While the preceding chapter primarily focused on the substantive criminal law provided in the Rome Statute, this chapter describes in detail the procedures to be followed by the International Criminal Court (ICC). This chapter places emphasis on investigations, trial procedures, appeals, penalties, sentencing, amendment of the Statute, funding arrangements and state cooperation with the ICC. Special attention has been paid to those provisions of the Statute which are most crucial for the proper and effective functioning of the ICC such as independent powers of the Prosecutor to conduct investigations and obligation of states to comply with the orders and requests of the ICC. In addition this chapter highlights the procedural guarantees accorded to the accused during trial and special measures provided in the Statute to protect the interests and well-being of victims and witnesses of crimes.

TRIAL PROCEDURES OF THE COURT

Every stage of the trial to be followed by the ICC starting from the initiation of investigations by the Prosecutor to the enforcement of sentences of punishment has been defined in great detail. It must be noted that the trial procedures of the ICC are a synthesis of different legal systems especially of the Anglo-American common law system and the Western European civil law system. Although the drafters of the Statute basically preferred an adversarial criminal procedure of the common law system, important elements have also been incorporated from the inquisitorial criminal procedure of the civil law system. The end result is the hybrid of the two. It


3 The Nuremberg and Tokyo Tribunals as well as the ICTY and ICTR also adopted the adversarial model. However, in the case of the ICTY and ICTR, the procedural and evidentiary rules were prepared and adopted by the judges. As the judges represented different legal systems of the world, it led to the incorporation of elements taken from different criminal laws into the procedural rules of the ad hoc tribunals. The judges also developed innovative rules to meet the requirements of unique

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is worth noting the differences between the two procedures as their synthesis has important implications with respect to the role and functions of the Prosecutor, submission of evidence, procedural guarantees to the accused, rights of the victims, and powers of the judges to intervene in the conduct of criminal proceedings.

Under the adversarial procedure, trial takes place as a sort of contest between the two adversaries i.e. the prosecutor and the defendant where the judge sits as an impartial observer. The primary task of the prosecution is to establish the guilt of the accused. Focus of the prosecution is on incriminating evidence while paying little regard to exculpatory evidence. At most the duty of the prosecutor extends to providing any exonerating evidence if it is in his possession to the defence. The Prosecutor is not required to actively search for any exonerating evidence. Trial starts with a blank sheet. No evidence is submitted before the judges prior to the trial. This is meant to protect the neutrality of judges and to prevent them from forming opinions before the start of trial. During trial evidence is presented in the form of oral testimonies and exhibits tendered by parties. First chance is given to the prosecution to present its case. Afterwards the defence is required to reply to the charges and to submit its own evidence. In many common law countries jury is the trier of facts. As members of the jury are not experts of criminal law, very strict rules exist for the admissibility of any evidence. Therefore, any evidence whose “prejudicial effect” may outweigh its probative value is not put before “lay fact-finders.” In fact it is the duty of the sitting judge to allow only that evidence whose reliability is not doubtful. However, judges are not required to actively participate in the criminal proceedings. Their prime responsibility concerns with maintaining fair balance between the two adversaries. Trials usually take much longer time. Nevertheless plea bargaining is allowed whereby the prosecutor and the accused may enter into an agreement as regards to the criminal charges and severity of punishment.

In the inquisitorial procedure, judicial officials, generally known as investigating magistrates, are entrusted with the task of investigating and preparing the case. Here the magistrates collect evidence and question the witnesses. They are required to perform their duty with impartiality and neutrality by paying equal regard to both the inculpatory and exculpatory evidence. Here the emphasis from the very beginning is

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on the determination of truth. Apart from proving guilt, establishment of innocence is of equal importance. The evidence and testimonies collected by the investigating magistrates are submitted to the court before the commencement of the trial. Indeed the dossier submitted by the investigating magistrate before the trial court form the basis on which further proceedings take place. Trial starts with judges having knowledge of the case beforehand. At this stage the trial becomes more like that of an adversarial model. However, the judges play a more pro-active role. They may ask for additional evidence and cross-examine witnesses themselves. All sorts of evidence are admissible as well qualified and experienced trial judges are required to assess the probative value of such evidence. Here witnesses do not belong to any party. They testify as “witnesses of justice.” Trials are generally completed in less time. Unlike many common law countries, plea bargaining is not permitted under the inquisitorial system.

Although the Rome Statute basically adopts an adversarial approach as the Prosecutor has been made responsible for investigations and leading prosecutions before the ICC, the judges of the ICC have been granted enough power to intervene during proceedings. Moreover, the Prosecutor has to act both as an adversary during trial and as an “administrator of justice.” It is his duty to place equal emphasis on incriminating as well as exculpatory evidence. For conducting international criminal trials, certain elements from inquisitorial approach are imperative because a fair balance between the prosecutor and the defence is a rare possibility. In comparison to the prosecutor, the defence is less likely to have much access to evidence and witnesses. Further, the defence is also unlikely to receive much assistance from other states in preparing its case.

INVESTIGATION AND PRE-TRIAL PROCEDURE

Initiation of Proceedings

Under the Rome Statute, the Prosecutor has been invested with the power to initiate proceedings. Both the Security Council and the state party are required to refer situations to the Prosecutor. In addition, the Prosecutor may initiate action on its

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5 See, William A. Schabas, An Introduction to the International Criminal Court (Cambridge, 2001), pp. 95-96
own. It is understood that the power of the Prosecutor to start investigations *proprio motu* is likely to be the most important route to activate the ICC's mechanism. For political reasons states parties may show reluctance in referring situations to the Prosecutor. The Security Council, on the other hand, may be sharply divided with the additional problem of use of veto by any permanent member in referring situations. Chances are that states parties as well as non-states parties and others like the NGOs and human rights groups may try to influence the Prosecutor in taking initiative.

To prevent abuse of power by the Prosecutor, his decision to initiate investigation on his own is subject to confirmation by the Pre-Trial Chamber. The Prosecutor must seek authorization from the Pre-Trial Chamber if he thinks that there is "reasonable basis" to proceed with an investigation. In this regard victims are also allowed to "make representations" to the Pre-Trial Chamber. There is strong possibility that victims will support the Prosecutor. After examining the request if the Pre-Trial Chamber concludes that there is a "reasonable basis" to proceed and the case appears to fall within the ICC's jurisdiction it has to authorize the commencement of the investigation. The refusal by the Pre-Trial Chamber does not bar the prosecutor to make another request on the basis of new evidence or facts. The discretionary power of the prosecutor of the ICC in deciding whether or not to prosecute is more than that of his domestic counterparts. He will have to select more appropriate ones from a variety of cases before him. And in all probability he will be using same discretionary powers in selecting offenders for prosecution.

**Preliminary Rulings regarding Admissibility**

Along with investigations, the procedures of the ICC require settlement of issues related to jurisdiction and admissibility of a case in accordance with the principle of complementarity. When a state party has referred a situation or when the Prosecutor has initiated investigation on his own, the Prosecutor has to notify all states parties

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6 Art 13, Rome Statute
7 With respect to referral of situations by the state party, political considerations might take precedence in triggering the ICC's machinery. It would be more so if the situation involves other states than the referring state. States often show great caution in denouncing human rights violations in other countries. To avoid diplomatic embarrassment, reluctant states might push the prosecutor to handle the situation on his own.
8 Art 15(3), Rome Statute; See also Rule 50, Procedure for authorization by the Pre-Trial Chamber of the commencement of the investigation. Rules of Procedure and Evidence.
9 This decision of the Pre-Trial Chamber is "without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case." Art. 15(4), Rome Statute
10 Art 15(5), Rome Statute

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and those states which would “normally exercise jurisdiction over the crimes.” The Prosecutor may notify such states on a confidential basis. Moreover, the Prosecutor may conceal some contents of the information if he thinks that it is necessary to protect persons, prevent destruction of evidence or absconding of suspects.11 States have one month after the receipt of the notice to inform the ICC that they have investigated or are investigating the crimes within their jurisdiction. Pursuant to request of the state, the Prosecutor is required to defer to the state’s investigation of suspects. Therefore, the principle of complementarity extends even to those states which are not parties to the Rome Statute. However, the Prosecutor is entitled to seek authorization from the Pre-Trial Chamber to take investigation in his own hands. If the Pre-Trial Chamber allows, the Prosecutor may initiate proceedings.12 Any decision of the Pre-Trial Chamber on whether or not the investigation should be deferred to a state at this stage is referred to as “preliminary rulings regarding admissibility.” Both the state concerned and the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber.

Deferral of investigation to a state is subject to “review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State’s unwillingness or inability genuinely to carry out the investigation.” The Prosecutor may also request the concerned state to regularly inform him about the progress of its investigations and prosecutions. He can also take permission from the Pre-Trial Chamber for special measures to preserve evidence “where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available.”13

Challenges to the Jurisdiction of the Court and the Admissibility of a Case
Apart from the above mentioned preliminary rulings regarding admissibility, there is another provision to determine the admissibility of cases. Once a case has been brought before the ICC Article 19 allows challenges to the jurisdiction of the ICC and to the admissibility of a case. Article 19 is equally applicable to all the cases brought before the ICC, even to those situations which are referred to it by the Security Council. First of all, the ICC must satisfy itself on its own whether it has jurisdiction

11 Art 18(1), Rome Statute
12 Here it is the Prosecutor who asks for a ruling on admissibility. Art. 18(2), Rome Statute
13 Art 18 (3), (4), (5) and (6), Rome Statute
over the case.\textsuperscript{14} Afterwards challenges to the admissibility of a case are allowed. A challenge can be made by the accused, the state having jurisdiction over a case,\textsuperscript{15} or the state whose consent is required in accordance with the preconditions to the exercise of jurisdiction.\textsuperscript{16} The Prosecutor is also allowed to seek a ruling from the Court concerning a question of jurisdiction or admissibility. In this respect, those who have referred the situation as well as victims of crimes are also entitled to submit observations to the ICC.\textsuperscript{17} The ICC may also, on its own, determine the admissibility of a case.\textsuperscript{18} While challenges to the jurisdiction of the Court can be made on different grounds such as whether or not crimes fall under the purview of the ICC, non-retroactivity \textit{ratione personae}, controversies related to territorial state or state of nationality of the accused, the age of the accused at the time of commission of crimes; challenges to the admissibility of a case have to be on the grounds which are clearly referred to in the provision on issues of admissibility.\textsuperscript{19}

Challenges can be made only once by any person or state. Such condition is not applicable for the Prosecutor. And any challenge must take place before or at the commencement of the trial. Only under exceptional circumstances, the ICC may grant leave for a challenge to be brought more than once or at a later stage of the trial.\textsuperscript{20} Challenges prior to the confirmation of the charges must be referred to the Pre-Trial Chamber, and challenges after the confirmation of the charges must be referred to the Trial Chamber.\textsuperscript{21} When a challenge is made by a state, the Prosecutor is required to suspend the investigation till a final ruling by the ICC.\textsuperscript{22}

Pending a ruling by the ICC, the Prosecutor may ask for permission to take necessary investigative steps to preserve evidence similar to those provided prior to preliminary rulings regarding admissibility,\textsuperscript{23} "to take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the

\textsuperscript{14} Art 19(1), Rome Statute
\textsuperscript{15} The state can challenge on the ground that it has investigated or is investigating the case.
\textsuperscript{16} I.e. the territorial state or the state of nationality of the accused. Art. 19(2), Rome Statute
\textsuperscript{17} Art 19(3), Rome Statute
\textsuperscript{18} Art 19(1), Rome Statute
\textsuperscript{19} See Art 17, Rome Statute. This article deals with principle of complementarity, rights of states to investigate or prosecute a case, assessment of unwillingness or inability of a state, principle of \textit{ne bis in idem} (protection against double jeopardy) and gravity of the case. See Chapter IV
\textsuperscript{20} Such challenges at a later stage have to be based on Art. 17(1) (c), which declares a case inadmissible when the accused has already been tried for conduct which is the subject of the complaint. This Article further directs the ICC to take into account Art. 20 (3) on \textit{ne bis in idem}.
\textsuperscript{21} Art. 19 (4) to (6), Rome Statute
\textsuperscript{22} Art. 19(7), Rome Statute
\textsuperscript{23} That is "where there is a unique opportunity to obtain important evidence or there is significant risk that such evidence may not be subsequently available."
making of the challenge” and “in cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest.” 24

If the court declares a case inadmissible, the Prosecutor is entitled to submit another request for a review of the Court’s decision in the light of new developments “which negate the basis on which the case had previously been found inadmissible.” If the Prosecutor has decided to defer an investigation to a state, he can still request the concerned state to provide information on the proceedings. However, that information has to be kept confidential if that state so desires. 25

Investigation
Investigation is the responsibility of the Prosecutor. Before initiating an investigation, the Prosecutor is required to carefully evaluate the information in his possession or which he has received from different sources about the commission of crimes within the ICC’s jurisdiction. He may seek additional information from states, organs of the UN, intergovernmental organizations or NGOs, or any other reliable source. 26 Taking into account the available information he is required to determine whether there is a “reasonable basis” to proceed.

[The Prosecutor shall consider whether:

(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;

(b) The case is or would be admissible...; and

(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.” 27

The last condition provides an option to the Prosecutor to consider other non-judicial accountability measures like truth commissions. Taking into account the nature of crisis resulting from any ongoing conflict, the Prosecutor may also conclude that investigations would not be appropriate. Amnesty deals or negotiations between different warring factions to put an end to a conflict, or other measures which are particularly aimed at promoting the interests of justice are likely to influence the decision of the Prosecutor before initiating investigations. The possibility remains that

24 Art. 19(8), Rome Statute
25 Art. 19 (10) and (11), Rome Statute
26 Art 15(1) and (2), Rome Statute
27 Art 53(1), Rome Statute
in a number of situations the Prosecutor may come to the conclusion that “an investigation would not serve the interests of justice.”28 Once the investigation has started, the Prosecutor may still arrive at similar conclusions. The Prosecutor may decide not to initiate prosecution because:

(a) There is not a sufficient legal or factual basis to seek a warrant or summons...;
(b) The case is inadmissible under article 17; or
(c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age of infirmity of the alleged perpetrator, and his or her role in the alleged crime.29

If the Prosecutor has decided not to proceed, he must inform the Pre-Trial Chamber and the state or the Security Council depending on which has referred the situation. It appears that little can be done once the Prosecutor has taken a decision in this regard. Although at the request of the state or the Security Council, the Pre-Trial Chamber may review the decision of the Prosecutor, it can only “request the Prosecutor to reconsider that decision.” Ultimately the Prosecutor has the final say in taking a decision on not to proceed. However, if the Prosecutor’s decision is based on the ground of “interests of justice” [as provided in Article 53(1)(c) and (2)(c)], such a decision “shall be effective only if confirmed by the Pre-Trial Chamber.” It does not mean that the Prosecutor is under obligation to prosecute. He may again conduct investigation and may reach the same conclusion or he may invoke other grounds for not initiating prosecution. Nevertheless, the Prosecutor is always free to reconsider his own decision with respect to any investigation or prosecution in the light of “new facts or information.”30

The Rome Statute provides clear instructions regarding the duties and powers of the Prosecutor with respect to investigations. It provides that “in order to establish the truth,” the Prosecutor is required to “extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under [the] Statute, and, in doing so, investigate incriminating and exonerating

29 Art 53(2), Rome Statute. Art 53(1) and (2) must be read in conjunction with Art 16 on deferral of investigation or prosecution by the Security Council and Art 17 on issues of admissibility. As the Rome Statute is silent on matters such as amnesty or truth and reconciliation commissions, these provisions are likely to address such issues arising before the ICC.
30 Art 53 (3) and (4), Rome Statute
circumstances equally.”31 In this respect, the Prosecutor will be acting more like an impartial truth seeker similar to investigating magistrate of the civil law system.

The primary investigative functions of the Prosecutor include collection and examination of evidence, and questioning of suspects, victims and witnesses. The Prosecutor can seek cooperation of any state (whether or not a party to the Statute) or intergovernmental organization. In order to facilitate such cooperation, he is also entitled to enter into agreements or arrangements. He may also agree to non-disclosure of documents or information which are obtained “on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents.” The Statute empowers the prosecutor to take all the necessary measures “to ensure the confidentiality of information, the protection of any person or the preservation of evidence.”32

The Pre-Trial Chamber has been assigned an important role at the investigative stage. The Pre-Trial Chamber is authorized, at the request of the prosecutor, to take special measures in relation to a unique investigative opportunity to take testimony from a witness or to collect evidence when there is a risk that the same may not be available in future.33 The Prosecutor is also required to provide the relevant information to the suspect or to any person who has appeared in response to a summons, unless the Pre-Trial Chamber decides otherwise.34

Other functions of the Pre-Trial Chamber include issuance of orders and warrants as requested by the Prosecutor for the purposes of an investigation; upon request assistance to the accused or a person who has appeared pursuant to a summons in the preparation of his defence; protection of the victims, witnesses and accused; preservation of evidence and protection of national security information.35

It is important to note that the Pre-Trial Chamber may also “authorize the Prosecutor to take specific investigative steps within the territory of a state party without having secured the cooperation of that State” as required under Part 9 on international cooperation and judicial assistance of the Statute. But such authorization must be

31 Art 54(1)(a), Rome Statute
32 Art 54(3), Rome Statute
33 The special measures may include recommendations or orders regarding procedures to be followed, recording of the proceedings, appointment of experts, authorizing counsel to represent the interests of the defence, and the collection and preservation of evidence and the questioning of persons under the observation by a judge.
34 Art. 56(1), (2) and (3), Rome Statute
35 Art. 57(3), Rome Statute
made “whenever possible having regard to the views of the State concerned” and where the Pre-Trial Chamber has determined that “the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation.”

When investigations are under way, the Pre-Trial can issue a warrant of arrest of a person on the application of the prosecutor. The Pre-Trial Chamber is required to examine the application and evidence or other information provided by the Prosecutor to satisfy itself that there are “reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court,” and his arrest appears necessary to ensure his presence at trial, to ensure that he does not obstruct or endanger the investigation, or to prevent him from continuing with the crime. The arrest warrant must contain a “concise statement of the facts which are alleged to constitute those crimes.” The Pre-Trial Chamber can also amend the arrest warrant at the request of the Prosecutor by “modifying or adding to the crimes” which the person is alleged to have committed.

At the request of the Prosecutor the Pre-Trial Chamber can also issue a summons for the person to appear as an alternative to an arrest warrant if it is satisfied that a summons is sufficient to ensure the person’s presence. It may issue the summons “with or without conditions restricting liberty (other than detention) if provided for by national law.”

Upon receiving a request from the ICC for the arrest and surrender of a suspect, a state party is required to take immediate measures to arrest the person in question in accordance with its laws and the provisions mentioned in Part 9 of the Statute on international cooperation and judicial assistance. The person arrested has the right to apply for interim release in the custodial state pending surrender to the ICC. However, the Pre-Trial Chamber must be promptly informed of any request for interim release. In this regard the custodial state has to give full consideration to

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36 Art. 57(3)(d), Rome Statute
37 In the application, the Prosecutor must explain the reason why he thinks the arrest of the person is necessary. Art. 58(2) (e), Rome Statute
38 Art. 58(1), Rome Statute; See also Rule 117, Detention in the Custodial State, Rules of Procedure and Evidence
39 Art. 58(3) (c), Rome Statute
40 Art. 58(6), Rome Statute
41 Art. 58(7), Rome Statute
42 Art. 59(1), Rome Statute
43 The state in whose territory the suspect is found is referred to as custodial state in the Rome Statute. Art. 59(3), Rome Statute
recommendations of the Pre-Trial Chamber that may include measures to prevent the escape of the person. If the person is granted interim release, the Pre-Trial Chamber may demand “period reports” on the status of the release. Once the custodial state has decided to surrender, the person must be delivered to the ICC at the earliest opportunity.\textsuperscript{44}

**Rights of Persons during an Investigation**

Individuals enjoy special rights during investigations under the Statute. The Statute protects rights of persons even if investigations are carried out by national authorities pursuant to orders of the ICC.\textsuperscript{45} No person can be compelled to incriminate himself or to confess guilt. Neither can he be subjected to any form of coercion, threat, torture or any other form of cruel, inhuman or degrading treatment. In addition, no one can be subjected to arbitrary arrest or detention; nor any one can be deprived of his liberty except in accordance with procedures established in the Statute. The accused also has the right to have assistance of an interpreter and translations if he is questioned in a language which he can not fully understand.\textsuperscript{46}

A suspect must be informed about his rights before being questioned by the Prosecutor or by national authorities if they are acting in response to a request by the ICC. A suspect has the right to be informed before being questioned about the charges made against him. He also has the right “to remain silent, without such silence being a consideration in the determination of guilt or innocence.” The person can avail of legal assistance of his own choice. If he does not have legal assistance, the same must be provided to him “where the interests of justice” so require and the assistance must be provided free of cost to one who “does not have sufficient means to pay for it.” Further, the person must be questioned in the presence of counsel unless he voluntarily waives his right to counsel.\textsuperscript{47}

**Initial Proceedings before the Pre-Trial Chamber**

When a suspect is surrendered by the custodial state or when he appears before the ICC voluntarily or in response to a summons, the Pre-Trial Chamber has to ensure

\textsuperscript{44} Art. 59 (5) (6) and (7), Rome Statute
\textsuperscript{45} It is only after the confirmation of charges that the suspect is referred to as the “accused.” At the investigative stage, the suspect is simply referred to as the “person” in the Rome Statute.
\textsuperscript{46} Art. 55(1), Rome Statute
\textsuperscript{47} Art. 55(2), Rome Statute
that he has been informed of the charges against him and of his rights under the Statute. The suspect subject to an arrest warrant may apply for interim release. If the Pre-Trial Chamber considers that the conditions in which warrant of arrest was issued still exist, the suspect has to remain in detention. Otherwise, he has to be released, with or without conditions.\footnote{Art. 60 (1) and (2), Rome Statute}

However, the Pre-Trial Chamber must ensure that an accused “is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor”. Under such circumstances, the accused has to be released. It is also the duty of the Pre-Trial Chamber to review its ruling on the release or detention on a regular basis. Moreover, it can issue an arrest warrant to secure a person’s appearance who has been released earlier.\footnote{Art. 60 (3), (4) and (5), Rome Statute}

**Confirmation of the Charges before Trial**

Within a “reasonable time” after the suspect’s surrender or voluntary appearance, the Pre-Trial Chamber is to hold a hearing to confirm the charges on the basis of which the Prosecutor seeks to initiate trial.\footnote{Art 61(1), Rome Statute. This sort of confirmation hearing is similar to preliminary hearing of the adversarial system in common law countries. It is regarded important to ascertain whether there is a sound basis to find guilt and to protect the rights of the accused from any kind of abuse of power by the Prosecutor.} And “within a reasonable time before the hearing,” the suspect must be provided with a copy of the document containing the charges and he must be informed of the evidence on which the prosecutor intends to rely at the hearing.\footnote{Art 61(3), Rome Statute}

Normally such hearing should be held in the presence of the accused and his counsel. However, the Pre-Trial Chamber may allow hearing in the absence of the accused when he has waived his right to be present or he has “[f]led or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held.”\footnote{Art 61(2), Rome Statute; Rules 121-126, Proceedings with regard to the confirmation of charges under article 61, Rules of Procedure and Evidence. Such ex parte hearing is strictly prohibited under common law systems but is allowed in continental or civil law systems in certain circumstances when sufficient notice has been served to the accused to be present at the hearing.}

As the investigation may not be over before the confirmation hearing, the Prosecutor of the ICC is allowed to amend or withdraw any charges depending upon the result of
investigations. But in such a situation, he is required to serve a “reasonable notice” to the suspect before the hearing of any amendment to charges. If the Prosecutor has decided to withdraw charges, he must clarify the reasons for doing so to the Pre-Trial Chamber.\textsuperscript{53}

At the hearing, the Prosecutor has to support each charge with sufficient evidence. He may solely rely on documentary or summary evidence. At this stage there is no need for him to call the witnesses who are expected to testify at the trial. In turn the suspect may object to the charges or challenge the evidence presented by the Prosecutor. He may present his own evidence. Subsequently, the Pre-Trial Chamber has to determine on the basis of hearing “whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.” It may either confirm or decline to confirm those charges on the basis of evidence. It may also adjourn the hearing and ask the Prosecutor to provide more evidence or conduct further investigation, or amend a charge where evidence indicates commission of a different crime.\textsuperscript{54} These powers of the Pre-Trial Chamber to intervene in the investigations are similar to those provided to the judges in the civil law countries. If the Pre-Trial Chamber has declined to confirm a charge, the Prosecutor may still return requesting the confirmation of the charge on the basis of additional evidence. Moreover, if any charges are not confirmed by the Pre-Trial Chamber, any warrant issued earlier with respect to those charges will “cease to have effect.”\textsuperscript{55}

\textbf{TRIAL}

After the confirmation of the charges, the Presidency of the ICC is required to constitute a Trial Chamber. Thereafter, the conduct of proceedings will be the responsibility of the Trial Chamber.\textsuperscript{56} The trial has to take place at the seat of the ICC, “unless otherwise decided.”\textsuperscript{57} The Hague is the seat of the ICC. “Unless otherwise decided” suggests the ICC may sit elsewhere as well. The Rules of Procedure and Evidence clarify that the ICC may sit in a state other than the host state in a particular

\textsuperscript{53} Art 61(4), Rome Statute
\textsuperscript{54} Art 61 (5), (6) and (7), Rome Statute
\textsuperscript{55} Art 61 (8) and (10), Rome Statute
\textsuperscript{56} The Trial Chamber may also assume functions of the Pre-Trial Chamber according to the requirements of subsequent proceedings. Art. 61 (11), Rome Statute
\textsuperscript{57} Art 62, Rome Statute
case if the “interests of justice” so requires. A change of place may be recommended either by the Prosecutor, the defence or by a majority of the judges. 58

While the confirmation hearing before the Pre-Trial Chamber allows proceedings even in the absence of the suspect, such in absentia proceedings are not allowed during the trial. The accused must be present during the trial. However, the Trial Chamber may remove the accused from the courtroom if he continuously disrupts the proceedings. In such cases, the Trial Chamber has to make special arrangements such as providing means of communication technology to the accused to observe the trial and instruct his counsel from outside the courtroom. 59

Functions and powers of the Trial Chamber as enumerated in the Statute require it to “ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.” It is required to “confer with the parties and adopt such procedures as are necessary” to facilitate a fair trial. It can also call for the disclosure of information, hitherto kept confidential, in advance to enable the parties to prepare for trial. 60

One of the prime functions of the Trial Chamber is to decide on the admissibility or relevance of evidence. 61 During the course of a trial, the Trial Chamber may ask for the attendance and testimony of witnesses and production of documents and other evidence. In doing so, it may take the assistance of states. Apart from evidence already collected prior to or during the trial, the Trial Chamber is entitled to order the production of additional evidence. 62 In addition, it may take measures to protect any confidential information and to protect the accused, witnesses and victims. 63 The Trial Chamber is also required to ensure that a complete and accurate record of the trial is preserved. 64 The trial must be held in public. However, owing to special circumstances certain proceedings can be held in closed session to protect interests of

58 Rule 100, Place of the proceedings, Rules of Procedure and Evidence
59 Such steps are to be taken only in “exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.” Art 63, Rome Statute; Rule 170, Disruption of proceedings, Rules of Procedure and Evidence,
60 Art 64, Rome Statute
61 Art. 64. (9) (a), Rome Statute
62 Under the common law system, judges rarely exercise such power as it is seen to cause imbalance between the two parties at trial. On the other hand, such intervention by judges is regarded normal in the continental or civil law countries.
63 Art. 64 (6), Rome Statute
64 Art 64 (9) (b) and (10), Rome Statute
victims and witnesses or to protect confidential or sensitive information given in evidence.\textsuperscript{65}

At the beginning of the trial, the accused is afforded an opportunity to make an admission of guilt or to plead not guilty.\textsuperscript{66} If an admission of guilt is made by the accused, the Trial Chamber has to determine whether the accused understands the nature and consequences of the admission of guilt, whether the admission is voluntarily made by the accused after consultation with defence counsel and whether such an admission is supported by the facts of the case. Only when the Trial Chamber is satisfied after considering all these factors, it may convict the accused. Otherwise, it has to order for the trial to continue under the ordinary trial procedures. As a precaution, the Statute provides that any understanding between the Prosecutor and the defence regarding the charges, admission of guilt or penalty will not be binding on the ICC.\textsuperscript{67}

\textbf{Evidence and Testimony}

With respect to submission of evidence, international criminal tribunals favour civil law approach whereby all evidence are admissible. Unlike most of the common law countries, the Rome Statute does not prohibit the submission of hearsay or indirect evidence.\textsuperscript{68} Hearsay evidence refers to “information based not on the knowledge of the person giving evidence but on what was heard or based on a document.”\textsuperscript{69} Under the Rome Statute, there are only general guidelines as to the admissibility of any evidence. The parties are required to submit evidence which should be relevant to the case. The judges enjoy fairly broad discretionary powers in determining the probative value of any evidence. The ICC also has the authority to ask for more evidence that, in its view, is necessary for the determination of the truth. As regards to the relevance or admissibility of any evidence, the ICC has to take into account, among others, “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.” The judges will be required to assign weight to different sorts of evidence depending upon their probative value. Furthermore, the ICC does “not require proof of facts of common knowledge

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{65} Art. 64 (7), Rome Statute
\item \textsuperscript{66} Art. 64 (8) (a), Rome Statute
\item \textsuperscript{67} Art. 65 (1) (2) (3) and (5), Rome Statute
\item \textsuperscript{68} Hearsay evidence is not allowed in common law systems because it does not afford an opportunity to the accused to test the evidence through cross-examination. Gray, n.2, p.294
\item \textsuperscript{69} Ibid, p.292
\end{itemize}
\end{footnotesize}
but may take judicial notice of them.” Nevertheless, evidence obtained through violation of internationally recognized human rights is not admissible. This rule is applicable where “(a) the violation casts substantial doubt on the reliability of the evidence; or (b) the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.”\footnote{Art 69 (3), (4), (6) and (7), Rome Statute} This means that any evidence obtained through torture or coercive techniques will not be allowed.

As a general rule, a witness is required to testify at trial in person. However, the ICC may also allow “the giving of \textit{viva voce} (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts.”\footnote{Submission of such evidence must “not be prejudicial to or inconsistent with the rights of the accused.” Art 69 (2), Rome Statute} Before testifying, each witness has to give an undertaking of the truthfulness of the evidence.\footnote{The text of solemn undertaking before testifying reads as: “I solemnly declare that I will speak the truth, the whole truth and nothing but the truth.” Rule 66, \textit{Solemn undertaking}, Rules of Procedure and Evidence} At trial, the presiding judge may give directions regarding the conduct of the proceedings and the giving of testimony.\footnote{Art 64(8), Rome Statute} Otherwise, the Prosecutor and the defence have to decide on the order and manner of the submission of evidence to the Trial Chamber. A witness can be questioned by both the Prosecutor and the defence in order to ascertain his credibility and reliability of his testimony and other relevant matters. The Trial Chamber also has a right to question a witness. The defence has the right to be the last to examine a witness.\footnote{Rule 140, Rules of Procedure and Evidence} Before the closure of evidence, the defence has to be given the opportunity to make closing statements.\footnote{Rule 141(2), Rules of Procedure and Evidence} Some of the evidence e.g. evidence regarding the prior or subsequent sexual conduct of a victim or witness are not allowed.\footnote{Rule 71, Rules of Procedure and Evidence}

The ICC is to “respect and observe privileges on confidentiality.”\footnote{Art 69(5), Rome Statute} Hence, communications made in the context of a professional or confidential relationship such as between a person and his legal counsel or between a person and his doctor or religious clergy are regarded as privileged. Such communications can not be subject to disclosure. Similarly any information, document or evidence in possession of the

\footnotesize{\textit{Notes:}}

\footnotesize{\textsuperscript{70} Art 69 (3), (4), (6) and (7), Rome Statute}

\footnotesize{\textsuperscript{71} Submission of such evidence must “not be prejudicial to or inconsistent with the rights of the accused.” Art 69 (2), Rome Statute}

\footnotesize{\textsuperscript{72} The text of solemn undertaking before testifying reads as: “I solemnly declare that I will speak the truth, the whole truth and nothing but the truth.” Rule 66, \textit{Solemn undertaking}, Rules of Procedure and Evidence}

\footnotesize{\textsuperscript{73} Art 64(8), Rome Statute}

\footnotesize{\textsuperscript{74} Rule 140, Rules of Procedure and Evidence}

\footnotesize{\textsuperscript{75} Rule 141(2), Rules of Procedure and Evidence}

\footnotesize{\textsuperscript{76} Rule 71, Rules of Procedure and Evidence}

\footnotesize{\textsuperscript{77} Art 69(5), Rome Statute}
International Committee of the Red Cross (ICRC) which is obtained in the course of its official functions is also regarded as privileged.\(^78\)

**Protection of National Security Information**

Different rules exist for the disclosure of information, which is regarded by states as imperative to their national security interests. If a state is of the view that the disclosure of information or documents of that state is prejudicial to its national security interests, it has the right to refuse to provide or disclose them.\(^79\)

Nevertheless, the state is required to consult the Prosecutor, the defence, and the Pre-Trial Chamber or Trial Chamber in order to resolve the matter through cooperative means. In this regard certain steps such as use of *in camera* or *ex parte* proceedings can be considered.\(^80\) However, in the absence of any agreement the final discretion is of states in determining whether or not the disclosure of information is prejudicial to their national interests.\(^81\)

In case the ICC concludes that by refusing to disclose information, the requested state is acting in contravention of its obligations under the Statute, it is empowered to refer the matter to the Assembly of States Parties or to the Security Council if the situation was referred by it.\(^82\) Nevertheless, in such a scenario, the Statute allows the ICC to make "such inference" in the course of trial "as to the existence or non-existence of a fact, as may be appropriate in the circumstances."\(^83\)

**Rights of the Accused during Trial**

The Rome Statute recognizes the fundamental procedural guarantee of presumption of innocence until convicted accorded to the accused. This guarantee is firmly rooted in a number of domestic criminal laws. The Statute says:

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.
2. The onus is on the Prosecutor to prove the guilt of the accused.

\(^78\) Rule 73, *Privileged communications and information*, Rules of Procedure and Evidence

\(^79\) Art 72, Rome Statute. This article also applies to a situation where “a person who has been requested to give information or evidence has refused to do so or has referred the matter to the State on the ground that disclosure would prejudice the national security interests of a State and the State concerned confirms that it is of the opinion that disclosure would prejudice its national security interests.”

\(^80\) Art 72 (5), Rome Statute

\(^81\) Art 72 (6), Rome Statute

\(^82\) Art 72 (7) (a) (ii), Rome Statute

\(^83\) Art 72 (7) (b) (ii), Rome Statute
3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt. Apart from this, a number of guarantees have been provided to the accused during trial. Some of these are similar to those which a suspect enjoys during investigations. The accused must 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.” He must have “adequate time and facilities” to prepare for the case. The accused has a right “to be tried without undue delay.” Further procedural guarantees allow the accused to conduct the defence in person or through legal assistance of his own choosing. Legal assistance can be provided to the accused by the ICC if the “interests of justice so require.” And such assistance has to be provided without payment if the accused does not have sufficient means to pay for it. However, the right to choice of counsel is not unlimited. The Rules of Procedure and Evidence clarify that the defence counsel must 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.” The counsel is also required to possess sound knowledge and fluency in at least one of the working languages (English and French) of the ICC. The accused has the right “to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf. Moreover, the accused is also “entitled to raise defences and to present other evidence.” In the same manner he is entitled to raise defences and present other evidence. He is also allowed “to make an unsworn oral or written statement” in his defence. Furthermore, the Statute enshrines two very important procedural safeguards. First, the accused cannot be “compelled to testify or to confess guilt.” He has the right “to remain silent, without such silence being a consideration in the determination of guilt or innocence.” Secondly, the Statute protects the accused from “any reversal of the burden of proof or any onus of rebuttal.” Besides this, the Prosecutor is under obligation to disclose to the defence any evidence in his possession that “shows or

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84 Art 66, Rome Statute. Presumption of innocence is a general principle of criminal law. However, it is placed outside Part 3.
85 The procedural guarantees also provide the accused access to, free of cost, “assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness.” Art 67 (1), Rome Statute
86 Rule 22, Appointment and qualifications of Counsel for the defence. Rules of Procedure and Evidence
87 Art 67 (1), Rome Statute
tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence.\footnote{88}

**Rights of the Victims during Trial**

Special measures in the Statute to protect the victims and witnesses and their participation in the proceedings are unprecedented in international criminal law. The Rules of Procedure and Evidence define victims as “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.” 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.”\footnote{89} The Statute empowers the victims to have a say in the conduct of proceedings. This seems unusual from the perspective of an adversarial criminal procedure of the common law system where such interference by victims in the proceedings of the court may be regarded as creating an imbalance between the two adversaries – the prosecutor and the defence. In an adversarial system victims’ participation in the trial is limited to that of witnesses. Victims are allowed to take part only as witnesses as their more active participation may generate sympathy among the jury members in the favour of victims to the detriment of the rights of the accused.

The ICC is required to take adequate safeguards “to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.”\footnote{90} During investigations it is the duty of the Prosecutor to:

\begin{quote}
Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender... and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children.\footnote{91}
\end{quote}

However, the Statute clarifies that any such measure to protect the rights and interests of victims must not be adopted in a manner which is not “prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”\footnote{92}

\footnote{88} This is in addition to other requirements of disclosure provided in the Statute, Art. 67 (2), Rome Statute.  

\footnote{89} Rule 85, Definition of victims, Rules of Procedure and Evidence.  

\footnote{90} Art 68 (1), Rome Statute  

\footnote{91} Art 54(1)(b), Rome Statute  

\footnote{92} Art 68(1), (3) and (5), Rome Statute
The ICC may even depart from the principle of public hearings to protect victims and witnesses or an accused and may allow the proceedings to take place *in camera* or allow the presentation of evidence by electronic or other special means. Generally such measures are to be used in cases of victims of sexual violence or where children are victims or witnesses.  

When the personal interests of the victims are at stake, the ICC is required to permit their concerns to be presented and considered at any stage of the proceedings, with the help of legal representatives if required. Such interference by the victims in the proceedings of the ICC is similar to *partie civile* (civil party) of the civil law system.  

The Rome Statute also provides for the establishment of a Victims and Witnesses Unit within the Registry. The Unit is assigned to “provide, in consultation with the Office of Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witness, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses.” The Unit is required to keep staff having “expertise in trauma, including trauma related to crimes of sexual violence.” The Statute also provides for a Trust Fund for the benefit of victims of crimes as well as their families. As appropriate, the ICC “may order money and other property collected through fines or forfeiture to be transferred ... to the Trust Fund.”  

In cases where the disclosure of evidence or information may put at risk the security of a witness or his family, the Prosecutor is allowed to withhold such information or evidence which he has obtained prior to the commencement of the trial. He may instead submit a summary of such evidence. A state can also request for necessary measures for the “protection of its servants or agents and the protection of confidential or sensitive information.”  

According to Haslam, these provisions “denote a major departure from a hitherto limited theory of international criminal justice, which is centered on punishment and international order. The Rome Statute is taken to embrace a more expansive model of...
international criminal law that encompasses social welfare and restorative justice.” Therefore, the Rome Statute recognizes that “victims have their own distinct interests in international prosecution that cannot be satisfactorily represented by another party.”

**Sentencing and Penalties**

When the Trial Chamber has convicted an accused, it has to impose an appropriate sentence. In doing so, it is required to consider the “evidence presented and submissions made during the trial that are relevant to the sentence.” It may hold another hearing to consider any additional evidence or submissions for the sole purpose of determining appropriate sentence.

The Statute provides only two categories of sentences of imprisonment which the ICC may impose on a convicted person. First one is “imprisonment for a specified number of years, which may not exceed a maximum of 30 years; and second is “a term of life imprisonment.”

Thus the Statute specifies only maximum punishment that can be awarded by the ICC. This is an area where judges enjoy maximum discretion. Here the Statute departs radically from criminal codes of most of the countries which provide limited options to judges in awarding punishment. In domestic criminal codes, for every offence an applicable penalty specifying maximum and minimum terms of imprisonment is provided.

In the determination of sentence, the ICC must take into account mitigating and aggravating factors like “the gravity of the crime and the individual circumstances of the convicted person.” According to the Rules of Procedure and Evidence, any sentence of imprisonment and fine “must reflect the culpability of the convicted person.” In the determination of the sentence, the Rules require the ICC to consider, among others:

- 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

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99 Emily Haslam, “Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience?” in McGoldrick, n.2, pp.315,320
100 Where the request has come from the Prosecutor or the accused, the Trial Chamber must hold a further hearing on sentence. It may do so on its own motion. Art 76 (1) and (2), Rome Statute; Rule 143, *Additional hearings on matters related to sentence or reparations*, Rules of Procedure and Evidence
101 Art 77 (1), Rome Statute
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. The mitigating circumstances may include diminished mental capacity, crimes committed under duress, efforts by the convicted person to compensate the victims and any cooperation with the ICC. The aggravating circumstances may include prior criminal record of the person, abuse of power or official capacity, particular cruelty in committing crimes or multiple victims.

While imposing a sentence of imprisonment, the ICC has to deduct the time which the accused has already spent in detention. Where the accused has been found guilty of more than one crime, the ICC has to pronounce sentences separately for all crimes and a joint sentence specifying the total period of imprisonment. The total period must not be less than the highest individual sentence pronounced. The ICC is not allowed to impose death penalty. Emerging international human rights norms increasingly support the abolition of the death penalty. More than half of the states around the world have abolished it “in law or practice.” States which have abolished death penalty refuse to extradite fugitives if the applicable punishment for the offence in question is death penalty in requesting state. In such circumstances the person may be extradited only under the condition that death penalty will not be carried out. However, under the Rome Statute, on the basis of the principle of complementarity, states prosecuting a crime under the jurisdiction of the ICC may grant death penalty. Art 80 of the Rome Statute clarifies that “[n]othing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.” It must be noted that apart from death penalty many states have also abolished life imprisonment. Besides imprisonment, the ICC may also impose fine or order “forfeiture of proceeds, property and assets derived directly or indirectly from that crime.” States parties are required to “give effect to fines or forfeitures ordered by the Court.” In case “a State Party is unable to give effect to an order for forfeiture, it shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited.” Such property or the proceeds of the sale of property obtained by a state

102 Rule 145(1), Determination of sentence, Rules of Procedure and Evidence
103 Rules 145(2), Rules of Procedure and Evidence
104 Art 78, Rome Statute
106 Art 77 (2), Rome Statute; Rules 146-148, Rules of Procedure and Evidence
party pursuant to an order of forfeiture must be transferred to the ICC. All this must be done “without prejudice to the rights of bona fide third parties.”

Sentences of imprisonment are to be served in a state designated by the ICC from a list of states which have indicated their willingness to accept sentenced persons. In choosing a state for the enforcement of sentences of imprisonment, the ICC is required to consider the principle of equitable geographical distribution, application of “widely accepted international treaty standards governing the treatment of prisoners,” nationality and views of the convicted person. If no state is willing to accept a sentenced person, he has to serve imprisonment in the host state.

According to Article 106, the conditions of imprisonment in the state of enforcement of a sentence must not be “more or less favourable than those available to prisoners convicted of similar offences.” Nevertheless the conditions of imprisonment must also be consistent with “widely accepted international treaty standards governing treatment of prisoners.” A sentence is to be served under the supervision of the ICC. The ICC is required to observe whether or not such international standards are followed in the state of enforcement. It may also transfer a sentenced person to another state. A sentenced person is also entitled to request to the ICC to transfer him from the state of enforcement. The state of enforcement cannot release the person before expiry of the sentence. The ICC alone has the right to take a decision on any reduction of sentence.

There is no provision for probation or parole of prisoners. Obviously, the ICC will be dealing with the most serious crimes as well as the most serious offenders, where such reformative measures cannot be adopted. However, the Statute empowers the ICC to reduce the sentence of imprisonment where the prisoner has served two thirds of the sentence or twenty five years in the case of life imprisonment. In doing so the ICC has to consider certain factors like the willingness of the prisoner to cooperate with the ICC in its investigations and prosecutions and his voluntary assistance to enforce the

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107 Art 109, Rome Statute
108 Art 103 (1) (a), Rome Statute
109 Art 103 (3), Rome Statute
110 The conditions to provide such facility are to be clarified in the headquarters agreement. Art 103 (4), Rome Statute
111 Art 104, Rome Statute
112 Art 110 (1) and (2), Rome Statute
orders of the Court in other cases, particularly in locating assets subject to orders of fine, forfeiture or reparation which may be utilized for the benefit of victims.\textsuperscript{113}

\textbf{Reparations to Victims}

In addition to penalties, the ICC is also entitled to "make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation." In this respect, the Statute directs the ICC to first establish the principles on the basis of which it will determine the scope and extent of any damage, loss and injury. The ICC may also order that reparations be made through the Trust Fund. Before making an order in this regard, the ICC is required to take into account views of convicted person, victims, other interested persons or interested states.\textsuperscript{114} This is another feature of the civil law system. As opposed to common law systems, the civil law systems allow linking of civil proceedings to claim reparations in response to injury caused by the commission of a crime with criminal proceedings.\textsuperscript{115} Anyone who has been unlawfully arrested or detained or anyone who has undergone punishment because of a miscarriage of justice is also entitled to be compensated.\textsuperscript{116}

\textbf{Decisions of the Trial Chamber}

All the judges of the Trial Chamber must be present at each stage of the trial and throughout their deliberations. However, the Presidency may appoint one or more alternate judges to sit at each stage of the trial in order to replace a member of the Trial Chamber if that member is unable to be present. After an evaluation of the evidence and the entire proceedings, the Trial Chamber has to give the final decision. The judges of the Trial Chamber are required to aspire for unanimity in their decision, failing which the decision has to be taken by a majority of the judges.\textsuperscript{117} All "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

\begin{itemize}
\item \textsuperscript{113} Art 110, Rome Statute
\item \textsuperscript{114} Art 75, Rome Statute
\item \textsuperscript{115} Boas, n.2, p.284
\item \textsuperscript{116} Art 85, Rome Statute; See also, Chapter 10, \textit{Compensation to an arrested or convicted person}, Rules of Procedure and Evidence
\item \textsuperscript{117} Art 74, Rome Statute
\end{itemize}
Prosecutor, the victims or [their] legal representatives... and the representatives of the States which have participated in the proceedings."\textsuperscript{118}

**APPEAL AND REVISION**

The Trial Chamber’s decision of acquittal or conviction is open to appeal.\textsuperscript{119} Both the Prosecutor and the convicted person are allowed to make an appeal against the decision of the Trial Chamber on the grounds of procedural error, error of fact, error of law or “any other ground that affects the fairness or reliability of the proceedings or decision.”\textsuperscript{120} Similarly, a sentence may also be appealed on the ground of disproportion between the crime and the sentence.\textsuperscript{121} In addition to acquittal, conviction and sentence, other decisions of the Pre-Trial and Trial Chamber may also be appealed. The decisions open to appeal may involve issues related to jurisdiction or admissibility, release of the person being investigated or prosecuted and any matter having implications for “the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.” Such appeals may also be made by the states.\textsuperscript{122}

If the Appeals Chamber concludes that the grounds for making an appeal are valid, it may reverse or amend the decision or sentence, or order a new trial before a different Trial Chamber. However, in a defence appeal, the Appeals Chamber cannot modify a decision of the Trial Chamber to the detriment of the convicted person.\textsuperscript{123} It implies that a sentence imposed at trial cannot be increased nor more convictions can be added to the existing ones, if an appeal is made on behalf of the convicted person.

Apart from the appeals, the Statute also provides for the revision of the final judgment of conviction or sentence on the basis of new evidence which was not available at the time of trial, provided that the party making a claim was not responsible for such

\textsuperscript{118} Rule 144, Delivery of the decisions of the Trial Chamber, Rules of Procedure and Evidence
\textsuperscript{119} Appeal against an acquittal is not accepted in some common law countries.
\textsuperscript{120} Appeal on “any other ground” can only be made by the convicted person or on his behalf by the Prosecutor. Art 81, Rome Statute
\textsuperscript{121} Art 81 (2), Rome Statute
\textsuperscript{122} Art 82, Rome Statute. These are generally known as interlocutory appeals which can be made during the course of trial. In the case of the ICTY, the jurisdictional appeal was raised in the famous Dusko Tadic case. In that case the Appeals Chamber of the ICTY gave a ruling even before the beginning of the trial.
\textsuperscript{123} Art 83 (2), Rome Statute
unavailability.\textsuperscript{124} And the new evidence is of such a value that had it been proved at
the time of trial it could have resulted in a different judgment. Further, the revision of
the final judgment is also possible if it is found that one or more of the participating
judges at trial had committed "an act of serious misconduct or serious breach of duty
of sufficient gravity to justify the removal of that judge or those judges from office"\textsuperscript{125}

**COOPERATION OF STATES AND NON-STATES PARTIES**
Because international criminal trials are not possible without active support of states,
procedures concerning cooperation of states with the ICC are enshrined in the Statute
in great detail. The Statute clarifies in what manner states are expected to cooperate
with the ICC and to execute the orders or requests of the ICC. The Statute also takes
into account a variety of circumstances in which states parties as well as non-states
parties will be asked to assist the Court.
States parties are under a general obligation to "cooperate fully with the Court in its
investigation and prosecution of crimes within the jurisdiction of the Court".\textsuperscript{126} They
are required to ensure the availability of procedures under their national laws to
provide all forms cooperation to the ICC.\textsuperscript{127} Requests for cooperation from the ICC
have to be transmitted through the diplomatic channel or any other appropriate
channel as per decision of each state party. Requests can also be transmitted through
the International Criminal Police Organization (INTERPOL) or any other appropriate
regional organization.\textsuperscript{128} The requested state is required to keep such requests
confidential, "except to the extent that the disclosure is necessary for execution of the
request."\textsuperscript{129} The ICC is also entitled to seek assistance from non-states parties. In this
regard the ICC may enter into an agreement or an ad hoc arrangement with a state.
The ICC may also seek any information or documents or any other form of
cooperation from an intergovernmental organization.\textsuperscript{130}

\textsuperscript{124} In the case of the death of the convicted person such claim may also be brought by his relatives or
by the prosecutor acting on behalf of the convicted person before the Appeals Chamber.
\textsuperscript{125} Art 84 (1), Rome Statute
\textsuperscript{126} Art 86, Rome Statute
\textsuperscript{127} Art 88, Rome Statute
\textsuperscript{128} Art 87 (1), Rome Statute; Rule 177, *Channels of communication*, Rules of Procedure and Evidence
\textsuperscript{129} Art 87 (3), Rome Statute
\textsuperscript{130} Art 87 (5) and (6), Rome Statute
Non-Compliance by States

There are two provisions which deal with situations where states fail to comply with requests of cooperation from the ICC. First one deals with non-compliance by a non-state party. It states:

Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council. 131

In case of non-compliance by a state party, the Statute states:

Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council. 132

Hence, the only remedy before the ICC in cases of failure of states to cooperate with it will be the referral of the matter to the Assembly of States Parties or to the Security Council. In case of non-compliance by a state party, the ICC will be required to “make a finding to that effect,” meaning that it will have to specify the particular provisions in reference to which a state is found to be at fault. The Statute is silent on what measures the Assembly of States Parties may take in these cases of non-compliance. It will have to device its own course of action. It may, in turn, refer the matter to the Security Council. In such a scenario, it will be for the Security Council to decide whether and how to deal with uncooperative states. In this regard the Council may take a decision either under Chapter VI or Chapter VII of the UN Charter. While decisions taken under Chapter VI entail non-binding measures, the same decisions under Chapter VII will have binding effect. However, once a state has decided to cooperate, it will be the Rome Statute rather than the UN Charter that will direct the ICC seeking subsequent cooperation from that state. According to Oosthuizen, notwithstanding this condition, the Security Council “would be able to try and get state parties [as well as non-state parties] to cooperate with the Court, whether it originally referred the situation to the Court or not, and regardless of what the court does with the case.” 133

131 Art 87 (5) (b), Rome Statute
132 Art 87(7), Rome Statute
Surrender of Persons to the ICC

Special provisions exist to surrender suspects to the ICC. All states parties are under obligation to comply with the ICC’s requests for arrest and surrender. The ICC is also entitled to request any state to arrest and surrender a person if he is found on its territory. If that person brings a challenge before a national court on the basis of the principle of non bis in idem, the requested state is required to immediately consult with the ICC to clarify whether the issue of admissibility has been settled. If the case is admissible, the requested state must comply with the ICC’s request for surrender. If a ruling on admissibility is pending, the requested state may postpone the surrender of that person until the ICC makes a determination on admissibility.134

Where a state party receives competing requests for the surrender of a person to the ICC and extradition of the same person to any other state, it must give priority to the request from the ICC if the other requesting state is also a state party.135 The Statute makes a distinction between surrender and extradition. “Surrender” is defined as “the delivering up of a person by a State to the Court.” And “extradition” is defined as “the delivering up of a person by one State to another as provided by treaty, convention or national legislation.” This technical distinction is essential because many national laws do not allow extradition of their own nationals and in other cases special rules exist for extraditing a person which may pose technical hurdles in delivering a person to the ICC.136

If the requesting state is not party to the Statute and the requested state is not under an international obligation to extradite the person to the requesting state, the requested state has to give priority to the request from the ICC provided that the ICC has already determined the case to be admissible.137 In cases where the requested state is under an international obligation to extradite the suspect to the requesting non-state party, the requested state has to make a determination on its own. However, in reaching a decision as to whether to surrender the suspect to the ICC or to extradite him to the requesting state, the Statute requires the requested state to consider all the relevant factors such as the respective dates of the requests, the matters related to territory

134 Art 89(1) and (2), Rome Statute
135 Art 90 (1), (2) and (3), Rome Statute
136 Art 102, Rome Statute
137 Art 90 (4) and (5), Rome Statute

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where crime occurred or the nationality of the suspect or the victims, and the possibility of surrender from the requesting state to the ICC in future.\textsuperscript{138}

In urgent cases, the ICC may even call for the provisional arrest of the suspect, pending a formal request for surrender along with supporting documents. In these cases, if the requested state does not receive a request from the ICC within a specified time period the arrested person may be released from custody.\textsuperscript{139}

Article 101 of the Rome Statute enshrines the rule of speciality according to which a person surrendered to the ICC cannot be prosecuted for any other conduct except the one for which he has been surrendered. However, if necessary, the ICC may request the state which surrendered the person for a waiver of rule of speciality on the basis of additional information. Article 101 states that “States Parties shall have the authority to provide a waiver to the Court and should endeavour to do so.” This means that final authority for providing a waiver rests with the state. In any case this Article directs only states parties to make “endeavour” in this regard.

**Other Forms of Cooperation**

Other forms of cooperation between the states parties and the ICC with respect to investigations and prosecutions include:

(a) The identification and whereabouts of persons or the location of items;
(b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;
(c) The questioning of any person being investigated or prosecuted;
(d) The service of documents, including judicial documents;
(e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;
(f) The temporary transfer of persons...
(g) The examination of places or sites, including the exhumation and examination of grave sites;
(h) The execution of searches and seizures;
(i) The provision of records and documents, including official records and documents;
(j) The protection of victims and witnesses and the preservation of evidence;
(k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and

\textsuperscript{138} Art 90 (6), Rome Statute

\textsuperscript{139} Art 92 (1) and (3), Rome Statute
(1) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.\textsuperscript{140}

Upon request a person in custody in any state may be temporarily transferred to the ICC for the purposes of identification or for obtaining testimony, subject to the fulfillment of two conditions. First, the person gives his consent to the transfer; and second, the requested state agrees to the transfer on such conditions as may be agreed between the state and the ICC.\textsuperscript{141}

The ICC is to maintain the confidentiality of documents and information which it receives, “except as required for the investigation and proceedings described in the request.” Where the requested state has provided documents or information to the Prosecutor on a confidential basis, the Prosecutor is expected to use them “solely for the purpose of generating new evidence.” However, subsequently the requested state may, on its own or at the request of the Prosecutor, consent to the disclosure of such documents or information, which then may be used as evidence.\textsuperscript{142}

It is important to note that upon request the ICC can also assist a state party in its efforts to investigate or prosecute conduct which may or may not constitute a crime within the jurisdiction of the ICC. If the conduct in question is not a crime within the jurisdiction of the Court, it must be a “serious crime under the national law of the requesting State.”\textsuperscript{143}

Cooperation with Respect to Waiver of Immunity and Consent to Surrender

The Rome Statute contains special provisions with respect to surrender of persons enjoying diplomatic immunity and officials or members of armed forces serving abroad under an international agreement. In these cases the ICC is first required to seek cooperation from the third state. Article 98 addresses a state’s competing obligations towards the ICC and towards other states under international law. It states:

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless

\textsuperscript{140} Art 93(1), Rome Statute
\textsuperscript{141} Art. 93 (7), Rome Statute
\textsuperscript{142} Art. 93 (8), Rome Statute
\textsuperscript{143} Art. 93 (10), Rome Statute
the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender. Therefore, these provisions impose limitations on the jurisdictional reach of the ICC over nationals of a non-state party. The first provision is applicable for those persons who enjoy diplomatic immunity like heads of states under general international law. As the Statute expressly denies exemption from prosecution and immunities granted to heads of states or governments and other public officials of a state party, this provision, in effect, will be applicable for nationals of a non-state party. The ICC will be required to first obtain the waiver of immunity from that state.

The second provision is applicable for situations where guest armed forces are serving in a state under an international agreement which requires the consent of the sending state to prosecute members of such forces for any alleged crime committed in the territory of host state. Hence international agreements such as the North Atlantic Treaty: Status of Forces Agreement (SOFA) may prevent the host state from surrendering the nationals of a sending state to the ICC, unless the ICC can first obtain the consent of the sending state.\textsuperscript{144}

**FUNDING ARRANGEMENTS**

The ICC will be financed through assessed contributions made by states parties and funds provided by the UN “in particular in relation to the expenses incurred due to referrals by the Security Council.” Funds provided by the UN are subject to approval by the General Assembly.\textsuperscript{145} With respect to assessment of contributions, the Statute provides, that “[t]he contributions of States Parties shall be assessed in accordance with an agreed scale of assessment, based on the scale adopted by the United Nations for its regular budget and adjusted in accordance with the principles on which that scale is based.”\textsuperscript{146} In addition to these two sources, the ICC is also allowed to receive voluntary contributions from governments, international organizations, individuals, corporations and other entities.\textsuperscript{147} Carrying out all the budgetary and financial matters of the ICC is the responsibility of the Registrar.

\textsuperscript{144} See e.g. Jordan J. Paust, “The Reach of ICC Jurisdiction Over Non-Signatory Nationals,” Vanderbilt Journal of Transnational Law, Vol.33, No.1, Jan 2000, p.10

\textsuperscript{145} Art 115, Rome Statute

\textsuperscript{146} Art 117, Rome Statute

\textsuperscript{147} Acceptance of voluntary contributions has to be in accordance with criteria adopted by the Assembly of States Parties. Art 116, Rome Statute
AMENDMENTS

A very cumbersome and complex process is required to make amendments to the Rome Statute. The Statute can be amended in two ways - on the proposal of a state party or through a Review Conference which is to be convened seven years after the entry into force of the Statute.\(^{148}\) In either case, no amendments are possible before the expiry of seven years after the coming into existence of the ICC. The Statute adopts different procedures for substantive amendments and for amendments of an institutional nature. Where a proposal for amendment has come from a state party, the Assembly is first required to decide by a majority of those present and voting whether to take up the proposal. It may also convene another Review Conference for this purpose. If consensus cannot be reached, the adoption of an amendment will require a two-thirds majority of states parties.\(^{149}\) Only when seven-eights of states parties have ratified an amendment, it will enter into force for all states parties one year after the deposit of instruments of ratification or acceptance. Any amendment to Articles 5 to 8 of the Statute (i.e. crimes within the ICC’s jurisdiction) will be applicable only for those which have accepted the amendment. It is further clarified that “[i]n respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party’s nationals or on its territory.” For an amendment of any other provision which has been ratified by seven-eights of states parties, any state party not willing to accept it may withdraw from the Statute with immediate effect.\(^{150}\) Amendments to provisions of the Statute which are of an “exclusively institutional nature” can be adopted by the Assembly or by a Review Conference, by a two-thirds majority of states parties. Such amendments will enter into force for all states parties six months after their adoption.\(^{151}\)

Amendments to the Rules of Procedure and Evidence may be proposed by any state party, the judges acting by an absolute majority or by the Prosecutor. Such amendments will enter into force when adopted by a two-thirds majority of the

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\(^{148}\) The Review Conference is to be convened by the UN Secretary-General to consider any amendments to the Statute. The Conference may review any aspect of the Statute as Art 123 says that “such review may include, but is not limited to, the list of crimes contained in article 5.” The Conference will “be open to those participating in the Assembly of States Parties.” Art 123, Rome Statute

\(^{149}\) Art 121 (1), (2), and (3), Rome Statute

\(^{150}\) Art 121 (4), (5), and (6), Rome Statute

\(^{151}\) Art 122, Rome Statute
Assembly of States Parties. As neither the Rome Statute nor the Rules of Procedure and Evidence can address all the situations coming before the ICC, it is provided that “in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties.”

SETTLEMENT OF DISPUTES
According to Article 119, all disputes “concerning the judicial functions of the Court shall be settled by the decision of the Court.” For other disputes “between two or more States Parties relating to the interpretation or application” of the Statute, Article 119 first suggests settlement through negotiations. However, if no settlement is reached within three months, the matter must be put before the Assembly of States Parties. The Assembly, in turn, “may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.”

WITHDRAWAL FORM THE STATUTE
A state party may withdraw from the Statute by notifying the UN Secretary-General. The withdrawal will come into effect “one year after the date of receipt of the notification, unless the notification specifies a later date.” However, if a decision of withdrawal is in response to an amendment to the Statute, the state may withdraw with immediate effect. In any case a state cannot renounce its “obligations arising from [the] Statute while it was a Party to the Statute, including any financial obligations which may have accrued.” The withdrawal will have no effect on any cooperation between the withdrawing state and the ICC in connection with criminal proceedings that started prior to the date on which withdrawal became effective.

152 Any amendment to the Rules of Procedure and Evidence and any provisional Rule must be consistent with the Statute. And they must “not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.” Art 51, Rome Statute
153 Art 127(1), Rome Statute
154 Art 121 (6), Rome Statute. This is not applicable for amendments to provisions of the Statute which are of institutional nature.
155 Art 127(2), Rome Statute
SUMMARY OBSERVATIONS

Although the procedural rules of the ICC are a synthesis of the common law and civil law system, they may not represent the best of the two. While such detailed procedural rules are intended to ensure fair and expeditious trial, they contain a number of technical requirements which may cause delay in rendering justice. Unlike the prosecutors in the domestic settings which enjoy considerable powers to collect evidence and question witnesses, the Prosecutor of the ICC is dependent on state cooperation in every aspect of the investigations. He may find himself facing great difficulties from uncooperative states or states that are not parties to the Statute. On-site investigations, requests for arrest, search and seizure are going to be some of the most controversial aspects of investigations and also most crucial for the success of the trial. In any case, the Prosecutor of the ICC will certainly need strong arm of the Security Council. In the past, the Council has been of immense help to the prosecutors of the ad hoc Tribunals in apprehending suspects and procuring crucial evidence and witnesses. Much also depends on the ability and credibility of the Prosecutor in discharging his duties. The Prosecutors (Richard Goldstone, Louise Arbour and Carla Del Ponte) of the ICTY and ICTR have earned praise for performing their duties with impartiality and neutrality.

On the whole the Statute maintains a fair balance between the rights of the accused and those of the victims. Procedural guarantees accorded to the accused exceed even those provided in international treaties like the International Covenant on Civil and Political Rights. First time victims have found such a place in international criminal law. The concerns and views of victims can be presented at any stage of the trial. The Statute also provides for the Victims and Witnesses Unit and the Trust Fund for the benefit of victims. The ICC is entitled to award reparations to victims.

The procedures of the ICC also protect interests of states. States enjoy unfettered powers to withhold any information which, they think, would prejudice their national security interests. Moreover, the Prosecutor is required to maintain the secrecy of any information which is provided by states on a confidential basis. The procedural rules also impose limitations on the jurisdictional reach of the ICC over nationals of non-states parties even when it has over-all jurisdiction over any given situation. In order to have custody of any national of a non-state party who enjoys diplomatic immunity under international law or who is member of a guest armed force serving in the host
state pursuant to an international agreement, the ICC will be required to first obtain the consent of that state.

It is clearly understood that the ICC will derive its power and authority from the willingness of states to enforce its orders. It appears that the ICC would be able to do little where states refuse to cooperate or to comply with its requests. It does not have a force of its own. It can only refer the matter to the Assembly of States Parties or to the Security Council. The Statute is silent on how the Assembly of States Parties will deal with such non-compliance. The Statute does not provide for any appropriate measures which can be adopted by the Assembly in cases of non-compliance. It is also true that this is an area which lies beyond the scope of the Statute. The Assembly has to find its own solutions. Furthermore, a very cumbersome amendment procedure is provided that will make it extremely difficult to make substantive changes to the Rome Statute.