books, documents, photographs and tangible objects (i) on which the Prosecution intends to rely at the confirmation hearing or trial, (ii) which are material to the preparation of the defence for the purpose of the confirmation hearing or the trial, or (iii) which have been obtained from or belonged to the suspect or accused person, and thus this rule is not applicable in the context of the victim application process.¹

Doctrine: For the bibliography, see the final comment on Rule 77.

Author: Enrique Carnero Rojo, revised by Mark Klamberg.

¹ 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. 21 (<https://www.legal-tools.org/doc/5ccca1/>); *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. 22 (<https://www.legal-tools.org/doc/bf662d/>).

Rule 77: Categories of Objects

which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.

Right not to reveal defences:

The Defence has the right not to reveal before the confirmation hearing any of the defences on which it intends to rely at trial, but the Prosecution is already in a position to identify most of the Rule 77 materials which are material to the Defence's preparation because of its current knowledge of the case in question.¹

Material to the preparation of the defence:

In this regard, the Appeals Chamber has given a broader interpretation of Rule 77, finding that the term "material to the preparation of the defence" under Rule 77 should be understood as referring to "all objects that are relevant for the preparation of the defence".²

In *Lubanga*, the Trial Chamber noted the Appeals Chamber Judgment of 11 July 2008.³ Nevertheless, the Trial Chamber found that "that further information relating to the general use of child soldiers by groups other than the UPC, above and beyond that already disclosed, is unnecessary for the preparation of the defence (viz. it would have no material effect). It does not, therefore, fall into the scope of the disclosure obligations under Rule 77 of the Rules" (*Lubanga*, 2 October 2009, para 24).

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. 118 (<https://www.legal-tools.org/doc/052848/>).

² 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. 77 (<https://www.legal-tools.org/doc/f5bc1e/>); see also *Bemba*, Trial Chamber III, Redacted Version of Decision on the "Defence Motion for Disclosure Pursuant to Rule 77", 29 July 2011, ICC-01/05-01/08-1594-Red, para. 19 (<https://www.legal-tools.org/doc/be2a5d/>).

³ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on the prosecution's request for an order on the disclosure of tu quoque material pursuant to Rule 77, 2 October 2009, ICC-01/04-01/06-2147, para. 17 (<https://www.legal-tools.org/doc/a4f088/>).

In *Bemba*, the Trial Chamber ruled that “[d]ocuments and any other items listed in Rule 77 of the Rules that are relevant to the accused’s complementarity and *non bis in idem* challenges are self-evidently material to the preparation of his defence, and the prosecution must permit inspection of them”.⁴

Cross-references:

Article 67

Rules 81 and 82.

Doctrine:

1. Helen Brady, “Disclosure of Evidence”, in Lee, Roy S. (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 403–426 (<https://www.legal-tools.org/doc/e34f81/>).
2. Mark Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Martinus Nijhoff Publishers, Leiden, 2013, pp. 285–286.

Author: Enrique Carnero Rojo, revised by Mark Klamberg.

⁴ ICC, *Prosecutor v. Bemba*, Trial Chamber III, Decision on the defence application for additional disclosure relating to a challenge on admissibility, 2 December 2009, ICC-01/05-01/08-632, para. 19 (<https://www.legal-tools.org/doc/f78c6c/>).

Rule 78

The defence shall permit the Prosecutor to inspect any books, documents, photographs and other tangible objects in the possession or control of the defence, which are intended for use by the defence as evidence for the purposes of the confirmation hearing or at trial.

Rules 78 and 79 concern defence disclosure obligations. These obligations are subject to restrictions and qualifications as set out the ICC Statute and the Rules of Procedure and Evidence, including Rules 81 and 82. One could discuss whether the defence disclosure obligations concerning under Rules 78 and 79 constitute a reciprocal disclosure regime. The Trial Chamber in *Katanga and Ngudjolo* stated that “the Statute’s framework does not provide for a reciprocal disclosure regime. The disclosure obligations of the Prosecution and the Defence differ significantly, because of the particular roles that these two parties have at trial”.¹

Since the defendant has the right not to self-incriminate, he or she does not have any obligation to disclose incriminatory evidence. However, if the defendant intends to present evidence at trial, such evidence may be subject to disclosure evidence. Rule 78 allows the Prosecutor to inspect any books, documents, photographs and other tangible objects in the possession or control of the defence, which are intended for use by the defence as evidence for the purposes of the confirmation hearing or at trial. This is a narrower obligation compared to the Prosecutor’s obligations under Rule 77. The Trial Chamber in *Lubanga* emphasized that an accused’s right to a fair trial is not necessarily compromised by the imposition on him or her of an obligation to reveal in advance details of the defences and the evidence to be presented.² More specifically, the defence shall disclose in general terms the defences the accused intends to rely on and any substantive factual or legal issues that he intends to raise. It shall also disclose, after the presentation of the evidence of the prosecution, “the name, address and date of birth of any witness, to enable the prosecution to conduct appropriate enquiries”. Moreover, in *Katanga and Ngudjolo*, the Trial Chamber considered that if the defence

¹ ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, Decision on the “Prosecution’s Application Concerning Disclosure by the Defence Pursuant to Rules 78 and 79(4)”, 14 September 2010, ICC-01/04-01/07-2388, para. 36 (<https://www.legal-tools.org/doc/198b83/>).

² ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on disclosure by the defence, 20 March 2008, ICC-01/04-01/06-1235, paras. 31 and 41 (<https://www.legal-tools.org/doc/d372fb/>).

challenges the testimony of a prosecution witness by using documentary evidence, an obligation to disclose such documents to the prosecution is triggered sufficiently in advance of the witness's testimony. This was justified to ensure procedural fairness and to promote efficiency in the trial (*Katanga and Ngudjolo*, 14 September 2010, paras. 42–43).

In *Bemba*, Pre-Trial Chamber III relied on Rule 78 when it requested the Defence to submit an in-depth analysis chart of the evidence it intends to use for the purpose of the confirmation hearing.³

In *Lubanga*, Pre-Trial Chamber I ordered the Registry to give immediate access to the Prosecution to the evidence included in the Defence List of Evidence filed on 2 November 2006 and filed in accordance with the Decision and the Decision on the E-Court Protocol on 6 November 2006.⁴ Trial Chamber I held in regard to inspection rights of victims that “inspection as provided for in Rules 77 and 78 of the Rules relates only to the prosecution and the defence”.

Later, in *Lubanga*, the Trial Chamber stated that “once a decision has been taken by counsel that a book, document, photograph or other tangible object is to be used by the defence during the trial, it should be served forthwith on the prosecution”.⁵

Cross-reference:

Article 67.

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, vol. 3: *International Criminal Procedure*, Oxford University Press, 2016, pp. 540–541 (<https://www.legal-tools.org/doc/995606/>).
2. Helen Brady, “Setting the Record Straight: A Short Note on Disclosure and ‘the Record of the Proceedings’”, in Horst Fischer *et al.* (eds.),

³ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber III, Decision on the disclosure of evidence by the Defence, ICC-01/05-01/08-311, 5 December 2008 (<https://www.legal-tools.org/doc/1eab23/>).

⁴ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision to give access to the Prosecution to the evidence included in the Defence list of evidence filed on 2 November 2006, 8 November 2006, ICC-01/04-01/06-680 (<https://www.legal-tools.org/doc/97c6cb/>).

⁵ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Redacted Second Decision on disclosure by the defence and Decision on whether the prosecution may contact defence witnesses, 20 January 2010, ICC-01/04-01/06-2192-Red, para. 64 (<https://www.legal-tools.org/doc/f70320/>).

International and National Prosecution of Crimes Under International Law, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 269.

3. Helen Brady, “Disclosure of Evidence”, 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. 413–417 (<https://www.legal-tools.org/doc/e34f81/>).
4. Mark Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Martinus Nijhoff Publishers, Leiden, 2013, pp. 293 and 299–301 (<https://www.legal-tools.org/doc/0d524b/>).

Author: Mark Klamberg.

Rule 79

- 1. The defence shall notify the Prosecutor of its intent to:**
 - (a) Raise the existence of an alibi, in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names of witnesses and any other evidence upon which the accused intends to rely to establish the alibi; or**
 - (b) Raise a ground for excluding criminal responsibility provided for in article 31, paragraph 1, in which case the notification shall specify the names of witnesses and any other evidence upon which the accused intends to rely to establish the ground.**
- 2. With due regard to time limits set forth in other rules, notification under subrule 1 shall be given sufficiently in advance to enable the Prosecutor to prepare adequately and to respond. The Chamber dealing with the matter may grant the Prosecutor an adjournment to address the issue raised by the defence.**
- 3. Failure of the defence to provide notice under this rule shall not limit its right to raise matters dealt with in sub-rule 1 and to present evidence.**
- 4. This rule does not prevent a Chamber from ordering disclosure of any other evidence.**

Rules 78 and 79 concern defence disclosure obligations. These obligations are subject to restrictions and qualifications as set out the ICC Statute and the Rules of Procedure and Evidence, including Rules 81 and 82. Rule 79 provides that the Defence must notify the Prosecutor of its intent to raise an alibi or a ground for excluding criminal responsibility under Article 31(1). The purpose of Rule 79 is to provide the Prosecutor with an understanding of the defence case before the trial commences in the interests of an expeditious trial and efficient proceedings. The rule still respects the accused’s right of silence, it is clear from sub-paragraph 3 that even if the accused fails to disclose in accordance with Rule 79, he or she may still raise such matters and present evidence in support of such defences.

In *Katanga and Ngudjolo*, the Trial Chamber stated that “the Statute’s framework does not provide for a reciprocal disclosure regime. The

disclosure obligations of the Prosecution and the Defence differ significantly, because of the particular roles that these two parties have at trial”.¹

Judge Steiner held the view in *Lubanga* that under Rules 79 and 80 of the ICC Rules, the Defence has the right not to reveal before the confirmation hearing any of the defences on which it intends rely at trial.²

Cross-reference

Article 31(1)

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, vol. 3: *International Criminal Procedure*, Oxford University Press, 2016, pp. 540–541 (<https://www.legal-tools.org/doc/995606/>).
2. Helen Brady, “Setting the Record Straight: A Short Note on Disclosure and ‘the Record of the Proceedings’”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 269.
3. Helen Brady, “Disclosure of Evidence”, 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. 413–417 (<https://www.legal-tools.org/doc/e34f81/>).
4. Mark Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Martinus Nijhoff Publishers, Leiden, 2013, p. 299 (<https://www.legal-tools.org/doc/0d524b/>).

Author: Mark Klamberg.

¹ ICC, *Prosecutor v. Katanga and Ngudjolo*, Decision on the “Prosecution’s Application Concerning Disclosure by the Defence Pursuant to Rules 78 and 79(4)”, 14 September 2010, ICC-01/04-01/07-2388, para 36 (<https://www.legal-tools.org/doc/198b83/>).

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, para. 118 (<https://www.legal-tools.org/doc/052848/>).

Rule 80

- 1. The defence shall give notice to both the Trial Chamber and the Prosecutor if it intends to raise a ground for excluding criminal responsibility under article 31, paragraph 3. This shall be done sufficiently in advance of the commencement of the trial to enable the Prosecutor to prepare adequately for trial.*
- 2. Following notice given under sub-rule 1, the Trial Chamber shall hear both the Prosecutor and the defence before deciding whether the defence can raise a ground for excluding criminal responsibility.*
- 3. If the defence is permitted to raise the ground, the Trial Chamber may grant the Prosecutor an adjournment to address that ground.*

Rule 80 elaborates on Article 31(3) which concerns grounds for excluding criminal responsibility which is not set out in Article 31(1). The rule sets out the procedure for the Court’s consideration of the question.

Cross-reference:

Article 31(3).

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, vol. 3: *International Criminal Procedure*, Oxford University Press, 2016, p. 540 (<https://www.legal-tools.org/doc/995606/>).
2. Helen Brady, “Disclosure of Evidence”, 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. 417 (<https://www.legal-tools.org/doc/e34f81/>).
3. Albin Eser, “Article 31”, 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. 1159 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Rule 81

General Remarks:

Rule 81 covers various grounds for restricting disclosure relating to different articles in the Rome Statute. Disclosure restrictions may apply both to the defence and the public. The rule is based on the regime on restrictions at the ICTY and ICTR and gave rise to the little debate during the negotiations of the Rules of Procedure and Evidence.¹

Chambers take a two-step approach to disclosure with a first step determining whether certain information is disclosable and the second step whether the disclosure is subject to restrictions.²

Doctrine: For the bibliography, see the final comment on Rule 81.

Author: Mark Klamberg.

¹ Helen Brady, “Disclosure of Evidence”, 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. 418 (<https://www.legal-tools.org/doc/e34f81/>).

² ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V(a), Decision on Disclosure of Information Related to Prosecution Intermediaries, 8 October 2013, ICC-01/09-01/11-904-Red, para. 47 (<https://www.legal-tools.org/doc/517311/>); Kai Ambos, *Treatise on International Criminal Law*, vol. 3: *International Criminal Procedure*, Oxford University Press, 2016, p. 541 (<https://www.legal-tools.org/doc/995606/>).

Rule 81(1)

1. Reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure.

Sub-rule 1 provides that there is no duty to disclose work products, which includes reports, memoranda or other internal documents prepared by a party in connection with the investigation or preparation of the case. The sub-rule is clearly based on ICTY and ICTR Rule 70(A).

In *Bemba*, the Trial Chamber determined that question whether screening notes or pre-interview assessments come within Rule 81(1) of the Rules depend on the content of the record and the matters that are addressed during the screening process.¹ The Appeals Chamber found no grounds for impeaching the prosecution's approach to Rule 81(1) of the Rules as applied to the documents relevant to the instant application.

In *Lubanga*, the Chamber indicated that the internal work product of the prosecution under Rule 81(1) “[...] includes, *inter alia*, the legal research undertaken by a party and its development of legal theories, the possible case strategies considered by a party, and its development of potential avenues of investigation”.²

Doctrine: For the bibliography, see the final comment on Rule 81.

Author: Mark Klamberg.

¹ ICC, *Prosecutor v. Bemba*, Trial Chamber III, Public Redacted version of “Decision on the Defence Request for disclosure of pre-interview assessments and the consequences of non-disclosure” ICC-01/05-01/08-750-Conf), 9 April 2010, ICC-01/05-01/08-750-Red, para. 35 (<https://www.legal-tools.org/doc/b9ce0d/>).

² ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision issuing corrected and redacted versions of “Decision on the “Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing Tu Quoque Information” of 5 December 2008”, Annex 2, 3 June 2009, ICC-01/04-01/06-1924-Anx2, para. 31 (<https://www.legal-tools.org/doc/460245/>). See *Prosecutor v. Lubanga*, Trial Chamber I, Redacted Decision on the prosecution's disclosure obligations arising out of an issue concerning witness DRC-OTP-WWWW-0031, 20 January 2011, ICC-01/04-01/06-2656-Red, paras. 13 and 17 (<https://www.legal-tools.org/doc/a7ac6e/>).

Rule 81(2)

2. Where material or information is in the possession or control of the Prosecutor which must be disclosed in accordance with the Statute, but disclosure may prejudice further or ongoing investigations, the Prosecutor may apply to the Chamber dealing with the matter for a ruling as to whether the material or information must be disclosed to the defence. The matter shall be heard on an ex parte basis by the Chamber. However, the Prosecutor may not introduce such material or information into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.

Rule 81(2) is clearly based on ICTY and ICTR Rule 66(C), allowing the prosecutor to obtain a ruling from the relevant Chamber, on an *ex parte* basis, as to whether the material or information must be disclosed to the defence in order to protect further or ongoing investigations. The sub-rule also ensures that if the Prosecutor seeks to introduce such material or information into evidence during the confirmation hearing or the trial, he or she must give adequate prior disclosure in order to prevent that the accused is ‘ambushed’.

In *Katanga*, Judge Sylva Steiner held that the purpose of Rule 81(2) and (4) “is to prevent the Defence from accessing certain information”.¹

In *Lubanga*, the Appeals Chamber found that:

1. A decision pursuant to rule 81(2) of the Rules of Procedure and Evidence authorising disclosure prior to the confirmation hearing of witness statements or other documents to the defence with redactions must state how the Pre-Trial Chamber came to such a conclusion; the reasoning should also state which of the facts before it led the Pre-Trial Chamber to reach its conclusion.
2. At the confirmation hearing, the Prosecutor, in principle, may rely on the unredacted parts of witness statements and other documents even if they were disclosed to the defence prior to the hearing with redactions authorised pursuant to rule 81(2) of the Rules of Procedure and Evidence.²

¹ ICC, *Prosecutor v. Katanga*, Pre-Trial Chamber I, Decision on the Defence Motion for leave to Appeal the First Decision on Redactions, 19 December 2007, ICC-01/04-01/07-116, p. 5 (<https://www.legal-tools.org/doc/76720a/>).

² 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-01/04-01/06-773, paras. 1–2 (<https://www.legal-tools.org/doc/2b7ca3/>).

The Appeals Chamber reversed Pre-Trial Chamber I's decision to the extent that it authorised the Prosecutor to disclose to the appellant witness statements and documents with redactions and directed Pre-Trial Chamber I to decide anew upon the authorisation of disclosure of witness statements and documents with redactions.

In *Katanga*, the Single Judge considered the Prosecutor's request for the authorisation of the Single Judge for redactions, pursuant to Rules 81(2) and (4) in the statements of certain witnesses who have already been included in the witness protection program of the Court.³ The Single Judge had "the view that the Prosecution's change of approach is for the most part unjustified" and "in order for any redaction in any given statement to be authorised, the Single Judge must, first and foremost, have reached the conclusion that there is a risk that the disclosure to the Defence - at least at this stage of the proceedings - of the information sought to be redacted could:

1. prejudice further or ongoing investigations by the Prosecution (Rule 81(2) of the Rules);
2. affect the confidential character of the information under Articles 54, 72 and 93 of the Statute (Rule 81(4) of the Rules); or
3. affect the safety of witnesses, victims or members of their families (Rule 81(4) of the Rules).

Moreover, after ascertaining the existence of such a risk, the Single Judge will analyse whether:

1. the requested redactions are adequate to eliminate, or at least, reduce such a risk;
2. there is no less intrusive alternative measure that can be taken to achieve the same goal at this stage; and
3. the requested redactions are not prejudicial to or inconsistent with the rights of the arrested person and a fair and impartial trial.

³ ICC, *Prosecutor v. Katanga*, Pre-Trial Chamber I, First Decision on the Prosecution Request for Authorisation to Redact Witness Statements, 7 December 2007, ICC-01/04-01/07-90 ('*Katanga*, 7 December 2007') (<https://www.legal-tools.org/doc/55bb43/>).

Only when these three additional questions have been answered in the affirmative will the Single Judge authorise the redactions requested by the Prosecution” (*Katanga*, 7 December 2007, paras. 3–4).⁴

In *Katanga*, Single Judge Sylva Steiner considered that the disclosure of information would

likely prejudice the Prosecution further investigations; that the redaction of this information is an adequate measure to minimize such risk; that, at this stage, there is no less intrusive alternative measure that can be taken to achieve the same goal; and that, in the view of the Single Judge, the redaction of this information is not prejudicial to or inconsistent with the rights of the Defence and a fair and impartial trial because authorisation has been sought to redact only information which merely gives notice of certain Prosecution investigative activities.⁵

The Single Judge stated in *Katanga* that “[o]nly in a few instances where the Single Judge has found compelling reasons to depart from the practice in the [Lubanga] case [...] will the Single Judge authorise the requested redactions” (*Katanga*, 7 December 2007, para. 3).

In order to carry out her analysis, the Single Judge classified the redactions requested by the Prosecution into the following six categories:

1. whereabouts of Prosecution witnesses;
2. names and identifying information of family members of Prosecution witnesses;
3. current whereabouts of family members of Prosecution witnesses;
4. potential Prosecution witnesses;
5. innocent third parties; and
6. further and ongoing investigations pursuant to Rule 81(2) of the Rules.

The last category includes the following two sub-categories:

⁴ This was repeated in ICC, *Prosecutor v. Katanga*, Pre-Trial Chamber I, Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9, 23 January 2008, ICC-01/04-01/07-160, para. 6 (<https://www.legal-tools.org/doc/eb69c1/>).

⁵ ICC, *Prosecutor v. Katanga*, Decision on the Prosecution Request for authorisation for redactions in the formatted version of the Prosecution Application for Warrant of Arrest for Germain Katanga, 21 December 2007, ICC-01/04-01/07-126, p. 5 (<https://www.legal-tools.org/doc/b9997b/>); see also *Katanga*, 7 December 2007, para. 4.

1. information relating to the place where the interviews were conducted, and the names, initials and signatures of the persons present when the witness statements were taken; and
2. other locations and incidents (*Katanga*, 7 December 2007, para. 5).

It was also held that “rule 81(4) of the Rules does not empower the competent Chamber to authorise redactions whose sole purpose is to protect individuals other than Prosecution witnesses, victims or members of their families” (*Katanga*, 7 December 2007, para. 54).

In *Katanga and Ngudjolo*, the Appeals Chamber ruled that the Prosecutor “may apply to the Pre-Trial Chamber, pursuant to rule 81(2) of the Rules of Procedure and Evidence, for a ruling as to whether the identities and identifying information of ‘potential prosecution witnesses’ must be disclosed to the Defence”.⁶

In *Abu Garda*, the Single Judge agreed with the Prosecution that, at the stage of proceedings, with investigation still ongoing in regions that are facing ongoing armed conflicts, it is reasonable to believe that the presence of OTP investigators in the field, if their identities are disclosed to the Defence, can be easily traced and, therefore, bring risk to the OTP staff and to ongoing investigations.⁷ Accordingly, the Single Judge granted, *inter alia*, authorisation to redact the names and signatures of the OTP investigators present when the interview was conducted, and other OTP staff members otherwise mentioned in such statements.

In *Gbagbo*, the Single Judge granted authorisation, pursuant to Rule 81(2) of the Rules, for the redactions of the names, initials, identifying information and signatures of the investigators, analysts, psychosocial experts and other members of the Office of the Prosecutor who assisted in the preparation or process of taking the witness statements.⁸ The Single Judge stated that “[i]n light of the general security situation in Côte d’Ivoire, it is

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 “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements, 13 May 2008, ICC-01/04-01/07-476, p. 3 (<https://www.legal-tools.org/doc/da8435/>).

⁷ ICC, *Prosecutor v. Abu Garda*, Pre-Trial Chamber I, Public Redacted Version of the ‘First Decision on the Prosecution’s Requests for Redactions’ issued on 14 August 2009, 20 August 2009, ICC-02/05-02/09-58, paras. 14–15 (<https://www.legal-tools.org/doc/71ffbc/>).

⁸ ICC, *Prosecutor v. Gbagbo*, Pre-Trial Chamber, First decision on the Prosecutor’s requests for redactions and other protective measures, 27 March 2012, ICC-02/11-01/11-74-Red, para. 91 (*Gbagbo*, 27 March 2012’) (<https://www.legal-tools.org/doc/afc08b/>).

reasonable to believe that, regardless of the logistical reasons also brought forward by the Prosecutor, the presence of staff members of the Office of the Prosecutor involved in the field, if their identities are disclosed to the Defence, could become easily traced and, therefore, bring risk to the ongoing investigations of the Prosecutor”. The Single Judge believed that, at the investigatory stage, such redaction, “is the least intrusive protective measure available” (*Gbagbo*, 27 March 2012, para. 87)

Doctrine: For the bibliography, see the final comment on Rule 81.

Author: Mark Klamberg.

Rule 81(3)

3. Where steps have been taken to ensure the confidentiality of information, in accordance with articles 54, 57, 64, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, such information shall not be disclosed, except in accordance with those articles. When the disclosure of such information may create a risk to the safety of the witness, the Court shall take measures to inform the witness in advance.

Sub-rule 81(3); acknowledges provisions which are critical to preserving confidentiality concerning investigations; orders; warrants; evidence; protection of arrested and summoned persons, accused, witnesses, victims; protective measures for the purpose of forfeiture; and protection of national security information. When previously restricted information is to be disclosed and this may the disclosure create a risk to the safety of the witness, the Court must take measures to inform the witness in advance.

In *Lubanga*, Pre-Trial Chamber I decided that the Prosecution should cease to disclose redacted documents to the Defence without previous authorisation by the Chamber.¹

Doctrine: For the bibliography, see the final comment on Rule 81.

Author: Mark Klamberg.

¹ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Prosecution practice to provide to the Defence redacted versions of evidence and materials without authorisation by the Chamber, 25 August 2006, ICC-01/04-01/06-355 (<https://www.legal-tools.org/doc/1158ea/>).

Rule 81(4)

4. The Chamber dealing with the matter shall, on its own motion or at the request of the Prosecutor, the accused or any State, take the necessary steps to ensure the confidentiality of information, in accordance with articles 54, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of the trial.

5. Where material or information is in the possession or control of the Prosecutor which is withheld under article 68, paragraph 5, such material and information may not be subsequently introduced into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.

6. Where material or information is in the possession or control of the defence which is subject to disclosure, it may be withheld in circumstances similar to those which would allow the Prosecutor to rely on article 68, paragraph 5, and a summary thereof submitted instead. Such material and information may not be subsequently introduced into evidence during the confirmation hearing or the trial without adequate prior disclosure to the Prosecutor.

Rule 81(4) provides for non-disclosure where the disclosure of information would compromise the safety of victims, witnesses, their families, or any other “person at risk on account of activities of the Court”.¹ The purpose of Rule 81(2) and (4) “is to prevent the Defence from accessing certain information”.² For this purpose summaries may be used for the purpose of witness protection.

The Appeals Chamber stated in *Lubanga* that “the authorisation of non-disclosure of information is the exception to this general rule”. It also stated that

the factors pursuant to rule 81(2) of the Rules of Procedure and Evidence apply *mutatis mutandis* to the authorisation of redactions sought pursuant to rule 81(4) of the Rules of Procedure

¹ ICC, *Prosecutor v. Ntaganda*, Trial Chamber VI, Decision on the Protocol establishing a redaction regime, 12 December 2014, ICC-01/04-02/06-411, para. 14 (<https://www.legal-tools.org/doc/9338e9/>).

² ICC, *Prosecutor v. Katanga*, Pre-Trial Chamber I, Decision on the Defence Motion for leave to Appeal the First Decision on Redactions, 19 December 2007, ICC-01/04-01/07-116, p. 5 (<https://www.legal-tools.org/doc/76720a/>).

and Evidence and have been summarised briefly as follows: [A] thorough consideration of the danger that the disclosure of the identity of the person may cause; the necessity of the protective measure, including whether it is the least intrusive measure necessary to protect the person concerned; and the fact that any protective measures taken shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.³

The Applicability of General Principles and Procedure:

In *Lubanga*, Pre-Trial Chamber I established general principles governing applications to restrict disclosure. The single judge considered that:

insofar as *ex parte* proceedings in the absence of the Defence constitute a restriction on the rights of the Defence, *ex parte* proceedings under rule 81(4) of the Rules shall only be permitted subject to the Prosecution showing in its application that: (i) it serves a sufficiently important objective; (ii) it is necessary in the sense that no lesser measure could suffice to achieve a similar result; and (iii) the prejudice to the Defence interest in playing a more active role in the proceedings must be proportional to the benefit derived from such a measure.⁴

However, the decision of the Single Judge (*Lubanga*, 19 May 2006, pp. 19–20) that all future Prosecution applications under Rules 81(2) and (4) should be filed *inter partes* so as to notify the Defence of the existence of the application and its legal basis was reversed by the Appeals Chamber. In *Lubanga*, the Appeals Chamber found that a Pre-Trial Chamber acts erroneously in deciding how it will exercise its discretion with respect to maintaining future applications pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence *ex parte* if the Chamber does not provide for a degree of flexibility for deciding, on a case-by-case basis, whether and to what extent the application be maintained *ex parte*.⁵

³ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Reasons for the “Decision on the Prosecutor’s request for redactions for the purposes of disclosure”, 19 June 2014, ICC-01/04-01/06-3115-Red, paras. 5 and 7 (<https://www.legal-tools.org/doc/566b22/>).

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. 13 (*Lubanga*, 19 May 2006’) (<https://www.legal-tools.org/doc/c1ca24/>).

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

In *Lubanga*, Trial Chamber I considered it

appropriate to act on the following principles, which can be shortly stated. First, *ex parte* procedures are only to be used exceptionally when they are truly necessary and when no other, lesser, procedures are available, and the court must ensure that their use is proportionate given the potential prejudice to the accused. Second, even when an *ex parte* procedure is used, the other party should be notified of the procedure, and its legal basis should be explained, unless to do so is inappropriate. Accordingly, to this limited but important extent there should be a flexible approach. Complete secrecy would, for instance, be justified if providing information about the procedure would risk revealing the very thing that requires protection. Furthermore, the Chamber stresses that it should always be provided with a full explanation of the legal basis and a factual justification for the *ex parte* procedure. If the applicant has not notified the other party of the fact of the application or its legal basis, then the reason for not doing so should also be set out for the Chamber's consideration. To the extent that victims have been granted the right to participate on particular issues or as regards particular areas of evidence, consideration should be given to including them in any relevant notification procedure (in the sense outlined above), and if this is inappropriate, providing the Bench with an explanation in writing as to why they have not been informed.⁶

Trial Chamber I also noted that *ex parte* proceedings are expressly provided for in five situations, in accordance with Article 72 of the Statute and Rules 74, 81, 83, and 88 of the Rules (*Lubanga*, 6 December 2007, para. 4)

In *Ntaganda*, the Single Judge noted that “when submitting justified requests for redactions or other protective measures, the Prosecutor is expected to provide a security risk assessment carried out by her with respect to each and every witness whom she intends to rely on for the purposes of

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 (<https://www.legal-tools.org/doc/7813d4/>).

⁶ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on the procedures to be adopted for *ex parte* proceedings, 6 December 2007, ICC-01/04-01/06-1058, para 12 (*Lubanga*, 6 December 2007) (<https://www.legal-tools.org/doc/5bbae1/>).

the confirmation hearing and in respect of whom she will request redactions to be granted pursuant to Rule 81(4) of the Rules”.⁷

Scope of the Sub-Rule:

The Appeals Chamber in *Katanga and Ngudjolo* ruled that “Rule 81(4) of the Rules of Procedure and Evidence should be read to include the words ‘persons at risk on account of the activities of the Court’ so as to reflect the intention of the States that adopted the Rome Statute and the Rules of Procedure and Evidence, as expressed in article 54(3)(f) of the Statute and in other parts of the Statute and the Rules, to protect that category of persons”.⁸ The scope of Rule 81(4) concerning restrictions on disclosure was thus extended beyond its textual meaning in order to protect individuals at risk but to the detriment of the defence. The Appeals Chamber also gave precise guidelines about the factors that the Single Judge must take into consideration in deciding on the Prosecution’s request for authorisation for redactions pursuant to Rule 81(2) and (4) of the Rules. Non-disclosure pursuant to Rule 81(4) may only be authorised if, first of all, disclosure of the information concerned would pose a danger to the particular person. The alleged danger must involve an “objectively justifiable” risk to the safety of the person concerned. (*Katanga and Ngudjolo*, 13 May 2008, paras. 71–73, 98, 99 and 111).⁹

⁷ ICC, *Prosecutor v. Ntaganda*, Pre-Trial Chamber II, Decision Ordering the Parties to Provide Risk Assessment with Respect of Witnesses and the Victims and Witnesses Unit to Submit Observations Thereupon, 21 August 2013, ICC-01/04-02/06-88 (<https://www.legal-tools.org/doc/4e5d7c/>).

⁸ 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 1 (*Katanga and Ngudjolo*, 13 May 2008”) (<https://www.legal-tools.org/doc/a76f99/>).

⁹ See also ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Redacted “Decision on the prosecution’s application for non-disclosure of information filed on 7 May 2008”, 5 May 2009, ICC-01/04-01/06-1834, paras. 15–16 (<https://www.legal-tools.org/doc/fe7e98/>); *Prosecutor v. Katanga and Ngudjolo*, Decision on the Defence Request to Redact the Identity of the Source of Three Items of Documentary Evidence, 4 July 2011, ICC-01/04-01/07-3057, para. 10 (<https://www.legal-tools.org/doc/b4721b/>); ICC, *Prosecutor v. Gbagbo*, Decision on the “Requête de la Défense aux fins d’expurgation de deux attestations” and the “Demande aux fins de mesures de protection”, 26 July 2012, ICC-02/11-01/11-195, para. 10 (<https://www.legal-tools.org/doc/685b93/>); and *Prosecutor v. Lubanga*, Appeals Chamber. Public Redacted Version: Decision on the Prosecutor’s second request for redactions for the purposes of

In *Katanga*, the Single Judge considered that “the notion of “victim” under Rule 81(4) of the Rules would also cover alleged victims of sexual offences which are unrelated to the charges in the case at hand” and authorised certain redactions specified in an annex to the decision.¹⁰ The Appeals Chamber in *Katanga* confirmed the decision of the single Judge and found that: “The Prosecutor may apply to the Pre-Trial Chamber, pursuant to Rule 81(4) of the Rules of Procedure and Evidence, for a ruling as to whether the names, identifying information and whereabouts of alleged victims of sexual offences who are not connected to the charges in the relevant case and to whom reference is made in the statements of Prosecution witnesses must be disclosed to the Defence, so as to protect the safety of such alleged victims as “persons at risk on account of the activities of the Court”.”¹¹

Means to Ensure Confidentiality:

In *Lubanga*, the Pre-Trial Chamber considered that Articles 61 (5) and 68 (5) of the ICC Statute and Rule 81(4) of the Rules allows the Prosecution to request the Chamber to authorise (i) the non-disclosure of the identity of certain witnesses on whom the Prosecution intends to rely at the confirmation hearing and (ii) the reliance on the summary evidence of their statements, the transcripts of their interviews and/or the investigators’ notes and reports of their interviews.¹²

In *Lubanga*, the Appeals Chamber found that:

1. A decision authorising the non-disclosure of the identities of witnesses of the Prosecutor to the defence has to state sufficiently the reasons upon which the Pre-Trial Chamber based its decision.
2. The presentation by the Prosecutor of summaries of witness statements and other documents at the confirmation hearing is permissible even if the identities of the relevant

disclosure, 8 December 2014, ICC-01/04-01/06-3118-Red2, paras. 7–10 (<https://www.legal-tools.org/doc/e8744a/>).

¹⁰ ICC, *Prosecutor v. Katanga*, Pre-Trial Chamber I, Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9, 23 January 2008, ICC-01/04-01/07-160, pp. 12, 23–24 (<https://www.legal-tools.org/doc/eb69c1/>).

¹¹ ICC, *Prosecutor v. Katanga*, Appeals Chamber, Judgment on the appeal of Mr Mathieu Ngujolo against the decision of Pre-Trial Chamber I entitled “Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9”, 27 May 2008, ICC-01/04-01/07-521, para. 1 (<https://www.legal-tools.org/doc/719882/>).

¹² 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 (<https://www.legal-tools.org/doc/28d05d/>).

witnesses have not been disclosed to the defence prior to the hearing, provided that such summaries are used in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.¹³

It reversed Pre-Trial Chamber I's decision and ordered it to decide anew upon the applications of the Prosecutor. The Appeals Chamber stated that for an authorisation of non-disclosure of the identity of a witness pursuant to Rule 81(4) the following three considerations should be addressed: "the endangerment of the witness or of members of his or her family that the disclosure of the identity of the witness may cause; the necessity of the protective measure; and why [...] the measure would not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial" (*Lubanga*, 14 December 2006, para. 21).¹⁴

Within the two broad categories of redactions identified according to the legal basis under which they are sought by the Prosecutor, the Single Judge in *Banda and Jerbo* identified five sub-categories in which the authorised redactions can be grouped:

1. names and other identifying information of OTP and other Court staff members, whether present when the interview was conducted or otherwise mentioned, when applicable, pursuant to Rule 81(2);
2. specific locations at which interviews with the witnesses were conducted, pursuant to Rule 81(2);
3. names and other identifying information of witnesses for whom anonymity was granted in the case *Prosecutor v. Bahar Idriss Abu Garda*;
4. names and other identifying information of family members and other information of a personal nature pertaining to the OTP witnesses, pursuant to Rule 81(4);

¹³ 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 (*Lubanga*, 14 December 2006') (<https://www.legal-tools.org/doc/883722/>).

¹⁴ See also ICC, *Prosecutor v. Bemba*, Decision on the Prosecution's Request to Apply Redactions to Screening Notes, 9 July 2010, ICC-01/05-01/08-689-Conf-Exp, para. 8 (<https://www.legal-tools.org/doc/03e965/>); *Prosecutor v. Mbarushimana*, Decision on the Prosecution's applications for redactions pursuant to Rule 81(2) and Rule 81(4), 20 May 2011, ICC-01/04-01/10-167, paras. 11–21 (<https://www.legal-tools.org/doc/40c4ad/>).

5. names and identifying information of other persons who might be put at risk on account of the activities of the Court, pursuant to Rule 81(4).¹⁵

In *Lubanga*, Pre-Trial Chamber I decided to grant the Prosecutor access to recommendations of the Registrar on protective measures for Prosecution witnesses.¹⁶

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, vol. 3: *International Criminal Procedure*, Oxford University Press, 2016, pp. 539–544 (<https://www.legal-tools.org/doc/995606/>).
2. Helen Brady, “Disclosure of Evidence”, 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. 417–421 (<https://www.legal-tools.org/doc/e34f81/>).
3. Mark Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Martinus Nijhoff Publishers, Leiden, 2013, pp. 307–316 (<https://www.legal-tools.org/doc/0d524b/>).

Author: Mark Klamberg.

¹⁵ ICC, *Prosecutor v. Banda and Jerbo*, Pre-Trial Chamber I, First Decision on the Prosecutor’s Requests for Redactions, 29 July 2010, ICC-02/05-03/09-58 (<https://www.legal-tools.org/doc/564cb4/>).

¹⁶ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the prosecution Request for Access to the Registry Recommendations, 31 July 2006, ICC-01/04-01/06-225 (<https://www.legal-tools.org/doc/d0b4a3/>).

Rule 82

Restrictions on disclosure of material and information protected under article 54, paragraph 3 (e)

- 1. Where material or information is in the possession or control of the Prosecutor which is protected under article 54, paragraph 3 (e), the Prosecutor may not subsequently introduce such material or information into evidence without the prior consent of the provider of the material or information and adequate prior disclosure to the accused.*
- 2. If the Prosecutor introduces material or information protected under article 54, paragraph 3 (e), into evidence, a Chamber may not order the production of additional evidence received from the provider of the initial material or information, nor may a Chamber for the purpose of obtaining such additional evidence itself summon the provider or a representative of the provider as a witness or order their attendance.*
- 3. If the Prosecutor calls a witness to introduce in evidence any material or information which has been protected under article 54, paragraph 3 (e), a Chamber may not compel that witness to answer any question relating to the material or information or its origin, if the witness declines to answer on grounds of confidentiality.*
- 4. The right of the accused to challenge evidence which has been protected under article 54, paragraph 3 (e), shall remain unaffected subject only to the limitations contained in sub-rules 2 and 3.*
- 5. A Chamber dealing with the matter may order, upon application by the defence, that, in the interests of justice, material or information in the possession of the accused, which has been provided to the accused under the same conditions as set forth in article 54, paragraph 3 (e), and which is to be introduced into evidence, shall be subject mutatis mutandis to sub-rules 1, 2 and 3.*

Rule 82 supplements Article 54(3)(e) ICC Statute and restricts disclosure of material and information obtained pursuant to that article. The first paragraph 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 in the absence of adequate prior disclosure to the accused. In *Lubanga*, the Prosecution made broad use of Article 54(3)(e) to obtain a wide range of documents on a confidential basis, and to then identify from these materials evidence for use at trial. It defended this approach on the basis of Rule 82(1), which anticipates

that information or materials obtained under Article 54(3)(e) may later be introduced as evidence after having obtained the information provider's consent.¹ Nevertheless, Trial Chamber I held that under Article 54(3)(e), the Prosecution "should receive documents or information on a confidential basis solely for the purpose of generating new evidence - in other words, the only purpose of receiving this material should be that it is to lead to other evidence (which, by implication, can be utilised), unless Rule 82(1) applies" (*Lubanga*, 13 June 2008, para. 71).

The Prosecution appealed the decision, and argued that the Trial Chamber erroneously considered that Article 54(3)(e) only applies to a limited category of "lead or springboard material".² The Prosecution argued that the "Trial Chamber appeared to create two independent and mutually exclusive categories of material – 'lead' or 'springboard' materials on the one hand; and incriminatory or exculpatory evidence on the other – only one of which may be legitimately gathered under Article 54(3)(e)" (*Lubanga*, 14 July 2008, para. 9). However, provided that Rule 82(1) allows the Prosecutor to introduce any "material or information [gathered under Article 54(3)(e)] into evidence", with the consent of the information provider, it apparently allows for the use of material gathered under Article 54(3)(e) as direct evidence. Hence, there can be no distinction between "lead material" and material with evidentiary value (para. 8). However, the Appeals Chamber rejected this argument. It held that the Trial Chamber did not create a category of 'springboard or lead material' which it juxtaposed to evidence. Rather did the Trial Chamber acknowledge that under Rule 82(1) ICC RPE, material obtained under Article 54(3)(e) may later be used as evidence, if the information provider consents.³

¹ 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, paras. 25, 73 (*'Lubanga*, 13 June 2008') (<https://www.legal-tools.org/doc/e6a054/>).

² ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Prosecution's Document in Support of Appeal against Decision to Stay Proceedings, 14 July 2008, ICC-01/04-01/06-1434 (*'Lubanga*, 14 July 2008') (<https://www.legal-tools.org/doc/ffb5d5/>).

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 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

The following paragraphs of Rule 82 seek to balance the interests of the information provider and the right of the Defence to challenge evidence which was obtained under Article 54(3)(e) ICC Statute.

Paragraph 2 provides that in case the information provider agrees to the introduction of material or information in evidence, the Chamber may not subsequently “order the production of additional evidence received from the provider of the initial material or information”. Likewise, the Chamber may not “summon the provider or a representative of the provider as a witness or order their attendance” in order to obtain such additional evidence.

Paragraph 3 provides for the scenario where the Prosecutor calls a witness to introduce in evidence the material that was protected under Article 54(3)(e), but where the information provider subsequently consented to its introduction. In such a case, the “Chamber may not compel that witness to answer any question relating to the material or information or its origin, if the witness declines to answer on grounds of confidentiality”. The rationale of paragraphs 2 and 3 is to encourage the co-operation of information providers to assist the proceedings before the Court.⁴ Pre-Trial Chamber I held in *Lubanga* that while Rule 82(3) allows the witness not to answer certain questions posed to him or her, this does not prevent the Chamber (i) to declare the testimony inadmissible in whole or in part or (ii) to assess the weight given to the witness in light of this factor.⁵ Paragraph 4 then seeks to clarify that the right of the accused to challenge evidence may not be curtailed further than the limitations in paragraphs 2 and 3 allow. Final paragraph 5 provides that the Defence may apply to the Chamber to order, in the interests of justice, that paragraphs 1 to 3 shall also apply *mutatis mutandis* to documents it seeks to introduce and which it received under the same conditions as set forth in Article 54(3)(e) ICC Statute.

Conference on 10 June 2008”, 21 October 2008, ICC-01/04-01/06-1486 (OA 13), para. 54 (<https://www.legal-tools.org/doc/485c2d/>).

⁴ Rod Rastan, “Testing Co-operation: The International Criminal Court and National Authorities”, in *Leiden Journal of International Law*, 2008, vol. 21, p. 447; Sabine Swoboda, “The ICC Disclosure Regime – A Defence Perspective”, in *Criminal Law Forum*, 2008, vol. 19, p. 467.

⁵ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Annex 1 : Decision on the Motion by the Defence to exclude anonymous hearsay testimony of the Prosecution witness - Public redacted version, 9 November 2006, ICC-01/04-01/06-693-Anx1, p. 7 (<https://www.legal-tools.org/doc/e4597e/>).

Doctrine:

1. Rod Rastan, “Testing Co-operation: The International Criminal Court and National Authorities”, in *Leiden Journal of International Law*, 2008, vol. 21, p. 447.
2. Sabine Swoboda, “The ICC Disclosure Regime – A Defence Perspective”, in *Criminal Law Forum*, 2008, vol. 19, p. 467.

Author: Karel De Meester.

Rule 83

The Prosecutor may request as soon as practicable a hearing on an ex parte basis before the Chamber dealing with the matter for the purpose of obtaining a ruling under article 67, paragraph 2.

The second sentence of Article 67(2) provides for a determination of the Court in cases where the Prosecutor seeks clarification whether evidence is of exculpatory nature.

During the negotiations of the Rome Statute an early version described this as a hearing “*ex parte*” and “*in camera*”.¹ These words were omitted from Article 67(2), Rule 83 clarifies that matter by stating that the Prosecutor may request a hearing on an *ex parte* basis.

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, pp. 524 and 534 (<https://www.legal-tools.org/doc/995606/>).
2. Mark Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Martinus Nijhoff Publishers, Leiden, 2013, p. 291 (<https://www.legal-tools.org/doc/0d524b/>).
3. William A. Schabas and Yvonne McDermott, “Article 67”, 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. 1677 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

¹ See Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II Compilation of proposals, UN Doc. A/51/22 (Supplement No. 22A), 14 September 1996, p. 200 (<https://www.legal-tools.org/doc/03b284/>).

Rule 84

In order to enable the parties to prepare for trial and to facilitate the fair and expeditious conduct of the proceedings, the Trial Chamber shall, in accordance with article 64, paragraphs 3 (c) and 6 (d), and article 67, paragraph (2), and subject to article 68, paragraph 5, make any necessary orders for the disclosure of documents or information not previously disclosed and for the production of additional evidence. To avoid delay and to ensure that the trial commences on the set date, any such orders shall include strict time limits which shall be kept under review by the Trial Chamber.

Rule 84 acknowledges that disclosure is an ongoing obligation. It thus applies prior to the confirmation of charges proceedings, during subsequent preparations for trial and extends into the appeals stage. The Appeals Chamber in *Lubanga* stated that Rule 84 applies to the appeals phase by virtue of Article 83(1) of the ICC Statute and Rule 149(1).¹

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, pp. 523–524 and 534 (<https://www.legal-tools.org/doc/995606/>).
2. Helen Brady, “Disclosure of Evidence”, 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. 421–422 (<https://www.legal-tools.org/doc/e34f81/>).
3. William A. Schabas and Yvonne McDermott, “Article 67”, 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. 1677 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

¹ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Decision on Mr Thomas Lubanga’s request for disclosure, 11 April. 2013, ICC-01/04-01/06-3017, para. 9 (<https://www.legal-tools.org/doc/2298fb/>); see also Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. 523 (<https://www.legal-tools.org/doc/995606/>).

*Section III. Victims and Witnesses**Subsection 1. Definition and General Principle Relating to Victims***Rule 85: General Remarks*****General Remarks:***

The ICC Statute provides for the protection, participation, and reparation of victims. However, discussions on a definition of victims were only held during the elaboration of the Rules of Procedure and Evidence. The jurisprudence has subsequently clarified the resulting definition.

Single Notion of ‘Victims’:

The Statute and the Rules do not embrace two different notions of ‘victims’, one for protection purposes pursuant to Article 68(1) of the ICC Statute and Rules 81, 87 and 88 of the RPE, and the other for the purpose of participation in situation and case proceedings. On the contrary, the notion of ‘victim’ is the same both in respect of protection and participation in the proceedings.¹ In fact, the location of Rule 85 in the Rules is indicative of a general provision relating to victims, applicable to various stages of proceedings,² including reparations proceedings.³

List of Rule 85 Criteria:

Rule 85(a) establishes four criteria to be met in order to be recognised as victim: (i) the applicant must be a natural person, (ii) the applicant must have suffered harm, (iii) the crime from which the harm ensued must fall within the jurisdiction of the Court, and (iv) there must be a causal link between the crime and the harm suffered.⁴

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. 13 (<https://www.legal-tools.org/doc/eb69c1/>).

² 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 2008, ICC-01/04-01/06-1432, para. 57 (<https://www.legal-tools.org/doc/75cf1a/>).

³ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on the defence request for leave to appeal the Decision establishing the principles and procedures to be applied to reparation 29 August 2012, ICC-01/04-01/06-2911, para. 217 (<https://www.legal-tools.org/doc/b19035/>).

⁴ 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. 79 (*Situation in the Democratic Republic of the Congo*, 17 January 2006') (<https://www.legal-tools.org/doc/2fe2fc/>); *Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo, 31 July 2006, ICC-01/04-177-tENG, p. 7 (<https://www.legal-tools.org/doc/fa83fc/>); *Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo, 28 July 2006, ICC-01/04-01/06-228-tEN, p. 7 (<https://www.legal-tools.org/doc/0f3b26/>); *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 The Prosecutor v. Thomas Lubanga Dyilo, 20 October 2006, ICC-01/04-01/06-601-tEN, p. 9 (<https://www.legal-tools.org/doc/d293d9/>). *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, 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, 14 March 2008, ICC-02/04-01/05-282, para. 8 (<https://www.legal-tools.org/doc/12ef1e/>); *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. 36 (*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 Applications for Participation in the Proceedings of Applicants a/0327/07 to a/0337/07 and a/0001/08, 2 April 2008, ICC-01/04-01/07-357, p. 8 (<https://www.legal-tools.org/doc/3efc3f/>); *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. 24 (*Democratic Republic of the Congo*, 3 July 2008') (<https://www.legal-tools.org/doc/79af84/>); *Prosecutor v. Bemba*, Pre-Trial Chamber III, Fourth decision on Victims' participation, 15 December 2008, ICC-01/05-01/08-320, para. 30 (<https://www.legal-tools.org/doc/1652d9/>); *Katanga and Ngudjolo*, Pre-Trial Chamber I, Decision on the Application for Participation of Witness 166, 23 June 2008, ICC-01/04-01/07-632, para. 4 (*Katanga and Ngudjolo*, 23 June 2008') (<https://www.legal-tools.org/doc/d8902d/>); *Prosecutor v. Abu Garda*, Pre-Trial Chamber I, Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case, 25 September 2009, ICC-02/05-02/09-121, para. 11 (<https://www.legal-tools.org/doc/1e2c8b/>); *Prosecutor v. Al-Bashir*, Pre-Trial Chamber I, Decision on Applications a/0011/06 to a/0013/06, a/0015/06 and a/0443/09 to a/0450/09 for Participation in the Proceedings at the Pre-Trial Stage of the Case, 10 December 2009, ICC-02/05-01/09-62, para. 25 (<https://www.legal-tools.org/doc/ee5825/>); *Prosecutor v. Banda and Jerbo*, Pre-Trial Chamber I, Decision on Victims' Participation at the Hearing on the Confirmation of the Charges, 29 October 2010, ICC-02/05-03/09-89, para. 2 (<https://www.legal-tools.org/doc/fbf657/>); *Prosecutor v. Ruto et al.*, Pre-Trial Chamber II, First Decision on Victims' Participation in the Case, 30 March 2011, ICC-01/09-01/11-17, para. 6 (*Ruto et al.*, 30 March 2011') (<https://www.legal-tools.org/doc/f00f2b/>); *Prosecutor v. Kenyatta et al.*, Pre-Trial

Rule 85(b) also sets out four criteria necessary for granting victim status regardless of the stage of the proceedings at which the applicants wish to participate: (i) the applicant must be an organization or institution whose property is dedicated to religion, education, art or science or charitable purposes, a historical monument, hospital or other place or object for humanitarian purposes, (ii) the organization or institution must have sustained harm, (iii) the crime from which the harm arises must fall within the jurisdiction of the Court, and (iv) there must be a direct causal link between the crime and the harm.⁵ In practical terms, this means that in order to qualify as a victim, an organization will have to establish the following criteria: (i) its quality of organization or institution must be established, (ii) the individual acting on behalf of the organization or institution must demonstrate his or her capacity to represent the organization, (iii) the individual acting on behalf of the organization or institution must establish his or her identity, (iv) the organization or institution has suffered direct harm, and (v) the harm suffered is as a result of an incident falling within the parameters of the confirmed charges (*Al Mahdi*, 8 June 2016, para. 23).

Chamber II, First Decision on Victims' Participation in the Case, 30 March 2011, ICC-01/09-02/11-23, para. 6 ('*Kenyatta et al.*, 30 March 2011') (<https://www.legal-tools.org/doc/153849/>); *Situation in Côte d'Ivoire*, Pre-Trial Chamber III, Order to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to Article 15(3) of the Statute, 6 July 2011, ICC-02/11-6, para. 10 (<https://www.legal-tools.org/doc/45f4fd/>); 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, paras. 19–20 (<https://www.legal-tools.org/doc/17ef31/>); *Prosecutor v. Gbagbo*, Pre-Trial Chamber I, Second decision on victims' participation at the confirmation of charges hearing and in the related proceedings, 8 February 2013, ICC-02/11-01/11-384, para. 25 (<https://www.legal-tools.org/doc/ab6f12/>); *Prosecutor v. Ntaganda*, Pre-Trial Chamber II, Second Decision on Victims' participation at the confirmation of charges hearing and in the related proceedings, 7 February 2014, ICC-01/04-02/06-251, para. 13 (<https://www.legal-tools.org/doc/eb21da/>); *Prosecutor v. Al Mahdi*, Trial Chamber VIII, Public redacted version of 'Decision on Victim Participation at Trial and on Common Legal Representation of Victims', 8 June 2016, ICC-01/12-01/15-97-Red, para. 17 ('*Al Mahdi*, 8 June 2016') (<https://www.legal-tools.org/doc/c8c749/>).

⁵ *Democratic Republic of the Congo*, 31 January 2008, para. 140; *Ruto et al.*, 30 March 2011, para. 10; *Kenyatta et al.*, 30 March 2011, para. 10; 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. 197 ('*Lubanga*, 7 August 2012') (<https://www.legal-tools.org/doc/a05830/>).

Applicable Standard of Proof:

The standard of proof against which the information submitted by a victim applicant is assessed is “grounds to believe” that the Rule 85 criteria are met, conducting a *prima facie* assessment of the content of the application on the merits *inter alia* of its intrinsic coherence.⁶ By contrast, taking into account the non-criminal nature of the reparation proceedings after a conviction, victim applicants must only meet the ‘balance of probabilities’ standard to become participants in the latter proceedings (*Lubanga*, 7 August 2012, para. 253).

Compatibility of Victim and Witness Status:

The dual procedural status of victim and witness has been accepted by the Court.⁷ Neither the ICC Statute nor the Rules specify any restriction or limitation concerning the probative value that should be accorded to the

⁶ *Democratic Republic of the Congo*, 17 January 2006, para. 99; ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo, 29 July 2006, ICC-01/04-01/06-172-tEN, pp. 6–9 (<https://www.legal-tools.org/doc/2c91db/>); *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. 8 (<https://www.legal-tools.org/doc/27da16/>); *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. 5 (<https://www.legal-tools.org/doc/bf662d/>); *Katanga and Ngudjolo*, 23 June 2008, para. 7; *Democratic Republic of the Congo*, 3 July 2008, para. 27; *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, para. 27 (<https://www.legal-tools.org/doc/9e1c30/>); *Prosecutor v. Bemba*, Trial Chamber III, Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties’ observations on applications for participation by 86 applicants, 22 February 2010, ICC-01/05-01/08-699, para. 19 (*Bemba*, 22 February 2010’) (<https://www.legal-tools.org/doc/1d6591/>); *Al Mahdi*, 8 June 2016, paras. 17, 21 and 23.

⁷ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on Victims’ Participation, 18 January 2008, ICC-01/04-01/06-1119, paras. 132–134 (<https://www.legal-tools.org/doc/4e503b/>); *Katanga and Ngudjolo*, 23 June 2008, para. 18; ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Confirmation of Charges Decision, 30 September 2008, ICC-01/04-01/07-717, para. 206 (*Katanga and Ngudjolo*, 30 September 2008’) (<https://www.legal-tools.org/doc/67a9ec/>).

evidence of a witness who is also a victim in the case, the dual status of witness and victim does not affect the probative value of witnesses' statements and related documents (*Katanga and Ngudjolo*, 30 September 2008, paras. 208–209).

Victims Already Granted Leave to Participate:

In circumstances in which victims have already been granted leave to participate in the proceedings before the Pre-Trial Chamber or the Trial Chamber, the Appeals Chamber will not enquire into their victim status pursuant to Rule 85.⁸ For interlocutory appeals, the Appeals Chamber will not itself make first hand determinations with respect to the status of victims since other factors are likely to inhibit the Appeals Chamber from taking the initiative to make such determinations, such as (i) the fact that the applications for victim status and authorisation to participate in the trial proceedings are *sub judice* before other Chamber, or (ii) the fact that maybe applications are not transmitted to the Appeals Chamber in terms of Rule 89(1) of the Rules of Procedure and Evidence nor is the Appeals Chamber provided with any of the information required under Regulation 86 of the Regulations of the Court (*Lubanga*, 16 May 2008, para. 40). In fact, it is the duty of a legal representative who applies for the participation of victims in an appeal to refer specifically to the relevant decisions granting victim status to each of the victims he or she represents in his application for participation.⁹ If the

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-tCMN, para. 45 (<https://www.legal-tools.org/doc/ff3bd8/>); *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 (*Lubanga*, 16 May 2008’) (<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, para. 53 (<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, para. 92 (<https://www.legal-tools.org/doc/6aacb4/>).

⁹ ICC, *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

legal representatives do not specify the victims they represent in an appeal referring to the decisions that granted the victims such status, the Appeals Chamber will reject the victims' request to participate in the appeal at hand (*Bemba*, 6 March 2012, para. 13). By contrast, regarding appeals against decisions on acquittal or conviction or against sentence (Article 81), the Appeals Chamber decides whether the criteria of Rule 85 of the Rules of Procedure and Evidence are fulfilled with respect to new applicants.¹⁰

Along the same lines, the Trial Chambers will normally not inquire into the victim status of individuals authorized to participate in preceding phases of the proceedings, unless the parties raise concerns related to, for instance, the non-confirmation of some of the charges by the Pre-Trial Chamber.¹¹

Doctrine: For the bibliography, see the final comment on Rule 85(a).

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2012, ICC-01/05-01/08-2098, para. 11 (*Bemba*, 6 March 2012') (<https://www.legal-tools.org/doc/95f629/>); *Prosecutor v. Banda and Jerbo*, Appeals Chamber, Decision on the Participation of Victims in the Appeal, 6 May 2013, ICC-02/05-03/09-470, para. 14 (<https://www.legal-tools.org/doc/74a59d/>).

¹⁰ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Decision on the Request of the Registrar Relating to the Transmission of Applications for Participation in the Appeal Proceedings and on Related Issues, 6 May 2013, ICC-01/04-01/06-3026, para. 7 (<https://www.legal-tools.org/doc/fe7c39/>).

¹¹ ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, Decision on the treatment of applications for participation, 26 February 2009, ICC-01/04-01/07-933-tENG, para. 13 (<https://www.legal-tools.org/doc/1691ec/>); *Bemba*, 22 February 2010, paras. 17–19.

Rule 85(a): Natural Persons

(a) ‘Victims’ means natural persons

Definition of Natural Person:

The ordinary meaning of the term “natural person”, as it appears in Rule 85(a), is in French “[un] être humain tel qu’il est considéré par le droit; la personne humaine prise comme sujet de droit, par opposition à la personne morale”, or, in English, “a human being”. A natural person is thus any person who is not a legal person.¹ Victims may also include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.²

Deceased Persons:

Victims who are deceased can no longer be said to be participating and they must therefore be removed from the list of participating victims. However, this is not to say that the views and concerns expressed by the victims prior to their death are disregarded thereafter. The views and concerns expressed by victims prior to their death and considered by a Chamber remain part of the case record even if the deceased victim is no longer participating.³ While deceased persons cannot be considered to be natural persons within the meaning of Rule 85(a),⁴ close relations of deceased persons may 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. 80 (<https://www.legal-tools.org/doc/2fe2fc/>).

² ICC, *Prosecutor v. Ongwen*, Pre-Trial Chamber II, Decision Establishing Principles on the Victims’ Application Process, 4 March 2015, ICC-02/04-01/15-205, para. 17 (<https://www.legal-tools.org/doc/5037fb/>).

³ 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. 25 (<https://www.legal-tools.org/doc/e34abb/>).

⁴ *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. 36 (‘*Situation in Darfur*, 14 December 2007’) (<https://www.legal-tools.org/doc/bf662d/>).

considered to be victims under the ICC Statute, the Rules, and the Regulations of the Court provided they fulfil the necessary criteria.⁵

Person's Identity:

Proof of identity, kinship, guardianship and legal guardianship must be submitted with any application.⁶ Whether the identity of the applicant as a natural person appears duly established is an analysis of fact based on adequacy of the supporting evidence.⁷ In principle, the identity of an applicant should be confirmed by a document (i) issued by a recognised public authority, (ii) stating the name and date of birth of the holder, and (iii) showing a photograph of the holder. When the documents provided do not meet the above three criteria, the assessment on those applications is deferred until adequate proof of identities is submitted and/or a report on the identity documents available and administrative system is provided to the Court.⁸ Nonetheless,

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. 24 (<https://www.legal-tools.org/doc/de0474/>); *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. 22 (<https://www.legal-tools.org/doc/79af84/>).

⁶ ICC, *Situation in Uganda*, 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-02/04-101, para. 16 (<https://www.legal-tools.org/doc/8f9181/>); *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, para. 13 (*‘Situation in the Democratic Republic of the Congo, 17 August 2007’*) (<https://www.legal-tools.org/doc/a4e393/>).

⁷ 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. 12 (*‘Kony et al., 10 August 2007’*) (<https://www.legal-tools.org/doc/d25664/>).

⁸ *Situation in Uganda*, 10 August 2007, paras. 16 and 21; *Kony et al.*, 10 August 2007, paras. 16 and 20; *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, 20 August 2007, ICC-01/04-374, para. 14 (<https://www.legal-tools.org/doc/a4e393/>); *Situation in Darfur*, 14 December 2007, para. 26; *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, a/0082/06, a/0084/06 to a/0089/06,

in areas of recent conflict where communication and travel may be difficult, it would be inappropriate to expect applicants to be able to provide proof of identity of the same type as would be required of individuals living in areas not experiencing the same types of difficulties (*Democratic Republic of the Congo*, 17 August 2007, para. 14; *Situation in Darfur*, 14 December 2007, para. 27; *Kony et al.*, 14 March 2008, para. 6). Accordingly, the Court seeks to achieve a balance between the need to establish an applicant's identity with certainty, on the one hand, and the applicant's personal circumstances, on the other, taking into account the need of ensuring that victims are not unfairly deprived of an opportunity to participate for reasons beyond their control.⁹ As a result, where it is not possible for an applicant to acquire or produce documents of the kind set out above, the Court will consider a statement signed by two credible witnesses attesting to the identity of the applicant and including, where relevant, the relationship between the victim and the person acting on his or her behalf.¹⁰ This flexible approach to the establishment of the applicant's identity extends to possible discrepancies between the application and identity document(s) submitted. Thus, minor discrepancies which do not call into question the overall credibility of the information provided by the applicant may be accepted.¹¹

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 14 March 2008, ICC-02/04-01/05-282, para. 2 (*Kony et al.*, 14 March 2008') (<https://www.legal-tools.org/doc/12ef1e/>).

⁹ 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 2008, ICC-01/04-01/06-1432, para. 87 (*Lubanga*, 18 January 2008') (<https://www.legal-tools.org/doc/75cf1a/>); *Prosecutor v. Lubanga*, Appeals Chamber, Decision on 32 applications to participate in the proceedings, 27 August 2013, ICC-01/04-01/06-3045-Red2, para. 17 (*Lubanga*, 27 August 2013') (<https://www.legal-tools.org/doc/af8699/>).

¹⁰ *Democratic Republic of the Congo*, 17 August 2007, para. 15; *Lubanga*, 18 January 2008, para. 88; *Prosecutor v. Ruto et al.*, Pre-Trial Chamber II, First Decision on Victims' Participation in the Case, 30 March 2011, ICC-01/09-01/11-17, para. 8 (<https://www.legal-tools.org/doc/f00f2b/>); *Prosecutor v. Kenyatta et al.*, Pre-Trial Chamber II, First Decision on Victims' Participation in the Case, 30 March 2011, ICC-01/09-02/11-23, para. 8 (<https://www.legal-tools.org/doc/153849/>); *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. 25 (<https://www.legal-tools.org/doc/0fdd1e/>); *Lubanga*, 27 August 2013, para. 17.

¹¹ ICC, *Prosecutor v. Gbagbo*, Trial Chamber I, Decision on victim participation, 6 March 2015, ICC-02/11-01/11-800, paras. 31–32 (<https://www.legal-tools.org/doc/a62e6b/>); *Prosecutor v. Al Mahdi*, Trial Chamber VIII, Public redacted version of 'Decision on Victim Participation

Doctrine: For the bibliography, see the final comment on Rule 85(a).

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at Trial and on Common Legal Representation of Victims’, 8 June 2016, ICC-01/12-01/15-97-Red, paras. 18–19 (<https://www.legal-tools.org/doc/c8c749/>).

Rule 85(a): Harm

who have suffered harm

Definition of Harm:

The ICC Statute framework does not provide a definition of the concept of harm under Rule 85 of the Rules. In the absence of a definition, the Court has interpreted the term on a case-by-case basis in the light of Article 21(3) of the Statute, noting that the determination of a single instance of harm suffered is sufficient to establish the status of victim at the situation stage.¹ The Appeals Chamber has specified that the notion of “harm” in Rule 85(a) of the Rules denotes injury, loss or damage suffered by a natural person, that is, personal harm.² Moreover, the notion of victim necessarily implies the existence of personal harm, but does not necessarily imply the existence of direct harm since the harm suffered by one victim as a result of the commission of a crime within the jurisdiction of the Court can give rise to harm suffered by other victim (*Lubanga*, 11 July 2008, paras. 32 and 38).

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, paras. 81–82 (*‘Situation in the Democratic Republic of the Congo, 17 January 2006’*) (<https://www.legal-tools.org/doc/2fe2fc/>); *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 and a/0105/06 to a/0110/06, a/0188/06, a/0128/06 to a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06, a/0224/06, a/0227/06 to a/0230/06, a/0234/06 to a/0236/06, a/0240/06, 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”, 31 January 2008, ICC-01/04-423-Corr-tENG, para. 3 (<https://www.legal-tools.org/doc/de0474/>).

² 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 2008, ICC-01/04-01/06-1432, paras. 31–32 (*‘Lubanga, 11 July 2008’*) (<https://www.legal-tools.org/doc/75cf1a/>); *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. 28 (<https://www.legal-tools.org/doc/0fdd1e/>); *Prosecutor v. Al Mahdi*, Trial Chamber VIII, Public redacted version of ‘Decision on Victim Participation at Trial and on Common Legal Representation of Victims’, 8 June 2016, ICC-01/12-01/15-97-Red, para. 20 (<https://www.legal-tools.org/doc/e8c749/>).

Types of Harm:

Pursuant to the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, and the 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, the harm suffered by victims may be individual or collective, material (such as economic harm), physical or psychological (including mental and emotional harm³ and/or may consist in a substantial impairment of their fundamental rights.⁴ Whether a victim applicant has suffered harm is an analysis of fact based on adequacy of the supporting evidence⁵ and must be determined in light of the particular circumstances (*Lubanga*, 11 July 2008, para. 32). Moreover, the fact that harm is collective does not mandate either its inclusion or exclusion in the establishment of whether a person is

³ ICC, *Prosecutor v. Kony, et al.*, 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. 34 (<https://www.legal-tools.org/doc/e287c9/>).

⁴ *Situation in the Democratic Republic of the Congo*, 17 January 2006, paras. 116, 131, 145, 161, 172 and 182; *Prosecutor v. Lubanga*, Trial Chamber I Decision on Victims’ Participation, 18 January 2008, ICC-01/04-01/06-1119, para. 92 (<https://www.legal-tools.org/doc/4e503b/>); *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 2008, ICC-01/04-01/06-1432, para. 32 (<https://www.legal-tools.org/doc/75cf1a/>); *Prosecutor v. Bemba*, Pre-Trial Chamber III, Fourth decision on Victims’ participation, 15 December 2008, ICC-01/05-01/08-320, para. 70 (<https://www.legal-tools.org/doc/1652d9/>); *Prosecutor v. Ruto et al.*, Pre-Trial Chamber II, Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 5 August 2011, ICC-01/09-01/11-249, para. 50 (<https://www.legal-tools.org/doc/102f41/>); *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. 28 (<https://www.legal-tools.org/doc/0fdd1e/>); *Prosecutor v. Gbagbo*, Trial Chamber I, Decision on victim participation, 6 March 2015, ICC-02/11-01/11-800, para. 33 (<https://www.legal-tools.org/doc/a62e6b/>); *Prosecutor v. Al Mahdi*, Trial Chamber VIII, Public redacted version of ‘Decision on Victim Participation at Trial and on Common Legal Representation of Victims’, 8 June 2016, ICC-01/12-01/15-97-Red, para. 20 (<https://www.legal-tools.org/doc/c8c749/>).

⁵ 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. 12 (<https://www.legal-tools.org/doc/d25664/>).

a victim before the Court. The issue for determination is whether the harm is personal to the individual victim. The notion of harm suffered by a collective is not, as such, relevant or determinative (para. 35).

Doctrine: For the bibliography, see the final comment on Rule 85(a).

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Rule 85(a): Result of Crime

as a result of the commission of any crime

Assessment of Sufficient Causal Link Harm-Crime:

At the situation stage, it is necessary to establish that there are grounds to believe that the harm suffered is the result of the commission of crimes falling within the jurisdiction of the Court, but it is not necessary to determine in any great detail the precise nature of the causal link between the crime and the alleged harm.¹ By contrast, at the case stage the victims must demonstrate that a sufficient causal link exists between the harm they have suffered and the crimes for which there are grounds to believe that the suspect/accused bears criminal responsibility and for which the Chamber has issued an arrest warrant/summons to appear, has confirmed the charges² or has rendered judgment.³ The causality between the commission of the crime and the harm suffered by the victim applicant cannot be established with precision *in*

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. 94 (*'Situation in the Democratic Republic of the Congo, 17 January 2006'*) (<https://www.legal-tools.org/doc/2fe2fc/>); *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 and a/0105/06 to a/0110/06, a/0188/06, a/0128/06 to a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06, a/0224/06, a/0227/06 to a/0230/06, a/0234/06 to a/0236/06, a/0240/06, 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", 31 January 2008, ICC-01/04-423-Corr-tENG, para. 3 (<https://www.legal-tools.org/doc/de0474/>).

² *Situation in the Democratic Republic of the Congo*, 17 January 2006, para. 100; ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo, 29 June 2006, ICC-01/04-01/06-172-tEN, p. 6 (*'Lubanga, 29 June 2006'*) (<https://www.legal-tools.org/doc/2c91db/>); *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo, 31 July 2006, ICC-01/04-177-tENG, p. 9 (<https://www.legal-tools.org/doc/fa83fc/>); *Prosecutor v. Katanga*, Pre-Trial Chamber I, Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9, 23 January 2008, ICC-01/04-01/07-160, para. 14 (<https://www.legal-tools.org/doc/eb69c1/>).

³ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Decision on 32 applications to participate in the proceedings, 27 August 2013, ICC-01/04-01/06-3045-Red2, paras. 18–19 (*'Lubanga, 27 August 2013'*) (<https://www.legal-tools.org/doc/af8699/>).

abstracto but must instead be assessed on a case-by-case basis, in light of the information available in the application form and the supporting material, when available.⁴ In this regard, the identification of the perpetrators of the incidents alleged by the victim applicants constitutes a facet of the requisite link between the alleged harm and the alleged crimes against the suspect. However, it would be unfair, at the pre-trial stage of the proceedings, to place on victim applicants the onerous burden of identifying in a conclusive way or providing a considerable degree of precision with respect to the identification of those responsible for their victimisation.⁵ Accordingly, whether the alleged harm appears to have arisen “as a result” of the event constituting a crime within the jurisdiction of the Court is assessed in light of the legal provisions of the Statute, using a pragmatic, strictly factual approach, whereby the alleged harm is held as ‘resulting from’ the alleged incident when the spatial and temporal circumstances surrounding the appearance of the harm and the occurrence of the incident seem to overlap, or at least to be compatible and not clearly inconsistent.⁶ Moreover, a victim applicant does not need to demonstrate that the alleged crimes charged by the Prosecutor are the only or substantial cause of the harm suffered; it is sufficient if the victim applicant demonstrates that the alleged crimes could have objectively contributed to the harm suffered.⁷ Nonetheless, when the harm alleged by the

⁴ ICC, *Prosecutor v. Ruto et al.*, Pre-Trial Chamber II, Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 5 August 2011, ICC-01/09-01/11-249, para. 52 (<https://www.legal-tools.org/doc/102f41/>); *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, paras. 29 and 31 (*Gbagbo*, 4 June 2012’) (<https://www.legal-tools.org/doc/0fdd1e/>).

⁵ 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. 36 (*Mbarushimana*, 11 August 2011’) (<https://www.legal-tools.org/doc/17ef31/>).

⁶ 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. 12 and 14 (<https://www.legal-tools.org/doc/d25664/>); *Lubanga*, 27 August 2013, para. 166; *Mbarushimana*, 11 August 2011, para. 36.

⁷ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber III, Fourth decision on Victims’ participation, 15 December 2008, ICC-01/05-01/08-320, paras. 776–77 (<https://www.legal-tools.org/doc/1652d9/>); *Gbagbo*, 4 June 2012, para. 31; *Prosecutor v. Al Mahdi*, Trial Chamber VIII, Public redacted version of ‘Decision on Victim Participation at Trial and on Common Legal Representation of Victims’, 8 June 2016, ICC-01/12-01/15-97-Red, para. 22 (<https://www.legal-tools.org/doc/c8c749/>).

victim applicant is remote in relation to the alleged crimes, his or her application for participation will be rejected as it does not meet the requirement of Rule 85 of the Rules (*Gbagbo*, 4 June 2012, para. 31).

Definition of Indirect Victims:

Following the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, ‘indirect victims’ are also recognised as victims before the Court, that is, (i) victims who have suffered harm as a result of the harm suffered by the direct victim, and (ii) those persons that have suffered harm whilst intervening to help direct victims or to prevent the latter from becoming victims because of the commission of the crimes.⁸ Rule 85(a) supports this conclusion because, by contrast with Rule 85(b), it does not provide that natural persons must have “sustained direct harm” (*Lubanga*, 18 January 2008, para. 91). The relevant issue is whether the harm suffered is “personal” to the individual. If it is, it can attach to both direct and indirect victims.⁹

Need for Link Harm-Charged Crime:

In any event, the harm suffered by the victims must be directly linked to the crimes contained in the arrest warrant, summons to appear or document containing the charges preferred against the suspect or accused, or must have been suffered by intervening to help direct victims in the case or to prevent

⁸ *Lubanga*, 29 June 2006, pp. 7–8; ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Public Redacted Version of the “Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case”, 10 June 2008, ICC-01/04-01/07-579, para. 66 (<https://www.legal-tools.org/doc/87f4c3/>); *Prosecutor v. Lubanga*, Trial Chamber I, Redacted version of “Decision on ‘indirect victims’”, 8 April 2009, ICC-01/04-01/06-1813, para. 51 (<https://www.legal-tools.org/doc/c1cf65/>); *Prosecutor v. Abu Garda*, Pre-Trial Chamber I, Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case, 29 September 2009, ICC-02/05-02/09-121, para. 13 (<https://www.legal-tools.org/doc/1e2c8b/>); *Prosecutor v. Ruto et al.*, Pre-Trial Chamber II, Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 5 August 2011, ICC-01/09-01/11-249, para. 54 (<https://www.legal-tools.org/doc/102f41/>); *Gbagbo*, 4 June 2012, para. 30.

⁹ 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 2008, ICC-01/04-01/06-1432, para. 33 (*Lubanga*, 11 July 2008’) (<https://www.legal-tools.org/doc/75cf1a/>).

the latter from becoming victims because of the commission of said crimes.¹⁰ The position adopted by the Trial Chamber in the *Lubanga* case, pursuant to which Rule 85 would not have the effect of restricting the participation of victims to the crimes contained in the charges confirmed by the Pre-Trial Chamber (*Lubanga*, 18 January 2008, para. 93) was eventually corrected by the Appeals Chamber. The latter found that whilst the ordinary meaning of Rule 85 does not per se, limit the notion of victims to the victims of the crimes charged, the effect of Article 68(3) of the Statute is that the participation of victims in the trial proceedings, pursuant to the procedure set out in Rule 89(1) of the Rules, is limited to those victims who are linked to the charges (*Lubanga*, 11 July 2008, para. 58; *Mbarushimana*, 11 August 2011, para. 22). Accordingly, the Chambers must determine whether an applicant is a victim because he or she suffered harm in connection with the particular crimes charged, and if so, whether the personal interests of the applicant are affected. If the applicant is unable to demonstrate a link between the harm suffered and the particular crimes charged, then even if his or her personal interests are affected by an issue in the trial, it would not be appropriate under Article 68(3) read with Rule 85 and 89(1) of the Rules for his or her views and concerns to be presented (*Lubanga*, 11 July 2008, para. 64; *Gbagbo*, 4 June 2012, para. 27). Nevertheless, it must be noted that discrepancies between dates or locations mentioned in a victim's application to participate and those in the charged crimes are not necessarily fatal in terms of the merits of the applications by victims to participate in a particular case. It all depends on the overall evidence presented.¹¹

Doctrine: For the bibliography, see the final comment on Rule 85(a).

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¹⁰ 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, p. 4 (<https://www.legal-tools.org/doc/30ee9d/>); *Lubanga*, 27 August 2013, paras. 19 and 165.

¹¹ *Prosecutor v. Bemba*, Trial Chamber III, Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings, 12 July 2010, ICC-01/05-01/08-807-Corr, para. 96 (<https://www.legal-tools.org/doc/c2f6d4/>); *Bemba*, Trial Chamber III, Decision on 772 applications by victims to participate in the proceedings, 18 November 2010, ICC-01/05-01/08-1017, paras. 52–55 (<https://www.legal-tools.org/doc/ccfc38/>).

Rule 85(a): Within the Jurisdiction of the Court

within the jurisdiction of the Court

Definition of Court's jurisdiction:

Whether the events described by each victim applicant constitute a crime within the jurisdiction of the Court is assessed in light of the legal provisions of the Statute.¹ To fall within the Court's jurisdiction, a crime must meet the following conditions: (i) it must be one of the crimes mentioned in Article 5 of the Statute (the crime of genocide, crimes against humanity and war crimes), (ii) the crime must have been committed within the time period laid down in Article 11 of the Statute, and (iii) the crime must meet one of the two alternative conditions described in Article 12 of the Statute.² With regard to the latter condition, given that the criteria laid down in Article 12(2) of the Statute are alternative, it is unnecessary to determine the nationality of the persons who are or may be charged if the crimes were committed on the territory of a State Party (*Situation in the Democratic Republic of the Congo*, 17 January 2006, para. 93).

¹ 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. 12 (<https://www.legal-tools.org/doc/d25664/>).

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-tEN-Corr, paras. 85 and 93 ('*Situation in the Democratic Republic of the Congo*, 17 January 2006') (<https://www.legal-tools.org/doc/2fe2fc/>); *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo, 28 July 2006, ICC-01/04-01/06-228-tEN, p. 14 (<https://www.legal-tools.org/doc/0f3b26/>); *Prosecutor v. Ruto et al.*, Pre-Trial Chamber II, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 5 August 2011, ICC-01/09-01/11-249, paras. 44–45 (<https://www.legal-tools.org/doc/102f41/>); *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 to a/0110/06, a/0188/06, a/0128/06 to a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06, a/0224/06, a/0227/06 to a/0230/06, a/0234/06 to a/0236/06, a/0240/06, 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, 31 January 2008, ICC-01/04-423-Corr-tENG, para. 37 (<https://www.legal-tools.org/doc/de0474/>).

Cross-references:

Articles 15(3), 19(3), 43(6), 53(1)(c) and 2(c), 54(1)(b), 54(3)(b), 57(3)(c), 57(3)(e), 64(2) and (6)(e), 65(4), 68, 75, 79, 82(4), 87(4), 93(1)(j), 110(4)(b)
Rules 16–19, 43, 50, 59, 69, 72, 81(3)–(4), 86–99, 112(4), 119(3), 121(10), 131(2), 132 *bis*(5)(c)(6), 143–144, 194(3), 218(3)–(4), 221, 224.

Doctrine:

1. Silvia A. Fernández de Gurmendi, “Definition of Victims and General Principle”, 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. 427–433 (<https://www.legal-tools.org/doc/e34f81/>).
2. Claude Jorda, and Jérôme Hemptinne, “The Status and Role of the Victim”, 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. 1387–1419 (<https://www.legal-tools.org/doc/01addc/>).
3. 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. 1704–1705 (<https://www.legal-tools.org/doc/040751/>).
4. 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*, vol. 2, A. Pedone, Paris, 2012, p. 1559 (<https://www.legal-tools.org/doc/cdde69/>).
5. Héctor Olásolo, and Alejandro Kiss, “Victims’ participation according to the jurisprudence of the International Criminal Court”, in Héctor Olásolo, *Essays on International Criminal Justice*, Hart Publishing, Oxford, 2012, pp. 145–155 (<https://www.legal-tools.org/doc/852d7e/>).
6. Rina Randriamiarisoa, “Rome Statute of the International Criminal Court – Article 68: Protection of victims and witnesses and their participation in the proceedings”, in De Hert *et al.* (eds.), *Code of International Criminal Law and Procedure*, Larcier, Brussels, 2013, pp. 332–337 (<https://www.legal-tools.org/doc/3f10e0/>).

7. 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. 1300–1308 (<https://www.legal-tools.org/doc/bcad4c/>).
8. Kai Ambos, *Treatise on International Criminal Law*, vol. 3, Oxford University Press, 2016, pp. 171–174, p. 183 (<https://www.legal-tools.org/doc/995606/>).

Author: Enrique Carnero Rojo.

Rule 85(b)

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

The ICC Statute framework does not provide a definition of the concept of harm under Rule 85(b) of the Rules. However, in *Lubanga*, Trial Chamber I stated that “in accordance with Principle 8 of the Basic Principles,¹ a victim may suffer, either individually or collectively, from harm in a variety of different ways such as physical or mental injury, emotional suffering, economic loss or substantial impairment of his or her fundamental rights. This principle provides appropriate guidance”.²

In the *Situation in Democratic Republic of the Congo*, Pre-Trial Chamber I ruled that the applicant organization suffered economic loss as a result of one or more crimes within the Court’s jurisdiction, pursuant to Article 5 of the Statute.³ The organization therefore meet the criteria of Rule 85(b) of the Rules.

Cross-reference:

Article 68(1)

Author: Mark Klamberg.

¹ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147, 16 December 2005 (<https://www.legal-tools.org/doc/bcf508/>).

² ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on victim’s participation, 18 January 2008, ICC-01/04-01/06-1119, para. 92 (<https://www.legal-tools.org/doc/4e503b/>).

³ ICC, *Situation in Democratic Republic of the Congo*, Pre-Trial Chamber I, Redacted version of the Decision on 13 applications for victims’ participation in proceedings relating to the situation in the Democratic Republic of the Congo, 18 August 2011, ICC-01/04-597-Red, para. 34 (<https://www.legal-tools.org/doc/9fe200/>).

Rule 86

A Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with article 68, in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence.

General remarks:

Articles 68(1) and 54(1)(b) of the ICC Statute make explicit reference to particularly vulnerable groups of victims and witnesses that may specially require protection for reason of their gender, age or the sexual nature of the crime. Rule 86 contains a general principle in this regard.

General Principle: Consideration of Victims and Witnesses' Needs:

Rule 86 of the Rules establishes as a general principle that the Pre-Trial Chamber in making any direction or order, as well as the other organs of the Court in performing their functions under the Statute and the Rules, shall take into account the needs of all victims and witnesses in accordance with Article 68 of the Statute.¹ There are particular special needs to be taken into account for child and elderly victims, victims with disabilities, and victims

¹ ICC, *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, p. 3 (<https://www.legal-tools.org/doc/a15e9d/>); *Situation in the Democratic Republic of the Congo*, Decision appointing ad hoc Counsel and establishing a deadline for the Prosecution and the ad hoc Counsel to submit observations on the applications of applicants a/0001/06 to a/0003/06, 18 May 2006, ICC-01/04-147, p. 3 (<https://www.legal-tools.org/doc/a72335/>); *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Décision autorisant le dépôt d'observations sur les demandes de participation à la procédure a/0004/06 à a/0009/06, a/0016/06 à a/0063/06 et a/0071/06, 22 September 2006, ICC-01/04-228, p. 4 (<https://www.legal-tools.org/doc/5c6a3e/>); *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision authorising the filing of observations on applications for participation in the proceedings, 23 May 2007, ICC-01/04-329-tEN, p. 3 (<https://www.legal-tools.org/doc/53e7ba/>); *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision authorising the filing of observations on applications for participation in the proceedings, 23 July 2007, ICC-01/04-358-tENG, pp. 2–3 (<https://www.legal-tools.org/doc/6da856/>); *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, p. 2 (<https://www.legal-tools.org/doc/685f01/>); *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, 21 June 2007, p. 3.

of sexual and gender violence when they are participating in the proceedings.² The age and gender of the victims are also taken into account when reparation decisions addressing the harm they suffered are issued.³ The needs and interests of victims or groups of victims may sometimes be different or in opposition (*Lubanga*, 18 January 2008, para. 127).

Privacy and Safety:

The privacy and safety of victims and witness is a need of the latter balanced by the Court when transmitting to the parties' copies of the victims' applications for participation in the proceedings pursuant to Rule 89(1). In order to protect the victims' privacy and safety pursuant to Rule 86, strictly necessary redactions are usually made to the applications transmitted to the parties.⁴ The same type of considerations are made when deciding on requests by victim applicants to know the types of challenges directed by the parties at their applications for participation.⁵ The privacy and safety of victims have also been relied upon as a ground not to provide the Defence with copies of the unredacted applications for participation.⁶

Cross-references:

Article 68.

² 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. 18 (<https://www.legal-tools.org/doc/eb69c1/>); *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, para. 127 ('*Lubanga*, 18 January 2008') (<https://www.legal-tools.org/doc/4e503b/>).

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. 210–216 (<https://www.legal-tools.org/doc/a05830/>).

⁴ ICC, *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, 20 August 2007, ICC-01/04-374, paras. 20–21 (<https://www.legal-tools.org/doc/a4e393/>).

⁵ ICC, *Democratic Republic of the Congo*, Pre-Trial Chamber, Decision on the Requests of the OPCV, 10 December 2007, ICC-01/04-418, para. 14 (<https://www.legal-tools.org/doc/637670/>).

⁶ 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/>).

Doctrine:

1. Silvia A. Fernández de Gurmendi, “Definition of Victims and General Principle”, 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. 433–434 (<https://www.legal-tools.org/doc/e34f81/>).

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*Subsection 2. Protection of Victims and Witnesses***Rule 87**

1. Upon the motion of the Prosecutor or the defence or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness pursuant to article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the protective measure is sought prior to ordering the protective measure.

2. A motion or request under sub-rule 1 shall be governed by rule 134, provided that:

(a) Such a motion or request shall not be submitted ex parte;

(b) A request by a witness or by a victim or his or her legal representative, if any, shall be served on both the Prosecutor and the defence, each of whom shall have the opportunity to respond;

(c) A motion or request affecting a particular witness or a particular victim shall be served on that witness or victim or his or her legal representative, if any, in addition to the other party, each of whom shall have the opportunity to respond;

(d) When the Chamber proceeds on its own motion, notice and opportunity to respond shall be given to the Prosecutor and the defence, and to any witness or any victim or his or her legal representative, if any, who would be affected by such protective measure; and

(e) A motion or request may be filed under seal, and, if so filed, shall remain sealed until otherwise ordered by a Chamber. Responses to motions or requests filed under seal shall also be filed under seal.

3. A Chamber may, on a motion or request under sub-rule 1, hold a hearing, which shall be conducted in camera, to determine whether to order measures to prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness or other person at risk on account of testimony given by a witness by ordering, inter alia:

(a) That the name of the victim, witness or other person at risk on account of testimony given by a witness or any information

which could lead to his or her identification, be expunged from the public records of the Chamber;

(b) That the Prosecutor, the defence or any other participant in the proceedings be prohibited from disclosing such information to a third party;

(c) That testimony be presented by electronic or other special means, including the use of technical means enabling the alteration of pictures or voice, the use of audio-visual technology, in particular videoconferencing and closed-circuit television, and the exclusive use of the sound media;

(d) That a pseudonym be used for a victim, a witness or other person at risk on account of testimony given by a witness; or

(e) That a Chamber conduct part of its proceedings in camera.

General Remarks:

There are several provisions in the Rome Statute that are relevant for the protection of victims and witnesses, including Articles 64(2), 64(7), 68(2) and 69(2). Article 69(2) provides that the Rules of Procedure and Evidence shall provide more specific regulation of the protective regime. Rule 87 on “protective measures” meets this aim. The provision is supplemented by Rule 88 on “special measures”.

The two rules serve quite distinct purposes: protective measures seek to protect the identity or location of a victim or witness (or another person at risk) from the public or media, while the special measures rule is more flexible allowing the Court to engineer measures to facilitate the testimony of certain vulnerable victims and witnesses.¹

Analysis:

Sub-rule 1 regulates who can request protective measures. The sub-rule allows the Chamber to order protective measures upon the motion of the Prosecutor or the defence or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion.

Sub-rules 1 and 3 clarify the subject of protective measures: a victim, a witness or another person at risk on account of testimony given by a witness. In *Abu Garda*, the Pre-Trial Chamber decided, *inter alia*, that the identity of the witness would be kept confidential towards the public and media

¹ Helen Brady, “Disclosure of Evidence”, 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. 440 (<https://www.legal-tools.org/doc/e34f81/>).

through expunging the name and address of the witness from the public records.²

Sub-rule 2 sets out the procedure for making an application for protective measures. Motion or requests cannot be submitted *ex parte*. This is explained by the nature of Rule 87, it concerns protective measures vis-à-vis the press and the public, not protective measures vis-à-vis the accused or his or her counsel (or *vis-à-vis* the Prosecutor). There was a proposal that a majority of judges should agree to the protective measures in order to safeguard the principle of public hearings. This proposal was rejected which means that a single judge can decide on these measures (Brady, 2001, p. 445).

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, vol. 3: *International Criminal Procedure*, Oxford University Press, 2016, p. 494 (<https://www.legal-tools.org/doc/995606/>).
2. Helen Brady, “Disclosure of Evidence”, 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. 440 (<https://www.legal-tools.org/doc/e34f81/>).
3. Mark Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Martinus Nijhoff Publishers, Leiden, 2013, p. 443 (<https://www.legal-tools.org/doc/0d524b/>).
4. Claus Krefß, “Witnesses in Proceedings Before the International Criminal Court”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 360–362 (<https://www.legal-tools.org/doc/95e5f9/>).
5. Donald K. Piragoff and Paula Clarke, “Article 69”, 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. 1714–1715 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

² ICC, *Prosecutor v. Abu Garda*, Pre-Trial Chamber I, Public Redacted Version of “Decision on the Prosecutor’s application for protective measures dated 22 September 2009”, 9 October 2009, ICC-02/05-02/09-117-Red, p. 4 (<https://www.legal-tools.org/doc/a5f4af/>).

Rule 88

- 1. Upon the motion of the Prosecutor or the defence, or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may, taking into account the views of the victim or witness, order special measures such as, but not limited to, measures to facilitate the testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence, pursuant to article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the special measure is sought prior to ordering that measure.*
- 2. A Chamber may hold a hearing on a motion or a request under sub-rule 1, if necessary in camera or ex parte, to determine whether to order any such special measure, including but not limited to an order that a counsel, a legal representative, a psychologist or a family member be permitted to attend during the testimony of the victim or the witness.*
- 3. For inter partes motions or requests filed under this rule, the provisions of rule 87, sub-rules 2 (b) to (d), shall apply mutatis mutandis.*
- 4. A motion or request filed under this rule may be filed under seal, and if so filed shall remain sealed until otherwise ordered by a Chamber. Any responses to inter partes motions or requests filed under seal shall also be filed under seal.*
- 5. Taking into consideration that violations of the privacy of a witness or victim may create risk to his or her security, a Chamber shall be vigilant in controlling the manner of questioning a witness or victim so as to avoid any harassment or intimidation, paying particular attention to attacks on victims of crimes of sexual violence.*

General remarks:

Rule 88 on the special measures allows the Court to engineer measures to facilitate the testimony of certain vulnerable victims and witnesses, for example traumatised victims or witnesses, Children, victims of sexual violence and the elderly. The rule stems from Article 68(2).

Analysis:

Sub-rule 1 regulates who can request special measures. The-sub-rule allows the Chamber to order special measures upon the motion of the Prosecutor or

the defence or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion.

Sub-rule 1 clarifies the subject of special measures: a traumatized victim or witness, a child, an elderly person or a victim of sexual violence.

Sub-rule 2 sets out the procedure for making an application for special measures. In contrast to Rule 87, Rule 88(2) allows the Chamber to hold a hearing *in camera* or *ex parte*.

There is nothing on anonymous witnesses in this rule as there was no agreement on the matter during the negotiations. However, those advocating a broader use of Rule 88 - to allow anonymous witnesses during trial - point to the phrase “measures such as, but not limited to” and the fact that it allows order to be made *ex parte*.¹

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, vol. 3: *International Criminal Procedure*, Oxford University Press, 2016, p. 494 (<https://www.legal-tools.org/doc/995606/>).
2. Helen Brady, “Disclosure of Evidence”, 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. 447–453 (<https://www.legal-tools.org/doc/e34f81/>).
3. Mark Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Martinus Nijhoff Publishers, Leiden, 2013, p. 443 (<https://www.legal-tools.org/doc/0d524b/>).
4. Claus Krefß, “Witnesses in Proceedings Before the International Criminal Court”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, Berliner Wissenschafts-Verlag, 2nd. ed., 2004, pp. 375–376 (<https://www.legal-tools.org/doc/95e5f9/>).
5. Donald K. Piragoff and Paula Clarke, “Article 69”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court*:

¹ Helen Brady, “Disclosure of Evidence”, 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. 453 (<https://www.legal-tools.org/doc/e34f81/>).

A Commentary, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 1714–1715 (<https://www.legal-tools.org/doc/040751/>).

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Subsection 3. Participation of Victims in the Proceedings

Rule 89

Application for the participation of victims in the proceedings

General Remarks:

The ICC Statute grants victims an explicit right to make representations, to submit observations, and to have their views and concerns presented and considered before the Court. However, particular details of the model for victim participation before the Court, such as when and in what manner victims may exercise their right to participate, are addressed in the Rules of Procedure and Evidence.

Nature and Purpose of Process to Decide on Applications for Participation:

The process to decide upon applications for participation of victims in the proceedings is prior to, distinct and separate from, the proceedings for the determination and exercise of the modalities of participation by those authorised to participate as victims.¹ The application process is not related

¹ ICC, *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. 5 (*‘Democratic Republic of the Congo, 7 December 2007’*) (<https://www.legal-tools.org/doc/27da16/>); *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. 5 (*‘Situation in Darfur, 3 December 2007’*) (<https://www.legal-tools.org/doc/5ccc1/>); *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, pp. 6,7 (*‘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 Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor”, 23 January 2008, ICC-02/05-118, pp. 6, 7 (*‘Darfur, 23 January 2008’*) (<https://www.legal-tools.org/doc/8cc411/>); *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the Prosecution, OPCD and OPCV Requests for Leave to Appeal the Decision on the Applications for Participation of Victims in the Proceedings in the Situation, 6 February 2008, ICC-01/04-444, p. 12 (<https://www.legal-tools.org/doc/d43fd2/>); *Prosecutor*

either to questions pertaining to the guilt or innocence of the suspect or accused person or to questions pertaining to the award of reparations (*Democratic Republic of the Congo*, 7 December 2007, para. 6; *Darfur*, 3 December 2007, para. 6; *Katanga and Ngudjolo*, 27 February 2008, p. 6). The sole purpose of the process to decide upon applications for participation is to determine whether the applicants can be granted authorisation to participate as victims in the relevant proceedings.² Likewise, applicants are not required to exhaust all domestic remedies and are not required to indicate that they have not simultaneously submitted a claim before another body or court (*Democratic Republic of the Congo*, 31 January 2008, para. 8). The specific procedural features of the application process (Rule 89 of and Regulation 86) are the result of this distinct and specific nature, object and purpose (*Darfur*, 3 December 2007, para. 8; *Democratic Republic of the Congo*, 23 January 2008, p. 4; *Darfur*, 23 January 2008, p. 4). As a consequence, some of the procedural safeguards that apply in criminal proceedings before the Court may not be applicable during the application process (*Democratic Republic of the Congo*, 23 January 2008, pp. 6–7; *Darfur*, 23 January 2008, pp. 6–7). Similarly, the complementarity principle applicable during the investigation and the trial is inapplicable to the application process because the object and purpose of the application process is confined to the determination of

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. 6 (*Katanga and Ngudjolo*, 27 February 2008’) (<https://www.legal-tools.org/doc/e9180f/>).

² ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber, Decision on the Requests of the OPCV, 10 December 2007, ICC-01/04-418, para. 8 (<https://www.legal-tools.org/doc/637670/>); *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the application for leave to appeal the Decision on the requests of the OPCV, 18 January 2008, ICC-01/04-437, p. 3 (<https://www.legal-tools.org/doc/99a4b7/>); *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 to a/0110/06, a/0188/06, a/0128/06 to a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06, a/0224/06, a/0227/06 to a/0230/06, a/0234/06 to a/0236/06, a/0240/06, 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”²⁰⁰⁸, 31 January 2008, ICC-01/04-423-Corr-tENG, para. 8 (*Democratic Republic of the Congo*, 31 January 2008’) (<https://www.legal-tools.org/doc/de0474/>); *Prosecutor v. Ongwen*, Pre-Trial Chamber II, Decision concerning the procedure for admission of victims to participate in the proceedings in the present case, 3 September 2015, ICC-02/04-01/15-299, para. 8 (*Ongwen*, 3 September 2015’) (<https://www.legal-tools.org/doc/92c569/>).

whether the applicant(s) can be authorized to participate in the relevant proceedings (*Darfur*, 3 December 2007, para. 11).

Systematic and Casuistic Approaches to the Application Process:

The application process has been applied systematically and casuistically: every time a natural or legal person intends to participate in any specific procedural activity in situation or case proceedings, (i) this person must make an application for participation, (ii) the parties must be given the opportunity to submit their observations on the application, and (iii) the Chamber must decide on such application prior to conducting the specific procedural activity (*Democratic Republic of the Congo*, 23 January 2008, p. 6; *Darfur*, 23 January 2008, p. 6).

Role of Victim Applicants:

The role of victim applicants in the application process can by no means be confused with that of witnesses in criminal proceedings. In the application process, victim applicants make requests to be authorised to participate as victims in the proceedings, whereas witnesses in criminal proceedings are a means or evidence to prove the factual allegations on which the requests for the conviction or acquittal of the defendant are based (*Darfur*, 3 December 2007, para. 20; *Democratic Republic of the Congo*, 7 December 2007, para 11). In fact, victim's applications are not evidence in the case.³

Role of the Victims Participation and Reparations Section:

During the application process, the Victims Participation and Reparations Section of the Registry submits a report to the Chamber within the meaning of Regulation 86(5), containing *inter alia* (i) summaries of the matters contained in the original applications for participation, set out on an applicant-by-applicant basis (these will take the form of narrative summaries, along with a grid or a series of boxes dealing with formal matters, for ease of reference but in each case based solely on the application forms), (ii) a grouping of applications when there are links founded on such matters as time, circumstance or issue, (iii) any other information which may be relevant to a decision on the applications (for instance, as supplied by States, the Prosecutor and intergovernmental or non-governmental organizations pursuant to

³ 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. 231–232 (<https://www.legal-tools.org/doc/67a9ec/>).

Regulation 86(4)), and (iv) any other assistance the VPRS can give to assist the Chamber in its task of assessing the merits of the applications, without expressing any views on the overall merits of the applications but directing the attention of the Chamber in a neutral way to particular issues or facts that it considered are likely to be relevant to the Chamber's decision.⁴ The report may also include (v) an *ex parte* annex with an assessment by the Victims and Witnesses Unit of the need for protection of applicants who requested protective measures and recommendations in this regard, and (vi) information about the Registrar's inquiry as to any agreement by the applicants on legal representation (*Lubanga*, 6 May 2013, paras. 8–9). Alternatively, the Chamber may instruct the Registry to assess all victim applications for participation collected or otherwise received against the factual parameters of the case. Such applications by applicants who, in the Registry's assessment, qualify as victims shall be provided to the Chamber as annexes to the transmission report provided for by Regulation 86(5) of the Regulations of the Court. The applications that, in the view of the Registry, are incomplete and/or fall outside the scope of the case are not to be transmitted to the Chamber. In case the Registry, for any reason, is unable to determine whether a particular applicant or group(s) of applicants qualify as victims in the case, the Registry shall consult the Single Judge in order to obtain guidance as to whether the concerned application(s) should be transmitted or not to the Chamber and the parties.⁵

⁴ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on the implementation of the reporting system between the Registrar and the Trial Chamber in accordance with Rule 89 and Regulation of the Court 86(5), 9 November 2007, ICC-01/04-01/06-1022, paras. 18–20 (<https://www.legal-tools.org/doc/1b0802/>); *Prosecutor v. Kenyatta et al.*, Pre-Trial Chamber II, First Decision on Victims' Participation in the Case, 30 March 2011, ICC-01/09-02/11-23, para. 21 (<https://www.legal-tools.org/doc/153849/>); *Situation in Uganda*, Pre-Trial Chamber II, Decision on Victim's Participation in Proceedings Related to the Situation in Uganda, 12 March 2012, ICC-02/04-191, para. 27 (<https://www.legal-tools.org/doc/26b39a/>); *Prosecutor v. Lubanga*, Appeals Chamber, Decision on the Request of the Registrar Relating to the Transmission of Applications for Participation in the Appeal Proceedings and on Related Issues, 6 May 2013, ICC-01/04-01/06-3026, para. 7 ('*Lubanga*, 6 May 2013') (<https://www.legal-tools.org/doc/fe7c39/>).

⁵ *Ongwen*, 3 September 2015, paras. 4–5 and 9; ICC, *Prosecutor v. Al Mahdi*, Trial Chamber VIII, Public redacted version of 'Decision on Victim Participation at Trial and on Common Legal Representation of Victims', 8 June 2016, ICC-01/12-01/15-97-Red, paras. 10–12 (<https://www.legal-tools.org/doc/c8c749/>).

Victims of the Situation v. Victims of the Case:

As a result of the application process, victims may be recognised as “victims of the situation” or as “victims of the case”. Victim applicants who seem to meet the definition of victim set out in Rule 85 during the stage of investigation of a situation are “victims of the situation”, whereas those who seem to meet the definition of victims set out in Rule 85 in relation to the relevant case are “victims of the case”.⁶ With respect to incidents not included in the warrants of arrest issued in a case, the Chamber has to be satisfied that the victim applicants have suffered harm as a result of a crime within the jurisdiction of the Court, such crime having allegedly been committed within the temporal, geographical and, as the case may be, personal parameters of the relevant situation.⁷ However, the Appeals Chamber has clarified that victims cannot be acknowledged a general participatory right in the investigation of crimes committed in a situation referred to the Court, but only within the context of judicial proceedings taking place during an investigation.⁸

Need for Subsequent Applications to Participate:

There is no need for a subsequent application to participate in a case arising from the situation where a victim applicant requesting participation in respect of a situation also requests to be authorized to participate in any case ensuing from the investigation of such a situation. The Chamber automatically address the question of whether the victim applicant seem to meet the

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, VPRS 5 and VPRS 6, 17 January 2006, ICC-01/04-101-tEN-Corr, para. 66 (*‘Democratic Republic of the Congo, 17 January 2006’*) (<https://www.legal-tools.org/doc/2fe2fc/>).

⁷ 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. 106 (*‘Kony et al., 10 August 2007’*) (<https://www.legal-tools.org/doc/d25664/>); *Democratic Republic of the Congo*, 31 January 2008, para. 4.

⁸ 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, paras. 45–46 (<https://www.legal-tools.org/doc/dca981/>); *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 decision 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, para. 7 (<https://www.legal-tools.org/doc/95100b/>).

definition of victim set out in Rule 85 in connection with said case (*Democratic Republic of the Congo*, 17 January 2006, paras. 67–68). By contrast, victims must apply to participate in any subsequent interlocutory appeal, showing to the Appeals Chamber that their personal interests are affected by the issues on appeal, that such participation is appropriate and that the victims' participation may occur in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.⁹ However, victims need not apply to participate in interlocutory appeals arising under Article 82(1)(b) or (d) of the ICC Statute.¹⁰

Victims as 'Participants' v. Victims as 'Parties':

Victims whose applications for participation with the Court are granted or, in some cases, who transmit their interest in participating to the Common Legal Representative of victims, become 'participants' in the triggering and/or criminal proceedings of the Court. The term 'participant' is used to distinguish the narrower legal status of the victims *vis-à-vis* that of the traditional participants in criminal proceedings, namely the Prosecution and the Defence. By contrast, victims participating in reparation proceedings after the conviction of an accused are not "participants" because their participatory rights are no more limited than those of the parties to the proceedings. Since the victims are expressly afforded the right to appeal an order for reparations rendered by a Trial Chamber as a result of the reparations proceedings, they become "parties" to the reparations proceedings and not, as is the case at other stages of the proceedings, participants who, under Article 68(3) of the Statute, may present their views and concerns where their personal interests are affected.¹¹ The victims' status as 'parties' in reparations

⁹ 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 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. 88 (<https://www.legal-tools.org/doc/6aacb4/>).

¹⁰ ICC, *Prosecutor v. Gbagbo and Blé Goudé*, Appeals Chamber, Reasons for the "Decision on the 'Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr Gbagbo's detention (ICC-02/11-01/15-134-Red3)", 31 July 2015, ICC-02/11-01/15-172, para. 19 (<https://www.legal-tools.org/doc/23da6c/>).

¹¹ 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

proceedings involves inter alia the possibility to question witnesses and introduce evidence without the limitations imposed on “victim participants” (*Lubanga*, 14 December 2012, para. 69).

Burden of Proof and Indirect Proof:

Victims and their legal representatives must furnish the Court with the requisite information to demonstrate that they have suffered harm as a result of a crime within the jurisdiction of the Court, such crime having allegedly been committed within the temporal and territorial limits of the relevant situation or case (*Democratic Republic of the Congo*, 17 January 2006, paras. 100 and 101). For instance, when a Chamber is considering whether an applicant fulfils the criteria of Rule 85 because he or she suffered emotional harm as the result of the loss of a family member, it must require proof of the identity of the family member and of his or her relationship with the applicant.¹² In general, assessing the soundness of a given statement or other piece of evidence for this purpose has to comply with the general principle of law that the burden of proof of elements supporting a claim lies on the party making the claim.¹³ It is also accepted as a general principle of law that “indirect proof” (that is, inferences of fact and circumstantial evidence) is admissible if it can be shown that the party bearing the burden of proof is hampered by objective obstacles from gathering direct proof of a relevant element supporting his or her claim; the more so when such indirect evidence appears to be based on a series of facts linked together and leading logically to a single conclusion (*Kony et al.*, 10 August 2007, para. 15).

to reparations” and directions on the further conduct of proceedings, 14 December 2012, ICC-01/04-01/06-2953, para. 67 (*Lubanga*, 14 December 2012) (<https://www.legal-tools.org/doc/2e59a0/>).

¹² ICC, *Prosecutor v. Kony et al.*, 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, paras. 1 and 36 (*Kony et al.*, 23 February 2009’) (<https://www.legal-tools.org/doc/e287e9/>); *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. 30 (*Gbagbo*, 4 June 2012’) (<https://www.legal-tools.org/doc/0fdd1e/>).

¹³ *Kony et al.*, 10 August 2007, para. 13; *Prosecutor v. Bemba*, Pre-Trial Chamber III, Fourth decision on Victims’ participation, 12 December 2008, ICC-01/05-01/08-320, para. 31 (<https://www.legal-tools.org/doc/1652d9/>).

Standard of Proof:

There is no statutory or regulatory provision addressing the standard of proof to be applied in order for victims to participate in the criminal proceedings before the Court.¹⁴ At the investigation of the situation stage, victim applicants are recognised as victims only if they provide sufficient evidence to meet the criteria set forth in Rule 85(a) at a relatively low standard of proof such as showing “grounds to believe” (*Democratic Republic of the Congo*, 17 January 2006, para. 99; *Democratic Republic of the Congo*, 31 January 2008, paras. 38 and 141). Corroboration from the applicant or the parties is not a requirement for granting procedural status at this stage of the proceedings.¹⁵ This standard, borrowed from Article 55(2), is the least demanding one, since in Articles 58 and 61 the tests become stricter as one moves from one stage of the proceedings to the next one.¹⁶ At the case stage, victim applicants are recognised as victims upon providing sufficient evidence to show that there are “reasonable grounds to believe” that they meet the criteria set forth in Rule 85.¹⁷ Both standards only require that victim applicants

¹⁴ ICC, *Situation in the Democratic Republic of the Congo*, 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, 17 January 2006, ICC-01/04-01/06-2953, para. 97 (*Situation in the Democratic Republic of the Congo*, 17 January 2006’) (<https://www.legal-tools.org/doc/2e59a0/>); *Prosecutor v. Lubanga*, Trial Chamber I, Decision on victims’ participation, 18 January 2008, ICC-01/04-01/06-1119, para. 99 (*Lubanga*, 18 January 2008’) (<https://www.legal-tools.org/doc/4e503b/>).

¹⁵ ICC, *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/0031/084 November 2008, ICC-01/04-545, para. 27 (*Democratic Republic of the Congo*, 4 November 2008’) (<https://www.legal-tools.org/doc/9e1c30/>).

¹⁶ *Democratic Republic of the Congo*, 17 January 2006, para. 97; 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, para. 58 (<https://www.legal-tools.org/doc/902494/>).

¹⁷ 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. 9 (*Lubanga*, 20 October 2006’) (<https://www.legal-tools.org/doc/d293d9/>); *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, p. 4 (<https://www.legal-tools.org/doc/30ee9d/>).

demonstrate that the elements established by Rule 85 are met *prima facie*, a standard also adopted on appeal.¹⁸ During the investigation of the situation victim applicants are not required to determine in any great detail the precise nature of the causal link and the identity of the person(s) responsible for the crimes¹⁹ because there are additional opportunities to further scrutinize the credibility and authenticity of the victim applicants' identities and allegations within their applications throughout the subsequent proceedings (*Democratic Republic of the Congo*, 3 July 2008, para. 21). In this regard, at the case stage the Chambers must be merely ensured that the necessary link is established between the harm alleged by the victim applicants and the charges brought against the accused (*Lubanga*, 18 January 2008, para. 99). All in all, applicants must only provide credible grounds for suggesting that they have suffered harm as a result of a crime committed within the jurisdiction of the Court (*Lubanga*, 27 August 2013, para. 16). For the participation of victims in reparations proceedings after a conviction, the Court has taken into account the non-criminal nature of said proceedings and has ruled that

¹⁸ *Darfur*, 3 December 2007, para. 8; 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. 5 (*'Darfur*, 14 December 2007') (<https://www.legal-tools.org/doc/bf662d/>); *Lubanga*, 18 January 2008, para. 99; *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. 19 (*'Mbarushimana*, 11 August 2011') (<https://www.legal-tools.org/doc/17ef31/>); *Prosecutor v. Lubanga*, Appeals Chamber, Decision on 32 applications to participate in the proceedings, 27 August 2013, ICC-01/04-01/06-3045-Red2, para. 16 (*'Lubanga*, 27 August 2013') (<https://www.legal-tools.org/doc/af8699/>); *Prosecutor v. Lubanga*, Appeals Chamber, Decision on a/2922/11's application to participate in the appeals proceedings, 3 October 2013, ICC-01/04-01/06-3052-Red, para. 8 (<https://www.legal-tools.org/doc/c7862a/>); *Ongwen*, 3 September 2015, para. 8.

¹⁹ ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision Authorizing the submission of Observations Pursuant to rule 89(1) of the Rules on Applications a/0332/07, a/0334/07 to a/0337/07, a/0001/08, a/0030/08 and a/0031/08, 3 July 2008, ICC-01/04-504, para. 27 (*'Democratic Republic of the Congo*, 3 July 2008') (<https://www.legal-tools.org/doc/539730/>); *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. 8 (*'Democratic Republic of the Congo*, 7 December 2007') (<https://www.legal-tools.org/doc/27da16/>).

victim applicants must only meet the ‘balance of probabilities’ standard to become participants in the reparations proceedings.²⁰

Application of Standard of Proof:

The Chamber is in the best position to determine the nature and the quantum of evidence it deems necessary and adequate at each stage of the proceedings to establish the elements of Rule 85 of the Rules of Procedure and Evidence. What evidence may be sufficient to establish the elements of Rule 85 of the cannot be determined in the abstract, but must be assessed on a case-by-case basis taking into account all relevant circumstances, including the context in which the Court operates (*Kony et al.*, 23 February 2009, paras. 2 and 38; *Gbagbo*, 4 June 2012, para. 21). Corroboration from the victim applicant or the parties is not required (*Democratic Republic of the Congo*, 4 November 2008, para. 27). The ICC Statute does not set forth general rules on the basis of which the reliability of relevant elements is to be assessed and victim applicants will not necessarily or always be in a position to fully substantiate their claim. Consequently, in order to determine whether the elements established by Rule 85 are met *prima facie*, it is not necessary to assess the credibility of the victim’s statement or to engage in a process of corroboration *stricto sensu* of the victim’s application but rather to check the victim’s account of the events on the merits of its intrinsic coherence, as well as on the basis of information otherwise available to the Chamber, such as official reports.²¹ Regarding the contextual elements of the crimes within the jurisdiction of the Court, explicit factual references to them are often not present in the victims’ applications, but the Chambers analyse the applications themselves, the observations submitted by the Defence and the Prosecutor, any additional information that they may receive pursuant to Regulation 86(7) of

²⁰ 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. 253 (<https://www.legal-tools.org/doc/a05830/>).

²¹ *Democratic Republic of the Congo*, 17 January 2006, para. 101; *Kony et al.*, 10 August 2007, paras. 13 and 15; *Democratic Republic of the Congo*, 7 December 2007, para. 8; *Darfur*, 14 December 2007, paras. 1–5; ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Public Redacted Version of the “Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case”, 10 June 2008, ICC-01/04-01/07-579, para. 67 (<https://www.legal-tools.org/doc/87f4c3/>); *Prosecutor v. Bemba*, Pre-Trial Chamber III, Fourth decision on Victims’ participation, 15 December 2008, ICC-01/05-01/08-320, para. 31 (<https://www.legal-tools.org/doc/1652d9/>); *Prosecutor v. Abu Garda*, Pre-Trial Chamber I, Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case, 29 September 2009, ICC-02/05-02/09-121, para. 14 (<https://www.legal-tools.org/doc/1e2c8b/>).

the Regulations, and any information in the application itself from which the Chambers may directly infer said contextual elements (*Democratic Republic of the Congo*, 3 July 2008, paras. 28–29). Taking into account that any prima facie inference from the facts alleged by a victim applicant about the existence of the contextual elements of a crime within the jurisdiction of the Court is merely based on the aforementioned preliminary analysis, a decision to grant an application for participation in no way predetermines any factual findings that could be made by a Chamber in any judgment on the merits (*Democratic Republic of the Congo*, 3 July 2008, para. 30; *Democratic Republic of the Congo*, 4 November 2008, para. 29). With regard to the identity of the alleged perpetrators, the ruling of the Chamber hinges upon an overall assessment of the account of events as described by the victim applicants, the intrinsic coherence of their applications, the parameters and the circumstances surrounding the alleged events alongside the Chamber’s findings regarding the material time and place of the crimes charged (*Mbarushimana*, 11 August 2011, para. 39).

Deadline for Applications:

Although there is no deadline in the legal texts of the Court for the filing of applications (see Regulation 86(3) of the Regulations of the Court), deadlines have usually been set prior to the start of the confirmation hearing,²² the submission of closing arguments,²³ and the start of the sentencing and reparations proceedings,²⁴ on the grounds inter alia that it will be more difficult for the Chambers to be able to consider and decide on new applications during said hearings. Nonetheless, the Appeals Chamber has on occasion found it to be in the interests of the proper administration of justice to consider applications submitted during the trial proceedings, where the Trial Chamber stated that it would rule on the applications for the purposes of the sentencing

²² *Lubanga*, 20 October 2006, pp. 12–13; 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, paras. 188–189 (<https://www.legal-tools.org/doc/da8435/>).

²³ ICC, *Prosecutor v. Bemba*, Trial Chamber III, Corrigendum to the Decision on 401 applications by victims to participate in the proceedings and setting a final deadline for the submission of new victims’ applications to the Registry, 21 July 2011, ICC-01/05-01/08-1590-Corr, para. 25 (<https://www.legal-tools.org/doc/53c44a/>).

²⁴ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Order on the applications by victims to participate and for reparations, 27 January 2012, ICC-01/04-01/06-2838, para. 5 (<https://www.legal-tools.org/doc/4b3674/>).

proceedings, but the Registrar did not re-submit the applications nor did the Trial Chamber rule on the applications during said proceedings (*Lubanga*, 6 May 2013, para. 5).

Withdrawal of Applications:

Similarly, the legal texts of the Court do not expressly provide the victims with the possibility to withdraw the applications that they may have submitted to the Court. However, the Court has reiterated that participation is not a once-and-for-all event, but rather should be decided on the basis of the evidence or issue under consideration at any particular point in time.²⁵ Accordingly, victims may register, withdraw or re-register their desire to participate in the proceedings at any time provided that such desire is free and is communicated to the Court in a clear and reliable manner (*Ruto and Sang*, 14 November 2013, paras. 16–18).

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²⁵ *Lubanga*, 18 January 2008, para. 101; 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. 13 (<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. 12 (<https://www.legal-tools.org/doc/535eee/>) *Prosecutor v. Ruto and Sang*, Trial Chamber V(A), Decision on the Legal Representative's Report on the Withdrawal of Victims, 14 November 2013, ICC-01/09-01/11-1098-Red2, para. 15 ('*Ruto and Sang*, 14 November 2013') (<https://www.legal-tools.org/doc/83952a/>).

Rule 89(1): Written Applications

1. In order to present their views and concerns, victims shall make written application to the Registrar

Purpose of the Rule:

Rule 89 of the Rules is specifically fashioned to the provisions of Article 68 of the ICC Statute and aims to regulate the steps that must be taken in order for a victim to participate in judicial proceedings.¹

Required Content of an Application:

An application for participation is considered complete if it contains (i) the identity of the applicant, (ii) the date of the crime(s), (iii) the location of the crime(s), (iv) a description of the harm suffered as a result of the commission of any crime within the jurisdiction of the Court, (v) proof of identity, (vi) the express consent of the victim if the application is made by a person acting with the consent of said victim, (vii) proof of kinship or legal guardianship if the application is made by a person acting on behalf of a victim who is a child or proof of legal guardianship if the victim is disabled, and (viii) a signature or thumb-print of the victim applicant on the document, at the very least, on the last page of the application.² It is not required that the

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. 46 (<https://www.legal-tools.org/doc/dca981/>).

² ICC, *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, 20 August 2007, ICC-01/04-374, para. 12 (<https://www.legal-tools.org/doc/a4e393/>); *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. 26 ('*Darfur*, 14 December 2007') (<https://www.legal-tools.org/doc/bf662d/>); *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision Authorizing the submission of Observations Pursuant to rule 89(1) of the Rules on Applications a/0332/07, a/0334/07 to a/0337/07, a/0001/08, a/0030/08 and a/0031/08, 3 July 2008, ICC-01/04-504, para. 16 (<https://www.legal-tools.org/doc/1c41b4/>); *Prosecutor v. Bemba*, Trial Chamber III, Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties' observations on applications for participation by 86 applicants, 22 February 2010, ICC-01/05-01/08-699, para. 35 (<https://www.legal-tools.org/doc/1d6591/>); *Prosecutor v. Gbagbo*, Pre-Trial Chamber I, Decision on Victims' Participation and Victims' Common Legal Representation at the

applications are filed using only standardised translations and qualified interpreters to be found to be complete (*Darfur*, 14 December 2007, para. 24). Moreover, it is not *per se* erroneous for a Chamber to require specific evidence in respect of one of the elements of Rule 85 of the Rules of Procedure and Evidence, but not to require the same specific evidence in respect of the other elements of that rule, in certain circumstances.³

Possible Additional Information Requested by Court:

Moreover, the Chamber has the power, pursuant to Regulation 86(7) of the Regulations, to request, whenever necessary, additional information from applicants before deciding on their application.⁴ Nonetheless, further information is requested by the Chamber pursuant to Regulation 86(7) only when there are indications that there might have been a misunderstanding or a misrepresentation of the victim applicants' statements (*Darfur*, 14 December 2007, para. 40). For instance, information concerning (i) the conditions under which certain victim applicants had been granted asylum in a third country, (ii) the qualification of the interpreters who were mentioned in their application forms, (iii) the applicants' prior statements, if any, to other international institutions, (iv) the identity and role of persons listed as witnesses during the application process, and (v) the resubmission of an application if a witness has a conflict of interest were found to be unnecessary for a Chamber's decision on the applications (*Darfur*, 3 December 2007, para. 17).

Confirmation of Charges Hearing and in the Related Proceedings, 4 June 2012, ICC-02/11-01/11-138, para. 22 ('*Gbagbo*, 4 June 2012') (<https://www.legal-tools.org/doc/0fdd1e/>).

³ ICC, *Prosecutor v. Kony et al.*, 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. 38 (<https://www.legal-tools.org/doc/e287c9/>).

⁴ 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. 16 ('*Situation in Darfur*, 3 December 2007') (<https://www.legal-tools.org/doc/5ccca1/>); *Darfur*, 14 December 2007, para. 20; *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 [...]", 19 January 2008, ICC-01/04-423-Corr-tENG, para. 7 ('*Democratic Republic of the Congo*, 19 January 2008') (<https://www.legal-tools.org/doc/de0474/>).

No Need to File Application in Person:

No provisions of the Statute, the Rules or the Regulations require that the application for participation be filled in by the applicants themselves or that, in case the applicants received the assistance of a person in filling in their forms, the application contains the name and signature of this person who had assisted the applicant. However, when there are indications that the applicant might have been misunderstood or when there is a doubt as to the extent of the person's assistance in the filling in of the applications for participation, the Chamber will either reject the application for participation or defer its decision until further information pursuant to Regulation 86(7) of the Regulations is received (*Gbagbo*, 4 June 2012, para. 23).

Need to Express Intention to Participate:

The application must contain an explicit intention to participate in the proceedings. Faced with the lack thereof, the Chamber cannot consider the applications.⁵ By contrast, victim applicants are not required, unlike applicants before the European Court of Human Rights and the Inter-American Court on Human Rights, to exhaust all domestic remedies and to indicate that they have not simultaneously submitted a claim before another body or court (*Darfur*, 3 December 2007, para. 12; *Darfur*, 14 December 2007, para. 23; *Democratic Republic of the Congo*, 31 January 2008, para. 8).

Need for Application to Participate in Appeal:

In order for victims to participate in interlocutory appeals (Articles 82(1)(b) and (d)), the Court initially found that pursuant to Article 68(3), victim applicants must file an application for participation in the appeal at hand in order for the Appeals Chamber to determine the appropriateness of the victims' participation because the reference to a "participant" or to the filing of a "response" within Regulations 64 and 65 does not mean that victims have an automatic right to participate in an interlocutory appeal under Articles 82(1)(b) or (d) of the Statute.⁶ However, the Appeals Chamber interpreted

⁵ 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. 8 (<https://www.legal-tools.org/doc/d293d9/>).

⁶ 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. 43 and 46 (*Lubanga*, 13 February 2007') (<https://www.legal->

the term “participant” in Regulations 64(4) and 65(5) of the Regulations of the Court to include victims. The Appeals Chamber considers that this interpretation of these regulations obviates the need for a “specific determination” by the Appeals Chamber, pursuant to Article 68(3) of the Statute, on the appropriateness or otherwise of victim participation in a particular interlocutory appeal.⁷ Consequently, for appeals arising under Article 82(1)(b) and (d) of the Statute, victims who have participated in the proceedings that gave rise to the particular appeal need not seek the prior authorisation of the Appeals Chamber to file a response to the document in support of the appeal (*Gbagbo and Blé Goudé*, 31 July 2015, para. 19). Applications for participation in any other interlocutory appeals should in principle be made as soon as possible after the appeal is filed⁸ and in any event before the date of filing of the response to the document in support of the appeal (*Lubanga*, 16 May 2008, para. 15; *Darfur*, 18 June 2008, para. 26; *Democratic Republic of the Congo*, 30 June 2008, para. 39; *Bemba*, 6 March 2012, para. 10). The Appeals Chamber will not ordinarily accept requests for participation filed late

tools.org/doc/ff3bd8/); *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, paras. 12, 13 (*Lubanga*, 16 May 2008’) (<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, para. 23 (*Darfur*, 18 June 2008’) (<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, paras. 32, 34 and 36 (*Democratic Republic of the Congo*, 30 June 2008’) (<https://www.legal-tools.org/doc/6aacb4/>).

⁷ ICC, *Prosecutor v. Gbagbo and Blé Goudé*, Appeals Chamber, Reasons for the “Decision on the ‘Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr Gbagbo’s detention (ICC-02/11-01/15-134-Red3)”, 31 July 2015, ICC-02/11-01/15-172, para. 16 (*Gbagbo and Blé Goudé*, 31 July 2015’) (<https://www.legal-tools.org/doc/23da6c/>).

⁸ *Lubanga*, 13 February 2007, para. 46; *Lubanga*, 16 May 2008, para. 12; *Darfur*, 18 June 2008, para. 23; *Democratic Republic of the Congo*, 30 June 2008, para. 36; *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. 10 (*Bemba*, 6 March 2012’) (<https://www.legal-tools.org/doc/95f629/>).

and the legal representatives must exercise due diligence regarding applicable timelines and file their applications on or before the day the response to the document in support of the appeal is due (*Bemba*, 6 March 2012, para. 10).

No Need for Application to Participate in Some Proceedings:

It must however be noted that in respect of particular stages, such as the Prosecutor's opening of an investigation *proprio motu*, proceedings under Article 53 of the Statute, challenges to the jurisdiction or the admissibility of a case, the confirmation of the charges, conditional release, *et cetera*, an application to participate and a decision pursuant to Rule 89 of the Rules is not a pre-condition to participate for victims having communicated with the Court.⁹ The Chambers always retain the power under Rule 93 to request the views of victims who may not have applied to participate in the proceedings.¹⁰ Moreover, in the *Ruto and Sang* case and in the *Kenyatta* case, the Court read Article 68(3) and Rule 89 as applicable only to victim applicants willing to present their views and concerns in person before the Court. Consequently, except for the said category of victims, in the *Ruto and Sang* case and in the *Kenyatta* case victim applicants seeking to participate through a common legal representative are no longer required to complete the standard application form. Instead, they must contact the common legal representative, who decides whether there is reason to believe that victim applicants

⁹ ICC, *Situation in Uganda*, 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-02/04-101, paras. 92–94 (*'Uganda*, 10 August 2007') (<https://www.legal-tools.org/doc/8f9181/>); *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. 92–94 (<https://www.legal-tools.org/doc/d25664/>); *Prosecutor v. Kony et al.*, Pre-Trial Chamber II, Decision initiating proceedings under Article 19, requesting observations and appointing counsel for the Defence, 21 October 2008, ICC-02/04-01/05-320, p. 7 (<https://www.legal-tools.org/doc/0878bf/>); *Situation in the Republic of Kenya*, Pre-Trial Chamber II, Order to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to Article 15(3) of the Statute 10 December 2009, ICC-01/09-4, paras. 5–7 (<https://www.legal-tools.org/doc/908205/>); *Situation in the Republic of Côte d'Ivoire*, Pre-Trial Chamber III, Order to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to Article 15(3) of the Statute, 6 July 2011, ICC-02/11-6, para. 8 (<https://www.legal-tools.org/doc/45f4fd/>).

¹⁰ *Uganda*, 10 August 2007, para. 102; *Prosecutor v. Lubanga*, Trial Chamber I, Decision on "Demande de déposition du représentant légal des demandeurs des victimes", 25 October 2007, ICC-01/04-01/06-1004, para. 2 (<https://www.legal-tools.org/doc/7c9657/>).

qualify as victims in the case and can therefore be represented during the trial phase.¹¹

Doctrine: For the bibliography, see the final comment on Rule 89.

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¹¹ 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. 53 (<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. 52 (<https://www.legal-tools.org/doc/535eee/>).

Rule 89(1): Transmission and Response

Compulsory Transmission of Copies of Applications:

The Court's only obligation under Rule 89(1) is to order the Registrar to provide the Prosecution and the Defence with copies of the applications, such that they may make observations on the applications within a time limit set by the Chamber.¹ This rule does not require the Chamber to provide, or to order the applicants to provide, to the Prosecution or the Defence, for the purpose of submitting their observations, information extrinsic to the applications themselves.²

Discretionary Transmission of the Victims Participation and Reparations Section Report:

Along these lines, the reports on victims' applications prepared by the VPRS, which are meant to assist the Chamber in issuing only one decision on a number of victim applications, are not, in principle, disclosed to the parties or the participants because (i) Rule 89 does not direct the Court to transmit

¹ ICC, *Situation in Darfur*, Pre-Trial Chamber I, Decision on the requests of the OPCD and the legal representatives of the applicants regarding the transmission of the report of the Registry under rule 89 of the rules of evidence and procedure, 21 August 2007, ICC-02/05-93, pp. 3–4 (*'Darfur*, 21 August 2007') (<https://www.legal-tools.org/doc/b54cee/>); *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. 14 (*'Situation in Darfur*, 3 December 2007') (<https://www.legal-tools.org/doc/5ccca1/>); *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. 7 (*'Democratic Republic of the Congo*, 31 January 2008') (<https://www.legal-tools.org/doc/de0474/>); *Prosecutor v. Ongwen*, Pre-Trial Chamber II, Decision concerning the procedure for admission of victims to participate in the proceedings in the present case, 3 September 2015, ICC-02/04-01/15-299, para. 2 (*'Ongwen*, 3 September 2015') (<https://www.legal-tools.org/doc/92c569/>); *Prosecutor v. Al Mahdi*, Trial Chamber VIII, Public redacted version of 'Decision on Victim Participation at Trial and on Common Legal Representation of Victims', 8 June 2016, ICC-01/12-01/15-97-Red, para. 13 (*'Al Mahdi*, 8 June 2016') (<https://www.legal-tools.org/doc/c8c749/>).

² *Darfur*, 3 December 2007, para. 15; 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. 20 (<https://www.legal-tools.org/doc/bf662d/>); *Democratic Republic of the Congo*, 31 January 2008, para. 7.

said reports to the participants,³ (ii) the reports may influence the participants in their assessment of the applications, and (iii) the reports are likely to contain information not set out in the applications which should be treated as confidential or which may require protection for some other reasons (*Lubanga*, 9 November 2007, paras. 25–26). Nonetheless, should any particular fact or matter emerge relevant to the reports that a Chamber considers justifies disclosure, that will occur, subject always to the Chamber having secured an appropriate level of protection for confidential information, the disclosure of which could be harmful to the welfare of individual victims (para. 26). On occasion, the Court has transmitted to the Prosecution and the Defence a redacted version of the report⁴ and an unredacted version thereof to the legal representative of the relevant victims.⁵

Right to Respond to Applications:

Under Rule 89(1) of the Rules, the Prosecutor and the Defence have a right to reply to any application for participation within a time limit to be set by the Pre-Trial Chamber.⁶ The Prosecution and the Defence normally have a

³ ICC, *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, para. 38 ('*Situation in the Democratic Republic of the Congo*, 20 August 2007') (<https://www.legal-tools.org/doc/a4e393/>); *Darfur*, 21 August 2007, pp. 3–4; *Prosecutor v. Lubanga*, Trial Chamber I, Decision on the implementation of the reporting system between the Registrar and the Trial Chamber in accordance with Rule 89 and Regulation of the Court 86(5), 9 November 2007, ICC-01/04-01/06-1022, paras. 22, 24–25 (<https://www.legal-tools.org/doc/1b0802/>).

⁴ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Decision on the Request of the Registrar Relating to the Transmission of Applications for Participation in the Appeal Proceedings and on Related Issues, 6 May 2013, ICC-01/04-01/06-3026, para. 10 (<https://www.legal-tools.org/doc/fe7c39/>).

⁵ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Decision on 32 applications to participate in the proceedings, 27 August 2013, ICC-01/04-01/06-3045-Red2, paras. 167, 169 (<https://www.legal-tools.org/doc/af8699/>).

⁶ ICC, *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, pp. 2, 3 ('*Democratic Republic of Congo*, 21 July 2005') (<https://www.legal-tools.org/doc/a15e9d/>) CC, *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, p. 3 ('*Darfur*, 23 May 2007') (<https://www.legal-tools.org/doc/685f01/>). *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision authorising the filing of observations on applications for participation in the proceedings, 23 May 2007, ICC-01/04-329-tEN, p. 3 ('*Democratic Republic of the Congo*, 23 May 2007') (<https://www.legal-tools.org/doc/53e7ba/>); *Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision authorising the filing of observations on applications for

period between 30 days or 7 days from the notification of the applications to submit their observations (*Democratic Republic of the Congo*, 20 August 2007, para. 52; *Al Mahdi*, 8 June 2016, para. 13). In order to represent and protect the interests of the Defence during the application proceedings at the initial stage of an investigation, it may be necessary to appoint an ad hoc counsel for the Defence under Regulation 76(1)⁷ or to grant the Office of Public Counsel for the Defence the opportunity to reply to applications for participation (*Democratic Republic of the Congo*, 23 May 2007, p. 3; *Democratic Republic of the Congo*, 20 August 2007, para. 26). Dealing with requests to participate in interlocutory appeals, the Prosecutor and the Defence are entitled to reply to the application pursuant to Rule 89(1) once the application is received.⁸

Transmission of Redacted or Unredacted Applications:

In order to balance the competing obligations to, on the one hand, transmit copies of the applications to the Prosecution and the Defence for them to reply and, on the other hand, to protect the privacy of victims and witnesses and take into account their needs, proportionate redactions to the applications for participation are sometimes made before transmitting them to the parties (*Democratic Republic of the Congo*, 20 August 2007, paras. 20–21). However, the scope of the redactions cannot exceed what is strictly necessary in light of the applicant’s security situation and must allow for a meaningful exercise by the Prosecution and the Defence of their right to reply to the application for participation.⁹ It is also necessary to distinguish between

participation in the proceedings, 17 July 2007, ICC-01/04-358-t-ENG, p. 3 (<https://www.legal-tools.org/doc/6da856/>); *Ongwen*, 3 September 2015, para. 2.

⁷ *Democratic Republic of the Congo*, 22 July 2005, p. 4; 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. 16 (*Kony et al.*, 1 February 2007) (<https://www.legal-tools.org/doc/03e64f/>).

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-tCMN, para. 47 (<https://www.legal-tools.org/doc/ff3bd8/>).

⁹ *Democratic Republic of the Congo*, 22 July 2005, p. 4; ICC, *Situation in the Democratic Republic of the Congo*, Decision appointing ad hoc Counsel and establishing a deadline for the Prosecution and the ad hoc Counsel to submit observations on the applications of applicants a/0001/06 to a/0003/06, 18 May 2006, ICC-01/04-147, p. 3 (<https://www.legal-tools.org/doc/a72335/>); *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I,

(i) the non-disclosure of the identity of the applicants during the application for participation procedure, in accordance with Article 68(1) of the Statute and Rule 89(1) of the Rules, and (ii) the non-disclosure of the identity of the applicants in accordance with Rules 87 and 88 of the Rules, once a) they have been granted the status of victim in the case and b) that the manner in which they will participate has been defined.¹⁰

In respect of applications to participate during the investigation of a situation, un-redacted copies of the applications are usually provided to both the Prosecution and the Defence.¹¹ In respect of applications to participate in case proceedings, sometimes applications are transmitted at the same time to the Prosecution and the Defence with redactions on any information suitable to lead to the applicants' identification because of the need to preserve the equality of arms between the parties (*Kony et al.*, 1 February 2007, paras. 21–22 and 25). By contrast, in other cases a differentiated regime is applied, providing un-redacted copies of the applications to the Prosecution and ordering the transmission of redacted applications only to the Defence, especially so if an applicant has expressed security concerns in case his identity and involvement with the Court were to be known to the Defence.¹² The Defence is usually provided with an un-redacted version of the applications when it is represented by the OPCD (*Darfur*, 23 May 2007, p. 3).

Décision autorisant le dépôt d'observations sur les demandes de participation à la procédure a/0004/06 à a/0009/06, a/0016/06 à a/0063/06 et a/0071/06, 22 September 2006, ICC-01/04-228, p. 5 (<https://www.legal-tools.org/doc/5c6a3e/>).

¹⁰ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Defence request for leave to appeal regarding the transmission of applications for victim participation, 6 November 2006, ICC-01/04-01/06-672-tEN, p. 5 (<https://www.legal-tools.org/doc/540332/>).

¹¹ *Democratic Republic of the Congo*, 20 August 2007, paras. 20 and 29; ICC, *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/0031/084 November 2008, ICC-01/04-545, para. 22 (<https://www.legal-tools.org/doc/9e1c30/>).

¹² 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. 3 (<https://www.legal-tools.org/doc/63059d/>); *Ongwen*, 3 September 2015, para. 6; *Al Mahdi*, 8 June 2016, para. 13.

Transmission of Complete Applications:

In any event, with a view to ensure that the Prosecution and the Defence are able to exercise their right to make observations, only complete applications are transmitted to them, subject to the Registry being able to gather the required information (*Democratic Republic of the Congo*, 20 August 2007, para. 37).

No Transmission to Victim Applicants nor Right to Respond:

Victim applicants are normally not provided with the observations made by the Prosecution and the Defence on their applications because when confidential information concerns all applicants, this information cannot be notified to persons who are not connected to all applicants¹³ and because providing each applicant with redacted observations on their respective application affects the expeditiousness and effectiveness of the proceedings and is extremely impractical with a high number of victim applicants (*Democratic Republic of the Congo*, 10 December 2007, para. 15). Moreover, victim applicants are not entitled to respond to the observations of the Prosecution and the Defence on their applications because as applicants they are still not permitted to participate in the proceedings.¹⁴

Doctrine: For the bibliography, see the final comment on Rule 89.

Author: Enrique Carnero Rojo.

¹³ ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber, Decision on the Requests of the OPCV, 10 December 2007, ICC-01/04-418, paras. 12–13 (*‘Democratic Republic of the Congo, 10 December 2007’*) (<https://www.legal-tools.org/doc/637670/>).

¹⁴ *Democratic Republic of the Congo*, 10 December 2007, para. 16; ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber, Decision on the Requests of the OPCV, 10 December 2007, ICC-01/04-418, para. 8 (<https://www.legal-tools.org/doc/637670/>) *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the application for leave to appeal the Decision on the requests of the OPCV, 18 January 2008, ICC-01/04-437, p. 3 (<https://www.legal-tools.org/doc/99a4b7/>); *Prosecutor v. Kenyatta et al.*, Pre-Trial Chamber II, Decision on the “OPCV’s Request for Leave to Respond to ‘Defence Observations on 4 Applications for Victim Participation in the Proceedings’”, 1 July 2011, ICC-01/09-02/11-147, paras. 6–8 (<https://www.legal-tools.org/doc/923acf/>).

Rule 89(1): Proceedings and Manner for Participation

Rights of Victim Participants:

Once a victim applicant is found to meet the requirements in Rule 85 (Rule 89(2)), the Court must determine the proceedings and the manner in which victims are authorized to participate.¹ Victims authorized to participate may present their views and concerns,² file documents (*Democratic Republic of the Congo*, 17 January 2006, para. 71) and request the Chamber to order specific proceedings or measures in the framework of an investigation (para. 75) or a case whenever an issue arises that affects their interests individually or collectively;³ and for that purposes should, in essence, receive information in the same way as the Chamber and the prosecution to the extent that their interests are affected at a particular stage in the proceedings.⁴

In particular, victims authorised to participate may (i) have access only to public documents and filings in the proceedings, irrespective of whether the victims are represented by the OPCV or not,⁵ although victims may

¹ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Decision on the Request of the Registrar Relating to the Transmission of Applications for Participation in the Appeal Proceedings and on Related Issues, 6 May 2013, ICC-01/04-01/06-3026, para. 6 (<https://www.legal-tools.org/doc/fe7c39/>).

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-tEN-Corr, para. 71 (*Democratic Republic of the Congo*, 17 January 2006’); *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 (*‘Situation in Uganda*, 19 December 2007’) (<https://www.legal-tools.org/doc/dae372/>).

³ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on victims’ participation, 18 January 2008, ICC-01/04-01/06-1119, para. 117 (*‘Lubanga*, 18 January 2008’) (<https://www.legal-tools.org/doc/4e503b/>).

⁴ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on disclosure by the defence, 20 March 2008, ICC-01/04-01/06-1235, para. 39 (<https://www.legal-tools.org/doc/d372fb/>).

⁵ ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber, Decision on the Requests of the OPCV, 10 December 2007, ICC-01/04-418, para. 6 (<https://www.legal-tools.org/doc/637670/>); *Uganda*, 19 December 2007, para. 38; *Lubanga*, 18 January 2008, para. 105; *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the “Demande du BPCV d’accéder au document confidentiel déposé par le Conseil des Fonds d’affectation spéciale au profit des victimes le 7 février 2008”, 18 February 2008, ICC-01/04-456, paras. 3–4 (<https://www.legal-tools.org/doc/65f4c8/>); *Lubanga*, Trial Chamber I, Decision on the role of the Office of Public Counsel for Victims and its request for access to documents, 6 March 2008, ICC-01/04-01/06-1211, para. 40 (<https://www.legal-tools.org/>

request and be granted access to confidential filings which are of material relevance to their personal interests,⁶ and sometimes victims have directly been granted access to confidential and *ex parte* filings;⁷ (ii) have access to the public evidence and access to precisely identified evidence in the possession of the Prosecution when the latter is requested by participating victims as relevant to their personal interests which the Court has permitted to be investigated during the proceedings (*Lubanga*, 18 January 2008, para. 111; *Katanga and Ngudjolo*, 13 May 2008, para. 127; *Mbarushimana*, 11 August 2011, para. 42; *Gbagbo*, 4 June 2012, para. 55); (iii) attend the hearings, including, depending on the circumstances and upon consultation with the Prosecution and the Defence, closed and *ex parte* hearings (*Lubanga*, 18 January 2008, para. 113; *Katanga and Ngudjolo*, 13 May 2008, paras. 140 and 149; *Mbarushimana*, 11 August 2011, para. 42; *Gbagbo*, 4 June 2012, para. 48); (iv) make written and oral submissions to the Chambers, even of a confidential or *ex parte* character, by way of an application to that effect⁸ including in relation to observations filed by amici curiae pursuant to Rule

doc/7f6128/); *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. 42 ('*Mbarushimana*, 11 August 2011') (<https://www.legal-tools.org/doc/17ef31/>); *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. 55 ('*Gbagbo*, 4 June 2012') (<https://www.legal-tools.org/doc/0fdd1e/>).

- ⁶ *Uganda*, 19 December 2007, para. 38; *Lubanga*, 18 January 2008, para. 106; 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. 11 ('*Gbagbo*, 15 August 2012') (<https://www.legal-tools.org/doc/c23ccb/>).
- 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. 128–131 and 149–151 ('*Katanga and Ngudjolo*, 13 May 2008') (<https://www.legal-tools.org/doc/285b52/>); *Prosecutor v. Ngudjolo*, Appeals Chamber, Decision on the participation of victims in the appeal against Trial Chamber II's "Jugement rendu en application de Particle 74 du Statut", 6 March 2013, ICC-01/04-02/12-30, para. 7 ('*Ngudjolo*, 6 March 2013') (<https://www.legal-tools.org/doc/4fc190/>).
- ⁸ *Lubanga*, 18 January 2008, para. 114; *Katanga and Ngudjolo*, 13 May 2008, paras. 134, 141–143; *Gbagbo*, 4 June 2012, paras. 52 and 60; 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. 5 (<https://www.legal-tools.org/doc/9551a4/>); *Ngudjolo*, 6 March 2013, para. 5; *Gbagbo*, 15 August 2012, para. 12; *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/>).

103 of the Rules⁹ and to trigger the legal recharacterisation of the facts and circumstances described in the charges¹⁰ or the exercise of the Chamber's powers under Article 61(7)(c);¹¹ (v) make opening and closing statements at the confirmation of charges hearing¹² and during the trial (*Lubanga*, 18 January 2008, para. 117); (vi) tender and examine evidence if in the view of the Chamber it will assist it in the determination of the truth, and if in this sense the Court has "requested" the evidence during the trial¹³ but not during the confirmation hearing (*Katanga and Ngudjolo*, 13 May 2008, paras. 101–103), following (i) a discrete application, (ii) notice to the parties, (iii) demonstration of personal interests that are affected by the specific proceedings, iv) compliance with disclosure obligations and protection orders, (v)

⁹ ICC, *Prosecutor v. Gaddafi and Al-Senussi*, Appeals Chamber, Decision on the OPCV's request to file observations on the observations of Ms. Mishana Hosseinioun, 23 August 2013, ICC-01/11-01/11-415, para. 9 (<https://www.legal-tools.org/doc/4b89a5/>); *Prosecutor v. Gbagbo*, Appeals Chamber, Decision on the "Request by the Common Legal Representative for leave to Present Observations on Submission under rule 103, 10 October 2013, ICC-02/11-01/11-533, para. 11 (<https://www.legal-tools.org/doc/ec77a7/>).

¹⁰ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, 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, 14 July 2009, ICC-01/04-01/06-2049, para. 33 (<https://www.legal-tools.org/doc/965040/>); *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 [...], 8 December 2009, ICC-01/04-01/06-2205 (<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, para. 27 (<https://www.legal-tools.org/doc/54fbac/>).

¹¹ 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, paras. 9–10 (<https://www.legal-tools.org/doc/c84657/>).

¹² 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, pp. 4 and 7 (<https://www.legal-tools.org/doc/fc1b60/>); *Katanga and Ngudjolo*, 13 May 2008, para. 142; *Mbarushimana*, 11 August 2011, para. 42; *Gbagbo*, 4 June 2012, para. 51.

¹³ *Lubanga*, 18 January 2008, para. 108; 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. 94 (<https://www.legal-tools.org/doc/75cf1a/>) ('*Lubanga*, 11 July 2008'); *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, para. 40 (<https://www.legal-tools.org/doc/e58575/>).

determination of appropriateness, and (vi) consistency with the rights of the accused and a fair trial (*Lubanga*, 11 July 2008, para. 104); (vii) examine the evidence before the Chambers without being limited to making questions on reparations issues and being allowed to make questions whenever their personal interests are engaged by the evidence under consideration;¹⁴ (viii) challenge the admissibility or relevance of evidence when their interests are engaged, in accordance with Articles 68(3) and 69(4) of the ICC Statute (*Katanga and Ngudjolo*, 13 May 2008, para. 134; *Lubanga*, 11 July 2008, para. 94), following a successful application for this purpose when the Chamber considers it appropriate (*Lubanga*, 18 January 2008, para. 109); and (xi) provide testimony as witness under oath (*Lubanga*, 18 January 2008, para. 108; *Lubanga*, 11 July 2008, paras. 4 and 104), either on their own initiative after showing that the evidence they seek to present affects their personal interests and is directly related to the charges brought against the accused,¹⁵ or upon being called to testify with the eventual assistance of their legal representatives.¹⁶ All these procedural rights are without prejudice to any other right that the Chamber may grant to them in the course of the proceedings either proprio motu or upon specific and motivated request submitted by the legal representative (*Gbagbo*, 4 June 2012, para. 47).

Nonetheless, victims authorised to participate do not have investigative powers, independent from those of the Prosecution. Consequently, if victims find it necessary to undertake certain investigative steps, they must request the Prosecution to undertake such steps (*Katanga and Ngudjolo*, 13 May 2008, para. 83). Moreover, the rights of victims participating in confirmation hearings can be subject to limitations under certain conditions,

¹⁴ *Lubanga*, 18 January 2008, para. 108; *Katanga and Ngudjolo*, 13 May 2008, paras. 135–139; ICC, *Prosecutor v. Bemba*, Trial Chamber III, Decision setting a timeline for the filing of observations on pending victims' applications, 9 September 2011, ICC-01/05-01/08-1726, para. 15 (<https://www.legal-tools.org/doc/ca12e2/>).

¹⁵ ICC, *Prosecutor v. Lubanga*, T. Ch. I, Decision on the request by victims a/0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial, 9 July 2009, No. ICC-01/04-01/06-2032-Anx, para. 39 (<https://www.legal-tools.org/doc/5937fd/>) ('*Lubanga*, 9 July 2009').

¹⁶ *Lubanga*, 9 July 2009, para. 25; ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V, Decision on the supplementary protocol concerning the handling of confidential information concerning victims and contacts of a party with victims, 9 November 2012, ICC-01/09-01/11-472, para. 8 (<https://www.legal-tools.org/doc/ba43cc/>); *Prosecutor v. Kenyatta and Muthaura*, Trial Chamber V, Decision on the supplementary protocol concerning the handling of confidential information concerning victims and contacts of a party with victims, 9 November 2012, ICC-01/09-02/11-524, para. 8 (<https://www.legal-tools.org/doc/56ee10/>).

provided such limitations are carefully delimited on the basis of proportionality (*Katanga and Ngudjolo*, 13 May 2008, paras. 146 and 148). Moreover, the participatory rights of anonymous victims may be more limited in order not to prejudice the rights of the parties and other participants.¹⁷ Another relevant example is the impossibility for victims authorized to participate in the proceedings to request the disqualification of a judge because of an appearance of bias or conflict of interests.¹⁸

Doctrine: For the bibliography, see the final comment on Rule 89.

Author: Enrique Carnero Rojo.

¹⁷ *Lubanga*, 18 January 2008, para. 131; ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, Decision on the Modalities of Victim Participation at Trial, 22 January 2010, ICC-01/04-01/07-1788-tENG, paras. 92–93 (<https://www.legal-tools.org/doc/8b6e01/>); *Prosecutor v. Lubanga*, Appeals Chamber, Decision on 32 applications to participate in the proceedings, 27 August 2013, ICC-01/04-01/06-3045-Red2, para. 23 (<https://www.legal-tools.org/doc/af8699/>) *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. 19 (<https://www.legal-tools.org/doc/e34abb/>).

¹⁸ ICC, *Prosecutor v. Katanga*, Presidency, Notification of the decision on the application of the legal representative for victims for the disqualification of a Judge in case ICC-01/04-01/07, 22 July 2014, ICC-01/04-01/07-3504, paras. 44–45 (<https://www.legal-tools.org/doc/ca2cf7/>).

Rule 89(2): Rejection

2. The Chamber, on its own initiative or on the application of the Prosecutor or the defence, may reject the application if it considers that the person is not a victim or that the criteria set forth in article 68, paragraph 3, are not otherwise fulfilled. A victim whose application has been rejected may file a new application later in the proceedings.

The Prosecutor and the Defence, in accordance with Rule 89(2) of the Rules, are entitled to provide observations on the applications transmitted to them and to the Chamber, and may, as provided for by Rule 89(4), request that one or more individual applications be rejected. The Chamber, proprio motu or upon request of the Prosecutor or the Defence, may reject the application inter alia if the person does not qualify as a victim.¹

Rejection of Incomplete Applications:

Applications determined by the Chamber to be incomplete are to be denied, although the victim applicants involved may file a new application containing the required information later in the proceedings.² However, pursuant to Rule 89(2) of the Rules and Regulation 86(7) of the Regulations of the Court, the Chamber may request additional information from the applicants before deciding on their applications.³

¹ ICC, *Prosecutor v. Ongwen*, Pre-Trial Chamber II, Decision concerning the procedure for admission of victims to participate in the proceedings in the present case, 3 September 2015, ICC-02/04-01/15-299, paras. 2 and 7 (<https://www.legal-tools.org/doc/92c569/>).

² ICC, *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, para. 21 (*‘Democratic Republic of the Congo, 4 November 2008’*) (<https://www.legal-tools.org/doc/9e1c30/>).

³ ICC, *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, para. 7 (<https://www.legal-tools.org/doc/a4e393/>).

Rejection of Complete Applications:

Similarly, when the applications are rejected on their merits, victim applicants may file a new application.⁴ For instance, applicants whose applications were rejected because their applications were deemed not to be causally connected with the case at hand are reminded of their possibility to file a new application later in the proceedings under Rule 89(2).⁵

Revision of Granted Applications:

Moreover, applications can be revised after being granted, and eventually the decisions granting said applications may be reversed on the basis *inter alia* of the lack of accuracy and reliability of the victims' statements as witnesses during the trial.⁶

Remedies to Rejection of Application:

Victims are not entitled to seek leave to appeal a decision of the Chamber rejecting their applications on the merits (*Democratic Republic of the Congo*, 10 December 2007, para. 16; *Democratic Republic of the Congo*, 18 January 2008, p. 3) and even less to seek leave to appeal interlocutory decisions of the Chamber addressing potential procedural matters relating to the application process prior to a decision on the merits of their applications (*Democratic Republic of the Congo*, 18 January 2008, pp. 3–4). Should their applications be rejected under Rule 89(2), victim applicants are only entitled to submit new applications to correct any deficiencies in light of the Chamber's decision on their applications, which will indicate any further information required or the reasons for which the applications have been rejected (*Lubanga*, 29 June 2006, p. 9; *Democratic Republic of the Congo*, 10

⁴ ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber, Decision on the Requests of the OPCV, 10 December 2007, ICC-01/04-418, paras. 16–17 ('*Democratic Republic of the Congo*, 10 December 2007') (<https://www.legal-tools.org/doc/637670/>); *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the application for leave to appeal the Decision on the requests of the OPCV, 18 January 2008, ICC-01/04-437, p. 3 ('*Situation in the Democratic Republic of the Congo*, 18 January 2008') (<https://www.legal-tools.org/doc/99a4b7/>).

⁵ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo, 29 June 2006, ICC-01/04-01/06-172-tEN, p. 9 ('*Lubanga*, 29 June 2006') (<https://www.legal-tools.org/doc/2c91db/>).

⁶ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Judgment, 14 March 2012, ICC-01/04-01/06-2842, para. 484 (<https://www.legal-tools.org/doc/677866/>).

December 2007, paras. 16–17; *Democratic Republic of the Congo*, 18 January 2008, p. 3; *Democratic Republic of the Congo*, 4 November 2008, para. 21).

Doctrine: For the bibliography, see the final comment on Rule 89.

Author: Enrique Carnero Rojo

Rule 89(3): Applications on Behalf of Victims

3. An application referred to in this rule may also be made by a person acting with the consent of the victim, or a person acting on behalf of a victim, in the case of a victim who is a child or, when necessary, a victim who is disabled

Application by Legal Persons:

It is possible for non-governmental organizations to file applications on behalf of victims because the term ‘person’ in the context of Rule 89 does not seem to rule out ‘legal persons’. When the Statute and the Rules make a distinction between natural and legal persons, they generally mention this distinction explicitly.¹

Application with Victim’s Consent:

Rule 89(3) refers to two circumstances, namely (i) the circumstance in which a victim’s application may be made by another person who has obtained the victim’s consent (‘contact person’), and (ii) the circumstance in which a legally authorised person is allowed to act on behalf of a victim without having first obtained his or her consent, where the victim is a child or a disabled person and obtaining consent is impossible.² When the victim applicant is a minor, his or her application must be submitted on his or her behalf by a person who has attained the age of majority.³

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. 104 (‘*Democratic Republic of the Congo*, 17 January 2006’) (<https://www.legal-tools.org/doc/2fe2fc/>).

² *Democratic Republic of the Congo*, 17 January 2006, para. 105; ICC, *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. 26 (<https://www.legal-tools.org/doc/0fdd1e/>).

³ ICC, *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, para. 33 (‘*Democratic Republic of the Congo*, 4 November 2008’) (<https://www.legal-tools.org/doc/9e1c30/>).

Content of Applications Made on a Victim's Behalf:

Where an application on behalf of the victim is submitted by a person, the application must contain (i) the express consent of the victim, (ii) proof of identity of the victim, (iii) proof of identity of the person acting on the victim's behalf.⁴ In the case of a victim who is a child, the application must contain, in addition to a proof of identity of the person acting on the victim's behalf, (i) proof of kinship, or (ii) proof of guardianship or legal guardianship.⁵ If the application is submitted by a person who is not the next-of-kin or legal guardian of the victim applicant, the minor's consent to have a third-party submit an application on his or her behalf is insufficient because the application must contain the consent of the next-of-kin or legal guardian that an application has been made on the minor's behalf (*Democratic Republic of the Congo*, 3 July 2008, para. 31). Pursuant to a narrow interpretation of Rule 89(3), proof of kinship or guardianship between the minor and the person acting on his or her behalf is always required.⁶ By contrast, pursuant to a broader interpretation of the same provision, applications made on behalf of minors by adults who are neither relatives nor legal guardians of the

⁴ *Democratic Republic of the Congo*, 4 November 2008, para. 19; 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, 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, 14 March 2008, ICC-02/04-01/05-282, para. 7 ('*Kony et al.*, 14 March 2008') (<https://www.legal-tools.org/doc/12ef1e/>).

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. 41 ('*Democratic Republic of the Congo*, 31 January 2008') (<https://www.legal-tools.org/doc/de0474/>); *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, paras. 17 and 31 ('*Democratic Republic of the Congo*, 3 July 2008') (<https://www.legal-tools.org/doc/79af84/>).

⁶ ICC, *Prosecutor v. Bemba*, Trial Chamber III, Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties' observations on applications for participation by 86 applicants, 22 February 2010, ICC-01/05-01/08-699, para. 36 (<https://www.legal-tools.org/doc/1d6591/>); ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V, Decision on the Protocol Concerning the Handling of Confidential Information and Contacts of a Party with Witnesses whom the Opposing Party Intends to Call, 24 August 2012, ICC-01/09-01/11-449, para. 33 (<https://www.legal-tools.org/doc/8cd3f3/>).

victims have been admitted,⁷ and on a case by case basis even applications directly submitted by individuals under the age of 18 have been accepted, taking into consideration the minor's maturity and capacity to make decisions.⁸ In any event, the link existing between a child applying for participation and the person acting on his or her behalf (kinship, guardianship, or legal guardianship) as well as the link existing between a disabled applicant and the person acting on his or her behalf (legal guardianship) should be confirmed by a document attached to the application as supporting documentation within the meaning of Regulation 86(2)(e) of the Regulations (*Kony et al.*, 14 March 2008, para. 7).

Application on Behalf of Deceased Persons:

No provision permits the submission of an application for participation on behalf of a deceased victim because Rule 89(3) authorises the submission of an application for participation on a person's behalf provided the person consents, and consent cannot be given by a deceased person.⁹

However, close relations of deceased and disappeared persons may be considered to be indirect victims (*Democratic Republic of the Congo*, 31 January 2008, para. 24; *Democratic Republic of the Congo*, 4 November 2008, para. 68; *Katanga and Ngudjolo*, 23 September 2009, para. 52, *Kenyatta et al.*, 26 August 2011, para. 47). However, some Chambers have determined that a victim does not cease to be a victim because of his or her death, and have recognised deceased persons as victims provided that (i) the deceased was a natural person, (ii) the death of the person appears to have

⁷ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Annex A1 to Order issuing public redacted annexes to the Decisions on the applications by victims to participate in the proceedings of 15 and 18 December 2008, 8 May 2009, ICC-01/04-01/06-1861-AnxA1, pp. 59–60 (<https://www.legal-tools.org/doc/27302f/>); *Prosecutor v. Lubanga*, Trial Chamber I, Decision on the applications by 7 victims to participate in the proceedings, 10 July 2009, ICC-01/04-01/06-2035 (<https://www.legal-tools.org/doc/94728b/>).

⁸ ICC, *Katanga and Ngudjolo*, Trial Chamber II, Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims, 23 September 2009, ICC-01/04-01/07-1491-Red-tENG, para. 98 (<https://www.legal-tools.org/doc/fdd738/>).

⁹ 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. 36 (<https://www.legal-tools.org/doc/bf662d/>); *Democratic Republic of the Congo*, 31 January 2008, para. 24; *Prosecutor v. Kenyatta et al.*, Pre-Trial Chamber II, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 26 August 2011, ICC-01/09-02/11-267, para. 49 (<https://www.legal-tools.org/doc/f6f688/>).

been caused by a crime within the jurisdiction of the Court, and (iii) a written application on behalf of the deceased person has been submitted by his or her successor.¹⁰ This situation must be distinguished from that where a victim participant dies in the course of the proceedings. In this circumstance, the close relatives of a victim authorised to participate in the proceedings who is now deceased may decide to continue the action initiated by the victim before the Court, but that they may do so only on behalf of the deceased victim and within the limits of the views and concerns expressed by the victim in his or her initial application.¹¹

Application on Behalf of Groups of People:

Under the existing legal framework, collective victims' applications cannot be imposed but individual victims may be encouraged to join with others so that a single application is made by a person acting on their behalf, with their consent, in accordance with Rule 89(3) of the Rules of Procedure and Evidence. In this respect, the Registry has on occasion been ordered to produce an initial mapping report in order to serve as the foundation for a more collective approach to victims' application, (i) identifying the main communities or groups of victims; (ii) identifying potential persons that could act on behalf of multiple individual victims, with their consent, in accordance with Rule 89(3) of the Rules; and (iii) encouraging potential individual applicants

¹⁰ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber III, Fourth decision on Victims' participation, 15 December 2008, ICC-01/05-01/08-320, paras. 39–40 (<https://www.legal-tools.org/doc/1652d9/>); *Prosecutor v., Bemba*, Trial Chamber III, Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings, 12 July 2010, ICC-01/05-01/08-807-Corr, para. 80 (<https://www.legal-tools.org/doc/c2f6d4/>).

¹¹ ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, Motifs de la deuxième décision relative aux demandes de participation de victimes à la procédure, 22 December 2009, ICC-01/04-01/07-1737, para. 30 (<https://www.legal-tools.org/doc/b05633/>); *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, Decision on the applications to resume action submitted by the family members of deceased Victims a/0025/08, a/0051/08, a/0197/08 and a/0311/09, 14 June 2011, ICC-01/04-01/07-3018-tENG, para. 20 (<https://www.legal-tools.org/doc/62a66e/>); *Katanga*, Trial Chamber II, Decision on the application to resume action, submitted by a family member of deceased Victim a/0253/09, 27 August 2013, ICC-01/04-01/07-3383-tENG, para. 6 (<https://www.legal-tools.org/doc/088357/>).

to join with others and to that effect consent to a single application to be made on their behalf in accordance with Rule 89(3) of the Rules.¹²

Doctrine: For the bibliography, see the final comment on Rule 89.

Author: Enrique Carnero Rojo.

¹² ICC, *Prosecutor v. Gbagbo*, Trial Chamber III, Decision on issues related to the victims' application process, 6 February 2012, ICC-02/11-01/11-33, paras. 8–10 (<https://www.legal-tools.org/doc/da3e22/>).

Rule 89(4): Many Applications

4. Where there are a number of applications, the Chamber may consider the applications in such a manner as to ensure the effectiveness of the proceedings and may issue one decision.

Consideration of Complete Applications:

Where there are a number of applications, the Court is able to deal more efficiently with applications submitted with all relevant information and documentation, ensuring that the Prosecution and the Defence receive all the information required for them to exercise their right to make observations, and therefore usually instructs the Registry that only complete applications be transmitted pursuant to Rule 89(4).¹ For the same purpose, the Chamber may provide only the essential information on each applicant in its decision.² In fact, those victims whose participation in the proceedings is not objected by either party within the relevant timeframe are admitted to participate in the proceedings. Indeed, the Rules do not require that an explicit, positive determination on each application be made by the Chamber – which may, rather, “reject” applications – and, in the Single Judge’s view, the positive assessment conducted by the Registry and the absence of objections from either party provide sufficient guarantees.³

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- ¹ ICC, *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, 20 August 2007, ICC-01/04-374, para. 9 (*‘Democratic Republic of the Congo*, 20 August 2007’) (<https://www.legal-tools.org/doc/a4e393/>). *Situation in Darfur*, Pre-Trial Chamber I, Decision on the requests of the OPCD and the legal representatives of the applicants regarding the transmission of the report of the Registry under rule 89 of the rules of evidence and procedure, 21 August 2007, ICC-02/05-93, pp. 3–4 (<https://www.legal-tools.org/doc/b54cee/>); *Prosecutor v. Ongwen*, Pre-Trial Chamber II, Decision concerning the procedure for admission of victims to participate in the proceedings in the present case, 3 September 2015, ICC-02/04-01/15-299, para. 4 (<https://www.legal-tools.org/doc/92c569/>).
- ² 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. 9 (<https://www.legal-tools.org/doc/bf662d/>).
- ³ *Ongwen*, 3 September 2015, paras. 7–8; ICC, *Prosecutor v. Al Mahdi*, Trial Chamber VIII, Public redacted version of ‘Decision on Victim Participation at Trial and on Common Legal Representation of Victims’, 8 June 2016, ICC-01/12-01/15-97-Red, para. 14 (*‘Al Mahdi*, 8 June 2016’) (<https://www.legal-tools.org/doc/c8c749/>).

Consideration of Victims Participation and Reparations Section Report:

The consideration of a number of victims' applications is not always accompanied by the transmission to the Prosecution and the Defence of the reports prepared by the VPRS on the applications. These reports are meant to assist the Chamber in issuing only one decision on a number of victim applications (*Democratic Republic of the Congo*, 20 August 2007, para. 36; *Darfur*, 21 August 2007, p. 4). Said reports are not, in principle, disclosed to the parties or the participants because (i) Rule 89 does not direct the Court to transmit said reports to the participants,⁴ (ii) the reports may influence the participants in their assessment of the applications, and (iii) the reports are likely to contain information not set out in the applications which should be treated as confidential or which may require protection for some other reasons (*Lubanga*, 9 November 2007, paras. 25–26). Nonetheless, should any particular fact or matter emerge relevant to the reports that a Chamber considers justifies disclosure, that will occur, subject always to the Chamber having secured an appropriate level of protection for confidential information, the disclosure of which could be harmful to the welfare of individual victims (para. 26). On occasion, the Court has transmitted to the Prosecution and the Defence a redacted version of the report.⁵ In some other occasions, the Chamber has transmitted the *ex parte* report to the Prosecution and the Legal Representative of Victims (*Al Mahdi*, 8 June 2016, para. 10).

Cross-references:

Articles 68, 69(4)

Rules 64, 77, 78

Regulation 86

Doctrine:

1. Gilbert Bitti and Håkan Friman, "Participation of Victims in the Proceedings", in Roy S. Lee and Håkan Friman (eds.), *The International Criminal*

⁴ *Democratic Republic of the Congo*, 20 August 2007, para. 38; *Darfur*, 21 August 2007, pp. 3–4; *Prosecutor v. Lubanga*, Trial Chamber I, Decision on the implementation of the reporting system between the Registrar and the Trial Chamber in accordance with Rule 89 and Regulation of the Court 86(5), 9 November 2007, ICC-01/04-01/06-1022, paras. 22, 24–25 ('*Lubanga*, 9 November 2007') (<https://www.legal-tools.org/doc/1b0802/>).

⁵ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Decision on the Request of the Registrar Relating to the Transmission of Applications for Participation in the Appeal Proceedings and on Related Issues, 6 May 2013, ICC-01/04-01/06-3026, para. 10 (<https://www.legal-tools.org/doc/fe7c39/>).

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- Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 460–462 (<https://www.legal-tools.org/doc/e34f81/>).
2. 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. 232–233.
 3. Paolina Massidda and Caroline Walter, “Article 68: Protection et participation au process des victimes et des témoins”, in Julian Fernandez and Xavier Pacreau (ed.), *Statut de Rome de la Cour pénale internationale: Commentaire article par article*, vol. 2, A. Pedone, Paris, 2012, pp. 1545–1576 (<https://www.legal-tools.org/doc/cdde69/>).
 4. 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. 1308–1312 (<https://www.legal-tools.org/doc/bcad4c/>).
 5. Kai Ambos, *Treatise on International Criminal Law*, vol. 3, Oxford University Press, 2016, pp. 181–186 (<https://www.legal-tools.org/doc/995606/>).
 6. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 1065–1066 (<https://www.legal-tools.org/doc/b7432e/>).

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Rule 90

Legal representatives of victims

General Remarks:

Victims may present their views and concerns through their appointed legal representatives, as foreseen in Article 68(3) of the ICC Statute. However, the legal regime of the representation of victims is regulated in the Rules of Procedure and Evidence. Rule 90 regulates the required qualifications to be appointed legal representative of victims, the selection and appointment of said representatives, as well as the possibility to obtain financial assistance from the Court to pay for legal assistance.

Legal Representation of Victim Applicants:

The statutory instruments of the Court fail to address specifically the issue of whether victim applicants are entitled to rely on a legal representative at the time between the filing of their application and the Chamber's assessment of its merits. In these circumstances, although victim applicants cannot claim to have an absolute and unconditional right to be provided with the assistance of a legal representative in respect of the phase preceding the Chamber's decision on the merits of their applications, the Court may appoint a legal representative of victims during this phase where the interests of justice so require, pursuant to Regulation 80(1).¹

Evolution of Legal Representation of Victims:

In the beginning of the activities of the Court, victims' applications for participation were transmitted to the OPCV, not to represent the applicants, but to provide the latter with any support and assistance which could be necessary or appropriate before the Chamber's decision on the merits of their applications, where necessary upon consultation with the VPRS and the VWU.²

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. 2 and 11, 12 ('*Kony et al.*, 1 February 2007') (<https://www.legal-tools.org/doc/03e64f/>).

² *Kony et al.*, 1 February 2007, para. 13; 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. 164 (<https://www.legal-tools.org/doc/d25664/>); ICC, *Prosecutor v. Kony et al.*, Pre-Trial Chamber II, Decision on the OPCV's Requests for leave to file a response to the Defence's

Subsequently, Counsels from the OPCV have been appointed to represent victim applicants and/or victims authorised to participate in the proceedings³ or to represent the common legal representative of victims during the hearings.⁴

Doctrine: For the bibliography, see the final comment on Rule 90.

Author: Enrique Carnero Rojo.

Application dated 25 March 2008 and to file observations on the Prosecution's Response to such Application, 4 April 2008, ICC-02/04-01/05-290, p. 5 (<https://www.legal-tools.org/doc/2e7039/>).

- ³ ICC, *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. 44 (<https://www.legal-tools.org/doc/0fdd1e/>); *Prosecutor v. Gbagbo*, Pre-Trial Chamber I, Corrigendum to the Second decision on victims' participation at the confirmation of charges hearing and in the related proceedings, 8 February 2013, ICC-02/11-01/11-384-Corr, para. 46 (<https://www.legal-tools.org/doc/4e5d36/>); *Prosecutor v. Blé Goudé*, Pre-Trial Chamber I, Decision on victims' participation in the pre-trial proceedings and related issues, 11 June 2014, ICC-02/11-02/11-83, para. 25 (<https://www.legal-tools.org/doc/e55eab/>); *Prosecutor v. Blé Goudé*, Pre-Trial Chamber I, Second Decision on victims' participation in the pre-trial proceedings and related issues, 1 August 2014, ICC-02/11-02/11-111, para. 15 (<https://www.legal-tools.org/doc/ef196c/>); *Prosecutor v. Ntaganda*, Pre-Trial Chamber II, Decision Concerning the Organisation of Common Legal Representation of Victims, 2 December 2013, ICC-01/04-02/06-160, para. 25 (<https://www.legal-tools.org/doc/1d23b9/>).
- ⁴ 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. 41 (<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. 40 (<https://www.legal-tools.org/doc/535eee/>).

Rule 90(1)

1. A victim shall be free to choose a legal representative

Freedom of Victims to Choose Legal Representation

Victims' Right to not Choose Legal Representative:

While Rule 90(1) seems to imply a right of every victim to choose his or her own legal representative, it does not go so far as to make it compulsory for the victim to make such a choice. A victim's 'freedom' to choose a legal representative includes the right not to proceed to such a choice and to exercise his or her right to participate on his or her own.¹

Victims' Right to Choose Same Legal Representative:

Conversely, pursuant to Rule 90(1) of the Rules, a victim shall be free to choose his or her legal representative and there is no provision in the Rules that, in principle, prohibits a victim from choosing the legal representative of a victim in another case.² Nonetheless, although pursuant to Rule 90(1) of the Rules, "victims shall be free to choose a legal representative", such right is not absolute but qualified in accordance with Rule 90 of the Rules, sub-rules 2 to 4.³

Doctrine: For the bibliography, see the final comment on Rule 90.

Author: Enrique Carnero Rojo.

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, para. 5 (<https://www.legal-tools.org/doc/03e64f/>).

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. 7 (<https://www.legal-tools.org/doc/285b52/>).

³ ICC, *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. 35 (<https://www.legal-tools.org/doc/0fdd1e/>).

Rule 90(2)

2. *Where there are a number of victims, the Chamber may, for the purposes of ensuring the effectiveness of the proceedings,*
- (ii) request the victims or particular groups of victims, if necessary with the assistance of the Registry, to choose a common legal representative or representatives.*
 - (iii) In facilitating the coordination of victim representation, the Registry may provide assistance, inter alia, by referring the victims to a list of counsel, maintained by the Registry, or suggesting one or more common legal representatives.*

Circumstances Allowing Victims to Choose a Common Legal Representative

Judicial Discretion on Common Legal Representation:

Chambers retain the option (and are not under an obligation) to request victims or particular groups of victims to choose a common legal representative or representatives, “where there are a number of victims” and “for the purposes of ensuring the effectiveness of the proceedings”.¹

Appropriateness of Common Legal Representation:

It is necessary to apply a flexible approach to the question of the appropriateness of common legal representation and, consequently, detailed criteria cannot be laid down in advance of a particular scenario.² Nonetheless, the appointment of a legal representative for the victims allowed to participate, albeit not compulsory, may be appropriate in view of a large number of victims (i) for representing victims who claim to have suffered from the same attack,³ (ii) for preventing any adverse impact on the fairness and

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, para. 5 (<https://www.legal-tools.org/doc/03e64f/>).

² ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on Victims’ Participation, 18 January 2008, ICC-01/04-01/06-1119, para. 124 (*‘Lubanga*, 18 January 2008’) (<https://www.legal-tools.org/doc/4e503b/>).

³ 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. 80 (*‘Kony et al.*, 10 August 2007’) (<https://www.legal-tools.org/doc/d25664/>); *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,

expeditiousness of the proceedings,⁴ (iii) for ensuring the provision of a meaningful participation of victims (*Mbarushimana*, 11 August 2011, para. 46), or (iv) for reasons of language or security (*Lubanga*, 18 January 2008, para. 116).

Determination of Need for Common Legal Representation:

The Chamber must make the determination of when common legal representation is necessary in order to ensure the effectiveness of the proceedings, and in so doing, the victims will receive the assistance of the Registry if necessary (*Lubanga*, 18 January 2008, para. 123). In this regard, a mapping process conducted by the Registry to identify the main groups of victims and potential persons that could act on their behalf may also be used by the Pre-Trial Chamber to assess whether victim applicants could be further grouped for the purposes of common legal representation in accordance with Rule 90 of the Rules and to start identifying potential common legal representatives.⁵

Common Legal Representative Chosen by the Victims:

Pursuant to Rule 90(1) of the Rules, “[a] victim shall be free to choose a legal representative”. However, the Chamber is of the view that the remainder of Rule 90 of the Rules makes it clear that this right is not absolute and that, “where there are a number of victims” and “for the purposes of ensuring the effectiveness of the proceedings”, a legal representative can be chosen by the Court, taking into consideration the distinct interests of the victims and avoiding any conflict of interest.⁶

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, 14 March 2008, ICC-02/04-01/05-282, para. 192 (<https://www.legal-tools.org/doc/12ef1e/>).

⁴ *Kony et al.*, 10 August 2007, para. 80; *Lubanga*, 18 January 2008, para. 116; 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. 45 (*Mbarushimana*, 11 August 2011’) (<https://www.legal-tools.org/doc/17ef31/>).

⁵ ICC, *Prosecutor v. Gbagbo*, Pre-Trial Chamber III, Decision on issues related to the victims’ application process, 6 February 2012, ICC-02/11-01/11-33, para. 11 (<https://www.legal-tools.org/doc/da3e22/>).

⁶ ICC, *Prosecutor v. Al Mahdi*, Trial Chamber VIII, Public redacted version of ‘Decision on Victim Participation at Trial and on Common Legal Representation of Victims’, 8 June 2016, ICC-01/12-01/15-97-Red, para. 36 (<https://www.legal-tools.org/doc/e8c749/>).

Doctrine: For the bibliography, see the final comment on Rule 90.

Author: Enrique Carnero Rojo.

Rule 90(3)

3. If the victims are unable to choose a common legal representative or representatives within a time limit that the Chamber may decide, (iv) the Chamber may request the Registrar to choose one or more common legal representatives.

Circumstances Allowing Chambers to Request a Common Legal Representative - Condition for Imposition of Common Legal Representative:

Rule 90(3) clarifies that a power to impose legal representation, whenever the victims are unable to make the choice, is bestowed on the Chamber in respect of a common legal representative.¹ On occasion, the Chambers have directly instructed the Registrar under Rule 90(3) to choose a common legal representative among the legal representatives of participating victims,² by reason of the practical difficulties to consult the victims and the proximity of the proceedings where the presence of the common legal representative is required.³

Common Legal Representative Chosen by the Registrar - Criteria to Select Common Legal Representative:

It is necessary to apply a flexible approach to the appointment of any particular common legal representative in order to protect the individual interests of the victims. As a result, detailed criteria to select a common legal representative cannot be laid down in advance, but some considerations are potentially of relevance, such as (i) the language spoken by the victims (and any proposed representative), (ii) links between the victims provided by time, place and circumstance, and (iii) the specific crimes of which they are alleged to be victims. In order to assist it in the consideration of this issue,

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, para. 5 (<https://www.legal-tools.org/doc/03e64f/>).

² ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Decision on 32 applications to participate in the proceedings, 27 August 2013, ICC-01/04-01/06-3045-Red2, para. 170 (<https://www.legal-tools.org/doc/af8699/>).

³ 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. 48 (<https://www.legal-tools.org/doc/17ef31/>).

the Victims Participation and Representation Section is usually directed to make recommendations on common legal representation in its reports to the Chamber.⁴

Doctrine: For the bibliography, see the final comment on Rule 90.

Author: Enrique Carnero Rojo.

⁴ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on Victims' Participation, 18 January 2008, ICC-01/04-01/06-1119, para. 124 ('*Lubanga*, 18 January 2008') (<https://www.legal-tools.org/doc/4e503b/>).

Rule 90(4)

4. The Chamber and the Registry shall take all reasonable steps to ensure that in the selection of common legal representatives, the distinct interests of the victims, particularly as provided in article 68, paragraph 1, are represented(vi) and that any conflict of interest is avoided.

Representation of Victims' Interests in the Selection of Common Legal Representative - Consideration of Common Interests for Joint Representation:

The approach to decisions under Rule 90 should not be rigid, and instead will depend on whether at a certain phase in the proceedings or throughout the case a group or groups of victims have common interests which necessitate joint representation, considering the views of victims under Article 68(3), along with the need to ensure that the accused's right to a fair and expeditious trial under Article 67.¹

Rule 90(4) – Avoidance of Conflicts in Interests in the Selection of Common Legal Representative - No Anonymity of Common Legal Representatives:

Anonymity is incompatible with the functions to be performed by a legal representative because a request for confidentiality by a legal representative of victims not only affects the expeditiousness of the proceedings, but may also create a conflict of interests in which the legal representative must choose, for example, between effectively representing the victims in a public hearing and keeping his identity confidential.²

Doctrine: For the bibliography, see the final comment on Rule 90.

Author: Enrique Carnero Rojo.

¹ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on Victims' Participation, 18 January 2008, ICC-01/04-01/06-1119, paras. 125–126 (<https://www.legal-tools.org/doc/4e503b/>).

² ICC, *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, 20 August 2007, ICC-01/04-374, paras. 47–48 (<https://www.legal-tools.org/doc/a4e393/>).

Rule 90(5)

5. A victim or group of victims who lack the necessary means to pay for a common legal representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance.

6. A legal representative of a victim or victims shall have the qualifications set forth in rule 22, sub-rule 1.

Legal aid for victims:

The legal representation provided by the Legal Representatives of Victims is not eligible for being covered by legal aid funds where (i) as a matter of fact, the Legal Representatives are individually chosen by the victims concerned in the exercise of their rights under Rule 90(1) to choose their legal representative, and are not common legal representatives chosen by the Court within the meaning of Rule 90(5) of the Rules; (ii) as a matter of law, the plain contextual and teleological interpretation of Rule 90(5) makes it clear that victims who individually choose their own legal representatives do not qualify for financial assistance as a matter of right from the Court; and (iii) to accept that all Rule 90(1) legal representatives be given legal assistance would result in “an inevitably unwieldy system” whereby the Court, when upholding the right of victims to appoint counsel of their own choice, would also be obligated to provide financial assistance to any legal representative appointed by any victims’ group, even if this results in dozens of such representatives being part of the legal aid scheme for a single case.¹

¹ ICC, *Prosecutor v. Ongwen*, Pre-Trial Chamber II, Decision on contested victims’ applications for participation, legal representation of victims and their procedural rights, 27 November 2015, ICC-02/04-01/15-350, para. 18 (<https://www.legal-tools.org/doc/95f763/>); *Prosecutor v. Ongwen*, Pre-Trial Chamber II, Decision on issues concerning victims’ participation, 15 December 2015, ICC-02/04-01/15-369, para. 10 (<https://www.legal-tools.org/doc/bb7f40/>); *Prosecutor v. Ongwen*, Pre-Trial Chamber II, Second decision on contested victims’ applications for participation and legal representation of victims, 24 December 2015, ICC-02/04-01/15-384, para. 22 (<https://www.legal-tools.org/doc/489997/>); *Prosecutor v. Ongwen*, Pre-Trial Chamber IX, 24 May 2016, paras. 7–12; *Prosecutor v. Ongwen*, Trial Chamber IX, Decision on Registry’s Request for Clarification on the Issue of Legal Assistance Paid by the Court for the Legal Representatives of Victims, 14 November 2016, ICC-02/04-01/15-591, para. 2 (<https://www.legal-tools.org/doc/f011b0/>).

Doctrine:

1. Gilbert Bitti and Håkan Friman, “Participation of Victims in the Proceedings”, in Lee, Roy S. *et al.* (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 462–465 (<https://www.legal-tools.org/doc/e34f81/>).
2. 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. 1699–1701 (<https://www.legal-tools.org/doc/040751/>).
3. 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*, vol. 2, A. Pedone, Paris, 2012, pp. 1570–1571 (<https://www.legal-tools.org/doc/cdde69/>).
4. Anne-Marie De Brouwer and Mikaela Heikkilä, “Victim Issues: Participation, Protection, Reparation, and Assistance”, Göran Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, pp. 1308–1310 (<https://www.legal-tools.org/doc/bcad4c/>).

Author: Enrique Carnero Rojo.

Rule 91

General Remarks:

Article 68(3) provides for a role for legal representatives of victims by stating that the views and concerns of victims “may be presented by the legal representatives of the victims where the Court considers it appropriate”. Rule 91 elaborates on the matter.

Since victims may be grouped together there will be a need to be represented by a legal representative. This raises several additional questions, including such relating to the victims’ ability to choose representative.¹ In *Kony et al.*, the Pre-Trial Chamber noted that “a victim’s participation in the proceedings is not conditional upon him or her being assisted by a legal representative”.²

Rule 91 describes the special participatory rights that victim enjoy when represented by counsel to attend hearings, question witnesses, and others. Victims will not enjoy such rights when unrepresented.³

Doctrine: For the bibliography, see the final comment on Rule 91.

Author: Mark Klamberg.

¹ Gilbert Bitti and Håkan Friman, “Victims and Witnesses”, 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. 462 (<https://www.legal-tools.org/doc/e34f81/>).

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, ICC-02/04-01/05-134, 1 February 2007, ICC-02/04-01/05-134, para. 10 (<https://www.legal-tools.org/doc/03e64f/>).

³ Kai Ambos, *Treatise on International Criminal Law*, vol. 3: *International Criminal Procedure*, Oxford University Press, 2016, p. 188 (<https://www.legal-tools.org/doc/995606/>).

Rule 91(1)

1. A Chamber may modify a previous ruling under rule 89.

Sub-rule 1 clarifies that a ruling under Rule 89 may be modified. The rationale of this sub-rule is the need for a modified ruling extending the participation of a victim, who had previously been granted a limited participation.¹

Doctrine: For the bibliography, see the final comment on Rule 91.

Author: Mark Klamberg.

¹ Gilbert Bitti and Håkan Friman, “Victims and Witnesses”, 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. 466 (<https://www.legal-tools.org/doc/e34f81/>).

Rule 91(2)

2. A legal representative of a victim shall be entitled to attend and participate in the proceedings in accordance with the terms of the ruling of the Chamber and any modification thereof given under rules 89 and 90. This shall include participation in hearings unless, in the circumstances of the case, the Chamber concerned is of the view that the representative's intervention should be confined to written observations or submissions. The Prosecutor and the defence shall be allowed to reply to any oral or written observation by the legal representative for victims.

Sub-rule 2 provides that the participation of a legal representative is subject to the ruling of the Chamber and any modification thereof given under Rules 89 and 90. The Prosecutor and the defence shall be allowed to reply to any oral or written observation by the legal representative for victims. This does not apply to all submissions, since some submissions may be dealt *ex parte* for example under Rule 88.¹

Doctrine: For the bibliography, see the final comment on Rule 91.

Author: Mark Klamberg.

¹ Gilbert Bitti and Håkan Friman, “Victims and Witnesses”, 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. 467 (<https://www.legal-tools.org/doc/e34f81/>).

Rule 91(3)(a)

3. (a) When a legal representative attends and participates in accordance with this rule, and wishes to question a witness, including questioning under rules 67 and 68, an expert or the accused, the legal representative must make application to the Chamber. The Chamber may require the legal representative to provide a written note of the questions and in that case the questions shall be communicated to the Prosecutor and, if appropriate, the defence, who shall be allowed to make observations within a time limit set by the Chamber.

Sub-rule 3 concerns a controversial form of participation, namely the questioning of a witness, an expert or the accused.

In *Lubanga*, Trial Chamber I considered that:

Rule 91(3) of the Rules enables participating victims to question witnesses with the leave of the Chamber (including experts and the defendant).¹ The Rule does not limit this opportunity to the witnesses called by the parties. It follows that victims participating in the proceedings may be permitted to tender and examine evidence if in the view of the Chamber it will assist it in the determination of the truth, and if in this sense the Court has ‘requested’ the evidence. Furthermore, for the reasons set out above, the Chamber will not restrict questioning by victims to reparations issues, but instead will allow appropriate questions to be put by victims whenever their personal interests are engaged by the evidence under consideration.²

Doctrine: For the bibliography, see the final comment on Rule 91.

Author: Mark Klamberg.

¹ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on Victims’ Participation, 18 January 2008, ICC-01/04-01/06-1119, para. 108 (<https://www.legal-tools.org/doc/4e503b/>).

² See also ICC, *Prosecutor v. Bemba*, Trial Chamber III, Decision (i) ruling on legal representatives’ applications to question Witness 33 and (ii) setting a schedule for the filing of submissions in relation to future applications to question witnesses, ICC-01/05-01/08-1729, 9 September 2011, ICC-01/05-01/08-1729, para. 15 (<https://www.legal-tools.org/doc/a28dec/>).

Rule 91(3)(b)

(b) The Chamber shall then issue a ruling on the request, taking into account the stage of the proceedings, the rights of the accused, the interests of witnesses, the need for a fair, impartial and expeditious trial and in order to give effect to article 68, paragraph 3. The ruling may include directions on the manner and order of the questions and the production of documents in accordance with the powers of the Chamber under article 64. The Chamber may, if it considers it appropriate, put the question to the witness, expert or accused on behalf of the victim's legal representative.

The Chamber shall pursuant to sub-rule 3(b) issue a ruling on the request of a legal representative to attend and participate, taking into account the stage of the proceedings, the rights of the accused, the interests of witnesses, the need for a fair, impartial and expeditious trial. These factors shall not only have an impact on whether questioning should be allowed or not, but also the kind of questions to be allowed and the conduct of the questioning.¹

In *Lubanga*, the aforesaid victims were authorized to participate in the confirmation hearing of the case upon the terms set forth in that decision, *inter alia*, the Victims' Representative will not be able to add any point of fact or any evidence, the Victims' Representative will not be able to question the witnesses according to the procedure set out in Rule 91(3) of the Rules.² Pre-Trial Chamber I considered that the victims requested that their identities remain confidential.

Pre-Trial Chamber I decided that victim status was granted to Applicant a/0105/06 at the stage of the case of *Lubanga*; on the same terms as those granted to victims a/0001/06 to a/0003/06.³

¹ Gilbert Bitti and Håkan Friman, "Victims and Witnesses", 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. 468 (<https://www.legal-tools.org/doc/e34f81/>).

² 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 (<https://www.legal-tools.org/doc/2f4510/>).

³ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the applications for participation in the proceedings a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 in the case of The Prosecutor v. Thomas Lubanga Dyilo, 20 October 2006, ICC-01/04-01/06-601-tEN (<https://www.legal-tools.org/doc/d293d9/>).

In *Lubanga*, the Trial Chamber concluded that “it follows from the object and purpose of questioning by the victims’ legal representatives that there is a presumption in favour of a neutral form of questioning, which may be displaced in favour of a more closed form of questioning, along with the use of leading or challenging questions, depending on the issues raised and the interests affected.”⁴

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, vol. 3: *International Criminal Procedure*, Oxford University Press, 2016, pp. 188, 191–192 and 197 (<https://www.legal-tools.org/doc/995606/>).
2. Gilbert Bitti and Håkan Friman, “Victims and Witnesses”, 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. 462–465 (<https://www.legal-tools.org/doc/e34f81/>).
3. David Donat-Cattin, “Article 68”, 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. 1699–1701 (<https://www.legal-tools.org/doc/040751/>).
4. Bitte Timm, “The Legal Position of Victims in the Rules of Procedure and Evidence”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 298–301 (<https://www.legal-tools.org/doc/95e5f9/>).

Author: Mark Klamberg.

⁴ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims, 16 September 2009, ICC-01/04-01/06-2127, para. 29 (<https://www.legal-tools.org/doc/e1ee1a/>).

Rule 92

1. This rule on notification to victims and their legal representatives shall apply to all proceedings before the Court, except in proceedings provided for in Part 2.

2. In order to allow victims to apply for participation in the proceedings in accordance with rule 89, the Court shall notify victims concerning the decision of the Prosecutor not to initiate an investigation or not to prosecute pursuant to article 53. Such a notification shall be given to victims or their legal representatives who have already participated in the proceedings or, as far as possible, to those who have communicated with the Court in respect of the situation or case in question. The Chamber may order the measures outlined in sub-rule 8 if it considers it appropriate in the particular circumstances.

3. In order to allow victims to apply for participation in the proceedings in accordance with rule 89, the Court shall notify victims regarding its decision to hold a hearing to confirm charges pursuant to article 61. Such a notification shall be given to victims or their legal representatives who have already participated in the proceedings or, as far as possible, to those who have communicated with the Court in respect of the case in question.

4. When a notification for participation as provided for in sub-rules 2 and 3 has been given, any subsequent notification as referred to in sub-rules 5 and 6 shall only be provided to victims or their legal representatives who may participate in the proceedings in accordance with a ruling of the Chamber pursuant to rule 89 and any modification thereof.

5. In a manner consistent with the ruling made under rules 89 to 91, victims or their legal representatives participating in proceedings shall, in respect of those proceedings, be notified by the Registrar in a timely manner of:

(a) Proceedings before the Court, including the date of hearings and any postponements thereof, and the date of delivery of the decision;

(b) Requests, submissions, motions and other documents relating to such requests, submissions or motions.

6. Where victims or their legal representatives have participated in a certain stage of the proceedings, the Registrar shall notify them as soon as possible of the decisions of the Court in those proceedings.

7. Notifications as referred to in sub-rules 5 and 6 shall be in writing or, where written notification is not possible, in any other form as appropriate. The Registry shall keep a record of all notifications.

Where necessary, the Registrar may seek the cooperation of States Parties in accordance with article 93, paragraph 1 (d) and (l).

8. For notification as referred to in sub-rule 3 and otherwise at the request of a Chamber, the Registrar shall take necessary measures to give adequate publicity to the proceedings. In doing so, the Registrar may seek, in accordance with Part 9, the cooperation of relevant States Parties, and seek the assistance of intergovernmental organizations.

Rule 92 deals with the notification to the victims of the Prosecutor's decision not to investigate or to prosecute under Article 53. This notification is important because proceedings regarding a review by the Pre-Trial Chamber of a decision by the Prosecutor not to proceed pursuant to Article 53 of the ICC Statute constitute a judicial proceeding at the investigation stage during which the victims can participate.

The Rule indicates three classes of victims which should be notified: (i) victims or their legal representatives who have already participated in the proceedings; (ii) victims who have communicated with the Court in respect of the relevant situation; and (iii) victims who have communicated with the Court in respect of the relevant case.¹ According to Regulation 87(2) of the Regulations of the Court, it is for the Prosecutor to inform the Registry of his or her decision not to proceed and "to provide all relevant information for notification by the Registry to victims in accordance with Rule 92, sub-rule 2".

In the *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I underlined that like Rule 92(3), Rule 92(2) only contains a notification rule and is limited to that. Hence, it cannot be argued (as the Prosecutor has done) that it seeks to limit the participation of victims at the investigation stage to the proceedings mentioned therein.² Moreover, the Appeals Chamber held that Rule 92 does not support the position that victims have a

¹ 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 ICC-02/04-01/05-252, 10 August 2007, ICC-02/04-01/05-252, para. 95 (<https://www.legal-tools.org/doc/d25664/>).

² ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Décision sur les demandes de participation à la procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 et VPRS 6, 17 January 2006, ICC-01/04-101, para. 49 (<https://www.legal-tools.org/doc/3eeb94/>).

general participatory right at the investigation stage of a situation, outside the framework of judicial proceedings.³

Cross-reference:

Rule 68(3).

Author: Karel De Meester.

³ See 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, 19 December 2008, ICC-01/04-556 (OA4 OA5 OA6), para. 46 (<https://www.legal-tools.org/doc/dca981/>); *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 decision 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 (OA OA2 OA3), para. 46 (<https://www.legal-tools.org/doc/95100b/>).

Rule 93

A Chamber may seek the views of victims or their legal representatives participating pursuant to rules 89 to 91 on any issue, inter alia, in relation to issues referred to in rules 107, 109, 125, 128, 136, 139 and 191. In addition, a Chamber may seek the views of other victims, as appropriate.

General Remarks:

In contrast to the general field of application of Rules 89–91 regarding the procedure for the participation of victims in proceedings before the Court, a Chamber may resort to Rule 93 on an exceptional basis only, when confronted with a specific “issue” requiring a judicial determination within or in the course of a stage of the proceedings.

However, Rule 93 is not intended to limit the power of a Chamber to seek the views of any victim on any issue when the Chamber finds it appropriate. In fact, Rule 93 refers also to victims who are not participating in the proceedings within which the “issue” in question arose. In this regard, several Chambers have clarified that they always retain the power under Rule 93 to request the views of victims who may not have applied to participate in the proceedings.¹

Analysis:

A Chamber may seek the views of victims or their legal representatives participating pursuant to Rules 89 to 91 on any issue, *inter alia*, in relation to issues referred to in Rules 107, 109, 125, 128, 136, 139 and 191. In addition, a Chamber may seek the views of other victims, as appropriate.

Full Discretion by the Chamber:

Rule 93 confers power upon a Chamber to seek the views of victims or their legal representatives on any matter arising in the course of proceedings before it, including issues referred to it pursuant to Rules 107, 109, 125, 128,

¹ ICC, *Situation in Uganda*, 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-02/04-101, para. 102 (<https://www.legal-tools.org/doc/8f9181/>); *Prosecutor v. Lubanga*, Trial Chamber I, Decision on “Demande de déposition du représentant légal des demandeurs des victimes”, 25 October 2007, ICC-01/04-01/06-1004, para. 2 (<https://www.legal-tools.org/doc/7c9657/>).

136, 139, and 191 of the Rules. Initiative for soliciting the views of victims under this rule rests entirely with a Chamber.²

Independent Provision of Views:

The views of victims may be solicited independently of whether they participate or not in any given proceedings before the Court. This process is distinguished from victim participation under Article 68(3), and from the provision of victims' representations under Article 15(3) and the submission of victims' observation under Article 19(3) (*Democratic Republic of the Congo*, 19 December 2008, para. 48). However, for some issues, such as the amendment of the charges (Rule 128), the Chamber may seek only the views of victims or their legal representatives participating pursuant to Rules 89 to 91.³

Issues in relation to which the views of victims may be sought
Free Choice of Issue by Chambers:

Victims may express their views on any given subject identified by the Chamber (*Democratic Republic of the Congo*, 19 December 2008, para. 48).

Issues and Timing of Views of Victims:

In light of the broad wording of Rule 93, any victim may be invited by a Chamber to express his or her views on one or more issues at any stage of the proceedings provided that the Chamber considers it appropriate.⁴ As a consequence, victims may participate in judicial proceedings by presenting

² 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. 48 (*'Democratic Republic of the Congo*, 19 December 2008') (<https://www.legal-tools.org/doc/dca981/>).

³ 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/>).

⁴ 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. 102 (<https://www.legal-tools.org/doc/d25664/>).

their views pursuant to Rule 93 also at the stage of the investigation of a situation.⁵

Cross-references:

Rules 68(3), 89–91, 107, 109, 125, 128, 136, 139, 191.

Doctrine:

1. Gilbert Bitti and Håkan Friman, “Participation of Victims in the Proceedings”, 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. 473–474 (<https://www.legal-tools.org/doc/e34f81/>).
2. 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.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 2, Oxford University Press, 2002, pp. 1387–1419 (<https://www.legal-tools.org/doc/01addc/>).
3. Carsten Stahn, *et al.*, “Participation of Victims in the Pre-Trial Proceedings of the ICC”, *Journal of International Criminal Justice*, 2006, vol. 4, no. 2, p. 237.
4. Paolina Massidda and Caroline Walter, “Article 68: Protection et participation au process des victimes et des témoins”, 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. 1568–1569 (<https://www.legal-tools.org/doc/cdde69/>).
5. Sergey Vasiliev, “Article 68(3) and personal interests of victims in the emerging practice of the ICC”, in Carsten Stahn and Goran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff Publishers, Leiden, 2009, pp. 639–640, 686 (<https://www.legal-tools.org/doc/5d1db6/>).

Author: Enrique Carnero Rojo.

⁵ ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on victims’ participation in proceedings relating to the situation in the Democratic Republic of the Congo, 11 April 2011, ICC-01/04-593, para. 10 (<https://www.legal-tools.org/doc/bb2a9b/>).

 Subsection 4. Reparations to Victims

Rule 94

1. A victim's request for reparations under article 75 shall be made in writing and filed with the Registrar. It shall contain the following particulars:

- (a) The identity and address of the claimant;**
- (b) A description of the injury, loss or harm;**
- (c) The location and date of the incident and, to the extent possible, the identity of the person or persons the victim believes to be responsible for the injury, loss or harm;**
- (d) Where restitution of assets, property or other tangible items is sought, a description of them;**
- (e) Claims for compensation;**
- (f) Claims for rehabilitation and other forms of remedy;**
- (g) To the extent possible, any relevant supporting documentation, including names and addresses of witnesses.**

2. At commencement of the trial and subject to any protective measures, the Court shall ask the Registrar to provide notification of the request to the person or persons named in the request or identified in the charges and, to the extent possible, to any interested persons or any interested States. Those notified shall file with the Registry any representation made under article 75, paragraph 3.

Rules 94–99 supplement Article 75 of the ICC Statute on reparations. Reparations proceedings may be initiated by the Chamber upon the request by a victim under Rule 94 or on its own motion pursuant to Rule 95.

Sub-rule 1 provides a list of items that should be included in a request for reparations. Two of the items attracted particular attention during the negotiations of the rule. The original draft of sub-rule 1(c) would have required the claimant to identify the person or persons responsible for the injury, loss or harm. Since victims may be unable to identify the perpetrator of the attack, the caveat “to the extent possible” was added. Sub-rule 1(g) requires the claimant to provide relevant supporting documentation, including names and addresses of witnesses. since this may be difficult for some victims, for example refugees, the caveat “to the extent possible” was also added here.¹

¹ Håkan Friman and Peter Lewis, “Reparation to victims”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and*

Sub-rule 2 requires notification of the request for reparations to the person or persons named in the request or identified in the charges. Sub-rule 2 is drafted to encourage early claims by the requirement that notification should occur at the commencement of the trial (Friman and Lewis, 2001, p. 480).

Cross-references:

Article 75, Rules 94–99

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. 198 (<https://www.legal-tools.org/doc/995606/>).
2. Håkan Friman and Peter Lewis, “Reparation to victims”, 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. 479–480.
3. Birte Timm, “The Legal Position of Victims in the Rules of Procedure and Evidence”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 302–303 (<https://www.legal-tools.org/doc/995606/>).

Author: Mark Klamberg.

Evidence, Transnational Publishers, Ardsley, 2001, pp. 479–480 (<https://www.legal-tools.org/doc/e34f81/>).

Rule 95

1. In cases where the Court intends to proceed on its own motion pursuant to article 75, paragraph 1, it shall ask the Registrar to provide notification of its intention to the person or persons against whom the Court is considering making a determination, and, to the extent possible, to victims, interested persons and interested States. Those notified shall file with the Registry any representation made under article 75, paragraph 3

2. If, as a result of notification under sub-rule 1:

(a) A victim makes a request for reparations, that request will be determined as if it had been brought under rule 94;

(b) A victim requests that the Court does not make an order for reparations, the Court shall not proceed to make an individual order in respect of that victim.

Rule 95 concerns reparations proceedings initiated by the Chamber on its own motion. According to Article 75(1) the Court should only act in its own motion in exceptional circumstances.

Sub-rule 1 requires notification to the person or persons against whom the Court is considering making a determination on reparations.

Sub-rule 2 provides that when the Court decides to proceed on its own motion, the victim can either: (i) step in as if he or she had brought the complaint under Rule 94 or (ii) object, with the result that Court shall not proceed to make an individual order in respect of that victim. However, the individual victim cannot stop a collective award.¹ The rationale for giving victims the possibility to object is that some victims, as a matter of conscience, would not wish reparations since it could be perceived that they benefit from ‘blood money’.²

Cross-references:

Article 75.

¹ Birte Timm, “The Legal Position of Victims in the Rules of Procedure and Evidence”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 302 (<https://www.legal-tools.org/doc/95e5f9/>).

² Håkan Friman and Peter Lewis, “Reparation to victims”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, 2nd. ed., Transnational Publishers, Ardsley, 2001, p. 481 (<https://www.legal-tools.org/doc/e34f81/>).

Rules 94–99

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. 198 (<https://www.legal-tools.org/doc/995606/>).
2. Håkan Friman and Peter Lewis, “Reparation to victims”, 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. 481 (<https://www.legal-tools.org/doc/e34f81/>).
3. Birte Timm, “The Legal Position of Victims in the Rules of Procedure and Evidence”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 302 (<https://www.legal-tools.org/doc/95e5f9/>).

Author: Mark Klamberg.

Rule 96

1. Without prejudice to any other rules on notification of proceedings, the Registrar shall, insofar as practicable, notify the victims or their legal representatives and the person or persons concerned. The Registrar shall also, having regard to any information provided by the Prosecutor, take all the necessary measures to give adequate publicity of the reparation proceedings before the Court, to the extent possible, to other victims, interested persons and interested States.

2. In taking the measures described in sub-rule 1, the Court may seek, in accordance with Part 9, the cooperation of relevant States Parties, and seek the assistance of intergovernmental organizations in order to give publicity, as widely as possible and by all possible means, to the reparation proceedings before the Court.

Rule 96 provides that the Registrar shall seek to give adequate publicity of the reparation proceedings. The purpose of the rule is to ensure that victims are encouraged to make applications for reparations and this is only possible if they are aware of the proceedings.¹

For the purpose of spreading awareness of the proceedings, sub-rule 2 provides that publicity may be achieved by co-operation with relevant States Parties and assistance of intergovernmental organizations under Part 9 of the ICC Statute.

Cross-references:

Article 75, Rules 94–99

Doctrine:

1. Håkan Friman and Peter Lewis, “Reparation to victims”, 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. 482 (<https://www.legal-tools.org/doc/e34f81/>).
2. Birte Timm, “The Legal Position of Victims in the Rules of Procedure and Evidence”, in Horst Fischer *et al.* (eds.), *International and National*

¹ Håkan Friman and Peter Lewis, “Reparation to victims”, 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. 482 (<https://www.legal-tools.org/doc/e34f81/>).

Prosecution of Crimes Under International Law, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 302 (<https://www.legal-tools.org/doc/95e5f9/>).

Author: Mark Klamberg.

Rule 97

- 1. Taking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both.*
- 2. At the request of victims or their legal representatives, or at the request of the convicted person, or on its own motion, the Court may appoint appropriate experts to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations. The Court shall invite, as appropriate, victims or their legal representatives, the convicted person as well as interested persons and interested States to make observations on the reports of the experts.*
- 3. In all cases, the Court shall respect the rights of victims and the convicted person.*

Rule 97 introduces a distinction between individual and collective reparations that is not contained in the Rome Statute. The rationale behind the concept of “collective victims” is that some crimes are directed against a Group and that victimization of the individual is mainly a victimization of a group. An obvious example would be the crime of apartheid. Collective Awards will in many cases serve a symbolic purpose.¹

During the negotiations, some delegations perceived reparations proceedings as a means for victims to enforce their civil claims through the Court. For these delegations it was difficult to adopt the concept of collective Awards. Other delegations perceived reparations as a form of sanctions imposed by the Court to meet the needs of the victims and not a means of satisfying civil claims; Rule 97 is a compromise.² Sub-rule 1 provides that awards should normally be on an individual basis, and where the Court deems it appropriate, on a collective basis or both. Sub-rule 2 allows the Court to appoint appropriate experts to assist it in making awards. Sub-rule

¹ Birte Timm, “The Legal Position of Victims in the Rules of Procedure and Evidence”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 303–304 (<https://www.legal-tools.org/doc/95e5f9/>).

² Håkan Friman and Peter Lewis, “Reparation to victims”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, 2nd. ed., Transnational Publishers, Ardsley, 2001, p. 483 (<https://www.legal-tools.org/doc/e34f81/>).

3 was added to ensure that the Court shall respect the rights of victims and the convicted person. This was important for delegations that did not want the Court to Award reparations against the will of victims (Friman and Lewis, 2001, p. 484).

Cross-references:

Article 75, Rules 94–99

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. 198 (<https://www.legal-tools.org/doc/995606/>).
2. Håkan Friman and Peter Lewis, “Reparation to victims”, 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. 482–484 (<https://www.legal-tools.org/doc/e34f81/>).
3. Birte Timm, “The Legal Position of Victims in the Rules of Procedure and Evidence”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 303–304 (<https://www.legal-tools.org/doc/95e5f9/>).

Author: Mark Klamberg.

Rule 98

- 1. Individual awards for reparations shall be made directly against a convicted person.**
- 2. The Court may order that an award for reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim. The award for reparations thus deposited in the Trust Fund shall be separated from other resources of the Trust Fund and shall be forwarded to each victim as soon as possible.**
- 3. The Court may order that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate.**
- 4. Following consultations with interested States and the Trust Fund, the Court may order that an award for reparations be made through the Trust Fund to an intergovernmental, international or national organization approved by the Trust Fund.**
- 5. Other resources of the Trust Fund may be used for the benefit of victims subject to the provisions of article 79.**

Rule 98 supplements Article 79 which provides that a Trust Fund shall be established by decision of the Assembly of States Parties.

Sub-rule 1 indicates that the Trust Fund need not be involved in awards to individuals, these shall be made directly against a convicted person.

Pursuant to sub-rule 2, the trust Fund shall assist the Court in implementing reparations awards.

Since collective awards may be made for the benefit of a Group without legal personality, awards may be deposited with the Trust Fund pursuant to sub-rule 3.¹ Many of the arguments concerning collective awards that surrounded the discussion on Rule 97 were also relevant for Rule 98 since the Trust Fund is the obvious body to administer such awards.² In *Lubanga*, the

¹ Birte Timm, “The Legal Position of Victims in the Rules of Procedure and Evidence”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 305 (<https://www.legal-tools.org/doc/95e5f9/>).

² Håkan Friman and Peter Lewis, “Reparation to victims”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and*

Appeals Chamber determined that “[w]hen only collective reparations are awarded pursuant to Rule 98(3) of the Rules of Procedure and Evidence, a Trial Chamber is not required to rule on the merits of the individual requests for reparations”.³

Sub-rule 4 provides that the Court may also order that an award for reparations be made through the Trust Fund to an intergovernmental, international or national organization approved by the Trust Fund.

Sub-rule 5 concerns “Other resources of the Trust Fund”. “Other resources” are defined in Regulation 47 of the Regulations of the Trust Fund as “resources other than those collected from awards for reparations, fines and forfeitures”. In *Lubanga*, the Appeals Chamber noted that the word “may” in Rule 98(5) means that a decision to use “other resources” is a discretionary decision and not mandatory (*Lubanga*, 7 August 2012, para. 111).

Cross-references:

Article 79.

Rules 94–99.

Doctrine:

1. Kai Ambos, “*Treatise on International Criminal Law*”, Oxford University Press, 2016, pp. 199–200 (<https://www.legal-tools.org/doc/995606/>).
2. Håkan Friman and Peter Lewis, “Reparation to victims”, 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. 487–488 (<https://www.legal-tools.org/doc/e34f81/>).
3. Karim A.A. Khan, “Article 79”, 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/>).
4. Birte Timm, “The Legal Position of Victims in the Rules of Procedure and Evidence”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner

Evidence, Transnational Publishers, Ardsley, 2001, p. 487 (<https://www.legal-tools.org/doc/e34f81/>).

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, 3 March 2015, ICC-01/04-01/06-3129, para. 7 (*Lubanga*, 7 August 2012’) (<https://www.legal-tools.org/doc/c3fc9d/>).

Wissenschafts-Verlag, 2004, pp. 304–306 (<https://www.legal-tools.org/doc/95e5f9/>).

Author: Mark Klamberg.

Rule 99

- 1. The Pre-Trial Chamber, pursuant to article 57, paragraph 3 (e), or the Trial Chamber, pursuant to article 75, paragraph 4, may, on its own motion or on the application of the Prosecutor or at the request of the victims or their legal representatives who have made a request for reparations or who have given a written undertaking to do so, determine whether measures should be requested.*
- 2. Notice is not required unless the Court determines, in the particular circumstances of the case, that notification could not jeopardize the effectiveness of the measures requested. In the latter case, the Registrar shall provide notification of the proceedings to the person against whom a request is made and so far as is possible to any interested persons or interested States.*
- 3. If an order is made without prior notification, the relevant Chamber shall request the Registrar, as soon as is consistent with the effectiveness of the measures requested, to notify those against whom a request is made and, to the extent possible, to any interested persons or any interested States and invite them to make observations as to whether the order should be revoked or otherwise modified.*
- 4. The Court may make orders as to the timing and conduct of any proceedings necessary to determine these issues.*

Rule 99 concerns enforcement of reparations orders, which involves co-operation with states as well as protection of victims.

In relation to co-operation, Article 75(5) provides that reparations orders are subject to the same rules as fines and forfeitures, that is Rule 218.

In relation to protection, the relevant provisions in the ICC Statute are Articles 57(3)(e), 79(4), 93(1)(k).

Sub-rule 1 of Rule 99 clarifies that not only victims “who have made a request for reparations” but also victims “who have given a written undertaking to do so” make a request for co-operation and protective measures. This is to protect the interests of victims who are preparing a request for reparations.¹

¹ Håkan Friman and Peter Lewis, “Reparation to victims”, 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. 489 (<https://www.legal-tools.org/doc/e34f81/>).

Sub-rules 2 and 3 concerns notification regarding proceedings for measures under Rule 99.

Cross-references:

Articles 57(3)(e), 75(5), 79(4), 93(1)(k) and 109.
Rules 94–99, 218

Doctrine:

1. Daniel 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. 1867–1868 (<https://www.legal-tools.org/doc/040751/>).
2. Håkan Friman and Peter Lewis, “Reparation to victims”, 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. 489–490 (<https://www.legal-tools.org/doc/e34f81/>).
3. Birte Timm, “The Legal Position of Victims in the Rules of Procedure and Evidence”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 306 (<https://www.legal-tools.org/doc/95e5f9/>).

Author: Mark Klamberg.

*Section IV. Miscellaneous Provisions***Rule 100⁵**

1. In a particular case, where the Court considers that it would be in the interests of justice, it may decide to sit in a State other than the host State, for such period or periods as may be required, to hear the case in whole or in part.

2. The Chamber, at any time after the initiation of an investigation, may proprio motu or at the request of the Prosecutor or the defence, decide to make a recommendation changing the place where the Chamber sits. The judges of the Chamber shall attempt to achieve unanimity in their recommendation, failing which the recommendation shall be made by a majority of the judges. Such a recommendation shall take account of the views of the parties, of the victims and an assessment prepared by the Registry and shall be addressed to the Presidency. It shall be made in writing and specify in which State the Chamber would sit. The assessment prepared by the Registry shall be annexed to the recommendation.

3. The 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. Thereafter, the Chamber or any designated Judge shall sit at the location decided upon.

⁵ As amended by resolution ICC-ASP/17/Res.2.

Place of the proceedings:

Article 3(1) of the ICC Statute lays down that the “seat of the Court shall be established at The Hague in the Netherlands”. Additionally, Article 3(3) provides for that the ICC “may sit elsewhere, whenever it considers it desirable, as provided in this Statute”. The original text of Rule 100(1) read as follows: “in a particular case, where the Court considers that it would be in the interests of justice, it may decide to sit in a State other than the host State”. With regard to the Republic of Kenya, Pre-Trial Chamber II assessed the desirability and feasibility of conducting the confirmation of charges hearing in Kenya.¹ Since the Kenyan cases at the ICC involved President Uhuru

¹ ICC, *Prosecutor v. Muthaura et al*, Pre-Trial Chamber II, Decision Requesting Observations on the Place of the Proceedings for the Purposes of the Confirmation of Charges Hearing, 3 June 2011, ICC-01/09-02/11-102, para. 3 (<https://www.legal-tools.org/doc/0982b2/>).

Kenyatta and Vice-President William Samoei Arap Ruto, Rules 134 *bis* (“Presence through the use of video technology”), 134 *ter* (“Excusal from presence at trial”) and 134 *quater* (“Excusal from presence at trial due to extraordinary public duties”) were introduced to accommodate the ICC proceedings to the circumstances of the said cases. In *Lubanga*, the Registry undertook reconnaissance missions to identify a suitable location in the Democratic Republic of Congo (‘DRC’) and developed a protocol to conduct court proceedings *in situ*. Nevertheless, this possibility was foreclosed when the Minister of Justice of the DRC informed the ICC that the proceedings could not be held in the proposed location as this could cause ethnic tensions in an area regarded as potentially unstable.²

According to the original Rule 100 of the Rules of Procedure and Evidence, the prosecutor, defence or a majority of the judges first needed to file an application or recommendation to the ICC President who had to consult with the state at which the ICC would sit. Should the State accept, a decision to hold proceedings *in situ* needs to be made by two-thirds of the ICC judges. Current Rule 100(2) of the Rules of Procedure and Evidence provides for that: by unanimity (or failing this, by majority), the Chamber may *proprio motu* or at the prosecutor/defence request recommend in writing the place (state) where the Chamber sits, taking into account the views of the parties, victims, and a Registry’s assessment. In turn, current Rule 100(3) establishes that the ICC Presidency ‘shall consult the State where the Chamber intends to sit’ and, if the answer is in the affirmative, the Presidency (in consultation with the Chamber) takes the decision to sit outside the host state (the Netherlands). Then, the Chamber/judge shall sit at the selected location.

Whereas the original Rule 100(1) read as follows: “In a particular case, where the Court considers that it would be in the interests of justice, it may decide to sit in a State other than the host State”, the current Rule 100(1) reads as follows: “In a particular case, where the Court considers that it would be in the interests of justice, it may decide to sit in a State other than the host State, *for such period or periods as may be required, to hear the case in whole or in part* [emphasis added]”.

The original Rule 100 was amended by the Assembly of States Parties to ease the decision-making for the ICC to sit outside. A more unambiguous and expeditious process has been introduced for designating an alternate seat

² Human Rights Watch, *Courting History. The Landmark International Criminal Court’s First Years*, Human Rights Watch, New York, 2008, pp. 113–114.

by giving the Trial Chamber the authority to decide the issue to the Court's President, considering the ICC Registry's assessment and an absolute majority recommendation of the competent ICC Chamber judges.³

In *Ongwen*, the Chamber explicitly acknowledged the importance of bringing justice closer to the affected community; however, it found that holding the trial opening statements in Uganda was undesirable under Article 3 of the ICC Statute. Two main factors explain this decision: first, security concerns relating to Mr Ongwen's prospective presence in Uganda and the victims' ensuing fear of possible episodes of violence, and, second, logistical difficulties, including the judicial workload of the Chamber's individual judges in other ICC situations and cases. Based on these considerations, Pre-Trial Chamber II decided not to make a recommendation to change the place of the proceedings and, thus, the trial was decided to take place at the ICC's seat. Additionally, Pre-Trial Chamber II found that the determination of whether a judicial site-visit in Northern Uganda would provide material assistance to its evaluation of the evidence should be conducted at a later procedural stage.⁴

Cross-references:

Articles 3(1), 3(3) and 62.

Doctrine:

1. Human Rights Watch, *Courting History. The Landmark International Criminal Court's First Years*, Human Rights Watch, New York, 2008.

Author: Juan Pablo Pérez-León-Acevedo.

³ ICC ASP, Report of the Working Group on Amendments, ICC-ASP/12/44, 24 October 2013, para. 5 (<https://www.legal-tools.org/doc/a6b458/>).

⁴ ICC, *Prosecutor v. Ongwen*, Trial Chamber IX, Decision Concerning the Requests to Recommend Holding Proceedings in Situ and to Conduct a Judicial Site Visit in Northern Uganda, 18 July 2016, ICC-02/04-01/15-499, para. 4 (<https://www.legal-tools.org/doc/58541e/>).

Rule 101

Time limits

- 1. In making any order setting time limits regarding the conduct of any proceedings, the Court shall have regard to the need to facilitate fair and expeditious proceedings, bearing in mind in particular the rights of the defence and the victims.*
- 2. Taking into account the rights of the accused, in particular under article 67, paragraph (1) (c), all those participating in the proceedings to whom any order is directed shall endeavour to act as expeditiously as possible, within the time limit ordered by the Court.*
- 3. The Court may order in relation to certain decisions, such as those referred to in rule 144, that they are considered notified on the day of their translation, or parts thereof, as are necessary to meet the requirements of fairness, and, accordingly, any time limits shall begin to run from this date.*

The original version of Rule 101 consisted of two paragraphs. The third paragraph of the current version of Rule 101 was added via Resolution adopted by the Assembly of State Parties at its tenth plenary meeting, on 24 November 2016.¹ This third paragraph reads as follows:

The Court may order in relation to certain decisions, such as those referred to in rule 144 [Delivery of the decisions of the Trial Chamber], that they are considered notified on the day of their translation, or parts thereof, as are necessary to meet the requirements of fairness, and, accordingly, any time limits shall begin to run from this date.

In applying Rule 101, that is, setting a deadline as to for example commencement of the trial, the ICC's case-law has sought to ensure that the parties have a reasonable opportunity to obtain witness testimony and pay attention to the impact of recesses and holidays on postponing the commencement date of the trial.²

¹ ICC ASP, Resolution on amendments to rule 101 and rule 144, paragraph 2(b), of the Rules of Procedure and Evidence, Resolution ICC-ASP/15/Res.4, 24 November 2016 (<https://www.legal-tools.org/doc/501853/>).

² ICC, *Prosecutor v. Al Mahdi*, Trial Chamber, Decision Setting the Commencement Date of the Trial, 1 June 2016, ICC-01/12-01/15-93, paras. 10–11 (<https://www.legal-tools.org/doc/bfc3d0/>).

As part of the language cluster amendments, Rule 101 was amended. This received strong support as it was sought to save considerable amount of cost and time. Arguments included the lack of a written form of some languages and the considerable time required to train translators in *Lubanga* and the need to balance expeditiousness with fair trial standards. Amendments were said to be consistent with relevant practice of regional human rights courts and other international or regional organizations and bodies as well as Article 67 of the ICC Statute. Full translations of witness statements led to considerable delays in the proceedings, up to three years, and legal uncertainty concerning whether partial translations of judicial decisions were authorized. Overall speaking, there was a strong support for the speedy adoption of the proposed amendments since these sought to safeguard the accused's rights.³

Cross-reference:

Article 67.

Author: Juan Pablo Pérez-León-Acevedo.

³ ICC ASP, Report of the Working Group on Amendments, ICC-ASP/15/24, 8 November 2016, paras. 22, 25–27 (<https://www.legal-tools.org/doc/2f133a/>).

Rule 102

Communications other than in writing

Where a person is unable, due to a disability or illiteracy, to make a written request, application, observation or other communication to the Court, the person may make such request, application, observation or communication in audio, video or other electronic form

Rule 102 provides for that if a person is unable because of disability or illiteracy to complete a written application, (s)he may apply in audio, video or other electronic form. For example, the use of standard application forms for victim participation is not compulsory as long as the applicant provides the information referred to in regulation 86(2) of the Regulations of the Court¹. Rule 94(1) provides with another instance of specific application of the general provisions under Rule 102. Rule 94(1) states that the victims' request for reparations has to be made "in writing". This departs from the original draft rule that also considered requests being made "in electronic form".² However, under Rule 102 general provisions, alternative forms of communications to the ICC such as audio, video or other electronic forms are covered and allowed under certain conditions, which are indeed necessary when, for example, the victim is disabled or illiterate.³

Regulation 25 of the Regulations of the Court fleshes out Rule 102 by providing the contents of communications other than in writing:

A person making a communication to the Court under Rule 102 shall indicate at the start of the communication: (a) His or her identity; (b) The situation or case number, if known; (c) The Chamber seized of the matter, if known; (d) The name of the person to whom article 55, paragraph 2, or article 58 applies, the accused, convicted or acquitted person, if known; (e) The purpose of the communication; (f) When referring to a specific

¹ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS 2, VPRS 3, VPRS 4, VPRS5 and VPRS6, 17 January 2006, ICC-01/04-101-tEN-Corr, para 102 (<https://www.legal-tools.org/doc/2fe2fc/>).

² Peter Lewis and Håkan Friman, "Reparations to Victims", in Roy Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, p. 480 (<https://www.legal-tools.org/doc/e34f81/>).

³ Juan-Pablo Perez-Leon-Acevedo, *Victims' Status at International and Hybrid Criminal Courts: Victims' Status as Witness, Victim Participants/Civil Parties and Reparations Claimants*, Åbo Akademi University Press, Åbo/Turku, 2014, p. 668.

event, to the extent possible, the location, date and individuals involved.

Cross-references:

Rules of Procedure and Evidence, Rule 94(1); Regulations of the Court, Regulations 25 and 86(2).

Doctrine:

1. Peter Lewis and Håkan Friman, “Reparations to Victims”, in Roy Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 474–491.
2. Juan-Pablo Perez-Leon-Acevedo, *Victims’ Status at International and Hybrid Criminal Courts: Victims’ Status as Witness, Victim Participants/Civil Parties and Reparations Claimants*, Åbo Akademi University Press, Åbo/Turku, 2014.

Author: Juan Pablo Pérez-León-Acevedo.

Rule 103

Amicus curiae and other forms of submission

1. At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.

2. The Prosecutor and the defence shall have the opportunity to respond to the observations submitted under sub-rule 1.

3. A written observation submitted under sub-rule 1 shall be filed with the Registrar, who shall provide copies to the Prosecutor and the defence. The Chamber shall determine what time limits shall apply to the filing of such observations.

General Remarks:

Rule 103 deals with the principles and procedure concerning submission of *amicus curiae*. An *amicus curiae*, or a friend of the court, is an established institution of domestic courts and, its traditional role has been understood as: “A friend of the court. A term applied to a bystander, who without having an interest in the cause, of his own knowledge makes suggestion on a point of law or of fact for the information of the presiding judge”.¹ However, this role has changed throughout time and now is accepted as a partisan advocate rather than a neutral informer in some countries.² Before examining the ICC’s case-law on *amicus curiae*, attention is paid to relevant case-law on this matter at other international and hybrid criminal courts and, to some extent, national criminal courts.

Amicus Curiae Practice at International, Hybrid and National Criminal Courts:

Rule 74 (“Amicus Curiae”) common to the Rules of Procedure and Evidence of the ICTY, the ICTR and the SCSL reads as follows: “A Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to any State, organization or person to appear before it and make submissions on an issue specified by the Chamber”. Accordingly, *amicus*

¹ Samuel Krislov, “The Amicus Curiae Brief: From Friendship to Advocacy”, in *Yale Law Journal*, 1963, vol. 72, no. 4, p. 694.

² Sarah Williams and Hannah Woolaver, “The Role of the Amicus curiae before International Criminal Tribunals”, in *International Criminal Law Review*, 2006, vol. 6, no. 2, p. 152.

curiae submissions, to some extent, constitute some manner of victim's "participation" due to the fact that victims and their representatives may appear as amici at the respective tribunals.³ However, the victim participant status as such during trial is/was inexistent at the ICTY, the ICTR and the SCSL. In any event, Rule 74 provided broad discretion to a Chamber to permit any individual or group to appear as an *amici* and worked under either invitation or spontaneous application (Williams and Woolaver, 2006, p. 155).

With regard to the ICTY's practice on Rule 74, the admissibility of *amicus curiae* submissions involves the following: (i) discretion of the Chamber; (ii) the primary criterion is whether the Chamber would be assisted in its consideration of the questions at issue; (iii) submissions must be limited to questions of law and cannot include factual evidence relating to elements of a crime charged; and (iv) *amicus curiae* submissions concerning legal questions have been generally allowed.⁴ Taking into consideration the ICTR's case-law, four rules on the admissibility of *amicus curiae* can be identified: (i) the relief sought must fall within the tribunal's jurisdiction, and not within that of the Prosecution or the defence; (ii) the brief must deal with an issue that is relevant to the case at hand; (iii) when the *amicus curiae* deals with legal and non-factual arguments, the *amicus curiae* applications are granted much more readily; and (iv) *amicus curiae* briefs must not be employed simply to advertise the views or causes of the applicants (Williams and Woolaver, 2006, pp. 170–172, referring to the ICTR's jurisprudence).

Amicus curiae briefs have been filed, for example, by women's organizations and individuals to back up sexual violence victims. At the ICTR, *amicus curiae* briefs were filed on a similar matter but with different outcomes in *Akayesu* and *Ntagerura et al.* In *Ntagerura et al.*, the brief was rejected as this would equal "to transgressing upon the independence of the Prosecutor and impugning the integrity of the Tribunal as an arbiter of

³ Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence. The ICC and the Practice of the ICTY and the ICTR*, Intersentia, Oxford/Antwerp, 2005, p. 291 (<https://www.legal-tools.org/doc/43fca9/>); Juan-Pablo Perez-Leon-Acevedo, *Victims' Status at International and Hybrid Criminal Courts: Victims' Status as Witness, Victim Participants/Civil Parties and Reparations Claimants*, Åbo Akademi University Press, Åbo/Turku, 2014, p. 422.

⁴ ICTY, *Prosecutor v. Gotovina and Markač*, Trial Chamber, Decision on Application and Proposed Amicus Curiae Brief, 14 February 2012, IT-06-90-A, para. 3 (<https://www.legal-tools.org/doc/6746ab/>). See also, *inter alia*, *Prosecutor v. Šainović et al.*, Appeals Chamber, Decision on David J. Scheffer's Application to File an Amicus Curiae Brief, 7 September 2010, IT-05-87-A, p. 2 (<https://www.legal-tools.org/doc/734fdf/>).

international law”⁵. In *Akayesu*, the Chamber never decided on the *amicus curiae* brief submitted; however, it contributed to the Chamber’s decision on the need for the Prosecutor’s subsequent investigations into sexual violence (De Brouwer, 2005, p. 295). This led to the Prosecutor’s finding of additional evidence of sexual violence and inclusion of sexual crimes charges in the indictment.⁶ At the ICTY, in *Furundžija*, the Chamber did not consider two *amicus curiae* briefs that challenged the re-opening of a case and cross-examination of a rape witnesses as these briefs were filed too late and, thus, the Chamber set a controversial precedent in detriment of sexual violence victims’ rights and interests on privacy, equality, security and protection (De Brouwer, 2005, p. 298). Nevertheless, the briefs produced effects as the Prosecution and defence responded them, particularly, the Prosecution filed motions seeking to protect the rights of the rape witness.⁷

In *Bagosora et al.*, the *amicus curiae* brief filed by Belgium on behalf of the Belgians affected by the massacres in Rwanda to argue their right as plaintiffs and not mere witnesses was found inadmissible by the ICTR as the determination of penalties only follows after conviction, and the defence and Prosecution are the only parties.⁸ In turn, Rwanda applied to appear as *amicus curiae* at the ICTR to argue, inter alia, for the restitution of stolen property to their rightful owners and call additional witnesses, which the ICTR rejected as this found that: (i) there was no allegation of unlawfully taken property in the indictment; and (ii) restitution claims were premature before determination of guilt.⁹

The SCSL was more active than the ICTY and the ICTR in inviting *amicus curiae* submissions from international organizations and leading

⁵ ICTR, *Prosecutor v. Ntagerura et al.*, Trial Chamber, Decision on the Application to File an Amicus Curiae Brief According to Rule 74 of the Rules of Procedure and Evidence Filed on Behalf of the NGO Coalition for Women’s Human Rights in Conflict Situations, 24 May 2001, ICTR-99-46-T (<https://www.legal-tools.org/doc/823750/>).

⁶ ICTR, *Prosecutor v. Akayesu*, Trial Chamber, Judgment, 2 September 1998, ICTR-96-4-T, para. 417 (<https://www.legal-tools.org/doc/b8d7bd/>).

⁷ ICTY, Trial Chamber, *Prosecutor v. Furundžija*, Judgment, 10 December 1998, IT-95-17/1-T, para. 37 (<https://www.legal-tools.org/doc/e6081b/>).

⁸ ICTR, *Prosecutor v. Bagosora*, Trial Chamber, Decision on the Amicus Curiae Application by the Government of the Kingdom of Belgium, 6 June 1998, ICTR-96-7-T, pp. 2–4 (<https://www.legal-tools.org/doc/3301b9/>).

⁹ ICTR, *Prosecutor v. Bagosora et al.*, Trial Chamber, Decision on Amicus Curiae Request by the Rwandan Government, 13 October 2004, ICTR-98-41-T (<https://www.legal-tools.org/doc/93a920/>).

academics rather than just accepting unsolicited briefs (Williams and Woolaver, 2006, p. 175). When there was such invitation, there was no need to apply for leave and the court neither gave reasons for its request nor demonstrated how the briefs could assist the determination of the case.¹⁰ Moreover, whereas the finding of references to *amicus curiae* submissions in the ICTY and ICTR judgments seems to be difficult, the SCSL normally summarized these submissions (in addition to those of the Prosecution and the defence) at the beginning of the judgments [Williams and Woolaver, 2006, p. 179]. For example, in *Norman* the majority relied on a conclusion in the *amicus curiae* submitted by the University of Toronto International Human Rights Clinic to conclude that “citizens of Sierra Leone, and even less, persons in leadership roles, cannot possibly argue that they did not know that recruiting children was a criminal act in violation of international humanitarian law”.¹¹

At international and hybrid criminal courts, where victims can intervene not only as witnesses but also as victim participants (ICC, Special Tribunal for Lebanon) or civil parties (Extraordinary Chambers in the Courts of Cambodia) and at which they can additionally claim and be granted reparations (ICC, ECCC), *amicus curiae* briefs are also admitted as provided in their respective rules of procedure and evidence.¹²

¹⁰ SCSL, Practice Direction on Filing Amicus Curiae Applications Pursuant to Rule 74 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone, 20 October 2004, Article 1(2) (<https://www.legal-tools.org/doc/e8b0c0/>).

¹¹ SCSL, *Prosecutor v. Norman*, Appeals Chamber, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, SCSL-2004-14-AR72(E), para. 52 (<https://www.legal-tools.org/doc/42004d/>) (citing Toronto International Human Rights Clinic brief, para. 69).

¹² ICC RPE, Rule 103; ECCC Internal Rules, Rule 33:

Amicus Curiae Briefs. 1. At any stage of the proceedings, the Co-Investigating Judges or the Chambers may, if they consider it desirable for the proper adjudication of the case, invite or grant leave to an organization or a person to submit an *amicus curiae* brief in writing concerning any issue. The Co-Investigating Judges, and the Chambers concerned shall determine what time limits, if any, shall apply to the filing of such briefs;

STL RPE, Rule 131:

Third Parties and Amicus Curiae. (A) The Trial Chamber may decide, after hearing the Parties, that it would assist the proper determination of the case to invite or grant leave to a State, organization, or person to make written submissions on any issue, or to allow a State, organization, or person to appear before it as *amicus curiae* [...].

Submission of *amici curiae* may be also important in cases of serious human rights violations and/or international crimes at national criminal proceedings. This is for example illustrated by the case against the former Peruvian President Alberto Fujimori, who was convicted by the Supreme Court of Peru as a mediate or indirect perpetrator in control of an apparatus of power for the *Barrios Altos* and *La Cantuta* massacres-qualified as crimes against humanity.¹³ As acknowledged by the Supreme Court, alongside the written arguments brought by the parties to the proceedings, that is., Prosecutor, accused and civil parties, six *amicus curiae* briefs were admitted, namely four submitted by legal clinics/law schools and the other two by NGOs (*Barrios Altos, La Cantuta and SIE Basement*, 7 April 2009, para. 29.2). These *amicus curiae* briefs found admissible by the Supreme Court of Peru helped it have access to a painstaking analysis of a wide array of international law sources such as jurisprudence of international criminal courts and tribunals and relevant legal literature on definitions of international crimes and modes of criminal liability. All of this legal information was exhaustively systematized and examined in the briefs of international human rights and/or public legal clinics participating in Fujimori's trial.

Overview of the ICC's Practice on Amicus Curiae Briefs:

In general, the ICC Chambers have followed a mixed practice on acceptance of application to file *amici curiae*. Whereas some case-law has suggested that the application would only be accepted provided that indispensable assistance to the ICC is given, other cases have applied a lower threshold. As of December 2015, approximately only one-third of the applications files were accepted, the ICC Judges have mentioned that non-governmental organization *amicus curiae* briefs have been only sparsely accepted and have been overall speaking reluctant to embrace *amicus curiae* briefs to avoid complication of the proceedings.¹⁴ Taking into account the available case-law, the following conditions are required to successfully apply: (i) the submission has to assist the ICC, which involves that the issues of concern are relevant and live before a particular chamber; (ii) timely submission and not

¹³ Supreme Court of Peru, *Barrios Altos, La Cantuta and SIE Basement Case*, Special Criminal Chamber, Judgment, 7 April 2009, File No. AV-19-2001, para. 717 ('*Barrios Altos, La Cantuta and SIE Basement*, 7 April 2009') (<https://www.legal-tools.org/doc/d43130/>).

¹⁴ Kirsty Brimelow *et al.*, *Shaping the Law: Civil Society Influence at International Criminal Courts-International Law Programme Meeting Summary*, Chatam House/The Royal Institute of International Affairs, London, 25 January 2016, pp. 2–3.

likely to delay the proceedings substantially; (iii) the organization must possess expertise on the respective issue and this expertise would not otherwise be available to the Court; and (iv) the organization must not intrude on the ICC's inherent functions of applying law and examining evidence. Generally speaking, most successful applications have focused on legal issues (Brimelow *et al.*, 2016, p. 3).

As ICC practice shows, a diverse range of actors have filed *amicus curiae* briefs at different procedural stages in cases and situations at the ICC. These actors have mainly included: (i) academic institutions such as universities, particularly law faculties and/or university centres or institutes; (ii) civil society organizations, especially, human rights NGOs; and (iii) international bodies and/or international experts

ICC's Case-Law on Amicus Curiae Briefs:

The rationale for admission of *amicus curiae* at the ICC is to have: “the opportunity to get experts’ information on relevant issues of legal interest for the proceedings”.¹⁵ Under Rule 103, states, organizations or individuals willing to participate in the ICC proceedings can submit *amicus curiae*. According to Rule 103, the decision of granting the leave to an applicant to submit observations as *amicus curiae* involves an evaluation of whether these observations both are “desirable for the proper determination of the case” and relate to an issue that the Chamber deems appropriate as determined on a case-by-case basis at a specific procedural stage (*Situation in the Democratic Republic of the Congo*, 17 August 2007, paras. 2–3 and 5).

Under Rule 103(1), the ICC's jurisprudence has determined that a Chamber's decision concerning “applications for leave to submit observations is discretionary in nature”.¹⁶ At the discretion of the Chamber, to rule

¹⁵ 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. 248 (*Lubanga*, 3 March 2015’) (<https://www.legal-tools.org/doc/c3fc9d/>); *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision on the Request submitted pursuant to rule 103(1) of the Rules of Procedure and Evidence, 17 August 2007, para. 4 (*Situation in the Democratic Republic of the Congo*, 17 August 2007’) (<https://www.legal-tools.org/doc/b9775f/>).

¹⁶ ICC, *Situation in the State of Palestine*, Pre-Trial Chamber I, Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, 20 February 2020, ICC-01/18-63, para. 49 (*Situation in Palestine*, 20 February 2020) (<https://www.legal-tools.org/doc/cpsou4/>).

on an application for leave to participate as *amicus curiae*, it must determine whether the applicant's proposed observations are useful to properly determine the case and, thus, be satisfied that the applicant's proposals may assist it in ruling on the case.¹⁷ To establish whether the *amicus curiae* submissions are relevant for the proper determination of the case and, thus, grant the respective application to intervene, the competent Chamber must consider: (i) whether the submissions 'would be of indispensable assistance, or would provide information that it could not procure by other means'; and (ii) the respective stage of the proceedings in the light of the filings received (*Katanga and Ngudjolo*, 9 June 2011, para. 54). In *Bemba*, the Single Judge granted Amnesty International leave to 'submit observations under Rule 103(1) of the Rules on the following issues: (i) the requisite mental element for military commanders; (ii) liability for the failure to punish as applied to non-state actors and; (iii) whether causation is an element of superior responsibility.¹⁸ In *Lubanga*, Trial Chamber I considered that the issue of the resources allocated to the defence for Mr Thomas Lubanga Dyilo had been resolved by the Registrar.¹⁹ Thus, the Trial Chamber found the application for intervention in the proceedings as *amicus curiae* by the Ordre des avocats de Paris under Rule 103 of the Rules of Procedure and Evidence was moot and dismissed the application. In *Katanga and Ngudjolo*, the Trial Chamber

¹⁷ ICC, *Prosecutor v. Katanga and Ngudjolo Chui*, Trial Chamber II, Decision on Amicus Curiae an 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, para. 53 ('*Katanga and Ngudjolo*, 9 June 2011') (<https://www.legal-tools.org/doc/e411d5/>); *Prosecutor v. Lubanga*, Trial Chamber I, Decision Inviting Observations from the Special Representative of the Secretary General of the United Nations for Children and Armed Conflict, 18 February 2008, ICC-01/04-01/06- 1175, para. 7 (<https://www.legal-tools.org/doc/0b4a5d/>); *Prosecutor v. Lubanga*, Appeals Chamber, Decision on "Motion for Leave to File Proposed Amicus Curiae Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules of Procedure and Evidence", 22 April 2008, ICC-01/04-01/06-1289, para. 8 ('*Lubanga*, 22 April 2008') (<https://www.legal-tools.org/doc/463965/>); *Prosecutor v. Bemba*, Appeals Chamber, Decision on the application of 14 September 2009 for participation as an *amicus curiae*, 9 November 2009, ICC-01/05-01/08-602, para. 11 ('*Bemba*, 9 November 2009') (<https://www.legal-tools.org/doc/494aab/>).

¹⁸ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber II, Decision on Application for Leave to Submit Amicus Curiae Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, 9 April 200, ICC-01/05-01/08-401 (<https://www.legal-tools.org/doc/5bd167/>).

¹⁹ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Order on application of the Ordre des avocats de Paris filed on 30 May 2007, 18 October 2007, ICC-01/04-01/06-990 (<https://www.legal-tools.org/doc/7fdf7e/>).

rejected a leave to submit, as *amicus curiae*, written observations on the definition of crimes of sexual slavery.²⁰

A decision under Rule 103(1) is discretionary and “may be made after a request for leave to address the Chamber as an *amicus curiae* by an organisation, person or State, or the Chamber may, *proprio motu*, invite an organisation, person or State to participate as an *amicus curiae* if the Chamber considers it desirable to do so” (*Bemba*, 9 November 2009, para. 10)]. If the observations that the applicant wish to make would merely repeat submissions already provided by the parties and participants, it is not desirable to admit them (para. 11). In *Lubanga*, Trial Chamber I considered the requests of the legal representative of a number of victims to be allowed to make submissions regarding victims’ participation issues which have not been covered in the submissions of the current victims’ representatives, pursuant to Rules 103 and 93.²¹ Trial Chamber I stated that “Rule 103 is not intended to encompass the views of victims under its framework and instead allows for other forms of participation such as, *inter alia*, an independent *amicus curiae* or government submission” and rejected the application. In any event, in the *Situation in Darfur*, Pre-Trial Chamber I seemingly made a sort of a cross between a typical ‘friend of the court’ and a standby counsel.²² In *Situation in Kenya*, one of the persons who were subject to the Court’s investigation applied to submit *amicus curiae* observations. The Pre-Trial Chamber stated that there is no legal basis for a person under the Prosecutor’s investigation to submit observations at the current stage of proceedings (*Situation in Kenya*, 18 January 2011, para. 10).²³

The fact that an organization filed its substantive observations on the appeals under Rule 103 without having obtained leave to do so does not

²⁰ ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, Decision on the motion filed by the Queen’s University Belfast Human Rights Centre for leave to submit an *amicus curiae* brief on the definition of crimes of sexual slavery, 7 April 2011, ICC-01/04-01/07-2823-tENG (<https://www.legal-tools.org/doc/f5b0c3/>).

²¹ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on “Demande de déposition du représentant légal des demandeurs des victimes”, 25 October 2007, ICC-01/04-01/06-1004 (<https://www.legal-tools.org/doc/7c9657/>).

²² ICC, *Situation in Darfur*, Registry, Decision of the Registrar Appointing Mr. Hadi Shalluf as ad hoc Counsel for the Defence, 25 August 2006, ICC-02/05-12 (<https://www.legal-tools.org/doc/38a355/>).

²³ ICC, *Situation in Kenya*, Pre-Trial Chamber II, Decision on Application for Leave to Submit Amicus Curiae Observations, 18 January 2011, ICC-01/09-05, para. 10 (<https://www.legal-tools.org/doc/773abe/>).

necessarily result in rejection of the requests on this basis. Nevertheless, requests for leave under Rule 103 “should not include the substance of the proposed observations and [...] the submission of observations is only permissible after a Chamber has either invited or granted leave to an individual, organisation, or state to make such a submission”.²⁴ The Appeals Chamber has the discretion to decide on granting leave to submit observations under Rule 103. The Appeals Chamber in the Decision on Child Soldiers International’s Requests to Intervene as Amici Curiae rejected a request to submit observations on three issues as these were “of an essentially legal nature, whereas Child Soldiers International is ‘a research and advocacy organization’” (*Lubanga*, 16 August 2013, para. 11). Pursuant to Rule 103(2), parties to a case must be given time to respond to *amicus curiae* observations brought by an organization (*Lubanga*, 22 April 2008, para. 8). ICC Chambers have issued orders inviting responses on applications for leave to submit observations as amici curiae.²⁵

In its first decision setting the principles and procedures applicable to reparations, the ICC Trial Chamber I in *Lubanga* considered the written observations submitted by diverse civil society organizations.²⁶ Similar than in other procedural stages, victim participants were able to voice their own views and concerns via their own submissions. These submissions were considered by Trial Chamber I when drafting principles and procedures for reparations. This fact may arguably lead to consider *amicus curiae* advocating for victims’ interests as not as necessary as at the international and hybrid criminal tribunals where victims’ role is limited to that of being witnesses (Perez-Leon-Acevedo, 2014, p. 426).

Concerning the request of the Women’s Initiatives for Gender Justice to file an *amicus curiae* in the reparation proceedings in *Lubanga*, the

²⁴ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Decision on the application by Child Soldiers International for leave to submit observations pursuant to rule 103 of the Rules of Procedure and Evidence, 16 August 2013, ICC-01/04-01/06-3044, para. 9 (*Lubanga*, 16 August 2013’) (<https://www.legal-tools.org/doc/68b9de/>).

²⁵ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Order inviting responses on two applications for leave to submit observations as amici curiae, 26 March 2013, ICC-01/04-01/06-3000, p. 3 (<https://www.legal-tools.org/doc/f66660/>).

²⁶ See ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision Establishing the Principles and Procedures to be Applied to Reparations, 7 August 2012, ICC-01/04-01/06-2904, para. 14 (<https://www.legal-tools.org/doc/a05830/>); *Prosecutor v. Lubanga*, Trial Chamber I, Decision Granting Leave to Make Representations in the Reparations Proceedings, 20 April 2012, ICC-01/04-01/06-2870 (<https://www.legal-tools.org/doc/a10f88/>).

Appeals Chamber noted that this organization pointed out its expertise in gender justice and long experience with the ICC. Nevertheless, the ICC Appeals Chamber found that even if the said organization “may offer a relevant contribution to the issue of whether victims of sexual and gender-based crimes are eligible for reparations, it has become clear that this aspect is not relevant for the determination of the appeals regarding these matters” (*Lubanga*, 3 March 2015, para. 249). Concerning the joint request filed by other organizations (Justice Plus, Terres des Enfants, Fédération des Jeunes pour la Paix Mondiale and Avocats Sans Frontières) in the same reparations proceedings, the Appeals Chamber noted that although these organizations filed their requests “for the purpose of contributing to the proper administration of justice”, they provided no further details as to how their observations would assist the proper determination of the specific issues and, therefore, the Chamber did not consider desirable for the proper determination of the case to grant leave to the said organizations under Rule 103(1) (paras. 250–251).

When inviting representatives of specific organizations (for example Louise Arbour, then High Commissioner of the Office of the United Nations High Commissioner for Human Rights and Antonio Cassese, Chairperson of the International Commission of Inquiry on Darfur, Sudan) to submit observations, the Chambers have considered the importance of these observations for clarifying current and specific issues and preserving evidence and, in general, to achieve certain objectives such as the protection of victims.²⁷ The fact that an organization’s request for leave to submit observations was rejected once does not preclude it from re-filing a new request for leave to submit observations in the same situation or case (*Situation in the Democratic Republic of the Congo*, 17 August 2007, p. 4).

When inviting Rule 103 submissions in writing and, where applicable, at the public hearing organized by a Chamber, the competent Chamber has considered inter alia the global expertise or the presence in the field of the invited organizations and entities that have included states, regional authorities, the UN (including its specialized agencies), and non-governmental

²⁷ ICC, *Situation in Darfur*, 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, pp. 4–6 (<https://www.legal-tools.org/doc/657682/>).

organizations.²⁸ As indicated in Rule 103(2), the parties to the proceedings have been invited to respond orally, at the end of the hearing, to the written and oral observations (*Prosecutor v. Lubanga*, 15 July 2016, para. 11). Although requests for leave to submit observations under Rule 103 “contain inaccuracies as to typography, style and/or formatting”, the ICC “has decided not to order any such requests for leave to submit observations to be resubmitted in the interests of efficiency” (*Situation in Palestine*, 20 February 2020, para. 50).

Doctrine:

1. Kirsty Brimelow *et al.*, “Shaping the Law: Civil Society Influence at International Criminal Courts-International Law Programme Meeting Summary”, Chatam House/The Royal Institute of International Affairs, London, 25 January 2016.
2. Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence. The ICC and the Practice of the ICTY and the ICTR*, Intersentia, Oxford/Antwerp, 2005 (<https://www.legal-tools.org/doc/43fca9/>).
3. Samuel Krislov, “The Amicus Curiae Brief: From Friendship to Advocacy”, in *Yale Law Journal*, 1963, vol. 72, no. 4, pp. 694–721.
4. Juan-Pablo Perez-Leon-Acevedo, *Victims’ Status at International and Hybrid Criminal Courts: Victims’ Status as Witness, Victim Participants/Civil Parties and Reparations Claimants*, Åbo Akademi University Press, Åbo/Turku, 2014.
5. Sarah Williams and Hannah Woolaver, “The Role of the Amicus curiae before International Criminal Tribunals”, in *International Criminal Law Review*, 2006, vol. 6, no. 2, pp. 151–89.

Author: Juan Pablo Pérez-León-Acevedo.

²⁸ ICC, *Prosecutor v. Lubanga*, Trial Chamber II, Order pursuant to rule 103 of the Rules of Procedure and Evidence, 15 July 2016, ICC-01-04-01/06-3217, para. 8 (*Lubanga*, 15 July 2016’) (<https://www.legal-tools.org/doc/5042ab/>).

CHAPTER 5. INVESTIGATION AND PROSECUTION

Section I. Decision of the Prosecutor Regarding the Initiation of an Investigation Under Article 53, Paragraphs 1 and 2

Rule 104

Evaluation of information by the Prosecutor

General Remarks:

To some extent, Rule 104 further details the process of the preliminary examination or the ‘pre-investigative phase’ under Article 53(1) ICC Statute, which immediately precedes the investigation proper. This preliminary examination is initiated by the Prosecutor, on the basis of information received. Alternatively, this preliminary examination will be initiated following the referral of a situation.¹ During this phase, the Prosecutor should assess whether to proceed with an investigation, on the basis of the factors outlined in Article 53(1)(a)–(c) ICC Statute.

Doctrine: For the bibliography, see the final comment on Rule 104.

Author: Karel De Meester.

¹ Consider for example, ICC OTP, “Policy Paper on Preliminary Examinations”, 2013, paras. 73–76 (<https://www.legal-tools.org/doc/acb906/>).

Rule 104(1)

1. In acting pursuant to article 53, paragraph 1, the Prosecutor shall, in evaluating the information made available to him or her, analyse the seriousness of the information received.

According to paragraph 1 of Rule 104, the Prosecutor should at all times analyse the seriousness of the information received when he or she is acting under Article 53(1) ICC Statute. This is a repetition of what is stated in Article 15(2) ICC Statute with regard to proprio motu investigations. While Rule 104(1) obliges the Prosecutor to analyse the seriousness of all information received, Article 42(1) ICC Statute imposes a threshold with regard to information received by the Prosecutor. It requires the Prosecutor to examine “referrals and any substantiated information on crimes within the jurisdiction of the Court”.¹

Doctrine: For the bibliography, see the final comment on Rule 104.

Author: Karel De Meester.

¹ Confirming, see ICC OTP, “Paper on Some Policy Issues before the Office of the Prosecutor”, Annex: Referrals and Communications, 2003, p. 2 (<https://www.legal-tools.org/doc/f53870/>).

Rule 104(2)

2. For the purposes of sub-rule 1, the Prosecutor may seek additional information from States, organs of the United Nations, intergovernmental and non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court. The procedure set out in rule 47 shall apply to the receiving of such testimony.

Paragraph 2 puts some limited investigative powers at the Prosecutor's disposal during the preliminary examination. It is a repetition of the powers which are provided for in Article 15(2) ICC Statute, with regard to the possibility of proprio motu investigations. These powers are provided to the Prosecutor for the purpose of determining the seriousness of the information received. It is clear that the investigative powers mentioned in Article 54 ICC Statute are only at the Prosecutor's disposal after the start of the investigation proper.

The reference, in the last sentence, to Rule 47 implies that the procedural rules on the recording of questioning during the investigation apply *mutatis mutandis* to the scenario where the Prosecutor receives written or oral testimony at the seat of the Court in the course of the preliminary examination (Rules 47, 104(2), 111 and 112 ICC RPE). Additionally, when the Prosecutor considers that there is a serious risk that testimony may not be available later (during a possible formal investigation), he or she may request the Pre-Trial Chamber "to take such measures as may be necessary to ensure the efficiency and integrity of the proceedings". This may include the appointment of a counsel or a Judge to protect the rights of the Defence during the taking of the testimony (Rule 47(2) ICC RPE).

Rule 104(2) (and Article 15(2) ICC Statute) only refer to the possibility for the Prosecutor to receive testimony "at the seat of the Court". A textual interpretation suggests that field offices are excluded. This interpretation is supported by Article 3(1) ICC Statute, which defines the seat of the Court. However, it has been argued that this provision should be given a more liberal interpretation, allowing the Prosecutor to receive testimony at the field offices.¹ The Prosecutor has interpreted its powers under Rule 104(2) (and

¹ Morten Bergsmo and Jelena Pejić, "Article 15", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Verlag C.H. Beck, Munich, 2008, p. 588 (<https://www.legal-tools.org/doc/a9e9f7/>).

Article 15(2) ICC Statute) in a broad fashion, as to allow him or her to undertake regular ‘field missions’, in order to monitor the situation.² Moreover, on this basis the Prosecutor received diplomatic missions at the seat of the Court and entered into a dialogue with different stakeholders in the conflict.³

Doctrine:

1. Morten Bergsmo and Jelena Pejić, “Article 15”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Verlag C.H. Beck, Munich, 2008, p. 588 (<https://www.legal-tools.org/doc/a9e9f7/>).
2. Hector Olásolo, “The Role of the International Criminal Court in Preventing Atrocity Crimes Through Timely Intervention: From the Humanitarian Intervention Doctrine and Ex Post Facto Judicial Institutions to the Notion of Responsibility to Protect and the Preventative Role of the International Criminal Court”, Inaugural Lecture as Chair in International Criminal Law and International Criminal Procedure at Utrecht University, 18 October 2010, pp. 6–7 (<https://www.legal-tools.org/doc/8269d1/>).

Author: Karel De Meester.

² See, for example, Report on the International Criminal Court, UN Doc. A/66/309, 19 August 2011, paras. 75 and 78 (reporting on field missions to Georgia and Guinea) (<https://www.legal-tools.org/doc/91f5b7/>); ICC OTP, “Policy Paper on Preliminary Examinations”, 2013, para. 85 (<https://www.legal-tools.org/doc/acb906/>).

³ Hector Olásolo, “The Role of the International Criminal Court in Preventing Atrocity Crimes Through Timely Intervention: From the Humanitarian Intervention Doctrine and Ex Post Facto Judicial Institutions to the Notion of Responsibility to Protect and the Preventative Role of the International Criminal Court”, Inaugural Lecture as Chair in International Criminal Law and International Criminal Procedure at Utrecht University, 18 October 2010, pp. 6–7 (<https://www.legal-tools.org/doc/8269d1/>).

Rule 105

Notification of a decision by the Prosecutor not to initiate an investigation

1. When the Prosecutor decides not to initiate an investigation under article 53, paragraph 1, he or she shall promptly inform in writing the State or States that referred a situation under article 14, or the Security Council in respect of a situation covered by article 13, paragraph (b).

2. When the Prosecutor decides not to submit to the Pre-Trial Chamber a request for authorization of an investigation, rule 49 shall apply.

3. The notification referred to in sub-rule 1 shall contain the conclusion of the Prosecutor and, having regard to article 68, paragraph 1, the reasons for the conclusion.

4. In case the Prosecutor decides not to investigate solely on the basis of article 53, paragraph 1 (c), he or she shall inform in writing the Pre-Trial Chamber promptly after making that decision.

5. The notification shall contain the conclusion of the Prosecutor and the reasons for the conclusion.

Rule 105 ICC RPE provides for a notification duty in case the Prosecutor decides not to proceed with an investigation. The importance of this notification duty lies where it enables the review function of the Pre-Trial Chamber under Article 53(3) ICC Statute. The Prosecutor should promptly inform the State(s) or the Security Council which referred the situation. According to Rule 105(3), the Prosecutor should provide reasons for its decision not to initiate an investigation.

No time frame for the conduct of the preliminary examination by the Prosecutor has been included in the ICC Statute. However, Pre-Trial Chamber III held that “the preliminary examination of a situation pursuant to Article 53(1) of the Statute and Rule 104 of the Rules must be completed within a reasonable time from the reception of a referral by a State Party under Articles 13(a) and 14 of the Statute, regardless of its complexity”.¹ Among others, it derived this requirement from Rule 105(1), which obliges the

¹ 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, 30 November 2006, ICC-01/05-6, p. 4 (<https://www.legal-tools.org/doc/76e607/>).

Prosecutor to “promptly” inform the State(s) which referred the situation, or the Security Council, of a decision not to initiate an investigation.

Paragraphs 4 and 5 concern the situation where the Prosecutor decides not to proceed with an investigation, solely on the basis of the interests of justice criterion under Article 53(1)(c) ICC Statute. In this scenario, the Pre-Trial Chamber should be informed promptly in writing. No distinction is made on the basis of the triggering mechanism. This notification triggers the review power of the Pre-Trial Chamber.² The Prosecutor’s obligation to provide reasons for its decision (Rule 105(5)) may be seen as an incentive for the Prosecutor to adopt ex ante prosecutorial guidelines on the exercise of prosecutorial discretion. The Prosecution already adopted a guideline on its understanding of the ‘interests of justice’ criterion.³

Author: Karel De Meester.

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. 63 (<https://www.legal-tools.org/doc/338a6f/>).

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

Rule 106

Notification of a decision by the Prosecutor not to prosecute

1. When the Prosecutor decides that there is not a sufficient basis for prosecution under article 53, paragraph 2, he or she shall promptly inform in writing the Pre-Trial Chamber, together with the State or States that referred a situation under article 14, or the Security Council in respect of a situation covered by article 13, paragraph (b).

2. The notifications referred to in sub-rule 1 shall contain the conclusion of the Prosecutor and, having regard to article 68, paragraph 1, the reasons for the conclusion.

Rule 106 imposes a notification duty upon the Prosecutor in case he or she decides not to proceed with a prosecution. Such notification duty is necessary in order for the Pre-trial Chamber to be able to exercise its review function under Article 53(3) ICC Statute. The second paragraph of Rule 106 requires the Prosecutor to provide reasons for its decision not to proceed with a prosecution.

A fundamental problem with Rule 106 (and Article 53(2) ICC Statute) is that its object is unclear. The information duty under Rule 106 may arise following (i) a decision not to prosecute a particular individual, (ii) a decision not to prosecute a certain group of persons in a given situation, (iii) a decision not to prosecute certain crimes and (iv) a decision not to bring any case at all.¹ The jurisprudence will have to further elucidate this threshold.

Doctrine:

1. 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 (<https://www.legal-tools.org/doc/5d1db6/>).

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¹ 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, p. 270 (<https://www.legal-tools.org/doc/5d1db6/>).

*Section II. Procedure Under Article 53, Paragraph 3***Rule 107****Request for review under article 53, paragraph 3 (a)**

1. A request under article 53, paragraph 3, for a review of a decision by the Prosecutor not to initiate an investigation or not to prosecute shall be made in writing, and be supported with reasons, within 90 days following the notification given under rule 105 or 106.

2. The Pre-Trial Chamber may request the Prosecutor to transmit the information or documents in his or her possession, or summaries thereof, that the Chamber considers necessary for the conduct of the review.

3. The Pre-Trial Chamber shall take such measures as are necessary under articles 54, 72 and 93 to protect the information and documents referred to in sub-rule 2 and, under article 68, paragraph 5, to protect the safety of witnesses and victims and members of their families.

4. When a State or the Security Council makes a request referred to in sub-rule 1, the Pre-Trial Chamber may seek further observations from them.

5. Where an issue of jurisdiction or admissibility of the case is raised, rule 59 shall apply.

Rule 107 ICC RPE concerns requests for review by the referring State or the Security Council of the Prosecutor's decision not to proceed. A time limitation for such requests for review is provided for. They should be filed within 90 days following the notification by the Prosecutor of the decision not to proceed. Moreover, such request should be "supported with reasons". The other paragraphs provide the Pre-Trial Chamber with the necessary powers to be able to fulfil its review task, including the power to request the Prosecutor to transmit the information or documents in his or her possession or summaries thereof which the Chamber considers necessary to fulfil its review task or to seek further observations from the referring State(s) or the Security Council.

Author: Karel De Meester.

Rule 108

Decision of the Pre-Trial Chamber under article 53, paragraph 3 (a)

- 1. A decision of the Pre-Trial Chamber under article 53, paragraph 3 (a), must be concurred in by a majority of its judges and shall contain reasons. It shall be communicated to all those who participated in the review.*
- 2. Where the Pre-Trial Chamber requests the Prosecutor to review, in whole or in part, his or her decision not to initiate an investigation or not to prosecute, the Prosecutor shall reconsider that decision as soon as possible.*
- 3. Once the Prosecutor has taken a final decision, he or she shall notify the Pre-Trial Chamber in writing. This notification shall contain the conclusion of the Prosecutor and the reasons for the conclusion. It shall be communicated to all those who participated in the review.*

The first paragraph of Rule 108 sets forth the decision-making process when the Pre-Trial Chamber exercises its power under Article 53(3)(a) to review a decision by the Prosecutor not to proceed. The decision by the Pre-Trial Chamber should be concurred in by a majority of the Judges and be reasoned. The Pre-Trial Chamber may either confirm the decision of the Prosecutor not to proceed or request the Prosecutor to reconsider his or her decision.

When the Pre-Trial Chamber requests the Prosecutor to review, ‘in whole or in part’, its decision not to proceed, the Prosecutor should “reconsider” his or her decision (Rule 108(2)). Hence, the Prosecutor is not under an obligation to change his or her decision. No further recourse is provided for in case the Prosecutor does not alter his or her decision. The last paragraph of Rule 108 requires the Prosecutor to notify the decision to the Pre-Trial Chamber in writing and provide reasons for his or her conclusion. It will then be communicated to those who participated in the review (Rule 108(3)).

Author: Karel De Meester.

Rule 109

Review by the Pre-Trial Chamber under article 53, paragraph 3 (b)

1. Within 180 days following a notification given under rule 105 or 106, the Pre-Trial Chamber may on its own initiative decide to review a decision of the Prosecutor taken solely under article 53, paragraph 1 (c) or 2 (c). The Pre-Trial Chamber shall inform the Prosecutor of its intention to review his or her decision and shall establish a time limit within which the Prosecutor may submit observations and other material.

2. In cases where a request has been submitted to the Pre-Trial Chamber by a State or by the Security Council, they shall also be informed and may submit observations in accordance with rule 107.

Rule 109 concerns the situation where the Pre-Trial Chamber decides, on its own initiative, to review a decision of the Prosecutor not to proceed, when this decision is solely based on the basis of the ‘interests of justice’ criterion (Article 53(3)(b) ICC Statute). A time limitation is included. The Pre-Trial Chamber should take a decision to review the decision by the Prosecutor within 180 days following notification.

Absent from Rule 108 is a provision authorising the Pre-Trial Chamber to request the Prosecutor to “transmit the information or documents in his or her possession, or summaries thereof, that the Chamber considers necessary for the conduct of the review” (compare with Rule 107(2) ICC RPE). However, this power has been included in Regulation 48 of the Regulations of the Court.

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Rule 110

Decision by the Pre-Trial Chamber under article 53, paragraph 3 (b)

1. A decision by the Pre-Trial Chamber to confirm or not to confirm a decision taken by the Prosecutor solely under article 53, paragraph 1 (c) or 2 (c), must be concurred in by a majority of its judges and shall contain reasons. It shall be communicated to all those who participated in the review.

2. When the Pre-Trial Chamber does not confirm the decision by the Prosecutor referred to in sub-rule 1, he or she shall proceed with the investigation or prosecution.

Rule 110 details the decision-making process in case the Pre-Trial Chamber decides to review a decision of the Prosecutor not to proceed under Article 53(3)(b). The decision by the Pre-Trial Chamber should be reasoned and concurred in by a majority of the Judges. It follows from Rule 110(2) that in case the Pre-Trial Chamber exercises its review function under Article 53(3)(b) and decides not to confirm the decision by the Prosecutor, “he or she shall proceed with the investigation or prosecution”. This implies that the Prosecutor may be forced to continue with the investigation or prosecution. Clearly, there is a risk that the Prosecutor may not put too much effort in the subsequent proceedings.

Author: Karel De Meester.

*Section III. Collection of Evidence***Rule 111**

1. A record shall be made of formal statements made by any person who is questioned in connection with an investigation or with proceedings. The record shall be signed by the person who records and conducts the questioning and by the person who is questioned and his or her counsel, if present, and, where applicable, the Prosecutor or the judge who is present. The record shall note the date, time and place of, and all persons present during the questioning. It shall also be noted when someone has not signed the record as well as the reasons therefor.

2. When the Prosecutor or national authorities question a person, due regard shall be given to article 55. When a person is informed of his or her rights under article 55, paragraph 2, the fact that this information has been provided shall be noted in the record.

The ICC Statute does not regulate how questioning shall be recorded. This is dealt with in the Rules of Procedure and Evidence. Rule 111 contains general provisions which during the negotiations was accepted to be good practice.¹ Rule 112 regulates particular cases.

One major issue during the negotiations was whether rules on recording of questioning would also apply when a national authority questions a person at the request of the Court. The Rules of Procedure and Evidence cannot by itself create new obligations for the States. However, the Court may request the national authorities to record the questioning in the same way as regulated in the Rules of Procedure and Evidence pursuant to Articles 96(2)(d) and 99(1) (Friman, 2004, p. 198).

Cross-references:

Articles 55(2), 96(2)(d) and 99(1).

¹ Håkan Friman, “The Rules of Procedure and Evidence in the Investigative Stage”, in Horst Fischer *et al.* (eds.) *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 197 (<https://www.legal-tools.org/doc/95e5f9/>).

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, vol. 3, Oxford University Press, 2016, pp. 74, 160, 341, 495–496 (<https://www.legal-tools.org/doc/995606/>).
2. Håkan Friman, “Investigation and Prosecution”, 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. 512–14 (<https://www.legal-tools.org/doc/e34f81/>).
3. Håkan Friman, “The Rules of Procedure and Evidence in the Investigative Stage”, in Horst Fischer *et al.* (eds.) *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 197–98 (<https://www.legal-tools.org/doc/95e5f9/>).

Author: Mark Klamberg.

Rule 112

1. Whenever the Prosecutor questions a person to whom article 55, paragraph 2, applies, or for whom a warrant of arrest or a summons to appear has been issued under article 58, paragraph 7, the questioning shall be audio- or video-recorded, in accordance with the following procedure:

(a) The person questioned shall be informed, in a language he or she fully understands and speaks, that the questioning is to be audio- or video-recorded, and that the person concerned may object if he or she so wishes. The fact that this information has been provided and the response given by the person concerned shall be noted in the record. The person may, before replying, speak in private with his or her counsel, if present. If the person questioned refuses to be audio- or video-recorded, the procedure in rule 111 shall be followed;

(b) A waiver of the right to be questioned in the presence of counsel shall be recorded in writing and, if possible, be audio- or video-recorded;

(c) In the event of an interruption in the course of questioning, the fact and the time of the interruption shall be recorded before the audio- or video-recording ends as well as the time of resumption of the questioning;

(d) At the conclusion of the questioning, the person questioned shall be offered the opportunity to clarify anything he or she has said and to add anything he or she may wish. The time of conclusion of the questioning shall be noted;

(e) The tape shall be transcribed as soon as practicable after the conclusion of the questioning and a copy of the transcript supplied to the person questioned together with a copy of the recorded tape or, if multiple recording apparatus was used, one of the original recorded tapes;

(f) The original tape or one of the original tapes shall be sealed in the presence of the person questioned and his or her counsel, if present, under the signature of the Prosecutor and the person questioned and the counsel, if present.

2. The Prosecutor shall make every reasonable effort to record the questioning in accordance with sub-rule 1. As an exception, a person may be questioned without the questioning being audio- or video-recorded where the circumstances prevent such recording taking place. In this case, the reasons for not recording the questioning

shall be stated in writing and the procedure in rule 111 shall be followed.

3. When, pursuant to sub-rule 1 (a) or 2, the questioning is not audio- or videorecorded, the person questioned shall be provided with a copy of his or her statement.

4. The Prosecutor may choose to follow the procedure in this rule when questioning other persons than those mentioned in sub-rule 1, in particular where the use of such procedures could assist in reducing any subsequent traumatization of a victim of sexual or gender violence, a child or a person with disabilities in providing their evidence. The Prosecutor may make an application to the relevant Chamber.

5. The Pre-Trial Chamber may, in pursuance of article 56, paragraph 2, order that the procedure in this rule be applied to the questioning of any person.

While Rule 111 deals with general provisions for recording the questioning, Rule 112 regulates questioning of a ‘suspect’.

Sub-rule 1 contains a requirement that the questioning shall be audio- or video-recorded with some room for exceptions: (i) it may be waived by the accused under sub-rule 1(b) or (ii) where the circumstances prevent such recording taking place (sub-rule 2).

Sub-rule 4 provides that the Prosecutor may choose to audio- or video-record when questioning other persons than the ‘suspect’.

In *Ruto and Sang*, the Trial Chamber determined that Rule 68 on “prior recorded testimony” applies to recorded statements under Rules 111 and 112.¹

In *Banda and Jerbo*, the Appeals Chamber ruled that “[w]hen the Prosecutor records the questioning of a person in accordance with Rule 112 of the Rules of Procedure and Evidence, he or she is not required to create an additional record of the person’s statements under Rule 111 of the Rules of Procedure and Evidence”.²

¹ ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V(a), Decision on Prosecution Request for Admission of Prior Recorded Testimony, 19 August 2015, ICC-01/09-01/11-1938-Corr-Red2, paras. 32–33 (<https://www.legal-tools.org/doc/d18042/>).

² 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

Cross-references:

Article 55(2).

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, vol. 3, Oxford University Press, 2016, pp. 74, 82, 341, 495, 523–524 (<https://www.legal-tools.org/doc/995606/>).
2. Håkan Friman, “Investigation and Prosecution”, 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. 512–14 (<https://www.legal-tools.org/doc/e34f81/>).
3. Håkan Friman, “The Rules of Procedure and Evidence in the Investigative Stage”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 197–98 (<https://www.legal-tools.org/doc/95e5f9/>).

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instructions on translation”, 17 February 2012, ICC-02/05-03/09-295, para. 1 (<https://www.legal-tools.org/doc/c5440f/>).

Rule 113

1. The Pre-Trial Chamber may, on its own initiative or at the request of the Prosecutor, the person concerned or his or her counsel, order that a person having the rights in article 55, paragraph 2, be given a medical, psychological or psychiatric examination. In making its determination, the Pre-Trial Chamber shall consider the nature and purpose of the examination and whether the person consents to the examination.

2. The Pre-Trial Chamber shall appoint one or more experts from the list of experts approved by the Registrar, or an expert approved by the Pre-Trial Chamber at the request of a party.

The question of medical examinations was raised already during the Rome Conference but it was agreed that the matter should be resolved in the Rules of Procedure and Evidence.¹ Rule 113 provides that the Pre-Trial Chamber may order that the ‘suspect’ is given a medical, psychological or psychiatric examination.

Friman has noted that the rule applies to ‘examination’ and not ‘treatment’. The rule is relevant to establish whether the person is fit to stand trial or suffers from a mental disease or defect that could exclude criminal responsibility under Article 31(1)(a). It may also be used to collect incriminating or exculpatory circumstances. To use such examinations to obtain incriminatory evidence was controversial during the negotiations (Friman, 2004, pp. 198–199).

Cross-references:

Article 55(2).

Rule 135.

Doctrine:

1. Håkan Friman, “Investigation and Prosecution”, 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. 504–6 (<https://www.legal-tools.org/doc/e34f81/>).

¹ Håkan Friman, “The Rules of Procedure and Evidence in the Investigative Stage”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd ed., Berliner Wissenschafts-Verlag, 2004, p. 198 (<https://www.legal-tools.org/doc/95e5f9/>).

2. Håkan Friman, “The Rules of Procedure and Evidence in the Investigative Stage”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd ed., Berliner Wissenschafts-Verlag, 2004, pp. 198–99 (<https://www.legal-tools.org/doc/95e5f9/>).

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Rule 114

- 1. Upon being advised by the Prosecutor in accordance with article 56, paragraph 1 (a), the Pre-Trial Chamber shall hold consultations without delay with the Prosecutor and, subject to the provisions of article 56, paragraph 1 (c), with the person who has been arrested or who has appeared before the Court pursuant to summons and his or her counsel, in order to determine the measures to be taken and the modalities of their implementation, which may include measures to ensure that the right to communicate under article 67, paragraph 1 (b), is protected.*
- 2. A decision of the Pre-Trial Chamber to take measures pursuant to article 56, paragraph 3, must be concurred in by a majority of its judges after consultations with the Prosecutor. During the consultations, the Prosecutor may advise the Pre-Trial Chamber that intended measures could jeopardize the proper conduct of the investigation.*

Rule 114 underpins Article 56 on “unique investigative opportunities”. Article 56 is a compromise between the interest of having an independent prosecutor and judicial intervention.

Article 56 addresses two situations: (i) when the Prosecutor takes the initiative of such an investigation situation (Article 56(1)) or (ii) when the Pre-Trial Chamber takes the initiative of such an investigation situation on its own initiative (Article 56(3)). Rule 114 follows this, sub-rule 1 concerns initiatives by the Prosecutor while sub-rule 2 concerns initiatives by the Pre-Trial Chamber.

In order to protect the rights of the defence, sub-rule 1 states that measures could include those that seek to ensure that the right to communicate under Article 67, paragraph 1 (b), is protected.

In the *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I considered that there was 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.¹

¹ ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision to Hold Consultation under Rule 114, 21 April 2005, ICC-01/04-19 (<https://www.legal-tools.org/doc/f21a15/>).

Cross-references:

Article 56.

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, vol. 3, Oxford University Press, 2016, pp. 102, 393 (<https://www.legal-tools.org/doc/995606/>).
2. Håkan Friman, “Investigation and Prosecution”, 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. 506–7 (<https://www.legal-tools.org/doc/e34f81/>).
3. Håkan Friman, “The Rules of Procedure and Evidence in the Investigative Stage”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 195–96 (<https://www.legal-tools.org/doc/95e5f9/>).

Author: Mark Klamberg.

Rule 115

- 1. Where the Prosecutor considers that article 57, paragraph 3 (d), applies, the Prosecutor may submit a written request to the Pre-Trial Chamber for authorization to take certain measures in the territory of the State Party in question. After a submission of such a request, the Pre-Trial Chamber shall, whenever possible, inform and invite views from the State Party concerned.**
- 2. In arriving at its determination as to whether the request is well founded, the Pre-Trial Chamber shall take into account any views expressed by the State Party concerned. The Pre-Trial Chamber may, on its own initiative or at the request of the Prosecutor or the State Party concerned, decide to hold a hearing.**
- 3. An authorization under article 57, paragraph 3 (d), shall be issued in the form of an order and shall state the reasons, based on the criteria set forth in that paragraph. The order may specify procedures to be followed in carrying out such collection of evidence.**

Rule 115 underpins Article 57 which grants 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 is a highly controversial power since it interferes with State sovereignty. During the negotiations on Rule 115 the issue under debate concerned the obligation of the Court to communicate with the State before granting authorization for an investigation.¹

There is no absolute requirement to communicate with the State concerned. Sub-rule 1 provides that the Pre-Trial Chamber shall, whenever possible, inform and invite views from the State Party concerned.

Some of the same delegations that wanted an absolute requirement to communicate with the State concerned argued that the Prosecutor must show that the request is “well founded”. For that purpose, sub-rule 2 provides that when the Pre-Trial Chamber arrives at its determination whether to authorize an investigation, it must find that the request is “well founded”.

¹ Håkan Friman, “The Rules of Procedure and Evidence in the Investigative Stage”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd ed., Berliner Wissenschafts-Verlag, 2004, p. 196 (<https://www.legal-tools.org/doc/95e5f9/>).

Cross-reference:

Article 57(3)(d).

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, vol. 3, Oxford University Press, 2016, p. 382 (<https://www.legal-tools.org/doc/995606/>).
2. Håkan Friman, “Investigation and Prosecution”, 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. 507–9 (<https://www.legal-tools.org/doc/e34f81/>).
3. Håkan Friman, “The Rules of Procedure and Evidence in the Investigative Stage”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 196–197 (<https://www.legal-tools.org/doc/95e5f9/>).

Author: Mark Klamberg.

Rule 116

- 1. The Pre-Trial Chamber shall issue an order or seek cooperation under article 57, paragraph 3 (b), where it is satisfied:**
 - (a) That such an order would facilitate the collection of evidence that may be material to the proper determination of the issues being adjudicated, or to the proper preparation of the person’s defence; and**
 - (b) In a case of cooperation under Part 9, that sufficient information to comply with article 96, paragraph 2, has been provided.**
- 2. Before taking a decision whether to issue an order or seek cooperation under article 57, paragraph 3 (b), the Pre-Trial Chamber may seek the views of the Prosecutor.**

Rule 116 relates to Article 57(3)(b) which grants the Pre-Trial Chamber powers to issue such orders, including measures such as those described in Article 56, or seek such co-operation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence. A key concern when drafting Rule 116 was to avoid frivolous requests for co-operation but at the same time not make it too cumbersome for the Defence.¹

During the negotiations, one version of draft Rule 116(1)(a) stated that “[t]he Pre-Trial Chamber shall issue an order under article 57, paragraph 3 (b), where it is satisfied: (i) That such an order will facilitate the collection of evidence that is material to the proper determination of the issues being adjudicated, or otherwise necessary to the proper presentation of the person’s defence”. This draft was reviewed and rejected in part because it was noted that the requirement that the request is “necessary” would be too cumbersome for the Defence and the standard for satisfying the Chamber was too high. Thus, in the final adopted version of the rule “is material” was changed to “may be material”, “will facilitate” was changed to “would facilitate” and the word “necessary” was eliminated altogether.

The final version of the Rule 116(1)(a) did not address the fear of some that the Court may order what is known as “fishing-expeditions”, but this was dealt with in Rule 116(1)(b) which read together with ICC Statute,

¹ Håkan Friman, “The Rules of Procedure and Evidence in the Investigative Stage”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd ed., Berliner Wissenschafts-Verlag, 2004, p. 200 (<https://www.legal-tools.org/doc/95e5f9/>).

Article 96(2)(e) would make it possible for States not allowing ‘fishing expeditions’ in their national criminal investigations to require more specific information.

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).²

Cross-reference:

Article 57(3)(b).

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, vol. 3, Oxford University Press, 2016, p. 398 (<https://www.legal-tools.org/doc/995606/>).
2. Håkan Friman, “Investigation and Prosecution”, 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. 509–512 (<https://www.legal-tools.org/doc/e34f81/>).
3. Håkan Friman, “The Rules of Procedure and Evidence in the Investigative Stage”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 199–201 (<https://www.legal-tools.org/doc/95e5f9/>).

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² ICC, *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-01/04-01/07-444 (<https://www.legal-tools.org/doc/d7e664/>).

*Section IV. Procedures in Respect of Restriction and Deprivation of Liberty***Rule 117**

- 1. The Court shall take measures to ensure that it is informed of the arrest of a person in response to a request made by the Court under article 89 or 92. Once so informed, the Court shall ensure that the person receives a copy of the arrest warrant issued by the Pre-Trial Chamber under article 58 and any relevant provisions of the Statute. The documents shall be made available in a language that the person fully understands and speaks.*
- 2. At any time after arrest, the person may make a request to the Pre-Trial Chamber for the appointment of counsel to assist with proceedings before the Court and the Pre-Trial Chamber shall take a decision on such request.*
- 3. A challenge as to whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b), shall be made in writing to the Pre-Trial Chamber. The application shall set out the basis for the challenge. After having obtained the views of the Prosecutor, the Pre-Trial Chamber shall decide on the application without delay.*
- 4. When the competent authority of the custodial State notifies the Pre-Trial Chamber that a request for release has been made by the person arrested, in accordance with article 59, paragraph 5, the Pre-Trial Chamber shall provide its recommendations within any time limit set by the custodial State.*
- 5. When the Pre-Trial Chamber is informed that the person has been granted interim release by the competent authority of the custodial State, the Pre-Trial Chamber shall inform the custodial State how and when it would like to receive periodic reports on the status of the interim release.*

Rules 117 to 120 concern various issues relating to procedures involving restriction and deprivation of liberty. Pursuant to Article 59 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. It is not for the State to consider whether the Court has properly issued the arrest warrant. Challenges pertaining to the arrest warrant shall always be dealt with by the Pre-Trial Chamber. Rule 117 elaborates on the proceedings Before the person has been surrendered to the Court and deals with issues that involve State co-operation regulated in Part 9 of the ICC Statute.

In *Barasa*, Mr Barasa requested that the warrant of arrest issued against him be withdrawn and replaced with a summons to appear.¹ The Pre-Trial Chamber considered that “rule 117 does not become applicable until the person for whom a warrant of arrest has been issued is arrested by the requested State, that is, until the person is detained in the custodial State” (*Barasa*, 10 September 2015, para. 2).

Sub-rule 1 concerns information to the Court in the event of an arrest pursuant to a warrant by the Court. It also contains a right for the person concerned to receive a copy of the arrest warrant issued by the Pre-Trial Chamber.

Sub-rule 2 allows the Court to appoint of counsel to assist with proceedings before the Court. This provision is limited to persons already arrested at the request of the Court and to proceedings before the Court. The counsel may, for example, assist the person in challenging the arrest warrant before the person is surrendered to the Court.²

Sub-rules 4 and 5 provides for Communication between the Court and the national authorities regarding interim release pending surrender (which is decided by the national authorities) and periodic reports after such a release. These provisions were drafted in a way not to impose new obligations for States Parties that could require domestic legislation, for example the rules did not introduce time-limits (Friman, 2004, p. 204).

Cross-reference:

Article 59.

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, vol. 3, Oxford University Press, 2016, pp. 407 and 611 (<https://www.legal-tools.org/doc/995606/>).
2. Håkan Friman, “The Rules of Procedure and Evidence in the Investigative Stage”, in Horst Fischer *et al.* (eds.), *International and National*

¹ ICC, *Prosecutor v. Barasa*, Pre-Trial Chamber, Decision on the “Defence challenge to the warrant for the arrest of Walter Osapiri Barasa”, 10 September 2015, ICC-01/09-01/13-35 (“*Barasa*, 10 September 2015”) (<https://www.legal-tools.org/doc/e100dd/>).

² Håkan Friman, “The Rules of Procedure and Evidence in the Investigative Stage”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 204 (<https://www.legal-tools.org/doc/95e5f9/>).

- Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 204 (<https://www.legal-tools.org/doc/95e5f9/>).
3. Håkan Friman, “Investigation and Prosecution”, 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. 515–16 (<https://www.legal-tools.org/doc/e34f81/>).
 4. Christopher K. Hall and Cedric Ryngaert, “Article 59”, 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. 1468–70 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Rule 118

- 1. If the person surrendered to the Court makes an initial request for interim release pending trial, either upon first appearance in accordance with rule 121 or subsequently, the Pre-Trial Chamber shall decide upon the request without delay, after seeking the views of the Prosecutor.*
- 2. The Pre-Trial Chamber shall review its ruling on the release or detention of a person in accordance with article 60, paragraph 3, at least every 120 days and may do so at any time on the request of the person or the Prosecutor.*
- 3. After the first appearance, a request for interim release must be made in writing. The Prosecutor shall be given notice of such a request. The Pre-Trial Chamber shall decide after having received observations in writing of the Prosecutor and the detained person. The Pre-Trial Chamber may decide to hold a hearing, at the request of the Prosecutor or the detained person or on its own initiative. A hearing must be held at least once every year.*

General Remarks:

Rule 118 concerns pre-trial detention at the seat of the Court. The main concern of this provision is interim release and periodical review whether to release or continue with the detention which stems from Article 60(2) and (3). Article 60(4) provides that “[t]he 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”.

There was insufficient support during the negotiations to specify exact time limits in the ICC Statute, this left for the Rules of Procedure and Evidence.¹

The provision contains two time-limits: (i) if the person surrendered to the Court makes an initial request for interim release pending trial, either upon first appearance or subsequently, the Pre-Trial Chamber shall decide upon the request without delay (sub-rule 1); and (ii) the Pre-Trial Chamber shall review its ruling on the release or detention of a person, at least every 120 days (sub-rule 2).

¹ Håkan Friman, “The Rules of Procedure and Evidence in the Investigative Stage”, in Horst Fischer *et al.* (eds.) *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 204–5 (<https://www.legal-tools.org/doc/95e5f9/>).

The text of Rule 118 only mentions the Pre-Trial Chamber. The Pre-Trial Chamber and the Trial Chamber have a division of work: the Pre-Trial Chamber performs all judicial functions until the confirmation of charges and the Trial Chamber is responsible for subsequent proceedings, see Article 61(11). The Trial Chamber may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings. Pursuant to Article 64(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.

In *Lubanga*, the defence submitted its first application for interim release of Thomas Lubanga Dyilo.² The Pre-Trial Chamber considered “that since pre-trial detention cannot be extended to an unreasonable degree; that reasonableness cannot be assessed *in abstracto* but depends on the particular features of each case; and that to assess the reasonableness of the detention, it is particularly important to assess the complexity of the case”. The Pre-Trial Chamber rejected the Defence request for interim release. After 120 days Pre-Trial Chamber I, reviewed its ruling and decided that Thomas Lubanga Dyilo should continue to be detained.³

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.⁴ 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 these circumstances persist or whether there has been a change (para. 55). For the

² ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, 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/>).

³ 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/>).

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 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/>).

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:

Article 60(2) and (3).

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, vol. 3, Oxford University Press, 2016, pp. 408–9 and 412 (<https://www.legal-tools.org/doc/995606/>).
2. Håkan Friman, “The Rules of Procedure and Evidence in the Investigative Stage”, in Horst Fischer *et al.* (eds.) *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 204–5 (<https://www.legal-tools.org/doc/95e5f9/>).
3. Håkan Friman, “Investigation and Prosecution”, 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. 517–18 (<https://www.legal-tools.org/doc/e34f81/>).
4. Karim A. A. Khan, “Article 60”, 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. 1479–81 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Rule 119

1. The Pre-Trial Chamber may set one or more conditions restricting liberty, including the following:

- (a) The person must not travel beyond territorial limits set by the Pre-Trial Chamber without the explicit agreement of the Chamber;*
- (b) The person must not go to certain places or associate with certain persons as specified by the Pre-Trial Chamber;*
- (c) The person must not contact directly or indirectly victims or witnesses;*
- (d) The person must not engage in certain professional activities;*
- (e) The person must reside at a particular address as specified by the Pre-Trial Chamber;*
- (f) The person must respond when summoned by an authority or qualified person designated by the Pre-Trial Chamber;*
- (g) The person must post bond or provide real or personal security or surety, for which the amount and the schedule and mode of payment shall be determined by the Pre-Trial Chamber;*
- (h) The person must supply the Registrar with all identity documents, particularly his or her passport.*

2. At the request of the person concerned or the Prosecutor or on its own initiative, the Pre-Trial Chamber may at any time decide to amend the conditions set pursuant to sub-rule 1.

3. Before imposing or amending any conditions restricting liberty, the Pre-Trial Chamber shall seek the views of the Prosecutor, the person concerned, any relevant State and victims that have communicated with the Court in that case and whom the Chamber considers could be at risk as a result of a release or conditions imposed.

4. If the Pre-Trial Chamber is convinced that the person concerned has failed to comply with one or more of the obligations imposed, it may, on such basis, at the request of the Prosecutor or on its own initiative, issue a warrant of arrest in respect of the person.

5. When the Pre-Trial Chamber issues a summons to appear pursuant to article 58, paragraph 7, and intends to set conditions restricting liberty, it shall ascertain the relevant provisions of the national law of the State receiving the summons. In a manner that is in keeping with the national law of the State receiving the summons, the Pre-Trial Chamber shall proceed in accordance with sub-rules 1, 2 and 3. If the Pre-Trial Chamber receives information that the person

concerned has failed to comply with conditions imposed, it shall proceed in accordance with subrule 4.

General Remarks:

Pursuant to Article 60(2)–(4) of the ICC Statute the Pre-Trial Chamber may as an alternative to pre-trial detention release the person with conditions. Such conditions may also be imposed when a summons to appear before the Court is issued pursuant to Article 58(7). Rule 119 covers all cases when the Court may impose conditions restricting liberty.

By using the words “including the following”, Rule 119 provides a non-exhaustive list of restrictions in relation to a conditional release.

Sub-rule 3 provides that the Pre-Trial Chamber shall, before imposing or amending any conditions restricting liberty, seek the views of the Prosecutor, the person concerned, any relevant State and victims that have communicated with the Court in that case and whom the Chamber considers could be at risk as a result of a release or conditions imposed. In *Bemba*, 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”.¹

Sub-rule 4 clarifies that if the person concerned has failed to comply with one or more of the obligations imposed, it may, on such basis, at the request of the Prosecutor or on its own initiative, issue a warrant of arrest in respect of the person.

Sub-rule 5 underpins Article 58(7) and sets out procedures for handling of conditions for a summons to appear and the relationship between the Court and the State receiving the summons.²

Cross-references:

Article 58(7) and 60.

¹ 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”, ICC-01/05-01/08-1626-Red, 19 August 2011, para. 1 (<https://www.legal-tools.org/doc/64dc49/>)

² Håkan Friman, “Investigation and Prosecution”, 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. 520 (<https://www.legal-tools.org/doc/e34f81/>).

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, vol. 3, Oxford University Press, 2016, pp. 181, 402, 409, 412, 647 (<https://www.legal-tools.org/doc/995606/>).
2. Håkan Friman, “The Rules of Procedure and Evidence in the Investigative Stage”, in Horst Fischer *et al.* (eds.) *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 206 (<https://www.legal-tools.org/doc/95e5f9/>).
3. Håkan Friman, “Investigation and Prosecution”, 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. 519–20 (<https://www.legal-tools.org/doc/e34f81/>).
4. Christopher K. Hall and Cedric Ryngaert, “Article 58”, 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. 1456 (<https://www.legal-tools.org/doc/040751/>).
5. Karim A. A. Khan, “Article 60”, in Triffterer and Ambos (eds.), 2016, p. 1477.

Author: Mark Klamberg.

Rule 120

Personal instruments of restraint shall not be used except as a precaution against escape, for the protection of the person in the custody of the Court and others or for other security reasons, and shall be removed when the person appears before a Chamber.

General Remarks:

Measures such as the use of instruments of restraint may be necessary to provide security and order in a custodial setting: to protect persons deprived of their liberty from inter-prisoner violence; for self-defence, to prevent self-harm and suicide; and to prevent escape.¹

The European Committee for the Prevention of Torture holds that the resort to instruments of physical restraint involve “high risk situations insofar as the possible ill-treatment of prisoners is concerned, and as such call for specific safeguards”.²

Prohibitions and limitations of use, as well as the manner in which instruments of restraint may be applied, derive from the prohibition of torture and cruel, inhuman or degrading treatment or punishment, and from the obligation to respect and protect the human dignity of persons deprived of their Liberty (Penal Reform International and Association for the Prevention of Torture, 2013).

The use of restraints should be prescribed by law, and be restricted by the principles of necessity and proportionality.³

Cross-reference:

Article 60.

¹ Penal Reform International and Association for the Prevention of Torture, “Fact-sheet: Instruments of restraint, Addressing risk factors to prevent torture and ill-treatment”, 2nd. ed., 2013 (<https://www.legal-tools.org/doc/fce3c8/>).

² European Committee for the Prevention of Torture (CPT), 2nd General Report on the CPT’s activities 1 January – 31 December 1991, CPT/Inf (92) 3, 13 April 1992, para. 53 (<https://www.legal-tools.org/doc/0bfef4/>).

³ Code of Conduct for Law Enforcement Officials, UN Doc. A/RES/34/169, 17 December 1979, Article 3 (<https://www.legal-tools.org/doc/e87057/>); United Nations Standard Minimum Rules for the Treatment of Prisoners, UN Doc. A/RES/70/175, 17 December 2012, Rule 48 (<https://www.legal-tools.org/doc/29e244/>); for the application of these guiding principles on restraints, see Report of the Special Rapporteur on Torture, UN Doc. E/CN.4/2004/56, 23 December 2003, paras. 45–46 (<https://www.legal-tools.org/doc/66b957/>).

Author: Mark Klamberg.

Section V. Proceedings with Regard to the Confirmation of Charges Under Article 61

Rule 121: General Remarks

General Remarks:

Rules 121 and 122 concern proceedings before and at the confirmation hearing. The rules were developed during several meetings and based upon detailed French proposals.¹

Rule 121 provides for procedural steps relating to disclosure, submission of charges and evidence that should take place before the confirmation hearing. Each step is accompanied by specific times limits in sub-rules 3–6 and 9.

Author: Mark Klamberg.

¹ Håkan Friman, “Investigation and Prosecution”, 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. 523 (<https://www.legal-tools.org/doc/e34f81/>).

Rule 121(1)

1. A person subject to a warrant of arrest or a summons to appear under article 58 shall appear before the Pre-Trial Chamber, in the presence of the Prosecutor, promptly upon arriving at the Court. Subject to the provisions of articles 60 and 61, the person shall enjoy the rights set forth in article 67. At this first appearance, the Pre-Trial Chamber shall set the date on which it intends to hold a hearing to confirm the charges. It shall ensure that this date, and any postponements under sub-rule 7, are made public.

Once the person is surrendered to the court, he or she shall “promptly” appear before the Pre-Trial Chamber. In *Lubanga*, Pre-Trial Chamber I decided to hold a public hearing.¹ Sub-rule 1 grants the rights under Article 67 to a person subject to a warrant of arrest or a summons at the moment of the first appearance before the pre-trial chamber.

The rule adds upon Article 61(1) which provides that Pre-Trial Chamber shall set the date of the confirmation hearing “within a reasonable time after the person’s surrender or voluntary appearance before the Court”. This softened by sub-rule 7 which allows the Pre-Trial Chamber to postpone the date of the confirmation hearing.

Important factors in setting the date for confirmation hearing are: (i) the rights of the suspect to have adequate time to prepare for the confirmation hearing and to be tried without undue delay; (ii) the particularities of the case, including the need for the Prosecutor to prepare the case for the hearing; (iii) the number of suspects of the holding of parallel pre-trial proceedings; (iv) the completeness of the Prosecutor’s investigation.²

Doctrine: For the bibliography, see the final comment on Rule 121.

Author: Mark Klamberg.

¹ 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/>).

² William A. Schabas, Eleni Chaitidou and Mohamed M. El Zeidy, “Article 61”, 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. 1492–93 (<https://www.legal-tools.org/doc/040751/>).

Rule 121(2)

2. In accordance with article 61, paragraph 3, the Pre-Trial Chamber shall take the necessary decisions regarding disclosure between the Prosecutor and the person in respect of whom a warrant of arrest or a summons to appear has been issued. During disclosure:

(a) The person concerned may be assisted or represented by the counsel of his or her choice or by a counsel assigned to him or her;

(b) The Pre-Trial Chamber shall hold status conferences to ensure that disclosure takes place under satisfactory conditions. For each case, a judge of the Pre-Trial Chamber shall be appointed to organize such status conferences, on his or her own motion, or at the request of the Prosecutor or the person;

(c) All evidence disclosed between the Prosecutor and the person for the purposes of the confirmation hearing shall be communicated to the Pre-Trial Chamber.

Sub-rule 2 deals with disclosure and status conferences. Rules 76–84 on disclosure apply to the pre-trial stage as well as the trial stage. The Chamber shall hold status conferences to ensure that disclosure takes place under satisfactory conditions.

During the discussions leading to Rule 121 it was agreed that evidence disclosed *inter partes* for the purpose of the confirmation hearing would also be communicated to the Pre-Trial Chamber. Brady describes that the purpose of this arrangement was that the Pre-Trial Chamber would better understand the issues, enhancing its abilities to make appropriate orders for disclosure, for the production of additional evidence and expediting the confirmation hearing. Delegations felt comfortable that no ‘infection’ would arise since no finding of guilt results from the confirmation hearing.¹

The notion “all evidence” in sub-rule 2(c) may be interpreted either in a broad sense, that is, all evidence disclosed or in a more narrow sense, that is, all evidence on which the prosecution intends to rely at the confirmation hearing. In *Lubanga* Judge Steiner upheld the later interpretation. She also decided that exculpatory evidence and books, documents, photographs and

¹ Helen Brady, “Disclosure of Evidence”, 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. 424 (<https://www.legal-tools.org/doc/e34f81/>).

other tangible objects in the possession or control of the prosecutor material to the Defence's preparation for the confirmation hearing should not be communicated to the Pre-Trial Chamber.² In *Katanga and Ngudjolo*, Judge Steiner decided to follow the practices on disclosures that were set out for the purpose of the confirmation hearing in *Lubanga*.³ The majority in *Abu Garda* also opted for a narrow interpretation when it decided that the parties were not requested to communicate to the Chamber those materials subject to disclosure on which they do not intend to rely at the confirmation hearing. The majority emphasized the limited scope of the confirmation hearing, namely “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, rather, to determine whether sufficient evidence exists to establish substantial grounds to believe that the person committed each of the crimes charged”.⁴

In comparison with Judge Steiner of Pre-Trial Chamber I in *Lubanga*, Pre-Trial Chamber III in *Bemba* chose to put much more emphasis on the objective of truth during disclosure prior to the confirmation hearing. Thus, Pre-Trial Chamber III in *Bemba* came to a different conclusion on the scope of communication to the Chamber, making it significantly wider in ordering the Prosecutor “to disclose to the defence through the Registry all evidence in the Prosecutor’s possession or control under Article 67(2) of the Statute

² ICC, *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, p. 5f and paras. 41, 50–51 (*Lubanga*, 15 May 2006”) (<https://www.legal-tools.org/doc/052848/>). See also *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Final Decision on the E-Court Protocol for the Provision of Evidence, Material and Witness Information on Electronic Version for their Presentation During the Confirmation Hearing, 28 August 2006, ICC-01/04-01/06-360 (<https://www.legal-tools.org/doc/eb7d2a/>).

³ ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Transcript, ICC-01/04-01/07-T11-ENG, 14 December 2007, p. 4, lines 14–22 (<https://www.legal-tools.org/doc/78a77d/>), making references to *Prosecutor v. Lubanga*, 15 May 2006; *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 (<https://www.legal-tools.org/doc/c1ca24/>); and *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 (<https://www.legal-tools.org/doc/7813d4/>).

⁴ ICC, *Prosecutor v. Abu Garda*, Pre-Trial Chamber I, Second Decision on issues relating to Disclosure, 15 July 2009, ICC-02/05-02/09-35, paras. 9 and 10 (<https://www.legal-tools.org/doc/b57860/>).

as soon as practicable and on a continuous basis”.⁵ Judge Trendafilova, a member of the *Bemba* Pre-Trial Chamber, repeated the same approach in *Ruto et al.* and *Muthaura et al.*⁶

For the interim system established in the *Lubanga* case, Pre-Trial Chamber I established an interim system of disclosure.⁷ In *Lubanga*, Pre-Trial Chamber I considered that any request by the defence pursuant to Articles 61 (3) and 67 (2) and Rules 76, 77 and 121 of the Rules must be channelled through the Registry.⁸

Doctrine: For the bibliography, see the final comment on Rule 121.

Author: Mark Klamberg.

⁵ 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. 11, 16 and 18 and p. 24 (<https://www.legal-tools.org/doc/15c802/>).

⁶ 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, paras. 4 and 6 (<https://www.legal-tools.org/doc/90595d/>); *Prosecutor v. Muthaura et al.*, Pre-Trial Chamber II, 6 April 2011 (<https://www.legal-tools.org/doc/12b91f/>), paras. 5 and 7.

⁷ See ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision Requesting Observations of the Prosecution and the Duty Counsel for the Defence on the System of Disclosure and Establishing an Interim System of Disclosure, 23 March 2006, ICC-01/04-01/06-54 (<https://www.legal-tools.org/doc/13bd67/>).

⁸ ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber. I, Decision Requesting further Observations from the Prosecution and the Duty Counsel for the Defence on the System of Disclosure, 27 March 2006, ICC-01/04-01/06-58 (<https://www.legal-tools.org/doc/aa79da/>).

Rule 121(3)–(10)

3. The Prosecutor shall provide to the Pre-Trial Chamber and the person, no later than 30 days before the date of the confirmation hearing, a detailed description of the charges together with a list of the evidence which he or she intends to present at the hearing.

4. Where the Prosecutor intends to amend the charges pursuant to article 61, paragraph 4, he or she shall notify the Pre-Trial Chamber and the person no later than 15 days before the date of the hearing of the amended charges together with a list of evidence that the Prosecutor intends to bring in support of those charges at the hearing.

5. Where the Prosecutor intends to present new evidence at the hearing, he or she shall provide the Pre-Trial Chamber and the person with a list of that evidence no later than 15 days before the date of the hearing.

6. If the person intends to present evidence under article 61, paragraph 6, he or she shall provide a list of that evidence to the Pre-Trial Chamber no later than 15 days before the date of the hearing. The Pre-Trial Chamber shall transmit the list to the Prosecutor without delay. The person shall provide a list of evidence that he or she intends to present in response to any amended charges or a new list of evidence provided by the Prosecutor.

7. The Prosecutor or the person may ask the Pre-Trial Chamber to postpone the date of the confirmation hearing. The Pre-Trial Chamber may also, on its own motion, decide to postpone the hearing.

8. The Pre-Trial Chamber shall not take into consideration charges and evidence presented after the time limit, or any extension thereof, has expired.

9. The Prosecutor and the person may lodge written submissions with the Pre-Trial Chamber, on points of fact and on law, including grounds for excluding criminal responsibility set forth in article 31, paragraph 1, no later than three days before the date of the hearing. A copy of these submissions shall be transmitted immediately to the Prosecutor or the person, as the case may be.

10. The Registry shall create and maintain a full and accurate record of all proceedings before the Pre-Trial Chamber, including all documents transmitted to the Chamber pursuant to this rule. Subject to any restrictions concerning confidentiality and the protection of national security information, the record may be consulted by the Prosecutor, the person and victims or their legal representatives participating in the proceedings pursuant to rules 89 to 91.

Sub-rule 3 serves the purpose of guaranteeing the person adequate time and facilities for preparation of his or her defence. The Document Containing the Charges (‘DCC’) need not “strictly follow the factual and legal Foundations” of an arrest warrant or summons to appear, since the Prosecution can continue its investigation and thus amend the charges.¹

In *Mbarushimana*, the Prosecutor filed an “Addendum to the ‘Prosecution’s document containing the charges and List of Evidence submitted pursuant to Article 61(3) and Rule 121(3)’” 5 days after the expiry of the deadline set in accordance with Rule 121(3) of the Rules.² At the first request of the defence, the Pre-Trial Chamber excluded the Prosecution’s amended document containing the charges and amended list of evidence. However, the Pre-Trial Chamber considered it disproportionate to follow the second request of the defence to decline to receive the altered document containing the charges. Instead it ordered the Prosecutor to re-file the document containing the charges filed on the deadline set in accordance with Rule 121(3), together with a version of this document containing tracked changes.

Cross-references:

Article 58, 60 and 61.
Rules 76–84.

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, vol. 3, Oxford University Press, 2016, pp. 69, 143, 344, 346–347, 349, 354, 357–358, 385, 408, 418–420, 511–512, 521–524, 526–527, 529, 538, 540–541, 547 (<https://www.legal-tools.org/doc/995606/>).

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. 88 (<https://www.legal-tools.org/doc/63028f/>); Kai Ambos, *Treatise on International Criminal Law*, vol. 3, Oxford University Press, 2016, p. 349 (<https://www.legal-tools.org/doc/995606/>). For an example of a submission of DCC, see *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Submission of the Document Containing the Charges pursuant to Article 61(3)(a) and of the List of Evidence pursuant to Rule 121(3), 28 August 2006, ICC-01/04-01/06-356 (<https://www.legal-tools.org/doc/ceb03c/>) and *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Document Containing the Charges, Article 61(3) (a), 28 August 2006, ICC-01/04-01/06-356-Anx2 (<https://www.legal-tools.org/doc/e2fa01/>).

² ICC, *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the “Defence request to exclude the Prosecution’s amended document containing the charges and amended list of evidence”, 22 July 2011, ICC-01/04-01/10-306 (<https://www.legal-tools.org/doc/264e1c/>).

2. Helen Brady, “Disclosure of Evidence”, 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. 424 (<https://www.legal-tools.org/doc/e34f81/>).
3. Håkan Friman, “Investigation and Prosecution”, in Lee *et al.* (eds.), 2001, pp. 521–25.
4. Mark Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Martinus Nijhoff Publishers, Leiden, 2013, pp. 108, 277, 318–324 (<https://www.legal-tools.org/doc/0d524b/>).
5. Peter Lewis, “The Rules of Procedure and Evidence of the International Criminal Court: confirmation Hearing to Trial”, in Horst Fischer *et al.* (eds.) *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 220–23 (<https://www.legal-tools.org/doc/95e5f9/>).
6. William A. Schabas, Eleni Chaitidou and Mohamed M. El Zeidy, “Article 61”, 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. 1492–93 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Rule 122: General Remarks

Proceedings at the confirmation hearing in the presence of the person charged

General Remarks:

Rule 122 details the different phases of confirmation proceedings held in the presence of the suspect. In this regard, this rule provides for the consideration of jurisdiction or admissibility challenges, and of objections or observations prior to consideration of the merits pursuant to Article 61 of the ICC Statute. Rule 122 also clarifies the evidentiary regime applicable during confirmation hearings.

Purpose of the Proceedings:

There must be consistency between the proceedings leading to the confirmation hearing, the hearing itself and, in the eventuality of the confirmation of the charges, the proceedings held before the Trial Chamber. Hence, the procedural activities carried out for the purpose of the confirmation hearing must also aim at facilitating the preparation for trial in the event that the charges are confirmed.¹

Author: Enrique Carnero Rojo.

¹ ICC, *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, 25 April 2008, ICC-01/04-01/07-428-Corr, para. 7 (<https://www.legal-tools.org/doc/6442e8/>).

Rule 122(1): Conduct of the Hearing

1. The Presiding Judge of the Pre-Trial Chamber shall ask the officer of the Registry assisting the Chamber to read out the charges as presented by the Prosecutor. The Presiding Judge shall determine how the hearing is to be conducted

Broad Judicial discretion:

Rule 122(1) confers broad discretion on the Presiding judge to determine how a confirmation hearing is to be conducted, including, *inter alia*, how a witness shall be examined.¹

Closed Sessions:

For the adequate protection of certain witnesses, the confirmation hearing may be held partly in closed session (*Lubanga*, 7 November 2006, pp. 5 and 7).

Questions by Judges:

Additionally, Rule 140(2)(c) also applies *mutatis mutandis* to pre-trial proceedings. Thus, in accordance with Rule 140(2)(c), the Chamber may put questions to a witness before, during or after his/her examination by the Prosecution and the Defence (*Lubanga*, 7 November 2006, pp. 3 and 4).

Doctrine: For the bibliography, see the final comment on Rule 122.

Author: Enrique Carnero Rojo.

¹ 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, p. 3 ('*Lubanga*, 7 November 2006') (<https://www.legal-tools.org/doc/abb2c3/>).

Rule 122(1): Presentation of Evidence

and, in particular, may establish the order and the conditions under which he or she intends the evidence contained in the record of the proceedings to be presented

Communication of Evidence to the Chamber:

The rules on communication of certain evidence to the Pre-Trial Chamber aim at placing the Pre-Trial Chamber in a position to properly organize and conduct the confirmation hearing, which is best achieved by the Chamber having advance access to the evidence to be presented at the hearing.¹ Moreover, access to all documents, materials and evidence filed in the record of the case is inherent to the jurisdictional functions of the Pre-Trial Chamber (*Lubanga*, 15 May 2006, Annex I, para. 35). The introduction of additional evidence by victims authorised to participate on which neither the Prosecution nor the Defence intend to rely (and that therefore is not part of the record of the case kept by the Registry) would (i) distort the limited scope, as well as the object and purpose, of the confirmation hearing as defined by Article 61 of the Statute and Rules 121 and 122 of the Rules, and (ii) inevitably delay the commencement of a confirmation hearing that, pursuant to Article 61(1) of the Statute, must be held within a reasonable period of time after the suspect's surrender or voluntary appearance before the Court. The introduction of additional evidence by victims would also infringe upon the Defence's right not to rely on such materials for the purpose of the confirmation hearing.²

Doctrine: For the bibliography, see the final comment on Rule 122.

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, 15 May 2006, ICC-01/04-01/06-102, Annex I, para. 34 ('*Lubanga*, 15 May 2006') (<https://www.legal-tools.org/doc/052848/>).

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. 101–103 (<https://www.legal-tools.org/doc/285b52/>).

Rule 122(3): Objections and Observations on the Proceedings

3. Before hearing the matter on the merits, the Presiding Judge of the Pre-Trial Chamber shall ask the Prosecutor and the person whether they intend to raise objections or make observations concerning an issue related to the proper conduct of the proceedings prior to the confirmation hearing.

The Pre-Trial Chambers usually request the Prosecution and the Defence to indicate before the confirmation hearing whether they intend to raise objections or make observations concerning an issue related to the proper conduct of the proceedings pursuant to Rule 122(3) of the Rules.¹

Doctrine: For the bibliography, see the final comment on Rule 122.

Author: Enrique Carnero Rojo.

¹ ICC, *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Order requesting the parties to submit views and proposals on confirmation hearing, 2 August 2011, ICC-01/04-01/10-326, p. 3 (<https://www.legal-tools.org/doc/1152b9/>).

Rule 122(4): Late Objections and Observations

4. At no subsequent point may the objections and observations made under sub-rule 3 be raised or made again in the confirmation or trial proceedings

General Rule - Conduct of the Proceedings not to Be Discussed Later:

Rule 122(3) and (4) of the Rules stipulates that objections and observations concerning an issue related to the proper conduct of the proceedings prior to the confirmation hearing shall be raised by the parties at the beginning of the confirmation hearing and such objections and observations shall, at no subsequent point, be raised or made again.¹

Exceptions - Admissibility and Relevance of Evidence:

However, issues relating to the admissibility and relevance of evidence can always be raised by either party pursuant to Article 64 of the Statute and Rule 63 of the Rules according to which the Trial Chamber “shall have, *inter alia*, the power [to] rule on the admissibility or relevance of evidence”, and may therefore reassess Pre-Trial Chamber rulings on admissibility and relevance of evidence tendered at the pre-trial stage by the parties (*Lubanga*, 24 May 2007, para. 32).

Doctrine: For the bibliography, see the final comment on Rule 122.

Author: Enrique Carnero Rojo.

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, para. 31 (*Lubanga*, 24 May 2007’) (<https://www.legal-tools.org/doc/602c7a/>).

Rule 122(9): Evidentiary Rules

9. Subject to the provisions of article 61, article 69 shall apply mutatis mutandis at the confirmation hearing.

Power of the Chamber to Assess the Evidence:

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 *inter alia* because Rule 122(9) of the Rules of Procedure and Evidence redirects to Article 69(4) of the Statute, which states in particular that 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. These provisions all reflect a general authority on the part of the Pre-Trial Chamber to assess the evidence.¹

Free Assessment of Evidence by the Chamber:

Pursuant to Rule 122(9), the paramount principle of free assessment of evidence as enshrined in Article 69(4) of the Statute and Rule 63(2) of the Rules is equally applicable at the pre-trial and trial stages of the proceedings.²

Cross-references:

Articles 61(5)–(6), 69.
Rule 58.

Doctrine:

1. Håkan Friman, The Pre-Trial Phase – Part 5 of the Statute, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of*

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. 41 (<https://www.legal-tools.org/doc/6ead30/>).

² ICC, *Prosecutor v. Ruto et al.*, Pre-Trial Chamber, 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. 59 (<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. 79 (<https://www.legal-tools.org/doc/4972c0/>).

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- Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 520–25 (<https://www.legal-tools.org/doc/e34f81/>).
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*, vol. 2, Oxford University Press, 2002, pp. 1242–46 (<https://www.legal-tools.org/doc/01addc/>).
 3. Kuniji Shibahara and William A. Schabas, “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, Munich/Oxford/Baden-Baden, 2016, pp. 1521–1525 (<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*, vol. 2, A. Pedone, Paris, 2012, pp. 1395–1402 (<https://www.legal-tools.org/doc/872bf2/>).
 5. Enrique Carnero Rojo, “Rome Statute of the International Criminal Court – Article 61: Confirmation of the charges before trial”, in Paul De Hert *et al.* (eds.), *Code of International Criminal Law and Procedure*, Larcier, Brussels, 2013, pp. 266–267 (<https://www.legal-tools.org/doc/3f10e0/>).
 6. Håkan Friman *et al.*, “Charges”, in Göran Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, pp. 404–8 (<https://www.legal-tools.org/doc/bcad4c/>).

Author: Enrique Carnero Rojo.

Rule 123: General Remarks

Measures to ensure the presence of the person concerned at the confirmation hearing

General Remarks:

The confirmation hearing must, in principle, take place after the suspect has surrendered to the Court or been arrested. However, the suspect who has surrendered or been arrested is entitled to waive his right to be present during the confirmation hearing, pursuant to Article 61(2)(a). Moreover, the charges against a suspect who has not appeared before the Court may be confirmed in his or her absence without a waiver (Article 61(2)(b)). Rule 123 entitles the suspect to know about the occurrence of the confirmation hearing and strengthens the suspect's right to be represented by counsel during said hearing. In this regard, several procedural safeguards must be adopted pursuant to this rule in order to inform the suspect of the charges before the confirmation hearing, and to secure the suspect's presence during said hearing. Said guarantees reinforce the understanding that confirmation hearings may be held in absentia, but only exceptionally.

Author: Enrique Carnero Rojo.

Rule 123(1)

1. When a warrant of arrest or summons to appear in accordance with article 58, paragraph 7, has been issued for a person by the Pre-Trial Chamber and the person is arrested or served with the summons, the Pre-Trial Chamber shall ensure that the person is notified of the provisions of article 61, paragraph 2.

Presence of the Suspect at the Confirmation Hearing:

The presence of the accused is judged essential at every stage of the proceedings and a prerequisite for the holding of the trial (Article 63(1) of the Statute). Although the confirmation hearing may in the circumstances specified in Article 61(2) of the Statute (see also Rule 125 of the Rules of Procedure and Evidence) be held in the absence of the person against whom the charges are levelled, such course must in the nature of things be an exceptional one. The arrest of a person is not intended as an aid to the investigation of a case but as a means of securing his/her appearance before the Court in proceedings sequential thereto.¹

Doctrine: For the bibliography, see the final comment on Rule 123.

Author: Enrique Carnero Rojo.

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, paras. 2–3 (<https://www.legal-tools.org/doc/ff3bd8/>).

Rule 123(2)

2. The Pre-Trial Chamber may hold consultations with the Prosecutor, at the request of the latter or on its own initiative, in order to determine whether there is cause to hold a hearing on confirmation of charges under the conditions set forth in article 61, paragraph 2 (b). When the person concerned has a counsel known to the Court, the consultations shall be held in the presence of the counsel unless the Pre-Trial Chamber decides otherwise.

3. The Pre-Trial Chamber shall ensure that a warrant of arrest for the person concerned has been issued and, if the warrant of arrest has not been executed within a reasonable period of time after the issuance of the warrant, that all reasonable measures have been taken to locate and arrest the person.

Cause to Hold the Confirmation Hearing in Absentia:

In *Kony et al.*, when one of several co-suspects was arrested, after consulting the Prosecutor on whether or not “there is cause to hold a hearing on confirmation of charges under the conditions set forth in article 61, paragraph 2(b)”, as dictated by Rule 123(2) of the Rules, the Single Judge noted the reservations expressed by the Prosecutor and decided that there was no cause to proceed with the confirmation of charges proceedings against the other co-suspects in absentia because (i) the Court lacked the necessary resources to proceed against the other co-suspects in absentia; (ii) this course of action would have significant but unjustified budgetary implications; and (iii) should the charges be confirmed, and accordingly, the case proceed to trial, then only those victims linked to the charges against Mr. Ongwen would participate in trial, whereas victims linked to the charges concerning the other co-suspects who remain at large would not continue to participate in any trial proceedings.¹

Cross-references:

Articles 58(7) and 61(2)(b).

¹ ICC, *Prosecutor v. Kony et al.*, Pre-Trial Chamber II, Decision Severing the Case Against Dominic Ongwen, 6 February 2015, ICC-02/04-01/05-424, para. 7 (<https://www.legal-tools.org/doc/16fb19/>).

Doctrine:

1. Håkan Friman, “The Pre-Trial Phase – Part 5 of the Statute”, 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. 525–528 (<https://www.legal-tools.org/doc/e34f81/>).
2. Håkan Friman *et al.*, “Charges”, in Göran Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, p. 404 (<https://www.legal-tools.org/doc/bcad4c/>).
3. Kai Ambos, *Treatise on International Criminal Law*, vol. 3, Oxford University Press, 2016, p. 359 (<https://www.legal-tools.org/doc/995606/>).
4. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 929–930 (<https://www.legal-tools.org/doc/b7432e/>).

Author: Enrique Carnero Rojo.

Rule 124

Waiver of the right to be present at the confirmation hearing

General Remarks:

The confirmation hearing must, in principle, take place after the suspect has surrendered to the Court or been arrested. However, the suspect who has surrendered or been arrested has the right to waive his or her right to be present during the hearing and may be allowed to observe it from outside the courtroom. The Pre-Trial Chamber retains full discretion to accept such waiver, although it must be satisfied that the suspect understands his or her right to be present at the hearing and the consequences of waiving this right.

Doctrine: For the bibliography, see the final comment on Rule 124.

Author: Enrique Carnero Rojo.

Rule 124(1)

1. If the person concerned is available to the Court but wishes to waive the right to be present at the hearing on confirmation of charges, he or she shall submit a written request to the Pre-Trial Chamber, which may then hold consultations with the Prosecutor and the person concerned, assisted or represented by his or her counsel.

Written Request for Waiver:

In order for the Pre-Trial Chamber to decide on whether the confirmation hearing may be held in absentia, the Chamber shall receive the written request on the basis of which it must satisfy itself that the suspects are fully aware of (i) the rights they are entitled to pursuant to Article 67 of the Statute; (ii) the right to be present at the confirmation hearing; (iii) the content of the Joint Submissions; (iv) the consequences of waiving their right to attend the confirmation hearing as well as of the facts agreed between the Defence and the Prosecution.¹ The written request must be personally executed by the suspect intending to waive his or her right to be present at the confirmation of charges and, as such, cannot be delegated to the Defence Counsel.²

Doctrine: For the bibliography, see the final comment on Rule 124.

Author: Enrique Carnero Rojo.

¹ ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Transcript, 11 July 2008, ICC-01/04-01/07-T-46-ENG, pp. 23–24 (<https://www.legal-tools.org/doc/fd87a4/>); *Prosecutor v. Banda and Jerbo*, Pre-Trial Chamber I, Decision postponing the confirmation hearing and setting a deadline for the submission of the suspects' written request to waive their right to attend the confirmation hearing, 22 October 2010, ICC-02/05-03/09-81, para. 10 (<https://www.legal-tools.org/doc/ea0806/>); *Prosecutor v. Banda and Jerbo*, Pre-Trial Chamber I, Decision on issues related to the hearing on the confirmation of charges, 17 November 2010, ICC-02/05-03/09-103, paras. 1–4 (<https://www.legal-tools.org/doc/73accb/>).

² ICC, *Prosecutor v. Banda and Jerbo*, Pre-Trial Chamber I, Second decision setting a deadline for the submission of the suspects' written request to waive their right to attend the confirmation hearing, 27 October 2010, ICC-02/05-03/09-87, para. 6 (<https://www.legal-tools.org/doc/5533ea/>).

Rule 124(2)(3)(4)

2. A confirmation hearing pursuant to article 61, paragraph 2 (a), shall only be held when the Pre-Trial Chamber is satisfied that the person concerned understands the right to be present at the hearing and the consequences of waiving this right.

3. The Pre-Trial Chamber may authorize and make provision for the person to observe the hearing from outside the courtroom through the use of communications technology, if required.

4. The waiving of the right to be present at the hearing does not prevent the Pre-Trial Chamber from receiving written observations on issues before the Chamber from the person concerned.

Consequences of the Waiver:

While Article 61(2)(a) of the Statute together with Rules 124 and 125 of the Rules entitle a suspect, in principle, to waive his right to be present at the confirmation of charges hearing, they do not support a suspect picking and choosing the days he wishes to attend. On the contrary, Rule 124(1) of the Rules speaks of “the person [who] wishes to waive the right to be present at the hearing on confirmation of charges [...]”, which entails the entire hearing and not part of it. This is equally true if one reads the plain wording of Rule 125(1) of the Rules, which makes clear that once a decision is taken to hold a hearing in the absence of the person concerned, this will be for the entirety of the confirmation proceeding. Thus, nowhere in the text of these provisions is it stated that the person could skip parts of the hearing and attend the other. It follows that a suspect must either decide to be present during the whole proceeding or he may waive his right to be present throughout the entirety of the hearing.¹

Cross-references:

Article 61(2)(a).

Doctrine:

1. Håkan Friman, “The Pre-Trial Phase – Part 5 of the Statute”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court*:

¹ 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/>).

Elements of Crimes and Rules of Procedure and Evidence, Transnational Publishers, Ardsley, 2001, p. 529 (<https://www.legal-tools.org/doc/2a4cd9/>).

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, vol. 2, pp. 1242–1246 (<https://www.legal-tools.org/doc/01addc/>).
3. Kuniji Shibahara, and William A. Schabas, “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, Munich/Oxford/Baden-Baden, 2016, pp. 1494–1496 (<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*, vol. 2, A. Pedone, Paris, 2012, pp. 1389–1394 (<https://www.legal-tools.org/doc/872bf2/>).
5. Enrique Carnero Rojo, “Rome Statute of the International Criminal Court – Article 61: Confirmation of the charges before trial”, in De Hert *et al.* (eds.), *Code of International Criminal Law and Procedure*, Larcier, Brussels, 2013, pp. 260–262 (<https://www.legal-tools.org/doc/3f10e0/>).
6. Håkan Friman *et al.*, “Charges”, in Göran Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, p. 406 (<https://www.legal-tools.org/doc/bcad4c/>).
7. Kai Ambos, *Treatise on International Criminal Law*, vol. 3, Oxford University Press, 2016, p. 359 (<https://www.legal-tools.org/doc/995606/>).

Author: Enrique Carnero Rojo.

Rule 125

Decision to hold the confirmation hearing in the absence of the person concerned

General Remarks:

The confirmation hearing must, in principle, take place after the suspect has surrendered to the Court or been arrested. However, said hearing may be held in the absence of the suspect if the latter has waived his or her right to be present during the hearing, has fled or cannot be found and all reasonable measures have been taken to locate and arrest the person. In these circumstances, unless the Chamber decides otherwise, the suspect may be represented by counsel during the confirmation hearing held in his or her absence. The suspect will be notified of the decision to hold the confirmation hearing in his or her absence unless the person is not available to the Court. Moreover, this rule expressly provides that if the Pre-Trial Chamber decides not to hold a confirmation hearing in the absence of the person concerned, and the person is not available to the Court, the confirmation of the charges may not take place until the person is available to the Court. However, criteria justifying holding confirmation proceedings in absentia could not be agreed during the negotiations of the Rules of Procedure and Evidence.

Doctrine: For the bibliography, see the final comment on Rule 125.

Author: Enrique Carnero Rojo.

Rule 125(1)–(4)

1. After holding consultations under rules 123 and 124, the Pre-Trial Chamber shall decide whether there is cause to hold a hearing on confirmation of charges in the absence of the person concerned, and in that case, whether the person may be represented by counsel. The Pre-Trial Chamber shall, when appropriate, set a date for the hearing and make the date public.

2. The decision of the Pre-Trial Chamber shall be notified to the Prosecutor and, if possible, to the person concerned or his or her counsel.

3. If the Pre-Trial Chamber decides not to hold a hearing on confirmation of charges in the absence of the person concerned, and the person is not available to the Court, the confirmation of charges may not take place until the person is available to the Court. The Pre-Trial Chamber may review its decision at any time, at the request of the Prosecutor or on its own initiative.

4. If the Pre-Trial Chamber decides not to hold a hearing on confirmation of charges in the absence of the person concerned, and the person is available to the Court, it shall order the person to appear.

Cause to Hold the Confirmation Hearing in Absentia:

The Pre-Trial Chamber decides on whether the confirmation hearing may be held in absentia on the basis of (i) the written request personally executed by the suspect intending to waive his or her right to be present at the confirmation of charges hearing¹ and/or (ii) its consultations with the Prosecutor on

¹ ICC, *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, Transcript, 11 July 2008, ICC-01/04-01/07-T-46-ENG, pp. 23–24 (<https://www.legal-tools.org/doc/fd87a4/>); *Prosecutor v. Banda and Jerbo*, Pre-Trial Chamber I, Decision postponing the confirmation hearing and setting a deadline for the submission of the suspects' written request to waive their right to attend the confirmation hearing, 22 October 2010, ICC-02/05-03/09-81, para. 10 (<https://www.legal-tools.org/doc/ea0806/>); *Prosecutor v. Banda and Jerbo*, Pre-Trial Chamber I, Second decision setting a deadline for the submission of the suspects' written request to waive their right to attend the confirmation hearing, 27 October 2010, ICC-02/05-03/09-87, para. 6 (<https://www.legal-tools.org/doc/5533ea/>); *Prosecutor v. Banda and Jerbo*, Pre-Trial Chamber I, Decision on issues related to the hearing on the confirmation of charges, 17 November 2010, ICC-02/05-03/09-103, paras. 1–4 (<https://www.legal-tools.org/doc/73accb/>).

whether there is a cause to proceed with the confirmation of charges proceedings against co-suspects in absentia.²

Cross-references:

Article 61(2)(b).

Rules 123, 124.

Doctrine:

1. Håkan Friman, “The Pre-Trial Phase – Part 5 of the Statute”, 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. 529 (<https://www.legal-tools.org/doc/e34f81/>).
2. Håkan Friman *et al.*, “Charges”, Göran Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, p. 404 (<https://www.legal-tools.org/doc/bcad4c/>).
3. Kai Ambos, *Treatise on International Criminal Law*, vol. 3, Oxford University Press, 2016, p. 359 (<https://www.legal-tools.org/doc/995606/>).

Author: Enrique Carnero Rojo.

² ICC, *Prosecutor v. Kony et al.*, Pre-Trial Chamber II, Decision Severing the Case Against Dominic Ongwen, 6 February 2015, ICC-02/04-01/05-424, para. 7 (<https://www.legal-tools.org/doc/16fb19/>).

Rule 126

Confirmation hearing in the absence of the person concerned

1. *The provisions of rules 121 and 122 shall apply mutatis mutandis to the preparation for and holding of a hearing on confirmation of charges in the absence of the person concerned.*
2. *If the Pre-Trial Chamber has determined that the person concerned shall be represented by counsel, the counsel shall have the opportunity to exercise the rights of that person.*
3. *When the person who has fled is subsequently arrested and the Court has confirmed the charges upon which the Prosecutor intends to pursue the trial, the person charged shall be committed to the Trial Chamber established under article 61, paragraph 11. The person charged may request in writing that the Trial Chamber refer issues to the Pre-Trial Chamber that are necessary for the Chamber's effective and fair functioning in accordance with article 64, paragraph 4.*

General Remarks:

The procedural rules on confirmation hearings held in the presence of the suspect apply *mutatis mutandis* to confirmation hearings *in absentia*. Moreover, persons whose charges have been confirmed in their absence may request the Trial Chamber to refer said charges to the Pre-Trial Chamber in order to have them examined once again, this time in their presence.

Doctrine:

1. Håkan Friman, “The Pre-Trial Phase – Part 5 of the Statute”, 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. 529–530 (<https://www.legal-tools.org/doc/e34f81/>).
2. Håkan Friman *et al.*, “Charges”, in Göran Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, p. 404 (<https://www.legal-tools.org/doc/bcad4c/>).

Author: Enrique Carnero Rojo.

*Section VI. Closure of the Pre-Trial Phase***Rule 127****Procedure in the event of different decisions on multiple charges**

If the Pre-Trial Chamber is ready to confirm some of the charges but adjourns the hearing on other charges under article 61, paragraph 7 (c), it may decide that the committal of the person concerned to the Trial Chamber on the charges that it is ready to confirm shall be deferred pending the continuation of the hearing. The Pre-Trial Chamber may then establish a time limit within which the Prosecutor may proceed in accordance with article 61, paragraph 7 (c) (i) or (ii).

General Remarks:

The charges filed by the Prosecution may be confirmed only in part. In said cases, the Pre-Trial Chamber may decide to refer the confirmed charges to the Trial Chamber and, instead of declining to confirm the remaining charges, continue working on them. As a consequence, the Pre-Trial Chamber may issue more than one decision on the charges submitted by the Prosecution. Alternatively, the Chamber may request the Prosecution to consider providing further evidence, conducting further investigations and/or amending the remaining charges within a given deadline. In these circumstances, the Chamber may decide not to commit the suspect for trial on the charges for which it has found sufficient evidence until it decides on the remaining charges.

Analysis:***Continuation of the Hearing:***

As stated by Pre-Trial Chamber I in the *Gbagbo and Blé Goudé* case:

As to the phrase “with respect to a particular charge” in Article 61(7)(c)(i) of the Statute, this phrase does allow for the Chamber to adjourn the Hearing with respect to one or more charges, including any element within the charge(s) in question. This interpretation also reconciles Article 61(7)(c)(i) of the Statute with rule 127 of the Rules of Procedure and Evidence, which contemplates the possibility of adjourning the hearing under Article 61(7)(c) of the Statute with respect to multiple charges [...] For these reasons, the Chamber, by majority, a) decides to adjourn the hearing, b) requests the Prosecutor to consider

providing further evidence or conducting further investigation with respect to all charges [...] g) decides that the 60-day period required for the issuance of the decision on the confirmation of charges will start running anew as of the date of receipt of the last written submission.¹

Cross-reference:

Article 61(7)(c).

Doctrine:

1. Håkan Friman, “The Pre-Trial Phase – Part 5 of the Statute”, 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. 531 (<https://www.legal-tools.org/doc/e34f81/>).
2. 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*, vol. 2, A. Pedone, Paris, 2012, p. 1411 (<https://www.legal-tools.org/doc/872bf2/>).
3. Kai Ambos, *Treatise on International Criminal Law*, vol. 3, Oxford University Press, 2016, p. 362 (<https://www.legal-tools.org/doc/995606/>).

Author: Enrique Carnero Rojo.

¹ ICC, *Prosecutor v. Gbagbo and Blé Goudé*, 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. 14 and pp. 22, 24 (<https://www.legal-tools.org/doc/2682d8/>).

Rule 128

Amendment of the charges

General Remarks:

The charges confirmed by the Pre-Trial Chamber are specific crimes for which the Prosecution intends to bring a person to trial. However, investigations may continue after the charges have been confirmed and, as a consequence, the Prosecution may seek to modify the confirmed charges or add further charges thereto before the start of the trial.¹ The participants may be requested to make observations in this regard. If the Chamber determines that the suggested amendments amount to additional charges or more serious ones, a new confirmation hearing – with or without the presence of the person concerned – must be held before the Pre-Trial Chamber to decide whether said charges will proceed to trial. It is clear that new charges deserve an additional confirmation hearing. However, there is no indication in the Statute and the Rules of Procedure and Evidence as to the comparative seriousness of the crimes. In these circumstances, the preservation of the fair trial rights of the accused (especially the right to be informed promptly and in detail of the charges) may serve as guidance for the application of this rule.

Doctrine: For the bibliography, see the final comment on Rule 128.

Author: Enrique Carnero Rojo.

¹ ICC, *Prosecutor v. Lubanga*, Appeals Chamber I, 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. 51 (<https://www.legal-tools.org/doc/7813d4/>).

Rule 128(1)–(3)

- 1. If the Prosecutor seeks to amend charges already confirmed before the trial has begun, in accordance with article 61, the Prosecutor shall make a written request to the Pre-Trial Chamber, and that Chamber shall so notify the accused.*
- 2. Before deciding whether to authorize the amendment, the Pre-Trial Chamber may request the accused and the Prosecutor to submit written observations on certain issues of fact or law.*
- 3. If the Pre-Trial Chamber determines that the amendments proposed by the Prosecutor constitute additional or more serious charges, it shall proceed, as appropriate, in accordance with rules 121 and 122 or rules 123 to 126.*

Observations on Requested Amendment of the Charges

Observations of the Accused:

Before deciding on whether or not to grant the permission requested by the Prosecution or to authorize the amendment sought under Article 61(9) of the Statute, it may be appropriate to request the accused person(s) to submit written observations on the Prosecutor's request, pursuant to Rule 128(2) of the Rules.¹

Views of Victim Participants:

Pursuant to Rule 93, for some issues, such as the amendment of the charges (Rule 128), the Chamber may seek the views of victims or their legal representatives participating pursuant to Rules 89 to 91 (*Kenyatta and Muthaura*, 29 January 2013, para. 11).

Cross-references:

Article 61(9).

Rules 93, 121, 122, 123, 124, 125 and 126.

Doctrine:

1. Håkan Friman, "The Pre-Trial Phase – Part 5 of the Statute", in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court:*

¹ 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. 8 ('*Kenyatta and Muthaura*, 29 January 2013') (<https://www.legal-tools.org/doc/3f752a/>).

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- Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, p. 532 (<https://www.legal-tools.org/doc/e34f81/>).
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*, vol. 2, Oxford University Press, 2002, pp. 1242–1246 (<https://www.legal-tools.org/doc/01addc/>).
 3. Kuniji Shibahara and William A. Schabas, “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, Munich/Oxford/Baden-Baden, 2016, pp. 1543–1546 (<https://www.legal-tools.org/doc/040751/>).
 4. Enrique Carnero Rojo, “Rome Statute of the International Criminal Court – Article 61: Confirmation of the charges before trial”, in Paul De Hert *et al.* (eds.), *Code of International Criminal Law and Procedure*, Larcier, Brussels, 2013, p. 271 (<https://www.legal-tools.org/doc/3f10e0/>).
 5. Håkan Friman *et al.*, “Charges”, in Göran Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, p. 422 (<https://www.legal-tools.org/doc/bcad4c/>).
 6. Kai Ambos, *Treatise on International Criminal Law*, vol. 3, Oxford University Press, 2016, pp. 418–419 (<https://www.legal-tools.org/doc/995606/>).

Author: Enrique Carnero Rojo.

Rule 129

Notification of the decision on the confirmation of charges

The decision of the Pre-Trial Chamber on the confirmation of charges and the committal of the accused to the Trial Chamber shall be notified, if possible, to the Prosecutor, the person concerned and his or her counsel. Such decision and the record of the proceedings of the Pre-Trial Chamber shall be transmitted to the Presidency.

General Remarks:

The decision on the confirmation of charges must be notified to the Prosecutor, the suspect and the suspect's counsel. Since the confirmation hearing may also be held when the suspect is not available to the Court, the notification of the decision to the latter may not always be possible. Other participants in the confirmation hearing, such as victims and amici curiae, are notified as well. The decision and the record of the pre-trial proceedings are sent to the Presidency, which will in turn transmit them to the Trial Chamber assigned for conducting trial.

Analysis:

The decision of the Pre-Trial Chamber on the confirmation of charges and the committal of the accused to the Trial Chamber shall be notified, if possible, to the Prosecutor, the person concerned and his or her counsel. Such decision and the record of the proceedings of the Pre-Trial Chamber shall be transmitted to the Presidency.

Cross-reference:

Article 61(11).

Doctrine:

1. Håkan Friman, "The Pre-Trial Phase – Part 5 of the Statute", 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. 532 (<https://www.legal-tools.org/doc/e34f81/>).
2. Enrique Carnero Rojo, "Rome Statute of the International Criminal Court – Article 61: Confirmation of the charges before trial", in De Hert *et al.* (eds.), *Code of International Criminal Law and Procedure*, Larcier, Brussels, 2013, p. 273 (<https://www.legal-tools.org/doc/3f10e0/>).

3. Kai Ambos, *Treatise on International Criminal Law*, vol. 3, Oxford University Press, 2016, pp. 362, 513 (<https://www.legal-tools.org/doc/995606/>).

Author: Enrique Carnero Rojo.

Rule 130

Constitution of the trial chamber

General Remarks:

The charges confirmed against a person are transmitted to an existing or a newly established Trial Chamber, which will decide on said charges. For this purpose, the Trial Chamber receives from the Presidency the decision whereby the Pre-Trial Chamber confirmed the charges against the accused, as well as all the evidence previously communicated to the Pre-Trial Chamber. The Presidency only transmits to the Trial Chamber the evidence and the decision on the confirmation of charges after said decision becomes final, namely when no leave to appeal the decision has been granted or when all interlocutory appeals against it have been decided.

Doctrine: For the bibliography, see the final comment on Rule 130.

Author: Enrique Carnero Rojo.

Rule 130(1)

When the Presidency constitutes a Trial Chamber and refers the case to it, the Presidency shall transmit the decision of the Pre-Trial Chamber and the record of the proceedings to the Trial Chamber. The Presidency may also refer the case to a previously constituted Trial Chamber.

Transmission of the Record of the Proceedings to the Trial Chamber Purpose of the Transmission of the Record:

The transmission of the decision on the confirmation of charges is necessary to ensure that there is a complete understanding of the “statement of facts” underlying the charges confirmed by the Pre-Trial Chamber.¹ The decision on the confirmation of charges is the only document that can serve as a reference during the trial proceedings and binds the Trial Chamber to the factual allegations in the charges.² 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 also be provided for the purposes of the trial (*Bemba*, 21 June 2010, para. 30) or a summary of the charges confirmed may have to be prepared by the Prosecution (*Katanga and Ngudjolo*, 29 October 2009, paras. 12–13 and 17). Moreover, the transmission of the record includes all pending applications before the Pre-Trial Chamber, considering that there can be no gap in the proceedings nor can the proceeding be delayed.³

Responsibility for the Transmission of the Record:

Responsibility for the transmission of the record lies with the Presidency in pursuance of the administrative or other functions entrusted to the Presidency as foreseen in Article 38(3) of the Statute. As such, it is to the

¹ ICC, *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. 29 (*‘Bemba*, 21 June 2010’) (<https://www.legal-tools.org/doc/670c33/>).

² ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, Decision on the Filing of a Summary of the Charges by the Prosecutor, 29 October 2009, ICC-01/04-01/07-1547-tENG, para. 16 (*‘Katanga and Ngudjolo*, 29 October 2009’) (<https://www.legal-tools.org/doc/7e906f/>); *Bemba*, 21 June 2010, paras. 32–33.

³ ICC, *Prosecutor v. Lubanga*, Presidency, Decision transmitting the pre-trial record of proceedings in the case of The Prosecutor v Thomas Lubanga Dyilo to Trial Chamber I, ICC-01/04-01/06-920, 5 June 2007 (<https://www.legal-tools.org/doc/386dac/>).

Presidency, and not to the Appeals Chamber, that any application to stay the transmission of the record should be made.⁴ The duty to set up a Trial Chamber and to transmit the decision and record of the proceedings thereto placed upon the Presidency is mandatory and “cannot be the subject of judicial proceedings”, as well as the duty established by Rule 130 of the Rules to transmit the record of the proceedings before the Pre-Trial Chamber to the Trial Chamber (*Lubanga*, 9 March 2007, para. 9). Consequently, there is no power conferred upon the Appeals Chamber to stop the Presidency as an organ of the Court established under the Statute from doing what the Statute mandates it to do.

Cross-reference:

Article 61(11).

Doctrine:

1. Håkan Friman, “The Pre-Trial Phase – Part 5 of the Statute”, 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. 532 (<https://www.legal-tools.org/doc/e34f81/>).
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*, vol. 2, Oxford University Press, 2002, pp. 1242–46 (<https://www.legal-tools.org/doc/01addc/>).
3. Kuniji Shibahara and William A. Schabas, “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, Munich/Oxford/Baden-Baden, 2016, pp. 1547–1549 (<https://www.legal-tools.org/doc/040751/>).
4. Leïla Bourguiba, “Article 61: Confirmation des charges avant le procès”, Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour*

⁴ 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. 8 (<https://www.legal-tools.org/doc/67912e/>).

pénale internationale: Commentaire article par article, vol. 2, A. Pedone, Paris, 2012, pp. 1403, 1406 (<https://www.legal-tools.org/doc/872bf2/>).

5. Enrique Carnero Rojo, “Rome Statute of the International Criminal Court – Article 61: Confirmation of the charges before trial”, De Hert *et al.* (eds.), *Code of International Criminal Law and Procedure*, Larcier, Brussels, 2013, p. 273 (<https://www.legal-tools.org/doc/3f10e0/>).
6. Kai Ambos, *Treatise on International Criminal Law*, vol. 3, Oxford University Press, 2016, pp. 362, 513 (<https://www.legal-tools.org/doc/995606/>).

Author: Enrique Carnero Rojo.

CHAPTER 6. TRIAL PROCEDURE

Rule 131

- 1. The Registrar shall maintain the record of the proceedings transmitted by the Pre-Trial Chamber, pursuant to rule 121, sub-rule 10.*
- 2. Subject to any restrictions concerning confidentiality and the protection of national security information, the record may be consulted by the Prosecutor, the defence, the representatives of States when they participate in the proceedings, and the victims or their legal representatives participating in the proceedings pursuant to rules 89 to 91.*

Rule 131 is part of the ‘package’ of provisions that establishes the disclosure regime of the Court, other provisions include Articles 61(3), 64(3)(c) and (6)(d), 67(2) of the ICC Statute, Rules 76–84 and 121(1)). In essence, Rules 131 and 121(10) provide that the Registrar shall create and maintain “the record of the proceedings” which may be consulted by the relevant parties.

In *Lubanga*, Trial Chamber I considered “that Rule 131(2) of the Rules provides participating victims the right to consult the record of the proceedings, including the index, subject to any restrictions concerning confidentiality and the protection of national security information.¹ Due to the fact that confidential filings within the record often contain sensitive information related to national security, protection of witnesses and victims, and the prosecution’s investigations, the presumption will be that the legal representatives of victims shall have access only to public filings”.

Cross-references:

Articles 61(3), 64(3)(c) and (6)(d), and 67(2).
Rules 76–84 and 121(1).

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. 511 (<https://www.legal-tools.org/doc/995606/>).

¹ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on victim’s participation, 18 January 2008, ICC-01/04-01/06-1119, para. 86 (<https://www.legal-tools.org/doc/4e503b/>).

2. Helen Brady, “Disclosure of Evidence”, 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. 404, 405, 408, 426 (<https://www.legal-tools.org/doc/e34f81/>).
3. Helen Brady, “Setting the Record Straight: A Short Note on Disclosure and ‘the Record of the Proceedings’ “, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 267 (<https://www.legal-tools.org/doc/95e5f9/>).

Author: Mark Klamberg.

Rule 132

1. Promptly after it is constituted, the Trial Chamber shall hold a status conference in order to set the date of the trial. The Trial Chamber, on its own motion, or at the request of the Prosecutor or the defence, may postpone the date of the trial. The Trial Chamber shall notify the trial date to all those participating in the proceedings. The Trial Chamber shall ensure that this date and any postponements are made public.

2. In order to facilitate the fair and expeditious conduct of the proceedings, the Trial Chamber may confer with the parties by holding status conferences as necessary.

Sub-rule 1 provides that promptly after it is constituted, the Trial Chamber shall hold a status conference in order to set the date of the trial. The purpose of holding this status Conference is to ensure a swift transition from the close of the -pre-trial phase and the start of the trial.

There is no definition of “promptly” and no time limit is in the rule. Setting a date of the trial may depend on several factors, including whether the accused intend to make admission of guilt, the state of readiness of the parties, estimates of trial length (which in turn depends on number of witnesses and the complexity of the issues), availability of courtrooms and judges.¹

In the first Status Conference, a wide range of issues may be discussed as illustrated in the *Ntaganda* case:

1. Timing, volume and modalities of disclosure of evidence pursuant to Rule 76 of the Rules;
2. Whether the Prosecution anticipates issues concerning the protection of witnesses and other persons (including the need for redactions), the disclosure of identities of witnesses, as well as referrals to the Court’s witness protection program;
3. Material already disclosed and intended to be disclosed by the Prosecution pursuant to Article 67(2) of the Statute and Rule 77 of the Rules;

¹ Peter Lewis, “Confirmation Hearing to Trial”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 225–226 (<https://www.legal-tools.org/doc/95e5f9/>).

4. Whether there are any outstanding issues relating to documents or information which the Prosecution obtained on the condition of confidentiality pursuant to Article 54(3)(e) of the Statute;
5. Whether the parties intend to call expert witnesses pursuant to Regulation 44 and, if so, whether they intend to give joint or separate instructions to them;
6. Evidence to be introduced under Rule 69 as regards agreed facts;
7. Update on victims' applications and the procedure for allowing victims to participate in the trial proceedings;
8. Languages to be used in the proceedings, in particular, the languages spoken by the witnesses the parties intend to call and victims the legal representatives may seek authorisation to call; and
9. Commencement date of the trial.²

To ensure flexibility, the Trial Chamber may, on its own motion, or at the request of the Prosecutor or the defence, may postpone the date of the trial.

Cross-reference:

Article 64(3)(a).

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, pp. 363, 365, 385, 424 (<https://www.legal-tools.org/doc/995606/>).
2. Gilbert Bitti, "Article 64", 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. 1598–1599 (<https://www.legal-tools.org/doc/040751/>).
3. 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. 542 (<https://www.legal-tools.org/doc/e34f81/>).

² ICC, *Prosecutor v. Ntaganda*, Trial Chamber VI, Order Scheduling a Status Conference and Setting a Provisional Agenda, 21 July 2014, ICC-01/04-02/06-339, para. 5 (<https://www.legal-tools.org/doc/6b4dbe/>).

4. Peter Lewis, “Confirmation Hearing to Trial”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 225–226 (<https://www.legal-tools.org/doc/95e5f9/>).

Author: Mark Klamberg.

Rule 132 bis⁶

- 1. In exercising its authority under article 64, paragraph 3 (a), a Trial Chamber may designate one or more of its members for the purposes of ensuring the preparation of the trial.*
- 2. The judge shall take all necessary preparatory measures in order to facilitate the fair and expeditious conduct of the trial proceedings, in consultation with the Trial Chamber.*
- 3. The judge may at any time, proprio motu or, if appropriate, at the request of a party, refer specific issues to the Trial Chamber for its decision. A majority of the Trial Chamber may also decide proprio motu or, if appropriate, at the request of a party, to deal with issues that could otherwise be dealt with by the judge.*
- 4. In order to fulfil his or her responsibilities for the preparation of the trial, the judge may hold status conferences and render orders and decisions. The judge may also establish a work plan indicating the obligations the parties are required to meet pursuant to this rule and the dates by which these obligations must be fulfilled.*
- 5. The functions of the judge may be performed in relation to preparatory issues, whether or not they arise before or after the commencement of the trial. These issues may include:*
 - (a) Ensuring proper disclosure between the parties;*
 - (b) Ordering protective measures where necessary;*
 - (c) Dealing with applications by victims for participation in the trial, as referred to in article 68, paragraph 3;*
 - (d) Conferring with the parties regarding issues referred to in regulation 54 of the Regulations of the Court, decisions thereon being taken by the Trial Chamber;*
 - (e) Scheduling matters, with the exception of setting the date of the trial, as referred to in rule 132, sub-rule 1;*
 - (f) Dealing with the conditions of detention and related matters; and*
 - (g) Dealing with any other preparatory matters that must be resolved which do not otherwise fall within the exclusive competence of the Trial Chamber.*
- 6. The judge 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, nor shall he or she, subject to sub-rule 5, make decisions that affect the substantive rights of victims.*

⁶ As amended by resolution ICC-ASP/11/Res.2.

Originally, the use of single judge was only foreseen for the Pre-Trial Chamber and not for the Trial Chamber (Articles 39(2)(b)(iii) and 57(2)). With resolution ICC-ASP/11/Res.2, Rule 132 *bis* was introduced that allows the Trial Chamber to designate a single judge to prepare the trial.¹ This may appear to be at odds with Article 39(2)(b)(ii) which provides that “[t]he functions of the Trial Chamber shall be carried out by three judges of the Trial Division”. Instead, Rule 132 *bis* is based on Article 64(3)(a) which confers broad Powers to the Trial Chamber to “adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings”.²

Ambos notes that there is no explicit ICC provision which allows a *pre-appeal* judge as known from the *ad hoc* tribunals (ICTY RPE Rule 127(B), ICTR RPE Rule 198 *bis*, IRMCT RPE Rule 135). However, such a judge may be based on an analogous application of ICC Rule 132 *bis* via Rule 149.³

Cross-references:

Article 64(3)(a).

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, pp. 363, 551 (<https://www.legal-tools.org/doc/995606/>).
2. Gilbert Bitti, “Article 64”, 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. 1598–1599 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

¹ ICC ASP, Amendment of the Rules of Procedure and Evidence, Resolution ICC-ASP/11/Res.2, ASP, 21 November 2012 (<https://www.legal-tools.org/doc/d09f58/>).

² Gilbert Bitti, “Article 64”, 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. 1599 (<https://www.legal-tools.org/doc/040751/>).

³ Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. 551 (<https://www.legal-tools.org/doc/995606/>).

Rule 133

Challenges to the jurisdiction of the Court or the admissibility of the case at the commencement of the trial, or subsequently with the leave of the Court, shall be dealt with by the Presiding Judge and the Trial Chamber in accordance with rule 58.

Although challenges to the jurisdiction of the Court or the admissibility of the case are expected early in the proceedings, Article 19(4) provides that such challenges shall take place prior to or at the commencement of the trial. However, the same provision allows such challenges during the trial in exceptional circumstances and with leave of the Court. Rule 133 establishes a special regime for such challenges while Rule 134 sets out the regime for other motions.

Cross-reference:

Article 19(4).

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, pp. 252, 324, 363 (<https://www.legal-tools.org/doc/995606/>).
2. Christopher K. Hall, Daniel D. Ntanda and Manuel J. Ventura, “Article 19”, 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. 877–880 (<https://www.legal-tools.org/doc/040751/>).
3. 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. 542–543 (<https://www.legal-tools.org/doc/e34f81/>).

Author: Mark Klamberg.

Rule 134

1. Prior to the commencement of the trial, the Trial Chamber on its own motion, or at the request of the Prosecutor or the defence, may rule on any issue concerning the conduct of the proceedings. Any request from the Prosecutor or the defence shall be in writing and, unless the request is for an ex parte procedure, served on the other party. For all requests other than those submitted for an ex parte procedure, the other party shall have the opportunity to file a response.

2. At the commencement of the trial, the Trial Chamber shall ask the Prosecutor and the defence whether they have any objections or observations concerning the conduct of the proceedings which have arisen since the confirmation hearings. Such objections or observations may not be raised or made again on a subsequent occasion in the trial proceedings, without leave of the Trial Chamber in this proceeding.

3. After the commencement of the trial, the Trial Chamber, on its own motion, or at the request of the Prosecutor or the defence, may rule on issues that arise during the course of the trial.

Rule 134 was adopted to meet concerns of many delegations that the proceedings at the *ad hoc* tribunals were being delayed by endless procedural challenges.¹

Sub-rule 1 encourages the parties to make their requests and the Trial Chamber to rule on procedural issues prior to the commencement of trial.

Sub-rule 2 provides that at the commencement of the trial, the Trial Chamber shall ask the Prosecutor and the defence whether they have any objections or observations concerning the conduct of the proceedings which have arisen since the confirmation hearings. The same sub-rule 2 only allows later challenges with the leave of the Court.

Cross-reference:

Article 64((3)(a).

¹ 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. 543 (<https://www.legal-tools.org/doc/e34f81/>).

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, pp. 99, 363, 506 (<https://www.legal-tools.org/doc/995606/>).
2. Gilbert Bitti, “Article 64”, 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. 1599 (<https://www.legal-tools.org/doc/040751/>).
3. 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. 543–544 (<https://www.legal-tools.org/doc/e34f81/>).
4. Peter Lewis, “Confirmation Hearing to Trial”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 228 (<https://www.legal-tools.org/doc/95e5f9/>).

Author: Mark Klamberg.

Rule 134 bis⁷

- 1. 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.**
- 2. The Trial Chamber shall rule on the request on a case-by-case basis, with due regard to the subject matter of the specific hearings in question.**

⁷ As amended by resolution ICC-ASP/17/Res.2.

Article 63(1) of the ICC Statute provides that the accused shall be present during the trial which would suggest that *in absentia* trials are not allowed. The introduction of Rules 134 bis, 134 ter and 134 quater provides for exceptions from this requirement. This amendment of the Rules of Procedure and Evidence has been criticized as political interference.¹

The requirement in Article 63(1) was initially uncontroversial. The absolute requirement on presence came under question in the Kenya cases. With the voluntary appearance of the President Kenyatta the judges attempted to reconcile the interests of Heads of State or other high-level officials to continue performing their duties on the one hand with the presence requirement to attend the trial on the other.² The issue became even more acute with the terrorist attack 21 September 2013 against Westgate Mall in Nairobi which happened during the appeal.³

The Assembly of State Parties responded to the development in the Kenya cases and political pressure by introducing Rules 134 bis, 134 ter and

¹ Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. 368 (<https://www.legal-tools.org/doc/995606/>).

² See 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/>); *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/>); *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/>).

³ William A. Schabas and 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, p. 1568 (<https://www.legal-tools.org/doc/040751/>).

134 *quater*.⁴ The new rules provide for a three-stages system softening the presence requirement: (i) virtual instead of physical presence (Rule 134 *bis*); (ii) partial absence (Rule 134 *ter*); and (iii) full absence of the defendant from trial to be represented by counsel only (Rule 134 *quater*) (see Ambos, 2016, pp. 162–165).

Cross-reference:

Article 64((3)(a).

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, pp. 59, 162, 164–165, 368 (<https://www.legal-tools.org/doc/995606/>).
2. William A. Schabas and 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. 1567–70 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

⁴ ICC ASP, Amendments to the Rules of Procedure and Evidence, Resolution ICC-ASP/12/Res.7, 27 November 2013 (<https://www.legal-tools.org/doc/c50839/>).

Rule 134 *ter*⁸

1. An accused subject to a summons to appear may submit a written request to the Trial Chamber to be excused and to be represented by counsel only during part or parts of his or her trial.

2. The Trial Chamber shall only grant the request if it is satisfied that:

- (a) exceptional circumstances exist to justify such an absence;**
- (b) alternative measures, including changes to the trial schedule or a short adjournment of the trial, would be inadequate;**
- (c) the accused has explicitly waived his or her right to be present at the trial; and**
- (d) the rights of the accused will be fully ensured in his or her absence.**

3. The Trial Chamber shall rule on the request on a case-by-case basis, with due regard to the subject matter of the specific hearings in question. Any absence must be limited to what is strictly necessary and must not become the rule.

⁸ As amended by resolution ICC-ASP/17/Res.2.

Rule 134 *ter* allows for partial absence of the accused from trial. The background of the rule is described in the comment on Rule 134 *bis*. *Ruto and Sang* to be absent during part of the proceedings, the Appeals Chamber considered that the Trial Chamber did not properly exercise its discretion in the case: “the Trial Chamber in the present case interpreted the scope of its discretion too broadly and thereby exceeded the limits of its discretionary power”.¹ The Appeals Chamber stated that excusal was possible in exceptional circumstances:

- (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

¹ 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, paras. 61 and 63 (*‘Ruto and Sang, 25 October 2013’*) (<https://www.legal-tools.org/doc/575657/>).

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 (*Ruto and Sang*, 25 October 2013, para. 62).

The *ratio decidendi* of the Appeals Judgment has been incorporated into Rule 134 *ter* and Rule 134 *quater*.²

Cross-reference:

Article 64((3)(a).

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, pp. 59, 163, 368–369 (<https://www.legal-tools.org/doc/995606/>).
2. William A. Schabas and 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. 1567–70 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

² Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. 163 (<https://www.legal-tools.org/doc/995606/>).

Rule 134 *quater*⁹

1. An accused subject to a summons to appear who is mandated to fulfill extraordinary public duties at the highest national level may submit a written request to the Trial Chamber to be excused and to be represented by counsel only; the request must specify that the accused explicitly waives the right to be present at the trial.

2. The Trial Chamber shall consider the request expeditiously and, if alternative measures are inadequate, shall grant the request where it determines that it is in the interests of justice and provided that the rights of the accused are fully ensured. The decision shall be taken with due regard to the subject matter of the specific hearings in question and is subject to review at any time.

⁹ As amended by resolution ICC-ASP/17/Res.2.

Rule 134 *quater* allows for full absence of the defendant from the trial to be represented by counsel only. The background of the rule is described in the comment on Rule 134 *bis* and the comment on Rule 134 *ter*.

Excusal under Rule 134 *quater* is only possible for accused who need “to fulfill extraordinary public duties at the highest national level”, provided that person is represented by counsel and waives the right to be present. The request is decided upon by the Trial Chamber.

Cross-reference:

Article 64((3)(a).

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, pp. 59, 163–164, 368–369 (<https://www.legal-tools.org/doc/995606/>).
2. William A. Schabas and 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. 1567–70 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Rule 135

- 1. The Trial Chamber may, for the purpose of discharging its obligations under article 64, paragraph 8 (a), or for any other reasons, or at the request of a party, order a medical, psychiatric or psychological examination of the accused, under the conditions set forth in rule 113.*
- 2. The Trial Chamber shall place its reasons for any such order on the record.*
- 3. The Trial Chamber shall appoint one or more experts from the list of experts approved by the Registrar, or an expert approved by the Trial Chamber at the request of a party.*
- 4. Where the Trial Chamber is satisfied that the accused is unfit to stand trial, it shall 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 in accordance with rule 132.*

Rule 135 provides that the Trial Chamber may order a medical, psychiatric or psychological examination of the accused. The reference in the rule to Article 64(8)(a) concerns the obligation of the Chamber to “satisfy itself that the accused understands the nature of the charges”. The “other reasons” may include cases where the defence argues that the defendant suffers from a mental disease or defect that would exclude criminal responsibility pursuant to Article 31((1)(a).

Sub-rule 1 contains a cross-reference to Rule 113 which allows for medical, psychological or psychiatric examination during the pre-trial stage. Sub-rule 2 ensures that the Trial Chamber places its reasons for any such order on the record. Sub-rule 3 requires that only approved experts will be used. If the Trial Chamber finds that the accused is unfit to stand trial, it shall order that the trial be adjourned pursuant to sub-rule 4. If the accused recovers the Trial Chamber shall proceed with setting a trial date pursuant to Rule 132.

Cross-references:

Article 64(8)(a).

Rule 113.

Doctrine:

1. 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. 544–545 (<https://www.legal-tools.org/doc/e34f81/>).

Author: Mark Klamberg.

Rule 136

1. 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 that separate trials are necessary, in order to avoid serious prejudice to the accused, to protect the interests of justice or because a person jointly accused has made an admission of guilt and can be proceeded against in accordance with article 65, paragraph 2.

2. In joint trials, each accused shall be accorded the same rights as if such accused were being tried separately.

Rule 136 supplements Article 64(5) which provides that “the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused”.

During the negotiations several delegates were concerned that separate trials would be traumatic for witnesses and for that reason the threshold for separate trial was set to “serious” prejudice in sub-rule 1.¹ Thus, there is a presumption for a joint trial.

Sub-rule 2 provides that in joint trials, each accused shall be accorded the same rights as if such accused were being tried separately.

During the negotiations of rule there was a debate whether the rules should regulate how to deal with an accused facing multiple charges and who may seek a separate trial for each charge. No agreement was made and it was left unresolved.

The Pre-Trial Chamber decided to join the cases against *Katanga* and *Ngudjolo*.² 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

¹ 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. 546 (<https://www.legal-tools.org/doc/e34f81/>).

² ICC, *Prosecutor v. 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 [originally ICC-01/04-02/07-48] (<https://www.legal-tools.org/doc/eeae9/>).

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” (pp. 8–9). In *Katanga and Ngudjolo*, the Pre-Trial Chamber granted leave to appeal, and the Appeals Chamber upheld the decision of the Pre-Trial Chamber.³ The charges were later severed.⁴

Cross-reference:

Article 64(5).

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, pp. 369–70, 443 (<https://www.legal-tools.org/doc/995606/>).
2. Gilbert Bitti, “Article 64”, 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. 1605–7 (<https://www.legal-tools.org/doc/040751/>).
3. 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. 545–46 (<https://www.legal-tools.org/doc/e34f81/>).

Author: Mark Klamberg.

³ 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, 9 April 2008, ICC-01/04-01/07-384 (<https://www.legal-tools.org/doc/5be263/>); *Prosecutor v. Katanga and Ngudjolo*, 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/>).

⁴ 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 (<https://www.legal-tools.org/doc/f5cbd0/>).

Rule 137

- 1. In accordance with article 64, paragraph 10, 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.*
- 2. A Trial Chamber may order the disclosure of all or part of the record of closed proceedings when the reasons for ordering its non-disclosure no longer exist.*
- 3. The Trial Chamber may authorize persons other than the Registrar to take photographs, audio- and video-recordings and other means of capturing the sound or image of the trial.*

Rule 137 supplements Article 64(10) which provides that 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 obligation to make and preserve a record of the trial is particularly important in case of an appeal or in case of a revision under Article 84.

Sub-rule 1 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. The responsibility for the Registrar to keep records is also addressed in Rules 15 and 121(10).

Sub-rule 2 allows the Trial Chamber to order the disclosure of all or part of the record of closed proceedings when the reasons for ordering its non-disclosure no longer exist.

For the purpose of promoting public access to the proceedings, the Trial Chamber may authorize persons other than the Registrar to take photographs, audio- and video-recordings and other means of capturing the sound or image of the trial.

Cross-references:

Article 64(10).

Rules 15 and 121(10).

Doctrine:

1. Gérard Dive, “The Registry”, 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. 267 (<https://www.legal-tools.org/doc/e34f81/>).

2. Gilbert Bitti, “Article 64”, 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. 1620 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Rule 138

The Registrar shall retain and preserve, as necessary, all the evidence and other materials offered during the hearing, subject to any order of the Trial Chamber.

The obligation under Rule 138 to retain and preserve evidence and other materials offered during the hearing is particularly important in case of an appeal or in case of a revision under Article 84. The rule is inspired by the equivalent provisions in the ICTY and ICTR Rules, Rule 81(c) in the ICTY and ICTR rules, respectively.

Cross-references:

Article 64(10).

Rules 15, 121(10) and 137.

Doctrine:

1. John R.W.D. Jones and Steven Powles, *International Criminal Practice*, 3rd. ed., Oxford University Press, 2003, p. 708.
2. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, pp. 369–370, 443 (<https://www.legal-tools.org/doc/995606/>).

Author: Mark Klamberg.

Rule 139

General Remarks:

The Rule builds on Article 65 of the ICC Statute and elaborates on the procedure that the Trial Chamber must follow when an accused tenders an admission of guilt.

Doctrine: For the bibliography, see the final comment on Rule 139.

Author: Jenia Iontcheva Turner.

Rule 139(1)

1. After having proceeded in accordance with article 65, paragraph 1, the Trial Chamber, in order to decide whether to proceed in accordance with article 65, paragraph 4, may invite the views of the Prosecutor and the defence.

After determining the validity of the admission of guilt under Article 65(1) - that is, confirming that it is voluntary, informed, and supported by the facts - the Trial Chamber must decide whether to convict the accused and proceed directly to sentencing or to follow Article 65(4). Under Article 65(4), in the interests of justice, and in particular, the interests of victims, the Chamber may order a more complete presentation of evidence or it may entirely reject the admission of guilt and refer the case to ordinary trial proceedings. Rule 139(1) suggests that in deciding whether the interests of justice call for a more complete presentation of facts or referral to ordinary trial, the Chamber “may invite the views of the Prosecutor and the defence”.

While the Rule mentions only the prosecution and defense as parties to be consulted, one may expect that Chambers would solicit the views of victims as well.¹ Because decisions under Article 65(4) are to be made in the interests of justice, and in particular the interests of victims, it would make sense for Chambers to consult victims. This would also be consistent with Article 68(3), which states that the Trial Chamber may permit victims to present their concerns at appropriate proceedings, as long as this is “not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”. More concretely, Rule 93 provides that a Trial Chamber may seek the views of victims or their legal representatives in relation to issues referred to in Rule 139, that is, proceedings on admission of guilt.² Victims’ views on reparations and on sentencing may be especially relevant to the Chamber’s decision whether to proceed under Article 65(4).

Doctrine: For the bibliography, see the final comment on Rule 139.

Author: Jenia Iontcheva Turner.

¹ 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/>).

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/>).

Rule 139(2)

2. The Trial Chamber shall then make its decision on the admission of guilt and shall give reasons for this decision, which shall be placed on the record.

After deciding whether to accept an admission of guilt, the Trial Chamber must provide written reasons for its decision. This Rule is consistent with the practice of the ICTY and ICTR, although the Tribunal Rules did not have a formal requirement for a reasoned judgment after a conviction based on a guilty plea. The Rule reflects the civil-law emphasis on holding judges accountable for their decisions and ensuring that the verdict - even when resting on an admission of guilt - is firmly supported by the factual evidence.¹ It also allows for appellate review of the decision and the correction of any factual and legal errors that may have occurred.

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. Stephen C. Thaman, “A Typology of Consensual Criminal Procedures: An Historical and Comparative Perspective on the Theory and Practice of Avoiding the Full Criminal Trial”, in Stephen C. Thaman (ed.), *World Plea Bargaining*, Carolina Academic Press, 2010 (<https://www.legal-tools.org/doc/8d92f3/>).
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 (<https://www.legal-tools.org/doc/bcad4c/>).

Author: Jenia Iontcheva Turner.

¹ Stephen C. Thaman, “A Typology of Consensual Criminal Procedures: An Historical and Comparative Perspective on the Theory and Practice of Avoiding the Full Criminal Trial”, in Stephen C. Thaman (ed.), *World Plea Bargaining*, Carolina Academic Press, 2010, pp. 368, 369 (<https://www.legal-tools.org/doc/8d92f3/>).

Rule 140

1. If the Presiding Judge does not give directions under article 64, paragraph 8, the Prosecutor and the defence shall agree on the order and manner in which the evidence shall be submitted to the Trial Chamber. If no agreement can be reached, the Presiding Judge shall issue directions.

General Remarks:

Rule 140 concerns the order and manner in which the evidence shall be submitted to the Trial Chamber. It was one of the most controversial rules during the negotiations. While cross-examination of witnesses conducted by parties is at the essence in an adversarial system, the judge's role in questioning witnesses is Paramount in an inquisitorial system.¹

Although the ICC Statute states the main purpose of the hearing in Article 64 and outlines some general principles, such as that the hearing will normally be held in the presence of the accused, it does not detail the procedure to be followed. For common law lawyers, Article 64 lacks adequate guidance and could risk leading to the Court adopting procedures on a case-by-case basis (Lewis, 2001, p. 548). Rule 140 may be characterized as a clash of cultures. It does not contain any sequencing to instruct when the parties should examine a witness, which would be normal in a common law system. However, sub-rule 2(d) does provide that the defence shall have the right to be the last to examine a witness.

Turning to the participation of victims, in *Lubanga*, Pre-Trial Chamber I decided, *inter alia*, that “the Legal Representatives of the Victims may make opening and closing statements at the confirmation hearing in which they may not enlarge upon the evidence or facts in the case of “The Prosecutor v Thomas Lubanga Dyilo””² In Annex I of the aforesaid decision, Pre-Trial Chamber I decided that the prosecution examines its witness followed by cross-examination of the defence.³

¹ 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. 547–548 (<https://www.legal-tools.org/doc/e34f81/>).

² 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, p. 4 (*‘Lubanga, 7 November 2006’*) (<https://www.legal-tools.org/doc/abb2e3/>).

³ *Lubanga*, 7 November 2006, annex 1 , p. 12.

If the victims' representatives wants to ask questions of a particular witness pursuant to Rule 91(3), after the Prosecution had finished its examination-in-chief, they have to seek permission to do so from the Chamber.⁴ In determining whether and how the Legal Representatives of the victims were allowed to call victims they represented to testify, the Chamber was guided by the overriding concern that this take place in an expeditious manner not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial (*Katanga and Ngudjolo*, 20 November 2009, 13, para. 21).

In *Lubanga*, the Pre-Trial Chamber found that the rule applies *mutatis mutandis* to pre-trial proceedings (*Lubanga*, 7 November 2006, p. 3.)

Doctrine: For the bibliography, see the final comment on Rule 140.

Author: Mark Klamberg.

⁴ ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, Directions for the conduct of the proceedings and testimony in accordance with rule 140, 20 November 2009, ICC-01/04-01/07-1665, paras. 15–18 ('*Katanga and Ngudjolo*, 20 November 2009') (<https://www.legal-tools.org/doc/ddb123/>); a similar approach was taken in *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. 9 (<https://www.legal-tools.org/doc/ac5449/>); *Prosecutor v. Ruto et al.*, Pre-Trial Chamber II, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 5 August 2011, ICC-01/09-01/11-249, paras. 98–100 (<https://www.legal-tools.org/doc/102f41/>); *Prosecutor v. Muthaura et al.*, Pre-Trial Chamber II, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 26 August 2011, ICC-01/09-02/11-267, paras. 115–117 (<https://www.legal-tools.org/doc/f6f688/>).

Rule 140(1)

1. If the Presiding Judge does not give directions under article 64, paragraph 8, the Prosecutor and the defence shall agree on the order and manner in which the evidence shall be submitted to the Trial Chamber. If no agreement can be reached, the Presiding Judge shall issue directions.

The presiding judge has under Article 64(8)(b) and Rule 140(1) broad discretion to determine how the trial is to be conducted, a typical civil-law feature. However, the same rule is a compromise between civil law and common law since it also suggests that the conduct of the proceeding can be put in the hands of the parties themselves, clearly an adversarial element.¹

In *Katanga and Ngudjolo*, the parties and participants were largely in agreement about how the trial should be conducted.² Nevertheless, in order to avoid any ambiguity and to provide clear guidance, the Presiding Judge, after consultation with the Chamber, decided to issue detailed directions for the conduct of the proceedings and testimony (*Katanga and Ngudjolo*, 20 November 2009, pp. 9–43). This approach has been followed in *Bemba*.³

Doctrine: For the bibliography, see the final comment on Rule 140.

Author: Mark Klamberg.

¹ Kai Ambos, “International Criminal Procedure: “adversarial”, “inquisitorial” or “mixed”?”, in *International Criminal Law Review*, 2003, vol. 3, p. 20 (<https://www.legal-tools.org/doc/fdcf29/>).

² ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, Directions for the conduct of the proceedings and testimony in accordance with rule 140 including Corrigenda, 20 November 2009, ICC-01/04-01/07-1665, para. 3 (*Katanga and Ngudjolo*, 20 November 2009’) (<https://www.legal-tools.org/doc/ddb123/>).

³ 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 (<https://www.legal-tools.org/doc/ac5449/>).

Rule 140(2)

2. In all cases, subject to article 64, paragraphs 8 (b) and 9, article 69, paragraph 4, and rule 88, sub-rule 5, a witness may be questioned as follows:

Although there is no overt common law terminology, the four principles in sub-rule 2 adds guidance to Article 64(8)(b) that induces the Court to adopt key adversarial elements during the trial.¹

In *Lubanga*, Pre-Trial Chamber I decided, inter alia, that Rule 140(2) of the Rules shall apply *mutatis mutandis* to the testimony of the witness who shall be called to testify at the confirmation hearing.²

Doctrine: For the bibliography, see the final comment on Rule 140.

Author: Mark Klamberg.

¹ 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. 549–550 (<https://www.legal-tools.org/doc/e34f81/>).

² 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, p. 9 (<https://www.legal-tools.org/doc/abb2c3/>).

Rule 140(2)(a)

(a) A party that submits evidence in accordance with article 69, paragraph 3, by way of a witness, has the right to question that witness;

Article 69(3) provides that the parties may submit evidence relevant to the case. Rule 140(2)(a) adds what would appear obvious, the party that has called a witness has the right to question that witness.

Doctrine: For the bibliography, see the final comment on Rule 140.

Author: Mark Klamberg.

Rule 140(2)(b)

(b) The prosecution and the defence have the right to question that witness about relevant matters related to the witness's testimony and its reliability, the credibility of the witness and other relevant matters;

Rule 140(2)(b) provides that the prosecution and the defence have the right to question that witness about relevant matters related to the witness's testimony and its reliability, the credibility of the witness and other relevant matters. This may be done by cross-examination. Sub-rules 2(a) and 2(b) of Rule 140 read together with Rules 67(1) and 68 implicitly recognize the possibility of cross-examination and suggest that the party who submits the testimonial evidence is the first to examine the witness, who will then be examined by the other party.

In *Katanga and Ngudjolo* the Trial Chamber decided that cross-examination should be limited to matters raised during examination-in-chief and matters affecting the credibility of the witness. The cross-examining party might also induce the witness to give evidence about matters relevant to the case for the party, even if these were not raised during examination-in-chief. The Chamber stressed that cross-examination must also contribute to the ascertainment of the truth and was not to be used to obfuscate or delay the fact-finding process. The party cross-examining might ask leading, closed questions of a witness and challenge the credibility of a witness with challenging questions.¹ The Trial Chamber in *Bemba* expressed a preference for neutral questions in cross-examination, but stopped short of imposing a prohibition on leadings questions.² Moreover, when Trial Chamber I in *Lubanga* determined that the scope of examination by a party not calling a witness it stated that “[i]n line with Article 69(3) of the Statute [...] a party may question a witness it has not called about matters which go beyond the scope of the

¹ ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, Directions for the conduct of the proceedings and testimony in accordance with rule 140, 20 November 2009, ICC-01/04-01/07-1665, paras. 68–75 (<https://www.legal-tools.org/doc/ddb123/>).

² 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. 15 (<https://www.legal-tools.org/doc/ac5449/>); *Prosecutor v. Bemba*, Trial Chamber III, Decision on the Prosecution's Request for Leave to Appeal the Trial Chamber's Decision on Directions for the Conduct of the Proceedings, 15 December 2010, ICC-01/05–01/08-1086, para. 19 (<https://www.legal-tools.org/doc/9ecc2a/>).

witness's initial evidence".³ The reference to Article 69(3) suggests that the Trial Chamber wanted to emphasize the objective of truth-seeking.

Rule 140(2)(b) also allows questions pertaining to "other relevant matters". In *Lubanga*, Trial Chamber I held that "[t]he concept of 'other relevant matters' under Rule 140(2)(b) of the Rules, includes, *inter alia*, trial issues (for example, matters which impact on the guilt or innocence of the accused such as the credibility or reliability of the evidence), sentencing issues (mitigating or aggravating factors), and reparation issues (properties, assets and harm suffered)" (*Lubanga*, 29 January 2008, para. 32).

Doctrine: For the bibliography, see the final comment on Rule 140.

Author: Mark Klamberg.

³ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on various issues related to witnesses' testimony during trial, 29 January 2008, ICC-01/04-01/06-110 para. 32 ('*Lubanga*, 29 January 2008') (<https://www.legal-tools.org/doc/8367f1/>).

Rule 140(2)(c)

(c) The Trial Chamber has the right to question a witness before or after a witness is questioned by a participant referred to in sub-rules 2 (a) or (b);

The Trial Chamber has the right to question the witness, but is encouraged under sub-rule 2(c) 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. In *Bemba*, the Chamber stated that it "will not interfere with a party's decisions regarding its selection and presentation of evidence unless there is a compelling reason to do so. This measure of deference permits the parties to shape their presentation of evidence in a manner that best fits their overall theory of the case".¹

Doctrine: For the bibliography, see the final comment on Rule 140.

Author: Mark Klamberg.

¹ 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. 25 (<https://www.legal-tools.org/doc/a595ab/>).

Rule 140(2)(d)

(d) The defence shall have the right to be the last to examine a witness.

As indicated earlier, Rule 140 does not contain any sequencing to instruct when the parties should examine a witness, which would be normal in a common law system. However, sub-rule 2(d) introduces a limit to the discretion of the Chamber as it explicitly provides that the defence shall have the right to be the last to examine a witness.

Doctrine: For the bibliography, see the final comment on Rule 140.

Author: Mark Klamberg.

Rule 140(3)

3. Unless otherwise ordered by the Trial Chamber, a witness other than an expert, or an investigator if he or she has not yet testified, shall not be present when the testimony of another witness is given. However, a witness who has heard the testimony of another witness shall not for that reason alone be disqualified from testifying. When a witness testifies after hearing the testimony of others, this fact shall be noted in the record and considered by the Trial Chamber when evaluating the evidence.

The presumption is that each testimony should be taken separately to avoid witnesses mutually influencing each other. This is of particular importance in relation to witnesses who are testifying on their personal observation, but arguably less important when it comes to expert witnesses who testify on their technical, scientific or discrete sets of ideas or concepts.¹ Thus, sub-rule 3 makes a distinction between ‘expert witnesses’ and other witnesses, whereby different rules may apply, for example on the possibility for the witness to be present when another witness testifies.

Cross-references:

Article 64(8)(b) and 69(3).

Doctrine:

1. Kai Ambos, “International Criminal Procedure: “adversarial”, “inquisitorial” or mixed?”, in *International Criminal Law Review*, 2003, vol. 3, p. 20 (<https://www.legal-tools.org/doc/fdcf29/>).
2. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, pp. 100, 353, 366, 453–454, 465–466, 469, 483, 606 (<https://www.legal-tools.org/doc/995606/>).
3. Gilbert Bitti, “Article 64”, 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. 1615–18 (<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

¹ Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, pp. 469 and 483 (<https://www.legal-tools.org/doc/995606/>).

- Publishers, Leiden, 2013, pp. 112, 432, 433, 435, 436–437, 439 (<https://www.legal-tools.org/doc/0d524b/>).
5. 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. 547–550 (<https://www.legal-tools.org/doc/e34f81/>).
 6. Peter Lewis, “Confirmation Hearing to Trial”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 230–33 (<https://www.legal-tools.org/doc/95e5f9/>).
 7. Alphons Orie, “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*, Oxford University Press, 2002, pp. 1439–1495, p. 1488.

Author: Mark Klamberg.

Rule 141(1)

1. The Presiding Judge shall declare when the submission of evidence is closed.

When all evidence has been heard, the Presiding Judge shall pursuant to sub-rule 1 declare that the submission of evidence is closed and pursuant to sub-rule 2 invite the Prosecutor and the defence to make their closing statements.

In *Katanga and Ngudjolo*, the Presiding Judge declared that the submission of evidence was closed in accordance with Rule 141(1) of the Rules.¹ On 30 March 2012, both the Defence for Mr. Katanga and the Defence for Mr. Ngudjolo submitted their final briefs. In its final brief, the Defence for Mr. Katanga asked the Chamber to admit into evidence those portions of the Lubanga Judgment that address intermediaries DRC-OTP-P-143 and 316. The Trial Chamber rejected the Defence request.²

Doctrine: For the bibliography, see the final comment on Rule 141.

Author: Mark Klamberg.

¹ ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, Declaration of closure of submission of evidence, 7 February 2012, ICC-01/04-01/07-3235-tENG (<https://www.legal-tools.org/doc/ee605b/>).

² See ICC, *Prosecutor v. Lubanga*, Trial Chamber II, Décision relative à la requête de la Défense de Germain Katanga tendant à l'admission d'extraits du jugement prononcé dans l'affaire Lubanga, 26 April 2012, ICC-01/04-01/07-3279 (<https://www.legal-tools.org/doc/b4b7e8/>).

Rule 141(2)

2. The Presiding Judge shall invite the Prosecutor and the defence to make their closing statements. The defence shall always have the opportunity to speak last.

Sub-rule 2 provides that the Presiding Judge shall invite the Prosecutor and the defence to make their closing statements. The defence shall always have the opportunity to speak last, however the parties “may seek a right to reply and rejoinder”, subject to the Chamber’s discretion.¹

In *Lubanga*, the Trial Chamber issued an order on the timetable for closing submissions. The order of public oral closing statements was: the prosecution, the participating victims and finally the defence.²

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, pp. 366, 367 (<https://www.legal-tools.org/doc/995606/>).
2. Mark Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Martinus Nijhoff Publishers, Leiden, 2013, pp. 433–34 (<https://www.legal-tools.org/doc/0d524b/>).
3. 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. 550–51 (<https://www.legal-tools.org/doc/e34f81/>).
4. Peter Lewis, “Confirmation Hearing to Trial”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 233 (<https://www.legal-tools.org/doc/95e5f9/>).

Author: Mark Klamberg.

¹ ICC, *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, Public redacted version of Order on the arrangements for the submission of the written and oral closing statements (regulation 54 of the Regulations of the Court), 15 December 2011, ICC-01/04-01/07-3218-Red-tENG, para. 14 (<https://www.legal-tools.org/doc/67fb6d/>).

² ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Order on the timetable for closing submissions, 12 April 2011, ICC-01/04-01/06-2722, para. 7 (<https://www.legal-tools.org/doc/262a8f/>).

Rule 142

1. After the closing statements, the Trial Chamber shall retire to deliberate, in camera. The Trial Chamber shall inform all those who participated in the proceedings of the date on which the Trial Chamber will pronounce its decision. The pronouncement shall be made within a reasonable period of time after the Trial Chamber has retired to deliberate.

2. When there is more than one charge, the Trial Chamber shall decide separately on each charge. When there is more than one accused, the Trial Chamber shall decide separately on the charges against each accused.

The meaning of the ‘reasonable period of time’ and the criteria to be relied upon in the determination of whether the duration of deliberations satisfies Rule 142(1) remain to be judicially determined in the future. As was expected, the time taken by the ICC Trial Chambers in the preparation of judgment varied and was informed by their specific circumstances of cases. Both the *Lubanga* and *Ngudjolo* verdicts were returned within 7 months after the closing statements. This is *prima facie* not an extraordinarily lengthy period for deliberations and judgment-drafting as compared to the *ad hoc* tribunals. However, the *Katanga* judgment was delivered 22 months after the closing arguments. To a large extent, this was a consequence of the Trial Chamber’s decision to change the legal characterization of facts by modifying the mode of liability under Regulation 55.¹ The implementation of Regulation 55 in the advanced stage when the deliberations were well underway led to their interruption and to the delay of additional 15 months before the verdict could be rendered. According to the minority opinion, this situation violated the Chamber’s duty to ensure expeditious process (Article 64(2)), the accused’s right to be tried without undue delay (Article 67(1)(c)) and was inconsistent with the Chamber’s obligation under Rule 142(1).²

¹ ICC, *Prosecutor v. Katanga*, 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/FRA (<https://www.legal-tools.org/doc/51ded0/>).

² 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. 118–128, 131 (<https://www.legal-tools.org/doc/9b0c61/>).

Cross-references:

Article 74(5).

Author: Sergey Vasiliev.

Rule 143

Additional hearings on matters related to sentence or reparations
Pursuant to article 76, paragraphs 2 and 3, for the purpose of holding a further hearing on matters related to sentence and, if applicable, reparations, the Presiding Judge shall set the date of the further hearing. This hearing can be postponed, in exceptional circumstances, by the Trial Chamber, on its own motion or at the request of the Prosecutor, the defence or the legal representatives of the victims participating in the proceedings pursuant to rules 89 to 91 and, in respect of reparations hearings, those victims who have made a request under rule 94.

Rule 143 imposes an obligation upon the Presiding Judge to set the date for a further separate hearing on matters related to sentence and, if applicable reparations, when requested by the Prosecutor or the accused. The procedural rule remains silent as to the time when a party to the proceedings should request the bench to conduct such an additional hearing. As evidenced from the early sentencing practice, a separate sentencing hearing was requested by the Prosecution in *Lubanga* as early as at the stage of the preparation to the trial,¹ whereas in *Bemba*² and *Katanga*,³ such hearings were requested at the final stages of the trial. After the judgement is delivered, the Trial Chamber sets the date for a sentencing hearing and invites the parties to the proceedings, including the legal representatives of victims, to file submissions on the relevant evidence for the purposes of sentencing along with their views as to the sentence to be imposed on the convicted person.⁴ As there is no guidance within the statutory or procedural framework of the ICC in which order oral submissions should take place at the additional hearing on matters related to sentence, this is normally addressed by the Trial

¹ 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. 20 (<https://www.legal-tools.org/doc/c79996/>).

² 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 (<https://www.legal-tools.org/doc/e4b798/>).

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, ICC-01/04-01/07-3437, para. 2 (<https://www.legal-tools.org/doc/5af172/>).

⁴ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Order fixing the date for the sentencing hearing, 24 April 2012, ICC-01/04-01/06-2871, paras. 5–6 (*Lubanga*, 24 April 2012') (<https://www.legal-tools.org/doc/a6ce7f/>).

Chamber in its order assigning the date for the sentencing hearing. For example, in *Lubanga*, oral submissions were presented in the following order: the Prosecution, the participating victims, and finally the Defence (*Lubanga*, 24 April 2012, para. 8). In *Katanga*, the order was slightly changed and, instead of the Defence, the legal representatives of victims were to close oral submissions at the sentencing hearing.⁵

The Rule also provides the possibility to postpone a sentencing hearing in “exceptional circumstances”. However, it still remains unclear, judging by the nascent jurisprudence of the Court, what could constitute circumstances that would justify the postponement of the hearing. This will have to be decided on a case-by-case basis. As an example, difficulties in obtaining additional evidence for the purposes of sentencing might be considered to fall under “exceptional circumstances” that would justify such a delay. It is also significant that, apart from the Prosecution and the Defence, the postponement may be requested by the legal representatives of victims with respect to reparations hearings, which confirms the important role accorded to victims taking part in proceedings and reinforces the victim centric perception of the Court. However, it may still be considered that victims participating in proceedings are put at a procedural disadvantage by only having the right to request the postponement of an additional hearing on reparations, while not being able to request the initiation of such a hearing.

Doctrine:

1. Guido Acquaviva, “Single and Bifurcated Trials”, in Göran Sluiter *et al.* (eds.) *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, pp. 534–43 (<https://www.legal-tools.org/doc/bcad4c/>).
2. Eva Dwertmann, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations*, Martinus Nijhoff, Leiden/Boston, 2010 (<https://www.legal-tools.org/doc/8faada/>).
3. 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 ICC, *Prosecutor v. Katanga*, Trial Chamber II, Ordonnance portant calendrier de la procédure relative à la fixation de la peine (article 76 du Statut), 7 March 2014, ICC-01/04-01/07-3437 (<https://www.legal-tools.org/doc/79db89/>).

Authors: Dr. Iryna Marchuk and B. Aloka Wanigasuriya.

Rule 144(1)

1. Decisions of the Trial Chamber concerning admissibility of a case, the jurisdiction of the Court, criminal responsibility of the accused, sentence and reparations shall be pronounced in public and, wherever possible, in the presence of the accused, the Prosecutor, the victims or the legal representatives of the victims participating in the proceedings pursuant to rules 89 to 91, and the representatives of the States which have participated in the proceedings.

Rule 144 appears as the final provision in Chapter 6 of the International Criminal Court's Rules of Procedure and Evidence. As a starting point, Article 74(5) of the ICC Statute sets out the requirements for a decision to be delivered in open court. Rule 144(1) further clarifies that decisions of the Trial Chamber regarding the admissibility of a case, the Court's jurisdiction, the accused's criminal responsibility, sentence and reparations should be pronounced in public, and wherever possible, in the presence of the accused, the Prosecutor, the victims or the legal representatives of the victims participating in the proceedings pursuant to Rules 89 to 91 and the representatives of States that have participated in the proceedings. Thus, the Rule has the effect of extending the Article 74 requirement for the delivery of decisions of the Court in 'open court' to the sentencing and reparations stages as well and adding an extra requirement of pronouncing these decisions 'in public and whenever possible, in the presence of the accused'.

The Rule is intertwined with the fairness of the trial. All aspects mentioned in the Rule (admissibility of a case, the jurisdiction of the Court, criminal responsibility of the accused and sentence and reparations) are of significant importance in terms of the rights of the accused and have an impact on all parties and participants to the proceedings. Furthermore, a public hearing, which allows the public and the press to be present when decisions are pronounced, generally enhances the fairness of a trial and public confidence in the judicial institution.¹ As stated by Judge Pikis in his separate opinion in *Kony et al*, the two main reasons behind publicity of judgments and decisions are (i) to allow public scrutiny of the judiciary in order to safeguard the

¹ Vladimir Tochilovsky, *Jurisprudence of the International Criminal Courts and the European Court of Human Rights: Procedure and Evidence*, Martinus Nijhoff Publishers, Leiden/Boston, 2008, p. 305 (<https://www.legal-tools.org/doc/9775ab-1/>).

right to a fair trial, and (ii) to facilitate determination and identification of the scope of application of the law.²

Doctrine: For the bibliography, see the final comment on Rule 144.

Authors: Dr. Iryna Marchuk and B. Aloka Wanigasuriya.

² ICC, *Prosecutor v. Kony et al*, Appeals Chamber, Decision of the Appeals Chamber on the Unsealing of Documents, Separate Opinion of Judge Georghios M. Pikis, 4 February 2008, ICC-02/04-01/05 OA, para. 9 (<https://www.legal-tools.org/doc/932792/>).

Rule 144(2)

2. Copies of all the above-mentioned decisions shall be provided as soon as possible to:

(a) All those who participated in the proceedings, in a working language of the Court;

(b) The accused, in a language he or she fully understands or speaks, in whole or to the extent necessary to meet the requirements of fairness under article 67, paragraph 1 (f).

Rule 144(2) requires the Court to provide copies of all the decisions mentioned in Rule 144(1) as soon as possible to all those who participated in the proceedings in one of the working languages of the Court (English or French as provided in Article 50(2)) and to the accused in a language she or he fully understands or speaks “if necessary to meet the requirements of fairness as set out in Article 67(1)(f)”. In *Lubanga*, a status conference was convened pursuant to Rule 132(2) to discuss the translation of the Trial Chamber’s Article 74 decision on the guilt of the accused.¹ Given that neither the Statute nor the Rules expressly answer the question as to whether it is necessary to simultaneously deliver a translation of the Chamber’s decision in both working languages, the Chamber considered the issue of whether such simultaneous delivery was necessary.² Here, the Chamber posed the important questions of (i) whether it is “permissible and fair to move to the sentencing and reparations phase of the proceedings (in the event of a conviction) or the release of the accused (in the event of an acquittal) if the parties and the participants have not been provided with the French translation”; and (ii) what the implications were for any appellate phase of the proceedings if the Chamber decides to release the English version of the judgment before the French translation is available (*Lubanga*, 15 December 2011, para. 17). With regard to the first question, in avoid any further delays, the Chamber found that the Statute permits moving on to the sentencing or reparations stage even if the defence had only been provided with the English version of the decision, provided that (i) it receives the support of the parties and participants;

¹ ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Scheduling order for a status conference on the translation of the judgment, 8 November 2011, ICC- 01/04-01/06-2818 (<https://www.legal-tools.org/doc/e4d171/>).

² ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on the translation of the Article 74 Decision and related procedural issues, 15 December 2011, ICC-01/04-01/06-2834, paras. 2 and 17 (*Lubanga*, 15 December 2011’) (<https://www.legal-tools.org/doc/d8aa4e/>).

(ii) there are no concerns as to fairness; and (iii) notwithstanding that certain minimum safeguards need to be in place (paras. 20–1 and 26). With regard to an appeal, the Chamber determined that under Rule 144(2)(b) the accused is considered to have been ‘notified’ of the Article 74 Decision in the event of a conviction only when the French translation is effectively sent from the Court by the Registry (paras. 24 and 26).

This position is also consistent with the approach of Pre-Trial Chamber II in *Bemba* where it was determined that the five-day period for filing an application for leave to appeal only commenced on the date of notification of the French translation of the relevant decision (*Lubanga*, 15 December 2011, para. 24). Furthermore, in certain instances, Rule 144 has been utilised when requesting extensions of time. In *Bemba et al.*, given the difficulty in obtaining a complete French translation of the conviction decision by the deadline proposed by the Prosecutor, the Appeals Chamber requested that the appellants briefly specify the legal findings of the Trial Chamber that they intend to appeal.³ Additionally, the Appeals Chamber was persuaded by the parties’ submissions that the unavailability of the complete French translation of the decision constitutes a good cause for granting an extension of the 90-day time limit pursuant to Regulation 58 for filing the documents in support of the appeal (*Bemba et al.*, 23 November 2016, para. 18). While neither of the defendants nor the Appeals Chamber made direct reference to the availability of such a translation being directly linked to the fairness of trial under Article 67, it clearly relates to the fairness guarantees.

As for the requirement that decisions should be pronounced ‘wherever possible’, in the presence of the accused, it is important to note that generally, the accused has a right to be present during all stages of the trial. 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.⁴ Trials *in absentia* are generally perceived as being unfair and have been prohibited at the *ad hoc* tribunals (Article 21(4)(d) ICTY Statute, Article 20(4)(d) ICTR Statute). This prohibition relates to the rights

³ ICC, *Prosecutor v. Bemba et al.*, Appeals Chamber, Decision on requests for an extension of the time limit for the filing of the documents in support of the appeal, 23 November 2016, ICC-01/05-01/13 A A2 A3 A4 A5, para. 21 (*‘Bemba et al.*, 23 November 2016’) (<https://www.legal-tools.org/doc/cab280/>).

⁴ Christoph Safferling, *International Criminal Procedure*, Oxford University Press, 2012, p. 396 (<https://www.legal-tools.org/doc/50a9f2/>).

enshrined in Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR). However, at the *ad hoc* tribunals the accused's right to be present at trial is not absolute⁵ and is subject to two exceptions, these being (i) waiver, and (ii) disruption (*Zigiranyirazo*, 30 October 2006, para. 14; *Milošević*, 1 November 2004, para. 13). With regard to the ICC, an express prohibition against trials *in absentia* is contained in Article 63(1) of the Rome Statute, with the defendant's right to be present at trial being set out in Article 67(1)(d). However, just as with the *ad hoc* tribunals, the right to be present comes with exceptions. Article 63(2) provides 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 which apply to situations where the accused's presence may not be required.⁶

Doctrine:

1. Nina H.B. Jørgensen and Alexander Zahar, "Deliberation, Dissent, Judgment", in Göran Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, pp. 1151–1201 (<https://www.legal-tools.org/doc/bcad4c/>).
2. 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. 539–553 (<https://www.legal-tools.org/doc/e34f81/>).
3. Christoph Safferling, *International Criminal Procedure*, Oxford University Press, 2012 (<https://www.legal-tools.org/doc/50a9f2/>).
4. Vladimir Tochilovsky, *Jurisprudence of the International Criminal Courts and the European Court of Human Rights: Procedure and*

⁵ ICTR, *Prosecutor v. Zigiranyirazo*, Appeals Chamber Decision on Interlocutory Appeal, 30 October 2006, ICTR-2001-AR73, para. 14 ('*Zigiranyirazo*, 30 October 2006') (<https://www.legal-tools.org/doc/6be72d/>); ICTY, *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 ('*Milošević*, 1 November 2004') (<https://www.legal-tools.org/doc/b62746/>).

⁶ See ICC ASP, Amendments to the Rules of Procedure and Evidence, Resolution ICC-ASP/12/Res.7, 27 November 2013 (<https://www.legal-tools.org/doc/e50839/>).

Evidence, Martinus Nijhoff Publishers, Leiden/Boston, 2008
(<https://www.legal-tools.org/doc/9775ab-1/>).

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CHAPTER 7. PENALTIES

Rule 145

Determination of sentence

General Remarks:

Rule 145 of the Rules of Procedure and Evidence concerns the determination of the sentence. Rule 145(1) outlines the factors that the ICC is to take into account in its determination of the sentence, whilst subparagraph 2 provides a list of mitigating and aggravating circumstances and subparagraph 3 covers sentences of life imprisonment specifically.

Doctrine: For the bibliography, see the final comment on Rule 145.

Author: Dejana Radisavljević.

Rule 145(1)

1. In its determination of the sentence pursuant to article 78, paragraph 1, the Court shall:

Pursuant to Article 77(1) of the Statute, the Court shall impose a sentence of imprisonment upon an individual who has been convicted of a crime referred to in Article 5 of the Statute. The sentence can either be imprisonment for a specified number of years, not exceeding 30 years, or life imprisonment “where the extreme gravity of the crime and the individual circumstances of the convicted person” so justify.

The wording in Rule 145(1) focuses on the individual and his or her culpability, and only on the impact of the crime(s) and the “broader social variables purely in the context of that paradigm”.¹ Thus, whilst the Court is to “give consideration *inter alia* to the harm caused to victims and their families”, the victim has no automatic right to have the Chamber determining a sentence of imprisonment (Findlay and Henham, 2010, p. 229). This underscores the emphasis on the convicted individual rather than his or her victims as well as the importance of retribution as a sentencing objective.

Thus far, the Court has sentenced five individuals: Thomas Lubanga Dyilo; Germain Katanga; Jean-Pierre Bemba Gombo; Ahmad Al Faqi Al Mahdi; and, Bosco Ntaganda. The first sentence handed down by the Court was in the case of *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.² The second sentence imposed by the Court was rendered on 23 May 2014 against Germain Katanga,³ imposing a sentence of 12 years’ imprisonment. Both the Defence and Prosecution withdrew their appeals making the judgment final. The third sentence of the Court was imposed in the case of

¹ Mark Findlay and Ralph Henham, *Beyond Punishment: Achieving International Criminal Justice*, Palgrave Macmillan, London, 2010, p. 172 (<https://www.legal-tools.org/doc/97798c/>).

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 (<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 (<https://www.legal-tools.org/doc/7e1e16/>).

Prosecutor v. Jean-Pierre Bemba Gombo, with the Trial Chamber sentencing Mr. Bemba on 21 June 2016 to 18 years' imprisonment.⁴ On 27 September 2016, the Court completed its most expeditious case yet, in *Prosecutor v. Ahmad Al Faqi Al Mahdi*. The Trial Chamber convicted and sentenced Mr. Al Mahdi to 9 years' imprisonment.⁵ Most recently, the Court sentenced Bosco Ntaganda to 30 years' imprisonment.⁶ On 30 March 2021, the Appeals Chamber confirmed his conviction and sentence.⁷ A sixth individual, Dominic Ongwen, was convicted and sentenced to 25 years' imprisonment in the first instance on 6 May 2021.⁸

Doctrine: For the bibliography, see the final comment on Rule 145.

Author: Dejana Radisavljević.

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 (<https://www.legal-tools.org/doc/09d4d9/>).

⁵ 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/>).

⁶ 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/>).

⁷ ICC, *Prosecutor v. Ntaganda*, Appeals Chamber, Public redacted version of Judgment on the appeal of Mr Bosco Ntaganda against the decision of Trial Chamber VI of 7 November 2019 entitled 'Sentencing judgment', 30 March 2021, ICC-01/04-02/06-2667-Red (<https://www.legal-tools.org/doc/94hzzf/>).

⁸ ICC, *Prosecutor v. Ongwen*, Trial Chamber IX, Sentence, 6 May 2021, ICC-02/04-01/15-1819-Red (<https://www.legal-tools.org/doc/vj1y8k/>).

Rule 145(1)(a)

(a) 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 provision is to be read in conjunction with Article 78(1), which stipulates that “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”. This is a rather scarce provision which can only be of limited guidance to the Trial Chamber tasked with determining the sentence in a specific case. Rule 145 provides further guidance by indicating how the sentence is to be determined, with Rule 145(1)(a) stating that in so doing the Court is to consider the totality of the sentence (of both imprisonment and fine), which must reflect the culpability of the convicted person.

The requirement that the sentence reflect the culpability of the individual is in recognition of the heinous nature of international crimes and the notion that the sentence imposed on the individual should not exceed his or her culpability. The ICTY in *Mucić et al.* articulated this as meaning that the sentence must be “both just and appropriate”.¹ The ICC, in Rule 145(1)(a) and Article 30 of the Statute, is the first international criminal court to expressly mention the principle of culpability.² Interestingly, de Guzman notes in this regard that the “idea that a sentence should reflect the offender’s culpability is usually associated with retributive proportionality”, which further implies that retribution shall be a relevant factor in determining proportionality.³

In practice, the Trial Chambers have explained their analysis of mitigating and aggravating circumstances listed in Rule 145(2) more than the culpability factor referred to in subparagraph 1. Nevertheless, the Trial Chamber in Bemba noted with regard to Mr. Bemba’s culpability his failure

¹ ICTY, Appeals Chamber, *Prosecutor v. Mucić et al.*, Judgement, 20 February 2001, IT-96-21-A, para. 429 (<https://www.legal-tools.org/doc/051554/>).

² 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. 29 (<https://www.legal-tools.org/doc/4cd0da/>).

³ Margaret M de Guzman, “Proportionate Sentencing at the ICC”, in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 944.

to prevent and repress crimes, which served to encourage and directly contribute to the commission and continuation of such crimes.⁴

Doctrine: For the bibliography, see the final comment on Rule 145.

Author: Dejana Radisavljević.

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, paras. 65–66 (<https://www.legal-tools.org/doc/f4c14e/>).

Rule 145(1)(b)

(b) Balance all the relevant factors, including any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime;

Rule 145(1)(b) stipulates that the Court is 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”. Use of the term “including” implies that the list of factors, as in Article 78 of the ICC Statute, is merely illustrative.

Doctrine: For the bibliography, see the final comment on Rule 145.

Author: Dejana Radisavljević.

Rule 145(1)(c)

(c) In addition to the factors mentioned in article 78, paragraph 1, give consideration, inter alia, to the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person.

Rule 145(1)(c) adds that, in addition to the factors listed in Article 78(1) of the Statute, consideration is to be given to: “the extent of the damage caused, in particular the harm caused to the victims and their families; the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner time and location; and the age, education, social and economic condition of the convicted person”. Once again, this list, much the same as the list in Article 78 of the Statute, is merely illustrative thanks to the use of the words “inter alia”.¹

William Schabas notes that whilst many of the factors addressed in Rule 145(1)(c) might be listed under mitigating and aggravating factors, the fact that they have been included prior to listing mitigating and aggravating factors might indicate that they are neutral, that is, depending on the particular circumstances, the factors in Rule 145(1)(c) may either mitigate or aggravate the sentence (Schabas, 2008, p. 903). Thus, for example, it is not evident whether the convicted person’s age is to be considered as a mitigating or aggravating factor and will surely depend on the particular circumstances of the case. Similarly, the convicted person’s intent can either be a mitigating or aggravating factor, depending on the case at hand. In this regard, despite the substantive list of mitigating and aggravating factors listed in this subsection of Rule 145, there is no reference to the standard of proof.

In *Lubanga*, the Trial Chamber simply noted that in determining the sentence to be imposed on Mr. Lubanga it had considered the gravity of the crimes committed with regard, inter alia, to the factors listed in Rule 145(1)(c), briefly discussing each factor without noting the importance it had

¹ 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/>).

ascribed to each of them.² Thus, the Trial Chamber described the conscription of children under the age of fifteen years to participate in hostilities as “very serious crimes” (*Lubanga*, 10 July 2012, para. 37) and widespread (para. 50), noting the children’s vulnerability and the potentially serious trauma caused to them (para. 38). With regard to Mr. Lubanga’s participation, the Trial Chamber held that the Conviction Decision provided “an important foundation” for the determination of his sentence (paras. 52–53). As concerns the last factor, that is “the age, education, social and economic condition of the convicted person”, the Trial Chamber decided that thanks to his intelligence and education Mr. Lubanga would have understood the seriousness of the crimes of which he has been found guilty, which is in turn a relevant factor in determining the appropriate sentence to be imposed upon him (para. 56).

In deciding on the gravity of the crimes committed by Mr. Katanga, the Trial Chamber referred to the killing of civilians, among whom were the elderly and children³ and the particularly cruel choice of weapon (*Katanga*, 23 May 2014, para. 49). The Trial Chamber also referred to “the significant consequences for the daily lives of the victims” of destroying their property (para. 52), the “obviously discriminatory dimension” of the attacks (para. 54) and the ensuing poverty as a result of the attacks (para. 59). As regards Mr. Katanga’s participation, the Trial Chamber concluded that “his activities as a whole and the various forms which his contribution took had a significant influence on the commission” of the attacks against civilians, murder, pillaging and destruction of property (para. 67). The Trial Chamber further noted that Mr. Katanga was aware of and shared the hostile sentiment against the group of people targeted, adding that he knew that the militia would commit crimes against those civilians and the suffering that this would cause to the civilian population (para. 68). As such, the Trial Chamber concluded that Mr. Katanga’s degree of participation and intent “must not be underrated” (para. 69).

In *Bemba*, the Trial Chamber discussed the gravity of each of the crimes in turn for which Mr. Bemba was convicted, concluding that the

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. 44 (*‘Lubanga*, 10 July 2012’) (<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, para. 47 (*‘Katanga*, 23 May 2014’) (<https://www.legal-tools.org/doc/7e1e16/>).

crimes of murder, rape and pillaging were of serious gravity.⁴ Moreover, Mr. Bemba's authority, education and experience, and his "knowing and willing impact on the crimes" were deemed to increase the gravity of his conduct (*Bemba*, 21 June 2016, para. 66).

In considering the gravity of the crimes committed by Mr. Al Mahdi, the Trial Chamber noted that the crimes in this case were against property, which are "generally of lesser gravity than crimes against persons".⁵ The Trial Chamber then discussed the extent of the damage caused to property, noting that the attack was carefully planned and that numerous sites were destroyed (*Al Mahdi*, 27 September 2016, para. 78). As regards impact, the Trial Chamber considered "that the fact that the targeted buildings were not only religious buildings but had also a symbolic and emotional value for the inhabitants of Timbuktu is relevant in assessing the gravity of the crime committed" (para 79), further finding that the destruction of these sites also affected people not only throughout Mali but also the international community (para. 80). Moreover, the Trial Chamber considered it relevant to the gravity of the crimes that the destruction of property was committed with a "discriminatory religious motive" (para 81). As regards his participation and intent, the Trial Chamber found that Mr. Al Mahdi "played an essential role in the execution of the attack" and personally participated, justifying his actions in public speeches (paras. 84–85). The Trial Chamber gave no weight to the convicted person's age, economic background, lack of prior convictions (noting that this is a common feature among international convicts) and education (para. 96).

In the case of Bosco Ntaganda,⁶ the Trial Chamber considered the factors stipulated in Rule 145(1)(c) as part of their consideration of the gravity of his crimes. Moreover, pursuant to Rule 145(1)(c), the Trial Chamber considered the individual circumstances of Mr. Ntaganda and accepted no aggravating or mitigating circumstances in relation to his age, education, or social and economic conditions.

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, para. 93 ('*Bemba*, 21 June 2016') (<https://www.legal-tools.org/doc/09d4d9/>).

⁵ ICC, *Prosecutor v. Al Mahdi*, Trial Chamber VIII, Judgment and Sentence, 27 September 2016, ICC-01/12-01/15, para. 77 ('*Al Mahdi*, 27 September 2016') (<https://www.legal-tools.org/doc/042397/>).

⁶ ICC, *Prosecutor v. Ntaganda*, Trial Chamber VI, Sentencing Judgment, ICC-01/04-02/06-2442, 7 November 2019 (<https://www.legal-tools.org/doc/yw2ef/>).

In the *Ongwen* case, when considering the factors referred to in Rule 145(1)(c), the Chamber found Mr. Ongwen's degree of intent "very high" in relation to a number of crimes,⁷ and noted the lasting impact and harm on his victims (*Ongwen*, 6 May 2021, para. 143). The Chamber considered the individual circumstances of Mr. Ongwen, 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 (para. 88).

Doctrine: For the bibliography, see the final comment on Rule 145.

Author: Dejana Radisavljević.

⁷ ICC, *Prosecutor v. Ongwen*, Trial Chamber IX, Sentence, 6 May 2021, ICC-02/04-01/15-1819-Red, paras. 171, 291, 297, 302, 307, 318, 323, 329 and 371 ('*Ongwen*, 6 May 2021') (<https://www.legal-tools.org/doc/vj1y8k/>).

Rule 145(2)

2. *In addition to the factors mentioned above, the Court shall take into account, as appropriate:*

Alongside the already substantial list of factors found in Rule 145(1), subparagraph 2 of Rule 145 provides a further list of specifically mitigating and aggravating circumstances that the Court shall take into account, as appropriate. Rule 145(2)(a) uses the term “such as”, thereby reiterating that the list of mitigating factors is not exhaustive. Whilst there is a notable lack of the words ‘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, although perhaps creating a level of uncertainty, is important in giving scope for the development of aggravating and mitigating factors and allowing the judiciary to consider factors relevant to each individual case.

Doctrine: For the bibliography, see the final comment on Rule 145.

Author: Dejana Radisavljević.

Rule 145(2)(a)

(a) Mitigating circumstances such as:

- (i) The circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress;**
- (ii) The convicted person's conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court;**

The list of possible mitigating factors referred to in Rule 145(2)(a)(i) is much shorter than the subsequent list of aggravating factors. The circumstances listed are those falling short of a defence, such as substantially diminished mental capacity or duress. This implies that diminished mental capacity or duress do not constitute grounds for the exclusion of criminal responsibility pursuant to Article 31(1)(a) of the Statute.¹ Diminished responsibility, in whatever way this is subsequently interpreted by the Court's judiciary, is thus more likely to be treated as a mitigating factor than as a defence (Cubbon, 2011, p. 374). The use of "such as" indicates that other defences would similarly be excluded. Grounds for exclusion of criminal responsibility are covered in Articles 31–33 of the Statute. Article 31 refers to a mental disease or defect that destroys the person's capacity to appreciate the unlawfulness or nature of his or her conduct or capacity to control the conduct; intoxication, self-defence and duress. Article 32 covers mistake of fact or law and Article 33 refers to superior orders. Interestingly, William Schabas notes that Rule 145 does not specify whether the convicted person can still invoke superior orders as a mitigating factor where it was deemed inadmissible or rejected as a defence.² Additionally, Rule 145(2)(a)(ii) refers to the convicted person's conduct after the act, including any efforts to compensate the victims and any co-operation with the Court.

Notably, there is no mention of the standard of proof (Schabas, 2008, p. 904), which was left for the Trial Chamber to decide upon in its first

¹ John Cubbon, "Diminished Responsibility and Loss of Control: The Perspective of International Criminal Law", in Alan Reed and Michael Bohlander (eds.), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives*, Routledge, London and New York, 2011, p. 374.

² William A. Schabas, *War Crimes and Human Rights: Essays on the Death Penalty Justice and Accountability*, Cameron May, London, 2008, p. 904 (<https://www.legal-tools.org/doc/e2e46b/>).

sentencing decision. Thus, the Trial Chamber in *Lubanga* noted that the “*in dubio pro reo*” principle applies at the sentencing stage of the proceedings”, and as such any mitigating circumstances are to be established on a balance of probabilities.³ Furthermore, the Trial Chamber in the case of *Lubanga* accepted the defence’s submission that mitigating factors are not limited to the facts and circumstances described in the Confirmation Decision, particularly in view of the words “the convicted person’s conduct after the act” found in Rule 145(2)(a)(ii). In this regard, the Court’s first ad hoc predecessor, the ICTY, earlier established that the burden of proof is on the balance of probabilities.⁴

Although the Trial Chamber’s decision was subsequently appealed, the Appeals Chamber in the case of *Lubanga* dismissed all of the grounds of appeal submitted by the Prosecution and Defence.⁵ As such, the following commentary is on the Trial Chamber’s decision on the sentence to be imposed on Mr. Lubanga. The Defence in *Lubanga* submitted several mitigating circumstances: necessity; peaceful motives; demobilisation orders; and co-operation with the Court. As regards Mr. Lubanga’s peaceful motives, the Trial Chamber accepted that the convicted person “hoped that peace would return to Ituri once he had secured his objectives”, but found this only of limited relevance given that, in order to achieve these objectives, he recruited child soldiers (*Lubanga*, 1 December 2014, para. 87). Regarding Mr. Lubanga’s co-operation, the Trial Chamber referred to his 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 Trial Chamber, however, failed to specify the weight it attributed to this as a mitigating circumstance.

The precedent on the standard of proof set in the *Lubanga* case was adopted by the Trial Chamber in the Court’s second case, that is, the case

³ ICC, *Prosecutor v. Lubanga*, ICC T. Ch. I, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/04-01/06-2901, 10 July 2012, para. 34).

⁴ ICTY, *Prosecutor v. Blaškić*, Appeals Chamber, Appeals Judgement, 29 July 2004, IT-95-14-A, para. 697 (<https://www.legal-tools.org/doc/88d8e6/>); *Prosecutor v. Blagojević and Jokić*, Trial Chamber, Trial Judgement, 17 January 2005, IT-02-60-T, para. 850 (<https://www.legal-tools.org/doc/7483f2/>); *Prosecutor v. Babić*, Appeals Chamber, Judgement on Sentencing Appeal, 18 July 2005, IT-03-72, para. 43 (<https://www.legal-tools.org/doc/640374/>).

⁵ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC A. Ch., Judgment on the Appeals of the Prosecutor and Mr. Thomas Lubanga Dyilo against the “Decision on Sentence pursuant to Article 76 of the Statute”, ICC-01/04-01/06-3121-Red, 1 December 2014, para. 119 (*‘Lubanga*, 1 December 2014’) (<https://www.legal-tools.org/doc/585c75/>).

against Germain Katanga. In this case, the Defence submitted several mitigating circumstances: Mr. Katanga's "young age; the type of role he played; the exceptional circumstances in which he found himself; his capacity for genuine reform; the manner in which he cooperated with the Court; and, his private and family life".⁶ In its analysis, the Trial Chamber found Mr. Katanga's young age and his family situation as a father of six children to be of limited weight, whilst his "personal and active support to the process of disarming and demobilising child soldiers" was considered to be of much greater weight as a mitigating circumstance. Moreover, the Trial Chamber deemed it relevant in mitigation of his sentence that Mr. Katanga had a "kindly and protective disposition towards the civilians in his community" (*Katanga*, 23 May 2014, para. 88). Nevertheless, the Trial Chamber concluded that none of these factors could "play a determinant role considering the nature of the crimes of which he was convicted" (para. 88). Referring to the precedent set by the ICTY⁷ the Trial Chamber considered that "efforts undertaken to promote peace and reconciliation can and must be taken into account in the sentencing and could potentially mitigate the sentence" (*Katanga*, 23 May 2014, para. 91). Interestingly, the Trial Chamber noted that there was no need to demonstrate results although such efforts have to be "both palpable and genuine" (para. 91). In this case, despite taking into consideration the positive role that Mr. Katanga had played in the process of disarming and demobilising child soldiers, the Trial Chamber was unable to conclude that Mr. Katanga had, on the balance of probabilities, sought to actively promote peace and reconciliation (para. 114).

Furthermore, the Trial Chamber considered the weight to be attributed to Mr. Katanga's statements of remorse and expressions of sympathy and compassion towards the victims, noting the precedent set by the ICTY that expressions of sympathy or genuine compassion "cannot be commensurate to a statement of remorse" and must thus be accorded less weight (*Katanga*, 23 May 2014, para. 117). In this case, the Trial Chamber found Mr. Katanga's statements of remorse to be "mere convention", noting that the convicted

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, para. 76 (*Katanga*, 23 May 2014') (<https://www.legal-tools.org/doc/7e1e16/>).

⁷ In ICTY, *Prosecutor v. Blagojević and Jokić*, Trial Chamber, Trial Judgement, 7 January 2005, IT-02-60-T, paras. 858–860 (<https://www.legal-tools.org/doc/7483f2/>) and *Prosecutor v. Plavšić*, Trial Chamber, Sentencing Judgement, 27 February 2003, IT-00-39-40/1, paras. 85–94 and 110 (<https://www.legal-tools.org/doc/f60082/>).

person actually had great difficulty in acknowledging his crimes (para. 118). As such, these statements were not considered a mitigating circumstance (para. 121).

Finally, as regards Mr. Katanga's co-operation with the Prosecution, the Trial Chamber took the convicted person's lengthy testimony, readiness to answer questions from all of the parties and the fact that he volunteered information as relevant. Notably, 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 the ICTR, which require substantial co-operation, whilst also noting that the ICTY has exercised a certain discretion in interpreting this requirement. Thus, the Trial Chamber found that in order to be considered a mitigating circumstance, co-operation need not be substantial but must go beyond good behaviour (*Katanga*, 23 May 2014, para. 127). Accordingly, Mr. Katanga's good behaviour in court was deemed to be of little weight as this conduct was expected of him (para. 128).

Finally, the Trial Chamber considered the Defence submission that Mr. Katanga's rights were violated during detention in the Democratic Republic of the Congo, which it was submitted should mitigate the sentence imposed upon him. Relying in particular on the ICTR cases of *Semanza* and *Kajelijeli*,⁸ the Trial Chamber considered that it would be appropriate to take the violation of the convict's fundamental rights into account in mitigation of his sentence (*Katanga*, 23 May 2014, para. 136). In this case, however, the Trial Chamber found that it could not "rule on alleged violations of Germain Katanga's rights to which he was subjected in the DRC while he was not in detention on behalf of the Court" (para. 136).

In its third case, that of *Bemba*, the Trial Chamber considered the existence and relevance of any mitigating factors for each of Mr. Bemba's crimes individually and found no such circumstances to exist.⁹

Finally, in the *Al Mahdi* case, the Trial Chamber found five mitigating circumstances: "Mr. Al Mahdi's admission of guilt; his cooperation with the

⁸ ICTR, *Prosecutor v. Semanza*, Trial Chamber, Trial Judgement, 15 May 2003, ICTR-97-20-T (<https://www.legal-tools.org/doc/7e668a/>); *Prosecutor v. Nahimana et al.*, Trial Chamber, Trial Judgement, 3 December 2003, ICTR-99-52-T (<https://www.legal-tools.org/doc/45b8b6/>) and *Prosecutor v. Kajelijeli*, Appeals Chamber, Appeals Judgement, 23 May 2005, ICTR-98-44-A (<https://www.legal-tools.org/doc/2b7d1c/>).

⁹ 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, para. 93 (<https://www.legal-tools.org/doc/09d4d9/>).

Prosecution; the remorse and empathy he expressed for the victims; his initial reluctance to commit the crime and the steps he took to limit the damage caused”; and, “his good behaviour in detention despite his family situation”, although this was deemed to be of limited importance.¹⁰ Mr. Al Mahdi’s cooperation despite the fact that this would increase “the security profile of his family”, guilty plea, and the remorse and empathy he expressed were deemed to be important and substantial factors in mitigation of his sentence (*Al Mahdi*, 27 September 2016, paras. 102 and 105). In this regard, the Trial Chamber referred to Mr. Al Mahdi’s offer to reimburse the cost of certain damage caused (para. 104). Perhaps unsurprisingly, the Trial Chamber concluded that Mr. Al Mahdi’s admission of guilt “may also further peace and reconciliation in Northern Mali by alleviating the victims’ moral suffering through acknowledgment of the significance of the destruction” (para. 100). This, however, is not unproblematic as it is an unsubstantiated claim with no indication of how exactly his admission of guilt might further peace and reconciliation.

As concerns the latest sentencing judgment by the Court, in the case of Bosco Ntaganda,¹¹ the Trial Chamber was not convinced that Mr. Ntaganda had made “any sincere demonstrations of remorse”, nor that they should be counted as a mitigating circumstance. Accordingly, the Trial Chamber found no mitigating circumstances in this case.

In its most recent case, *Prosecutor v. Dominic Ongwen*, the Chamber considered a number of mitigating circumstances, including the fact that the convicted individual was abducted and integrated into the Lord’s Resistance Army as a child himself, the impact that this had on his education, the killing of his parents as well as his behaviour as a child prior to abduction. At the same time, the Chamber noted that whilst Ongwen appeared to have a very difficult time in the LRA until he was 18 years old by this time, he became an important figure in the LRA. Whilst many individuals were abducted around the same age as Ongwen, “only a small minority made such a steep and purposeful rise in the LRA hierarchy as Dominic Ongwen” and that they

¹⁰ ICC, *Prosecutor v. Al Mahdi*, Trial Chamber VIII, Judgment and Sentence, 27 September 2016, ICC-01/12-01/15, para. 109 (*Al Mahdi*, 27 September 2016’) (<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/yw2ef/>).

made choices different to his own.¹² Nevertheless, the Chamber considered it “fitting and reasonable” that the convicted individual’s personal circumstances in this case warranted “approximately a one third-reduction” in the sentence that would otherwise be imposed (*Ongwen*, 6 May 2021, para. 88). With regard to Rule 145(2)(a)(i), the Chamber considered whether Dominic Ongwen had acted under duress or was of substantially diminished mental capacity, which the Chamber noted had already been considered at length during the trial. Neither mitigating factor was accepted in the present case; the Chamber found no indication of duress “as the conduct constituting the crimes Dominic Ongwen was convicted of was not caused by a threat of death or serious bodily harm to Dominic Ongwen or another person” (para. 111); nor that he was suffering from substantially diminished mental capacity, having, *inter alia*, spoken lucidly for over an hour at the sentencing stage of his process (para. 100). With regard to Rule 145(2)(a)(ii), the Chamber considered whether Dominic Ongwen had expressed any remorse for his crimes, noting that “in a display of self-pity, he acknowledged the suffering of (presumably) the victims of his crimes only to claim that his own suffering was equal” (para. 42).

Doctrine: For the bibliography, see the final comment on Rule 145.

Author: Dejana Radisavljević.

¹² ICC, *Prosecutor v. Ongwen*, Trial Chamber IX, Sentence, 6 May 2021, ICC-02/04-01/15-1819-Re, para. 85 (*‘Ongwen, 6 May 2021’*) (<https://www.legal-tools.org/doc/vj1y8k/>).

Rule 145(2)(b)

(b) As aggravating circumstances:

(i) Any relevant prior criminal convictions for crimes under the jurisdiction of the Court or of a similar nature;

(ii) Abuse of power or official capacity;

(iii) Commission of the crime where the victim is particularly defenceless;

(iv) Commission of the crime with particular cruelty or where there were multiple victims;

(v) Commission of the crime for any motive involving discrimination on any of the grounds referred to in article 21, paragraph 3;

(vi) Other circumstances which, although not enumerated above, by virtue of their nature are similar to those mentioned.

As concerns aggravating factors, Rule 145(2)(b) refers to: relevant criminal convictions for crimes under the Court’s jurisdiction or of a similar nature; abuse of power or official capacity; committing a crime against a particularly defenceless victim, multiple victims or with particular cruelty; committing a crime with discrimination as a motive; and any other similar circumstances. With regard to abuse of power or official capacity, Article 27 of the Statute stipulates that official capacity shall not “constitute a ground for reduction of sentence”. As William Schabas notes, a convicted person who held a senior position would usually have this be treated as an aggravating rather than a mitigating factor.¹ As concerns discrimination, further to Article 21(3) of the Statute, discrimination is an “adverse distinction” based on grounds such as gender, age, race, colour, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

Much the same as for mitigating circumstances, there is no mention of the standard of proof for aggravating factors.² As such, the Trial Chamber in *Lubanga* decided that the burden of proof for aggravating factors is to be beyond a reasonable doubt “since any aggravating factors established by the Chamber may have a significant effect on the overall length of sentence Mr.

¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1174 (<https://www.legal-tools.org/doc/b7432e/>).

² 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/>).

Lubanga will serve”.³ The two *ad hoc* international criminal tribunals preceding the Court, the ICTY and the ICTR, have similarly established that the burden of proof for aggravating factors lies with the prosecution and that such factors must be proven beyond a reasonable doubt.⁴

As regards double counting, the Trial Chamber in Lubanga referred to the ICTY Appeals Chamber Judgment in *Nikolić*⁵ stating that any factors taken into consideration when assessing the gravity of the crime committed are not to be taken into consideration again as aggravating circumstances (*Lubanga*, 10 July 2012, para. 35).

In *Lubanga*, the Prosecution submitted four aggravating circumstances: the harsh conditions in the camps and the brutal treatment of the children; the commission of sexual violence; the commission of the crime against particularly defenceless victims; and discriminatory motive. The Trial Chamber did not accept that the first two factors could be considered as aggravating circumstances in this case, noting the Prosecution’s failure to charge Mr. Lubanga with crimes of sexual violence and rape as separate crimes. The Trial Chamber did not consider this failure as determinative in deciding whether such activities are relevant in the determination of the sentence, but nevertheless found that as a result thereof “the link between Mr. Lubanga and sexual violence, in the context of the charges, has not been established beyond reasonable doubt” and could thus not “properly form part of the assessment of his culpability for the purposes of sentence” (*Lubanga*, 10 July 2012, para. 75). Moreover, as the age of the victims had already been considered for determining the gravity of the crime, the Trial Chamber concluded that it could not additionally take this factor into account as an aggravating circumstance (para. 78). Finally, the Trial Chamber was not convinced

³ 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. 33 (*Lubanga*, 10 July 2012’) (<https://www.legal-tools.org/doc/c79996/>).

⁴ ICTY, *Prosecutor v. Mucić et al.*, Appeals Chamber, Appeals Judgement, 20 February 2001, IT-96-21-A, para. 763 (<https://www.legal-tools.org/doc/051554/>); *Prosecutor v. Bralo*, Trial Chamber, Trial Judgement, 7 December 2005, IT-95-17-T, para. 27 (<https://www.legal-tools.org/doc/e10281/>); *Prosecutor v. Brđjanin*, Trial Chamber, Trial Judgement, 1 September 2004, IT-99-36-T, para. 1096 (<https://www.legal-tools.org/doc/4c3228/>); *Prosecutor v. Kunarac, Kovač and Vuković*, Trial Chamber, Trial Judgement, 22 February 2001, IT-96-23-23/1, para. 847 (<https://www.legal-tools.org/doc/fd881d/>).

⁵ ICTY, *Prosecutor v. Nikolić*, Appeals Chamber, Judgment on Sentencing Appeal, 8 March 2006, IT-02-60/I-A, para 58 (<https://www.legal-tools.org/doc/d25035/>).

of the existence of a discriminatory motive on the part of the convicted person and refused to treat it as an aggravating circumstance (para. 81).

In its second determination of sentence the Court cited *Lubanga*, affirming 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”.⁶ Here the Trial Chamber analysed only one aggravating factor - whether Mr. Katanga abused his authority or official capacity - having already taken into account cruelty in the commission of the crimes (the vulnerability of the victims and the discriminatory nature of the crimes) in determining gravity (*Katanga*, 23 May 2014, para. 71). Ultimately, the Trial Chamber was not convinced beyond a reasonable doubt that Mr. Katanga had abused his authority (para. 75).

In *Bemba*, the Trial Chamber considered any aggravating factors for each of Mr. Bemba’s crimes individually, as it did for mitigating circumstances. For the crime of rape, the Trial Chamber found two aggravating circumstances: that the crime was committed against particularly defenceless victims; and, that the crimes had been committed with particular cruelty.⁷ Moreover, the crime of pillaging was found by the majority to have been committed with one aggravating circumstance: with particular cruelty (*Bemba*, 21 June 2016, para. 93). As for the crime of murder, the Trial Chamber found no aggravating circumstances to exist, noting that it had already “considered all relevant factors concerning the crimes of murder in assessing their gravity” (para. 33).

Finally, in the case of *Al Mahdi*, noting that the gravity of the crimes and their discriminatory nature had already been considered in deciding the gravity of the crimes, the Trial Chamber refused to consider these as aggravating circumstances.⁸

In the *Ntaganda* case, the Trial Chamber considered the aggravating circumstances for each crime of which Mr. Ntaganda was convicted, noting *inter alia*: the age of the victims; the fact that some victims were particularly

⁶ ICC, *Prosecutor v. Katanga*, Trial Chamber, Decision on Sentence pursuant to Article 76 of the Statute, 23 May 2014, ICC-01/04-01/07-3484, para. 35 (*Katanga*, 23 May 2014’) (<https://www.legal-tools.org/doc/5af172/>).

⁷ 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. 93 (*Bemba*, 21 June 2016’) (<https://www.legal-tools.org/doc/f4c14e/>).

⁸ ICC, *Prosecutor v. Al Mahdi*, Trial Chamber VIII, Judgment and Sentence, 27 September 2016, ICC-01/12-01/15-171, paras. 86–88 (<https://www.legal-tools.org/doc/042397/>).

defenceless; the cruelty with which Ntaganda's crimes were committed; and the discriminatory intent behind the crimes.⁹

In the *Ongwen* case, the Chamber found that four out of the six aggravating circumstances referred to in Rule 145(2)(b) were established in this case: several of Ongwen's crimes were committed against particularly defenceless victims, because the victims were children (often girls) under the age of ten¹⁰ or because they were carrying heavy loads and subjected to attack whilst retreating from camps (*Ongwen*, 6 May 2021, para. 228); each of his crimes were committed against multiple victims (para. 331); and the crimes were committed on the grounds of gender as many girls were targeted (para. 333). However, despite the argument of the legal representative of participating victims, the Chamber found that there was no abuse of power under Rule 145(2)(b)(ii) as there was "no special lawful relationship" between the convicted individual and his victims (para. 134).

Doctrine: For the bibliography, see the final comment on Rule 145.

Author: Dejana Radisavljević.

⁹ ICC, *Prosecutor v. Ntaganda*, Trial Chamber, Sentencing Judgment, 7 November 2019, ICC-01/04-02/06-2442, para. 250 (<https://www.legal-tools.org/doc/yyw2ef/>).

¹⁰ ICC, *Prosecutor v. Ongwen*, Trial Chamber IX, Sentence, 6 May 2021, ICC-02/04-01/15-1819-Red, paras. 190 and 287 ('*Ongwen*, 6 May 2021') (<https://www.legal-tools.org/doc/vj1y8k/>).

Rule 145(3)

3. Life imprisonment may be imposed when justified by the extreme gravity of the crime and the individual circumstances of the convicted person, as evidenced by the existence of one or more aggravating circumstances.

Along with Article 77(1)(b), Rule 145(3) provides that life imprisonment may only be imposed when justified by the extreme gravity of the crime and the individual circumstances of the convicted person, to be evidenced by one or more aggravating factors – presumably those referred to in Rule 145. Considering the fact that the Court can only prosecute individuals for crimes of a particularly heinous nature, adding the additional caveat of extreme gravity in order to impose life imprisonment means that it may well be very rarely used by the Court (Schabas, 2016, p. 1159). Indeed, to date, the Court has not imposed a sentence of life imprisonment. Thus, in the *Prosecutor v. Ntaganda*, the Trial Chamber concluded that despite the lack of mitigating circumstances, the presence of numerous aggravating circumstances, the gravity of the crimes committed, and Mr. Ntaganda’s degree of culpability, these “nevertheless do not warrant a sentence of life imprisonment”.¹ Similarly, in its most recent sentencing decision, the Trial Chamber in the *Ongwen* case considered the possibility of imposing a sentence of life imprisonment. The legal representatives of participating victims suggested that only life imprisonment would be an adequate sentence, and the Trial Chamber agreed that such a sentence “would surely be in order”.² Nevertheless, 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 society upon release from his punishment, in due course, which weighed against imposing a sentence of life imprisonment.

¹ ICC, *Prosecutor v. Ntaganda*, Trial Chamber, Sentencing Judgment, 7 November 2019, ICC-01/04-02/06-2442, para. 250 (<https://www.legal-tools.org/doc/yyw2ef/>).

² ICC, *Prosecutor v. Ongwen*, Trial Chamber IX, Sentence, 6 May 2021, ICC-02/04-01/15-1819-Red (<https://www.legal-tools.org/doc/vj1y8k/>).

Much has been written about the compromises made during the negotiations at the Diplomatic Conference, including by William Schabas who has noted that adding an additional caveat to the power of imposing a sentence of life imprisonment was “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 One of the results of the compromise is the mandatory review of such sentences after the convicted person has served twenty-five years, pursuant to Article 110(3) of the Statute. This is perhaps evidence of a more universal trend towards attenuating the rigours of lengthy prison sentences (Schabas, 2016, p. 1160) and is certainly much clearer a position than that taken by the ICTY and the ICTR, whose foundational documents provide no guidance as to the enforcement of life sentences.

The Court’s lack of experience with life sentences to date may make the practice of its two most active predecessors, the ICTY and the ICTR, particularly instructive. The ICTY and the ICTR have imposed a number of sentences of life imprisonment, despite the fact that their respective Statutes make no reference to the possibility of imposing such a sentence. Instead, it is Rule 101(A) of the ICTY’s and the ICTR’s Rules of Procedure and Evidence that provides for the imposition of a sentence of imprisonment for a fixed-term or the remainder of the convicted person’s life. Moreover, the President of the Mechanism for International Criminal Tribunals (mandated *inter alia* to supervise the enforcement of ICTY and ICTR sentences) has recently issued a decision concerning the early release of a person serving a life sentence, denying the early release of Stanislav Galić.⁴ The President decided 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, and established 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 (*Galić*, 23 June 2015, para. 35).

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/>).

⁴ 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/>).

Cross-references:

Articles 5, 21(3), 30, 31–33, 71(1), 76, 77(1)(b), 78 and 110(3).

Doctrine:

1. John Cubbon, “Diminished Responsibility and Loss of Control: The Perspective of International Criminal Law”, in Alan Reed and Michael Bohlander (eds.), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives*, Routledge, London and New York, 2011.
2. 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/>).
3. Margaret M de Guzman, “Proportionate Sentencing at the ICC”, in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015.
4. Mark Findlay and Ralph Henham, *Beyond Punishment: Achieving International Criminal Justice*, Palgrave Macmillan, London, 2010 (<https://www.legal-tools.org/doc/97798c/>).
5. 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/>).
6. 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/>).

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Rule 146

Imposition of fines under article 77

General Remarks:

In addition to imposing a sentence of imprisonment, the Court is empowered to impose a fine pursuant to Article 77(2)(a) of the Statute. It is Rule 146 that provides rather detailed criteria for imposing such a fine.

The money and other property collected through fines can be to the benefit of the victims and their families as the Court may order the transfer of such fines to the Trust Fund, pursuant to Article 79(2) of the Statute. 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 Trust Fund to submit written or oral observations to it”. Once a fine has been imposed, the enforcement thereof lies with the Presidency under Regulation 116 of the Regulations of the Court, who shall receive payment of fines, account for interest gained on money received and ensure the transfer of this money to the Trust Fund or to the victims, as appropriate. In this regard, the Court is empowered to monitor the financial situation of the convicted person even once he or she has completed their sentence of imprisonment, in order to enforce orders of forfeiture, pursuant to Regulation 117. Regulation 117 further states that for such purposes, the Presidency may contact the sentenced person and his or her counsel, as well as seek observations from the Prosecutor, victims and their legal representatives. In order to enforce such a measure, Rule 212 empowers the Court to request the enforcement State to provide information concerning the intention of that State to authorise the convicted person to remain on its territory or the location to which it intends to transfer him or her.

Rules 217–222 cover the enforcement of such fines in detail, with Rule 217 providing that the Presidency shall seek State co-operation, stipulating the Court’s supremacy in Rule 220 which provides that such States cannot modify the fine imposed. Co-operation may only be sought from a State with which the convicted person has a direct connection in order to enforce a fine, which 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” according to Rule 217. Pursuant to Article 109(1) of the Statute, such fines are to be given effect to

without prejudice to the rights of bona fide third parties and in accordance with the procedure of their national law.

This power of the Court to impose fines under Article 77(2)(a) exceeds those of the ICTY and the ICTR, who 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), such fines are restricted to a maximum value of 100,000 EUR for the ICTY and 10,000 USD for the ICTR by the tribunals' respective Rules of Procedure and Evidence.

We have yet to see the practical implications of the Court's power to impose fines (and forfeitures) on a convicted person. In imposing its first sentence, the Trial Chamber in the *Lubanga* case considered it inappropriate to impose a fine on Mr. Lubanga in addition to a sentence of imprisonment, given his financial situation.¹ Similarly, the Trial Chamber in the *Katanga case* decided against imposing a fine on Mr. Katanga, referring to his indigency during trial, a financial situation which had not changed since.² More recently, in the cases of *Bemba* and *Al Mahdi*, the Trial Chambers noted that as none of the parties or participants requested the imposition of a fine or order of forfeiture, the imposition of a sentence of imprisonment would be a sufficient penalty.³ Finally, in the cases of *Ntaganda* and *Ongwen*, the Trial Chamber took into account the convicted individuals' solvency, and considered it inappropriate to also impose a fine or forfeiture of proceeds.⁴

Doctrine: For the bibliography, see the final comment on Rule 146.

Author: Dejana Radisavljević.

¹ 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/>).

² ICC, *Prosecutor v. Katanga*, Trial Chamber, Decision on Sentence pursuant to Article 76 of the Statute, 23 May 2014, ICC-01/04-01/07-3484, para. 169 (<https://www.legal-tools.org/doc/5af172/>).

³ 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/f4c14e/>) and *Prosecutor v. 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/>).

⁴ ICC, *Prosecutor v. Ntaganda*, Trial Chamber, Sentencing Judgment, 7 November 2019, ICC-01/04-02/06-2442, para. 27 (<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/>).

Rule 146(1)

1. In determining whether to order a fine under article 77, paragraph 2 (a), and in fixing the amount of the fine, the Court shall determine whether imprisonment is a sufficient penalty. The Court shall give 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. The Court shall take into account, in addition to the factors referred to in rule 145, whether and to what degree the crime was motivated by personal financial gain.

Rule 146(1) states that the Court, in determining whether to order a fine and the amount thereof, “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”. Furthermore, Rule 146(1) stipulates that the Court shall take into account “whether and to what degree the crime was motivated by personal financial gain”.

Doctrine: For the bibliography, see the final comment on Rule 146.

Author: Dejana Radisavljević.

Rule 146(2)

2. A fine imposed under article 77, paragraph 2 (a), shall be set at an appropriate level. To this end, the Court shall, in addition to the factors referred to above, in particular take into consideration the damage and injuries caused as well as the proportionate gains derived from the crime by the perpetrator. Under no circumstances may the total amount exceed 75 per cent 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 dependants.

Pursuant to Rule 146(2), any fine imposed pursuant to Article 77(2)(a) is to be set “at an appropriate level”, which requires the Court to take into consideration the factors referred to in Rule 146(1) and “the damage and injuries caused as well as the proportionate gains derived from the crime by the perpetrator”. This subsection of the Rule provides that under no circumstances can the fine “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 dependants”.

Doctrine: For the bibliography, see the final comment on Rule 146.

Author: Dejana Radisavljević.

Rule 146(3)

3. In imposing a fine, the Court shall allow the convicted person a reasonable period in which to pay the fine. The Court may provide for payment of a lump sum or by way of instalments during that period.

The convicted person is to be given a reasonable period of time in which to pay the fine, either through a lump-sum payment or in instalments.

Doctrine: For the bibliography, see the final comment on Rule 146.

Author: Dejana Radisavljević.

Rule 146(4)

4. In imposing a fine, the Court may, as an option, calculate it according to a system of daily fines. In such cases, the minimum duration shall be 30 days and the maximum duration five years. The Court shall decide the total amount in accordance with sub-rules 1 and 2. It shall determine the amount of daily payment in the light of the individual circumstances of the convicted person, including the financial needs of his or her dependants.

Rule 146(4) further gives the Court the power 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 is to be determined “in the light of the individual circumstances of the convicted person, including the financial needs of his or her dependants”.

Doctrine: For the bibliography, see the final comment on Rule 146.

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Rule 146(5)

5. If the convicted person does not pay the fine imposed in accordance with the conditions set above, appropriate measures may be taken by the Court pursuant to rules 217 to 222 and in accordance with article 109. Where, in cases of continued wilful non-payment, the Presidency, on its own motion or at the request of the Prosecutor, is satisfied that all available enforcement measures have been exhausted, it 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. In the determination of such period of extension, the Presidency shall take into account the amount of the fine, imposed and paid. Any such extension shall not apply in the case of life imprisonment. The extension may not lead to a total period of imprisonment in excess of 30 years.

Should a convicted person fail to pay the fine imposed upon him or her, the Court is empowered to take any appropriate measures, including ordering an extension. Where the convicted person continuously and wilfully fails to pay a fine, the Presidency may pursuant to Rule 146(5), on its own motion or at the request of the Prosecutor, “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”. Such an extension is only imposable upon those serving a fixed-term sentence and cannot lead to a total period of imprisonment in excess of 30 years. In deciding whether to extend the term of imprisonment, the Presidency may seek the observations from both States “in which attempts to enforce fines did not succeed” and the enforcement State, pursuant to Regulation 118(1). Moreover, pursuant to Regulation 118(2), where a sentence has been extended due to non-payment of a fine, the Court must revoke the extension ordered when the sentenced person subsequently pays the fine, or reduce the extension when the sentenced person pays a portion thereof.

The possibility of extending the sentence of imprisonment is potentially an important incentive for convicted persons to comply with the fine imposed, and is the only example in the Statute of the Presidency exercising a judicial power.¹ An additional incentive for the convicted person to assist

¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1161 (<https://www.legal-tools.org/doc/b7432e/>).

the Court in enforcing fines is found in Article 110(4)(b), which states that when reviewing a reduction of sentence the Court may reduce the sentence if it finds that 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”.

Doctrine: For the bibliography, see the final comment on Rule 146.

Author: Dejana Radisavljević.

Rule 146(6)

6. In order to determine whether to order an extension and the period involved, the Presidency shall sit in camera for the purpose of obtaining the views of the sentenced person and the Prosecutor. The sentenced person shall have the right to be assisted by counsel.

In determining whether to extend the term of imprisonment imposed on the convicted person as a consequence of continued wilful non-payment of a fine, Rule 146(6) provides that the views of the sentenced person, with the assistance of counsel, and the Prosecutor are to be heard in private by the Presidency.

Doctrine: For the bibliography, see the final comment on Rule 146.

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Rule 146(7)

7. In imposing a fine, the Court shall warn the convicted person that failure to pay the fine in accordance with the conditions set out above may result in an extension of the period of imprisonment as described in this rule.

Furthermore, subparagraph 7 stipulates that in imposing a fine, the Court is to warn the convicted person that a failure to pay the fine imposed upon him or her may result in an extension of his or her term of imprisonment, in accordance with the conditions set out in Rule 146(5).

Cross-references:

Articles 75, 76, 77(2), 79(2), 109(1) and 110(4)(b).

Rules 148, 212 and 217–222.

Regulations 116–118.

Doctrine:

1. Hiran Abtahi and Steven Arrig Koh, “The Emerging Enforcement Practice of the International Criminal Court”, in *Cornell International Law Journal*, 2012, vol. 45, no 1.
2. 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/>).

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Rule 147

Orders of forfeiture

General Remarks:

In addition to the power to impose a fine on the convicted person, Rule 147 empowers the Court to impose an order of forfeiture. This Rule is to be read in conjunction with Article 77(2)(b) which empowers the Court to order a forfeiture of proceeds, property and assets derived directly or indirectly from the crime for which the individual has been convicted, without prejudice to the rights of bona fide third parties. Much the same as Rule 146 provides the criteria for imposing a fine, Rule 147 provides additional details on the imposition of any orders of forfeiture. It is notable that the reference to a forfeiture of proceeds, property and assets derived directly or indirectly from the crime implicitly excludes the Court from ordering forfeiture of “property used or intended to be used to commit the crime”.¹

The explicit inclusion of orders of forfeiture in the Court’s Statute and Rules of Procedure and Evidence is unprecedented in international criminal justice and comes from the traditional criminal law rationale that a criminal should not profit from his or her crime (Fife, 2016, p. 1883). The comprehensive manner in which the imposition of such orders of forfeiture is dealt with in the Court’s foundational documents has been described as “a novel system within the history of international criminal law”.² But it is not the first time that an international criminal court has been empowered to make such orders. The Statutes of the ICTY and the ICTR similarly empowered these courts to “order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners”, in Article 24(3) and Article 23(3) respectively. The ICTY and the ICTR were able to impose orders for the 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”. In contrast, 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/>).

² Hirad Abtahi and Steven Arrig 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/>).

has restricted itself in an unprecedented way, by providing that forfeitures may be ordered “without prejudice to the rights of bona fide third parties”.

Much the same as for the imposition of fines, the practical implications of this Rule have yet to be seen as the Court has thus far not imposed an order of forfeiture.

Doctrine: For the bibliography, see the final comment on Rule 147.

Author: Dejana Radisavljević.

Rule 147(1)

1. In accordance with article 76, paragraphs 2 and 3, and rules 63, sub-rule 1, and 143, at any hearing to consider an order of forfeiture, 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.

Rule 147(1) states that, during a hearing to consider an order of forfeiture, in accordance with Article 76(2) and (3) of the Statute and Rules 63(1) and 143, the Chamber is to “hear evidence as to the identification and location of specific proceeds, property or assets which have been derived directly or indirectly from the crime”.

Doctrine: For the bibliography, see the final comment on Rule 147.

Author: Dejana Radisavljević.

Rule 147(2) and (3)

2. If before or during the hearing, a Chamber becomes aware of any bona fide third party who appears to have an interest in relevant proceeds, property or assets, it shall give notice to that third party.

3. The Prosecutor, the convicted person and any bona fide third party with an interest in the relevant proceeds, property or assets may submit evidence relevant to the issue.

Once again, the rights of bona fide third parties are recognised by the Rules of Procedure and Evidence, with Rule 147(2) providing that such parties will be given notice and Rule 147(3) adding that such parties may submit relevant evidence. Moreover, subparagraph 3 naturally extends the right to submit relevant evidence to the Prosecutor and the convicted person.

Doctrine: For the bibliography, see the final comment on Rule 147.

Author: Dejana Radisavljević.

Rule 147(4)

4. After considering any evidence submitted, a Chamber may issue an order of forfeiture in relation to specific proceeds, property or assets if it is satisfied that these have been derived directly or indirectly from the crime.

Having heard the evidence, the Court has considerable discretion in ordering such forfeitures, firstly because the Rules of Procedure and Evidence do not define property or assets, and secondly because there is no mention of the standard of proof. Instead, Rule 147(4) merely states that the Court must be “satisfied” that the proceeds, property and/or assets have been derived directly or indirectly from the crime. Presumably, the Court will have to look to other courts or international or European Conventions for guidance on delineating what is meant by “derived directly or indirectly from that crime”.

The proceeds of such orders of forfeiture are to be handled in much the same way as fines. Thus, pursuant to Article 79(2) of the Statute, any money and other property collected through forfeiture may be transferred to the Trust Fund. Rule 148 provides that before making an order to transfer forfeitures to the Trust Fund, in accordance with Article 79(2) of the Statute, the Chamber may request representatives of the Trust Fund to make written or oral observations.

A number of potential difficulties have been identified in ordering and enforcing forfeitures: the standard for burden of proof; the determination of ownership; and the choice of law in the determination of ownership, particularly where “victims, property and thirds parties are located in different jurisdictions”.¹ Another potential difficulty lies in the Court’s reliance on State co-operation in the enforcement of such forfeitures. In this regard, States Parties are expected to give effect to orders of forfeiture in accordance with the procedure of their national law, under Article 109(1) of the Statute and to comply with requests by the Court to provide assistance, including in “the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture”, pursuant to Article 93(1)(k).

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/>).

Much the same as for fines, the enforcement of order of forfeiture lies with the Presidency, under Regulation 116. The Court is empowered to monitor the financial situation of the convicted person even once he or she has been released from prison so as to enable it to enforce orders of forfeiture, pursuant to Regulation 117, and contact the sentenced person and his or her counsel, as well as to seek observations from the Prosecutor, victims and victim representatives. In this regard, the enforcement State plays an important role in informing the Court of the convicted person's location upon release, pursuant to Rule 212. Enforcement of orders of forfeiture is similarly covered by Rules 217–222. Under Rules 217, the Presidency is to seek State co-operation for the purposes of enforcement and Rule 218 provides specific provisions on enabling States to give effect to such orders. The Court is to give as much information as is available to it so as to enable the State Party to give effect to the order, and any such order must specify the convicted person's identity, the proceeds, property and assets that are to be forfeited, and make clear that where the State Party is unable to give effect to the order, "it shall take measures to recover the value of the same". Moreover, Rule 222 states that the Presidency shall assist the relevant State to give effect to the order by notifying the convicted person or any other relevant persons, or by carrying out "any other measures necessary for the enforcement of the order under the procedure of the national law of the enforcement State".

Finally, the incentive provided to convicted persons as regards the enforcement of fines similarly applies to the enforcement of orders of forfeiture, with Article 110(4)(b) providing that when reviewing a reduction of sentence the Court may reduce the sentence if it finds that 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".

Cross-references:

Articles 76(2) and (3), 77(2), 79(2), 93(1)(k), 109(1) and 110(4)(b).

Rules 63(1), 143, 148, 212 and 217–222.

Regulations 116 and 117.

Doctrine:

1. Hiram Abtahi and Steven Arrig Koh, "The Emerging Enforcement Practice of the International Criminal Court", in *Cornell International Law Journal*, 2012, vol. 45, no. 1.

2. 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 (<https://www.legal-tools.org/doc/040751/>).

Author: Dejana Radisavljević.

Rule 148

Before 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.

Rule 148 contains a procedural elaboration on Article 79(2) which provides that the Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund for Victims.

During the negotiations there were recommendations on whether the Trust Fund for Victims would have standing to appear before the Court, the powers of the Court to recommend the Fund how utilize Money paid to it, including whether the Court could order the Fund to pay costs of legal and other assistance to victims during the proceedings. At the end this is not regulated in the Rules of Procedure and Evidence. Instead Rule 148 provides for a mechanism for the Court to consult with the Fund.¹

Doctrine:

1. Karim A.A, Khan, “Article 79”, 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. 1906–7 (<https://www.legal-tools.org/doc/040751/>).
2. Rolf E. Fife, “Penalties”, 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. 570–72 (<https://www.legal-tools.org/doc/e34f81/>).
3. Jens Peglau, “Penalties and the Determination of the Sentence in the Rules of Procedure and Evidence”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 153 (<https://www.legal-tools.org/doc/95e5f9/>).

Author: Mark Klamberg.

¹ Rolf E. Fife, “Penalties”, 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. 571–72 (<https://www.legal-tools.org/doc/e34f81/>).

CHAPTER 8. APPEAL AND REVISION

Section I. General Provisions

Rule 149

Parts 5 and 6 and rules governing proceedings and the submission of evidence in the Pre-Trial and Trial Chambers shall apply mutatis mutandis to proceedings in the Appeals Chamber.

In order to perform its functions, the Appeals Chamber needs the same powers as the Pre-Trial and Trial Chambers, since it will review the decisions of these organs. Article 83(1) explicitly states that for the purposes of proceedings under Articles 81 and 83, the Appeals Chamber shall have all the powers of the Trial Chamber. However, it does not state the powers of the Appeals Chamber in relation to Article 82 appeals. Thus, there is a need to clarify the Powers of the Appeals Chamber.¹ Rule 140 does this by providing that parts 5 and 6 and rules governing proceedings and the submission of evidence in the Pre-Trial and Trial Chambers shall apply *mutatis mutandis* to proceedings in the Appeals Chamber. This rule is similar to ICTY and ICTR Rules 107.

Several authors have noted that there is no explicit ICC provision which allows a *pre-appeal* judge as known from the *ad hoc* tribunals (ICTY RPE Rule 127(B), ICTR RPE Rule 198 bis, IRMCT RPE Rule 135). However, such a judge may be based on an analogous application of ICC Rule 132 *bis* via Rule 149.²

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. 551 (<https://www.legal-tools.org/doc/995606/>).

¹ Helen J. Brady, “The Rules Procedure and Evidence on the Appeal”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 243–44 (<https://www.legal-tools.org/doc/95e5f9/>).

² Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. 551 (<https://www.legal-tools.org/doc/995606/>), Christopher Staker and Franziska Eckelmans, “Article 83”, 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. 1980 (<https://www.legal-tools.org/doc/040751/>).

2. 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, p. 1955 (<https://www.legal-tools.org/doc/040751/>).
3. Helen J. Brady, “Appeal and Revision”, 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. 582–83 (<https://www.legal-tools.org/doc/e34f81/>).
4. Helen J. Brady, “The Rules Procedure and Evidence on the Appeal”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 243–44 (<https://www.legal-tools.org/doc/95e5f9/>).
5. Christopher Staker and Franziska Eckelmans, “Article 83”, in Triffterer and Ambos (eds.), 2016, p. 1980.

Author: Mark Klamberg.

Section II. Appeals Against Convictions, Acquittals, Sentences and Reparation Orders

Rule 150

- 1. Subject to sub-rule 2, an appeal against a decision of conviction or acquittal under article 74, a sentence under article 76 or a reparation order under article 75 may be filed not later than 30 days from the date on which the party filing the appeal is notified of the decision, the sentence or the reparation order.**
- 2. The Appeals Chamber may extend the time limit set out in sub-rule 1, for good cause, upon the application of the party seeking to file the appeal.**
- 3. The appeal shall be filed with the Registrar.**
- 4. If an appeal is not filed as set out in sub-rules 1 to 3, the decision, the sentence or the reparation order of the Trial Chamber shall become final.**

Rules 150–153 cover appeals against the fundamental decisions of the Trial Chamber: a decision of conviction or acquittal under Article 74, a sentence under Article 76 or a reparation order under Article 75. Rule 150 sets the procedure for such appeals in terms of time-limits (sub-rules 1 and 2), recipient of the appeal: the Registrar (sub-rule 3) and the consequence if these requirements are not met, namely, the decision automatically becomes final (sub-rule 4).

The possibility under sub-rule 2 to extend the time-limit requires “good cause”. In *Lubanga*, the term “good cause” was defined as “valid reasons for non-compliance with the procedural obligations of a party to the litigation [...] associated with a party’s duties and obligations in the judicial process. A cause is good, if founded upon reasons associated with a person’s capacity to conform to the applicable procedural rule or regulation or the directions of the Court. Incapability to do so must be for sound reasons, such as would objectively provide justification for the inability of a party to comply with his/her obligations”. In *Lubanga* the question at hand was “whether counsel’s illness and sequential temporary inability to represent the person under charge proficiently constitute a ‘good cause’”.¹

¹ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Reasons for the “Decision of the Appeals Chamber on the request of counsel to Mr. Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007” issued on

This rule is similar to ICTY and ICTR Rules 108.

Cross-reference:

Regulation 35.

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, pp. 550, 551 (<https://www.legal-tools.org/doc/995606/>).
2. Helen J. Brady, “Appeal and Revision”, 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. 583–84 (<https://www.legal-tools.org/doc/e34f81/>).
3. Helen J. Brady, “The Rules Procedure and Evidence on the Appeal”, in Horst Fischer *et al.* (eds.) *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 244–45 (<https://www.legal-tools.org/doc/95e5f9/>).

Author: Mark Klamberg.

the 16 February 2007, ICC-01/04-01/06-834, 22 February 2007, para. 7 (<https://www.legal-tools.org/doc/e3a9c9/>); see also Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. 551 (<https://www.legal-tools.org/doc/995606/>).

Rule 151

1. Upon the filing of an appeal under rule 150, the Registrar shall transmit the trial record to the Appeals Chamber.

2. The Registrar shall notify all parties who participated in the proceedings before the Trial Chamber that an appeal has been filed.

After the Registrar has received the appeal, the Registrar shall pursuant to sub-rule 1 transmit the trial record to the Appeals Chambers. The Registrar shall also, pursuant to sub-rule 2 notify “all parties who participated in the proceedings before the Trial Chamber that an appeal has been filed”.

The rule does not state that the other party or parties have the right to respond. However, the principle of equality of arms and general principles on procedural fairness would suggest that they have such a right.¹ Article 83(1) with Rules 150–151 set out the applicable procedural rules and powers.

ICTY and ICTR Rules 109 and 110 are the equivalent provisions to ICC Rule 151.

Cross-references:

Article 81(4).

Regulation 35.

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, pp. 363, 551 (<https://www.legal-tools.org/doc/995606/>).
2. Helen J. Brady, “Appeal and Revision”, 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. 584–586 (<https://www.legal-tools.org/doc/e34f81/>).
3. Helen J. Brady, “The Rules Procedure and Evidence on the Appeal”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 246–247 (<https://www.legal-tools.org/doc/95e5f9/>).

¹ Helen J. Brady, “The Rules Procedure and Evidence on the Appeal”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 246 (<https://www.legal-tools.org/doc/95e5f9/>).

Author: Mark Klamberg

Rule 152

1. Any party who has filed an appeal may discontinue the appeal at any time before judgement has been delivered. In such case, the party shall file with the Registrar a written notice of discontinuance of appeal. The Registrar shall inform the other parties that such a notice has been filed.

2. If the Prosecutor has filed an appeal on behalf of a convicted person in accordance with article 81, paragraph 1 (b), before filing any notice of discontinuance, the Prosecutor shall inform the convicted person that he or she intends to discontinue the appeal in order to give him or her the opportunity to continue the appeal proceedings.

Rule 152 concerns discontinuance of the appeal. There is no requirement that the party who files a notice of discontinuance of appeal gives reasons for discontinuing, during the negotiations there was a strong view against having such a requirement.¹

Sub-rule 2 concerns cases where the Prosecutor has filed an appeal on behalf of a convicted person in accordance with Article 81(1)(b). Sub-rule 2 ensures that the convicted person does not forfeit his or her right to appeal if the Prosecutor decided to discontinue an appeal that has been filed under Article 81(1)(b).

Doctrine:

1. Helen J. Brady, “Appeal and Revision”, 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. 586–587 (<https://www.legal-tools.org/doc/e34f81/>).
2. Helen J. Brady, “The Rules Procedure and Evidence on the Appeal”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 247–249 (<https://www.legal-tools.org/doc/95e5f9/>).

Author: Mark Klamberg.

¹ Helen J. Brady, “The Rules Procedure and Evidence on the Appeal”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 248 (<https://www.legal-tools.org/doc/95e5f9/>).

Rule 153

- 1. The Appeals Chamber may confirm, reverse or amend a reparation order made under article 75.*
- 2. The judgement of the Appeals Chamber shall be delivered in accordance with article 83, paragraphs 4 and 5.*

The ICC Statute is silent on the powers of the Appeals Chamber in relation to reparation orders. Rule 153 fills this gap.

Sub-rule 1 which grants the Appeals Chamber powers to confirm, reverse or amend a reparation order mirrors Article 83(2). The rule does not grant the Appeals Chamber the Power to call evidence in the context of reparation appeals. However, Brady argues that Rule 149 could allow the Appeals Chamber to do so.¹

Sub-rule 2 Points to Article 83(4) and (5), namely that (i) the judgement of the Appeals Chamber shall be taken by a majority of the judges and shall be delivered in open court; and (ii) the Appeals Chamber may deliver its judgement in the absence of the person concerned.

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, pp. 564, 568 (<https://www.legal-tools.org/doc/995606/>).
2. Helen J. Brady, “Appeal and Revision”, 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. 587–588 (<https://www.legal-tools.org/doc/e34f81/>).
3. Helen J. Brady, “The Rules Procedure and Evidence on the Appeal”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 249–250 (<https://www.legal-tools.org/doc/95e5f9/>).

Author: Mark Klamberg.

¹ Helen J. Brady, “The Rules Procedure and Evidence on the Appeal”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 249 (<https://www.legal-tools.org/doc/95e5f9/>).

*Section III. Appeals Against Other Decisions***Rule 154**

- 1. An appeal may be filed under article 81, paragraph 3 (c) (ii), or article 82, paragraph 1 (a) or (b), not later than five days from the date upon which the party filing the appeal is notified of the decision.**
- 2. An appeal may be filed under article 82, paragraph 1 (c), not later than two days from the date upon which the party filing the appeal is notified of the decision.**
- 3. Rule 150, sub-rules 3 and 4, shall apply to appeals filed under sub-rules 1 and 2 of this rule.**

Rule 154 concerns appeals that do not require leave of the Court, namely appeals under Article 81(3)(c)(ii) and Article 82(1)(a) or (b). In relation to Rule 150, Rule 154 modifies the time limit for certain types of appeal (including appeals concerning jurisdiction and admissibility). However, the time-limit for appeals against a decision of conviction or acquittal or a reparations order remains 30 days.

It should be noted that pursuant to Article 82(3) and Rule 156(5) an appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders.

If an appeal is not filed within the time limit, the lower Chamber's decision becomes final pursuant to Rule 154(3) which contains a reference to Rule 150(3) and (4).

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. 569 (<https://www.legal-tools.org/doc/995606/>).
2. Helen J. Brady, "Appeal and Revision", 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. 588–589 (<https://www.legal-tools.org/doc/e34f81/>).
3. Helen J. Brady, "The Rules Procedure and Evidence on the Appeal", in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 250–251 (<https://www.legal-tools.org/doc/95e5f9/>).

Author: Mark Klamberg.

Rule 155

1. When a party wishes to appeal a decision under article 82, paragraph 1 (d), or article 82, paragraph 2, that party shall, within five days of being notified of that decision, make a written application to the Chamber that gave the decision, setting out the reasons for the request for leave to appeal.

2. The Chamber shall render a decision and shall notify all parties who participated in the proceedings that gave rise to the decision referred to in sub-rule 1.

Rule 155 sets out the procedure of appeal when leave of the either the Pre-Trial Chamber or the Trial Chamber is required. It provides that the party wishing to make appeal a decision under Article 82, paragraph 1 (d), or Article 82, paragraph 2, shall within five days of being notified of that decision, make a written application to the Chamber that gave the decision, setting out the reasons for the request for leave to appeal.

In *Kony et al.*, Pre-Trial Chamber II rejected the Prosecutor’s request for a variation of the time-limit prescribed in Rule 155 of the Rules for filing an application for leave to appeal.¹ In *Kony et al.*, Pre-Trial Chamber II dismissed the Prosecutor’s request for an extension of the time-limit.²

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. 569 (<https://www.legal-tools.org/doc/995606/>).
2. Helen J. Brady, “Appeal and Revision”, 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. 589–590 (<https://www.legal-tools.org/doc/e34f81/>).
3. Helen J. Brady, “The Rules Procedure and Evidence on the Appeal”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of*

¹ ICC, *Prosecutor v. Kony et al.*, Pre-Trial Chamber II, Decision on the Prosecutor’s Motion for Clarification and Urgent Request for Clarification of the Time-limit Enshrined in Rule 155, 18 July 2005, ICC-02/04-01/05-18 (<https://www.legal-tools.org/doc/b615e5/>).

² ICC, *Prosecutor v. Kony et al.*, Decision on Prosecutor’s “Application to lift redactions from applications for Victims’ Participation to be provided to the OTP” and on the Prosecution’s further submissions supplementing such Application, and request for extension of time, 20 February 2007, ICC-02/04-01/05-209 (<https://www.legal-tools.org/doc/bf6beb/>).

Crimes Under International Law, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 251–252 (<https://www.legal-tools.org/doc/95e5f9/>).

Author: Mark Klamberg.

Rule 156

General Comments:

Although Articles 81 and 82, Rules 154 and 155 make a distinction between appeals require leave to appeal for certain types of appeal and not for others, the appeal in itself has a common procedure as set out in Rule 156.

Rule 156 has not incorporated any provision on hearings to fix procedural arrangements. Instead, Rule 132 which provides for status Conferences can be used in order to determine necessary procedural arrangements.¹

Doctrine: For the bibliography, see the final comment on Rule 156.

Author: Mark Klamberg.

¹ Helen J. Brady, “The Rules Procedure and Evidence on the Appeal”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 253 (<https://www.legal-tools.org/doc/95e5f9/>).

Rule 156(1)

1. As soon as an appeal has been filed under rule 154 or as soon as leave to appeal has been granted under rule 155, the Registrar shall transmit to the Appeals Chamber the record of the proceedings of the Chamber that made the decision that is the subject of the appeal.

Sub-rule 1 provides that as soon as an appeal has been filed under Rule 154 or as soon as leave to appeal has been granted under Rule 155, the Registrar shall transmit to the Appeals Chamber the record of the proceedings of the Chamber that made the decision that is the subject of the appeal.

Doctrine: For the bibliography, see the final comment on Rule 156.

Author: Mark Klamberg.

Rule 156(2)

2. The Registrar shall give notice of the appeal to all parties who participated in the proceedings before the Chamber that gave the decision that is the subject of the appeal, unless they have already been notified by the Chamber under rule 155, sub-rule 2.

The Registrar shall pursuant to sub-rule 2 “give notice of the appeal to all parties who participated in the proceedings before” the lower Chamber “unless they have already been notified by the Chamber under Rule 155, sub-rule 2”.

Doctrine: For the bibliography, see the final comment on Rule 156.

Author: Mark Klamberg.

Rule 156(3)

3. The appeal proceedings shall be in writing unless the Appeals Chamber decides to convene a hearing.

4. The appeal shall be heard as expeditiously as possible.

Sub-rule 3 provides that the appeal proceedings shall be in writing unless the Appeals Chamber decides to convene a hearing. In *Ruto et al.*, the Appeals Chamber stated that Rule 156(3) “establishes as a norm that proceedings on appeal such as the present should be conducted by way of written submissions. The rule nonetheless also vests the Appeals Chamber with discretion to convene a hearing. However, for the Appeals Chamber to exercise its discretion and to depart from this norm it must be furnished with cogent reasons that demonstrate why an oral hearing in lieu of, or in addition to, written submissions is necessary”.¹ The Appeals Chamber found that “Kenya has failed to provide cogent reasons that would persuade the Appeals Chamber to exercise its discretion and convene a hearing” (*Ruto et al.*, 17 August 2011, para. 11). The Appeals Chamber noted that the Request for an Oral Hearing was made at a late stage in the proceedings. In the view of the Appeals Chamber, the holding of an oral hearing at such a late stage in the proceedings would unduly affect the expeditious resolution of the appeal, another factor for the rejection of the Request for an Oral Hearing (para. 13).²

Doctrine: For the bibliography, see the final comment on Rule 156.

Author: Mark Klamberg.

¹ ICC, *Prosecutor v. Ruto et al.*, Appeals Chamber, Decision on the “Request for an Oral Hearing Pursuant to Rule 156(3)”, 17 August 2011, ICC-01/09-01/11-271, para. 10 (*‘Ruto et al.*, 17 August 2011’) (<https://www.legal-tools.org/doc/94fb55/>).

² See also ICC, *Prosecutor v. Muthaura et al.*, Decision on the “Request for an Oral Hearing Pursuant to Rule 156(3)”, 17 August 2011, ICC-01/09-02/11-251, paras. 10–11 and 13 (<https://www.legal-tools.org/doc/7b4c3e/>).

Rule 156(5)

5. When filing the appeal, the party appealing may request that the appeal have suspensive effect in accordance with article 82, paragraph 3.

Sub-rule 5 supplements Article 82(3) which provides that “[a]n appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request”. Some delegations argued during the negotiations that the rule should provide guidelines as to when the Appeals Chamber should order that a pending appeal suspend a decision. At the end, it was decided that such guidelines should not be elaborated in the rules, instead it should be at the discretion of the Appeals Chamber.¹ In *Lubanga*, the Appeals Chamber considered that “neither article 82(3) of the Statute nor rule 156(5) of the Rules of Procedure and Evidence stipulate in which circumstances suspensive effect should be ordered” and determined that “this decision is left to the discretion of the Appeals Chamber. Therefore, when faced with 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 In the present case the Appeals Chamber asked “whether the implementation of the Impugned Decision would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant”, did not consider “that the implementation of the Impugned Decision would create such an irreversible situation” (*Lubanga*, 22 April 2008, para. 8) and thus the request for suspensive effect was rejected. The Appeals Chamber made a similar ruling in *Lubanga*.³

¹ Helen J. Brady, “The Rules Procedure and Evidence on the Appeal”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 254 (<https://www.legal-tools.org/doc/95e5f9/>).

² ICC, *Prosecutor v. Lubanga*, 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/>).

³ ICC, *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, 22 May 2008, ICC-01/04-01/06-1347, para. 10 (<https://www.legal-tools.org/doc/093bc1/>).

In *Lubanga*, the Appeals Chamber granted the request for suspensive effect of the appeal against the Decision on the release of Thomas Lubanga Dyilo, 2 July 2008.⁴ The Appeals Chamber reasoned that “[g]iven the fact that the decision on release was under appeal and that leave to appeal the stay of proceedings had been granted and in light of previous findings of the Pre-Trial and Trial Chambers that his detention is necessary to secure his presence at trial, the Appeals Chamber found that the release of Mr. Lubanga Dyilo at this point in time could potentially defeat the purpose of the present appeal as well as of the appeal that, in all likelihood, would be mounted against the Decision to Stay the Proceedings”.⁵

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. 569 (<https://www.legal-tools.org/doc/995606/>).
2. Helen J. Brady, “Appeal and Revision”, 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. 590–592 (<https://www.legal-tools.org/doc/e34f81/>).
3. Helen J. Brady, “The Rules Procedure and Evidence on the Appeal”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 253–254 (<https://www.legal-tools.org/doc/95e5f9/>).

Author: Mark Klamberg.

⁴ ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Decision on the request of the Prosecutor for suspensive effect of his appeal against the “Decision on the release of Thomas Lubanga Dyilo, 7 July 2008, ICC-01/04-01/06-1423 (<https://www.legal-tools.org/doc/19ec00/>).

⁵ See ICC, *Prosecutor v. Lubanga*, 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, para. 10 (<https://www.legal-tools.org/doc/4f026b/>).

Rule 157

Any party who has filed an appeal under rule 154 or who has obtained the leave of a Chamber to appeal a decision under rule 155 may discontinue the appeal at any time before judgement has been delivered. In such case, the party shall file with the Registrar a written notice of discontinuance of appeal. The Registrar shall inform the other parties that such a notice has been filed.

Rule 157 sets out the procedure for discontinuing an appeal brought under Rule 154 or Rule 155, that is, “other decisions”. This rule is consistent with the procedure for discontinuance of an appeal under Rule 152.

In *Lubanga*, the Appeals Chamber considered that a notice of discontinuance is neither subject to approval by nor acknowledgement from the Court.¹ Discontinuance of an appeal subject to reservations is not foreseen in either the Statute or the Rules of Procedure and Evidence and that includes reservations relevant to the future conduct of the proceedings. As such the Appeals Chamber is not vested with discretion to sanction discontinuance of an appeal subject to conditions. The Appeals Chamber found that in the instant case the Appellant’s Brief did not constitute a notice of discontinuance under Rule 157 of the Rules of Procedure and Evidence and decided that the Appellant’s notice of discontinuance of the appeal subject to his retaining the right to challenge the admissibility of the case before the Court was invalid. In *Lubanga*, the Appeals Chamber rejected the Appellant’s application for referral to the Pre-Trial Chamber and deemed the appeal abandoned and dismissed.²

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. 569 (<https://www.legal-tools.org/doc/995606/>).
2. Helen J. Brady, “Appeal and Revision”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules*

¹ 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/>).

² 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/>).

of Procedure and Evidence, Transnational Publishers, Ardsley, 2001, p. 592 (<https://www.legal-tools.org/doc/e34f81/>).

3. Helen J. Brady, “The Rules Procedure and Evidence on the Appeal”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 254–255 (<https://www.legal-tools.org/doc/95e5f9/>).

Author: Mark Klamberg.

Rule 158

- 1. An Appeals Chamber which considers an appeal referred to in this section may confirm, reverse or amend the decision appealed.*
- 2. The judgement of the Appeals Chamber shall be delivered in accordance with article 83, paragraph 4.*

The ICC Statute is silent on the powers of the Appeals Chamber in relation to appeal of certain “other decisions”. Rule 158 fills this gap.

Sub-rule 1 which grants the Appeals Chamber powers to confirm, reverse or amend an “other decision” mirrors Article 83(2).

Sub-rule 2 Points to Article 83(4), namely that the judgement of the Appeals Chamber shall be taken by a majority of the judges and shall be delivered in open Court.

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2016, p. 569 (<https://www.legal-tools.org/doc/995606/>).
2. Helen J. Brady, “Appeal and Revision”, 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. 592–593 (<https://www.legal-tools.org/doc/e34f81/>).
3. Helen J. Brady, “The Rules Procedure and Evidence on the Appeal”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 254–255 (<https://www.legal-tools.org/doc/95e5f9/>).

Author: Mark Klamberg.

*Section IV. Revision of Conviction or Sentence***Rule 159*****General Remarks:***

Rules 159 to 161 contain specifications on the procedure of revision, regulated in less detail in Article 84 of the ICC Statute.

The revision procedure consists of two steps: the first step, dealt with in Rule 159, is the application for revision and the Appeal Chamber's decision on the consistency of the application with the conditions set out in Article 84(1). The second part of the procedure begins if the application is meritorious and consists of the actual decision on the substance of the matter of revision. This latter decision is taken by the Chamber the matter has been referred to by the Appeals Chamber (Rule 161). Rule 160 on the other hand contains strictly organizational measures, concerning the presence of the convicted during the hearing for determination on revision.

Until now, there has not been a revision procedure before the ICC.

Preparatory Works:

Various proposals made during the preparatory work concerning Rules 159–161 were much more detailed than the ones that were finally adopted.¹ However, in the end the priority was given to options, which were drafted rather vaguely and left the concrete decision on how to deal with the matters in question to the power of the Appeals Chamber. All in all, Rules 159–161 were not a big issue during the drafting of the Rules of Procedure and Evidence, because the main controversies had already been settled in Article 84 of the ICC Statute. Originally Rule 160 was not included at all in the rules on revision and was only proposed quite late in the drafting process.²

¹ Proposal submitted by Australia, UN Doc. PCNICC/1999/DP.1, 26 January 1999 (<https://www.legal-tools.org/doc/79ba83/>); Proposal by France concerning the Rules of Procedure and Evidence, UN Doc. PCNICC/1999/WGRPE/DP.13, 19 July 1999 (<https://www.legal-tools.org/doc/622324/>); Proposal submitted by Australia and France to govern revision of conviction or sentence, UN Doc. PCNICC/1999/WGRPE/DP.32, 3 August 1999 (<https://www.legal-tools.org/doc/0104a6/>).

² See Rule 10.15 in Annex II: Rules of Procedure and Evidence, UN Doc. PCNICC/2000/L.1/Rev.1/Add.1, 10 April 2000 (<https://www.legal-tools.org/doc/612522/>).

Cross-reference: Article 84.

Doctrine: For the bibliography, see the final comment on Rule 159.

Authors: Wenke Brückner and Julia Dornbusch.

Rule 159(1)

1. An application for revision provided for in article 84, paragraph 1, shall be in writing and shall set out the grounds on which the revision is sought. It shall as far as possible be accompanied by supporting material.

Rule 159(1) contains specifications on the application for revision. The applicant is supposed to submit supporting material together with his/her application. This regulation suggests that the applicant bears the burden of proof for satisfying the Appeals Chamber that the requirements of Article 84(1) are met.¹

Preparatory Works:

The wording of the requirement to include supporting material “as far as possible” constitutes a compromise: Some delegates held the view that an application without supporting material should be inadmissible. A French proposal demanded the submitting of supporting material in a mandatory manner;² but because such a requirement might prove to be difficult – especially for the convicted, for example, when he is serving sentence in a distant country, – the drafters finally opted for the ‘as far as possible’ rule.³

Cross-references: Article 84(1).

Regulation 66.

Doctrine: For the bibliography, see the final comment on Rule 159.

Authors: Wenke Brückner and Julia Dornbusch.

¹ Volker Nerlich, “Article 84 Revision of conviction or sentence”, 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 Proposal by France concerning the Rules of Procedure and Evidence, UN Doc. PCNICC/1999/WGRPE/DP.13, 19 July 1999 (<https://www.legal-tools.org/doc/622324/>).

³ Gilbert Bitti and Silvia A. Fernández de Gurmendi, “Revision of Conviction or Sentence”, in Roy Lee *et al.* (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 596–603, 599 (<https://www.legal-tools.org/doc/e34f81/>).

Rule 159(2)

2. The determination on whether the application is meritorious shall be taken by a majority of the judges of the Appeals Chamber and shall be supported by reasons in writing.

The sole definite requirement set out in Rule 159(2) is a majority decision of the judges. An initial proposal during the negotiations set out this first step of the revision procedure in more detail and asked for the holding of a hearing. However, this is not necessary according to the final Rule that was adopted. However, a hearing is still possible, because the procedure of determining whether application is meritorious can be specified by the Appeals Chamber itself.¹

While it had also been suggested that the Presidency should have the power to decide on the merits of an application for revision, Rule 159(2) assigns the decision-making power to the Appeals Chamber. As a consequence, the Appeals Chamber can decide on a revision application in a case where the same Appeals Chamber has also issued the final judgment.²

Doctrine:

1. Gilbert Bitti and Silvia A. Fernández de Gurmendi, “Revision of Conviction or Sentence”, in Roy Lee *et al.* (eds.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 596–603 (<https://www.legal-tools.org/doc/e34f81/>).
2. Volker Nerlich, “Article 84 Revision of conviction or sentence”, 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. 2412–2426, paras. 1–34.

Authors: Wenke Brückner and Julia Dornbusch.

¹ Gilbert Bitti and Silvia A. Fernández de Gurmendi, “Revision of Conviction or Sentence”, in Roy Lee *et al.* (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 596–603, 600 (<https://www.legal-tools.org/doc/e34f81/>).

² Bitti and Fernández de Gurmendi, 2001, pp. 596–603, 589; Gideon Boas *et al.*, “Appeals, Reviews, and Reconsideration”, in Göran Sluiter *et al.* (eds.), *International Criminal Procedure, Principles and Rules*, Oxford University Press, 2013, pp. 939–1014, 985. (<https://www.legal-tools.org/doc/bcad4c/>).

Rule 160(1)

1. For the conduct of the hearing provided for in rule 161, the relevant Chamber shall issue its order sufficiently in advance to enable the transfer of the sentenced person to the seat of the Court, as appropriate.

Rules 160 and 161 require the convicted person's presence during the hearing for the decision on revision. It can be concluded that the convicted does not have to be present during the first step of the revision procedure, namely, the decision on the application on revision by the Appeals Chamber.¹

Apart from regulations on the accused's presence, Rule 160 is purely technical and sets out organizational measures concerning the transfer of the convicted to the seat of the Court for the hearing. The order of the transfer is issued by the Chamber in charge of the decision (according to Article 84 ICC-Statute either the original Trial Chamber, another Trial Chamber or the Appeals Chamber) and has to be made sufficiently in advance so as to actually enable the State to organize the transfer.

Cross-references: Article 84(1).

Rule 161.

Doctrine:

1. Volker Nerlich, "Article 84 Revision of conviction or sentence", 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. 2412–2426, paras. 1–34.

Author: Wenke Brückner and Julia Dornbusch.

¹ Volker Nerlich, "Article 84 Revision of conviction or sentence", 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. 30.

Rule 161(1)

1. On a date which it shall determine and shall communicate to the applicant and to all those having received notification under rule 159, sub-rule 3, the relevant Chamber shall hold a hearing to determine whether the conviction or sentence should be revised.

Rule 161 requires the holding of a hearing but does not give further indications on how the Appeals Chamber appoints the “relevant” Chamber and how this Chamber shall arrive at a conclusion. The Appeals Chamber’s power, set out in Article 84(2), to either reconvene the original Trial Chamber, constitute a new Trial Chamber or retain jurisdiction over the matter as it deems “appropriate” are not clarified any further in the ICC Rules of Procedure and Evidence. Leaving aside applications on grounds of Article 84(1)(c) ICC-Statute, as the underlying reason for a revision before the ICC is not a presumptive error of law or error of fact, but rather that false or forged evidence might unknowingly has been taken into account or new evidence should be taken into account, it seems appropriate that the same chamber revises its final decision or sentence as it is familiar with the case.¹

Cross-reference: Article 84.

Doctrine: For the bibliography, see the final comment on Rule 161.

Author: Wenke Brückner and Julia Dornbusch.

¹ Volker Nerlich, “Article 84 Revision of conviction or sentence”, 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.

Rule 161(2)

2. For the conduct of the hearing, the relevant Chamber shall exercise, mutatis mutandis, all the powers of the Trial Chamber pursuant to Part 6 and the rules governing proceedings and the submission of evidence in the Pre-Trial and Trial Chambers.

The Chamber's function at this stage is to decide whether the grounds for revision affect the conviction or the sentence of the judgment in question. According to Rule 161(2) the Chamber has the power of the Trial Chamber and Pre-Trial Chamber for the conduct of the hearing, which is consistent with Rule 149 concerning the appeals proceedings, but does not mean that the Chamber should always conduct a complete retrial.¹ However, in certain cases, where the trial proceedings were entirely affected by the grounds for revision an actual retrial can be necessary. This retrial would then have to be conducted through the proceedings of revision, because the Chamber does not have the power to order a retrial (Nerlich, 2022, pp. 2412–2426, para. 32).

Cross-reference:

Rule 149.

Doctrine: For the bibliography, see the final comment on Rule 161.

Authors: Wenke Brückner and Julia Dornbusch.

¹ Volker Nerlich, "Article 84 Revision of conviction or sentence", 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. 32; Helen Brady, "Appeal", in Roy Lee *et al.* (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, p. 583 (<https://www.legal-tools.org/doc/e34f81/>).

Rule 161(3)

3. The determination on revision shall be governed by the applicable provisions of article 83, paragraph 4.

Rule 161(3) refers to Article 83(4), thus referring to a majority decision of judges, which has to be delivered in open court, stating the reasons on which the decision is based. Furthermore, there is the possibility for separate or dissenting opinions. However, it remains unclear, if the decision on revision might be subject to appeal. It is suggested that the reference to Article 83(4) ICC-Statute equates the decision on revision with a final judgment of the Appeals Chamber – even if it might ultimately be made by the Trial Chamber – hence excluding the possibility of an appeal. Such an interpretation can be justified by the exceptional character of the revision proceedings.¹ On the other hand, scholars hold the differing view, that the decision on revision is open to appeal, as every decision that might be taken by a Trial Chamber, has to be subject to appeal.²

Cross-reference:

Article 83(4).

Doctrine:

1. Gideon Boas *et al.*, “Appeals, Reviews, and Reconsideration”, in Göran Sluiter *et al.* (eds.), *International Criminal Procedure, Principles and Rules*, Oxford University Press, 2013, pp. 939–1014 (<https://www.legal-tools.org/doc/bcad4c/>).
2. Volker Nerlich, “Article 84 Revision of conviction or sentence”, 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. 2412–2426, paras. 1–34.
3. Helen Brady, “Appeal”, in Roy Lee *et al.* (eds.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*,

¹ Volker Nerlich, “Article 84 Revision of conviction or sentence”, 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. 34.

² Gideon Boas *et al.*, “Appeals, Reviews, and Reconsideration”, in Göran Sluiter *et al.* (eds.), *International Criminal Procedure, Principles and Rules*, Oxford University Press, 2013, p. 986 (<https://www.legal-tools.org/doc/bcad4c/>).

Transnational Publishers, Ardsley, 2001, pp. 575–596 (<https://www.legal-tools.org/doc/e34f81/>).

Authors: Wenke Brückner and Julia Dornbusch.

CHAPTER 9. OFFENCES AND MISCONDUCT AGAINST THE COURT

Section I. Offences Against the Administration of Justice Under Article 70

Rule 162(1)

1. Before deciding whether to exercise jurisdiction, the Court may consult with States Parties that may have jurisdiction over the offence.

General Remarks:

This provision seeks to regulate the exercise of jurisdiction by the Court over the offences against the administration of justice set out in Article 70 of the Statute and derogates from the general procedure for exercising jurisdiction set out in Part II of the Statute (Articles 5–21 of the Statute) as provided by Rule 163(2). The considerations listed herein are not exhaustive and are all discretionary. Paragraphs 3 and 4 of this Rule also seek to regulate situations where States wish to exercise jurisdiction in lieu of the Court and also where the Court declines to exercise jurisdiction.

In both of the Decisions of Pre-Trial Chamber II issuing warrants of arrest for alleged offences under Article 70, consultation with States Parties under this provision has not been undertaken due to the possibility of inadvertent leaking or disclosure of information which would diminish the chance of arrest.¹

Doctrine: For the bibliography, see the final comment on Rule 162.

Author: Geoff Roberts.

¹ 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. 2 (<https://www.legal-tools.org/doc/25ee9d/>); *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-01/05-01/13-1-Red2-tENG, para. 7 (<https://www.legal-tools.org/doc/9f1848/>).

Rule 162(2)

2. In making a decision whether or not to exercise jurisdiction, the Court may consider, in particular:

- (a) The availability and effectiveness of prosecution in a State Party;**
- (b) The seriousness of an offence;**
- (c) The possible joinder of charges under article 70 with charges under articles 5 to 8;**
- (d) The need to expedite proceedings;**
- (e) Links with an ongoing investigation or a trial before the Court; and**
- (f) Evidentiary considerations.**

Further factors allegedly justifying the refusal to consult with the States Parties relate to the exercise of jurisdiction and are addressed in relation to Rule 162(2). Pre-Trial Chamber II referred also to the factors that it may consider when deciding whether to exercise jurisdiction set out in Rule 162(2) but appeared to mix these with considerations relating to whether or not to consult with States Parties under Rule 162(1) before deciding whether to exercise jurisdiction.¹ However, set out more clearly in *Bemba*, Pre-Trial Chamber II did consider that the reasons which required the Court's prompt exercise of jurisdiction included "the clear urgency of the issue and the ensuing need to act forthwith [...], the close and manifest connections between the investigation which gave rise to the Prosecutor's Application and the trial in the Case before the Court, as well as the gravity of the Prosecutor's allegations". The Pre-Trial Chamber also proceeded to recall that it had been following the Prosecutor's investigation into the Article 70 allegations and the impact on the evidence in the main *Bemba* trial as further reasons why both consultation with States Parties was not required and why the Court should exercise jurisdiction. Although not specifying exactly which factors were relevant in this case, Pre-Trial Chamber II therefore did appear to refer therefore to the factors set out in Rule 162(2)(b), (d), (e) and (f). In addition, the familiarity of the Pre-Trial Chamber with the Prosecutor's investigation and

¹ See 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. 3 (<https://www.legal-tools.org/doc/25ee9d/>); *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-01/05-01/13-1-Red2-tENG, para. 8 (<https://www.legal-tools.org/doc/9f1848/>).

its resulting ability to issue a prompt order on the merits of the request for an arrest warrant in that case was also held to be a relevant factor.

Doctrine: For the bibliography, see the final comment on Rule 162.

Author: Geoff Roberts.

Rule 162(3)

3. The Court shall give favourable consideration to a request from the host State for a waiver of the power of the Court to exercise jurisdiction in cases where the host State considers such a waiver to be of particular importance.

Rule 162(3) appears to establish a mini admissibility procedure for Offences against the Administration of Justice as Article 17 (which regulates cases for one of the substantive crimes under the Court’s jurisdiction as set out in Articles 5–8 of the Statute) does not apply to such offences by virtue of Rule 163(2). This mini admissibility procedure further explains what is meant by the phrase “[u]pon 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” (emphasis added). The terms in Rule 162(3) are somewhat vague and the phrase “favourable consideration” therein does not appear anywhere else in the Statute or Rules which would aid interpretation. However, it would appear to create a presumption in favour of the State exercising jurisdiction over such offences (and the Court therefore waiving such jurisdiction) where the State considers that it is very important for the State to do so. This presumption is rebuttable and the Court may still exercise jurisdiction, notwithstanding any request by a State, presumably when the other factors in Rule 162(2) are assessed against the State’s request or if the Court did not consider the State’s claim to the importance of the waiver to be justified. However, others consider that “any such request appears, by the text of this provision, to be binding on the Court”.¹ If such a request for a waiver pursuant to this Rule is granted by the Court, there is no mechanism for monitoring whether or not this resulted in a fair, thorough and impartial investigation and possible future prosecution.

Doctrine: For the bibliography, see the final comment on Rule 162.

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, the Regulations of the Court and Supplementary Instruments*, Brill Nijhoff, 2010, p. 235 (<https://www.legal-tools.org/doc/c9bdbd/>).

Rule 162(4)

4. If the Court decides not to exercise its jurisdiction, it may request a State Party to exercise jurisdiction pursuant to article 70, paragraph 4.

When the Court declines to exercise jurisdiction over Article 70 offences, Rule 162(4) provides that it may request a State Party to exercise jurisdiction pursuant to Article 70(4) of the ICC Statute. This appears to cover a situation distinct from a request for waiver submitted by a State Party under Rule 162(3) and instead must be directed at situations where the Court considers that the offence should not be prosecuted before it, for example if the State Party is able to effectively prosecute such an offence or if the alleged offence is not of sufficient gravity (Rules 162(2)(a) and (b)). This is a logical division of responsibilities between the Court and the relevant national authorities given the resources necessary to investigate and prosecute such cases at the international level, as well as the detailed and sophisticated mechanisms which may well be in place in national systems for such enforcement. It is slightly unclear from the Statute and Rules when challenges to the exercise of jurisdiction or the admissibility before the Court of the Article 70 proceedings by a suspect would take place in light of the different procedure to be followed in these proceedings from that followed for core crimes under Rule 163 (addressed below) which specifically excludes Articles 17–19 from these proceedings. When deciding whether to confirm charges under Article 61 against a Suspect in an Article 70 proceeding, Rule 122(3) provides that if a “question or challenge concerning jurisdiction or admissibility arises, rule 58 applies”. Rule 58 in turn is titled “Proceedings under Article 19” which, as addressed below, does not apply. However, it would appear logical that the principles applicable to Article 19 proceedings, such as the obligation to challenge admissibility or jurisdiction before the commencement of trial under Article 19(4), as well as the power of the relevant Chamber to “decide on the procedure to be followed and [...] take appropriate measures for the proper conduct of the proceedings” under Rule 58, together with the Court’s jurisprudence interpreting these provisions, would equally be applied to such challenges in Article 70 proceedings.

When jurisdiction of the Court was challenged in favour of a State Party, Pre-Trial Chamber II solicited the views of that State which informed the Chamber that it saw no reason to prosecute the concerned accused under its domestic jurisdiction, thus causing the Chamber not to defer the case to

that State because of lack of an available and effective prosecution in a state Party under Rule 162(2)(a).¹

Cross-references:

Articles 17–19 and 70.

Doctrine:

1. Georghios M. 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, 2010, p. 235 (<https://www.legal-tools.org/doc/c9bdbd/>).

Author: Geoff Roberts.

¹ ICC, *Prosecutor v. Barasa*, Pre-Trial Chamber II, Decision on the “Requête à la Cour de ne pas exercer sa compétence, en application de l’art. 70.4(b) du Statut de Rome et de la règle 162.a, ‘Demande en dessaisissement’” submitted by the Defence for Mr Mangenda, 17 March 2014, ICC-01/05-01/13-263 (<https://www.legal-tools.org/doc/8fbb9a/>).

Rule 163(1)

1. Unless otherwise provided in sub-rules 2 and 3, rule 162 and rules 164 to 169, the Statute and the Rules shall apply mutatis mutandis to the Court’s investigation, prosecution and punishment of offences defined in article 70.

General Remarks:

Rule 163 establishes that except where expressly excluded by the Statute or Rules, Article 70 proceedings follow the same procedures as those applicable to the core crimes in Articles 5 to 8. The two exceptions to this procedure included within this provision relate to “Jurisdiction, admissibility and applicable law” in Part II of the Statute and “Enforcement” covered by Part 10 thereof. It is important to note however, that Rule 165 and Rule 166 also exempt certain other provisions of the Statute and Rules from application to Article 70 proceedings and are addressed below.

Rule 163(1) has been used to confirm that all forms of liability set out in Article 25(3) including co-perpetration, may apply equally to Article 70 offences.¹ This contrasts markedly with the approach at the *ad hoc* Tribunals where joint criminal enterprise liability was expressly excluded from applying to offences of contempt.²

Author: Geoff Roberts.

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. 32 (<https://www.legal-tools.org/doc/a44d44/>); *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. 54 (<https://www.legal-tools.org/doc/fe0ce4/>); *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. 680 (<https://www.legal-tools.org/doc/56cfc0/>).

² IRMCT, *Prosecutor v. Turinabo et al.*, Decision on Challenges to Jurisdiction, 12 March 2019; *Prosecutor v. Turinabo et al.*, Decision on Prosecution Appeal Against Decision on Challenges to Jurisdiction, 28 June 2019, MICT-18-116-AR79.1 (<https://www.legal-tools.org/doc/2n6pme/>).

Rule 163(2)

2. The provisions of Part 2, and any rules thereunder, shall not apply, with the exception of article 21.

Rule 163(2) exempts from Article 70 proceedings Articles 5 to 20 of the Statute, but maintains the applicability of Article 21 relating to the applicable law. The majority of these exceptions are entirely logical and either seek to streamline the applicable procedures for Article 70 proceedings or are simply irrelevant to them. Therefore for Article 70 proceedings the following provisions are excluded: the crimes within the jurisdiction of the court and their elements in Articles 5 to 9; the protection against anything in the Statute limiting or prejudicing rules of international law in Article 10; the exercise of jurisdiction and deferral of investigation or prosecution in Articles 13 and 16 respectively; the referral of a situation by a State Party under Article 14; the role and obligations of the Prosecutor in Article 15; the complex and convoluted procedure for challenging the admissibility and jurisdiction of a case in Articles 17 to 19 of the Statute; and, in Article 20, the general provision on *ne bis in idem* which is replaced by a specific Article 70 provision in Rule 169.

However, two provisions that are excluded demonstrate that the Court may exercise jurisdiction over a greater array of persons than for the core crimes under the Court's jurisdiction. Article 11 provides that the Court only has jurisdiction with respect to crimes committed after the entry into force of this Statute. Article 12(2) provides that the Court may exercise its jurisdiction if one or more of the following States are Parties to the ICC Statute or have accepted the jurisdiction of the Court under Article 12(3): "(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; (b) The State of which the person accused of the crime is a national". By virtue of Rule 163, neither is applicable to cases brought by the Prosecutor under Article 70. Jurisdiction may therefore be exercised against nationals of a non-State Party to the ICC Statute or against members of State Party for offences committed before that State Party became a member of the Court. The only jurisdictional limitation appears to be that the offence is committed against the Court's administration of justice. This appears logical, due to the types of offences covered by Article 70 which may be directed towards individuals who interact with the court, such

as members of the Office of the Prosecutor, Victims’ or Defence Counsel and yet who are not members of a State Party as no requirement to be so exists. However, other jurisdiction limitations that appear elsewhere in the Statute are still applicable, such as Article 25(1) which limits the Court’s jurisdiction to “natural persons” rather than including ‘legal persons’.

Article 21 of the Statute still applies to proceedings under Article 70, which delineates how the Statute and Rules are interpreted. Already this has proved slightly controversial as under Article 21(2), the Court is permitted to apply principles and rules of law as interpreted in its previous decisions and yet these previous decisions, at least in the area of interim release under Articles 58(1) and 60(2) of the ICC Statute, have dealt with interim release in the context of core crimes. The Appeals Chamber has been criticised for relying on these decisions “without any critical analysis”, specifically when assessing whether continued detention for suspects charged with Article 70 offences is necessary under Article 58(1)(b) and “did not give sufficient consideration to the fact that offences against the administration of justice are in no way comparable to core crimes, and that this necessarily impacts on the analysis as to whether continued detention is justified”.¹

Author: Geoff Roberts.

¹ ICC, *Prosecutor v. Bemba et al.*, Appeals Chamber, Judgment on the appeal of Mr Jean-Jacques Mangenda Kabongo against the decision of Pre-Trial Chamber IT of 17 March 2014 entitled “Decision on the ‘Requete de mise en liberte’ submitted by the Defence for Jean-Jacques Mangenda”, 11 July 2014, ICC-01/05-01/13-560, Dissenting Opinion of Judge Anita Usacka, para. 19 (<https://www.legal-tools.org/doc/ea94c3/>).

Rule 163(3)

3. The provisions of Part 10, and any rules thereunder, shall not apply, with the exception of articles 103, 107, 109 and 111.

Rule 163 exempts Part X of the Statute, comprising Articles 103–112 and the applicable rules from application to Article 70 proceedings, except for Article 103 relating to the role of States in enforcement of sentences of imprisonment, Article 107 relating to the transfer of the person upon completion of sentence, Article 109 relating to the enforcement of fines and forfeiture measures and 111 relating to escape which remain applicable. Articles 104–106, 108 and 110 are replaced by sanctions specifically included within Rule 166 and addressed therein. The different sanctions reflect the difference between the nature of core crimes under the Statute and Article 70 offences and that “offences under Article 70 of the ICC Statute, while certainly serious in nature, are by no means considered to be as grave as the core crimes under Article 5 of the Statute, being genocide, crimes against humanity, war crimes, and the crime of aggression, which are described in that provision to be “the most serious crimes of concern to the international community as a whole”.¹

Cross-references:

Article 13, Part II of the Statute; Article 25(1); Part 10 of the Statute.

Author: Geoff Roberts.

¹ ICC, *Prosecutor v. Bemba et al.*, Appeals Chamber, Judgment on the appeal of Mr Jean-Jacques Mangenda Kabongo against the decision of Pre-Trial Chamber IT of 17 March 2014 entitled “Decision on the ‘Requete de mise en liberte’ submitted by the Defence for Jean-Jacques Mangenda”, 11 July 2014, ICC-01/05-01/13-560, para. 1 (<https://www.legal-tools.org/doc/174fc3/>).

Rule 164(1)

1. If the Court exercises jurisdiction in accordance with rule 162, it shall apply the periods of limitation set forth in this rule.

General Remarks:

The introduction of an effective statute of limitations for Article 70 offences in Rule 164 highlights the distinction between such offences and the core crimes under Article 5 to 8 of the ICC Statute for which, under Article 29, there shall not be subject to any statute of limitations. In addition, Rule 164(3) sets out limitations on enforcement of sanctions imposed for such offences in accordance with Rule 166.

Author: Geoff Roberts.

Rule 164(2)

2. Offences defined in article 70 shall be subject to a period of limitation of five years from the date on which the offence was committed, provided that during this period no investigation or prosecution has been initiated. The period of limitation shall be interrupted if an investigation or prosecution has been initiated during this period, either before the Court or by a State Party with jurisdiction over the case pursuant to article 70, paragraph 4 (a).

Rule 164(2) sets out a limitation of 5 years from the date on which the offence was committed within which some investigative action must take place. This is a relatively strict statute of limitations and requires the Court or other States Parties with jurisdiction over the offence, to take rapid action. It may however cause injustice or ambiguity in its application due to the continuing nature of certain offences such as presenting evidence that the person knows to be false under Article 70(1)(b) which could still be relied upon by the person involved and subsequently by the Chambers of the court many years after it was tendered into court. It is unclear at what point the offence was committed in this context. This is accentuated by the fact that jurisdiction over Article 70 offences is for a period of 5 years from the commission of the offence, rather than from the existence of the offence becoming known. In the context of Article 70 offences, where the very rationale of the offence is for it to remain secret, offences may not be discovered until significantly later.

It is possible that examples of offences barred under this statute of limitation provision may be relatively rare under the relatively generous exception to this provision which tolls the limitation as soon as “an investigation or prosecution has been initiated during this period, either before the Court or by a State Party with jurisdiction over the case pursuant to Article 70, paragraph 4(a)”. Rule 164(2) is silent on what constitutes an “investigation or prosecution” and what criteria either the ICC Prosecutor or domestic prosecution or investigative authorities would have to fulfill to show the existence of a genuine investigation. Presumably some guidance may be sought from the Court’s interpretation of what amounts to a ‘case’ being investigated by national authorities under Article 17, but applying the same standard to national investigations under Rule 164(2) for the purposes of applying a statute of limitations would be too strict. Presumably some investigative steps, directed at the offence if not the specific alleged offender, would be sufficient

to toll the limitation. What may be difficult to determine is if investigative steps are being taken by different States Parties with jurisdiction over the offences, simultaneously with steps being taken by the ICC Prosecutor.

Author: Geoff Roberts.

Rule 164(3)

3. Enforcement of sanctions imposed with respect to offences defined in article 70 shall be subject to a period of limitation of 10 years from the date on which the sanction has become final. The period of limitation shall be interrupted with the detention of the convicted person or while the person concerned is outside the territory of the States Parties.

The limitations on enforcement set out in Rule 164(3) reflect the limited sanctions available in case of Article 70 offences in comparison to core crimes where no limitation of enforcement exists under the Statute or Rules. However, the limitation of 10 years applicable to enforcement rather than 5 years for actually investigating the offence demonstrates the desire of the Court to see the effective implementation of its sanctions for these offences when prosecuted. There are two possible interruptions to this limitation period which protect different values. The interruption when a person is detained presumably means that if an accused is subject to a fine as well as incarceration, his obligation to pay the fine still extends for 10 years after release. Conversely, the tolling of the enforcement provision when the convicted person is on the territory of a non-State Party recognises the increased jurisdiction over citizens of such states and the likelihood that they would not be handed over to the court.

Cross-references:

Articles 17 and 29.

Author: Geoff Roberts.

Rule 165(1)

Rule 165¹⁰

Investigation, Prosecution, Trial and Appeal

1. The Prosecutor may initiate and conduct investigations with respect to the offences defined in article 70 on his or her own initiative, on the basis of information communicated by a Chamber or any reliable source.

¹⁰ As drawn up by the judges of the Court acting under article 51(3) of the Statute on 10 February 2016; see resolution ICC-ASP/15/Res.5, para. 125.

General Remarks:

Rule 165 formulates additional specific rules applicable to the investigation and prosecution of Article 70 offences, but always subject to the general provision in Rule 163(1), that unless specifically otherwise stated, “the Statute and the Rules shall apply *mutatis mutandis* to the Court’s investigation, prosecution and punishment of offences defined in Article 70”. Therefore, unless either the Statute or Rules specifically exempt a provision from application to Article 70 offences, it will apply. Rule 165 sets out an expedited investigation procedure under the exclusive jurisdiction of the Prosecutor. It also exempts provisions relating to interim release in the custodial state and amends and seeks to streamline the procedure for confirming charges under Article 61, as well as somewhat superfluously allowing for the joinder of Article 70 charges with those for core crimes.

Author: Geoff Roberts.

Rule 165(2)

2. Articles 39(2)(b), 53, 57(2), 59, 76(2) and 82(1)(d), and any rules thereunder, shall not apply. A Chamber composed of one judge from the Pre-Trial Division shall exercise the functions and powers of the Pre-Trial Chamber from the moment of receipt of an application under article 58. A Chamber composed of one judge shall exercise the functions and powers of the Trial Chamber, and a panel of three judges shall decide appeals. The procedures for constitution of Chambers and the panel of three judges shall be established in the Regulations.

Use of single judge in order to expedite proceedings:

Rule 165 provides for deviations from Articles 39(2)(b), 57(2), 76(2) and 82(1)(d) by allowing for the respective functions of the Pre-Trial and the Trial Chamber, including the confirmation of charges and the trial, to be exercised by one judge instead of a chamber of three judges. The rule further allows for appeal proceedings to be conducted by a panel of three judges instead of the Appeals Chamber. Regulation 66 *bis* of the Regulations of the Court complements provisional Rule 165 by establishing the modalities for the constitution of Chambers and the panel of three judges to decide appeals in Article 70 proceedings. The purpose is to increase the overall efficiency of proceedings before the Court by ensuring that the Court is able to focus its judicial resources on core crimes while preserving the fairness of Article 70 proceedings.

Expedited Investigation Procedure:

Rule 165 also exempts Article 53, the complex procedure applied to the Prosecutor's decision to initiate an investigation for core crimes, from applying to the investigation of Article 70 offences. This removes any judicial control over the Prosecution's decisions, especially where the decision not to investigate or prosecute is based on the Prosecutor's interpretation of the interests of justice (for state referrals or referrals by the Security Council) when the Prosecution must inform the Pre-Trial Chamber in advance of his decision and the decision shall be effective only if confirmed by the Pre-Trial Chamber. All the Prosecutor needs to initiate an investigation is information communicated by a Chamber or any reliable source. There is no requirement that the information itself be reliable but this may be presumed. As no formal

authorisation needs to be given to the Prosecutor to initiate the investigation, the reliability of any source providing information to the Prosecutor will not be assessed as instead the case produced by the Prosecutor will be assessed against the standard of substantial grounds to believe in the confirmation of charges procedure under Article 61. However, Pre-Trial Chamber II has ordered the disclosure of the information provided by an anonymous informant which allegedly initiated the Prosecutor's investigation.¹

Exclusive Jurisdiction of the Prosecutor to Conduct Investigations:

The exclusive jurisdiction under Rule 165(1) of the Prosecutor to initiate investigations under Article 70 has been confirmed by the Appeals Chamber which held that “the decision whether to initiate or conduct investigations on alleged offenses as provided by Article 70 of the Statute lies within the purview of the Prosecutor”.² The problematic nature of this exclusive jurisdiction has been noted by Trial Chamber III, when, in relation to a Defence request for the Prosecutor to initiate Article 70 proceedings against a Prosecution witness, held that the Prosecutor's exclusive jurisdiction over such investigations “may give rise to conflicts of interest in situations where a prosecution witness appears to have committed an offence under Article 70 of the Statute. In a situation where a prosecution witness is alleged to have provided false testimony, the prosecution may decline to initiate an investigation of its own witness”. However, the solution proposed by the Chamber was, pursuant to Articles 64(2) and 64(6)(f) of the Statute, to remind the prosecution of the authority that it has under Rule 165(1) of the Rules, communicate to the prosecution any information the Chamber may have in relation to a possible Article 70 offence. It also recalled that the Court was able

¹ ICC, *Prosecutor v. Barasa*, Pre-Trial Chamber II, Second Decision on the “Defence request for disclosure” submitted by the Defence for Jean-Pierre Bemba on 20 February 2014 and related filings, ICC-01/05-01/13-298, 27 March 2014) (<https://www.legal-tools.org/doc/c43642/>).

² ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Decision on the request of the Defence in relation to investigations conducted pursuant to article 70 of the Statute, ICC-01/04-01/06-3114, 17 June 2014, para. 19 (<https://www.legal-tools.org/doc/0dd5b4/>); see also Trial Chamber II's Oral Decision in *Prosecutor v. Katanga and Ngudjolo*, Transcript of hearing, 22 September 2010, ICC-01/04-01/07-T-190-Red-ENG, p. 3, lines 14 to 22 (<https://www.legal-tools.org/doc/d745c0/>); *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, Decision on the Prosecution's renunciation of the testimony of witness P-159, 24 February 2011, ICC-01/04-01/07-2731, para. 18 (<https://www.legal-tools.org/doc/0c2353/>); *Prosecutor v. Lubanga*, Trial Chamber I, Transcript of hearing, 14 April 2011, ICC-01/04-01/06-T-350-Red-ENG CT3, p. 16, lines 13 to p. 17, line 1 (<https://www.legal-tools.org/doc/665221/>).

to “request a State Party to exercise jurisdiction pursuant to Article 70(4) of the Statute” and Rule 162 of the Rules.³ The clear inadequacy of these solutions, and the structural imbalance created by the Statute in granting the Prosecutor exclusive jurisdiction to initiate investigations under Article 70 is a fundamental flaw. As recognised by the Pre-Trial Chamber, there is simply no control over the decisions of the Prosecutor in this regard, in marked contrast with Article 53 addressed above. Nor is this simply a conceptual problem. In that very case, the Chamber rejected the Defence’s request regarding the Prosecution witness’ false testimony, although it would have been powerless to order the Prosecution to investigate it in any event, and yet simultaneously the Prosecution was involved in *ex parte* status conferences with the Single Judge of Pre-Trial Chamber II in preparation of the arrest warrant issued on 20 November 2013.⁴ This lack of authority by the ICC Pre-Trial Chamber over the investigation of offences by the Prosecutor against the administration of justice contrasts with the situation at the ICTY, ICTR and STL where a Chamber that believes that a person may be in contempt of the Tribunal may “direct the Registrar to appoint an *amicus curiae* to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings [where the Prosecutor, in the view of the Chamber, has a conflict of interest with respect to the relevant conduct” (ICTY RPE, Rule 77(C)(ii); STL RPE, Rule 60 *bis*(E)(ii)).

Interim Release in the Custodial State:

Rule 165 exempts Article 59 of the Statute from applying to Article 70 proceedings which relates to implementing warrants of arrest and applying for interim release in the custodial State. It is unclear from the provisions of Article 59 why it was exempted from Article 70 proceedings as other provisions relating to arrest warrants for those charged under Article 70, such as Article 58, are applicable (*Bemba et al.*, 20 November 2013). However, as addressed below, it appears that as an arrest warrant issued by the Court would amount to a request, it would fall under Article 70(2) of the Statute

³ 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, ICC-01/05-01/08-2830-Red, 16 October 2013, para. 14 (<https://www.legal-tools.org/doc/a7d777/>).

⁴ 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-01/05-01/13-1-Red2-tENG, para. 4 (*Bemba et al.*, 20 November 2013’) (<https://www.legal-tools.org/doc/9f1848/>).

and in accordance with Rule 167(2) would be governed by the laws of the custodial State.

Author: Geoff Roberts, amended by Mark Klamberg.

Rule 165(3)

3. For purposes of article 61, the Pre-Trial Chamber may make any of the determinations set forth in that article on the basis of written submissions, without a hearing, unless the interests of justice otherwise require.

Rule 165(3) establishes a presumption of a written procedure for Article 70 confirmation of charges procedures under Article 61 rather than oral proceedings and the first ICC Article 70 proceeding complied with that presumption.¹

Author: Geoff Roberts.

¹ ICC, *Prosecutor v. Bemba et al.*, Pre-Trial Chamber II Decision amending the calendar for the confirmation of the charges, 28 May 2014, ICC-01/05-01/13-443 (<https://www.legal-tools.org/doc/78d62b/>).

Rule 165(4)

4. The Trial Chamber seized of the case from which the article 70 proceedings originate may, as appropriate and taking into account the rights of the defence, direct that there be joinder of charges under article 70 with charges in the originating case. Where the Trial Chamber directs joinder of charges, the Trial Chamber seized of the originating case shall also be seized of the article 70 charge(s). Unless there is such a joinder, a case concerning charges under article 70 must be tried by a Trial Chamber composed of one judge.

Rule 165(4) allows for a Trial Chamber to order the joinder of charges under Article 70 with charges in the originating case. It also establishes that in taking such a decision, the Chamber must take into account the rights of the defence. This is a curious provision whose utility appears limited. Article 64(5) already allows as one of its functions “the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused”. Furthermore, the rights of the defence should be respected in every decision in accordance with Article 67(1). As such, it is unclear why this provision was necessary and what precise purpose it serves.

Cross-references:

Articles 5 to 8, 59, 61, 64(5) and 67(1).

Author: Geoff Roberts, amended by Mark Klamberg.

Rule 166(1)

1. If the Court imposes sanctions with respect to article 70, this rule shall apply.

General Remarks:

The provisions in Rule 166 demonstrate the relative seriousness of Article 70 offences in comparison with core crimes under Articles 5 to 8 of the ICC Statute. They derogate from the set of penalties available under Article 77 (except the imposition of forfeiture orders) and establish the procedure for enforcement of fines and forfeiture orders.

Author: Geoff Roberts.

Rule 166(2)

2. Article 77, and any rules thereunder, shall not apply, with the exception of an order of forfeiture under article 77, paragraph 2 (b), which may be ordered in addition to imprisonment or a fine or both.

Rule 166(2) excludes the imposition of Article 77 to offences against the administration of justice under Article 70 except for Article 77(2)(b) which relates to forfeiture orders. As such, the permissible sanctions that can be imposed in relation to offences against the administration of justice are a sentence of imprisonment not exceeding 5 years under Article 70(3); a fine; or a forfeiture order.

Author: Geoff Roberts.

Rule 166(3)

3. Each offence may be separately fined and those fines may be cumulative. Under no circumstances may the total amount exceed 50 per cent 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 dependants.

The maximum level of all fines combined is set at 50 percent “of the value of the convicted person’s identifiable assets” after deduction of the living costs of the convicted person and his or her family. This contrasts with permissible fines for core crimes up to 75 percent of the convicted persons identifiable assets under Rule 146(2).

Author: Geoff Roberts.

Rule 166(4)

4. In imposing a fine the Court shall allow the convicted person a reasonable period in which to pay the fine. The Court may provide for payment of a lump sum or by way of instalments during that period.

Payment of fines may be by lump sum or by way of instalments under Rule 166(4).

Author: Geoff Roberts.

Rule 166(5)

5. If the convicted person does not pay a fine imposed in accordance with the conditions set forth in sub-rule 4, appropriate measures may be taken by the Court pursuant to rules 217 to 222 and in accordance with article 109. Where, in cases of continued wilful non-payment, the Court, on its own motion or at the request of the Prosecutor, is satisfied that all available enforcement measures have been exhausted, it may as a last resort impose a term of imprisonment in accordance with article 70, paragraph 3. In the determination of such term of imprisonment, the Court shall take into account the amount of fine paid.

Rule 166(5) allows for imprisonment as a last resort in order to enforce payment of fines when they have wilfully been ignored by a convicted person under Article 70. This measure may only be taken when “all available enforcement measures have been exhausted” and the sentence of imprisonment must be in accordance with Article 70(3) which establishes five years as the maximum sentence that can be imposed. It is unclear whether an accused that was convicted to a sentence of five years and a fine in accordance with Rule 166(2), could be subject to any further imprisonment if he served his sentence but never paid the fine imposed due to the overall maximum of five years in Article 70(3).

Cross-references:

Article 77; Rule 146.

Author: Geoff Roberts.

Rule 167(1)

1. With regard to offences under article 70, the Court may request a State to provide any form of international cooperation or judicial assistance corresponding to those forms set forth in Part 9. In any such request, the Court shall indicate that the basis for the request is an investigation or prosecution of offences under article 70.

General Remarks:

Rule 167(1) simply establishes that the Court may request international co-operation or judicial assistance from States for Article 70 offences corresponding to those set forth in Part 9 of the Statute and that when doing so the Court shall inform the State concerned that the requested co-operation or assistance is for the investigation or prosecution of Article 70 offences. Rule 167(2) confirms that when requesting such assistance or co-operation, the conditions for providing international co-operation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State under Article 70(2) of the Statute and addressed therein.

Type of Judicial Assistance and International Co-operation:

Rule 167(1) provides that the Court may seek international co-operation or judicial assistance corresponding to those forms set forth in Part 9 of the ICC Statute. However, this provision does not automatically apply those provisions otherwise there would be no requirement to include the word ‘corresponding’. It would appear that the drafters of this provision wished to recognise and include within the Court’s power for Article 70 offences, those types of judicial assistance and international co-operation which are set out in Part 9, without making all the provisions therein directly applicable. This is not clear however as Rule 163, which exempts from application some provisions of the Statute and Rules, does not refer to Part 9. As such, it appears that Part 9 does apply directly in addition to Rule 167(1).

Scope of Assistance or Co-operation:

Noticeably, Rule 167(1) provision does not limit assistance and co-operation to the Prosecution but simply to the Court. Consequently, the Defence has the right and obligation to seek material which it believes may assist the Defence in accordance with this provision. In addition, according to the text of the provision, the assistance or co-operation under Rule 167(1) may be

sought not only from States Parties but from any State. However, in the absence of a binding resolution by the Security Council under Chapter VII of the UN Charter, there is no obligation upon non-States Parties to co-operate with the Court.

Obligations when Seeking Assistance or Co-operation:

Under Rule 167(1), the Court must inform the State from whom co-operation or assistance is sought, that the basis for the request is the investigation or prosecution of Article 70 offences. This procedural step is necessary as the type of offence may determine the level of assistance that is appropriate.

Doctrine: For the bibliography, see the final comment on Rule 167.

Author: Geoff Roberts.

Rule 167(2)

2. The conditions for providing international cooperation or judicial assistance to the Court with respect to offences under article 70 shall be those set forth in article 70, paragraph 2.

Type of Judicial Assistance and International Co-operation:

Article 70(2) of the Statute refers to international co-operation with the court for the investigation and prosecution of Article 70 offences. In implementing Article 70(2), Rule 167 adds the phrase “judicial assistance” to that of “international cooperation”. Although Part 9 of the ICC Statute and Chapter 11 of the Rules use these terms, neither is further defined. Both are therefore deliberately left relatively vague to encompass all possible forms of assistance or co-operation for the Court.

Obligations when Seeking Assistance or Co-operation

Rule 167(2) also confirms that when requesting such assistance or co-operation, the conditions for providing international co-operation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State under Article 70(2). Therefore, even requests directed towards States Parties under Article 70(2) may not be immediately self-executing but will presumably require compliance with national laws and procedures before being implemented. For some, this would provide greater scope for a State to deny co-operation than provided in the provisions of Part 9 thus a State Party in which extradition of nationals is otherwise prohibited would not be obliged to surrender a national to the Court for an Article 70 offence.¹ This appears to contrast with the general obligation under Article 86 that “States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court”. Indeed, Article 86 may also not even apply as it refers simply to “crimes within the jurisdiction of the Court” which, given its textual narrow meaning, could be limited to the core crimes set out in Articles 5 to 8 of the Statute. Furthermore, although Article 88 provides that “States Parties shall ensure that there are procedures available under their national law for all of the forms of

¹ 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. 1757. (<https://www.legal-tools.org/doc/040751/>).

cooperation which are specified under this Part” it is unclear whether this would apply to judicial assistance and international co-operation for Article 70 offences.

Cross-references:

Article 86; Part 9 of the ICC Statute.

Doctrine:

1. 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. 1757. (<https://www.legal-tools.org/doc/040751/>).

Author: Geoff Roberts.

Rule 168

In respect of offences under article 70, no person shall be tried before the Court with respect to conduct which formed the basis of an offence for which the person has already been convicted or acquitted by the Court or another court.

General Remarks:

This *ne bis in idem* provision is superficially similar to the general provision applicable to prosecution and investigation of core crimes in Article 20, which is however excluded from application to Article 70 offences by Rule 163(2). However, Rule 168 provides less protection for Article 70 offences in that it only prohibits prosecution by the Court for conduct which formed the basis of the Article 70 offence and for which the person has already been acquitted or convicted and not protection against subsequent prosecution before domestic courts.

Analysis of Provisions and Sub-Provisions

Prohibition of Prosecution before the Court:

Rule 168 provides the standard prohibition from repeated prosecution before the Court if a person has been previously prosecuted before the Court or before another court. This is a simplified version of the system established in relation to core crimes by Article 20. By contrast however, Article 20 also prohibits prosecution of core crimes before the Court when they have previously been prosecuted before a domestic court unless “the proceedings in the other court: (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice”. These exceptions do not exist in Rule 168 and so as long as a person has been convicted or acquitted before another court, the Court is prohibited from prosecuting them for the same conduct even if the previous prosecution was to shield the person concerned from criminal responsibility or were not conducted independently and impartially and were inconsistent with an intent to bring the person concerned to justice.

Permissibility of Prosecutions before Domestic Courts:

Rule 168 does not prohibit subsequent prosecutions before a domestic court, or any other type of court for conduct for which a person has already been prosecuted under Article 70. This directly contrasts with the system for core crimes where Article 20(2) explicitly provides that “[n]o person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court”. This difference is marked and it is unclear why the Court has not elected to prohibit subsequent prosecutions at the national level. Two reasons may exist for this approach. Firstly, before any subsequent Court the person would be presumed to be able to invoke their domestic *ne bis in idem* provision to prevent prosecution. Secondly, as this *ne bis in idem* protection derives from the Rules rather than the Statute, it may be unclear the extent to which it could be relied upon as a legal justification to prevent prosecution before a domestic court in any event. This is all the more relevant since, as explained in relation to Rule 163, prosecutions under Article 70 do not have the same jurisdictional limitations as prosecutions before core crimes and can be directed towards nationals of non-States Parties. Prohibiting subsequent prosecutions before national courts of non-States Parties may have therefore been considered an example of international legislative overreach.

Cross-reference:

Article 20.

Author: Geoff Roberts.

Rule 169

In the case of an alleged offence under article 70 committed in the presence of a Chamber, the Prosecutor may orally request that Chamber to order the immediate arrest of the person concerned.

General remarks and analysis

This exceptional provision appears to relate to instances of false testimony or presenting false evidence under Articles 70(1)(a) or (b) although neither would be easy to prove to the requisite standard unless investigations had been carried out by the Prosecutor in advance of testimony or if the witness was being recalled to court to give further evidence. The other possible offences under Article 70 would be more difficult to commit inside at courtroom. Immediate arrest would allow the Chamber to use its own security staff to secure and arrest the person involved rather than the person leaving the seat of the Court and then the Court remaining dependent on states to enforce the arrest warrant.

Author: Geoff Roberts.

*Section II. Misconduct Before the Court Under Article 71***Rule 170: General Remarks**

Rules 170–172 implement the referral to the Rules of Procedure and Evidence in Article 71. Despite this explicit referral, Rules 170–172 remain partly vague and contain few concrete regulations, thereby only filling some of the regulatory gaps that were left open in Article 71.¹ General aspects set out by Rules 170–172 are the issuance of a warning prior to the sanctioning of misconduct, the different powers of sanctioning by the Presiding Judge and the Presidency, and the right of the sanctioned person to be heard before a sanction is imposed.

Until now, the ICC has issued only few decisions addressing the subject in depth.²

Preparatory Works:

Earlier drafts of the rules concerning Article 71 included definitions of misconduct. But the concept of contempt of court was rejected as a whole from the ICC Statute, and hence the attempt to define was met with reluctance because of the fear of having to raise this issue again.³

¹ Christoph Burchard, “Article 71 Sanctions for misconduct before the Court”, 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. 1, 9 and 34.

² *Inter alia*: ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010, 8 October 2010, ICC-01/04-01/06-2582 (<https://www.legal-tools.org/doc/8f3b61/>); *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the Defence request to consider sanctions for misconduct, 30 June 2011, ICC-01/04-01/10-259 (<https://www.legal-tools.org/doc/fb1198/>); *Prosecutor v. Kenyatta*, Trial Chamber V(B), Decision on the Defence application concerning professional ethics applicable to prosecution lawyers, 31 May 2013, ICC-01/09-02/11-747 (*Kenyatta*, 31 May 2013’) (<https://www.legal-tools.org/doc/d27ea0/>); *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 “Application for Judicial Review by the Government of the Union of the Comoros”, 15 November 2018, ICC-01/13-38 (*Situation in Comoros, Greece and Cambodia*, 15 November 2018’) (<https://www.legal-tools.org/doc/a268c5/>).

³ Håkan Friman, “Offences and Misconduct against the Court”, 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. 620 (<https://www.legal-tools.org/doc/e34f81/>).

Analysis

Misconduct Covered by Rules 170–172:

While the wording of Article 71 of the Statute suggests that there could be various kinds of misconduct because of the use of the word “including”, Rules 170–172 cover only the two types explicitly set out in the Statute: the disruption of proceedings (Rule 170) and the refusal to comply with a direction by the Court (Rule 171). Therefore, the Court is limited to these types of misconduct and cannot sanction other actions as long as the Assembly of States does not decide to extend the Rules of Evidence and Procedure in this regard (Burchard, 2022, para. 25). However, the Court may indirectly transform every action into a sanctionable one by giving a certain direction concerning the matter in question (for example, a witness’s refusal to comply with an order to appear before the Court;⁴ the Prosecution’s non-compliance with the Code of Professional Conduct for Counsel (see *Kenyatta*, 31 May 2013, paras. 12–16; Burchard, 2022, para. 23).

Possible Sanctions:

The only sanction provided by the Rules as a “similar measure” in addition to the temporary or permanent removal from a courtroom and the imposition of a fine already mentioned in Article 71, is the possibility to ban persons explicitly listed in Rule 171(2) from exercising their functions before the Court for a period not exceeding 30 days (Burchard, 2022, para. 31). Other “similar measures” are not addressed, thereby contradicting the impression of a non-exhaustive catalogue of sanctions given by the wording of the Statute. All the rules address the “Chamber dealing with the matter” and do not refer exclusively to the Trial Chamber, although Article 71 is located in the part of the ICC Statute dealing with the Trial Chamber: Hence, Article 71 and Rules 170–172 are applicable for the Trial Chamber, as well as the Appeals Chamber and the Pre-Trial Chamber (*Situation in Comoros, Greece and Cambodia*, 15 November 2018, para. 102; Burchard, 2022, para. 17).

⁴ See 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 OA 7 OA 8, para. 109 (<https://www.legal-tools.org/doc/e5eb09/>).

Possible Objects of Sanctions:

According to the wording of Rule 170, which speaks of “any person”, every person can commit misconduct regulated by Rules 170–172; therefore, also persons belonging to organs of the Court – except judges who constitute the Court – are covered by those provisions (for example, the Prosecution, see *Kenyatta*, 31 May 2013, paras. 12–16; Burchard, 2022, para. 11).

Cross-references:

Articles 63(2), 70 and 71.
Rule 171.

Doctrine: For the bibliography, see the final comment on Rule 170.

Authors: Wenke Brückner and Julia Dornbusch.

Rule 170

Having regard to article 63, paragraph 2, 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.

General Remarks:

The possible sanction for a person disrupting the proceeding is the (i) physical exclusion from the courtroom or (ii) the complete interdiction of attending the proceedings in case of repeated misconduct. The wording “removal from the courtroom” and “attending the proceedings” suggests that the sanctioned person actually has to be in the courtroom when disrupting the proceedings. Because the sanction for disrupting the proceedings is the removal of the disrupting person from the courtroom, it follows that the disruption itself can actually be stopped through the removal. A wider interpretation of disruption of proceedings that would not only include factual interruption but also obstructions, as delaying the procedure of the court, can thus not be included in Rule 170.¹ Additionally, Rule 170 requires a warning prior to a sanction and hence, the misconducting person has to be aware of its disruptive behaviour (Burchard, 2022, para. 22).

Analysis:

Generally, every person can commit misconduct as Rule 170 does not require a specific person. However, if the misconduct in question consists in the disruption of the proceedings by the accused, the removal from the courtroom or interdiction from attending the proceeding must be in conformity with Article 63(2), which reflects the general prohibition of trials *in absentia*. According to this provision, a removed accused must be enabled to follow the proceeding from outside the courtroom. Due to these special guarantees protecting the accused, the discretion of the Presiding Judge deciding on the removal is narrower when the person sanctioned is the accused. While Rule 170 requires a repeated disruption only for an interdiction and not for a

¹ Christoph Burchard, “Article 71 Sanctions for misconduct before the Court”, 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.

removal, Article 63(2) provides the possibility to order the removal of the accused (only) in case of continuing disruption. Furthermore, Article 63(2) stipulates that the removal of the accused is a measure of last resort. The Presiding Judge must take the human rights implication into account when deciding on the removal of the accused.²

Cross-references:

Articles 63, 71.

Rule 171.

Doctrine:

1. Björn Elberling, *The defendant in international criminal proceedings: between law and historiography*, Hart Publishing, Oxford/Portland/Orè, 2012, pp. 127–130.
2. Håkan Friman, “Offences and Misconduct against the Court”, 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. 605–622 (<https://www.legal-tools.org/doc/e34f81/>).
3. Christoph Burchard, “Article 71 Sanctions for misconduct before the Court”, 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. 2108–1774, paras. 1–35.

Authors: Wenke Brückner and Julia Dornbusch.

² See Björn Elberling, *The defendant in international criminal proceedings: between law and historiography*, Hart Publishing, Oxford/Portland/Orè, 2012, p. 127.

Rule 171

General Remarks:

The Court may give oral and written directions, which have to be concrete. Together with the direction it has to give a warning that a refusal might be sanctioned. The literal interpretation of Article 71 of the ICC Statute (“persons before it”), according to which the misconduct must take place in the courtroom, is somehow at odds with Rule 171, which does not contain such a requirement. Indeed, the scope of application would be rather narrow if the conduct ordered by the Court would be restricted to conduct taking place in the courtroom. A broader interpretation of Article 71 has been adapted by the ICC recently in situations of refusals to comply with a direction by the Court. Although the order of the Court is linked to the proceedings in question, the disobeying misconduct to that order might happen elsewhere, if the ordered conduct itself was actually not limited to actions in the courtroom. Such an interpretation is supported by the inclusion of a “written direction” by the Court in Rule 171, and the fact that “the misconduct provisions of other international courts are not limited to misconduct committed during courtroom proceedings”.¹ Following the opposite interpretation, Trial Chamber V adopted a different view in a Decision of 2013, stating, that “Article 71 is specifically directed towards conduct occurring within the courtroom”.² However, the Chamber nevertheless considered it had the power to address misconduct occurring outside the courtroom because of its discretionary powers set out in Article 64(2) and Article 64(6)(f) of the ICC Statute, enabling the Chamber to “ensure a fair trial and uphold the interests of justice” and “to rule on any other relevant matters in performing its functions” (*Kenyatta*, 31 May 2013, para. 14). The exact demarcation between the powers

¹ *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 “Application for Judicial Review by the Government of the Union of the Comoros”, 15 November 2018, ICC-01/13-38, para. 102 (<https://www.legal-tools.org/doc/a268c5/>).

² ICC, *Prosecutor v. Kenyatta*, Trial Chamber V(B), Decision on the Defence application concerning professional ethics applicable to prosecution lawyers, 31 May 2013, ICC-01/09-02/11-747, para. 13 (*Kenyatta*, 31 May 2013’) (<https://www.legal-tools.org/doc/d27ea0/>).

under Article 71 and the discretionary powers of the Chamber under Article 64 of the Statute remain unclear.³

Cross-reference:

Article 71.

Doctrine: For the bibliography, see the final comment on Rule 171.

Authors: Wenke Brückner and Julia Dornbusch.

³ Christoph Burchard, “Article 71 Sanctions for misconduct before the Court”, 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. 1, 3 and 18–19.

Rule 171(1)

1. 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 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 imposition of a fine in Rule 171(1) is only possible if the misconduct is of a more serious nature and cannot be dealt with by a simple exclusion from the court room.¹ The interdiction of attending the proceedings is hence the less serious measure.

Doctrine: For the bibliography, see the final comment on Rule 171.

Author: Wenke Brückner and Julia Dornbusch.

¹ Christoph Burchard, “Article 71 Sanctions for misconduct before the Court”, 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. 30.

Rule 171(2)

2. If the person committing misconduct as described in sub-rule 1 is an official of the Court, or a defence counsel, or a legal representative of victims, the Presiding Judge of the Chamber dealing with the matter may also order the interdiction of that person from exercising his or her functions before the Court for a period not exceeding 30 Days.

The wording of Article 71 of the ICC Statute suggests that the Court has a non-exhaustive catalogue of ‘similar measures’ at its disposal to sanction misconduct before the Court in addition to temporary or permanent removal and the imposition of a fine. However, the only additional “similar measure” the Rules of Procedure and Evidence provide for is the possibility to ban an official of the Court, a defence counsel, or a legal representative of victims from exercising their functions before the Court for a period not exceeding 30 days in Rule 171(2). This paragraph only applies to the persons explicitly mentioned, hence not to the accused, witnesses or the audience.

Cross-reference:

Article 71.

Doctrine: For the bibliography, see the final comment on Rule 171.

Authors: Wenke Brückner and Julia Dornbusch.

Rule 171(3)

3. If the Presiding Judge in cases under sub-rules 1 and 2 considers that a longer period of interdiction is appropriate, the Presiding Judge shall refer the matter to the Presidency, which may hold a hearing to determine whether to order a longer or permanent period of interdiction.

In case of ordering the interdiction of attending the proceedings for a period longer than 30 days, the matter has to be decided by the Presidency and not only the Presiding Judge.

Doctrine: For the bibliography, see the final comment on Rule 171.

Authors: Wenke Brückner and Julia Dornbusch.

Rule 171(5)

5. The person concerned shall be given an opportunity to be heard before a sanction for misconduct, as described in this rule, is imposed.

In contrast to sanctions under Rule 170, sanctions for a refusal to comply with a court order under Rule 171 can only be imposed after the person concerned has been heard.

Cross-references:

Articles 70 and 71.

Doctrine:

1. Christoph Burchard, “Article 71 Sanctions for misconduct before the Court”, 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. 2108–2126, paras. 1–35.

Authors: Wenke Brückner and Julia Dornbusch.

Rule 172

If conduct covered by article 71 also constitutes one of the offences defined in article 70, the Court shall proceed in accordance with article 70 and rules 162 to 169.

Rule 172 emphasizes the ICC Statute's differentiation between the criminal measures to sanction certain misconduct, which constitutes an offence under Article 70 of the Statute, and non-criminal or regulatory measures to sanction the disruption of proceedings or the non-compliance with court orders according to Article 71 and Rules 170–171. If the misconduct constitutes an offence, a separate criminal proceeding has to be conducted in accordance with Rules 162–169. Therefore, Rules 170–171 only provide subsidiary regulations in this regard.

Cross-references:

Article 70 and 71.

Rules 162–169.

Authors: Wenke Brückner and Julia Dornbusch.

CHAPTER 10. COMPENSATION TO AN ARRESTED OR CONVICTED PERSON

Rule 173: General Remarks

General Remarks:

Rules 173 to 175 provide some details concerning the procedure to request compensation on any of the grounds indicated in Article 85 of the Statute. Regulated are the formal requirements and the time limit for the request itself (Rule 173), the following designation of a Chamber that is considering the request (Rule 173), the further procedural steps after the request (Rule 174) and the way of establishing the amount of compensation corresponding to Article 85, paragraph 3 (Rule 175).

The case law of the ICC addressing Rules 173 to 175 is growing constantly, but is nevertheless still limited. Until now, every request for compensation has been dismissed. A vague request was made in the case of Lubanga in 2006, where a request for compensation was used as a legal foundation for release. Lubanga later reformulated his application for release into a challenge to the jurisdiction of the Court and the Court therefore did not address the issue of compensation.¹

The next important request was made by Mathieu Ngudjolo in 2015 and dismissed because the Chamber found that there had been no grave and manifest miscarriage of justice.² Another request for compensation was made in the case of *Bemba et al.* The Defence requested the concrete sum of 27.000 EUR for Mangenda's "unlawful detention", but Trial Chamber VI

¹ 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. 4 (<https://www.legal-tools.org/doc/1505f7/>).

² ICC, *Prosecutor v. Ngudjolo*, Trial Chamber II, Decision on the "Requête en indemnisation en application des dispositions de l'article 85(1) et (3) du Statut de Rome", 16 December 2015, ICC-01/04-02/12-301-tENG, para. 35 (<https://www.legal-tools.org/doc/5df284/>).

dismissed the request, confirming the lawfulness of the detention.³ The decision was confirmed on appeal.⁴

The application for compensation and damages by Jean-Pierre Bemba Gombo⁵ amounting up to over €60 million was rejected as well by Pre-Trial Chamber II with a decision of 18 May 2020.⁶ The most recent request was the claim for compensation and damages by Charles Blé Goudé made after his acquittal.⁷ The claim for compensation was rejected by the Article 85 Chamber stating that the necessary level of a wrongful prosecution had not been reached and no other form of a grave and manifest miscarriage had been shown to have taken place.⁸

Cross-reference:

Article 85.

Doctrine: For the bibliography, see the final comment on Rule 173.

Authors: Wenke Brückner and Julia Dornbusch.

³ ICC, *Prosecutor v. Bemba et al.*, Trial Chamber VI, Decision on request for compensation for unlawful detention, 26 February 2016, ICC-01/05-01/13-1663, paras. 21–26 (<https://www.legal-tools.org/doc/5f55f6/>).

⁴ ICC, *Prosecutor v. Bemba et al.*, Appeals Chamber, Judgment on Mr Mangenda’s appeal against the “Decision on request for compensation for unlawful detention”, 8 August 2016, ICC-01/05-01/13-1964 OA 13, para. 29 (<https://www.legal-tools.org/doc/af8c45/>).

⁵ ICC, *Prosecutor v. Bemba*, Defence, Second Public Redacted Version of “Mr. Bemba’s claim for compensation and damages”, 19 March 2019, ICC-01/05-01/08-3673-Red2 (<https://www.legal-tools.org/doc/4e04c8/>).

⁶ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber II, Decision on Mr Bemba’s claim for compensation and damages, 18 May 2020, ICC-01/05-01/08-3694, (<https://www.legal-tools.org/doc/50clpw/>); for an overview see Eleni Chaitidou, “Recent developments in the jurisprudence of the International Criminal Court: Part 2”, in *Zeitschrift für Internationale Strafrechtsdogmatik*, 2021, vol. 1, pp. 46, 52.

⁷ ICC, *Prosecutor v. Gbagbo and Blé Goudé*, Presidency, Public redacted version of “Mr. Blé Goudé’s Request for Compensation pursuant to Article 85(3) of the Rome Statute”, 9 September 2021, ICC-02/11-01/15-1411-Conf-Exp (<https://www.legal-tools.org/doc/w7gk5e/>).

⁸ ICC, *Prosecutor v. Gbagbo and Blé Goudé*, Article 85 Chamber, Decision on Mr Blé Goudé’s Request for Compensation, 10 February 2022, ICC-02/11-01/15-1427, paras. 50–52 (<https://www.legal-tools.org/doc/zysxes/>).

Rule 173(1): Compensation to Arrested or Convicted

Anyone seeking compensation [...]

While according to Article 84 and Rules 159–161, spouses, children, parents, *et cetera*, are entitled to seek revision after the death of a convicted person, Rule 172 refers to Article 85 and thus only allows the person concerned, that is, the person convicted, detained or arrested to request compensation.¹ The wording of the ICC Statute cannot be interpreted differently although the benefits of the ability of relatives to seek compensation might be more substantial than the possibility to have the final judgment revised.

Cross-references:

Article 84 and 85.

Doctrine: For the bibliography, see the final comment on Rule 173.

Authors: Wenke Brückner and Julia Dornbusch.

¹ Gilbert Bitti, “Compensation to an Arrested or Convicted person”, 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. 626 (<https://www.legal-tools.org/doc/e34f81/>).

Rule 173(1): Chamber Considering Request

[...] shall submit a request, in writing, to the Presidency, which shall designate a Chamber composed of three judges to consider the request.

The wording of Rule 173, empowering the Presidency to “designate” a Chamber, suggests that the decision on the request for compensation is to be made by a Pre-Trial or a Trial Chamber, as only these Chambers are composed of three judges and the wording “designate” does not indicate a competence of the Presidency to constitute a new Chamber exclusively for the question of compensation.¹ For the first two relevant requests for compensation, a Trial Chamber was designated by the Presidency to consider the application.² Mr. Bemba’s claim for compensation was decided by Pre-Trial Chamber II.³ However, with regard to the application for compensation by Mr Blé Goudé the Presidency constituted a new Chamber, the Article 85 Chamber, naming in particular the “heavy current and anticipated workload at the pre-trial and trial level” as the reason for not designating a pre-existing Chamber.⁴ The Presidency did not address whether it had the competency to indeed constitute such a new Chamber.

Cross-reference:

Article 85.

¹ Gilbert Bitti, “Compensation to an Arrested or Convicted person”, 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. 626 (<https://www.legal-tools.org/doc/e34f81/>).

² See ICC, *Prosecutor v. Ngudjolo*, Trial Chamber II, Decision on the “Requête en indemnisation en application des dispositions de l’article 85(1) et (3) du Statut de Rome”, 16 December 2015, ICC-01/04-02/12-301-tENG (<https://www.legal-tools.org/doc/5df284/>); *Prosecutor v. Bemba et al.*, Trial Chamber VI, Decision on request for compensation for unlawful detention, 26 February 2016, ICC-01/05-01/13-1663 (<https://www.legal-tools.org/doc/5f55f6/>).

³ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber II, Decision on Mr Bemba’s claim for compensation and damages, 18 May 2020, ICC-01/05-01/08-3694, (<https://www.legal-tools.org/doc/50c1pw/>).

⁴ ICC, *Prosecutor v. Gbagbo and Blé Goudé*, Decision constituting a chamber and referring a request arising under article 85 concerning Public Redacted Version of “Mr Blé Goudé’s Request for Compensation pursuant to Article 85(3) of the Rome Statute”, 14 September 2021, ICC-02/11-01/15-1413 (<https://www.legal-tools.org/doc/02mk7h/>).

Doctrine: For the bibliography, see the final comment on Rule 173.

Authors: Wenke Brückner and Julia Dornbusch.

Rule 173(1): Impartiality of Judges

These judges shall not have participated in any earlier judgement of the Court regarding the person making the request.

Rule 173(1) is supposed to guarantee a total impartiality of the deciding judges, notwithstanding the use of the word “judgment” that seems to exclude, for example, decisions of the Appeals Chamber. The objective of this provision is clearly to cover all relevant decisions by the Court, a finding that is supported by the French version of Rule 173, that speaks of “decision” instead of ‘arrêt’ although ‘arrêt’ is the word otherwise used for the English term ‘judgment’.¹

Cross-reference:

Article 85.

Doctrine: For the bibliography, see the final comment on Rule 173.

Authors: Wenke Brückner and Julia Dornbusch.

¹ Gilbert Bitti, “Compensation to an Arrested or Convicted person”, 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. 627 (<https://www.legal-tools.org/doc/e34f81/>).

Rule 173(2)

2. The request for compensation shall be submitted not later than six months from the date the person making the request was notified of the decision of the Court concerning:

The Prior Decision of the Court:

In general, the filing of requests for compensation according to Article 85(1) and (3) must be preceded by a decision of the Court determining that either the arrest or detention had been unlawful or that a miscarriage of justice had taken place.¹ According to the decision of Trial Chamber II in the case of *Ngudjolo*, a request can be made in order to obtain such a decision on the unlawfulness of his or her arrest or detention or the miscarriage of justice (*Ngudjolo*, 16 December 2015, para. 15; similarly *Bemba et al.*, 26 February 2016, para. 19). This motion has to be submitted as soon as the applicant becomes aware of the miscarriage of justice or the unlawfulness of his or her arrest or detention (*Ngudjolo*, 16 December 2015, para. 19). A separate decision as a precondition for the request under Article 85 of the Statute is not required when another decision or judgement of the Court explicitly states that the arrest or the detention had been unlawful or a miscarriage of justice had taken place (see *Ngudjolo*, 16 December 2015, para. 15). A decision on acquittal does not imply that the arrest or detention was unlawful or a miscarriage of justice has taken place (para. 15). In the case of Blé Goudé the Article 85 Chamber confirmed that Article 85(3) of the Statute “should not be interpreted as providing a right to compensation in all cases resulting in acquittal”.²

¹ ICC, *Prosecutor v. Ngudjolo*, Trial Chamber II, Decision on the “Requête en indemnisation en application des dispositions de l’article 85(1) et (3) du Statut de Rome”, 16 December 2015, ICC-01/04-02/12, para. 13 (*‘Ngudjolo*, 16 December 2015’) (<https://www.legal-tools.org/doc/5df284/>); *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. 4 (<https://www.legal-tools.org/doc/1505f7/>); *Prosecutor v. Bemba et al.*, Trial Chamber VI, Decision on request for compensation for unlawful detention, 26 February 2016, ICC-01/05-01/13-1663, para. 3 (*‘Bemba et al.*, 26 February 2016’) (<https://www.legal-tools.org/doc/5f55f6/>).

² ICC, *Prosecutor v. Gbagbo and Blé Goudé*, Article 85 Chamber, Decision on Mr Blé Goudé’s Request for Compensation, 10 February 2022, ICC-02/11-01/15-1427, para. 25 (*‘Gbagbo and Blé Goudé*, 10 February 2022’) (<https://www.legal-tools.org/doc/zysxes/>).

No Prior Decision:

Against a literal interpretation of Rule 173, a request for compensation can also be made in absence of a preceding decision declaring the unlawfulness of the arrest or detention or determining a miscarriage of justice had taken place. In both the *Ngudjolo* and the *Mangenda* case, the Trial Chambers, in lack of such a prior decision, simply addressed the question of the lawfulness of detention themselves, as “it would not serve the interest of justice to instruct Counsel to submit another request” (*Ngudjolo*, 16 December 2015, para. 16 ff.; cf. *Bemba et al.*, 26 February 2016, paras. 18, 20 ff.; confirmed in *Gbagbo and Blé Goudé*, 10 February 2022, paras. 22, 23). In the *Mangenda* case, Trial Chamber VI nevertheless stressed the discretion of the Court in this regard, reminding the Defence that the request for compensation could have been dismissed simply because of the missing prior decision (*Bemba et al.*, 26 February 2016, para. 20).

Problematic in this regard is that the Chamber deciding on compensation is not permitted to act as another level of adjudication. For example, it does not have the power to re-assess the merits of decisions of the Court in order to determine whether a miscarriage of justice has taken place (*Ngudjolo*, 16 December 2015, para. 4). The applicant must show proof that a miscarriage had occurred or that his or her arrest or detention was unlawful by making special reference to the content of transcripts of decisions and hearings (*Ngudjolo*, 16 December 2015, para. 48). Because the Chamber has no powers to act in an ‘investigatory manner’ the applicant should request an independent decision on the unlawfulness of his or her arrest or detention or the occurrence of a miscarriage of justice before filing a request for compensation.

The Time Limit:

In general, the request for compensation has to be submitted six months after the decision stating that the arrest or the detention had been unlawful or a grave miscarriage of justice had occurred. If the unlawfulness of the arrest or detention or the occurrence of a miscarriage of justice has not been determined in a separate decision of the Court prior to the request of compensation and therefore has to be determined as a preliminary question, the request for compensation shall be submitted as soon as the applicant became aware of the unlawfulness of his or her arrest or detention or the miscarriage of justice (see *Ngudjolo*, 16 December 2015, para. 19).

The time limit established in Rule 173(2) is, at least in theory, binding and cannot be changed. According to Pre-Trial Chamber II in the recent case of *Bemba*, Regulation 35(2) of the ICC Regulations is not applicable to time limits which are not prescribed in the Regulations or Orders of the Chamber, but the ICC Rules of Procedure and Evidence.³ The Chamber nevertheless granted an extension of three additional months upon the request of the Defence, arguing the legal superiority of the Statute over the Rules. The Chamber was of the view that it had the power to amend the time limit established in Rule 173(2) for the benefit of higher interests set forth in the statute (*Bemba*, 13 November 2018, para. 6). Without naming a specific ‘superior’ article in the Statute, the Chamber considered it “appropriate to guarantee the rights of Mr Bemba to the highest possible extent” (*Bemba*, 13 November 2018, para. 6).

Cross-references:

Article 85.

Regulation 35(2).

Doctrine: For the bibliography, see the final comment on Rule 173.

Authors: Wenke Brückner and Julia Dornbusch.

³ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber II, Order on the conduct of the proceedings related to Mr Bemba’s claim for compensation and damages, 13 November 2018, ICC-01/05-01/08-3675, para. 6 (*Bemba*, 13 November 2018’) (<https://www.legal-tools.org/doc/1c9386/>).

Rule 173(2)(b)

(b) The reversal of the conviction under article 85, paragraph 2;

The filing of a request for compensation pursuant to Article 85(2) must be preceded by a decision on revision of a final decision of the Court. The connection to Article 84 suggests that in lack of such a decision, the decision on revision cannot be made by the Chamber dealing with the request for compensation simultaneously.

Doctrine: For the bibliography, see the final comment on Rule 173.

Authors: Wenke Brückner and Julia Dornbusch.

Rule 173(3)

3. The request shall contain the grounds and the amount of compensation requested.

The application must meet certain standards of clarity and definiteness. For example, the amount of the compensation requested must be stated. It can be assumed that the Chamber is not bound by the amount proposed, considering the discretion the Rules confer to the Chamber especially regarding the amount of compensation under Article 85(1) and (2). For the latter no criteria for determining the amount are provided for in the Rules of Procedure and Evidence, while Rule 175 provides criteria for the amount of compensation under Article 85(3). In absence of a preceding decision on the unlawfulness of the arrest or detention or on the occurrence of a miscarriage of justice the application for compensation must meet a very high standard of clarity and definiteness as the burden of proof lies with the applicant.¹ His or her application must show that a miscarriage of justice took place or why the detention or arrest was illegal. As stated above, the Chamber deciding on the request for compensation does not act in an investigatory manner to determine this preliminary question.

Cross-references:

Article 85.

Rule 175.

Doctrine: For the bibliography, see the final comment on Rule 173.

Authors: Wenke Brückner and Julia Dornbusch.

¹ See ICC, *Prosecutor v. Ngudjolo*, Trial Chamber II, Decision on the “Requête en indemnisation en application des dispositions de l’article 85(1) et (3) du Statut de Rome”, 16 December 2015, ICC-01/04-02/12, paras. 47 ff. (<https://www.legal-tools.org/doc/5df284/>); see also *Prosecutor v. Gbagbo and Blé Goudé*, Article 85 Chamber, Decision on Mr Blé Goudé’s Request for Compensation, 10 February 2022, ICC-02/11-01/15-1427, paras. 32 ff. (<https://www.legal-tools.org/doc/zysxes/>).

Rule 173(4)

4. The person requesting compensation shall be entitled to legal assistance.

The specification in Rule 173(4) that the right to counsel exists also in compensation proceedings was necessary because Article 67 applies only to proceedings concerning the determination of charges. However, it is not clear, if – corresponding to Article 67 – free legal assistance is included. Regarding the difference between financial compensation and the risks of a criminal charge it might be justified to provide free legal assistance by the Court only in cases of questions on criminal liability, although the prior suffering of the person concerned due to malpractice of the Court itself suggests a higher duty of the Court in this regard.

Cross-reference:

Article 67.

Doctrine:

1. Gilbert Bitti, “Compensation to an Arrested or Convicted person”, 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. 623–636 (<https://www.legal-tools.org/doc/e34f81/>).

Authors: Wenke Brückner and Julia Dornbusch.

Rule 174(1)–(2)

1. A request for compensation and any other written observation by the person filing the request shall be transmitted to the Prosecutor, who shall have an opportunity to respond in writing. Any observations by the Prosecutor shall be notified to the person filing the request.

2. The Chamber designated under rule 173, sub-rule 1, may either hold a hearing or determine the matter on the basis of the request and any written observations by the Prosecutor and the person filing the request. A hearing shall be held if the Prosecutor or the person seeking compensation so requests.

In case of a request for compensation the principle of oral proceeding is softened in the way that a hearing is not mandatory, but shall be conducted when the prosecutor or the party seeking compensation requests so.

Doctrine: For the bibliography, see the final comment on Rule 174.

Authors: Wenke Brückner and Julia Dornbusch.

Rule 174(3)

3. The decision shall be taken by the majority of the judges. The decision shall be notified to the Prosecutor and to the person filing the request.

Originally, the decision of the judges was to contain their reasoning but no agreement could be reached between the different proposals referring either to “reasons” or Article 83(4) of the Rome Statute. Hence, in the end, the entire sentence was dropped.¹ The discussion concerning this sub-paragraph was connected to the unanimous opinion that a decision upon a request for compensation was not supposed to be subject to appeal (see Bitti, 2001, pp. 623–636, 634), nevertheless the decision in the *Mangenda* case has been appealed by Mr. Mangenda and Mr. Bemba also requested leave to appeal the compensation decision.² However, while Mr. Mangenda’s request was granted by Trial Chamber IV,³ Pre-Trial Chamber II in the *Bemba* case referred again to the drafting process of Rule 174 and rejected the request stating that appealability could neither be derived from Article 81 nor Article 82 of the ICC Statute.⁴

Cross-reference:

Articles 81, 82 and 83.

Doctrine:

1. Gilbert Bitti, “Compensation to an Arrested or Convicted person”, Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court:*

¹ Gilbert Bitti, “Compensation to an Arrested or Convicted person”, 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. 634 (<https://www.legal-tools.org/doc/e34f81/>).

² See ICC, *Prosecutor v. Bemba et al.*, Appeals Chamber, Judgment on Mr Mangenda’s appeal against the “Decision on request for compensation for unlawful detention”, 8 August 2016, ICC-01/05-01/13-1964, para. 29 (<https://www.legal-tools.org/doc/af8c45/>); *Prosecutor v. Bemba*, Request for leave to appeal the ‘Decision on Mr Bemba’s claim for compensation and damages’, 25 May 2020, ICC-01/05-01/08-3695 (<https://www.legal-tools.org/doc/3zt249/>).

³ ICC, *Prosecutor v. Bemba Gombo et al.*, Trial Chamber VI, Decision on Defence request seeking leave to appeal the ‘Decision on request for compensation for unlawful detention’, 13 May 2016, ICC-01/05-01/13-1893 (<https://www.legal-tools.org/doc/b4de28/>).

⁴ ICC, *Prosecutor v. Bemba Gombo*, Pre-Trial Chamber II, Decision on the request for leave to appeal the ‘Decision on Mr Bemba’s claim for compensation and damages’, 1 October 2020, ICC-01/05-01/08-3697, paras. 9 ff. (<https://www.legal-tools.org/doc/4pyzxr/>).

Elements of Crimes and Rules of Procedure and Evidence, Transnational Publishers, Ardsley, 2001, pp. 623–636 (<https://www.legal-tools.org/doc/e34f81/>).

Authors: Wenke Brückner and Julia Dornbusch.

Rule 175: Amount of Compensation

In establishing the amount of any compensation in conformity with article 85, paragraph 3,

Rule 175, concerning the amount of compensation, only addresses the situation of Article 85(3) of the ICC Statute, because only Article 85(3) explicitly requires concrete criteria for the decision on the amount of compensation. Although, it was suggested during the drafting of the Rules that Rule 174 should apply to Article 85 ICC Statute in its entirety, the States in the end decided to leave the Chamber with more – put in a positive way – flexibility. However, it should be pointed out that the Rules do not provide any criteria for deciding whether compensation should be granted or not. Even if a manifest and grave miscarriage took place, it is in the Chamber’s discretion to award compensation, as Article 85(3) does not provide a right to compensation.

Cross-references:

Article 85.

Rule 174.

Doctrine: For the bibliography, see the final comment on Rule 175.

Authors: Wenke Brückner and Julia Dornbusch.

Rule 175: Considerations

the Chamber designated under rule 173, sub-rule 1, shall take into consideration the consequences of the grave and manifest miscarriage of justice on the personal, family, social and professional situation of the person filing the request.

The criteria concerning the amount of compensation in Rule 175 shows the aim of the provisions to compensate material and immaterial damage linked to the miscarriage of justice. It remains to be seen how exactly a Chamber will make use of these considerations in establishing a concrete amount of compensation. Possible arguments of how to establish the amount of compensation are brought forward by the defence in the case of Bemba.¹

Doctrine:

1. Gilbert Bitti, “Compensation to an Arrested or Convicted person”, 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. 623–636 (<https://www.legal-tools.org/doc/e34f81/>).

Authors: Wenke Brückner and Julia Dornbusch.

¹ ICC, *Prosecutor v. Bemba*, Second Public Redacted Version of “Mr. Bemba’s claim for compensation and damages”, 19 March 2019, ICC-01/05-01/08-3673-Red2, paras. 84 ff. (<https://www.legal-tools.org/doc/4e04c8/>).

CHAPTER 11.

INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

Section I. Requests for Cooperation Under Article 87

Rule 176

1. Upon and subsequent to the establishment of the Court, the Registrar shall obtain from the Secretary-General of the United Nations any communication made by States pursuant to article 87, paragraphs 1 (a) and 2.

2. The Registrar shall transmit the requests for cooperation made by the Chambers and shall receive the responses, information and documents from requested States. The Office of the Prosecutor shall transmit the requests for cooperation made by the Prosecutor and shall receive the responses, information and documents from requested States.

3. The Registrar shall be the recipient of any communication from States concerning subsequent changes in the designation of the national channels charged with receiving requests for cooperation, as well as of any change in the language in which requests for cooperation should be made, and shall, upon request, make such information available to States Parties as may be appropriate.

4. The provisions of sub-rule 2 are applicable mutatis mutandis where the Court requests information, documents or other forms of cooperation and assistance from an intergovernmental organization.

5. The Registrar shall transmit any communications referred to in sub-rules 1 and 3 and rule 177, sub-rule 2, as appropriate, to the Presidency or the Office of the Prosecutor, or both.

Rule 176 identifies the organs responsible for the transmission and receipt of any communications relating to international co-operation and judicial assistance. A question during the negotiations was whether the Court's communications should be channelled through the Registry only, or whether the Prosecutor should also be allowed to transmit and receive requests.¹ In the

¹ 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, p. 640 (<https://www.legal-tools.org/doc/e34f81/>).

end both organs are responsible to transmit and receive communications pursuant to sub-rule 2.

Sub-rule 3 provides that the Registrar shall be the recipient of any communication from States concerning subsequent changes in the designation of the national channels charged with receiving requests for co-operation, as well as of any change in the chosen language. The substance of this rule, is for an unknown reason, restated in Rule 180. Sub-rule 3 includes an additional obligation compared to Rule 180, namely that the Registrar shall “make such information available to [other] States Parties as may be appropriate”.

In *Kony et al.*, Pre-Trial Chamber II decided, *inter alia*, that the Warrants and the Requests, be transmitted by the Registrar to the relevant States, in accordance with the terms set out in the requests.²

Cross references:

Article 87 and Rule 180.

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, vol. 3: *International Criminal Procedure*, Oxford University Press, 2016, p. 603 (<https://www.legal-tools.org/doc/995606/>).
2. 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. 640–643 (<https://www.legal-tools.org/doc/e34f81/>).
3. Claus Kreß and Kimberly Prost, “Article 87”, 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. 2024 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

² 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 (<https://www.legal-tools.org/doc/8db08a/>).

Rule 177

1. Communications concerning the national authority charged with receiving requests for cooperation made upon ratification, acceptance, approval or accession shall provide all relevant information about such authorities.

2. When an intergovernmental organization is asked to assist the Court under article 87, paragraph 6, the Registrar shall, when necessary, ascertain its designated channel of communication and obtain all relevant information relating thereto.

Sub-rule 1 provides that when states become parties to the Court they shall inform the depositary, that is, the UN Secretary-General, what channel they have chosen for Communication, including which national authorities they have charged with receiving requests for co-operation.

Pursuant to sub-rule 2 the Registrar shall ascertain the proper channel of Communication when an intergovernmental organization is asked to assist.

The procedure set out in Rule 177 is not available to non-States Parties. According to Article 87(5) the Court may invite such a state to provide assistance under on the basis of an *ad hoc* arrangement. Absent any specific rules, Rule 177(2) arguable may serve as a model for the procedure to be followed.¹

Cross reference:

Article 87(5).

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, vol. 3: *International Criminal Procedure*, Oxford University Press, 2016, p. 603 (<https://www.legal-tools.org/doc/995606/>).
2. 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*

¹ 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, p. 643 (<https://www.legal-tools.org/doc/e34f81/>).

Procedure and Evidence, Transnational Publishers, Ardsley, 2001, pp. 643–644 (<https://www.legal-tools.org/doc/e34f81/>).

3. Claus Kreß and Kimberly Prost, “Article 87”, 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. 2024 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Rule 178

- 1. When a requested State Party has more than one official language, it may indicate upon ratification, acceptance, approval or accession that requests for cooperation and any supporting documents can be drafted in any one of its official languages.*
- 2. When the requested State Party has not chosen a language for communication with the Court upon ratification, acceptance, accession or approval, the request for cooperation shall either be in or be accompanied by a translation into one of the working languages of the Court pursuant to article 87, paragraph 2.*

Rule 178 deals with issue of language of requests for co-operation by the Court. The rule supplements Article 87(2) which provides that requests for co-operation 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.

Sub-rule 2 concerns the situation when the requested State Party has not chosen a language for communication with the Court upon ratification, acceptance, accession or approval. If they fail to choose language, communications will be addressed to them in one of the working languages of the Court.

Doctrine:

1. Irene Gartner, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 424 (<https://www.legal-tools.org/doc/95e5f9/>).
2. 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. 644–646 (<https://www.legal-tools.org/doc/e34f81/>).
3. Claus Kreß and Kimberly Prost, “Article 87”, 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. 2025–2026 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Rule 179

When a State not party to the Statute has agreed to provide assistance to the Court under article 87, paragraph 5, and has not made a choice of language for such requests, the requests for cooperation shall either be in or be accompanied by a translation into one of the working languages of the Court.

Rule 179 concerns requests made to non-State Parties. It applies the same approach as Rule 178, namely if the state concerned has not chosen a language, communications will be addressed to them in one of the working languages of the Court.

Doctrine:

1. Irene Gartner, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 424.
2. 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. 644–646 (<https://www.legal-tools.org/doc/e34f81/>).
3. Claus Kreß and Kimberly Prost, “Article 87”, 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. 2025–2026 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Rule 180

- 1. Changes concerning the channel of communication or the language a State has chosen under article 87, paragraph 2, shall be communicated in writing to the Registrar at the earliest opportunity.**
- 2. Such changes shall take effect in respect of requests for cooperation made by the Court at a time agreed between the Court and the State or, in the absence of such an agreement, 45 days after the Court has received the communication and, in all cases, without prejudice to current requests or requests in progress.**

One issue during the negotiations of Rule 180 was to agree upon the time as of which notification should become effective. Some delegations were in favour that notification should take effect immediately while as others suggested 40, 60 or 90 days. The compromise was to leave it to the Court and state concerned to agree upon, in absence of such an agreement the effective date would be 45 days. As Rules 176–180 are not limited to States Parties, the procedure arguably also applies, *mutatis mutandis*, to *ad hoc* agreements with non-States Parties and international organizations.¹

Doctrine:

1. 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. 646–647 (<https://www.legal-tools.org/doc/e34f81/>).
2. Claus Kreß and Kimberly Prost, “Article 87”, 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. 2024 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

¹ 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, p. 646 (<https://www.legal-tools.org/doc/e34f81/>).

Section II. Surrender, Transit and Competing Requests Under Articles 89 and 90

Rule 181: General Remarks

Challenge to admissibility of a case before a national Court

General Remarks:

Rule 181 RPE complements Article 89(2) of the ICC Statute which addresses a *ne bis in idem* challenge by a person sought for surrender to the ICC.¹ A person whom is sought for surrender is entitled to bring a challenge before a national court, a process which follows national law,² notwithstanding the fact that the Court itself is the ultimate arbiter regarding the admissibility of the case.³ The national and international proceedings are linked insofar as the issues considered regularly overlap. For this reason, a close co-operation between the Court and the national authorities is necessary to guarantee that the relevant information is brought to the attention of the Court and, in particular, the Chamber dealing with the case (Meißner, 2003, p. 136). The consultation process is also meant to inform the State. Article 89(2) stipulates that the State shall immediately consult with the Court in order to determine the existence of an admissibility ruling by the Court. The consultation permits that the national court takes into consideration any decision made by the Court (Meißner, 2003, p. 136). The consultations are, however, rarely

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. 1843 (<https://www.legal-tools.org/doc/872bf2/>).

² 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, p. 648 (<https://www.legal-tools.org/doc/e34f81/>); 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/>); Silvia Fernández de Gurmendi and Håkan Friman, “The Rules of Procedure and Evidence of the International Criminal Court”, in *Yearbook of International Humanitarian Law*, 2000, vol. 3, p. 330 (<https://www.legal-tools.org/doc/dd7835-1/>).

³ 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; Meißner, 2003, p. 135.

necessary⁴ because any ruling on the admissibility of the case has already to be enclosed to the request by virtue of Regulation 111 of the Regulations of the Court (Kreß and Prost, 2022, Article 89, para. 31).

While Article 89(2) of the Statute mainly addresses the obligations of the State, Rule 181 stipulates the steps to be taken by the Court (Harhoff and Mochochoko, 2001, p. 648). The Rule only expands slightly on Article 89(2) for a situation of a pending ruling on the admissibility (Kreß and Prost, 2022, Article 89, para. 37).

Preparatory Works:

The Rule was first introduced by France in the Working Group on the Rules of Procedure and Evidence of the Preparatory Commission on 19 November 1999.⁵ and reads as follows:

When a situation described in article 89, paragraph 2, arises, and without prejudice to the provisions of article 19 and of rules (n) to (nn) on procedures applicable to challenges to the jurisdiction of the Court or to the admissibility of a case, the Chamber of the Court dealing with the case shall, if the admissibility ruling is still pending, take all appropriate steps to ensure that the person concerned is able to present to the Court the grounds on which he or she challenges the admissibility of the case on the basis of article 20.

The nature and scope of the suggested Rule differed from the version that was finally agreed upon. Harhoff and Mochochoko (Harhoff and Mochochoko, 2001, p. 648) correctly point out that the French proposal would have required the Court to rely on the person sought for surrender to present the grounds on which the admissibility challenge is based. Under Rule 181 the person is allowed to bring forward the *ne bis in idem* challenge in national Court and places the burden of information sharing on the Chamber (Rule 181) and the State (Article 89(2)). By replacing ‘all appropriate steps’ by ‘steps’ the Working Group also eased the burden on the Court by allowing the Chamber to directly contact the national authorities with an information

⁴ William A. Schabas, *The International Criminal Court. A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, Article 89, p. 1293 (<https://www.legal-tools.org/doc/b7432e/>).

⁵ Proposal submitted by France concerning part 9 of the Rome Statute of the International Criminal Court on international cooperation and judicial assistance, UN Doc. PCNICC/1999/WGRPE(9)/DP.2, 19 November 1999, Rule 9.8 (<https://www.legal-tools.org/doc/909b11/>).

request. The final version of the RPE facilitates the task of the Chamber in an even more significant way. The French proposal envisaged for the Chamber the role of a guarantor of the rights of the person sought for surrender by placing upon the Chamber the obligation to ‘ensure that the person concerned is able to present’ the grounds of the admissibility challenge instead of acting as a mere recipient of the information as envisaged in the current Rule 181. The contours of the obligation envisaged by the French proposal remain unclear and could have complicated the task of the Court.

In response to the French proposal the Colombian delegation criticized the ‘confusing’ text and suggested on 29 February 2000 the following wording:

When the situation described in article 89, paragraph 2, arises, and the admissibility ruling is still pending before the Court, it shall, without prejudice to the provisions of article 19, request from the State all the relevant information about the challenge.⁶

The final version of Rule 181, discussed and refined in informal discussions (Harhoff and Mochochoko, 2001, p. 648) included the clarification contained in the French proposal that the Chamber is the relevant organ to request the information about the admissibility challenge and followed the Colombian suggestion that the information should be requested directly from the State.

Doctrine: For the bibliography, see the final comment on Rule 181.

Author: Mayeul Hiéramente.

⁶ Proposal submitted by Colombia on the rules of procedure and evidence relating to part 9 of the Statute, on international cooperation and judicial assistance, UN Doc. PCNICC/2000/WGRPE(9)/DP.1, 29 February 2000, Rule 9.6 (<https://www.legal-tools.org/doc/93338d/>).

Rule 181: *Ne Bis in Idem* Challenge

When a situation described in article 89, paragraph 2,

A Situation Described in Article 89(2):

Pursuant to Article 89(2) every person sought for surrender to the International Criminal Court has the right to invoke the *ne bis in idem* principle to object to such surrender. Such a challenge is to be brought to the attention of the national court despite the fact that the national court is not in a position to rule on the admissibility of the case under the Statute. Such a challenge is based on the *ne bis in idem* principle as defined by the national laws.¹ The standards applicable under national law can differ from those relevant to an admissibility challenge under Article 19, which refers to Article 17 and thereby Article 20(3). The fact that the person challenged the surrender in national courts does, in itself, not impede the surrender process (Meißner, 2003, p. 137). A postponement of the surrender only occurs if a ruling on the admissibility by the Court is pending.

Doctrine: For the bibliography, see the final comment on Rule 181.

Author: Mayeul Hiéramente.

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/>).

Rule 181: Without Prejudice to Article 19 and Rules 58 to 62

Without prejudice to the provisions of Article 19 and Rules 58 to 62

Rule 181 references Article 19 and Rules 58 to 62. It thereby acknowledges that a request for arrest and surrender can also lead to an admissibility challenge for reasons other than *ne bis in idem* (Article 20). A person subject to an arrest warrant by the Court (Article 19(2)(a)) and a State which has jurisdiction over the case, and is willing and able to prosecute the case can challenge the admissibility of the case before the Court. Rule 181 indicates that such an application is not affected by the *ne bis in idem* challenge before national courts. Rules 58 to 62 contain distinct procedural provisions in this regard. Such a challenge is likely if the relationship between the Court and the requested State is antagonistic.¹ Due to the penitentiary conditions in some of the requested State a challenge by the person sought is rather unlikely at this early stage (see also Schabas, 2016, Article 89, p. 1294).

Doctrine: For the bibliography, see the final comment on Rule 181.

Author: Mayeul Hiéramente.

¹ William A. Schabas, *The International Criminal Court. A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, Article 89, p. 1294 (<https://www.legal-tools.org/doc/b7432e/>).

Rule 181: Competent Chamber

Chamber dealing with the case

Rule 181 clarifies that the Chamber is the competent organ to ask for all relevant information about the *ne bis in idem* challenge. Such a *ne bis in idem* challenge will most likely occur in a situation where the Court is still in the investigation phase. Thus, it is the task of the Pre-Trial Chamber to obtain the relevant information. The Chamber can rely on the support of the Registrar (Rule 176(2)).

Doctrine: For the bibliography, see the final comment on Rule 181.

Author: Mayeul Hiéramente.

Rule 181: Information from the State

Step to obtain from the requested State

If a *ne bis in idem* challenge is brought before a national court the Chamber will want to take note of all information that could be relevant for its own determination of admissibility. It might therefore request a transcript of the *ne bis in idem* application (including possible annexes) and, if possible, any judgments, case files and other official documents that could be relevant for a future determination by the Court.

Cross-references:

Articles 19, 89 (2).

Rules 58, 59, 60, 61, 62.

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, vol. 3: *International Criminal Procedure*, Oxford University Press, 2016, p. 614 (<https://www.legal-tools.org/doc/995606/>).
2. 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/>).
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, Ardsley, 2001, pp. 637–670 (<https://www.legal-tools.org/doc/e34f81/>).
4. Silvia Fernández de Gurmendi and Håkan Friman, “The Rules of Procedure and Evidence of the International Criminal Court”, *Yearbook of International Humanitarian Law*, 2000, vol. 3, pp. 289–336 (<https://www.legal-tools.org/doc/dd7835-1/>).
5. 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, pp. 2496–2509.

6. Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003 (<https://www.legal-tools.org/doc/8d1442/>).
7. 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/>).

Author: Mayeul Hiéramente.

Rule 182

Request for transit under article 89, paragraph 3 (e)

General Remarks:

Rule 182 complements Article 89(3) of the ICC Statute which addresses the situation of the transfer to the Court of an arrested person through the territory of a transit State. The fact that the seat of the Court is in The Hague, Netherlands (Article 3(1)) implies that a transit through States that were not involved in the arrest and surrender process will occur on a regular basis.¹ Sub-paragraph (e) deals with the very specific and rather rare situation of an unscheduled landing on the territory of the transit State. Due to the lack of prior agreements and consultations with the transit State, such a situation requires quick procedures to address the urgency of the situation (Harhoff and Mochochoko, 2001, p. 649)

Rule 182(1) specifies the transmission process and emphasizes the need for a written record. Paragraph 2 stipulates the consequences in case the Court fails to provide a transit request in the 96-hour period following the unscheduled landing. Article 89(3)(e) thereby stipulates the exemption to the general rule, laid down in Article 89(3)(d), that air transport without scheduled landing through the territory of States Parties does not require authorization by the State.² Rule 182 has had no known practical relevance yet.

Preparatory Works:

A draft for Rule 182 has been introduced by the French delegation to the Working Group on the Rules of Procedure and Evidence. The French

¹ 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, p. 649 (<https://www.legal-tools.org/doc/e34f81/>).

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. 45; Harhoff and Mochochoko, 2001, p. 649; 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/>).

proposal dated 19 November 1999³ was nearly identical to the text that was finally adopted and reads as follows:

- (a) In situations described in article 89, paragraph 3 (e), the Court may transmit the request for transit to the State concerned by any medium capable of delivering a written record.
- (b) When the time limit provided for in article 89, paragraph 3 (e), has expired and the person concerned has been released, such a release shall be without prejudice to a subsequent arrest of the person concerned in accordance with the provisions of article 92 or article 89.

The provision was not disputed and was adopted with minor changes (Harhoff and Mochochoko, 2001, p. 649).

Analysis

Sub-Rule 1:

Rule 182(1) contains procedural details for an urgent request in case of an unscheduled landing (Kreß and Prost, 2022, Article 89, para. 50).

Doctrine: For the bibliography, see the final comment on Rule 182.

Author: Mayeul Hiéramente.

³ Proposal submitted by France concerning part 9 of the Rome Statute of the International Criminal Court on international cooperation and judicial assistance, UN Doc. PCNICC/1999/WGRPE(9)/DP.2, 19 November 1999, Rule 9.9 (<https://www.legal-tools.org/doc/909b11/>).

Rule 182(1): The Court

The Rule does not specify which organ of the Court is designated to communicate with the national authorities in case of an unscheduled landing. The fact that the unscheduled landing is part of the surrender process (see Rule 184) suggests that the Registrar should handle such a request for transit in order to avoid any additional delays. The transit arrangements require technical consultations with all the States involved, especially with the requested State and should be entrusted to the Registrar.¹ Furthermore, it can be argued that the unscheduled landing is ultimately linked to a request for co-operation by the Chamber (see Rule 176(2)).

Doctrine: For the bibliography, see the final comment on Rule 182.

Author: Mayeul Hiéramente.

¹ 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/>).

Rule 182(1): May Transmit

The Court is entitled to transmit the request in writing if the situation so permits. The use of an alternative ‘medium capable of delivering a written record’ is optional. In light of the 96-hour deadline determined in Article 89(3)(e) the Court will certainly opt for a secure and fast line of communication.

Rule 182(1) lacks clarity in another regard and once again the comparison with Article 91(1) raises questions. Article 91(1) suggests that in urgent cases of requests for arrest and surrender the Court can depart from the communication channels established under Article 87(1)(a), namely the diplomatic channel or other communication channels designated by the State. In such a case the Court is tasked to subsequently confirm the request through these aforementioned channels. Rule 182(1) lacks any explicit provision addressing this issue. Article 89(3)(e) refers to Article 89(3)(b) which in turn refers to Article 87. This suggests that Rule 182(1) allows for a modification on the form of the request, but not to the transmission channels to be used. There is reason to argue that such an interpretation of Rule 182(1) and Article 89(3)(e) contradicts the *ratio legis* of the provision. First, the intended effect of Rule 182(1) is to streamline the procedure in cases of extreme and unpredicted urgency. A restrictive approach regarding the transmission procedure would hamper an effective implementation of the request for transit. Second, Article 91(1) provides for a balanced solution to a situation where time is of the essence. It protects the interest of the Court in a functioning co-operation regime by allowing it to directly contact the authorities ‘on the ground’ and guarantees that the diplomatic institutions guarding the sovereignty of the State are informed and included in the process before any irreversible decision on the part of the State has been made. Third, the situation addressed in Rule 182(1) and Article 89(3)(e) differs from other situations in that the State is already made aware of the situation due to the facts on the ground. Furthermore, it is only upon demand (‘that State may require a request’) by the State itself that a request for transit is issued by the Court.¹ In such a case,

¹ 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, p. 649 (<https://www.legal-tools.org/doc/e34f81/>); Julien Cazala, “Article 89”, in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale*.

the State is not deserving of any additional protection as to the transmission procedure to be followed. Given the urgency of the situation described in Article 89(3)(e) it is, therefore, reasonable to grant the Court the right to communicate directly with the authorities concerned and refer the State to a subsequent confirmation via the designated channels.

Doctrine: For the bibliography, see the final comment on Rule 182.

Author: Mayeul Hiéramente.

Commentaire Article par Article, A. Pedone, Paris, 2012, p. 1844 (<https://www.legal-tools.org/doc/872bf2/>).

Rule 182(1): Medium Capable of Delivering a Written Record

Rule 182(1) allows for a transmission of a request for transit by any medium capable of delivering a written record. The request can thereby be transmitted via email, facsimile¹ or telegram.² The purpose is to allow for a speedy communication.³ While other forms of communication such as SMS or other electronic media (Harhoff and Mochochoko, 2001, p. 649) could also be considered as capable of delivering a written record it should be noted that pursuant to Article 89(3)(e) the State can ask for a request for transit in conformity with Article 89(3)(b) which *inter alia* requires the description of the person, the facts, and the legal characterization, as well as the warrant of arrest and surrender. It is unlikely that such information could be provided by other – secure – means of communication making a communication via email, facsimile or telegram the only reasonable alternative to a written request.

As mentioned above, Rule 182(1) focuses on the situation of an unscheduled landing as determined by Article 89(3)(e) of the ICC Statute and postulates a specific formal requirement for the occasion. The Rule itself does not explicitly specify whether it lessens or establishes the formal requirements. Article 89(3)(b) establishes the required content for a request for transit but refrains from determining any formal requirements in this regard. Same holds true for Article 87, which contains general provisions regarding requests for co-operation but makes no mention of the form of the request.⁴ Only in Article 91(1) is it established that “[a] request for arrest and surrender shall be made in writing”. It is unclear whether the Article also applies

¹ Valerie Oosterveld, Mike Perry and John McManus, “The Cooperation of States with the International Criminal Court”, in *Fordham International Law Journal*, 2001, vol. 25, no. 3, p. 773 (<https://www.legal-tools.org/doc/c7c4b8/>).

² 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, p. 649 (<https://www.legal-tools.org/doc/e34f81/>).

³ 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. 50.

⁴ See also Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003, p. 185 (<https://www.legal-tools.org/doc/8d1442/>).

to a request for transit.⁵ The fact that Article 91(1) further stipulates that “[i]n urgent cases, a request may be made by any medium capable of delivering a written record”, might suggest otherwise. It would not have been necessary to clarify the formal requirements in Rule 182(1) for a situation that is per definition of a certain urgency and would thereby covered by Article 91(1). However, the close link between surrender and transit as well as the heading of Article 89(‘Surrender of persons to the Court’) militate in favour of a broad interpretation that includes the request for transit in the scope of application of Article 91(1). The ratio of Article 89(3)(b) shows that the founders of the ICC acknowledged that a request for transit had to include detailed information regarding the person to be surrendered, the acts he or she is accused, and the warrants for arrest and surrender. In such a situation, it is hard to imagine that the founders of the ICC Statute would have accepted a request that does not at least satisfy the criteria established in Rule 182(1). The fact that the Rules explicitly stipulate a specific formal requirement in Rule 182(1) for a defined situation of urgency and given the approach opted for in Article 91(1) strongly suggests that a regular request for transit pursuant to Article 89(3)(b) must be in writing. This is purported by the fact that it is hard to imagine that a request through the channels envisaged in Article 87(1) would be accepted if it were not in writing. As a consequence, it should be clear that Rule 182(1) lowers the formal threshold (see also Meißner, 2003, p. 184) for a request for the specific case of an unscheduled landing as envisaged in Article 89(3)(e). The language of the request is determined in accordance with Article 87(2) and depends on the designated channels (Meißner, 2003, p. 184).

Doctrine: For the bibliography, see the final comment on Rule 182.

Author: Mayeul Hiéramente.

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. I, 1999, p. 379 (<https://www.legal-tools.org/doc/27edd7/>).

Rule 182(2)

2. When the time limit provided for in article 89, paragraph 3 (e), has expired and the person concerned has been released, such a release is without prejudice to a subsequent arrest of the person in accordance with the provisions of article 89 or article 92.

Article 89(3)(e) specifies that the transit State may require a transit request from the Court. Failure by the Court to provide the necessary documentation can lead to the release of the person.¹ If the transit State does not receive the transit request in the 96-hour period following the unscheduled landing, the State is entitled to release the person from custody. Rule 182(2) clarifies that the expiry of the deadline does not preclude a future arrest of the person on the orders of the Court. The Rule further postulates that the release is without prejudice to a subsequent ‘arrest’ in accordance with “Article 89 or Article 92”. The wording of Rule 182(2) suggests that once a release in the sense of Article 89(3)(e) occurred, a mere transit request in the sense of Article 89(3)(b) ceases to suffice. The transit situation ends the moment the person exits through the prison door. He or she is then treated like any other person present on the territory of the State and is subject to arrest solely by virtue of a request for arrest and surrender (Article 89(1), Article 91) or a request for provisional arrest pursuant to Article 92.²

Cross-references:

Article 89(1), Article 89(3), Article 91(1), Article 92.

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. 184 (<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. 51; 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/>); 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, p. 649 (<https://www.legal-tools.org/doc/e34f81/>).

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, vol. 3: *International Criminal Procedure*, Oxford University Press, 2016, p. 611 (<https://www.legal-tools.org/doc/995606/>).
2. 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/>).
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, Ardsley, 2001, pp. 637–670 (<https://www.legal-tools.org/doc/e34f81/>).
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, pp. 2496–2509.
5. Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003 (<https://www.legal-tools.org/doc/8d1442/>).
6. Valerie Oosterveld, Mike Perry and John McManus, “The Cooperation of States with the International Criminal Court”, in *Fordham International Law Journal*, 2001, vol. 25, no. 3, pp. 767–839 (<https://www.legal-tools.org/doc/c7c4b8/>).
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. I, 1999, pp. 339–390 (<https://www.legal-tools.org/doc/27edd7/>).

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Rule 183

Possible temporary surrender

General Remarks:

Rule 183 complements Article 89(4) which deals with the situation that 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” and where the State already has already taken the decision to grant the request by the Court. Article 89(4) refers to a constellation in which neither the *ne bis in idem* principle (Article 20) nor the complementarity regime of Article 17(1)(a)-(c) applies and is distinct from the situation in which the prosecution for a different crime is sought by a *third* State, Article 90(7). It refers to a case where the requested State itself has an interest in prosecuting the person sought but for a *different* crime.¹ In such a situation the Statute envisages that the requested State cannot refuse the surrender of the person in question. The State is also not in a position to postpone the surrender by arguing the need for its own investigation or the serving of a sentence (Harhoff and Mochochoko, 2001, p. 650). Pre-Trial Chamber I notes that Article 89(4), being *lex specialis* to Article 94(1), envisages a sequencing of the proceedings of the Court and the national authorities with priority given to the Court.² Otherwise the national prosecution or imprisonment might lead to an indefinite postponement of the proceedings in The Hague (Harhoff and Mochochoko, 2001, p. 650).

Nonetheless, the State has a legitimate right that its own investigation into an (alleged) criminal behaviour of the person sought not be disregarded

¹ 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, p. 650 (<https://www.legal-tools.org/doc/e34f81/>).

² ICC, *Prosecutor v. 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. Gaddafi and al-Senussi*, 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. Saif al-Islam Gaddafi and al-Sennussi*, 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, ICC-01/11-01/11-321-Red, 2 May 2013, para. 26, footnote 41 (<https://www.legal-tools.org/doc/00bc27/>).

and, in case that the person sought had already been convicted, that the punishment is meted out. The Statute itself is mute in this regard due to disagreements at the Rome Conference.³ A similar provision (draft Article 87(8)) was not adopted.⁴ The vacuum is now filled by Rule 183, which provides for an option for a compromise⁵ and allows for a temporary surrender to the Court. Compared to other rules, Rule 183 is more substantive in nature.⁶ A situation of re-transfer is also addressed in Rule 185(2).

Preparatory Works:

The provision is based on a draft introduced by Germany and Canada and an informal document circulated by the German delegation (Harhoff and Mochochoko, 2001, p. 650). The formal draft incorporates concepts of extradition regimes of the time (Harhoff and Mochochoko, 2001, p. 651) and was presented on 26 November 1999.⁷ It reads as follows:

Following the consultations referred to in article 89, paragraph 4, the requested State may temporarily surrender the person sought in accordance with conditions to be determined between the requested State and the Court. In such case the person shall be kept in custody during his or her presence before the Court and shall be transferred to the requested State once his or her presence before the Court is no longer required.

The final version of Rule 183 clarifies that once the proceedings have been completed there is no ground to refuse a transfer back to the requested State.

³ Harhoff and Mochochoko, 2001, p. 650; 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. 52.

⁴ 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. 1845 (<https://www.legal-tools.org/doc/872bf2/>).

⁵ Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003, p. 140 (<https://www.legal-tools.org/doc/8d1442/>).

⁶ Silvia Fernández de Gurmendi and Håkan Friman, “The Rules of Procedure and Evidence of the International Criminal Court”, *Yearbook of International Humanitarian Law*, 2000, vol. 3, p. 330 (<https://www.legal-tools.org/doc/dd7835-1/>).

⁷ Proposal submitted by Canada and Germany concerning Part IX of the Rome Statute of the International Criminal Court, on international cooperation and judicial assistance, UN Doc. PCNICC/1999/WGRPE(9)/DP.4, 26 November 1999 (<https://www.legal-tools.org/doc/bde2a0/>).

Doctrine: For the bibliography, see the final comment on Rule 183.

Author: Mayeul Hiéramente.

Rule 183(1)

Following the consultations referred to in article 89, paragraph 4

Consultations pursuant to Article 89(4):

In order for consultations pursuant to Article 89(4) to take place there must be a prior surrender request on the part of the Court. In a decision dated 27 April 2007, Pre-Trial Chamber I emphasized that a prerequisite of a temporary surrender under Rule 183 is the issuance of an arrest warrant against the person sought.¹ In the judges' view, a summons to appear – insufficient in a situation of imprisonment of the person by national authorities on the basis of national law (*Ali Kushyab*, 27 April 2007, para. 120) – does not suffice for the application of the consultation process envisaged in Article 89(4) and Rule 183.²

Furthermore, Article 89(4) is clear as to the sequence to be followed. Consultations between the national authorities and the Court are to be based on a prior decision by the national authorities to grant the surrender request by the Court. After these consultations have taken place the State can decide on the temporary surrender.³ While is not explicitly envisaged, such consultations might fail or be inconclusive.⁴

Doctrine: For the bibliography, see the final comment on Rule 183.

Author: Mayeul Hiéramente.

¹ ICC, *Prosecutor v. Ali 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, para. 121 (*‘Ali Kushyab*, 27 April 2007’) (<https://www.legal-tools.org/doc/0b8412/>).

² Eleni Chaitidou and Elisa Hoven, “The Person’s Liberty at Stake – A Tour d’Horizon on the Rights of the Arrested Person under the Rome Statute, in Mayeul Hiéramente and Patricia Schneider (eds.), *The Defence in International Criminal Trials*, Nomos, Baden-Baden, 2016, p. 174 with further references (<https://www.legal-tools.org/doc/4d414b/>).

³ 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. 61.

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. I, 1999, p. 351 (<https://www.legal-tools.org/doc/27edd7/>).

Rule 183(2)

May temporarily surrender

At first sight, the language of Rule 183 seems somewhat confusing in that it appears to grant the requested State discretion on whether to proceed with the surrender, while Article 89(4) clearly postulates that the request by the Court shall be granted first.¹ The fact that the Statute grants ultimate prevalence of ICC requests (Ambos, 2016, p. 615) leaves, however, room for a discretionary decision by the requested State. Having already agreed to a surrender to the Court in principle, the national authorities have indeed two options at their disposal. They may agree to the surrender request and hand over the suspect to the Court without preconditions. Or they opt for a *temporary* surrender and discuss the details of such temporary surrender with the Court. The requested State is not obliged by virtue of the Statute and the Rules to insist on a temporary surrender (Kreß and Prost, 2022, para. 61). A sovereign State can decide on whether to postpone their own investigations and prosecutions or to end them completely by agreeing to a ‘normal’ surrender. In that sense, the discretion granted by Rule 183 is not problematic and not in conflict with the Statute, a conflict in which the Statute would take precedence (Ambos, 2016, p. 615). The conditions for such temporary surrender are not set out by the Statute nor are they directly enshrined in Rule 183 (see Kreß and Prost, 2022, para. 61). They are partly established by agreement.² The State could, in practice, also decide to delay surrender,³ an outcome not envisaged by the Statute and the Rules.

¹ See also Kai Ambos, *Treatise on International Criminal Law*, vol. 3, *International Criminal Procedure*, Oxford University Press, 2016, p. 615 (<https://www.legal-tools.org/doc/995606/>); 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. 59.

² 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. 1845 (<https://www.legal-tools.org/doc/872bf2/>).

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. I, 1999, p. 351 (<https://www.legal-tools.org/doc/27edd7/>).

Doctrine: For the bibliography, see the final comment on Rule 183.

Author: Mayeul Hiéramente.

Rule 183(3)

3. *Shall be kept in custody*

Rule 183 envisages that a temporary surrender of the person to the Court entails that the person remains in custody of the Court. The fact that the custody of the person is laid down in the second sentence of the Rule while the agreement on the conditions for a temporary surrender is mentioned in the first sentence suggests that custodial arrangements are, at least in general, not part of the conditions to be agreed upon by the Court and the national authorities. In most cases there will indeed be no need for specific arrangements regarding custody of the person. Pre-Trial Chamber I has clarified that a temporary surrender is conditioned upon the prior issuance of an arrest warrant.¹ Therefore, the person temporarily surrendered to the Court will be in the custody of the Court on the basis of the arrest warrant issued by the respective Pre-Trial Chamber.²

Such a situation may, however, be subject to change. Article 60(2) envisages that upon surrender to the Court, the person can apply for interim release before the competent Pre-Trial Chamber. Article 60(3) further states that “[t]he 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”. Such review has to take place every 120 days (Rule 118(2)). Especially in Article 70 cases, where different statutory penalties apply, it is therefore not unlikely that a detention that has once been considered as necessary and proportionate is subject to a reassessment during pre-trial or trial (see Chaitidou and Hoven, 2016, p. 182 ff.). A reassessment of the issue of detention might also be warranted in cases where new evidence raises doubts about the guilt of the accused or the flight risk of the person concerned.

¹ ICC, *Prosecutor v. Ali 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, para. 121 (<https://www.legal-tools.org/doc/0b8412/>).

² See also Eleni Chaitidou and Elisa Hoven, “The Person’s Liberty at Stake – A Tour d’Horizon on the Rights of the Arrested Person under the Rome Statute, in Mayeul Hiéramente and Patricia Schneider (eds.), *The Defence in International Criminal Trials*, Nomos, Baden-Baden, 2016, p. 183 (<https://www.legal-tools.org/doc/4d414b/>).

The crux of the matter is as follows: Rule 183 does not specify the effect of a decision by the Chamber to modify the ruling of detention pursuant to Article 60(3) on the custody of a person that has been temporarily surrendered by the requested State. Thus the Court faces a dilemma. On the one hand, the release of the person would be contrary to the legitimate interest of the requested State to prosecute or imprison the person for criminal acts punishable under the national law of the State. The State agreed on a temporary surrender and can legitimately expect that the person is made available to national authorities once the presence of the person at the Court is no longer required. On the other hand, the Court can certainly not deprive an individual of his or her liberty based solely on its acceptance of a temporary surrender by the requested State. It is not even guaranteed that the Court is in the possession or made aware of any judicial findings by national authorities (for example, a national arrest warrant). It is not known that this situation has occurred yet. Nevertheless, it is worth considering the options the Court and the national authorities have at their disposal:

If the proceedings have already reached a stage where the presence of the person is no longer required (see Article 63(1), Article 67(1)(d)), the person could be transferred back to the requested State. Same applies if the national authorities agree and guarantee that the person can travel freely to the seat of the Court in order to be present at his or her trial. This would require that the State does not insist on the detention of the person by its own judicial authorities, otherwise such an arrangement would not be manageable in practice. As a matter of law, the requested State could have opted for a ‘normal’ surrender without the caveat of a custody arrangement and is therefore in a position to waive its right to require the Court to hold the person in custody. An intricate situation arises when the State insists that the person remains in custody, but refuses or cannot guarantee participation of the person at his or her trial at the Court. This could lead to a situation where the person remains in custody of the Court on the basis of a detention decision by the national authorities. If and under which conditions such a situation is acceptable will be subject to further debate.

Doctrine: For the bibliography, see the final comment on Rule 183.

Author: Mayeul Hiéramente.

Rule 183(4)

4. ‘*transferred back to the requested State*’

The rule envisages that the Court faces the obligation to re-transfer the person to the requested State once his presence is no longer required. The form and conditions for such a transfer are not set out in the Statute nor are they defined in Rule 183. A problem could arise from the fact that such transfer would not be in direction of the Court and would therefore not be directly covered by the co-operation regime of the Court and most importantly Article 89(3) governing the transit through a sovereign third State. Rule 207 covers a similar situation¹ but only applies to a transit of a sentenced person to the State of enforcement. It would be reasonable to apply Rule 207 *mutatis mutandis* to all re-transfers on the basis of Rule 183. In all likelihood the Court will also face substantial challenges in case they decide on a transfer back to a State that imposes the death penalty (for example, asylum requests) for the crimes in question.²

Doctrine: For the bibliography, see the final comment on Rule 183.

Author: Mayeul Hiéramente.

¹ See Silvia Fernández de Gurmendi and Håkan Friman, “The Rules of Procedure and Evidence of the International Criminal Court”, in *Yearbook of International Humanitarian Law*, 2000, vol. 3, p. 333 (<https://www.legal-tools.org/doc/dd7835-1/>).

² See, for example, ICC, *Prosecutor v. Gaddafi and al-Senussi*, Libyan Government’s consolidated reply to the responses 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, para. 192 *et seq.* (<https://www.legal-tools.org/doc/68f474/>).

Rule 183(5)

5. *Presence no longer required*

It is the cornerstone of the idea of a ‘temporary’ surrender that national investigations and prosecutions into a (possible) crime committed by the person are only deferred until the conflict between the interests of justice of the international community and the national justice system can be resolved. Rule 183 therefore envisages that once the presence of the person is no longer required a transfer back to the requested State can take place. The requirement for the person to be present is determined by the provisions regulating the presence of the accused during trial, namely Article 63(1) and Article 67(1)(d). In the *Ruto and Sang* case it was made clear that the presence of the accused in trial is a fundamental principle¹ to which only minor derogations can be tolerated (see, for example, Rule 134 *bis, ter* and *quar-ter*). The obligation to be present at trial encompasses *inter alia* the delivery of judgment, the sentencing hearing and the sentencing.² In light of these provisions it is to be assumed that the presence of the person is required until the judgement and, in case of a conviction, until the sentencing. Whether or not the person’s presence in reparation hearings, victim impact hearings and the appeal is required in the sense of Rule 183 is open to debate. The wording of Rule 183 further suggests that even in parts of the proceedings where a presence of the accused is not strictly required – for example, in parts of the pre-trial proceedings³ – a re-transfer is not warranted if the presence of the person is still required at a later stage. Finally, Rule 183 clarifies that upon completion of the proceedings – including a possible appeal – the presence of the person is no longer needed.

This leads to the question where the person, if convicted, has to serve the sentence imposed by the ICC Trial Chamber. Harhoff and Mochochoko rightfully note that an agreement for temporary surrender should encompass

¹ See ICC, *Prosecutor v. Sang and Ruto*, 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’, ICC-01/09-01/11-1066, 25 October 2013 (<https://www.legal-tools.org/doc/575657/>)

² William A. Schabas and Yvonne McDermott, “Article 67”, 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. 28 with further references.

³ See William A. Schabas and Veronique Caruana, “Article 63”, in Ambos (ed.), 2022, para. 43.

an obligation for the requested State to enforce any sentence imposed by the Court in direct continuation to any sentence imposed by the national justice system of the requested State.⁴ Otherwise, the Court could face further and unnecessary difficulties in enforcing the sentences.

The wording as well as the purpose of Rule 183 shows that the Court can only invoke the required presence of the person for the purpose of prosecution and trial (Harhoff and Mochochoko, 2001, p. 650). The State may – in its original agreement or on an *ad hoc* basis – agree to the person testifying as a witness whilst present in The Hague. The Court cannot, however, invoke the need for a witness testimony to object to request for re-transfer.

Cross-references:

Articles 60(2), 60(3), 63(1), 67(1)(d).

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, vol. 3, Oxford University Press, 2016, pp. 614–615 (<https://www.legal-tools.org/doc/995606/>).
2. 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/>).
3. Eleni Chaitidou and Elisa Hoven, “The Person’s Liberty at Stake – A Tour d’Horizon on the Rights of the Arrested Person under the Rome Statute”, in Mayeul Hiéramente and Patricia Schneider (eds.), *The Defence in International Criminal Trials*, Nomos, Baden-Baden, 2016, pp. 149–199 (<https://www.legal-tools.org/doc/4d414b/>).
4. Silvia Fernández de Gurmendi and Håkan Friman, “The Rules of Procedure and Evidence of the International Criminal Court”, in *Yearbook of International Humanitarian Law*, 2000, vol. 3, pp. 289–336 (<https://www.legal-tools.org/doc/dd7835-1/>).
5. Frederick Harhoff and Phakiso Mochochoko, “International Cooperation and Judicial Assistance”, in Roy S. Lee and Håkan Friman (eds.), *The*

⁴ 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, p. 651 (<https://www.legal-tools.org/doc/e34f81/>).

International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence, Transnational Publishers, Ardsley, 2001, pp. 637–670 (<https://www.legal-tools.org/doc/e34f81/>).

6. 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, pp. 2496–2509.
7. Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003.
8. 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. I, 1999, pp. 339–390 (<https://www.legal-tools.org/doc/27edd7/>).
9. William A. Schabas and Veronique Caruana, “Article 63”, in Ambos (ed.), 2022, pp. 1848–1884.
10. William A. Schabas and Yvonne McDermott, “Article 67”, in Ambos (ed.), 2022, pp. 1966–2000.

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Rule 184

Arrangements for surrender

General Remarks:

A pre-condition for a successful and smooth co-operation regime is communication between the Court and the States tasked to arrest and surrender the person sought for prosecution by the Court. Rule 184 envisages such constant interaction between the Registrar and the States to guarantee an effective execution of surrender requests. It complements Article 59(7) which mandates that the person is to be delivered to the Court ‘as soon as possible’. The practical arrangements of the surrender process are neither stipulated in Article 59 nor in the Articles on co-operation in Part IX of the Statute.¹ Rule 184 remains relatively imprecise.²

Preparatory Works

The content of Rule 184 was not subject to much debate (Harhoff and Mochochoko, 2001, p. 651). It is based on a proposal by Australia dated 26 January 1999 which states:

Rule 133

Arrangements for surrender

- (a) The requested State shall immediately inform the Registrar when the person sought by the Court is available for surrender.
- (b) The person shall be removed from the territory of the requested State by the date agreed upon between the authorities of the requested State and the Registrar. The date set shall allow a reasonable period of time for the removal to take place. If the person is not removed by that date, he or she may be released from custody.

¹ See 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, p. 651 (<https://www.legal-tools.org/doc/e34f81/>); 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. 25.

² 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/>).

(c) If circumstances prevent the removal of the person by the date agreed, the authorities of the requested State and the Registrar shall agree upon a new date by which the person shall be removed and sub-rule (b) shall apply.

(d) The Registrar shall maintain contact with the authorities of the host State in relation to arrangements for the removal of a person.³

Part 9 of the Statute does not address the arrangements for the physical surrender of persons to the Court. This rule proposes a regime to address the matter. Article 59, paragraph 7, provides that when a person is ordered to be surrendered to the Court, he or she “shall be delivered to the Court as soon as possible”.

In its proposal⁴ dated 19 November 1999 the French delegation accepted the Australian suggestion. The Colombian proposal⁵ dated 29 February 2000 does not differ much from the original proposal either. The same applies to the Italian proposal (Harhoff and Mochochoko, 2001, p. 651). Most changes made to the Australian proposal are of a linguistic nature (Harhoff and Mochochoko, 2001, p. 651). The option to release the person after a ‘reasonable period of time’ was excluded from the scope of Rule 184. Such an option is now only included in Article 92(3) in case of a provisional request for arrest that is not followed by a proper surrender request in accordance with Article 91.

Doctrine: For the bibliography, see the final comment on Rule 184.

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³ Proposal submitted by Australia, UN Doc. PCNICC/1999/DP.1, 26 January 1999 (<https://www.legal-tools.org/doc/79ba83/>).

⁴ Proposal submitted by France concerning part 9 of the Rome Statute of the International Criminal Court on international cooperation and judicial assistance, UN Doc. CNICCC/1999/WGRPE(9)/DP.2, 19 November 1999, Rule 9.13 (<https://www.legal-tools.org/doc/909b11/>).

⁵ Proposal submitted by Colombia on the rules of procedure and evidence relating to part 9 of the Statute, on international cooperation and judicial assistance, UN Doc. PCNICC/2000/WGRPE(9)/DP.1, 29 February 2000, Rule 9.9 (<https://www.legal-tools.org/doc/93338d/>).

Rule 184(1): The Requested State

Rule 184(1) is addressed to the ‘requested State’ without further specifying which State that might be. What is clear is that the co-operation regime of the ICC Statute as well as the complementary Rules are binding on States Parties. The Court has further emphasized that the UN Security Council can use a referral as envisaged in Article 13(b) of the Statute to impose on (all) Member States of the United Nations a duty to co-operate with the International Criminal Court. The UN Security Council, at least in theory, could even expand the co-operation regime envisaged in Part IX.¹ In the Libya situation, Pre-Trial Chamber I notes:

[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 IX, is the legal framework within which Libya must comply with the Surrender Request.²

In the operative part of the decision, the Pre-Trial Chamber further decides that the Rules, Rule 184 in particular, are applicable by virtue of the UN Security Council resolution in which it is “*decided*” that “*Libyan authorities shall cooperate fully*”. The Registrar followed this approach by the Chamber in the Libya situation.³ The Registrar adopted a more restrictive approach *vis-à-vis* other non-States Parties. In a request to Libya’s neighbours⁴ the Registry merely “[i]nvite[d] Libya’s neighbouring States to

¹ Astrid Reisinger-Coracini, “Cooperation from States and other Entities”, in Göran Sluiter *et al.* (eds.), *International Criminal Procedure. Rules and Principles*, Oxford University Press, 2013, p. 101 (<https://www.legal-tools.org/doc/bcad4c/>).

² ICC, *Prosecutor v. 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/>).

³ See ICC, *Prosecutor v. Hussein*, Registry, Request to the Republic of Sudan for the arrest and surrender of Abdel Raheem Muhammad Hussein, 13 March 2012, ICC-02/05-01/12-4 (<https://www.legal-tools.org/doc/d7dd86/>).

⁴ ICC, *Prosecutor v. Gaddafi, Gaddafi and al-Senussi*, Registry, Request to States neighboring the Libyan Arab Jamhiriya for the arrest and surrender of Muammar Mohammed Abu Minyar Gaddafi, Saif al-Islam Gaddafi and Abdullah-Al Senussi, 4 July 2011, ICC-01/11-01/11-6 (<https://www.legal-tools.org/doc/c5df8f/>); see also *Prosecutor v. Gaddafi, Gaddafi and al-Senussi*, Registry, Request to the United Nations Security Council members that are not States

inform the Registry when the persons sought by the Court are available for surrender pursuant to rule 184 of the Rules” while requesting the arrest and surrender in a request made to the States Parties dated 4 July 2011.⁵

The approach taken by the Registrar has, however, differed in the past. In the Darfur situation the Registrar⁶ had *requested* co-operation pursuant to Rule 184 from non-States Parties despite the fact that the UN Security Council Resolution 1593 (2005) had “urge[d] all States [...] to cooperate fully”. The wording by the Security Council, which matters greatly for the determination of the co-operation regime,⁷ indicates that it was not willing to impose legal obligations on all Member States of the UN and thereby render applicable the entire Part IX of the Rome Statute and the Rules. The wording used by the Registrar, however, suggests that the requested States are considered to be legally obliged to satisfy the request. The underlying decisions by Pre-Trial Chamber I⁸ do not provide any guidance in this regard.

Parties to the Rome Statute for the arrest and surrender of Muammar Mohammed Abu Minyar Gaddafi, Saif al-Islam Gaddafi and Abdullah-Al Senussi, 4 July 2011, ICC-01/11-01/11-8 (*Gaddafi and al-Senussi*, 4 July 2011) (<https://www.legal-tools.org/doc/af1ff0/>); *Prosecutor v. Hussein*, Registry, Request to the United Nations Security Council members that are not States Parties to the Rome Statute for the arrest and surrender of Abdel Raheem Muhammad Hussein, 13 March 2012, ICC-02/05-01/12-6 (<https://www.legal-tools.org/doc/a54446/>); *Prosecutor v. al-Bashir*, Registry, Request for the Arrest of Omar Hassan Ahmad al-Bashir to the Republic of India, 26 October 2015, ICC-02/05-01/09-252 (<https://www.legal-tools.org/doc/8e0b91/>); *Prosecutor v. Hussein*, Registry, 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, para. 10 (<https://www.legal-tools.org/doc/d79b58/>).

⁵ ICC, *Prosecutor v. Gaddafi*, Registry, Request to all States Parties to the Rome Statute for the arrest and surrender of Muammar Mohammed Abu Minyar Gaddafi, Saif al-Islam Gaddafi and Abdullah-Al Senussi, 4 July 2011, ICC-01/11-01/11-7 (<https://www.legal-tools.org/doc/0dd450/>).

⁶ ICC, *Prosecutor v. Harun and Kushayb*, Registry, Request to the Arab Republic of Egypt, Eritrea, The Federal Democratic Republic of Ethiopia and the Libyan Araba Jamahiriya for the arrest and surrender of Ahmad Harun, 4 June 2007, ICC-02/05-01/07-15-tEn (<https://www.legal-tools.org/doc/e7cb3c/>); *Prosecutor v. al-Bashir*, Registry, Request to all United Nations Security Council members that are not States Parties to the Rome Statute for the arrest and surrender of Omar al Bashir,, 6 March 2009 ICC-02/05-01/09-8 (<https://www.legal-tools.org/doc/688fdf/>).

⁷ For example, 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*, no. 6, 2010, p. 442 (<https://www.legal-tools.org/doc/75c5d0/>).

⁸ 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 (<https://www.legal-tools.org/doc/e2469d/>); *Prosecutor v. al-Bashir*, Pre-Trial Chamber I,

Doctrine: For the bibliography, see the final comment on Rule 184.

Author: Mayeul Hiéramente.

Rule 184(1): Inform the Registrar

Rule 184(1) highlights, as does Rule 176(2), the importance of the Registrar in the day-to-day management of the co-operation regime.¹ As the competent organ to make arrangements with the State in matters of surrender, the Registrar reports to the respective Chamber.²

Doctrine: For the bibliography, see the final comment on Rule 184.

Author: Mayeul Hiéramente.

¹ See, for example, ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Public Redacted Version of Decision on the Prosecutor's Application for a warrant of arrest, Article 58, 10 February 2006, ICC-01/04-01/06-1-Corr, paras. 116 *et seq.* (<https://www.legal-tools.org/doc/af6679/>); *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-US-Exp (<https://www.legal-tools.org/doc/8db08a/>).

² ICC, *Prosecutor v. Kony et al.*, Pre-Trial Chamber II, Order to the Registrar and the Prosecutor for the Submission of Information on the Status of the Execution of the Warrants of Arrest in the Situation of Uganda, 15 September 2006, ICC-02/04-01/05-111 (<https://www.legal-tools.org/doc/b0fd76/>).

Rule 184(1): The Person Sought

The person can only be sought for surrender for a criminal act that can be prosecuted by the Court. It is therefore without doubt that Rule 184 applies to surrender requests for investigations into alleged acts of genocide (Article 6), crimes against humanity (Article 7) and war crimes (Article 8). A decision by Pre-Trial Chamber II suggests that Rule 184 also applies to offences against the administration of justice as envisaged in Article 70 of the ICC Statute.¹ It should be noted that the Statute as well as the Rules set out limits to the application of the co-operation regime with regards to offenses against the administration of justice. Article 70(2) sets out that “[t]he 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”. Rule 165(2) postulates that Article 59 and any Rules thereunder shall not apply. Furthermore, Rule 167(1) indicates that the co-operation regime of the Statute is not directly applicable. Thus the co-operation regime differs for investigations into offenses against the administration of justice.² Whether or not Rule 184 directly applies is, however, of lesser importance since it is obvious that a channel of communication has to exist notwithstanding the exact charges.

Doctrine: For the bibliography, see the final comment on Rule 184.

Author: Mayeul Hiéramente.

¹ See ICC, *Prosecutor v. Bemba et al.*, Registry, Request for cooperation to the United Kingdom of the Netherlands in relation to Article 70 of the Rome Statute, 20 November 2013, ICC-01/05-01/13-2-Red (<https://www.legal-tools.org/doc/84b9f8/>).

² See Donald K. Piragoff, “Article 70”, 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. 30; Mayeul Hiéramente and Philipp Müller, “Barasa, Bribery and Beyond: Offences against the administration of justice at the International Criminal Court”, in *International Criminal Law Review*, vol. 14, no. 6, 2014, p. 1129 (<https://www.legal-tools.org/doc/bd2f6c/>).

Rule 184(1): Available for Surrender

Rule 184 is instructive as to the procedure to be followed in the case of a surrender request by the Court. It was therefore explicitly referred to by Pre-Trial Chamber II in a decision regarding the applicability of the ‘speciality principle’ enshrined in Article 101 of the Statute.¹ The Prosecutor had argued that Dominic Ongwen consented to the transfer from the Central African Republic to the Court, thereby making his appearance ‘voluntary’ in lieu of considering the transfer as a surrender in the sense of Article 101(1). As a result, the Prosecutor had argued that the speciality rule could not apply. The Single Judge refuted the argument and stated that the acceptance on the part of Ongwen did not suffice to deny the transfer the quality of ‘surrender’ (*Ongwen*, 7 July 2015, para. 12). The interpretation suggested by the Prosecutor would deprive the requested State of its statutory rights and would be a disincentive to a constructive co-operation (para. 14). The fact that Ongwen was transferred as a detainee suggests, in the view of the Single Judge, a surrender (para. 13). More importantly, Article 59 did not mandate any particular proceedings on the part of the requested State (para. 10) so that the brevity of the transfer proceedings could not suffice to qualify the transfer as anything other than a ‘surrender’ (para. 11). Article 89 and Rule 184 did not proscribe a concrete procedure to be followed for the ‘delivering up’ (para. 4). The application for leave to appeal was rejected.² Regarding the interpretation of Rule 184 it should be noted that the Single Judge did not provide any limitations regarding the surrender process.

Doctrine: For the bibliography, see the final comment on Rule 184.

Author: Mayeul Hiéramente.

¹ ICC, *Prosecutor v. Ongwen*, Pre-Trial Chamber II, Decision on the applicability of article 101 of the Rome Statute in the proceedings against Dominc Ongwen, 7 July 2015, ICC-02/04-01/15-260 (*Ongwen*, 7 July 2015’) (<https://www.legal-tools.org/doc/584909/>).

² ICC, *Prosecutor v. Ongwen*, Pre-Trial Chamber II, Decision on the “Prosecution’s application for leave to appeal the ‘Decision on the applicability of article 101 of the Rome Statute in the proceedings against Dominc Ongwen’”, 1 September 2015, ICC-02/04-01/15-298 (<https://www.legal-tools.org/doc/21bb92/>).

Rule 184(2)

(2) The person shall be surrendered to the Court by the date and in the manner agreed upon between the authorities of the requested State and the Registrar.

Rule 184(2) envisages that national authorities agree with the Registrar on the date and manner of the surrender of the person. Harhoff and Mochochoko¹ highlight that the legal obligations of the national authorities with regards to the practical arrangements do therefore not stem from the Rules *per se*. It is indeed true that Rule 184 does not stipulate itself any time limits or modes of delivery of the person. The legal obligation stems from the Statute itself, namely Article 89² and is specified in the arrangements agreed upon with the competent organ of the Court. The semi-contractual approach might help to reduce the risk of non-compliance on the part of the national authorities (Harhoff and Mochochoko, 2001, p. 652).

Such agreements can include, among others, arrangements regarding the mode of transport, the contact with the host State and the ICC Detention Centre, steps to be taken to guarantee a safe transit pursuant to Article 89(3), as well as time-table for the transfer (see Harhoff and Mochochoko, 2001, p. 652). In most circumstances, the requested State will require the support of the Registrar.

Doctrine: For the bibliography, see the final comment on Rule 184.

Author: Mayeul Hiéramente.

¹ 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, p. 652 (<https://www.legal-tools.org/doc/e34f81/>).

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. 35.

Rule 184(3)

3. If circumstances prevent the surrender of the person by the date agreed, the authorities of the requested State and the Registrar shall agree upon a new date and manner by which the person shall be surrendered.

Sub-Rule 3:

A postponement of the surrender does not allow for a release of the person sought for surrender. Rule 184(3) clearly establishes that in case of (unexpected) delays in the surrender process a new date and, if necessary, manner of the surrender shall be agreed upon by the requested State and the Registrar. Rule 184 does not specify the ‘circumstances’ preventing the surrender so that Rule 184(3) applies to any reason for the delay.¹ For the practical arrangements to be made by the Registrar the reason and responsibility for such delay are of lesser relevance. The obligation of the Registrar remains to come to a viable and timely agreement and to guarantee the transfer of the person to the Court. A failure to comply with the agreement under sub-Rule 2 or the refusal to enter into such practical arrangements altogether can – independent of the efforts to realize the transfer – be addressed via a finding of non-compliance pursuant to Article 87(7).

The decision by the drafters of the Rules to exclude the possibility of release from the scope of application of Rule 184 indicates that the arrested person shall remain in custody until the agreed upon surrender to the Court can be affected. Depending on the gravity of the crimes or offense (Article 70) the person is accused of as well as the delays occurring in the surrender process this could – at least in theory – call into question the proportionality of the detention. If such significant delays in the surrender process were to occur, the person could apply for interim release pursuant to Article 59(3) before the national authorities.²

¹ 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, p. 651 (<https://www.legal-tools.org/doc/e34f81/>).

² See Eleni Chaitidou and Elisa Hoven, “The Person’s Liberty at Stake – A Tour d’Horizon on the Rights of the Arrested Person under the Rome Statute”, in Mayeul Hiéramente and Patricia Schneider (eds.), *The Defence in International Criminal Trials*, Nomos, Baden-Baden, 2016, pp. 177 *et seq.* (<https://www.legal-tools.org/doc/4d414b/>).

Doctrine: For the bibliography, see the final comment on Rule 184.

Author: Mayeul Hiéramente.

Rule 184(4)

4. The Registrar shall maintain contact with the authorities of the host State in relation to the arrangements for the surrender of the person to the Court.

Sub-rule 4:

Rule 184(4) stipulates that the Registrar shall remain in contact with the national authorities. This implies that the Registrar is entitled to communicate with the national authorities on all matters relevant to the surrender process. The communication is ongoing throughout the entire process.¹ This entails the risk that Court officials are made aware of possible violations of the rights of the person sought for surrender by national authorities. In the *Gbagbo* case the Defence had argued that the arrest of Mr. Gbagbo violated fundamental rights of the accused and that the investigations by the ICC were tainted and should be terminated on the basis of the ‘abuse of process doctrine’. This, *inter alia*, referred to contacts between the Ivorian authorities and organs of the Court. In a decision dated 15 August 2012, Pre-Trial Chamber I emphasized that mere contacts, as envisaged in Rule 184,² do not suffice to attribute any possible violations of the rights of the person sought for surrender to the Court. The Chamber stated:

The same holds true for the period between the notification of the request for arrest and surrender of Mr Gbagbo and his transfer to the Court. During this period, he was still detained by the Ivorian authorities and the conditions of his detention were within their competence. In particular, while organs of the Court were involved in the process of surrender of Mr Gbagbo to the Court, there is no evidence indicating any violation of Mr

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. 25.

² See 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. 80 (‘*Gbagbo*, 15 August’) (<https://www.legal-tools.org/doc/0d14c3/>); *Prosecutor v. Gbagbo*, OTP, 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), 28 June 2012, ICC-02/11-01/11-167-Red, para. 29 (‘*Gbagbo*, 28 June 2012’) (<https://www.legal-tools.org/doc/991ada/>).

Gbagbo's fundamental rights that can in any way be attributed to the Court (*Gbagbo*, 15 August, para. 110).

The Pre-Trial Chamber I further held that Article 59 “cannot be applied to the period of time before the receipt of the custodial State of the request for arrest and surrender, even in cases where the person may already have been in the custody of that State, and regardless of the grounds for any such prior detention”. It thereby concurred with the assertion by the Office of the Prosecutor “that there is no obligation or power of the Court or of the national authorities who conducted the arrest proceedings prior to transfer of the Suspect, to review the legality of the Suspect’s prior period of detention for the national proceedings unrelated to the process before this Court, pursuant to Article 59(2) or Rule 184” (*Gbagbo*, 28 June 2012, para. 42). The Chamber thereby strengthened the position of the Registrar and emphasized that a close communication with the authorities is a necessary condition for effective co-operation. Such contacts are permitted and necessary even in cases where (potential) violations of the rights of the person sought for surrender by national authorities could have occurred in the past.

Cross-references:

Articles 59 (7), 89.
Rule 176.

Doctrine:

1. 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, no. 6, pp. 428–444 (<https://www.legal-tools.org/doc/75c5d0/>).
2. 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/>).
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, Ardsley, 2001, pp. 637–670 (<https://www.legal-tools.org/doc/e34f81/>).
4. Mayeul Hiéramente and Philipp Müller, “Barasa, Bribery and Beyond: Offences against the administration of justice at the International

- Criminal Court”, in *International Criminal Law Review*, 2014, vol. 14, no. 6, pp. 1122–1149 (<https://www.legal-tools.org/doc/bd2f6c/>).
5. 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, pp. 2496–2509.
 6. Donald K. Piragoff, “Article 70”, in Ambos (ed.), 2022, pp. 2089–2107.
 7. Astrid Reisinger-Coracini, “Cooperation from States and other Entities”, in Göran Sluiter *et al.* (eds.), *International Criminal Procedure. Rules and Principles*, Oxford University Press, 2013, pp. 95–115 (<https://www.legal-tools.org/doc/bcad4c/>).

Author: Mayeul Hiéramente.

Rule 185(2)

2. Where the Court has determined that the case is inadmissible under article 17, paragraph 1 (a), the Court shall make arrangements, as appropriate, for the transfer of the person to a State whose investigation or prosecution has formed the basis of the successful challenge to admissibility, unless the State that originally surrendered the person requests his or her return.

Rule 185(2) details the effects of a decision declaring a case inadmissible before the ICC on the custody of the defendant. The rule provides that the Court should transfer the person to the State whose investigation or prosecution has formed the basis for inadmissibility, unless the State that originally surrendered the person to the ICC requests his or her return.

A successful admissibility challenge brought by a State does not entail automatic or unconditional transfer of the defendant to that State. It was argued that Rule 185(2) gives priority to the surrendering State in case of competing requests for the transfer of an accused person following a successful admissibility challenge. In this regard, it was observed that “even if the surrendering State has not formally requested the return of the person, the Registrar would probably still be obliged under the international legal extradition regime to inform the surrendering State of the Court’s intention to proceed with a request for transfer of the person to the challenging State”.¹

The negotiating history reveals that the drafters discussed a more complex scenario in which a State challenges admissibility on the basis of investigations or prosecutions conducted by a third State (Harhoff and Mochochoko, 2001, p. 655). In this scenario, it would appear that the person may be transferred either to the State whose investigation or prosecution has formed the basis for inadmissibility, the State that successfully challenged admissibility or the State that originally surrendered the person to the ICC.

Cross-reference:

Article 19(10).

¹ Frederik 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, p. 655 (<https://www.legal-tools.org/doc/e34f81/>).

Doctrine:

1. Frederik 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. 637–671 (<https://www.legal-tools.org/doc/e34f81/>).
2. John T. Holmes, “Jurisdiction and Admissibility”, in Lee (ed.), 2001, pp. 345–346.

Author: Mohamed Abdou.

Rule 186

Competing requests in the context of a challenge to the admissibility of the case

General Remarks:

Rule 186 refers to Article 90 which deals with a situation of competing requests by the Court (for surrender) and another State (for extradition). Article 90 takes note of the fact that extradition requests by States other than the requested State (the ‘requesting State’) – States Parties or not – can occur and might even take precedence over a request for surrender by the Court. Article 90(8) addresses a very peculiar situation in this regard. It deals with the possible outcome that the Court – upon review of the content of the competing requests – has established that the extradition request by the other State takes precedence over the surrender request and that the Court has thereby held that the case is inadmissible. In such a situation the requested State would be entitled – as far as its obligations under the Statute and the Rules are concerned – to extradite the person to the State which has made the competing request. The requested State might, however, decide – for legal, political or other reasons – to refuse extradition to the requesting State. The requested State’s refusal of the extradition might affect the assessment whether or not the case is indeed admissible. The refusal to extradite is a new fact¹ that allows the Prosecutor to request a review of the admissibility decision by virtue of Article 19(10). Rule 186 is meant to guarantee that the Prosecution is informed about this new fact without undue delay.²

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. 18617 (<https://www.legal-tools.org/doc/8d1442/>); 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/>).

² 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, p. 656 (<https://www.legal-tools.org/doc/e34f81/>).

Preparatory Works:

Rule 186 is based on the French proposal³ dated 19 November 1999. The proposal reads as follows:

In situations described in article 90, paragraph 8, the decision of the requested State shall be transmitted to the Prosecutor, who shall act, if necessary, in accordance with article 19, paragraph 10.

The re-drafting was meant to clarify that the requested State is solely under the obligation to notify one organ of the Court: The Prosecutor (Harhoff and Mochochoko, 2001, p. 656). Contrary to the French proposal, Rule 186 is only addressed to the requested State and does not give any guidance to the Prosecutor who, in the French proposal, would have been encouraged to seek a review of the decision by the Pre-Trial Chamber pursuant to Article 19(10). As pointed out by Cazala (Cazala, 2012, p. 1861), Rule 186 highlights the *raison d'être* of Article 90(8).

Doctrine: For the bibliography, see the final comment on Rule 186.

Author: Mayeul Hiéramente.

³ Proposal submitted by France concerning part 9 of the Rome Statute of the International Criminal Court on international cooperation and judicial assistance, UN Doc. PCNICC/1999/WGRPE(9)/DP.2, 19 November 1999, Rule 9.10(b) (<https://www.legal-tools.org/doc/909b11/>).

Rule 186(i)

Notification of its Decision:

Both Article 90(8) and Rule 186 specify that the ‘decision’ not to extradite to the requesting State shall be notified to the Prosecutor. This presupposes that an actual decision has been made by the national authorities. Commentators.¹ have pointed out that the Court may wish to reconsider its decision of admissibility if extradition to the requesting State is “subsequently refused or fails for any reason”.² For that matter it is reasonable to interpret both Article 90(8) and Rule 186 in a way to require information to the Prosecutor if the extradition did not occur in a reasonable time after the national authorities have been made aware of the inadmissibility decision. The fact that an extradition did not take place could, in and of itself, be a relevant new fact in the sense of Article 19(10) as it might indicate a ‘refusal’ to extradite. This might be relevant as it leads to an inability of the *requesting* State to effectively prosecute the crimes for which prosecution is sought after extradition.³ After all, the pending extradition request of the *requesting* State, willing and able to prosecute the crimes the Court itself was seeking prosecution for (see Meißner, 2003, p. 151), is the reason that the Court declared the case inadmissible. Whether or not the *requested* State is willing and able to prosecute was, most likely, not addressed in the admissibility decision by the Court. Any evidence that the *requested* State is responsible for the refusal to extradite or even intended to grant *de facto* immunity to the person might nonetheless be of relevance for the Court. The Court will certainly address the behaviour by the *requested* State in any subsequent decision it intends to make (Rinoldi and Parisi, 1999, p. 356), be it pursuant to Article 19(10) or Article 87(7).

¹ 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, p. 656 (<https://www.legal-tools.org/doc/e34f81/>).

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. 356 (<https://www.legal-tools.org/doc/27edd7/>).

³ See Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003, p. 152 with further references (<https://www.legal-tools.org/doc/872bf2/>).

Doctrine: For the bibliography, see the final comment on Rule 186.

Author: Mayeul Hiéramente.

Rule 186(ii)

To the Prosecutor:

Contrary to many other provisions of the co-operation regime, Rule 186 explicitly names the Prosecutor as the recipient of the notification. The purpose is to avoid any time delays caused by a transmission of the information via the Registrar.¹ Furthermore, the notification is meant to allow the Prosecution to review the new facts² and – if fully satisfied – seek a review of the admissibility decision under Article 19(10). Since it is the sole prerogative of the Prosecutor to seek a review of an admissibility decision,³ there is no need to opt for the normal communication channel via the Registrar.

Cross-references:

Articles 19(10), 90(8).

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, vol. 3: *International Criminal Procedure*, Oxford University Press, 2016, p. 617 (<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*, A. Pedone, Paris, 2012, pp. 1849–1861 (<https://www.legal-tools.org/doc/872bf2/>).
3. Christopher K. Hall, 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.
4. Frederick Harhoff and Phakiso Mochochoko, “International Cooperation and Judicial Assistance”, in Roy S. Lee and Håkan Friman (eds.), *The*

¹ 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, p. 656 (<https://www.legal-tools.org/doc/e34f81/>).

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. 29.

³ See Christopher K. Hall, Daniel D. Ntanda Nsereko and Manuel J. Ventura, “Article 19”, in Ambos (ed.), 2022, paras. 101 *et seq.*

International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence, Transnational Publishers, Ardsley, 2001, pp. 637–670 (<https://www.legal-tools.org/doc/e34f81/>).

5. Claus Kreß and Kimberly Prost, “Article 90”, in Ambos (ed.), 2022, pp. 2510–2518.
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. 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. I, 1999, pp. 339–390 (<https://www.legal-tools.org/doc/27edd7/>).

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*Section III. Documents for Arrest and Surrender Under Articles 91 and 92***Rule 187: General Remarks****Translation of documents accompanying request for surrender*****General Remarks:***

Rule 187 refers to Article 67 which addresses the rights of the accused. Cazala points out that such reference to an article that applies to the ‘accused’ is indeed rather surprising considering the early stage the provision comes into play.¹ The Rule highlights the duty of care the Court has vis-à-vis a person sought for arrest and surrender (Cazala, 2012, p. 1870). The Rule also eases the burden of the requested State inasmuch as it does not face any additional obligation to translate the documentation submitted with the request by the Court.² Rule 187 complements Article 67(1)(a) which articulates the right of the accused “[t]o 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”. To fully guarantee that the rights accorded to the accused by virtue of the Statute are respected, Rule 187 stipulates the organizational measures to be taken to provide the accused with a translation at the earliest possible moment, namely his arrest by national authorities upon request of the Court. It allows the person sought for surrender to prepare his defence as soon as he is apprehended by the authorities of the requested State.

Rule 187 is supplemented by Rule 117(1) which obliges the Court to verify that the translation provided in the request is handed over to the person sought for surrender. Upon receipt of the translation, the person can verify the existence and content of an arrest warrant against him or her.³ This allows

¹ 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. 1869 (<https://www.legal-tools.org/doc/872bf2/>).

² Silvia Fernández de Gurmendi and Håkan Friman, “The Rules of Procedure and Evidence of the International Criminal Court”, in *Yearbook of International Humanitarian Law*, 2000, vol. 3, p. 303 (<https://www.legal-tools.org/doc/dd7835-1/>); Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003, p. 116 (<https://www.legal-tools.org/doc/8d1442/>).

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, Ardsley, 2001, p. 651 (<https://www.legal-tools.org/doc/e34f81/>).

the person sought for surrender to actively participate in the surrender proceedings and, if he or she so wishes, to challenge the surrender as envisaged, for example, in Article 89(2). Rule 187 gains prominence in a situation where the person sought for surrender does not fully understand and speak the language designated by the requested State for official communication under Part IX of the Statute. In practice, such a situation can occur where the arrest has been made by a State other than the home state of the person sought for surrender or where the person is from a linguistic minority (Harhoff and Mochochoko, 2001, p. 651). Given the current practice of relatively widespread requests for arrest and surrender⁴ it is not unlikely that the person sought for surrender does not speak the official language of a requested State. Especially in cases where the person holds no official position in government, it can be difficult to assess the language spoken and understood by the person sought for arrest and surrender.⁵ In such a situation, the Chamber can require the Registrar to collect additional information in order to determine the language(s) spoken by the person whose arrest is sought⁶ as well as the level of proficiency regarding the official working languages of the Court. It may be taken into account that the person sought for arrest and surrender can benefit of assistance of counsel to understand complex legal issues (*Katanga*, 9 November 2007).

Rule 187 follows the approach taken by other international tribunals regarding the translation of documents (Cazala, 2012, p. 1869 with further references). It is part of a detailed regulatory framework which addresses the need for translation and interpretation in the different stages of the proceedings (for an overview, see de Gurmendi and Friman, 2000, p. 310).

⁴ See for example, ICC, *Prosecutor v. al-Bashir*, Registrar, Supplementary Request to all States Parties to the Rome Statute for the Arrest and Surrender of Omar Hassan Ahmad al Bashir, 21 July 2010, ICC-02/05-01/09-96 (<https://www.legal-tools.org/doc/cae63e/>).

⁵ See also William A. Schabas, *The International Criminal Court. A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1306 (<https://www.legal-tools.org/doc/b7432e/>).

⁶ For example, 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/>); *Prosecutor v. Katanga*, Registrar, Report of the Registry on the Additional Information Concerning the Languages Spoken, Written and Understood by Germain Katanga, 9 November 2007, ICC-01/04-01/07-62-tENG ('*Katanga*, 9 November 2007') (<https://www.legal-tools.org/doc/8f1dbe/>).

Doctrine: For the bibliography, see the final comment on Rule 187.

Author: Mayeul Hiéramente.

Rule 187: Request for Arrest and Surrender

Request under Article 91:

The Rule complements Article 91 which addresses the ‘normal’ request for arrest and surrender. The wording of Rule 187 indicates that it does not apply to a provisional request pursuant to Article 92. The language of the documentation to be provided in such an urgent case is solely determined by Article 87(2), which refers to the official language of the requested State.¹ If the circumstances of the provisional request for arrest permit, it is, however, in the interest of both the person sought and the Court to supplement such provisional request with a translation in a language the person fully understands and speaks. This allows the person to fully comprehend the charges against him or her and establishes the necessary conditions for an informed decision regarding a possible ‘consent to surrender’ as envisaged in Article 92(3). Such a consent can be beneficial to the person and the Court.² The Court is entitled to adapt the higher standards applicable to a request under Article 91 to a provisional request.³

Doctrine: For the bibliography, see the final comment on Rule 187.

Author: Mayeul Hiéramente.

¹ 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/>).

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.

³ See 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. 1876 (<https://www.legal-tools.org/doc/872bf2/>).

Rule 187: “As Appropriate”

As Appropriate:

Rule 187 establishes the principle that every request for arrest and surrender pursuant to Article 91 is to be supplemented by the necessary translations. The fact that a translation should only be provided in situation where it is deemed ‘appropriate’ indicates the possibility of an exception. Kreß and Prost¹ rightly note that the term ‘appropriate’ (solely) allows for a delay of the translation. The translation has to be provided subsequently. In light of Rule 117(1), which mandates that the Court ensures that the arrested person receives a copy of the arrest warrant and the necessary provisions in a language that the person fully understands and speaks, it should be clear that Rule 187 does not permit the Court to refrain from providing a (necessary) translation of such documents altogether.

Doctrine: For the bibliography, see the final comment on Rule 187.

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. 7.

Rule 187: Translation

Translation:

The Court has to provide for the translation.¹ Rule 187 does not include any obligation on the part of the requested State. The Rule does not explicitly specify the Court organ responsible for translating the warrant of arrest. This follows from the general framework of the co-operation regime. There is no doubt that the Registrar is the organ tasked with taking the necessary steps to translate the relevant documents and that it is the Registrar who is mandated to ensure that the requested State and subsequently the person sought for surrender receives a translated copy of the warrant.² The Registrar can rely on the translation and interpretation services (see Rule 42) of the Court to fulfil its mandate.

Doctrine: For the bibliography, see the final comment on Rule 187.

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. 7.

² ICC, *Prosecutor v. Odhiambo*, Pre-Trial Chamber II, Request for Arrest and Surrender of Okhlot Odhiambo, 8 July 2005, ICC-02/04-01/05-15 (<https://www.legal-tools.org/doc/a3541d/>); *Prosecutor v. Kony et al.*, Pre-Trial Chamber II, Request to the Central African Republic for Arrest and Surrender of Dominic Ongwen, 21 March 2007, ICC-02/04-01/05-227 (<https://www.legal-tools.org/doc/7nfuxo/>); see William A. Schabas, *The International Criminal Court. A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1306(<https://www.legal-tools.org/doc/b7432e/>).

Rule 187: Arrest Warrant

Translation of the Arrest Warrant:

The submission to the requested State has to include a translation of the arrest warrant itself. Nowadays, it is common practice at the ICC that the respective Pre-Trial Chamber provides for a distinct document containing the ‘arrest warrant’. If the arrest warrant refers to annexes these additional documents are also to be translated.¹ Otherwise the person whose arrest is sought might not be in a position to fully comprehend the nature and content of the charges determined to be relevant by the Pre-Trial Chamber in question.

Doctrine: For the bibliography, see the final comment on Rule 187.

Author: Mayeul Hiéramente.

¹ See ICC, *Prosecutor v. Odhiambo*, Pre-Trial Chamber II, Request for Arrest and Surrender of Okhlot Odhiambo, 8 July 2005, ICC-02/04-01/05-15 (<https://www.legal-tools.org/doc/a3541d/>).

Rule 187: Translation of Provisions

Translation of the Relevant Provisions:

Rule 187 clearly establishes that the relevant provisions of the Statute and the Rules of Procedure and Evidence have to be translated and added to a request under Article 91. Neither the Rules nor the Statute explicitly determine which provisions ought to be considered ‘relevant’. De Gurmendi and Friman point out that the obligation under Rule 187 encompasses all provisions dealing with the rights of the accused.¹ Pre-Trial Chamber II² provided the following list of Articles and Rules of which Dominic Ongwen should be advised of after his arrest in “a language he fully understands and speaks”: Articles 19 (2), 55 (2), 57, 59, 60, 61, 67; Rules 21, 112, 117, 118, 119, 120, 121, 122, 123, 124, 187.

While Pre-Trial Chamber II only requested that the person whose arrest is sought be ‘advised of’ the rights as set forth in these provisions, the explicit reference to the provisions indicates which provisions the judges consider relevant in a situation of arrest. Considering the fact that Rule 187 does impose an obligation on the Court and not the requested States to translate the relevant documents and provisions into a language the person understands, it should be clear that a translation of the provisions mentioned above is a pre-condition for any advice given to the person sought for surrender. The list provided by Pre-Trial Chamber II should therefore be considered as the basis for any request under Article 91 and Rule 187. Such request should also contain a translation of Article 89(2) to inform the person of the possibility of a *ne bis in idem* challenge before a national court. In order to make the person aware of such an admissibility challenge he or she should also be informed of the content of Article 17(1) and Article 20(3). Finally, it is advisable to include a translation of the definition of the crime as enshrined in Article 6, 7 or 8. As the Court has also applied Rule 187 to offenses against

¹ Silvia Fernández de Gurmendi and Håkan Friman, “The Rules of Procedure and Evidence of the International Criminal Court”, in *Yearbook of International Humanitarian Law*, 2000, vol. 3, p. 303 (<https://www.legal-tools.org/doc/dd7835-1/>).

² ICC, *Prosecutor v. Ongwen*, Pre-Trial Chamber II, Warrant of Arrest for Dominic Ongwen, 8 July 2005, ICC-02/04-01/05-10 (<https://www.legal-tools.org/doc/d2011f/>).

the administration of justice³ the person sought for arrest should be provided with a translation of Article 70 if he or she is accused of such an offense.

Further Translations:

Some observers⁴ have rightly remarked that Rule 187 does not require a translation of the co-operation request itself. A translation of the entire co-operation request might increase the transparency of the surrender process and is generally to be encouraged. This, however, is not mandatory under the Statute and the Rules. The language of the request for arrest and surrender is instead determined in accordance with Article 87(2) and Rules 178 and 179. Rule 187 is meant to guarantee the minimum protection appropriate to the (early) stage of the proceedings. Additional material will then be provided at a later stage. Article 67(1) guarantees that the accused is informed ‘in detail’ about the ‘nature, cause and content’ of the charge and that he can communicate freely with counsel and be provided with facilities to prepare his defence (see also Harhoff and Mochochoko, 2001, p. 651). However, it does not state that such detailed information should be included in a request pursuant to Article 91.

Cross-references:

Articles 67(1)(a), 91.

Rules 42, 117(1), 178, 179.

Doctrine:

1. 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. 1873–1880 (<https://www.legal-tools.org/doc/872bf2/>).
2. Julien Cazala, “Article 92”, in Fernandez and Pacreau (eds.), 2012, pp. 1863–1871.

³ See ICC, *Prosecutor v. Bemba et al.*, Registry, Request for cooperation to the Kingdom of the Netherlands in relation to Article 70 of the Rome Statute, 20 November 2013, ICC-01/05-01/13-2-Red (<https://www.legal-tools.org/doc/84b9f8/>).

⁴ 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, p. 651 (<https://www.legal-tools.org/doc/e34f81/>).

3. Silvia Fernández de Gurmendi and Håkan Friman, “The Rules of Procedure and Evidence of the International Criminal Court”, in *Yearbook of International Humanitarian Law*, 2000, vol. 3, pp. 289–336 (<https://www.legal-tools.org/doc/dd7835-1/>).
4. 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 (<https://www.legal-tools.org/doc/e34f81/>).
5. 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.
6. Claus Kreß and Kimberly Prost, “Article 92”, in Ambos (ed.), 2022, pp. 2525–2528.
7. Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, C.H. Beck, Munich, 2003 (<https://www.legal-tools.org/doc/8d1442/>).
8. 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/>).

Author: Mayeul Hiéramente.

Rule 188

For the purposes of article 92, paragraph 3, the time limit for receipt by the requested State of the request for surrender and the documents supporting the request shall be 60 days from the date of the provisional arrest.

Article 92(3) which concerns provisional arrest and introduces a time limit for receiving the request for surrender and the documents supporting the request. The time limit is specified by Rule 188 to 60 Days.

Rule 188 only regulates situations where the person has been arrested. If the person has not been arrested, the requested State is still under an obligation to arrest and surrender the person even if the required documents have not been submitted within the time limit. This follows from Article 92(4).¹

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, vol. 3: *International Criminal Procedure*, Oxford University Press, 2016, p. 612 (<https://www.legal-tools.org/doc/995606/>).
2. 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, p. 658 (<https://www.legal-tools.org/doc/e34f81/>).
3. Claus Kreß and Kimberly Prost, “Article 92”, 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. 2076–2077 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

¹ 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, p. 658 (<https://www.legal-tools.org/doc/e34f81/>).

Rule 189

When a person has consented to surrender in accordance with the provisions of article 92, paragraph 3, and the requested State proceeds to surrender the person to the Court, the Court shall not be required to provide the documents described in article 91 unless the requested State indicates otherwise.

Rule 189 concerns a simplified surrender procedure. Article 92(3) provides that the person who has been provisionally arrested may consent to surrender before the expiration of the time limit for transmission of documents 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. Rule 189 clarifies that in such cases the Court shall not be required to provide the documents described in Article 91 unless the requested State indicates otherwise.

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, vol. 3: *International Criminal Procedure*, Oxford University Press, 2016, p. 612 (<https://www.legal-tools.org/doc/995606/>).
2. Irene Gartner, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed. Berliner Wissenschafts-Verlag, 2nd. ed., 2004, pp. 428–429 (<https://www.legal-tools.org/doc/95e5f9/>).
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, Ardsley, 2001, p. 659 (<https://www.legal-tools.org/doc/e34f81/>).

Author: Mark Klamberg.

*Section IV. Cooperation Under Article 93***Rule 190**

When making a request under article 93, paragraph 1 (e), with respect to a witness, the Court shall annex an instruction, concerning rule 74 relating to self-incrimination, to be provided to the witness in question, in a language that the person fully understands and speaks.

Rule 190 has the purpose of ensuring that witnesses are instructed on the rules relating to self-incrimination. It balances different interests, witnesses have to be encouraged to testify on a voluntary basis, if they come, they have to answer all questions. Thus they need to be informed about the immunity that Rule 74 offers against prosecution.¹ The dilemma of voluntary appearance has somewhat been resolved in *Ruto and Sang*, where the Appeals Chamber states that “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”.²

States Parties shall pursuant to Article 93(1)(e) facilitate the voluntary appearance of persons as witnesses or experts before the Court. When making a request under Article 93(1)(e), the Court has an obligation under Rule 190 to annex an instruction concerning Rule 74 relating to self-incrimination. The requested state will serve the summons together with this instruction to the person concerned.

¹ 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, p. 660 (<https://www.legal-tools.org/doc/e34f81/>).

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, para. 2 (<https://www.legal-tools.org/doc/e5eb09/>). See also *Prosecutor v. Ruto and Sang*, Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation, 17 April 2014, ICC-01/09-01/11-1274, paras. 84–140 (<https://www.legal-tools.org/doc/78e130/>).

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, vol. 3: *International Criminal Procedure*, Oxford University Press, 2016, p. 630 (<https://www.legal-tools.org/doc/995606/>).
2. Irene Gartner, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 429.
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, Ardsley, 2001, pp. 659–660 (<https://www.legal-tools.org/doc/e34f81/>).
4. Claus Kreß and Kimberly Prost, “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/Oxford/Baden-Baden, 2016, p. 2088 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Rule 191

The Chamber dealing with the case, on its own motion or at the request of the Prosecutor, defence or witness or expert concerned, may decide, after taking into account the views of the Prosecutor and the witness or expert concerned, to provide the assurance described in article 93, paragraph 2.

The Court shall have, pursuant to Article 93(2), 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. This a familiar feature in bilateral and multilateral Treaties on Mutual assistance in criminal Matters called “safe conduct provision”.¹

While Rule 190 provides that the Court has an obligation to annex an instruction concerning self-incrimination, Rule 191 deals with the procedure for providing such information.

Doctrine:

1. Irene Gartner, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, Berliner Wissenschafts-Verlag, 2001, pp. 429–430 (<https://www.legal-tools.org/doc/2d6196/>).
2. 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. 660–661 (<https://www.legal-tools.org/doc/e34f81/>).
3. Claus Kreß and Kimberly Prost, “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/Oxford/Baden-Baden, 2016, p. 2091 (<https://www.legal-tools.org/doc/040751/>).

¹ Irene Gartner, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, Berlin Verlag, Berlin, 2001, p. 429 (<https://www.legal-tools.org/doc/2d6196/>).

Author: Mark Klamberg.

Rule 192

- 1. Transfer of a person in custody to the Court in accordance with article 93, paragraph 7, shall be arranged by the national authorities concerned in liaison with the Registrar and the authorities of the host State.**
- 2. The Registrar shall ensure the proper conduct of the transfer, including the supervision of the person while in the custody of the Court.**
- 3. The person in custody before the Court shall have the right to raise matters concerning the conditions of his or her detention with the relevant Chamber.**
- 4. In accordance with article 93, paragraph 7 (b), when the purposes of the transfer have been fulfilled, the Registrar shall arrange for the return of the person in custody to the requested State.**

Rule 192 relates to Article 93(7) which concerns requests by the Court for the temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance. This provision does not apply to the transfer of persons to the Court for the purpose of prosecution.¹ Provisions on temporary transfer of persons in custody is a familiar feature in bilateral and multilateral Treaties on Mutual Assistance in Criminal Matters.²

Sub-rule 3 gives the person in custody the right to raise matters concerning the conditions of his or her detention with the relevant Chamber which suggests that the person concerned can challenge the Court's subsequent custody (Harhoff and Mochochoko, 2001, p. 662).

In *Katanga and Ngudjolo*, the Trial Chamber noted that the witnesses had consented to the temporary transfer.³ To make the transfer dependant on

¹ 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, p. 662 (<https://www.legal-tools.org/doc/e34f81/>).

² Claus Kieß and Kimberly Prost, "Article 87", 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. 2094 (<https://www.legal-tools.org/doc/040751/>).

³ ICC, *Prosecutor v. Katanga and Ngudjolo Chui*, Trial Chamber II, Version publique expurgée de «Décision relative à la requête de la Défense de Germain Katanga visant à obtenir la coopération de la République démocratique du Congo en vue de la comparution de témoins détenus», 3 May 2011, ICC-01/04-01/07-2640-Red3, para. 6 (<https://www.legal-tools.org/doc/1e80c6/>).

the consent collides with the Power of the Court under Article 64(6)(b) to require the attendance and testimony of witnesses (Kreß and Prost, 2016, p. 2095).

A series of interesting decisions relates to the request by three witnesses in *Katanga and Ngudjolo* who had been transferred in custody from the Democratic Republic of the Congo to testify.⁴

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, vol. 3: *International Criminal Procedure*, Oxford University Press, 2016, p. 629 (<https://www.legal-tools.org/doc/995606/>).
2. 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. 661–662 (<https://www.legal-tools.org/doc/e34f81/>).
3. Claus Kreß and Kimberly Prost, “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/Oxford/Baden-Baden, 2016, pp. 2094–2098 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

⁴ See ICC, *Prosecutor v. Katanga*, Trial Chamber II, Decision on the application for the interim release of detained Witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350, 1 October 2013, ICC-01/04-01/07-3405-tENG (<https://www.legal-tools.org/doc/538ca4/>) and *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 (<https://www.legal-tools.org/doc/cdc267/>).

Rule 193

1. *The Chamber that is considering the case may order the temporary transfer from the State of enforcement to the seat of the Court of any person sentenced by the Court whose testimony or other assistance is necessary to the Court. The provisions of article 93, paragraph 7, shall not apply.*
2. *The Registrar shall ensure the proper conduct of the transfer, in liaison with the authorities of the State of enforcement and the authorities of the host State. When the purposes of the transfer have been fulfilled, the Court shall return the sentenced person to the State of enforcement.*
3. *The person shall be kept in custody during his or her presence before the Court. The entire period of detention spent at the seat of the Court shall be deducted from the sentence remaining to be served.*

Rule 193 is similar to Rule 192, the present rule differs as it covers witnesses who have previously been sentenced by the Court and now serves the sentence imposed by the Court in the State of enforcement.

Sub-rule 1 provides that the provisions of Article 93(7) shall not apply. The consequence is that temporary transfer of a person that is convicted by Court is not, as opposed to a person convicted by a domestic Court in the requested State, dependant on the consent of the person concerned. However, this matter may be subject to conditions laid down in the agreement of enforcement between the Court and the State of enforcement.¹

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, vol. 3: *International Criminal Procedure*, Oxford University Press, 2016, p. 629 (<https://www.legal-tools.org/doc/995606/>).
2. 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*

¹ 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, p. 663 (<https://www.legal-tools.org/doc/e34f81/>).

Procedure and Evidence, Transnational Publishers, Ardsley, 2001, p. 663 (<https://www.legal-tools.org/doc/e34f81/>).

3. Claus Kreß and Kimberly Prost, “Article 87”, 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. 2095 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Rule 194

Cooperation requested from the Court

General Remarks:

Rule 194 specifically focuses on the application of Article 93(10) regarding co-operation requested by State Parties and non-State Parties to the Court. It includes procedural instructions to the implementation of such requests. It serves as a practical complement to the Rome Statute, as relevant Article 93 and Article 96 mainly focus on requests issued by the Court.

Doctrine: For the bibliography, see the final comment on Rule 194.

Author: Zhang Yueyao.

Rule 194(1) and (2)

1. In accordance with article 93, paragraph 10, and consistent with article 96, mutatis mutandis, a State may transmit to the Court a request for cooperation or assistance to the Court, either in or accompanied by a translation into one of the working languages of the Court.

2. Requests described in sub-rule 1 are to be sent to the Registrar, which shall transmit them, as appropriate, either to the Prosecutor or to the Chamber concerned.

Requests described in sub-rule 1 are to be sent to the Registrar, which shall transmit them, as appropriate, either to the Prosecutor or to the Chamber concerned.

Paragraphs 1 and 2 provide procedure requirements for requests made to the Court. They are complementary to the requirements in Article 96, as it reaffirms general requirements concerning language and the transmit organ. According to paragraph 1 and 2, the request should be in writing or accompanied by a translation into one of the working languages of the Court. The Registrar is the qualified transmit organ of the request either to the Prosecutor or the concerned Chamber.

Doctrine: For the bibliography, see the final comment on Rule 194.

Author: Zhang Yueyao.

Rule 194(3)

3. If protective measures within the meaning of article 68 have been adopted, the Prosecutor or Chamber, as appropriate, shall consider the views of the Chamber which ordered the measures as well as those of the relevant victim or witness, before deciding on the request.

Paragraph 3 addresses the duty of the Prosecutor or the Chamber when deciding whether to grant the request the Chamber has received. The intention is to ensure the protection of victims and witnesses. The Prosecutor or Chamber is required to take account of the views of the Chamber that ordered the protective measures, and the health, safety, dignity and security of the victims and witnesses.

This paragraph is also a reaffirmation of the ICC Preparatory Committee Draft Statute. Protection of victim and witness was part of requirements on the form and contents of the request in the Draft Statute. The ICC Preparatory Committee Draft Statute,¹ which shares the same text in Articles 88(4) and 90(8)(b) provide that “[t]he Court may withhold, in accordance with article 68, from the requested State [or a State making a request under paragraph 6] specific information about any victims, potential witnesses and their families if it considers that this is necessary to ensure their safety or physical and psychological well-being. Any information that is made available under this article to the requested State shall be provided and handled in a manner that protects the safety or physical or psychological well-being of any victims, potential witnesses and their families”. The final ICC Statute removes such clauses from the content’s requirements, combines into Article 68 (“Protection of the victims and witnesses and their participation in the proceedings”).

Doctrine: For the bibliography, see the final comment on Rule 194.

Author: Zhang Yueyao.

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, Articles 88(4) and 90(8)(b), pp. 141, 147 (<https://www.legal-tools.org/doc/816405/>).

Rule 194(4)

4. If the request relates to documents or evidence as described in article 93, paragraph 10 (b) (ii), the Prosecutor or Chamber, as appropriate, shall obtain the written consent of the relevant State before proceeding with the request.

Sub-rule 4 reaffirms that the State that has provided assistance in getting documents or evidence under Article 93(10)(b)(ii) should give consent to the transmission of such documents or evidence. The consent should be in writing, and the Prosecutor or Chamber is required to obtain such written consent in advance for the integrity of the request.

Doctrine: For the bibliography, see the final comment on Rule 194.

Author: Zhang Yueyao.

Rule 194(5)

5. When the Court decides to grant the request for cooperation or assistance from a State, the request shall be executed, insofar as possible, following any procedure outlined therein by the requesting State and permitting persons specified in the request to be present.

Sub-rule 5 specified the duty of the Court when it grants the request from a State. The Court is required to follow the procedures requested by the State, and to permit, insofar as possible, the presence of the persons specified in the request in the investigation. Accordingly, the requesting State should provide as much detailed information as possible regarding the procedures and the persons sought. The requesting State is also entitled to the access to the statements, documents or other evidence obtained by the Court.

Doctrine:

1. Frederik Harhoff and Phakiso Mochochoko, “International Cooperation and 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, p. 664 (<https://www.legal-tools.org/doc/e34f81/>).

Author: Zhang Yueyao.

*Section V. Cooperation Under Article 98***Rule 195**

1. When a requested State notifies the Court that a request for surrender or assistance raises a problem of execution in respect of article 98, the requested State shall provide any information relevant to assist the Court in the application of article 98. Any concerned third State or sending State may provide additional information to assist the Court.

2. The Court may not proceed with a request for the surrender of a person without the consent of a sending State if, under article 98, paragraph 2, such a request would be inconsistent with obligations under an international agreement pursuant to which the consent of a sending State is required prior to the surrender of a person of that State to the Court.

The underlying problem that Article 98 and Rule 195 seek to address is that all states seek to protect their diplomats and official agents as well as their diplomatic and State property abroad. This might appear less of a problem vis-à-vis States Parties, they have agreed to waive the immunity of their own officials. It becomes more problematic in relation to non-States Parties when their officials are at risk of being surrendered to the Court.¹

Sub-rule 1 provides for a notification process and information exchange of information in case of a conflict of obligations. The requested State may do so by bringing the matter to the attention of the Court and advise of the Court of the necessity for the Court to seek the relevant waiver of immunity.²

Sub-rule 2 which underpins Article 98(2) caused considerable problems during the negotiations on the rules of procedure and evidence. USA tabled already during the negotiations of the ICC Statute a proposal which sought to ensure that the Court would always act in accordance with its obligations, that is, the Court could itself enter into an agreement and thereby

¹ 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, p. 666–667 (<https://www.legal-tools.org/doc/e34f81/>).

² Claus Kreß and Kimberly Prost, “Article 98”, 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. 2141 (<https://www.legal-tools.org/doc/040751/>).

accept an obligation. The proposal was rejected and Article 98(2) only applies to those agreements between a sending state and a receiving state. The term “sending state” implies that the provision mainly relates to Status of Forces Agreements (‘SOFA’). The idea behind this sub-rule was solve legal conflicts which may arise because of existing SOFAs. It should be noted that Article 98(2) was not designed to encourage for States to conclude new SOFAs.³

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, vol. 3: *International Criminal Procedure*, Oxford University Press, 2016, pp. 620 and 623 (<https://www.legal-tools.org/doc/995606/>).
2. Irene Gartner, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 430–433 (<https://www.legal-tools.org/doc/95e5f9/>).
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, Ardsley, 2001, pp. 664–669 (<https://www.legal-tools.org/doc/e34f81/>).
4. Claus Kreß and Kimberly Prost, “Article 98”, 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. 2117–2146 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

³ Irene Gartner, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, pp. 430–433; Kreß and Prost, 2016, pp. 2142–2143.

*Section VI. Rule of Speciality Under Article 101***Rule 196**

A person surrendered to the Court may provide views on a perceived violation of the provisions of article 101, paragraph 1.

Rule 196 concerns the speciality rule and underpins Article 101 which provides that “[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”.

A person that is surrendered may claim that there has been a violation of the speciality rule. This raises a question that was discussed during the negotiations on Rule 196 whether the speciality rule is a right of the surrendered person or the right of the requested state. The prevailing view in inter-State practice is that a violation of the speciality rule can only be claimed by the requested state and not by the extradited person. Rule 196 follows this approach, the surrendered person may only provide views.¹

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, vol. 3: *International Criminal Procedure*, Oxford University Press, 2016, p. 613 (<https://www.legal-tools.org/doc/995606/>).
2. Irene Gartner, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berliner Wissenschafts-Verlag, 2004, p. 433 (<https://www.legal-tools.org/doc/95e5f9/>).
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, Ardsley, 2001, p. 670 (<https://www.legal-tools.org/doc/e34f81/>).

¹ Irene Gartner, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, 2nd. ed., Berlin Verlag, Berlin, 2004, p. 433 (<https://www.legal-tools.org/doc/2d6196/>).

4. Peter Wilkitziki, “Article 101”, 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. 2167 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

Rule 197

When the Court has requested a waiver of the requirements of article 101, paragraph 1, the requested State may ask the Court to obtain and provide the views of the person surrendered to the Court.

Rule 197 underpins Article 101(2) which provides that the Court shall provide “additional information” when it seeks to include new charges to be brought against the surrendered person, thus waiving the requirements that follow from the rule of speciality. Rule 197 provides that the requested State may ask the Court to obtain and provide the views of the person surrendered to the Court. During the negotiations there was a debate whether it was a right for the person surrendered to be heard or whether this was a matter for between States only. The compromise was to allow the views of the person to be provided.¹

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, vol. 3, Oxford University Press, 2016, p. 613 (<https://www.legal-tools.org/doc/995606/>).
2. 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, p. 670 (<https://www.legal-tools.org/doc/e34f81/>).
3. Peter Wilkitziki, “Article 101”, 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. 2167 (<https://www.legal-tools.org/doc/040751/>).

Author: Mark Klamberg.

¹ 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, p. 670 (<https://www.legal-tools.org/doc/e34f81/>).

CHAPTER 12. ENFORCEMENT

Section I. Role of States in Enforcement of Sentences of Imprisonment and Change in Designation of State of Enforcement Under Articles 103 and 104

Rule 198

Unless the context otherwise requires, article 87 and rules 176 to 180 shall apply, as appropriate, to communications between the Court and a State on matters relating to enforcement of sentences.

Article 87 and the corresponding rules on requests for co-operation serve as supplementary provisions to Part 10. Notwithstanding the fundamental difference that States Parties are obliged to co-operate with the Court with the exception of enforcing sentences of imprisonment, the provision highlights the close relationship of Parts 9 and 10, which both concern matters of co-operation of States and the Court.

Cross-reference:

Article 103.

Doctrine:

1. Irene Gartner, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, Berlin Verlag, Berlin, 2001, pp. 423–445 (<https://www.legal-tools.org/doc/2d6196/>).
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, pp. 673–703 (<https://www.legal-tools.org/doc/e34f81/>).

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

Rule 199

Unless provided otherwise in the Rules, the functions of the Court under Part 10 shall be exercised by the Presidency.

The Presidency is chosen as the central organ to ensure a uniform practice of enforcement, following the practice of the *ad hoc* tribunals.¹ The alternative, entrusting enforcement matters to the respective Trial Chambers and establishing a right to appeal to achieve coherent decisions, seemed States Parties too “onerous”.²

There is one exception to this general rule: three judges of the Appeals Chamber are competent for decisions on early release, a substantive matter (Rule 224). The Registrar exercises merely technical functions (maintenance of the list, Rule 200(1); details of physical transfer of prisoners, Rule 206).

Cross-reference:

Article 103

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 (<https://www.legal-tools.org/doc/5dc0ec/>).
2. Irene Gartner, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, Berlin Verlag, Berlin, 2001, pp. 423–445 (<https://www.legal-tools.org/doc/2d6196/>).
3. Kimberly Prost, “Chapter 14 – Enforcement”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and*

¹ ICTY, Rules of Procedure and Evidence, 22 May 2013, IT/32/Rev.49, Rules 103A, 124 (<https://www.legal-tools.org/doc/950cb6/>); ICTR, Rules of Procedure and Evidence, 10 April 2013, Rule 125 (<https://www.legal-tools.org/doc/93961e/>); IRMCT, Rules of Procedure and Evidence, 8 June 2012, MICT/1, Rules 127A, 150 (<https://www.legal-tools.org/doc/cef176/>).

² Cf. Proposal submitted by France concerning part 10 of the Rome Statute of the International Criminal Court concerning enforcement, UN Doc. PCNICC/1999/WGRPE(10)/DP.1, 19 November 1999, Rule 10.2 (<https://www.legal-tools.org/doc/960039/>); 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, p. 501–504 (<https://www.legal-tools.org/doc/5dc0ec/>).

Rules of Procedure and Evidence, Transnational Publishers, Ardsley, 2001, pp. 673–703 (<https://www.legal-tools.org/doc/e34f81/>).

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

Rule 200

- 1. A list of States that have indicated their willingness to accept sentenced persons shall be established and maintained by the Registrar.*
- 2. The Presidency shall not include a State on the list provided for in article 103, paragraph 1 (a), if it does not agree with the conditions that such a State attaches to its acceptance. The Presidency may request any additional information from that State prior to taking a decision.*
- 3. A State that has attached conditions of acceptance may at any time withdraw such conditions. Any amendments or additions to such conditions shall be subject to confirmation by the Presidency.*
- 4. A State may at any time inform the Registrar of its withdrawal from the list. Such withdrawal shall not affect the enforcement of the sentences in respect of persons that the State has already accepted.*
- 5. The Court may enter bilateral arrangements with States with a view to establishing a framework for the acceptance of prisoners sentenced by the Court. Such arrangements shall be consistent with the Statute.*

The Presidency is entrusted with the task to assess the appropriateness of conditions (Rule 200(2)) or amendments thereto (Rule 200(3)(2)). As no interests of the Court are affected, there is no need for the Presidency's approval when a State decides to withdraw conditions previously attached to its declaration of willingness (Rule 200(3)(1)).

Establishment and maintenance of the list is the responsibility of the Registrar (Rule 200(1)). This relieves the Presidency of a mere record keeping of its decisions.

A State may withdraw from the list at any time. This will, however, not affect its existing enforcement obligations, see Rule 200(4). This fundamental provision is included in all 12 Enforcement Agreements currently in

force, namely between the Court and Argentina,¹ Austria,² Belgium,³ Denmark,⁴ Finland,⁵ Georgia,⁶ Mali,⁷ Norway,⁸ Serbia,⁹ Slovenia,¹⁰ Sweden¹¹ and the United Kingdom.¹²

The Enforcement Agreements mentioned in Rule 200(5) are an important tool to establish a “framework” of States willing to enforce under certain conditions. Enforcement Agreements that have entered into force are

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- ¹ Agreement between the Argentine Republic and the International Criminal Court on the Enforcement of Sentences of the International Criminal Court, 18 April 2017, ICC-PRES/19-01-17, Article 14(3) (<https://www.legal-tools.org/doc/asov9b/>).
 - ² Accord entre la Cour pénale internationale et l’Autriche sur l’exécution des peines prononcées par la Cour pénale internationale, 27 October 2005, ICC-PRES/01-01-05, Article 22 (<https://www.legal-tools.org/doc/ae5d4c/>).
 - ³ Accord entre la Cour pénale internationale et le gouvernement du Royaume de Belgique sur l’exécution des peines prononcées par la Cour, 8 December 2004, ICC-PRES/16-03-14, Article 22 (<https://www.legal-tools.org/doc/e017a3/>).
 - ⁴ 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 23 (<https://www.legal-tools.org/doc/cc1900/>).
 - ⁵ 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 22 (<https://www.legal-tools.org/doc/a1972d/>).
 - ⁶ Agreement between the Government of Georgia and the International Criminal Court on the Enforcement of Sentences of the International Criminal Court, 24 January 2019, ICC-PRES/27-01-19, Article 14(3) (<https://www.legal-tools.org/doc/bcl3pz/>).
 - ⁷ 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 15 (<https://www.legal-tools.org/doc/e9891a/>).
 - ⁸ Agreement between the Kingdom of Norway and the International Criminal Court on the Enforcement of Sentences of the International Criminal Court, Norway, 6 August 2016, ICC-PRES/18-02-16, Article 21 (<https://www.legal-tools.org/doc/3vdl75/>).
 - ⁹ 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 22 (<https://www.legal-tools.org/doc/42dca5/>).
 - ¹⁰ Agreement between the Republic of Slovenia and the International Criminal Court on the Enforcement of Sentences of the International Criminal Court, 7 December 2018, ICC-PRES/28-01-22, Article 14(2) (<https://www.legal-tools.org/doc/a4o31r/>).
 - ¹¹ Agreement between the Government of Sweden and the International Criminal Court on the Enforcement of Sentences of the International Criminal Court, 24 April 2017, ICC-PRES/20-02-17, Article 15(3) (<https://www.legal-tools.org/doc/98f0zs/>).
 - ¹² 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, 8 December 2007, ICC-PRES/04-01-07, Article 20(1) (<https://www.legal-tools.org/doc/d70d91/>).

published in the Court's Official Journal.¹³ To date, such Agreements exist between the ICC and the following 14 countries:

1. Argentina (ICC-PRES/19-01-17),
2. Austria (ICC-PRES/01-01-05),
3. Belgium (ICC-PRES/16-03-14),
4. Colombia (at the time of writing, the agreement with Colombia has not yet entered into force),
5. Denmark (ICC-PRES/12-02-12),
6. Finland (ICC-PRES/07-01-11),
7. France (at the time of writing, the agreement with France has not yet entered into force),
8. Georgia (ICC-PRES/27-01-19),
9. Mali (ICC-PRES/11-01-12),
10. Norway (ICC-PRES/18-02-16),
11. Serbia (ICC-PRES/09-03-11),
12. Sweden (ICC-PRES/20-02-17),
13. Slovenia (ICC-PRES/28-01-22) and
14. the United Kingdom (ICC-PRES/04-01-07).

Furthermore, there exist two *ad hoc* Enforcement Agreements with the Democratic Republic of the Congo for Thomas Lubanga Dyilo¹⁴ and Germain Katanga.¹⁵

Cross-reference:

Article 103

¹³ 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, p. 9 (<https://www.legal-tools.org/doc/2217b4/>).

¹⁴ Articles 8, 11(3); ICC, *Prosecutor v. Katanga*, Decision designating a State of enforcement, Annex, 8 December 2015, ICC-01/04-01/07-3626-Anx, p. 6 (<https://www.legal-tools.org/doc/0c7d33/>).

¹⁵ Articles 8, 11(3); ICC, *Prosecutor v. Lubanga*, Decision designating a State of enforcement, Annex, 8 December 2015, ICC-01/04-01/06-3185-Anx, p. 5 (<https://www.legal-tools.org/doc/fae14f/>).

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 (<https://www.legal-tools.org/doc/2217b4/>).
2. Irene Gartner, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, Berlin Verlag, Berlin, 2001, pp. 423–445 (<https://www.legal-tools.org/doc/2d6196/>).
3. 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 (<https://www.legal-tools.org/doc/e34f81/>).

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Rule 201

Principles of equitable distribution for purposes of article 103, paragraph 3, shall include:

- (a) The principle of equitable geographical distribution;*
- (b) The need to afford each State on the list an opportunity to receive sentenced persons;*
- (c) The number of sentenced persons already received by that State and other States of enforcement;*
- (d) Any other relevant factors.*

The principles underlying the notion of “equitable distribution” enshrined in Rule 201 were adopted without disagreement: (i) prevention of a concentration of prisoners in one geographical area, (ii) an opportunity for each State on the list to receive at least one prisoner, and (iii) the need to distribute the burden of receiving prisoners equally between volunteering States. The ICC thus follows the ‘dispersion model’ practiced by the ICTY in contrast to the ICTR’s ‘concentrated model’.¹

The list is non-exhaustive. Other relevant factors (iv) could include the financial resources of States and their penitentiary capacity to fulfill the requirements of hosting international prisoners (cf. Strijards and Harmsen, 2016, mgn. 21 f.).

Cross-reference:

Article 103

Doctrine:

1. Kai Ambos, *Treatise on International Criminal Law*, vol. 3: *International Criminal Procedure*, Oxford University Press, 2016, pp. 635 - 659 (Chapter VIII - Enforcement of Sentences and Other Penalties) (<https://www.legal-tools.org/doc/995606/>).

¹ Cf. Richard Culp, *Enforcement and Monitoring of Sentences in the Modern War Crimes Process: Equal Treatment before the Law?*, 2011, p. 10; Barbora Holá and Joris van Wijk, “Life after Conviction at International Criminal Tribunals”, in *Journal of International Criminal Justice*, 2014, vol. 12, p. 118 (<https://www.legal-tools.org/doc/32ce20/>); 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, mgn. 23 (<https://www.legal-tools.org/doc/a9e9f7/>).

2. Richard Culp, “Enforcement and Monitoring of Sentences in the Modern War Crimes Process: Equal Treatment before the Law?”, 2011 (<https://www.legal-tools.org/doc/0a1ca9/>).
3. Irene Gartner, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, Berlin Verlag, Berlin, 2001, pp. 423–445 (<https://www.legal-tools.org/doc/2d6196/>).
4. 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 (<https://www.legal-tools.org/doc/32ce20/>).
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, pp. 673–703 (<https://www.legal-tools.org/doc/e34f81/>).
6. Gerard A. M. Strijards and Robert O. Harmsen, “Article 103”, 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. 2173–2186 (<https://www.legal-tools.org/doc/040751/>).

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Rule 202

The delivery of a sentenced person from the Court to the designated State of enforcement shall not take place unless the decision on the conviction and the decision on the sentence have become final.

The Rule reflects the common principle that there is no provisional execution of punishment. Hence, the enforcement of a custodial sentence requires that conviction and sentence have become final viz. ‘res iudicata’ (have acquired ‘force de chose jugée’) after the exhaustion of all available regular procedural remedies, that is, appeal (Article 81), suspends the execution of the sentence (Article 81(4)) but not revision (Article 84).

Accordingly, it is out of question to transfer the defendant prematurely to the designated state of enforcement since detention or remand prior to and pending trial as well as during appeal (Article 81(3)) is of a different nature than post-adjudicatory imprisonment for punishment purposes (although the language of Article 81(4) is misleading). Even if a State Party were willing to take a defendant in remand for example, during appeal this would hamper the defendant’s ability to fully exercise his rights and cause unnecessary and expensive transfers of the convict to The Hague. The situation is different for reparation proceedings continuing after the sentence has become final and therefore enforceable. Those do not hinder the transfer to a State of enforcement.¹

Prior to the finality of conviction and judgment, all defendants put on remand are detained at the Court’s Detention Center in The Hague (cf. Regulation 223 of the Registry). After the judgment and sentence have become final, the sentenced person stays there until being transferred to the designated State of enforcement.

Cross-reference:

Article 103

¹ ICC, *Prosecutor v. Katanga*, Decision designating a State of enforcement, 8 December 2015, ICC-01/04-01/07-3626, p. 5 (<https://www.legal-tools.org/doc/0c7d33/>); ICC, *Prosecutor v. Lubanga*, Decision designating a State of enforcement, 8 December 2015, ICC-01/04-01/06-3185, pp. 4 f. (<https://www.legal-tools.org/doc/fae14f/>).

Doctrine:

1. Irene Gartner, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, Berlin Verlag, Berlin, 2001, pp. 423–445 (<https://www.legal-tools.org/doc/2d6196/>).
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, pp. 673–703 (<https://www.legal-tools.org/doc/e34f81/>).

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

Rule 203

1. The Presidency shall give notice in writing to the sentenced person that it is addressing the designation of a State of enforcement. The sentenced person shall, within such time limit as the Presidency shall prescribe, submit in writing his or her views on the question to the Presidency.

2. The Presidency may allow the sentenced person to make oral presentations.

3. The Presidency shall allow the sentenced person:

(a) To be assisted, as appropriate, by a competent interpreter and to benefit from any translation necessary for the presentation of his or her views;

(b) To be granted adequate time and facilities necessary to prepare for the presentation of his or her views.

In contrast to the designation procedures of both ICTY and ICTR which do not require a hearing of the sentenced person,¹ Article 103(3)(c) of the ICC Statute prescribes that the Presidency shall “take into account” the views of the prisoner. Therefore, the Presidency must inform him or her that the designation decision is imminent and give him or her the opportunity to present his views. The procedure will usually be written but an oral presentation is not excluded if deemed necessary.² For that purpose, he or she is entitled to have adequate time and facilities including an interpreter, if appropriate, at his disposal.

¹ 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, p. 502 (<https://www.legal-tools.org/doc/5e7da7/>); 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. 1775 ff. (<https://www.legal-tools.org/doc/01adde/>); 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. 132.

² Irene Gartner, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, Berlin Verlag, Berlin, 2001, p. 436 (<https://www.legal-tools.org/doc/2d6196/>).

However, he or she is not entitled to be assisted by counsel; a French proposal³ to that effect was rejected by a great majority which felt that there should be a distinction between “accused” and “sentenced” person.⁴ The absence of counsel may be tolerable in light of the fact that the sentenced person’s consent is not required and that there is no right to judicial review (critical Abels, 2012, pp. 501–504) because of the assumption that the transfer does not take place in the sentenced person’s interest (Gartner, 2001, p. 436 ff.; Kreß and Sluiter, 2002, p. 1789).

Cross-reference:

Article 103(3)(c)

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 (<https://www.legal-tools.org/doc/5dc0ec/>).
2. Irene Gartner, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, Berlin Verlag, Berlin, 2001, pp. 423–445 (<https://www.legal-tools.org/doc/2d6196/>).
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 (<https://www.legal-tools.org/doc/01addc/>).
4. 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. 125–144 (<https://www.legal-tools.org/doc/922550/>).

³ Proposal submitted by France concerning part 10 of the Rome Statute of the International Criminal Court concerning enforcement, UN Doc. PCNICC/1999/WGRPE(10)/DP.1, 19 November 1999, Rule 10.3 (<https://www.legal-tools.org/doc/960039/>).

⁴ 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, New York, 2001, p. 677 f. (<https://www.legal-tools.org/doc/e34f81/>).

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, pp. 673–703 (<https://www.legal-tools.org/doc/e34f81/>).

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Rule 204

When the Presidency notifies the designated State of its decision, it shall also transmit the following information and documents:

- (a) The name, nationality, date and place of birth of the sentenced person;*
- (b) A copy of the final judgement of conviction and of the sentence imposed;*
- (c) The length and commencement date of the sentence and the time remaining to be served;*
- (d) After having heard the views of the sentenced person, any necessary information concerning the state of his or her health, including any medical treatment that he or she is receiving.*

The Rule details which information the Presidency has to transmit to the designated State in order to enable that State to make an informed decision whether to accept the designation or not. The initial French draft of this rule¹ required the sentenced person's consent to transmit the information and was rejected because this did not meet legitimate interests of the State of enforcement to take the convict's state of health into account before taking the responsibility for him or her,² and was not in line with inter-State practice, for example, Article 6(2)(d) of the Convention on the Transfer of Sentenced Person of 21 March 1983.³

¹ Proposal submitted by France concerning part 10 of the Rome Statute of the International Criminal Court concerning enforcement, UN Doc. PCNICC/1999/WGRPE(10)/DP.1, 19 November 1999, Rule 10.3 (<https://www.legal-tools.org/doc/960039/>).

² Proposals submitted by Austria concerning the rules of procedure and evidence relating to Part 10 of the Statute, Enforcement, 17 March 2000, UN Doc. PCNICC/2000/WGRPE(10)/DP.3, p. 1 (<https://www.legal-tools.org/doc/a36aba/>).

³ Convention on the Transfer of Sentenced Persons, 21 March 1983, CETS No. 112 (<https://www.legal-tools.org/doc/73d1ab/>); Irene Gartner, "The Rules of Procedure and Evidence on Co-operation and Enforcement", in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, Berlin Verlag, Berlin, 2001, p. 436 (<https://www.legal-tools.org/doc/2d6196/>).

The provision is repeated in the Enforcement Agreements between the Court and Argentina,⁴ Austria,⁵ Belgium,⁶ Denmark,⁷ Finland,⁸ Georgia,⁹ Mali,¹⁰ Norway,¹¹ Serbia¹² Sweden,¹³ and the United Kingdom.¹⁴

The Enforcement Agreements concluded between the Court and Denmark (ICC-PRES/12-02-12, Article 2(1)(e)) Norway (ICC-PRES/18-02-16, Article 2(1)), Slovenia (ICC-PRES/28-01-22, Article 2(3)) and the United Kingdom (ICC-PRES/04-01-07, Article 2(1)(f)) require additional information on the ties of the convicted person with the relevant State. Presumably the relevant State favours enforcement of such persons in his prison

⁴ Agreement between the Argentine Republic and the International Criminal Court on the Enforcement of Sentences of the International Criminal Court, 18 April 2017, ICC-PRES/19-01-17, Article 2(3) (<https://www.legal-tools.org/doc/asov9b/>).

⁵ Accord entre la Cour penale internationale et l'Autriche sur l'execution des peines prononcees par la Cour penale internationale, 27 October 2005, ICC-PRES/01-01-05, Article 2 (<https://www.legal-tools.org/doc/ae5d4c/>).

⁶ Accord entre la Cour penale internationale et le gouvernement du Royaume de Belgique sur l'execution des peines prononcees par la Cour, 8 December 2004, ICC-PRES/16-03-14, Article 2(1) (<https://www.legal-tools.org/doc/e017a3/>).

⁷ 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 2(1) (<https://www.legal-tools.org/doc/cc1900/>).

⁸ 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 2(1) (<https://www.legal-tools.org/doc/a1972d/>).

⁹ Agreement between the Government of Georgia and the International Criminal Court on the Enforcement of Sentences of the International Criminal Court, 24 January 2019, ICC-PRES/27-01-19, Article 2(3) (<https://www.legal-tools.org/doc/bcl3pz/>).

¹⁰ 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 2(1) (<https://www.legal-tools.org/doc/e9891a/>).

¹¹ Agreement between the Kingdom of Norway and the International Criminal Court on the Enforcement of Sentences of the International Criminal Court, Norway, 6 August 2016, ICC-PRES/18-02-16, Article 2(1) (<https://www.legal-tools.org/doc/3vdl75/>).

¹² 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 2(1) (<https://www.legal-tools.org/doc/42dca5/>).

¹³ Agreement between the Government of Sweden and the International Criminal Court on the Enforcement of Sentences of the International Criminal Court, 24 April 2017, ICC-PRES/20-02-17, Article 2(3) – and security aspects (<https://www.legal-tools.org/doc/98f0zs/>).

¹⁴ 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, 8 December 2007, ICC-PRES/04-01-07, Article 2(1) (<https://www.legal-tools.org/doc/d70d91/>).

facilities. Information regarding the health of the sentenced person is only transmitted upon his or her consent.¹⁵

Cross-reference:

Article 103(3)(d) and (e)

Doctrine:

1. Irene Gartner, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, Berlin Verlag, Berlin, 2001, pp. 423–445 (<https://www.legal-tools.org/doc/2d6196/>).
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, pp. 673–703 (<https://www.legal-tools.org/doc/e34f81/>).

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

¹⁵ ICC, *Prosecutor v. Katanga*, Decision designating a State of enforcement, 8 December 2015, ICC-01/04-01/07-3626, p. 6 (<https://www.legal-tools.org/doc/8d5ad5/>); ICC, *Prosecutor v. Lubanga*, Decision designating a State of enforcement, 8 December 2015, ICC-01/04-01/06-3185, p. 5 (<https://www.legal-tools.org/doc/fae14f/>).

Rule 205

Where a State in a particular case rejects the designation by the Presidency, the Presidency may designate another State.

Rule 205 sets forth that a second designation is possible after the first has been rejected by a State.¹ The provision highlights once more the possibility of a State to reject a designation, even if it had declared its general willingness to enforce sentences before and all attached conditions had been previously accepted by the Presidency.

Cross-reference:

Articles 103(4), 104(1)

Doctrine:

1. 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 (<https://www.legal-tools.org/doc/e34f81/>).

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

¹ Cf. Kimberly Prost, “Chapter 14 – Enforcement”, in Roy S. Lee and Håkan Friman (eds.), in *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, p. 608 (<https://www.legal-tools.org/doc/e34f81/>).

Rule 206

- 1. The Registrar shall inform the Prosecutor and the sentenced person of the State designated to enforce the sentence.*
- 2. The sentenced person shall be delivered to the State of enforcement as soon as possible after the designated State of enforcement accepts.*
- 3. The Registrar shall ensure the proper conduct of the delivery of the person in consultation with the authorities of the State of enforcement and the host State.*

Rule 206 regulates the technicalities after the designated State of enforcement has accepted the designation of the prisoner. Sub-rule 1 lays down the Registrar's duty to inform the Prosecutor and the sentenced person about the State designated to enforce the sentence. Rule 206(2) requires prompt delivery of the prisoner to the enforcement state. To guarantee a proper transfer procedure, the Registrar has to consult pursuant to sub-rule 3 with the competent authorities of the host State and of the State of enforcement.

Cross-reference:

Article 103(1)(c).

Doctrine:

1. 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 (<https://www.legal-tools.org/doc/e34f81/>).

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

Rule 207

1. No authorization is required if the sentenced person is transported by air and no landing is scheduled on the territory of the transit State. If an unscheduled landing occurs on the territory of the transit State, that State shall, to the extent possible under the procedure of national law, detain the sentenced person in custody until a request for transit as provided in sub-rule 2 or a request under article 89, paragraph 1, or article 92 is received.

2. To the extent possible under the procedure of national law, a State Party shall authorize the transit of a sentenced person through its territory and the provisions of article 89, paragraph 3 (b) and (c), and articles 105 and 108 and any rules relating thereto shall, as appropriate, apply. A copy of the final judgement of conviction and of the sentence imposed shall be attached to such request for transit.

Rule 207 is concerned with the transit of the prisoner from the Court's detention facility on the territory of the host State to the territory of the State of enforcement. The inclusion of this rule was deemed necessary because the Statute does not contain a provision to that effect, since Art. 89(3) deals only with the transfer of surrendered person from the territory of the requested State to the Court and some delegations were not prepared to apply Article 89(3) *mutatis mutandis* because this was not provided for in their enabling legislation.¹ This is also the reason for the condition in sub-rule 2 "To the extent possible under [...] national law". Apart from that, Rule 207 closely resembles Articles 89 and 92, addressing transit through a non-State Party in sub-rule 1 and through a State Party in sub-rule 2.

Cross-references:

Articles 89, 92, 103, 105, 108

¹ Irene Gartner, "The Rules of Procedure and Evidence on Co-operation and Enforcement", in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, Berlin Verlag, Berlin, 2001, pp. 441 ff. (<https://www.legal-tools.org/doc/2d6196/>); Kimberly Prost, "Chapter 14 – Enforcement", in Roy S. Lee and Håkan Friman (eds.), in *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, p. 682 (<https://www.legal-tools.org/doc/e34f81/>).

Doctrine:

1. Irene Gartner, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, Berlin Verlag, Berlin, 2001, pp. 423–445 (<https://www.legal-tools.org/doc/2d6196/>).
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, pp. 673–703.

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

Rule 208

1. *The ordinary costs for the enforcement of the sentence in the territory of the State of enforcement shall be borne by that State.*
2. *Other costs, including those for the transport of the sentenced person and those referred to in article 100, paragraph 1 (c), (d) and (e), shall be borne by the Court.*

This provision establishes the general rule consistent with inter-State practice¹ that the State of enforcement shall bear the ordinary costs of imprisonment on his territory, while the Court pays for any other expenses. These include in particular, but are not limited to, the costs listed in sub-rule 2: visits of Court officials, reports from experts and the conduct of ICC hearings.² In contrast to this approach, the ILC Draft Report of 1994³ had suggested that State parties should share the substantial costs of incarceration enforcement as expenses of the Court but obviously had not found sufficient approval.

Rule 208 is not applicable if the sentence is enforced by the host State pursuant to Article 103(4).

Cross-references:

Articles 100, 103

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 (<https://www.legal-tools.org/doc/2217b4/>).
2. Kimberly Prost, “Chapter 14 – Enforcement”, in Roy S. Lee and Håkan Friman (eds.), *The International Criminal Court: Elements of Crimes and*

¹ Kimberly Prost, “Chapter 14 – Enforcement”, in Roy S. Lee and Håkan Friman (eds.), in *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, p. 683 (<https://www.legal-tools.org/doc/e34f81/>).

² 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, p. 14 (<https://www.legal-tools.org/doc/2217b4/>); Prost, 2001, p. 683.

³ 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 (comment 3 to Article 59) (<https://www.legal-tools.org/doc/f73459/>).

Rules of Procedure and Evidence, Transnational Publishers, Ardsley, 2001, pp. 673–703 (<https://www.legal-tools.org/doc/e34f81/>).

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

Rule 209

- 1. The Presidency, acting on its own motion or at the request of the sentenced person or the Prosecutor, may at any time act in accordance with article 104, paragraph 1.*
- 2. The request of the sentenced person or of the Prosecutor shall be made in writing and shall set out the grounds upon which the transfer is sought.*

Rule 209(1) mainly repeats the contents of Article 104 with the only addition that the Prosecutor may request a transfer as well. Rule 209(2) sets out the form and necessary contents of such requests.

The proceedings may be initiated by the sentenced person (cf. Article 104(2)), the Prosecutor or the Presidency itself (*inter alia*, after notification of circumstances under Article 103(2)(a)). It is unclear whether the State of enforcement can request the transfer of the sentenced person itself. On the one hand, one could argue that the State of enforcement is bound by a designation it has once accepted (Article 105(1), Rule 200((4))), and has therefore no right to request an end to the enforcement on its soil. However, it is submitted that there seems to be no good reason to deny the State the possibility of making such an application¹ or at least suggesting a transfer, as the process itself is in the hands of the Presidency.

Cross-reference:

Article 104.

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/>).

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, pp. 1386 f. (<https://www.legal-tools.org/doc/b7432e/>).

Rule 210(1)

1. *Before deciding to change the designation of a State of enforcement, the Presidency may:*
 - (a) *Request views from the State of enforcement;*
 - (b) *Consider written or oral presentations of the sentenced person and the Prosecutor;*
 - (c) *Consider written or oral expert opinion concerning, inter alia, the sentenced person;*
 - (d) *Obtain any other relevant information from any reliable sources.*

Rule 210(1) sets forth that the Presidency may seek, *inter alia*, views from the State of enforcement (a), the Prosecutor and the sentenced person (b). Normally, a written procedure should be sufficient.¹ If the Presidency deems it appropriate on a case-by-case basis, it may conduct an oral hearing of the sentenced person, namely on site or by way of video link.² The Presidency may also consider all other relevant information (d), in particular expert opinions concerning, *inter alia*, the sentenced person (c).

As time might be often the essential factor in such cases (especially after notification under Article 103(2)(a): 45 days or even less), it seems expedient to leave it entirely to the Presidency's discretion which information to obtain. It is submitted that, as a minimum, the sentenced person and the State of enforcement should be given the opportunity to present their views,³ if they have not initiated the proceedings under Rule 209.

Doctrine: For the bibliography, see the final comment on Rule 210.

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

¹ Irene Gartner, "The Rules of Procedure and Evidence on Co-operation and Enforcement", in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, Berlin Verlag, Berlin, 2001, p. 436 (<https://www.legal-tools.org/doc/2d6196/>).

² Cf. Kimberly Prost, "Chapter 14 – Enforcement", in Roy S. Lee and Håkan Friman (eds.), in *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, p. 684 (<https://www.legal-tools.org/doc/e34f81/>).

³ Cf. 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, p. 1791 (<https://www.legal-tools.org/doc/01addc/>).

Rule 210(2)

2. The provisions of rule 203, sub-rule 3, shall apply, as appropriate.

By virtue of this reference, the sentenced person will be assisted by an interpreter, if appropriate, and given sufficient time and facilities to prepare the presentation of his or her views. There is no obligation to provide counsel for the sentenced person in this situation.¹

Doctrine: For the bibliography, see the final comment on Rule 210.

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

¹ Cf. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1387 (<https://www.legal-tools.org/doc/b7432e/>); see comment to Rule 203.

Rule 210(3)

3. If the Presidency refuses to change the designation of the State of enforcement, it shall, as soon as possible, inform the sentenced person, the Prosecutor and the Registrar of its decision and of the reasons therefor. It shall also inform the State of enforcement.

In case the Presidency refuses to transfer the sentenced person, this decision and the reasons therefor shall be communicated to the convict, the Prosecutor, the State of enforcement and the Registrar.

Cross-references:

Article 104
Rule 203(3).

Doctrine:

1. Irene Gartner, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, Berlin Verlag, Berlin, 2001, pp. 423–445 (<https://www.legal-tools.org/doc/2d6196/>).
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 (<https://www.legal-tools.org/doc/01addc/>).
3. 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 (<https://www.legal-tools.org/doc/e34f81/>).
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/>).

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

Section II. Enforcement, Supervision and Transfer Under Articles 105, 106 and 107

Rule 211(1)

1. In order to supervise the enforcement of sentences of imprisonment, the Presidency:

(a) Shall, in consultation with the State of enforcement, ensure that in establishing appropriate arrangements for the exercise by any sentenced person of his or her right to communicate with the Court about the conditions of imprisonment, the provisions of article 106, paragraph 3, shall be respected;

(b) May, when necessary, request any information, report or expert opinion from the State of enforcement or from any reliable sources;

(c) May, where appropriate, delegate a judge of the Court or a member of the staff of the Court who will be responsible, after notifying the State of enforcement, for meeting the sentenced person and hearing his or her views, without the presence of national authorities;

(d) May, where appropriate, give the State of enforcement an opportunity to comment on the views expressed by the sentenced person under sub-rule 1 (c).

It is mandatory for the Presidency to secure a confidential and unimpeded communication channel with each prisoner (a). The importance of that right is stressed by sub-rule (1)(c) which specifies the Presidency's power to delegate a judge or member of the staff of the Court to meet the sentenced person in order to hear his or her views, after notification of the State of enforcement but without the presence of the national authorities.

A general authority to request all pertinent information from the State of enforcement or any other reliable source is contained in sub-rule (1)(b); a similar right to be informed by the enforcement State about important events concerning the sentenced person is established in Rule 216. There is no provision for regular inspections of the conditions of imprisonment, yet all bilateral Enforcement Agreements contain a provision on inspections by the Court or another entity like the ICRC, see the comment on Article 106(1).

Giving the State of enforcement an opportunity to comment on the views expressed by the sentenced person (d) requires careful consideration: On the one hand it is dangerous for the Court to exclusively rely on the

potentially biased information provided by the convict and thus further unfounded allegations,¹ on the other hand there are situations imaginable where such an invitation might pose the prisoner at great risk.²

Doctrine: For the bibliography, see the final comment on Rule 211.

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

¹ Irene Gartner, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, Berlin Verlag, Berlin, 2001, p. 437 (<https://www.legal-tools.org/doc/2d6196/>).

² Kimberly Prost, “Chapter 14 – Enforcement”, in Roy S. Lee and Håkan Friman (eds.), in *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, p. 686 (<https://www.legal-tools.org/doc/e34f81/>).

Rule 211(2)

2. When a sentenced person is eligible for a prison programme or benefit available under the domestic law of the State of enforcement which may entail some activity outside the prison facility, the State of enforcement shall communicate that act to the Presidency, together with any relevant information or observation, to enable the Court to exercise its supervisory function.

A special duty to inform the Court is spelled out in Rule 211(2) when the State of enforcement intends to make the prisoner eligible for some program or benefit which may entail “some activity outside the prison facility” in order “to enable the Court to exercise its supervisory function”. This results from a debate whether such measures like day-release or forms of open prison are to be subsumed under “conditions of detention” – governed by national law (Article 106(2)) – or constitute some form of release – reserved for the Court to decide (Article 110).¹ The compromise formula finally adopted as Rule 211(2) leaves room for debate whether it embodies a consensus that “activities outside the prison” fall under Article 106(2) (Gartner, 2001, p. 438) or whether this is left unclear (Prost, 2001, p. 688; Kreß and Sluiter, 2002, pp. 1806 ff.). It appears unlikely, however, that the correct construction of Rule 211(2) gives the Court the power to decide on such “outside activities”, so that the “exercise of the supervisory function” here is as usual limited to consultations with the State of enforcement and, as a last resort, exercise of the power under Article 104(1) (cf. commentary on Article 106; for an in-depth analysis see Kreß and Sluiter, 2002, pp. 1806–1808).

Since Rule 216 already obliges the State of enforcement to provide information on any “important event concerning the sentenced person”, Rule

¹ Irene Gartner, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, Berlin Verlag, Berlin, 2001, pp. 437 f. (<https://www.legal-tools.org/doc/2d6196/>); 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. 1800 ff. (<https://www.legal-tools.org/doc/01addc/>); 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. 687 (<https://www.legal-tools.org/doc/e34f81/>).

211(2) may be interpreted as a restatement of this general duty for the special situation of activities outside the prison.

Cross-references:

Articles 104, 106, 110

Rule 216

Doctrine:

1. Irene Gartner, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, Berlin Verlag, Berlin, 2001, pp. 423–445 (<https://www.legal-tools.org/doc/2d6196/>).
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 (<https://www.legal-tools.org/doc/01addc/>).
3. 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 (<https://www.legal-tools.org/doc/e34f81/>).

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

Rule 212

For the purpose of enforcement of fines and forfeiture measures and of reparation measures ordered by the Court, the Presidency may, at any time or at least 30 days before the scheduled completion of the sentence served by the sentenced person, request the State of enforcement to transmit to it the relevant information concerning the intention of that State to authorize the person to remain in its territory or the location where it intends to transfer the person.

The Rule illustrates the Presidency's responsibility for the enforcement of fines, forfeitures or reparation measures and vests it, in the exercise of its monitoring task,¹ with the authority to request vital information from the State of enforcement about the prospective future location of the prisoner, as this may be useful to locate sizeable assets. Curiously, Rule 212 appears like a special instance of the general monitoring duty enshrined in Regulation 117.

Cross-references:

Articles 77, 106, 109
Regulation 117

Doctrine:

1. 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 (<https://www.legal-tools.org/doc/e34f81/>).
2. 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/>).

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, pp. 1408 ff. (<https://www.legal-tools.org/doc/b7432e/>).

Rule 213

With resort to article 107, paragraph 3, the procedure set out in rules 214 and 215 shall apply, as appropriate.

Remarks:

In case the State of enforcement plans to extradite or otherwise surrender the prisoner to another State for purposes of prosecution or enforcement, Article 107(3) declares the provisions of Article 108 applicable *mutatis mutandis*. Accordingly, Rule 213 prescribes that Rules 214 and 215 (sub-provisions of Article 108) equally apply in this situation. Rule 213 thus is a mere expression of legal clarity.¹

Cross-references:

Articles 107, 108
Rules 214, 215
Regulation 115.

Doctrine:

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, pp. 2212–2213 (<https://www.legal-tools.org/doc/040751/>).
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, pp. 673–703 (<https://www.legal-tools.org/doc/e34f81/>).

Author: Michael Stiel.

¹ Cf. 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. 10 (“merely a cross-reference”) (<https://www.legal-tools.org/doc/040751/>).

Section III. Limitation on the Prosecution or Punishment of Other Offences Under Article 108

Rule 214

General Remarks:

Rule 214 specifies the preparatory phase of a decision of the Court pursuant to Article 108, notably which information shall be transmitted to or requested by the Court (sub-rules 1–3), who shall be consulted (sub-rules 4 and 5) and how (sub-rule 6). Sub-rules 1 to 3 are reproduced in the Enforcement Agreement between the Court and Argentina,¹ Austria,² Denmark,³ Finland,⁴

¹ Agreement between the Argentine Republic and the International Criminal Court on the Enforcement of Sentences of the International Criminal Court, 18 April 2017, ICC-PRES/19-01-17, Article 6 (<https://www.legal-tools.org/doc/asov9b/>).

² Accord entre la Cour penale internationale et l’Autriche sur l’exécution des peines prononcées par la Cour penale internationale, 27 October 2005, ICC-PRES/01-01-05, Article 10 (<https://www.legal-tools.org/doc/ae5d4c/>).

³ 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 10 (<https://www.legal-tools.org/doc/cc1900/>).

⁴ 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 10 (<https://www.legal-tools.org/doc/a1972d/>).

Georgia,⁵ Mali,⁶ Norway,⁷ Serbia,⁸ Slovenia¹⁰ and Sweden.¹¹ The same is the case for the two ad-hoc Enforcement Agreements with the Democratic Republic of the Congo for Thomas Lubanga Dyilo,¹² and Germain Katanga.¹³

Doctrine: For the bibliography, see the final comment on Rule 214.

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

⁵ Agreement between the Government of Georgia and the International Criminal Court on the Enforcement of Sentences of the International Criminal Court, 24 January 2019, ICC-PRES/27-01-19, Article 6 (<https://www.legal-tools.org/doc/bcl3pz/>).

⁶ 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 5 (<https://www.legal-tools.org/doc/e9891a/>).

⁷ Agreement between the Kingdom of Norway and the International Criminal Court on the Enforcement of Sentences of the International Criminal Court, Norway, 6 August 2016, ICC-PRES/18-02-16, Article 9 (<https://www.legal-tools.org/doc/3vdl75/>).

⁸ Agreement between the Government of Sweden and the International Criminal Court on the Enforcement of Sentences of the International Criminal Court, 24 April 2017, ICC-PRES/20-02-17, Article 7 (<https://www.legal-tools.org/doc/98f0zs/>).

⁹ 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 10 (<https://www.legal-tools.org/doc/42dca5/>).

¹⁰ Agreement between the Republic of Slovenia and the International Criminal Court on the Enforcement of Sentences of the International Criminal Court, 7 December 2018, ICC-PRES/28-01-22, Article 6 (<https://www.legal-tools.org/doc/a4o31tr/>).

¹¹ Agreement between the Government of Sweden and the International Criminal Court on the Enforcement of Sentences of the International Criminal Court, 24 April 2017, ICC-PRES/20-02-17, Article 7 (<https://www.legal-tools.org/doc/98f0zs/>).

¹² ICC, *Prosecutor v. Lubanga*, Decision designating a State of enforcement, Annex, 8 December 2015, ICC-01/04-01/06-3185-Anx, Article 6 (<https://www.legal-tools.org/doc/fae14f/>).

¹³ ICC, *Prosecutor v. Katanga*, Decision designating a State of enforcement, Annex, 8 December 2015, ICC-01/04-01/07-3626-Anx, Article 6 (<https://www.legal-tools.org/doc/0c7d33/>).

Rule 214(1)

1. For the application of article 108, when the State of enforcement wishes to prosecute or enforce a sentence against the sentenced person for any conduct engaged in prior to that person's transfer, it shall notify its intention to the Presidency and transmit to it the following documents:

(a) A statement of the facts of the case and their legal characterization;

(b) A copy of any applicable legal provisions, including those concerning the statute of limitation and the applicable penalties;

(c) A copy of any sentence, warrant of arrest or other document having the same force, or of any other legal writ which the State intends to enforce;

(d) A protocol containing views of the sentenced person obtained after the person has been informed sufficiently about the proceedings.

Rule 214(1) concerns the scenario that the State of enforcement itself wishes to prosecute or punish the sentenced person for conduct engaged in prior to delivery and sets out which documents to transmit to the Presidency upon notification of its intention, including a protocol containing the sentenced person's views on the matter. There is no need to fully disclose all relevant material to the convict, he or she must only be "informed sufficiently about the proceedings". This was a compromise again reflecting the fundamental question of the nature of the sentenced person's involvement in the proceedings, see comment on Article 108(2).¹ The Presidency has deemed it necessary to affirm that approval of the Court should be sought prior to the commencement of the relevant prosecution.²

Doctrine: For the bibliography, see the final comment on Rule 214.

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

¹ Kimberly Prost, "Chapter 14 – Enforcement", in Roy S. Lee and Håkan Friman (eds.), in *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, p. 691 (<https://www.legal-tools.org/doc/e34f81/>).

² 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, para. 18 (<https://www.legal-tools.org/doc/6565f5/>).

Rule 214(2)

2. In the event of a request for extradition made by another State, the State of enforcement shall transmit the entire request to the Presidency with a protocol containing the views of the sentenced person obtained after informing the person sufficiently about the extradition request.

In case the State of enforcement has been approached by a third State which requests the extradition of the sentenced person, the State of enforcement shall transmit the entire request to the Presidency – this is due to the fact that the third State cannot make the request itself – including a protocol containing the sentenced person’s views.

Doctrine: For the bibliography, see the final comment on Rule 214.

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

Rule 214(3)

3. The Presidency may in all cases request any document or additional information from the State of enforcement or the State requesting extradition.

Sub-rule 3 complements sub-rules 1 and 2 by enabling the Presidency to seek any additional information it deems necessary from the State of enforcement or directly from the third State requesting extradition.

Doctrine: For the bibliography, see the final comment on Rule 214.

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

Rule 214(4)

4. If the person was surrendered to the Court by a State other than the State of enforcement or the State seeking extradition, the Presidency shall consult with the State that surrendered the person and take into account any views expressed by that State.

Sub-rule 4 concerns an issue not addressed by the Statute, namely the role of the State which surrendered the defendant to the Court if that State is not identical with the State of enforcement, which presumably is the rule. In contrast to inter-State extradition law, the surrendering State has an unusual weak position here, since it is only to be consulted whereas extradition law would require its consent.¹ As this could prove a serious obstacle, especially for states with a long tradition of a prohibition to extradite their own nationals to surrender suspects to the Court, sub-rule 4 was incorporated.² Regulation 115 tries to further remedy this defect by directing the Presidency to have due regard to the principles of international law on re-extradition, so that, as a result, the Presidency should normally not disregard the vote of the surrendering State (cf. Kreß and Sluiter, 2002, p. 1813).

Doctrine: For the bibliography, see the final comment on Rule 214.

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

¹ Cf. 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, p. 1813 (<https://www.legal-tools.org/doc/01addc/>).

² Kimberly Prost, “Chapter 14 – Enforcement”, in Roy S. Lee and Håkan Friman (eds.), in *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 691 ff. (<https://www.legal-tools.org/doc/e34f81/>).

Rule 214(5)

5. Any information or documents transmitted to the Presidency under sub-rules 1 to 4 shall be transmitted to the Prosecutor, who may comment.

The Prosecutor will be provided with all information that is also forwarded to the Presidency and has the opportunity to comment on the matter. This is not the case with the sentenced person, who will only be “informed sufficiently”.¹

Doctrine: For the bibliography, see the final comment on Rule 214.

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

¹ Kimberly Prost, “Chapter 14 – Enforcement”, in Roy S. Lee and Håkan Friman (eds.), in *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, p. 691 (<https://www.legal-tools.org/doc/e34f81/>).

Rule 214(6)

6. *The Presidency may decide to conduct a hearing.*

As set out in the commentary to Article 108(2), there had been different proposals on the nature of the hearing. A mandatory oral hearing was rejected, as reflected in sub-rule 6 which leaves it to the Presidency's discretion to conduct a hearing. If a hearing is conducted, the Presidency might deem it helpful to include the surrendering State or even, as one commentator has suggested, to hold a full-fledged adversarial hearing.¹

Cross-references:

Article 108

Rules 215–216

Regulation 115

Doctrine:

1. Irene Gartner, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, Berlin Verlag, Berlin, 2001, pp. 423–445 (<https://www.legal-tools.org/doc/2d6196/>).
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 (<https://www.legal-tools.org/doc/01addc/>).
3. Kimberly Prost, “Chapter 14 – Enforcement”, in Roy S. Lee and Håkan Friman (eds.), in *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, p. 673---703 (<https://www.legal-tools.org/doc/e34f81/>).
4. William A. Schabas, “Article 108”, 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. 1955 (<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, Article 108, mgn. 9, p. 1404 (<https://www.legal-tools.org/doc/b7432e/>).

5. 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/>).

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

Rule 215

- 1. The Presidency shall make a determination as soon as possible. This determination shall be notified to all those who have participated in the proceedings.*
- 2. If the request submitted under sub-rules 1 or 2 of rule 214 concerns the enforcement of a sentence, the sentenced person may serve that sentence in the State designated by the Court to enforce the sentence pronounced by it or be extradited to a third State only after having served the full sentence pronounced by the Court, subject to the provisions of article 110.*
- 3. The Presidency may authorize the temporary extradition of the sentenced person to a third State for prosecution only if it has obtained assurances which it deems to be sufficient that the sentenced person will be kept in custody in the third State and transferred back to the State responsible for enforcement of the sentence pronounced by the Court, after the prosecution.*

Rule 215 sets out the details of the decision of the Court under Article 108(1), namely that the Presidency shall make the determination “as soon as possible” and notify all participants (sub-rule 1).

If the Court’s approval is sought for the execution of a prison sentence either in the State of enforcement or a third State, sub-rule 2 prescribes that the Court’s sentence must be fully served, subject to a reduction pursuant to Article 110, before the respective national sentence may be executed.

If the Court’s approval is sought for the prosecution of the sentenced person in a third State, sub-rule 3 requires the Presidency to obtain sufficient assurances that the prisoner will be kept in custody there and subsequently be transferred back to the State of enforcement to serve the remainder of his international sentence there before any national sentence is enforced (cf. sub-rule 2).

Cross-references:

Articles 108, 110
Rule 214

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

Rule 216

The Presidency shall request the State of enforcement to inform it of any important event concerning the sentenced person, and of any prosecution of that person for events subsequent to his or her transfer.

Since Article 108 is not concerned with behaviour of the sentenced person after delivery to the State of enforcement, it might seem that the Court has no say whether the prisoner is prosecuted or punished or even extradited for such subsequent behaviour, compare with comment on Article 108(1). This is in line with the usual rationale of the principle of specialty which, however, cannot be applied to the relationship between the Court and the State of enforcement without modification, compare with comment on Article 108. In particular, prosecution, punishment or extradition for subsequent behaviour might jeopardize the enforcement of the sentence pronounced by the Court and hence are matters which the Court must take notice of in the exercise of its supervisory role under Article 106(1), since ultimately a change of the State of enforcement pursuant to Article 104(1) may become necessary. Rule 216 renders explicit this need for information about any “important events” concerning the sentenced person, including subsequent prosecutions not covered by Article 108(1).

Cross-references:

Articles 104, 106, 108
Rule 211.

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

Section IV. Enforcement of Fines, Forfeiture Measures and Reparation Orders

Rule 217

For the enforcement of fines, forfeiture or reparation orders, the Presidency shall, as appropriate, seek cooperation and measures for enforcement in accordance with Part 9, as well as transmit copies of relevant orders to any State with which the sentenced person appears to have direct connection by reason of either nationality, domicile or habitual residence or by virtue of the location of the sentenced person's assets and property or with which the victim has such connection. The Presidency shall, as appropriate, inform the State of any third-party claims or of the fact that no claim was presented by a person who received notification of any proceedings conducted pursuant to article 75.

The Rule stipulates that the Presidency is to transmit copies of orders to all relevant states. At the discretion of the Presidency, these may be accompanied by information on claims by third parties under Article 75(3) to enable the States to assess whether there are rights of *bona fide* parties to be respected according to Article 109(1) and (2). One may interpret Rule 217 to the effect that it is the Presidency's prerogative to initiate enforcement measures so that States Parties are not obliged to act on their own motion.¹ Regarding fines, it follows from Rule 146(5) that the Presidency will first ask the convicted person to pay voluntarily.

With regard to reparation orders, it is curious that no mention is made of the initiative of the beneficiaries, that is, the victims. Apparently, the Presidency acts on its own motion here, too, and does not have to await the victim's request. In addition, there are a number of unresolved problems attached to the enforcement of reparation orders because such orders have a civil rather than penal nature in many national laws, thus following different rules from the enforcement of fines. Hence, the questions arise whether individual victims should be able to initiate such civil enforcement procedures in a State Party and whether State Parties should rather treat the Court's

¹ Claus Krefß 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, p. 1828 (<https://www.legal-tools.org/doc/01addc/>).

reparation orders like fines or, if that is impossible, at least provide a special regime and preclude victims from proceeding on their own cost and risk.²

The reference to Part 9 ‘bridges the gap’ between the enforcement and co-operation regimes (Kreß and Sluiter, 2002, p. 1831) and makes clear that the Presidency shall take all appropriate steps to ensure successful enforcement efforts. It is not clear, however, which provisions of Part 9 ought to be applied by analogy: It has been proposed to apply Art. 88 as well as Article 93(3), have the Presidency request assistance from non-State Parties pursuant to Article 87(5), censure non-compliance under Article 87(7), and deal with problems according to Articles 93(6) and (9), 97 and 98(1) (Kreß and Sluiter, 2002, p. 1831).

According to the second sentence, states will receive information on any notifications under Article 75(3) and corresponding submissions of third parties. The question whether any *bona fide* claims should be precluded for failure to take part in the proceedings is than up to the respective national courts to decide. A failure to make submissions under Article 75(3) does not preclude the exercise of those rights, as a proposal to this end³ was rejected by a majority of delegations. The matter is to be determined by national courts, which will receive information on procedures under Article 75(3) by the Presidency pursuant to Rule 217.⁴

Cross-references:

Articles 75, 86–102, 109.

Doctrine:

1. Irene Gartner, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, Berlin Verlag, Berlin, 2001, pp. 423–445 (<https://www.legal-tools.org/doc/2d6196/>).

² Irene Gartner, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, Berlin Verlag, Berlin, 2001, p. 444 (<https://www.legal-tools.org/doc/2d6196/>); Kreß and Sluiter, 2002, p. 1835.

³ Proposal submitted by France concerning part 10 of the Rome Statute of the International Criminal Court concerning enforcement, UN Doc. PCNICC/1999/WGRPE(10)/DP.1, 19 November 1999, Rule 10.26 (<https://www.legal-tools.org/doc/960039/>).

⁴ 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. 693 (<https://www.legal-tools.org/doc/e34f81/>).

2. 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. 1823–1838 (<https://www.legal-tools.org/doc/01addc/>).
3. 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 (<https://www.legal-tools.org/doc/e34f81/>).

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

Rule 218

1. In order to enable States to give effect to an order for forfeiture, the order shall specify:

(a) The identity of the person against whom the order has been issued;

(b) The proceeds, property and assets that have been ordered by the Court to be forfeited; and

(c) That if the State Party is unable to give effect to the order for forfeiture in relation to the specified proceeds, property or assets, it shall take measures to recover the value of the same.

2. In the request for cooperation and measures for enforcement, the Court shall also provide available information as to the location of the proceeds, property and assets that are covered by the order for forfeiture.

3. In order to enable States to give effect to an order for reparations, the order shall specify:

(a) The identity of the person against whom the order has been issued;

(b) In respect of reparations of a financial nature, the identity of the victims to whom individual reparations have been granted, and, where the award for reparations shall be deposited with the Trust Fund, the particulars of the Trust Fund for the deposit of the award; and

(c) The scope and nature of the reparations ordered by the Court, including, where applicable, the property and assets for which restitution has been ordered.

4. Where the Court awards reparations on an individual basis, a copy of the reparation order shall be transmitted to the victim concerned.

The Rule specifies the content of the orders for forfeiture (sub-rules 1 and 2), and reparation orders (sub-rules 3 and 4) in detail in order to facilitate their enforcement. Sub-rule 1(c) merely restates Article 109(2).¹

Cross-reference:

Article 109.

¹ For the drafting history see Irene Gartner, “The Rules of Procedure and Evidence on Cooperation and Enforcement”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, Berlin Verlag, Berlin, 2001, pp. 443 ff. (<https://www.legal-tools.org/doc/2d6196/>).

Doctrine:

1. Irene Gartner, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, Berlin Verlag, Berlin, 2001, pp. 423–445 (<https://www.legal-tools.org/doc/2d6196/>).
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, pp. 673–703 (<https://www.legal-tools.org/doc/e34f81/>).

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

Rule 219

The Presidency shall, when transmitting copies of orders for reparations to States Parties under rule 217, inform them that, in giving effect to an order for reparations, the national authorities shall not modify the reparations specified by the Court, the scope or the extent of any damage, loss or injury determined by the Court or the principles stated in the order, and shall facilitate the enforcement of such order.

The Rule clarifies – or, arguably, restates the obvious¹ – that the language of Article 75(5) and Article 109(1) which requires the States Parties “to give effect” to reparation orders “in accordance with the procedure of their national law” does not convey to the States the power to modify the contents of the reparation orders. On the contrary, States Parties have to enforce a reparation order “as is” and the Presidency has to remind them thereof when acting under Rule 217. Rule 219 corresponds to Rule 220 regarding fines.

Cross-references:

Articles 75(5), 109(1)

Rules 217, 220.

Doctrine:

1. Irene Gartner, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, Berlin Verlag, Berlin, 2001, pp. 423–445 (<https://www.legal-tools.org/doc/2d6196/>).

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

¹ Irene Gartner, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, Berlin Verlag, Berlin, 2001, p. 443 (<https://www.legal-tools.org/doc/2d6196/>).

Rule 220

When transmitting copies of judgements in which fines were imposed to States Parties for the purpose of enforcement in accordance with article 109 and rule 217, the Presidency shall inform them that in enforcing the fines imposed, national authorities shall not modify them.

Rule 220 directs the Presidency to remind the States Parties upon requesting assistance and enforcement under Rule 217 that they shall not modify the fines imposed by the Court. Like the parallel Rule 219 regarding reparation orders, this is only a restatement of the content of Article 109(1).¹ Nonetheless, some delegations felt the incorporation of Rule 220 necessary to avoid an *e contrario* conclusion drawn from Rule 219 dealing exclusively with reparation orders.² As a result, only prison sentences can be reduced by the Court, fines cannot since there is no provision corresponding to Article 110.

Cross-references:

Article 109(1)

Rules 217, 219.

Doctrine:

1. Irene Gartner, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, Berlin Verlag, Berlin, 2001, pp. 423–445 (<https://www.legal-tools.org/doc/2d6196/>).
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, pp. 673–703 (<https://www.legal-tools.org/doc/e34f81/>).

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

¹ Cf. Irene Gartner, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes Under International Law*, Berlin Verlag, Berlin, 2001, p. 443 (<https://www.legal-tools.org/doc/2d6196/>).

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. 696 (<https://www.legal-tools.org/doc/e34f81/>).

Rule 221

1. The Presidency shall, after having consulted, as appropriate, with the Prosecutor, the sentenced person, the victims or their legal representatives, the national authorities of the State of enforcement or any relevant third party, or representatives of the Trust Fund provided for in article 79, decide on all matters related to the disposition or allocation of property or assets realized through enforcement of an order of the Court.

2. In all cases, when the Presidency decides on the disposition or allocation of property or assets belonging to the sentenced person, it shall give priority to the enforcement of measures concerning reparations to victims.

When a State Party has transferred seized property or other assets realized through enforcement of a judgment of the Court in conformity with Article 109(3), it is the Presidency's task to decide all matters related to the disposition or allocation of such assets, for example, the transfer to the Trust Fund pursuant to Article 79(2), after due consultation with all relevant participants. Regulation 116 provides further details. Sub-rule 2 establishes the priority of the victim's interest in reparation with regard to property or assets belonging to the sentenced person.

Cross-references:

Articles 75, 79(2), 109(3)

Regulation 116.

Doctrine:

1. 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 (<https://www.legal-tools.org/doc/e34f81/>).

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

Rule 222

The Presidency shall assist the State in the enforcement of fines, forfeiture or reparation orders, as requested, with the service of any relevant notification on the sentenced person or any other relevant persons, or the carrying out of any other measures necessary for the enforcement of the order under the procedure of the national law of the enforcement State.

The Rule establishes a general duty of the Presidency to assist the national authorities with the enforcement of fines, forfeiture and reparation orders, for example, by serving notices on the sentenced person.¹

Cross-reference:

Article 109(2).

Doctrine:

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, pp. 673–703 (<https://www.legal-tools.org/doc/e34f81/>).

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

¹ Kimberly Prost, “Chapter 14 – Enforcement”, in Roy S. Lee and Håkan Friman (eds.), in *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, p. 697 (<https://www.legal-tools.org/doc/e34f81/>).

*Section V. Review Concerning Reduction of Sentence Under Article 110***Rule 223: General Remarks*****General Remarks:***

Rule 223 specifies the factors to be taken into account when deciding upon a sentence reduction, as referred to in Article 110(4)(c) of the Statute. However, given that Article 110(4) already lists two factors (early and continuing willingness to co-operate with the authorities as well as voluntary assistance in enabling the enforcement) and only makes reference to the RPE in the context of the third factor, that is, other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, it may be assumed that the factors mentioned in the Statute under Article 110(4)(a) and (b) have a stronger weight than those mentioned in Rule 223.

On the one hand, the specific wording and enumeration of several factors seems a progress with respect to the *ad hoc* tribunals, as the criteria are formulated in a more specific and concrete form. On the other, they are still sufficiently vague to allow certain acts to qualify under several legal provisions, making it difficult to see how the respective conduct should qualify and which weight should be attributed to it. For example, a guilty plea, expressing remorse and compassion for the victims, may qualify as co-operation with the prosecution (Article 110(4)(a) or (b)), but also as a sign for re-socialization (Rule 223, sub-para. b)) as well as a significant action taken to the benefit of victims (Rule 223, sub-para. d).

Criteria to Be Applied:

As explained, Rule 223 constitutes a specification of the “other factors” mentioned under Article 110(4)(c) ICC Statute. While factors (a), (b), and (d) are factors that the sentenced person can deliberately influence with his or her behaviour, factor e) concerns individual circumstances that lie in the person of the detainee’s life, but on which he may not have any influence (for example, sickness). In most cases, these will be compassionate¹ or

¹ Cf. for example, United Kingdom, Crime (Sentences) Act, 21 March 1997, Section 30(1) (<https://www.legal-tools.org/doc/122b23/>).

humanitarian.² grounds. In contrast, factor (c) is an element that has nothing to do with the detainee himself, but rather with the society's reaction to his release.

Doctrine: For the bibliography, see the final comment on Rule 223.

Author: Anna Oehmichen.

² Cf. Council of Europe, Recommendation No. R (93) 6 of the Committee of Ministers to member states concerning prison and criminological aspects of the control of transmissible diseases including AIDS and related health problems in prison, 18 October 1993, Principle 14, which states that Prisoners with terminal HIV disease should be granted early release, 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. 956 (<https://www.legal-tools.org/doc/993b3a/>).

Rule 223(a)

In reviewing the question of reduction of sentence pursuant to article 110, paragraphs 3 and 5, the three judges of the Appeals Chamber shall take into account the criteria listed in article 110, paragraph 4 (a) and (b), and the following criteria:

(a) The conduct of the sentenced person while in detention, which shows a genuine dissociation from his or her crime;

The conduct of the sentenced person during detention is thus the first criteria to be taken into account, after the ones enumerated under Article 110(4) ICC Statute (which relates to co-operation with the authorities). In domestic law, this is usually the most important criterion. The conduct during detention gives the closest indication as to the risk of the prisoner to re-offend upon release and thus serves to indicate the prisoner's ability for rehabilitation. It is actually a sub-category of re-socialization, which makes it difficult to draw the line between sub-paragraphs (a) and (b) of this Rule.

At the *ad hoc* tribunals, irreproachable behaviour during detention as a sign for rehabilitation was an argument for granting early release in many cases.¹ Impeccable behaviour was evidenced, *inter alia*, by employment in the prison laundry,² employment both inside and outside the prison

¹ For the ICTY, cf., for example, ICTY, *Prosecutor v. Blaskić*, Appeals Chamber, Order of the President on the Application for Early Release of Tihomir Blaskić, 29 July 2004, IT-95-14-A, para. 8 (<https://www.legal-tools.org/doc/186449/>); *Prosecutor v. Milojica Kos*, Appeals Chamber, Order of the President for the Early Release of Milojica Kos, 30 July 2002, IT-98-30/1-A (<https://www.legal-tools.org/doc/76322d/>); *Prosecutor v. Mucić*, Presidency, Order of the President in Response to Zdravko Mucic's Request for Early Release, 9 July 2003, IT-96-21-A bis (<https://www.legal-tools.org/doc/ca7a6b/>); *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. Furundžija*, Order of the President on the Application for the Early Release of Anto Furundžija, 29 July 2004, IT-95-17/1 ('*Furundžija*, 29 July 2004') (<https://www.legal-tools.org/doc/29f368/>); *Prosecutor v. Aleksovski*, Trial Chamber, Judgement, 25 June 1999, IT-95-14/1-T, para. 4 (<https://www.legal-tools.org/doc/52d982/>). For the ICTR, see ICTR, *Prosecutor v. Muvunyi*, Presidency, Decision on Tharcisse Muvunyi's Application for Early Release, 6 March 2012, ICTR-00-59A-T, para. 6 (<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. 12 (<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, para. 13 (<https://www.legal-tools.org/doc/a7cfee/>).

² ICTY, *Prosecutor v. Sikirica*, Presidency, Decision of President on Early Release of Dusko Sikirica, 21 June 2010, IT-95-8-ES, para. 18 (<https://www.legal-tools.org/doc/5c52e8/>).

(*Furundžija*, 29 July 2004), in the woodshop of the prison and passing the furniture maker carpentry exam with the best possible grade,³ by the prisoner taking active steps to avoid trouble, that is, his request to be moved from open to closed environment.⁴ Good relationships with fellow inmates (especially of different ethnicities or nationalities) was also a sign for rehabilitation and could also be evidence of good conduct.⁵

On the other hand, a lack of integration in prison, combined with high gravity of crimes, led in the case of a convict from Omarska camp to his release only after serving three-quarter rather than two thirds of his sentence.⁶

As the conduct during prison is supposed to show a “genuine dissociation from his crime”, expressed remorse will also be considered in this context.⁷ This may also qualify as a sign of resocialization (*infra sub-para. (b)*). Criteria as set out in the SCSL’s Practice Direction on the Conditional Early Release of Persons may also serve to interpret this rule, for example, “successful completion of any remedial, educational, moral, spiritual or other programme to which he was referred within the Prison”, “that he is not a danger to community or to any member of the public” and “Compliance with terms and conditions of imprisonment”.⁸

³ ICTY, *Prosecutor v. Kovač*, Presidency, Public and Redacted Version of the 27 March 2013 Decision of President on Early Release of Radomir Kovač, 3 July 2013, IT-96-23 -23/1-ES, para. 22 (<https://www.legal-tools.org/doc/524036/>).

⁴ ICTY, *Prosecutor v. Delić*, Presidency, Decision on Hazim Delić’s Motion for Commutation of Sentence, 24 June 2008, IT-96-21-ES, para. 20 (<https://www.legal-tools.org/doc/d679ba/>).

⁵ Cf. ICTY, *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. 10 (<https://www.legal-tools.org/doc/a3c065/>); *Prosecutor v. Rajić*, Presidency, Decision of the President on Early Release of Ivaca Rajić, 22 August 2011, IT-95-12-ES, para. 18 (<https://www.legal-tools.org/doc/2b355d/>).

⁶ 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/>).

⁷ Cf. ICTY, *Prosecutor v. Landzo*, Order issuing a Public Redacted Version of Decision on Hazim Delic’s Motion for Commutation of Sentence, 15 July 2008, IT-96-21-ES, para. 7 (<https://www.legal-tools.org/doc/d679ba/>).

⁸ SCSL, “Practice Direction on the Conditional Early Release of Persons convicted by the Special Court for Sierra Leone”, 1 October 2013, Section 2(B) (<https://www.legal-tools.org/doc/0260c4/>).

Doctrine: For the bibliography, see the final comment on Rule 223.

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Rule 223(b)

(b) The prospect of the resocialization and successful resettlement of the sentenced person;

Re-socialization and social rehabilitation are generally factors that also, together with public security, are considered by domestic courts. However, in a situation of macro-criminality the relevance of this factor is questionable. Unlike in cases of ‘ordinary’ crimes, perpetrators of international crimes act, as a rule, in conformity with their immediate social environment. As a consequence, the majority of them will not be likely to re-offend after release.¹

At the *ad hoc* tribunals, indications for a sincere attempt for social re-integration were seen in the involvement of rehabilitation programmes at prison,² participation in language classes,³ working at the prison in a reliable position, for example, as kitchen assistant⁴ or as manager of a painting workshop⁵ or in prison laundry.⁶ Serving the later part of his sentence in an open

¹ 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, p. 841 (<https://www.legal-tools.org/doc/4a0851/>).

² IRMCT, *Prosecutor v. Serushago*, Presidency, Decision of the President on Early Release of Omar Serushago, 13 December 2012, MICT-12-28-ES, para. 21 (<https://www.legal-tools.org/doc/fcc017/>).

³ ICTY, *Prosecutor v. Banović*, Presidency, Decision of the President on Commutation of Sentence, 3 September 2008, IT-02-65/1-ES, para. 13 (<https://www.legal-tools.org/doc/5218b9/>); *Prosecutor v. Bala*, Presidency, Decision of President on Application of Haradin Bala for Sentence Remission, 15 October 2010, IT-03-66-ES, para. 24 (<https://www.legal-tools.org/doc/105155/>); *Prosecutor v. Rajić*, Presidency, Decision of the President on Early Release of Ivaca Rajić, 22 August 2011, IT-95-12-ES, para. 18 (<https://www.legal-tools.org/doc/2b355d/>).

⁴ ICTY, *Prosecutor v. Obrenović*, Presidency, Decision of President on Early Release of Dragan Obrenovic, 21 September 2011, IT-02-60/2-ES, para. 21 (<https://www.legal-tools.org/doc/2dd00a/>); *Prosecutor v. Tadić*, Presidency, Decision of the President on the Application for Pardon or Commutation of Sentence of Dusko Tadić, 17 July 2008, IT-94-I-ES, paras. 8, 16 (<https://www.legal-tools.org/doc/01079f/>).

⁵ ICTY, *Prosecutor v. Rajić*, Presidency, Decision of the President on Early Release of Ivaca Rajić, 22 August 2011, IT-95-12-ES, para. 18 (<https://www.legal-tools.org/doc/2b355d/>).

⁶ ICTY, *Prosecutor v. Sikirica*, Decision of the President on Early Release of Dusko Sikirica, 21 June 2010, IT-95-8-ES, para. 18 (<https://www.legal-tools.org/doc/5c52e8/>).

prison regime⁷ or low security prison⁸ was also considered an indication that the prisoner demonstrated rehabilitation.

As sub-para. (b) specifically mentions the prospects of “successful resettlement”, prospects to obtain employment after release will play an important role. This was an aspect often also considered by the *ad hoc* tribunals.⁹

An indication for social reinsertion may also be the prisoner’s attachment to his family,¹⁰ for example, the decision of the family to stand by the prisoner in spite of retributive actions against the family.¹¹

Demonstrated remorse will also play an important role with regards to resocialization.¹² In this context, a guilty plea may weigh in favour of a decision on sentence reduction even if this has already been taken into account

⁷ ICTY, *Prosecutor v. Tarčulovski*, Presidency, Decision of President on Early Release of Johan Tarčulovski, 23 June 2011, IT-04-82-ES, para. 26 (<https://www.legal-tools.org/doc/448539/>).

⁸ ICTY, *Prosecutor v. Krajišnik*, Presidency, Decision of President on Early Release of Momcilo Krajišnik, 11 July 2011, IT-00-39-ES, para. 25 (<https://www.legal-tools.org/doc/59e0a2/>).

⁹ ICTY, *Prosecutor v. Banović*, Presidency, Decision of the President on Commutation of Sentence, 3 September 2008, IT-02-65/1-ES, para. 13 (<https://www.legal-tools.org/doc/5218b9/>); *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/>); *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. Mucić*, Presidency, Order of the President in Response to Zdravko Mucić’s Request for Early Release, 9 July 2003, IT-96-21-A bis (<https://www.legal-tools.org/doc/ca7a6b/>); *Prosecutor v. Dragan Kolundžija*, Presidency, Order of the President on Early Release of Dragan Kolundžija, 5 December 2001, IT-95-8 (<https://www.legal-tools.org/doc/89df34/>).

¹⁰ *Prosecutor v. Mucić*, Presidency, Order of the President in Response to Zdravko Mucić’s Request for Early Release, 9 July 2003, IT-96-21 (<https://www.legal-tools.org/doc/ca7a6b/>); *Prosecutor v. Blaskić*, Appeals Chamber, Order of the President on the Application for Early Release of Tihomir Blaskić, 29 July 2004, IT-95-14-A, para. 8 (<https://www.legal-tools.org/doc/186449/>); *Prosecutor v. Milojica Kos*, Appeals Chamber, Order of the President for the Early Release of Milojica Kos, 30 July 2002, IT-98-30/1-A (<https://www.legal-tools.org/doc/76322d/>); *Prosecutor v. Simić et al*, Presidency, Order of the President on the Application for Early Release of Simo Zaric, 21 January 2004, IT-95-9.

¹¹ Cf. ICTY, *Prosecutor v. Delić*, Presidency, Decision on Hazim Delić’s Motion for Commutation of Sentence, 24 June 2008, IT-96-21-ES, para. 21 (<https://www.legal-tools.org/doc/d679ba/>).

¹² ICTY, *Prosecutor v. Landzo*, Order issuing a Public Redacted Version of Decision on Hazim Delić’s Motion for Commutation of Sentence, 15 July 2008, IT-96-21-ES, para. 7 (<https://www.legal-tools.org/doc/d679ba/>).

at the level of sentencing.¹³ As co-operation with the prosecution has already been considered as a factor under Art. 110(4)(a) and (b) of the ICC Statute, it is doubtful in how far the remorse expressed in the guilty plea should have additional weight.

On the other hand, a limited degree of rehabilitation played against the granting of early release. In the case of *Bala*, the psychological report concluded that he “resorted to denial” and did not assume responsibility for his actions.¹⁴ The ICTY ruled that the rehabilitation factor also comprised the attitude of the prisoner towards the deeds for which he was convicted (*Bala*, 15 October 2010, para. 25). Similarly, Stakić’s release was denied based on his very limited rehabilitation.¹⁵ An ambivalent attitude towards his crimes also weighed against the decision on early release in the case of Zelenović.¹⁶

Refraining from incitement against peace and security and positive contributions to peace and reconciliation such as public acknowledgement of guilt, public support for peace projects, public apology to victims or victim’s restitution¹⁷ may also qualify as indications for good prospects for re-socialization and resettlement, although they may as well qualify under sub-*paras.* (c) and (d).

Doctrine: For the bibliography, see the final comment on Rule 223.

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¹³ Cf. ICTY, *Prosecutor v. Sikirica*, Presidency, Decision of President on Early Release of Dusko Sikirica, 21 June 2010, IT-95-8-ES, paras. 16, 17 (<https://www.legal-tools.org/doc/5c52e8/>).

¹⁴ ICTY, *Prosecutor v. Bala*, Presidency, Decision of President on Application of Haradin Bala for Sentence Remission, 15 October 2010, IT-03-66-ES, paras. 18 ff. (*Bala*, 15 October 2010’) (<https://www.legal-tools.org/doc/105155/>).

¹⁵ ICTY, *Prosecutor v. Stakić*, Presidency, Decision of President on Early Release of Milomir Stakić, 15 July 2011, IT-97-24-ES, para. 38 (<https://www.legal-tools.org/doc/8ab0c2/>).

¹⁶ ICTY, *Prosecutor v. Zelenović*, Presidency, Decision of President on Early Release of Dragan Zelenović, 21 October 2011, IT-96-23/2-ES, paras. 17, 20 (<https://www.legal-tools.org/doc/7bda07/>).

¹⁷ Cf. SCSL, “Practice Direction on the Conditional Early Release of Persons convicted by the Special Court for Sierra Leone”, 1 October 2013, Section 2(C) (<https://www.legal-tools.org/doc/0260c4/>).

Rule 223(c)

(c) Whether the early release of the sentenced person would give rise to significant social instability;

This factor refers to the effects the release may have upon society. Unlike the other factors, this one is formulated in a negative manner as an excluding criterion, that is, if no social instability is caused by the release, the absence of this element would weigh in favour of release. Under domestic law, the factor relating to effects on society mainly refers to a low risk that the sentenced person will re-offend upon release.¹ The legal interests at stake here are generally public safety as well as the public's confidence in the judicial system.² While in international criminal law, the risk of re-offending will often not be the greatest concern as political and social changes that triggered the offenses will in many cases have ceased to exist, the aspect of public's confidence in international justice is indeed an aspect of considerable significance.

Albeit not mentioned explicitly, it can be expected that the gravity of the crime may play an indirect role in this context. When denying the application for early release of Imanishimwe in 2007, the ICTR's president based his decision primarily on the gravity of the crimes, as well as on the fact that there was no precedent of early release at the ICTR.³ However, it is likely that consideration was also given to the impact an early release would have on the Rwandan people at that moment of time.

Refraining from incitement against peace and security and positive contributions to peace and reconciliation such as public acknowledgement of guilt, public support for peace projects, public apology to victims or victim's restitution⁴ may indicate unlikelihood of social instability in case of release.

¹ Cf., for example, Wolfgang Joecks and Klaus Meibach, *Munich Commentary of the Criminal Code*, 2nd. ed., C.H. Beck, Munich, 2012, para. 57, mgn. 14.

² For the United Kingdom, cf., Her Majesty's Prison Service, "Prison Service Order 6300: Release on Temporary Licence", 29 November 2011, no. 251, p. 7.

³ ICTR, *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/>).

⁴ Cf. SCSL, "Practice Direction on the Conditional Early Release of Persons convicted by the Special Court for Sierra Leone", 1 October 2013, Section 2(C)(iii) (<https://www.legal-tools.org/doc/0260c4/>).

In general, this factor leaves a great margin of discretion. Moreover, its relevance will largely depend on the media coverage of the respective case that is, the role media attributes to the detainee. While potential social instability must undoubtedly be taken into account for the decision of sentence reductions, it is hard to understand in how far this should affect the prisoner's right to have his sentence reviewed and, if other conditions are met, reduced, especially if he himself does not want to cause any trouble. It does not seem fair to deny him sentence reduction in such circumstances, on the exclusive basis that other people in his home country will protest against his release. In such cases, a way to reconcile the society's interest in social stability with the prisoner's interest in sentence reduction would be to allow for his release in another than his home country.⁵

Furthermore, another factor is whether the prisoner shows prospects to find employment subsequent to his release and play an active role in his community.⁶

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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. 21 (<https://www.legal-tools.org/doc/d679ba/>): retribitional acts to his family led Delić to request release not in his home country Bosnia but rather a Nordic country.

⁶ Cf., for example, ICTY, *Prosecutor v. Mucić*, Presidency, Order of the President in Response to Zdravko Mucic's Request for Early Release, 9 July 2003, IT-96-21-A bis, para. 2 (<https://www.legal-tools.org/doc/ca7a6b/>).

Rule 223(d): Significant Action

(d) Any significant action taken by the sentenced person for the benefit of the victims [...]

Actions for the benefit of the victims may include contributions to the victim's trust funds, payments of civil damages in certain cases, but also the expression of sincere apologies and regret.¹ Compassion for the victims may save judicial time and contribute to the process of national reconciliation.²

In any criminal law system, a positive conduct towards victims, for example, reparation or compensation payments, restitution of damage, or formal or informal apologies play a role not only in the sentencing decision, but also in the decision of reduction of sentence. However, in the case of the ICC, one might assume that this factor should have a particular weight, as one of the key features that distinguish the ICC from former international tribunals is the role victims play in this system (cf., for example, Articles 25, 43(6), 68, 79 ICC Statute). What is more, when the decision of whether a sentence reduction should be granted or not is taken, victims are to be heard (Rule 224(1) RPE). In light of their outstanding role, a positive conduct from the sentenced person towards victims should thus weigh strongly in favour of a sentence reduction, the more so, as this implies generally also good prospects of re-socialization. Conversely, a submission of a victim laying out a deteriorating impact on their well-being if the person in question should be early released should also play an important role. On the other hand, the relatively late mentioning of this factor (it is not mentioned in Article 110(4) ICC Statute, and only listed in Rule 223 in the fourth place) suggests that this factor should, notwithstanding, not be overestimated. As at the *ad hoc* tribunals, co-operation with the authorities, in particular, the OTP, at an early stage as well as the conduct during detention and (other) prospects of re-socialization as evident in prison reports will probably still have a stronger weight. In many cases, expressed remorse or contrition will go along with compassion with the victims. In such cases, it is unclear whether such

¹ Cf., for example, SCSL, "Practice Direction on the Conditional Early Release of Persons convicted by the Special Court for Sierra Leone", 1 October 2013, Section 2(C)(iii): "Public apology to victims or victim's restitution" (<https://www.legal-tools.org/doc/0260c4/>).

² Cf. ICTR, *Prosecutor v. Rugambarara*, Presidency, Decision on the Early Release Request of Juvenal Rugambarara (P), 8 February 2012, ICTR-00-59, para. 9 (<https://www.legal-tools.org/doc/a7cfee/>).

declarations will be considered under sub-para. d) or rather under sub-para. b) (prospect of re-socialization). While sub-para. b) relates to the convict's self-critical attitude towards his own actions (that is, recognizing one's own wrong-doing), sub-para. d) refers to the respect and compassion uttered to victims in general, which may be done independently of any acceptance of personal guilt.

A guilty plea and subsequent co-operation with the prosecution will generally also benefit the victim; however, this aspect has already been taken account at the level of sentencing, as well as a factor under Articles 110(4)(a) and (b) ICC Statute. It is therefore doubtful in how far it should weigh – again – in favour of a decision on sentence reduction.

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Rule 223(d): Impact on Victims and Families

[...] any impact on the victims and their families as a result of the early release;

This second part of sub-para. (d) demonstrates again the significance attributed to victims at the ICC. As victims will be heard during the decision on sentence reduction (cf. Rule 224(1) RPE), they may outline the impacts a release may have on them. One will mainly think of psychological impacts, but also social dynamics may be triggered by the release in the same village, for instance. One way of solving this issue may therefore be to release the person in geographical distance to the place where the crimes were committed.

Moreover, as at the SCSL, one may expect that (potentially regulated by a future Practice Direction) the Victims and Witnesses Unit of the ICC will also be heard with regards to potential impacts on victims. In this respect, the SCSL's Practice Direction on the Conditional Early Release of Persons convicted by the Special Court for Sierra Leone of 1 October 2013 is instructive, as it provides for detailed communications between Registrar and Witnesses and Victims Section, regarding in particular the effects of a release upon the well-being and safety of the local community, previous threats to victims or witnesses, any evidence that the convicted person may use his release to incite members of his political or military faction to use violence, the circumstances and attitudes of the family of the convicted person to his release, the suitability of the requested area of release, and others.¹

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¹ Cf. SCSL, "Practice Direction on the Conditional Early Release of Persons convicted by the Special Court for Sierra Leone", 1 October 2013, Section 2(F) ('SCSL, Practice Direction on Early Release') (<https://www.legal-tools.org/doc/0260c4/>).

Rule 223(e)

(e) Individual circumstances of the sentenced person, including a worsening state of physical or mental health or advanced age.

This factor relates to circumstances that are found in the individual situation of the sentenced person but on which he will have only limited or no influence himself. These circumstances may be of compassionate nature (sickness, advanced age). They can also be humanitarian circumstances that may call for early release under international humanitarian law.¹ The delicate health situation was a factor to be taken into account by the *ad hoc* tribunals, especially when the seriousness of the condition made it impossible for the prisoner to remain in prison any longer.² Similarly, in the case of *Simić*, his status as paraplegic, his need for daily assistance, and the fact that he was married to a trained nurse who was able to assist him, weighed in favour of his release.³ Further, in *Blaškić*, the acute need for medical care for a longstanding illness that was likely to require hospitalizations and surgery militated for early release.⁴

¹ Cf., for instance, Council of Europe, Recommendation No. R (93) 6 of the Committee of Ministers to member states concerning prison and criminological aspects of the control of transmissible diseases including AIDS and related health problems in prison, 18 October 1993, Principle 14, which states that Prisoners with terminal HIV disease should be granted early release; 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. 956 (<https://www.legal-tools.org/doc/993b3a/>).

² See ICTY, *Prosecutor v. Gvero*, Presidency, Decision of President on Early Release of Milan Gvero, 28 June 2010, IT-05-88-ES, paras. 10, 13, fn. 25 (urgent need for medical treatment militated in favor for early release) (<https://www.legal-tools.org/doc/2436b5/>); IRMCT, *Prosecutor v. Serushago*, Presidency, Decision of the President on Early Release of Omar Serushago, 13 December 2012, MICT-12-28-ES, para. 31 (<https://www.legal-tools.org/doc/fcc017/>).

³ 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/>).

⁴ ICTY, *Prosecutor v. Blaškić*, Appeals Chamber, Order of the President on the Application for Early Release of Tihomir Blaskic, 29 July 2004, IT-95-14-A, para. 4 (<https://www.legal-tools.org/doc/186449/>).

On the other hand, at the ICTY, also “good physical and mental health” served as a criterion favouring early release.⁵

Cross-references:

Articles 77, 103, 104 and 110
Rule 224.

Doctrine:

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⁵ ICTY, *Prosecutor v. Dragan Kolundzija*, Presidency, Order of the President on Early Release of Dragan Kolundzija, 5 December 2001, IT-95-8 (<https://www.legal-tools.org/doc/89df34/>); *Prosecutor v. Milojica Kos*, Appeals Chamber, Order of the President for the Early Release of Milojica Kos, 30 July 2002, IT-98-30/1-A (<https://www.legal-tools.org/doc/76322d/>); *Prosecutor v. Mucic*, Presidency, Order of the President in Response to Zdravako Mucic’s Request for Early Release, 9 July 2003, IT-96-21 (<https://www.legal-tools.org/doc/ca7a6b/>); *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/>); “lack of psychiatric problems”; *Prosecutor v. Zaric*, Presidency, Order of the President on the Application for Early Release of Simo Zaric, 21 January 2004, IT-95-9 (<https://www.legal-tools.org/doc/34od3e/>).

- University Chicago International Law Review, 2010, vol. 8, no. 13, p. 4 (<https://www.legal-tools.org/doc/ce6f7f/>).
7. Christoph Safferling, *Towards an International Criminal Procedure*, Oxford University Press, 2001, pp. 363–365 (<https://www.legal-tools.org/doc/890965/>).
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Rule 224

General Remarks:

Rule 224 regulates the procedure to be followed when reviewing the sentence for a possible reduction (Article 110(3), (5) of the ICC Statute). It is important to note that unlike at the ad hoc tribunals or at the SCSL, the ICC Statute does not provide for any remission, commutation of sentence, or pardon procedures, but only for sentence reduction. That means that sentence remissions or pardon procedures available under domestic law will not be at the disposal of ICC convicts, which may result in a discriminatory treatment of ICC convicts *vis-à-vis* other prisoners in the same prison.¹ Three judges appointed by the Appeals Chamber shall review the sentence. When the sentence is reviewed for the first time, that is, after two thirds have been served of a fixed-term prison sentence or 25 years in case of a life sentence (cf. Article 110(3) ICC Statute), a hearing or submission of written observations is provided for all parties, that is, the accused, the Prosecutor, the State of Enforcement, and, “to the extent possible”, the victims or their representatives. Moreover, in case a sentence reduction is found inappropriate, the sentence must again be reviewed on a regular basis (normally three years, cf. Article 110(5) ICC Statute), and in this second review, the appointed judges will invite written representations from the same parties, with the option to hold a hearing. The Rule thus provides a much larger participation in the review process than this was the case at the *ad hoc* tribunals, as it foresees a joint decision of three judges, and a hearing with all participants of the trial. Regarding the written observations of the diverse parties as well as the taking of the decision and its communication to the concerned parties, no time limits are given. Presumably, these will be regulated in a separate Practice Direction.

Doctrine: For the bibliography, see the final comment on Rule 224.

Author: Anna Oehmichen.

¹ Cf. on this question, IRMCT, *Prosecutor v. Stakić*, Presidency, Decision of the President on Sentence Remission of Milomir Stakić, 17 March 2014, MICT-13-60-ES, para. 18, with further references (<https://www.legal-tools.org/doc/noucwi/>).

Rule 224(1)

1. For the application of article 110, paragraph 3, three judges of the Appeals Chamber appointed by that Chamber shall conduct a hearing, unless they decide otherwise in a particular case, for exceptional reasons. The hearing shall be conducted with the sentenced person, who may be assisted by his or her counsel, with interpretation, as may be required. Those three judges shall invite the Prosecutor, the State of enforcement of any penalty under article 77 or any reparation order pursuant to article 75 and, to the extent possible, the victims or their legal representatives who participated in the proceedings, to participate in the hearing or to submit written observations. Under exceptional circumstances, this hearing may be conducted by way of a video-conference or in the State of enforcement by a judge delegated by the Appeals Chamber.

Three judges of the Appeals Chamber appointed by that Chamber shall be in charge of the hearing and the subsequent decision on sentence reduction (cf. Rule 223(1)), on behalf of the Court (cf. Article 110 ICC Statute). This is an important difference to the ICTY, the ICTR and the SCSL, where it was the President of the Tribunal (or now of the Mechanism) who decided upon early release or commutation of sentence, in consultation with the judges (cf. Article 28 ICTY Statute, Rule 124 ICTY RPE; Article 27 ICTR Statute, Rule 125 ICTR RPE and Article 26 IRMCT Statute, Rule 150 IRMCT RPE; Article 23 SCSL Statute and Rule 124 SCSL RPE). This choice of competence indicates that the Rome Statute qualifies the reduction of sentence as a substantive matter rather than a pure issue of enforcement.¹ This qualification is in line with the dogmatic nature of sentence reduction as a substantive decision as opposed to early release or pardon as a procedural question (cf. Commentary on Article 110 ICC Statute, General Remarks).

For the hearing, the judges will, unlike at the previous international tribunals, invite several parties, including the Prosecutor, the national authorities of the Enforcement State and even victims, to participate in this hearing. At the SCSL and the ad hoc tribunals, the hearing is exclusively carried out for the convicted person, based on information and reports previously provided by the relevant authorities of the enforcing state and of the OTP as

¹ 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, p. 840 (<https://www.legal-tools.org/doc/4a0851/>).

requested by the Registrar, and it is at the discretion of the President whether he hears the convicted person through written submissions or via video- or telephone link.²

The provision clarifies that as a general rule, preference shall be given to an oral hearing. Only in exceptional circumstances, “for exceptional reasons” and “in a particular case”, may the judges decide not to conduct a hearing. The wording suggests that in such a case, their decision not to conduct a hearing should be reasoned. Alternatively, they may conduct the hearing via video conference or in the state of enforcement by a judge delegated by the Appeals Chamber (second sentence). While the convicted person, assisted by his or her counsel and, if necessary, translator, will participate in the hearing, the other parties shall only be invited to participate, and they can choose to do so via written submissions. This is an important distinction from the ICTY, where the Practice Direction provides for a hearing either through written submissions or, alternatively, by video- or telephone link (ICTY, Practice Direction on Pardon, Commutation of Sentence, and Early Release, Section 5; IRMCT, Practice Direction on Pardon, Commutation of Sentence, and Early Release, Section 6). In practice, the ICTY generally prefers written submissions and seems to interpret the Practice Direction as such that oral hearings are only considered as an alternative to written submissions insofar as the latter ones do not suffice.³ The participation of victims in this hearing shows again the prominent role victims play at the ICC. A similar approach was also taken by the SCSL, which provides for information of victims and

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, Sections 4–6 (‘IRMCT, Practice Direction on Pardon, Commutation of Sentence, and Early Release’) (<https://www.legal-tools.org/doc/244989/>), or 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, Sections 3–5 (‘ICTY, Practice Direction on Pardon, Commutation of Sentence, and Early Release’) (<https://www.legal-tools.org/doc/d5df60/>); similarly at the SCSL, “Practice Direction on the Conditional Early Release of Persons convicted by the Special Court for Sierra Leone”, 1 October 2013, Section 6(D) (‘SCSL, Practice Direction on Early Release’) (<https://www.legal-tools.org/doc/0260c4/>).

³ Cf., for example, ICTY, *Prosecutor v. Krajišnik*, Presidency, Decision of President on Early Release of Momcilo Krajišnik, 11 July 2011, IT-00-39-ES, para. 40–42 (<https://www.legal-tools.org/doc/59e0a2/>); ICTY, *Prosecutor v. Krajišnik*, Presidency, Decision of the President on Early Release of Momcilo Krajišnik, 2 July 2013, IT-00-39-ES, para. 30–32 (<https://www.legal-tools.org/doc/6842fd/>).

witnesses on the pending decision of conditional release and provides for detailed communications and consideration of the victims' and witnesses' opinion on release (cf., for example, SCSL, Practice Direction on Early Release, Sections 5(E), (F), 8(D)). The United States' system of Parole hearings may have served as a model. Under US law, victims are notified of any parole hearing and given the opportunity to participate, either in person or per video or via written statement.⁴ However, it is very questionable whether the participation of victims in the hearing on review of sentences will be fruitful. They will in most cases not be favourable for an early release. By giving them a platform and allowing for their written observations, they are given the impression that their opinion at this stage matters. If this is indeed the case and their opinion is taken into account by the deciding judges, it will be rather unlikely that any victim will speak in favour of the early release of his or her perpetrator, so that the fact that the victim is being heard already will impede the possibility of sentence reduction in most cases. If, on the other hand, their submission will not be decisive and sentence reduction will be granted in spite of the victims' opposing viewpoint, the victims will not only be re-traumatised by having to go through the past once more and facing their perpetrator, but in addition to this, they will also be frustrated as their submission will be to no avail.⁵

Doctrine: For the bibliography, see the final comment on Rule 224.

Author: Anna Oehmichen.

⁴ For details, cf. United States, Department of Justice, "Parole Hearings" (available on its web site).

⁵ Cf. also 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 (<https://www.legal-tools.org/doc/3f10e0/>), who finds it regrettable that victims can comment on a possible reduction of sentences.

Rule 224(2)

2. The same three judges shall communicate the decision and the reasons for it to all those who participated in the review proceedings as soon as possible.

Para. 2 provides for a transparent procedure with respect to the parties who participated in the review proceedings. These parties include the sentenced person and his or her counsel, the Prosecutor, the relevant authorities of the enforcing state, as well as potentially the victims (to the extent to which their participation in the hearing was possible). However, it is not clear whether the decision shall, additionally, be made public.¹

No deadline is specified, neither for the rendering of the decision nor for its communication to the parties. In view of the purpose of the law to provide for a review of the sentence after completion of two thirds of the sentence (or 25 years in case of a life sentence), it is clear that the decision must, in any event, be rendered prior the two-third limit or the 25-years-limit have elapsed. The seven-day-period provided for at the *ad hoc* tribunals (cf. IRMCT, Practice Direction on Pardon, Commutation of Sentence, and Early Release, Section 9 or ICTY, Practice Direction on Pardon, Commutation of Sentence, and Early Release, Section 8) may serve as a guideline.

“The decision and the reasons for it” shall be communicated, that is, the decision on whether a sentence reduction was granted or not, and the reasons motivating this decision. There are no further legal requirements as to the substance of the decision. However, considering the SCSL’s Practice Direction on the Conditional Early Release of Persons convicted by the Special Court for Sierra Leone provides in detail the circumstances that the reasoned opinion shall evaluate (pursuant to Sect. 8(D) these include, for example, the safety of the community if the Convicted Person is released, the

¹ As is generally the case at the *ad hoc* tribunals, cf. 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, Section 9 (‘IRMCT, Practice Direction on Pardon, Commutation of Sentence, and Early Release’) (<https://www.legal-tools.org/doc/244989/>), or 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, Section 8 (‘ICTY, Practice Direction on Pardon, Commutation of Sentence, and Early Release’) (<https://www.legal-tools.org/doc/d5df60/>); similarly at the SCSL, “Practice Direction on the Conditional Early Release of Persons convicted by the Special Court for Sierra Leone”, 1 October 2013, Section 9(A) (<https://www.legal-tools.org/doc/0260c4/>).

views and concerns of victims, witnesses and their families), we may expect that the ICC will provide further guidance as to the contents in a future Practice Direction. Moreover, no reference is made to communication of the destination the sentenced person will travel to upon release, or any other relevant information that might be relevant for witnesses (cf., for example, IRMCT, Practice Direction on Pardon, Commutation of Sentence, and Early Release, Section 14, which provides for information on these questions for those persons who testified against the convicted person during his or her trial). It is likely that a similar provision will be adopted by the ICC in a future Practice Direction. However, until then, the wording of Rule 224 must be considered exhaustive and thus does not permit a communication in this regard.

Doctrine: For the bibliography, see the final comment on Rule 224.

Author: Anna Oehmichen.

Rule 224(3)

3. For the application of article 110, paragraph 5, three judges of the Appeals Chamber appointed by that Chamber shall review the question of reduction of sentence every three years, unless it establishes a shorter interval in its decision taken pursuant to article 110, paragraph 3. In case of a significant change in circumstances, those three judges may permit the sentenced person to apply for a review within the three-year period or such shorter period as may have been set by the three judges.

Article 110(5) ICC Statute provides for a subsequent review of the sentence in case a reduction is not granted at the initial review pursuant to Article 110(3) ICC Statute. As in the initial review decision, three judges of and appointed by the Appeals Chamber shall review the question of sentence reduction. Unlike at the ad hoc tribunals, where the President shall specify the date on which the convicted person would next become eligible for early release in his first review decision,¹ as a general rule, the interval for a subsequent review will be three years (although the judges, in the course of their first review decision, are free to establish a shorter period, and, “in case of a significant change in circumstances”, the sentenced person may apply for another review at an earlier stage). At the SCSL, the President may also specify the date in his first review decision denying conditional release, however, without being obliged to do so. The provision of the ICC is thus clearer and provides more legal certainty to the sentenced person than the SCSL, ICTR or ICTY regulations.

“Significant change in circumstances” relates to one of the criteria to be taken into account for the decision on sentence reduction pursuant to Rule 223 RPE, as the same term is used in Article 110(4)(c) of the ICC Statute, referring to that Rule. For instance, the prisoner may show a genuine dissociation from his crime, which before was not demonstrated, or he may have new prospects of a place to live and work for upon release. It is also

¹ Cf. 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, Section 9 (<https://www.legal-tools.org/doc/d5df60/>); 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 Section 10 (<https://www.legal-tools.org/doc/244989/>).

possible that socio-political conditions of the home country of the sentenced person have improved to an extent that make it less likely that a release would cause social instability. However, in practice, the most likely change of circumstances will consist in a deterioration of the convict's health status which will make external medical treatment mandatory.

Doctrine: For the bibliography, see the final comment on Rule 224.

Author: Anna Oehmichen.

Rule 224(4)

4. For any review under article 110, paragraph 5, three judges of the Appeals Chamber appointed by that Chamber shall invite written representations from the sentenced person or his or her counsel, the Prosecutor, the State of enforcement of any penalty under article 77 and any reparation order pursuant to article 75 and, to the extent possible, the victims or their legal representatives who participated in the proceedings. The three judges may also decide to hold a hearing.

As is the case for the first review decision under Art. 110(3) Rome Statute, three judges of the Appeals Chamber and appointed by the latter shall be competent to decide on a sentence reduction (see note on sub-paragraph 1). Unlike for the first review of the sentence, in any subsequent review the judges shall, in principle, decide on basis of only written representations, unless they decide to hold an oral hearing. In this case, the oral hearing is optional, and, unlike in the case of the first review decision where only exceptional reasons may justify omitting the hearing, in any subsequent review decision, invitation for written representation wholly suffices, and in case the judges do decide to hold a hearing, they obviously do not need to reason this decision.

The parties who may submit their representations regarding potential sentence reduction are the same as in the case of the first review on sentence reduction (cf. comment on sub-paragraph 1).

Doctrine: For the bibliography, see the final comment on Rule 224.

Author: Anna Oehmichen.

Rule 224(5)

5. The decision and the reasons for it shall be communicated to all those who participated in the review proceedings as soon as possible.

As is the case for the first review decision, any subsequent review decision shall also be communicated to those who participated in the review proceedings. The explanations provided for sub-paragraph 2 apply *mutatis mutandis* (see comment on sub-paragraph 2).

Cross-references:

Articles 77, 103, 104, 110.
Rule 223.

Doctrine:

1. Hiram Abtahi and Steven Arrig Koh, “The Emerging Enforcement Practice of the International Criminal Court”, in *Cornell International Law Journal*, 2012, vol. 45, no 1 (<https://www.legal-tools.org/doc/2217b4/>).
2. M. Cherif Bassiouni, *International Criminal Law*, 3rd ed. vol. 3, *International Enforcement*, Martinus Nijhoff Publishers, Leiden 2008, pp. 603–611 (<https://www.legal-tools.org/doc/65ab0e/>).
3. Klaus Hoffmann, “Some Remarks on the Enforcement of International Sentences in Light of the Galic case at the ICTY”, in *Zeitschrift für Internationale Strafrechtsdogmatik (ZIS)*, 2011, vol. 10, pp. 838–842 (<https://www.legal-tools.org/doc/4a0851/>).
4. 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 (<https://www.legal-tools.org/doc/32ce20/>).
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 (<https://www.legal-tools.org/doc/01addc/>).
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. 8, no. 13, p. 4 (<https://www.legal-tools.org/doc/ce6f7f/>).

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7. Christoph Safferling, *Towards an International Criminal Procedure*, Oxford University Press, 2001, pp. 363–365 (<https://www.legal-tools.org/doc/890965/>).
 8. Damien Scalia, “Art. 110”, in Paul De Hert, Mathias Holvoet, Jean Flamme and Olivia Struyven (eds.), *Code of International Criminal Law and Procedure*, Larcier Ghent, Brussels, 2013, pp. 492–493 (<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 on the Rome Statute*, 2nd. ed., Oxford University Press, 2016 (<https://www.legal-tools.org/doc/b7432e/>).
 11. 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. 2173–2186 (<https://www.legal-tools.org/doc/040751/>).
 12. Gerard A. M. Strijards and Robert O. Harmsen, “Article 110, in Triffterer and Ambos (eds.), 2016, pp. 2210–2213.
 13. Van Kempen, Piet Hein, “Early release in the context of international human rights law: Commentary”, in André Klip and Göran Sluiter, *Annotated Leading Cases of International Tribunals. The International Tribunal for Rwanda 2006–2007*, vol. 25, Intersentia, Antwerp/Oxford/Portland, 2010, pp. 954–962 (<https://www.legal-tools.org/doc/993b3a/>).
 14. 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/>).

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*Section VI. Escape***Rule 225*****General Remarks:***

The entire wording of Rule 225 is repeated in seven out of 12 Enforcement Agreements that have yet entered into force, namely in the Agreements between the Court and Australia,¹ Austria,² Belgium,³ Denmark,⁴ Finland,⁵ Georgia,⁶ Mali,⁷ Norway,⁸ Serbia,⁹ Slovenia¹⁰ and Sweden.¹¹ The same is the case for the two *ad hoc* Enforcement Agreements with the Democratic

¹ Agreement between the Argentine Republic and the International Criminal Court on the Enforcement of Sentences of the International Criminal Court, 18 April 2017, ICC-PRES/19-01-17, Articles 8, 11(3) (<https://www.legal-tools.org/doc/asov9b/>).

² Agreement between the International Criminal Court and Austria on the enforcement of sentences of the International Criminal Court, 27 October 2005, ICC-PRES/01-01-05, Articles 12, 18(3) (<https://www.legal-tools.org/doc/0f5f9e/>).

³ 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 2014, ICC-PRES/16-03-14, Articles 12, 18(3) (<https://www.legal-tools.org/doc/3e99c6/>).

⁴ 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, Articles 13, 19(3) (<https://www.legal-tools.org/doc/cc1900/>).

⁵ 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 April 2011, ICC-PRES/07-01-11, Articles 12, 18(3) (<https://www.legal-tools.org/doc/a1972d/>).

⁶ Agreement between the Government of Georgia and the International Criminal Court on the Enforcement of Sentences of the International Criminal Court, 24 January 2019, ICC-PRES/27-01-19, Articles 8, 11(3) (<https://www.legal-tools.org/doc/bcl3pz/>).

⁷ Accord entre la Cour pénale internationale et le Gouvernement de la République du Mali concernant l'exécution des peines prononcées par la Cour, 13 January 2012, ICC-PRES/11-01-12, Articles 7, 8(3) (<https://www.legal-tools.org/doc/e9891a/>).

⁸ Agreement between the Kingdom of Norway and the International Criminal Court on the Enforcement of Sentences of the International Criminal Court, Norway, 6 August 2016, ICC-PRES/18-02-16, Articles 11, 12(2), 17(3) (<https://www.legal-tools.org/doc/3vdl75/>).

⁹ 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, Articles 12, 18(3) (<https://www.legal-tools.org/doc/42dca5/>).

¹⁰ Agreement between the Republic of Slovenia and the International Criminal Court on the Enforcement of Sentences of the International Criminal Court, 7 December 2018, ICC-PRES/28-01-22, Articles 8, 12(3) (<https://www.legal-tools.org/doc/a4o31r/>).

¹¹ Agreement between the Government of Sweden and the International Criminal Court on the Enforcement of Sentences of the International Criminal Court, 24 April 2017, ICC-PRES/20-02-17, Articles 8, 11(3) (<https://www.legal-tools.org/doc/98f0zs/>).

Republic of the Congo for Thomas Lubanga Dyilo¹² and Germain Katanga.¹³ The Enforcement Agreement with the United Kingdom only stipulates an obligation of the UK to notify the Registrar in writing and to proceed in accordance with Art. 111 and repeats sub-rule 2 sentence 3 on the bearing of costs.¹⁴ As the United Kingdom is a State Party and therefore bound by the entire content of Rule 225, this deviation from the other Agreements is immaterial.

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

¹² ICC, *Prosecutor v. Lubanga*, Decision designating a State of enforcement, Annex, 8 December 2015, ICC-01/04-01/06-3185-Anx, Article 8 (<https://www.legal-tools.org/doc/8sabkl/>).

¹³ ICC, *Prosecutor v. Katanga*, Decision designating a State of enforcement, Annex, 8 December 2015, ICC-01/04-01/07-3626-Anx-tENG, Articles 8, 11(3) (<https://www.legal-tools.org/doc/ef5b7e/>).

¹⁴ 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, 8 December 2007, ICC-PRES/04-01-07, Articles 11, 17(2) (<https://www.legal-tools.org/doc/d70d91/>).

Rule 225(1)

1. If the sentenced person has escaped, the State of enforcement shall, as soon as possible, advise the Registrar by any medium capable of delivering a written record. The Presidency shall then proceed in accordance with Part 9.

The State of enforcement is under an obligation to notify the Court as early as possible of the escape. This is a corollary of the Court's comprehensive authority to supervise the enforcement (cf. Articles 105, 110). In addition to the duty to inform the Registrar immediately that is prescribed in Rule 225(1), five out of 12 Enforcement Agreements in force expressly lay down a duty of the State of enforcement to notify the Presidency directly as soon as feasible, namely the Agreements between the Court and Austria,¹ Belgium,² Denmark,³ Finland⁴ and Serbia.⁵ It further ensures that the Presidency can initiate proceedings under Part 9 parallel to any action by the State of enforcement. While Article 111 seems to leave it to the discretion of the Presidency whether to act under Part 9, the wording of Rule 225(1) obliges it to do so not only in situations of apparent unwillingness or inability of the State of enforcement.⁶

Doctrine: For the bibliography, see the final comment on Rule 225.

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

¹ Agreement between the International Criminal Court and Austria on the enforcement of sentences of the International Criminal Court, 27 October 2005, ICC-PRES/01-01-05, Article 17(1)(b) (<https://www.legal-tools.org/doc/0f5f9e/>).

² 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 2014, ICC-PRES/16-03-14, Article 9(1)(b) (<https://www.legal-tools.org/doc/3e99c6/>).

³ Agreement between the Kingdom of Denmark and the International Criminal Court on the Enforcement of Sentences of the International Criminal Court, 5 July 2012, ICC-PRES/12-02-12, Article 18(1)(b) (<https://www.legal-tools.org/doc/cc1900/>).

⁴ 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 April 2011, ICC-PRES/07-01-11, Article 17(1)(b) (<https://www.legal-tools.org/doc/a1972d/>).

⁵ 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 17(1)(b) (<https://www.legal-tools.org/doc/42dca5/>).

⁶ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 1428 (<https://www.legal-tools.org/doc/b7432e/>).

Rule 225(2)

2. However, if the State in which the sentenced person is located agrees to surrender him or her to the State of enforcement, pursuant to either international agreements or its national legislation, the State of enforcement shall so advise the Registrar in writing. The person shall be surrendered to the State of enforcement as soon as possible, if necessary in consultation with the Registrar, who shall provide all necessary assistance, including, if necessary, the presentation of requests for transit to the States concerned, in accordance with rule 207. The costs associated with the surrender of the sentenced person shall be borne by the Court if no State assumes responsibility for them.

Rule 225(2) provides guidance on the details of the necessary ‘consultation with the Court’, required by Article 111. The State of enforcement has to inform the Registrar about an agreement of surrender reached with the State where the fugitive is located. This enables the Presidency to exercise its power to transfer the prisoner according to Article 104 if deemed appropriate – Article 111 mentions this option only for the ‘vertical’ surrender directly to the Court. The Registrar will then be able to make any necessary arrangements for the transit of the fugitive in accordance with Rule 207.

The Court will normally bear the costs of the surrender, unless one of the States volunteers to do so.

Doctrine: For the bibliography, see the final comment on Rule 225.

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

Rule 225(3)

3. If the sentenced person is surrendered to the Court pursuant to Part 9, the Court shall transfer him or her to the State of enforcement. Nevertheless, the Presidency may, acting on its own motion or at the request of the Prosecutor or of the initial State of enforcement and in accordance with article 103 and rules 203 to 206, designate another State, including the State to the territory of which the sentenced person has fled.

Sub-rule 3 provides detail on the Court's power to designate the destination of persons surrendered to it under Part 9. There seems to be a preference for the former State of enforcement ("The Court shall transfer him or her to the State of enforcement"), presumably not to aggravate the sentence by relocating the prisoner in a completely different environment during the service of his sentence. However, if the Presidency decides otherwise for predominant reasons (for example, if the escape gives rise to security concerns), it may designate another State of enforcement in accordance with Article 103 and the corresponding Rules. This could be (for logistical reasons) the State where the fugitive is currently located.

Doctrine: For the bibliography, see the final comment on Rule 225.

Authors: Michael Stiel and Carl-Friedrich Stuckenberg.

Rule 225(4)

4. In all cases, the entire period of detention in the territory of the State in which the sentenced person was in custody after his or her escape and, where sub-rule 3 is applicable, the period of detention at the seat of the Court following the surrender of the sentenced person from the State in which he or she was located shall be deducted from the sentence remaining to be served.

The fugitive will benefit from time spent in the custody of the State where he is arrested or at the Court following an escape, which will be deducted from the time remaining to be served of the initial sentence. This approach is completely in line with the idea underlying Article 78(2). This Rule does not affect any penalty imposed for the escape according to applicable national laws.

Cross-references:

Articles 86, 103, 111.

Rules 203, 204, 205, 206.

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. 1757–1821 (<https://www.legal-tools.org/doc/01addc/>).
2. 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/>).
3. Gerard A. M. Strijards and Robert O. Harmsen, “Article 111”, 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. 2212–2213 (<https://www.legal-tools.org/doc/040751/>).

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ISBNs: 978-82-8348-208-9 (print) and 978-82-8348-209-6 (e-book).



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