

Co-operation with the ICC: Arrests and Surrender, the Gathering of Evidence and Asset Forfeiture

1 Introduction

The International Criminal Court (ICC) will look to States for assistance in investigating cases and gathering evidence. This co-operation includes arrest and surrender of suspects, and State Parties are obligated to co-operate fully with the Court in investigations and prosecutions of crimes within its jurisdiction. Furthermore, under the ICC Statute States are obligated to respond to requests for 'other' forms of co-operation – in essence, the types of assistance with evidence gathering analogous to mutual legal assistance in criminal matters in State to State practice.

In this chapter, we consider the ICC provisions relating to the arrest and surrender of suspects, other forms of co-operation to facilitate the gathering of evidence, and the tracing, freezing and forfeiture of assets upon conviction of an accused.

2 Co-operation under the ICC Statute

2.1 General principles

As a general principle the scheme for the arrest and surrender of suspects and the gathering of evidence under the ICC Statute is a co-operative one, involving the active participation of State Parties and, in some cases, non-State Parties and international organisations. The co-operation regime is mostly found in Part 9 of the Statute entitled 'International Co-operation and Judicial Assistance', though there are related provisions in Articles 56, 57 and 59 of the Statute.

Part 9 deals with two subjects: (a) arrest and surrender and (b) other forms of co-operation. It also contains general provisions of relevance to both these forms of co-operation. This regime is modelled on State to State schemes for international co-operation in criminal matters, but there are important differences. These include no grounds of refusal on the part of a State with respect to requests for arrest and surrender by the ICC and very limited grounds of refusal relating to other forms of co-operation.

State Parties to the ICC Statute thus have an obligation to co-operate and to execute requests for arrest and surrender or other forms of co-operation presented by the Court. This is clearly reflected in three Articles in Part 9. Article 86 imposes a general obligation on States to co-operate fully with the Court in the investigation and prosecution of the crimes within its jurisdiction. Articles 89 and 93 mandate that States must comply with requests for arrest and surrender and other forms of co-operation respectively.

Under Article 87 the Court is empowered to obtain assistance from a non-State Party on the basis of an arrangement or agreement or on any other appropriate footing. Similarly the Court may seek information or documents or other forms of assistance from any intergovernmental organisation.

2.2 What happens if a State fails to co-operate with the Court?

The same Article 87 sets out the procedure in situations where a State Party fails to comply with a request from the Court. In such instances the Court can make a finding of non-co-operation and refer the matter to the Assembly of States Parties or, if the case involved was referred by the Security Council, to the Council. Similar referral powers are granted with respect to a non-State Party that has entered into an *ad hoc* arrangement or agreement with the Court and fails to co-operate in respect of requests submitted pursuant to it.

2.3 How are requests transmitted and what are the procedures surrounding them?

Requests from the Court will be sent either through diplomatic channels (Ministries of Foreign Affairs) or via another designated channel. States have the option to decide which channel to use. For example, if there is a central authority for extradition or mutual legal assistance generally (usually this is the Director of Public Prosecutions' office or the Attorney General's chambers of a particular State), this channel may be identified as the relevant channel for requests. Requests may also be transmitted through Interpol or any other appropriate regional organisation (for example, Europol).

2.4 Are there any confidentiality restrictions on requests?

All requests and supporting documents sent by the Court must be kept confidential by the requested State.¹ The only exception is disclosure that must take place for the execution of the request. For example, it would be permissible for the authorities of a State to disclose the material in an application to the domestic court responsible for execution of the warrant,² but care must be taken to ensure that any particularly sensitive material is subject to protections that will prevent its general public disclosure through this process.

Of particular concern is information that could prejudice the safety and physical or psychological well-being of any victims, potential witnesses and their families. The importance of this is emphasised in the Statue by the inclusion of a separate paragraph in Article 87(4) on this point. This obligation requires not only protection of the request and supporting documents by the ICC but also additional measures that may be necessary in the execution process (for example, to protect witness identity).

On a related issue, the ICC is also under an obligation to keep confidential any documents or information that it receives except to the extent that the material needs to be disclosed in the course of the investigation or prosecution.

1 Article 87(3), Rome Statute of the ICC. Articles cited in the footnotes in this chapter are from the Statute unless otherwise indicated.

2 Article 87(3).

Further, a State may decide that some material requires additional protection. In these instances the requested State can transmit the documents on a purely confidential basis and the ICC Prosecutor may agree to use them only for the purpose of generating new evidence, unless the State authorities subsequently consent to the use of the documents or information as evidence.³ These protections may go some way in allowing State authorities to disclose sensitive material to the Court.

The confidentiality restrictions regarding any particular request should be discussed fully with the ICC authorities before any execution or investigative or prosecution action is taken that may result in disclosure on either side.

2.5 What are the arrangements regarding the costs of executing requests from the court?

There are, of course, costs associated with the execution of requests for arrest and surrender or for other forms of co-operation. Article 100 of the ICC Statute regulates the apportionment of such costs. The general rule is that the State bears the costs of expenses incurred in its territory except for:

- costs of or associated with, travel and security of witnesses, experts and temporary transferees;
- costs of translation, interpretation and transcription;
- costs of travel of officials of the Court;
- costs of expert opinion or reports requested by the Court;
- costs of or associated with, the travel of persons being surrendered.

In addition, after consultation, the Court may assume responsibility for the payment of the 'extraordinary costs' arising from a request. State authorities should keep this in mind, as the execution of some requests may involve very high costs or the dedication of significant resources for which some financial assistance may be needed from the Court.

3 The Procedure for Arrest and Surrender of ICC Suspects

Arrest and surrender of suspects to the ICC will be carried out by national authorities in response to requests issued by the Court.

In accordance with Article 89(1), the Court will transmit the request and the necessary support documents and the requested State will be under an obligation to comply with the request, using the procedures for surrender specified under national law.

3.1 Are there grounds on which a request may be refused?

Unlike State to State extradition, there are no grounds of refusal applicable to requests from the Court. However, Article 97 of the ICC Statute acknowledges that there are certain practical scenarios where it may not be possible to proceed with the request. It may be

3 Articles 54(3)(e), 72, 73, 93(4).

that, despite best efforts, the person sought cannot be located or it is determined that he or she has left the jurisdiction. Similarly, the person located in the requested State may turn out not to be the person who is the subject of the warrant. There may also be difficulties with the sufficiency of information provided by the ICC or a conflict with pre-existing international obligations.

Should these types of practical problems be encountered, State authorities would need to consult with the Court without delay to resolve the matter.

3.2 If execution of a request would be in breach of an international obligation, should it proceed?

The issue of conflicting international obligations (outside of competing requests) is addressed in Article 98. This Article has been the subject of much heated debate and considerable academic commentary because of the interpretation and use made of it by the Government of the United States. It is on the basis of this Article that the US has fashioned its proposed bilateral agreements with other States. Under so-called 'Article 98 Agreements', US citizens and other persons connected to the United States will not be surrendered to the ICC for prosecution. Approximately 90 States have entered into these agreements. There are serious concerns about the consistency of the agreements with States Parties' obligations under the Rome Statute and whether they accurately reflect the content and object of Article 98.⁴ Police and prosecution authorities may want to check whether there is such an agreement in place for their State. If there is an Article 98 agreement, and a situation arises involving a US citizen or another person covered by the agreement, there should be immediate consultation with authorities in the Foreign Ministry and other government officials to determine how to proceed.

As to the original intention of Article 98, it was included to address situations where a request from the Court would place a State in a position of conflict with its international obligations to other States. The focus of Article 98(1) was requests that might require a violation by the State of diplomatic immunity privileges of another State. The example often given was a request seeking the arrest and surrender of a diplomat. Such a request would result in a conflict between the obligations of the requested State under the Vienna Convention on Diplomatic Relations 1961 and its obligations to the ICC under the Rome Statute. For this reason, Article 98(1) places an obligation on the Court not to proceed with a request in this situation unless it can obtain a waiver of the applicable immunity from the affected State. If a request is received and it appears to raise issues of immunities relating to another State, it would be prudent to consult internally with authorities responsible for foreign affairs. If it appears that in fact the request does fall within the terms of Article 98(1), the matter should be discussed with the ICC.

Article 98(2) was intended to address primarily Status of Forces Agreements (SOFA). Under these military arrangements, forces of one State are 'sent' to another State – for example,

⁴ See Opinion of James Crawford SC, Philippe Sands QC and Ralphe Wilde, *In the Matter of the Statute of the International Criminal Court and in the Matter of Bilateral Agreements Sought by the United States under Article 98(2) of the Statute*, 5 June 2003. See also Salvatore Zappala, 'The Reaction of the US to the Entry into Force of the ICC Statute: Comments on SC Resolution 1422 (2002) and Article 98 Agreements', 1 *Journal of International Criminal Justice* 1 (2001).

on peacekeeping missions. These agreements accord certain rights and obligations to both the sending and receiving country. Generally a military officer of the sending State cannot be prosecuted or extradited or otherwise removed from the receiving State without the consent of the sending State.

For this reason, Article 98(2) was included to obligate the Court not to proceed with a request that would violate such an international agreement – for example, for the surrender of a military officer present in the requested State under a SOFA – without first obtaining a waiver from the sending State. Again, should State authorities receive a request that appears to fall within the terms of Article 98, consultations should be carried out as soon as possible both internally and with the ICC.

3.3 Do the obligations regarding arrest and surrender apply to domestic government officials and Heads of State or Government?

Article 27 of the Rome Statute makes it clear that the Statute applies equally to all persons regardless of official capacity, with specific reference to Heads of State or Government. Furthermore, no immunities or special procedural laws under domestic or international law bar the Court from proceeding with cases involving such persons.⁵ Part 9 of the ICC Statute contains no procedural bar to a request for the arrest and surrender of such a person, and Article 98 is limited to international obligations involving another State. As a result, the obligation to execute requests extends to those relating to Heads of State or Government or any type of official.

The implementation of this obligation in domestic law has posed legal and constitutional challenges for many States. Various legislative and interpretative approaches have been adopted, so State authorities will need to look at their domestic law to see how the issue has been addressed.⁶

3.4 Should the request be executed even if there is a challenge to the admissibility of the case before the ICC or to the jurisdiction of the Court?

It is recognised that challenges may be made to admissibility or jurisdiction, in which case it may be inappropriate for the domestic authorities to execute the request.⁷ Most of the relevant domestic legislation addresses this situation.⁸ However, execution of the request should proceed unless the Court is formally notified of a challenge to the request and indicates that the State may delay the execution.⁹

5 Article 27(2).

6 See further Part II of this Guide and the discussion there regarding immunities in terms of the relevant implementation legislation.

7 Article 89(2). For example, a challenge by the accused to the effect that he has already been prosecuted for the offence concerned.

8 See Part II of the Guide.

9 Article 89(2).

3.5 Competing requests for surrender and extradition

The Statute acknowledges that there may be problems with execution of a surrender request by the ICC if the requested State has also received a competing request from another State for the extradition of the person sought by the ICC. Such situations may be very complicated and difficult to resolve given the 'complementary' nature of the Court and its powers to decide on admissibility, outlined in Chapter 2 of this Guide.

Article 90 of the Statute regulates in detail how an authority must manage any competing requests. In some instances, this regime will be reflected in domestic law. In others, it will fall to authorities to directly apply the provisions of Article 90 even though their domestic law is silent on the issue.

3.5.1 *How does a State decide on competing requests?*

Where, in addition to a request from the ICC for the surrender of a suspect, a request is also received from another State for the same person, related to the same conduct, notice should be given immediately to the ICC of this extradition request.¹⁰ Where the other State involved is also a State Party to the Statute, the request from the ICC will be given priority if the Court has already ruled that the case is admissible, having taken into account in its decision the investigation or prosecution conducted by the State in its competing extradition request.¹¹ If there is a delay while such a ruling is being considered, the authorities in the requested State may proceed with the consideration of the extradition request up to the point of the actual extradition of the person. That must await the decision of the ICC on the admissibility of the case.¹²

Should the Court find the case inadmissible, the authorities in the requested State would be free to proceed with the request for extradition. If the Court rules on admissibility pursuant to a notice given because of a competing request from a State, and subsequently the extradition does not proceed for whatever reason, the Court must be notified of this as it could prompt reconsideration of the admissibility ruling. It would also be prudent for the requested State to advise the Court of any failed extradition where it is known that the Court has an interest in the person sought for extradition.

3.5.2 *What if the request is for the same person and same conduct but from a non-State Party?*

The applicable procedure is slightly different where the requesting State is not a Party to the Statute. In those instances, the same notification provisions would apply. If there is no treaty or arrangement in place between the two States creating obligations regarding extradition and the ICC rules the case admissible, again priority must be given to the Court's request.¹³ However, if the requested State is under an obligation to extradite to the requesting State and the case is ruled admissible by the ICC, thereby creating a competing

¹⁰ Article 90(1).

¹¹ Article 90(2).

¹² Article 90(3).

¹³ Article 90(4).

obligation, it is for the relevant authorities in the requested State to decide which request will be acceded to. While this is a discretionary decision for the authorities in the requested State, the Statute lists some of the factors to consider, including the dates of the requests (an earlier request is likely to be accorded more weight), the interests of the requesting State in the case and the possibility of subsequent surrender between the Court and that other State.¹⁴

3.5.3 *What if there is an extradition request for the same person but with regard to different conduct?*

If a request is received from the ICC and from another State for the same person but for different conduct, the Court will always have priority unless there is a treaty or arrangement in place between the two States imposing an obligation to extradite. In that case, again the authorities in the requested State must decide between the two requests, considering the factors noted above and paying particular attention in this instance to the relative nature and gravity of the conduct for which extradition and surrender are sought.

3.6 **What are the procedures to be followed on receipt of a request from the Court for arrest and surrender?**

As is the case in State to State extradition, there are two types of requests that may be received – a full request for arrest and surrender or a request for provisional arrest pending the submission of a full request.

While the applicable procedures will vary depending on national law, the steps involved will generally be similar. The first step for any authority (usually prosecution or justice authorities) to whom such a request is sent will be to review the material to ensure that the necessary documentation has been submitted by the ICC.

In the case of provisional arrest, under Article 92 of the ICC Statute the request may be sent using any medium capable of delivering a written record (this can include fax and e-mail transmissions). The request should contain:

- Descriptive information of the person sufficient to identify the person and his or her location;
- A concise statement of the crimes for which the person's arrest is sought and the alleged facts, including if possible date and location of the crime;
- A statement that there is a warrant of arrest or judgment of conviction against the person;
- A statement that a full request for arrest and surrender will follow.

If the documentation is sufficient, in most common law countries it will be necessary to apply to a court for a warrant of arrest to be issued. The type of material to be filed in support and the relevant court will depend on national law. In all States such applications will be made *ex parte*. Once an order is issued, it will fall to law enforcement authorities to locate and verify the identification of the person and to carry out the arrest.

14 Article 90(6).

As is the case in extradition practice, a person arrested provisionally can be held for 60 days pending receipt of the full request, after which he or she must be released if the documentation is not received.¹⁵ This will be without prejudice to the institution of subsequent proceedings if the documents arrive later. Some implementation legislation may give a discretion to the Court to extend the detention if justified in the circumstances.

In the case of a full request for arrest and surrender, the Court must submit:

- Descriptive information of the person and his or her location;
- A copy of the warrant of arrest;
- Such documents, statement or information as may be required by national procedural law.

This latter requirement recognises that in some jurisdictions there will be a requirement for evidence to be submitted in support of the request for arrest and surrender. In extradition practice most common law countries have required first person affidavit evidence in support of a request for arrest and surrender, sufficient to establish a *prima facie* case. While requirements in this regard are gradually being reduced, for some States this is mandated under their constitution. For this reason, Article 91(2)(c) recognises that evidence may be required in support of a request from the Court.

However, there is an exhortation to States to ensure that such requirements are as minimal as possible, not in any instance more onerous than those imposed in extradition and if possible less onerous.¹⁶

Domestic law will determine what the relevant requirements are, but fortunately much of the legislation adopted by common law countries has eliminated any requirement for evidence to be adduced in support of a request from the ICC.¹⁷ In most instances only minimal factual summaries are required.

3.7 The procedure after arrest

There are specific procedures applicable to a person arrested pursuant to a request from the ICC that should be reflected in domestic law explicitly or available without the need for legislative authority.

Article 59(2) provides that a person arrested shall be brought promptly before a competent judicial authority, who is to determine that the warrant applies to the person (i.e., that the person before the court is the person named in the warrant). The judicial authority is also to consider if the person has been arrested in accordance with proper process and whether his or her rights have been respected. However, if the judge finds any procedural irregularities or a violation of the rights of the person, the ICC Statute does not authorise him or her to take remedial action in relation to such failings. In recognition of this, some

15 Article 92(3), read with Rule 188 of the Rules of Procedure and Evidence,

16 Article 91(2)(c).

17 See Part II of this Guide and the discussion there of the relevant implementation legislation.

domestic laws specifically prohibit such action by the domestic judge and provide for a report to be submitted back to the ICC.¹⁸ If the applicable legislation is not specific on this point, an argument to that effect should be mounted based on the language of the Statute.

3.7.1 Is there any provision for bail for a person arrested in response to an ICC request?

Article 59(3) recognises the right of a person arrested pursuant to an ICC request to make an application for bail. Again, provision for this will either be explicit under the relevant implementation legislation or available as a matter of course. The test applicable to such bail applications is a high one and probably varies from the normal tests applicable to common crimes under domestic law. The judge needs to be satisfied whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify release and whether necessary safeguards exist to ensure that the person will be available for surrender.

An important point regarding applications for release is the involvement of the ICC in that process. Article 59(5) mandates that the Court's Pre-Trial Chamber be advised of any such application for bail and be permitted to make recommendations to the domestic judicial authority regarding possible release. The judicial authority must give full consideration to such recommendations, though the Article falls short of mandating that these must be followed. Law enforcement and prosecution authorities need to take all reasonable measures to ensure that notification is given to the ICC in a timely manner and that any recommendations are presented to the domestic court.

If the person is granted bail, the Pre-Trial Chamber may request periodic status reports on the matter from domestic authorities.

3.7.2 What is the relevance of Article 102 of the Statute, which defines 'surrender' and 'extradition'?

Under the ICC Statute, State Parties are obligated to arrest and 'surrender' a person in response to a request. Under Article 102 a clear distinction is drawn between 'surrender' – the delivering up of a person by a State to the ICC – and 'extradition' – the delivering up of a person by one State to another. These definitions were included in the Statute to make it clear that surrender is a distinct process for the ICC that need not employ the usual procedures associated with extradition and that does not import traditional principles such as grounds of refusal that apply in extradition. This point was particularly important for those States with constitutional or policy restrictions on the extradition of nationals. It was also inserted in the Statute to further encourage States to adopt a new and simplified process for surrender, distinct from the complicated existing regimes for extradition.

However, while encouraging a distinct and simple process, the Statute does not mandate the procedure to be employed for the surrender of persons. This is left to national law, and thus the actual surrender process – whether it involves a judicial and executive phase, what material needs to be adduced and the types of appeals or reviews, if any, that will be

18 See Part II of the Guide.

available – will depend on the domestic implementing legislation within a State. It will be necessary, therefore, to consult the domestic law to determine the details of the procedure to be employed. While the vast majority of common law States have adopted a new simplified procedure for surrender, at least one State has applied its existing extradition regime with amendments to take into account the obligations under the Statute.¹⁹

3.8 The arrest and surrender regime and ‘double jeopardy’

Regardless of national regimes, challenges to arrest and surrender based on the principle of *non bis in idem* (not twice for the same thing, or ‘double jeopardy’) are of serious concern. As noted previously, the ICC Statute establishes a regime that is complementary to national legal regimes. For this regime to operate effectively, it is for the ICC to make relevant determinations about the admissibility of a case where the matter is being investigated or prosecuted in a State or where there is an issue regarding a previous prosecution. For this reason, Article 89(2) explicitly provides that any challenges brought in a national court on the basis of *non bis in idem* are to be resolved through the Court’s determination on the admissibility of the case. Therefore, no such challenges should be adjudicated before a national court, as that could place a State in conflict with its obligations under the Statute. In some countries there will be a specific legislative exclusion on this point, but in others the matter will be need to be argued before the national court.

3.9 The procedure after execution of the request

On the conclusion of the relevant process within the requested State, if the person is ordered surrendered, arrangements need to be made for the physical removal of him or her to the ICC. The ICC authorities should be contacted as soon as possible after the issuance of any final order of surrender to discuss the logistics.

3.9.1 *What if the person to be surrendered is being prosecuted domestically for something else or serving a sentence of imprisonment?*

In some cases, the person who is sought for surrender to the Court may be the subject of a prosecution or serving a sentence in the requested State for another offence. In those circumstances, the issue needs to be discussed with the ICC to determine how best to proceed. The appropriate course of action will depend on many factors, including the length of any possible delay in surrender, the gravity of the domestic offences and the impact on the ICC case.

In some States, domestic legislation will allow for the ‘temporary’ surrender of the person for the trial process before the Court. At the conclusion of the trial the person will be returned to the State to serve out his or her domestic sentence and then re-surrendered to the Court if a sentence has been imposed as a result of the ICC proceedings. If the applicable legislation provides for this, temporary surrender may be very useful, particularly in cases where the person is serving a lengthy sentence in the requested state.²⁰

19 See Part II of this Guide.

20 See Part II of this Guide.

3.9.2 Does the Statute address the issue of persons in transit to the ICC?

As in extradition, it may be necessary for a person being surrendered to the ICC, or moved to or from a State of enforcement to serve a sentence, to transit through another State as part of the journey. The Rome Statute obligates States to accept the transit of prisoners through their territory “except where transit through the State would impede or delay the surrender”.²¹ Some examples of where the exception might apply would be if the person might claim a right to stay in the transit State on the basis of nationality or through a claim for refugee status.

If transit is requested, the ICC will submit the documentation specified in Article 89(3).

3.9.3 Is there a rule of ‘speciality’ that applies where a person is surrendered to the ICC?

As is the case in State to State extradition, Article 101 of the ICC Statute imposes ‘speciality’ obligations on the Court where a person is surrendered to it. This means that the person can only be proceeded against, punished or detained for the act or course of conduct that forms the basis of the crime(s) for which he or she was surrendered or for any offences committed post surrender.²² The Court can seek a waiver of the speciality rule by providing arrest and surrender documents in accordance with Article 91 relating to the new offence. Requested States are encouraged to provide such waivers.

4. Providing Other Assistance to the Court

4.1 Introduction

As with the surrender of suspects, State Parties are obligated to co-operate fully with the Court in investigations and prosecutions of crimes within the jurisdiction of the Court. Under Article 93, States are obligated to respond to requests for ‘other’ forms of co-operation. The general provisions discussed in section 2 above will also apply to requests for this type of assistance in terms of channels of communication, language, confidentiality, costs and failure to respond.

4.2 What types of assistance are contemplated?

Article 93(1) lists a range of types of assistance drawn from mutual legal assistance instruments. Assistance may be sought in the form of court orders or other compulsory measures to aid the investigation, gather evidence, protect victims and witnesses and locate and freeze proceeds, property, assets and instrumentalities of crime that may be the subject of forfeiture orders (see Box 4.1).

21 Article 89(3)(a).

22 In the case of offences committed while being surrendered or after surrender, those would most likely be prosecuted by the State authorities in which they were committed unless they constituted offences over which the Court would have jurisdiction.

Box 4.1: Types of Assistance Specified in the ICC Statute

The types of measures the ICC might seek include the following, which are specified in the Statute:

- Identifying persons or locating persons/things;
- Taking statements and testimony of witnesses;
- Production of evidence, including expert opinions and reports;
- Questioning of suspects and persons under investigation;
- Service of documents;
- Facilitating the appearance of witnesses or experts before the Court, including by way of temporary transfer;
- Examination of places and sites;
- Search and seizure;
- Provision of documents;
- Protection of victims and witnesses;
- Identification, tracing and freezing or seizure of assets as proceeds or instrumentalities of crime.

Article 93(1)(l) also provides for any other type of assistance that is not prohibited by the law of the requested State. This means, for example, that the Court might seek assistance such as surveillance or wiretaps, and such a request should be complied with unless the specific measure is prohibited under the law of the State. The forms of co-operation that may be sought are those that would normally arise in the context of any criminal investigation or prosecution. The general principles set out in Article 93 would appear to apply to most States, in particular as to whether court process is required, while execution procedures are governed by general principles of domestic law.

If requests are made for the identification or location of persons or places or other enquiries of this nature, they may be accomplished through investigative activity without the need for any court applications. The same is true of requests for the service of documents.

When it comes to taking statements from witnesses, if the witness concerned is prepared to co-operate on a voluntary basis, it may be that no court order or subpoena will be required. However, if ICC officials are going to travel to the requested State to participate in the proceedings, it may be safer to have the order in place to ensure that the witness is in attendance. In cases where a witness refuses to give a statement or evidence on a voluntary basis, it will be necessary to obtain the relevant court order.

Suspects who are accorded the right against self-incrimination will have to agree to answer questions and cannot be compelled to respond, though in some circumstances it may be possible to compel them to appear but not to answer any questions.

In cases where a witness is asked to travel to testify before the Court or to assist the investigation, the facilitation of such an appearance will not involve any judicial order. Rather, a police or prosecution authority will speak with the witness to encourage attendance though no compulsion or coercive measures should be applied to him or her. Appearance is on a voluntary basis.

The exception where some form of court order might be needed is if the person sought is in custody in the requested State. There are detailed provisions on this form of assistance in Article 93(7) relating to the temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance. This will be an important practical tool for these types of investigations and prosecutions.

In some instances both the requested State and the Court may prosecute different individuals in relation to the same incident. For example, a State may prosecute lesser members of a group involved in an atrocity, while the ICC may be conducting a prosecution against the leader of that group. The ICC may want to have the members of the group testify against the leader. Problems may arise if these individuals are incarcerated within the requested State. Under Article 93(7), domestic authorities will be asked to arrange for the temporary transfer of a person in custody to assist the Court. The person and relevant authorities in the requested State must agree to the transfer, and the Court must undertake to hold the person in custody while he or she is at the seat of the Court and to return him or her after the relevant assistance has been rendered.²³ This procedure will require some form of court order to ensure the person's release from custody in the requested State. It will also involve, on the part of the requested State, police assistance in the arrangements and the physical movement of the person.

Unless it involves a public record, most requests for the production of documents will require judicial authorisation. All search and seizure activity will need a court order.

Protective measures for witnesses can involve police activity or judicial orders. For example, physical protection can be carried out by police authorities while the taking of evidence *in camera* may require a court order. Similarly, the examination of a public site can be done by the local police but the exhumation of a grave site will require court intervention.

4.3 What are the applicable procedures for rendering the assistance?

The domestic law of the requested State will determine how this assistance will be provided, including the applicable procedures for obtaining any compulsory measures (judicial orders) that may be needed to execute a request.²⁴ Article 93(1) of the ICC Statute recognises that States will use procedures under their own national law to comply with requests. At the same time, Article 88 obligates State Parties to have procedures available under national law for all of the forms of co-operation specified in Part 9. This means that the domestic legislation in each State should set out procedures for providing the listed types of assistance. For example, there should be a process for domestic authorities to obtain a warrant or other type of search order in response to a request from the Court for premises to be entered and searched. In most common law jurisdictions the legislation either applies State to State mutual assistance powers to requests from the Court or alternatively creates a separate regime for assistance of this nature to the Court.

4.4 Are there any special provisions as to how a request should be executed?

The ICC Statute obligates States Parties to incorporate certain provisions for the execution of requests for evidence received from the Court into their own domestic criminal court procedures.

Article 99 mandates that requests for assistance shall be executed in accordance with the procedures of national law but also in the manner specified in the request, unless to do so is prohibited under domestic law. This is an important principle for effective assistance to the Court since the manner in which evidence is gathered can affect its ultimate admissibility in proceedings. For example, if the Court seeks the questioning of a suspect, that person is entitled to be accorded certain rights as specified in Article 55(2), namely a right to be given information, to remain silent, to have legal assistance of choice and to be questioned in the presence of counsel. A proper request for assistance from the Court would specify that these rights must be accorded to the individual prior to any questioning. If those rights are not given it may be that any statement obtained would be inadmissible before the Court or other remedies may flow to the individual as a result. Thus both the laws and practice of State authorities should be aimed at ensuring that the request is executed in the manner specified by the Court.

Article 99(4) is worth mentioning as well. This provision gives certain limited rights to the ICC Prosecutor to conduct investigations independently within a State. Under the structure of Part 9, investigation and evidence gathering will be carried out either by domestic authorities alone in response to a request or through a collaborative effort between domestic authorities and the Office of the Prosecutor. However, there may be instances where the Prosecutor considers that the successful execution of a request will require independent action. The most common example of this would be where there is concern that the presence of national authorities during an interview would inhibit or frighten the witness. Where the action to be carried out in the requested State does not require any court order or compulsory measure (such as voluntary witness interviews or examination of public sites), Article 99(4) provides for direct action. In order to proceed with such a request, the Prosecutor will need to consult with State authorities, though if the State involved is the territorial State for the crimes and the case has been found to be admissible, the Prosecutor cannot execute the request without first having made “all possible consultations” with the requested State.²⁵

In all other cases the Prosecutor will consult with and is to agree to any reasonable conditions or address reasonable concerns raised by the authorities in the requested State.²⁶ However, the ICC Statute stops short of requiring the consent of the State for the direct investigative activity to proceed. Instead, if State authorities have problems with the proposed action, they may simply “consult” with the Court to try and resolve the problem.²⁷ This vague language was used to achieve a compromise on what was a very

23 Article 93(7)(b).

24 For detail, see Part II of this Guide.

25 Article 99(4)(a).

26 Article 99(4)(b).

27 Article 99(4)(b).

difficult and sensitive issue during the negotiations at the Rome Conference for the creation of the ICC. The expectation is that, in as far as possible, State authorities will not oppose such activity by the Prosecutor but rather will support and facilitate it as necessary for effective evidence gathering. It is important to note that the national security protections discussed below are also applicable in such cases, so any apparent issues of this nature should be flagged as soon as possible during the consultations.

Finally Article 98 discussed above in relation to arrest and surrender is of relevance to requests for other forms of co-operation as well. A request by the ICC for the requested State to search an embassy or high commission would raise issues of diplomatic immunity accorded to another State. If a request is received and it appears to raise such issues, it would be prudent to consult internally with authorities responsible for foreign affairs. If it appears that in fact the request does fall within the terms of Article 98(1), the matter should be discussed with the Court.

4.5 What will the request for assistance from the Court contain?

Article 96 sets out in detail the information that should be provided by the Court in support of a request for other forms of co-operation. The request must be in writing, but in urgent cases it may be delivered through any medium capable of delivering a written record such as a fax or an e-mail. However, such requests would have to be followed up with the original document.

In summary the request should contain:

- a concise statement of the purpose of the request and the assistance sought, including the legal basis and grounds;
- location and/or identification information;
- a concise statement of the facts;
- the reasons for and details of any particular procedure that needs to be followed in executing the request;
- any other relevant information; and
- such information as may be required under the law of the requested State to execute the request.

This last requirement recognises that different types of information will be needed for a request to be executed in different States, depending on the applicable procedural law. For example, to obtain a search warrant in State A it may be necessary to provide sufficient information to satisfy a domestic court that there are reasonable grounds to suspect that evidence will be found at the location to be searched. In State B it may be sufficient to demonstrate the relevance of the search to the investigation. Authorities will need to look to domestic law for guidance.²⁸ Because of this variation in practice, it is expected that officials of the ICC Prosecutor's office will consult with domestic authorities prior to submitting a request, in order to determine what legal requirements must be met.

28 See Part II of this Guide for the differences of approach in this area of co-operation.

4.6 Can a request for assistance from the Court be refused?

As was the case with arrest and surrender of suspects, the traditional grounds of refusal that appear in mutual legal assistance treaties are not found in the ICC Statute. However, there are three specific situations where a request may not be executed by the State.

4.6.1 *Where the request for assistance is prohibited by domestic law*

First, if the Court seeks a type of assistance under Article 93(1)(l) (i.e., that is not otherwise listed in the Article), a State may refuse the assistance where it is prohibited by law. Prior to the requested State refusing such a request, Article 93(5) mandates that its authorities consider whether the assistance can be provided with conditions, at a later date or in an alternative manner, with the agreement of the Prosecutor or the Court. For example, it may be that information obtained through electronic intercepts can be provided with conditions as to its subsequent use in trial proceedings.

4.6.2 *Where the request for assistance conflicts with a fundamental principle of law of general application*

Second, under Article 93(3) a request for a particular measure of assistance in a specific case may be refused where the execution is prohibited in the requested State on the basis of an existing fundamental legal principle of general application, unless the matter can be otherwise resolved through consultations. This provision was included to ensure that fundamental legal principles would not be contravened through the execution of a request from the Court. The intention was that this protection would be used rarely, if at all. It will apply only where the principle that would be violated meets three conditions.

- (a) It must be a pre-existing principle and not something enacted in response to the establishment of the Court.
- (b) It must apply generally to all legal proceedings, as opposed to being specific to requests from the Court.
- (c) It is not all principles that will support a refusal, but only those which are 'fundamental' in the relevant legal system.

The primary concern in (c) above was the protection of privileges such as the spousal and lawyer/client privileges. At the time the ICC Statute was drafted the Rules of Procedure and Evidence had yet to be crafted, so it was unclear what privileges would be recognised by the Court. Given the broad range of privileges subsequently recognised, it is unlikely that this ground of refusal will be used often in practice.

As indicated above, should the need for refusal arise in a particular case, consultations should take place with the Court to see if there is a way to deliver the assistance sought without violating the applicable principle. Refusal of the request should be a last resort when all alternatives have failed.

If assistance is ultimately declined on the basis of either of these grounds of refusal, the authorities in the State Party will need to give reasons to the Court promptly.

4.6.3 *Where the request for assistance concerns the national security of the requested State*

The third ground of refusal is the most complex: national security. This was one of the last issues to be resolved under the Statute at the negotiations in Rome because of the sensitive matters involved. A balance needed to be achieved between the Court's interest in access to relevant information and the interest of States in protecting national security information and procedures. While the actual ground of refusal is found in Article 93(4), it is Article 72 that details the procedure to be followed in such cases.

Article 72 is broadly framed to cover all possible scenarios under the Statute where the disclosure of documents or information might, in the opinion of relevant State authorities, prejudice its national security interests. The issue can arise at a number of different stages of any case: during the pursuit of unique investigative opportunities; in the taking of action to preserve evidence under Article 56; during the disclosure of documents at the start of a trial; during the trial itself; or as a result of the execution of a request for assistance from the Court. It may also arise where a person has been requested to give information or evidence, and he or she has either refused to do so or has referred the matter to a State on the ground of national security.

If State authorities are of the opinion that national security interests may be jeopardised, they are obliged first to take all steps possible, in conjunction with the Prosecutor, to try and resolve the matter co-operatively. Examples of steps that could be taken are listed in Article 72(5), including:

- modification or clarification of the request;
- a determination by the Court on relevancy or that the information can be obtained other than through the relevant State;
- obtaining the evidence from a different source; or
- application of conditions or limitations regarding the information.

If none of these measures can be used to resolve the problem, the State authorities must notify the Prosecutor or the Court of the specific reasons for the decision to withhold or refuse the release of the information. However, in recognition of the practical realities, if the disclosure of specific reasons would in and of itself be prejudicial to national interests, this requirement need not be complied with. If exercising this option under paragraph 6, State authorities should still endeavour to provide some explanation to the Court or the Prosecutor as this will be relevant to subsequent proceedings that may arise, as outlined below.

If at this point the Court determines that the evidence is relevant and necessary and the issue arises in the context of a Part 9 request or where a person has refused to testify, there are certain steps open to the Court. First it may request further consultations, which may include *ex parte* hearings *in camera*, to obtain the view of state authorities.

After any such consultations have been exhausted, if the Court is of the view that the invocation of the ground of refusal in Article 93(4) is not in accordance with the obligation

on the State to co-operate, it may refer the matter in accordance with the procedure for non-compliance set out in Article 87(7). In cases that do not involve a Part 9 request for the testimony of an individual, it falls to the Court to decide whether to order disclosure or draw an appropriate inference in the trial process as to the existence or non-existence of a fact.

4.7 How are competing requests for other forms of co-operation to be dealt with?

The first obligation in the face of competing requests for other forms of co-operation is to try and execute both of them. Such competing requests are handled in a slightly different manner than those relating to arrest and surrender, because the nature of evidentiary assistance is such that it may be possible to satisfy both requests (which is not possible in the case of requests for the 'body'). For example, in the case of a request for documents it may be possible to provide certified copies of the relevant material to both the requesting State and the Court. In the case of taking the evidence of a person, a joint interview might be possible or alternatively one request could be postponed and the interviews conducted in sequence. The resolution of the issue will depend on the circumstances but, as this is not much different than what can occur in State to State practice, no doubt a way can be found to execute both requests satisfactorily.

If this should fail for some reason, the competing requests are to be dealt with in accordance with Article 90 outlined earlier in this chapter (section 3.5).

4.8 What if the information or evidence sought is within the control of another State?

In some instances, the Court may seek evidence or information that is actually under the control of another State or an international organisation by virtue of an international agreement. For example, a State may have received evidence or information from another State pursuant to an agreement whereby the lending State retains total control over the information. Should this arise, the authorities in the requested State are entitled to ask the Court to refer its request to the other State or organisation.

4.9 What happens if execution of the request would interfere with a domestic investigation or prosecution?

In some instances the execution of a request may interfere with an ongoing investigation or prosecution in the requested State, unrelated to the matter before the Court.²⁹ If such a case arises, state authorities should carefully consider if the circumstances of the domestic case are sufficiently serious in terms of the offence and how much interference would result from execution of the request to justify postponing assistance to the Court. They should also consider if the assistance can be provided subject to conditions to avoid the problem. If, however, it is determined that no other solution is possible in the circumstances, the Statute authorises postponement for a period of time agreed with the Court. The period of postponement should be as short as possible; no longer than necessary to complete the investigation or prosecution.

4.10 What if the admissibility of the case or the jurisdiction of the Court is challenged?

As with arrest and surrender, in some cases a request may be presented and at the same time or subsequently there may be an admissibility challenge or jurisdiction determination before the Court.³⁰ If the Court advises the requesting State of such a challenge, state authorities can postpone the execution of the request given that ultimately the ICC may find the case inadmissible, making the execution of the request unnecessary. The one exception would be where the Court has ordered the collection or preservation of evidence pending a decision on admissibility or jurisdiction.

5 Freezing and Forfeiture of Assets

Included in the ICC Statute are powers for the Court, upon conviction, to order the forfeiture of any proceeds derived from the ICC crime and to seek, in advance, the restraint and freezing of assets that may subsequently be the subject of a forfeiture order made by the Court.

Article 77 (2)(b) on Penalties in Part 7 of the ICC Statute provides that the Court may order “a forfeiture of proceeds, property and assets derived directly or indirectly from that crime”.

As outlined earlier in this chapter, Article 93(1)(k) allows the Court to request assistance with “the identification, tracing, and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture”.

Both provisions recognise that any action taken needs to take into account the rights of *bona fide* third parties.

5.1 What kinds of requests will the Court make regarding assets?

As in normal State to State practice regarding proceeds of crime, three types of requests are possible – requests for tracing and identification, freezing/seizure or forfeiture.

As an initial step, the Court may seek assistance in tracing the assets of a person being proceeded against. A request of this nature will be executed through investigative activity, following up on information provided by the Court. Depending on national legislation, there may be special investigative powers available to track the assets, such as monitoring and production orders. Otherwise normal investigative powers will need to be used to try and trace and locate assets.

As a provisional measure the Court may then seek the freezing/seizure of assets identified to ensure that they will be available for forfeiture should such an order issue on conviction. The ICC Statute does not specifically provide for the Court to issue a freezing or seizure order with respect to assets. However, it is possible that the Pre-Trial Chamber may be empowered to do so under Article 57(3)(a) on application by the Prosecutor.³¹ It will

30 Article 95.

31 Article 57(3) provides that, in addition to its other functions under the Statute, the Pre-Trial Chamber may “[a]t the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation”.

depend on whether the Court considers that such orders are “for the purpose of an investigation”. If it so decides, the request from the Court may seek, as a form of assistance under Article 93, the “direct enforcement” of the ICC freezing/seizing order by domestic authorities. If national law provides for the registration of such an order and enforcement as if it were a domestic freezing order, then this can be accomplished easily through a simple registration process. The only complication that may arise would be that a court hearing may be necessary should a third party seek to have the assets released. Domestic laws of this nature invariably provide for notification to affected parties with an opportunity to appear to argue for the release of the property in whole or in part, in recognition of the rights of an innocent third party.

However, if national law does not provide for “direct” enforcement,³² a request for freezing/seizing will need to be executed by obtaining the necessary court order under domestic law. While there will be a variety of procedures depending on the content of national law, this will generally involve an *ex parte* application to a specific court, supported by an affidavit or documentary evidence to demonstrate a set standard for the freezing of assets. The standard will vary in domestic law from establishing that there is a basis to believe the asset is connected to the individual (and may ultimately be determined to be a benefit from crime), to establishing that there is a basis to believe that ultimately a forfeiture order might issue for the criminal property. National laws will need to be examined to determine the appropriate procedures and standards that apply. Again, procedures will be available to protect the rights of *bona fide* third parties.

The final type of assistance that may be sought relates to the actual forfeiture of proceeds of the crimes. Here the Court has a specific power under Article 77 to issue a forfeiture order relating to the proceeds of the crime after conviction, as part of the penalty. Rule 147 of the Rules of Procedure and Evidence provides guidance to the Court as to the basis for such orders. The Court will hear evidence and have an opportunity to consider representations from any *bona fide* third party.

As with other penalties, national legislation should provide for a mechanism through which such orders can “be given effect to” as is mandated by Article 109. Most legislation will provide for the registration of the orders of the Court, followed by enforcement of the order as if it had been issued by a domestic court. In the case of forfeiture orders this will mean that, after registration, property can be physically confiscated or disposed of and converted into moveable form. Where the order cannot be executed directly against the actual property for whatever reason, Article 109 recognises that measures can be applied to allow for the recovery and transmission to the Court of the value of the property.

Once again, most of the domestic legislation will provide for notice to affected parties, either before or after registration, to afford them an opportunity to have their interests in the property excluded from the effect of the forfeiture order. On this point, as noted above,

32 While the Statute requires that States have in place procedures for all the forms of assistance set out in Article 93, ‘direct’ enforcement of ICC freezing or seizing orders is not amongst the listed forms of assistance. The obligation under Article 93(1)(k) is simply to assist with freezing/seizing but not to do so through the direct enforcement of the ICC order. It is also of note that while Article 109 obligates States to have a power to enforce or give effect to orders of fines and forfeitures, freezing or seizure orders are not mentioned. Rather the only comment on the point is in Article 93(1)(k), which calls for assistance with the freezing or seizure of assets.

third parties with interests in the property may have already had the question of their interests determined by the ICC under Rule 147. It will be important to liaise with the Court and obtain all relevant information about the hearing of the forfeiture matter to guard against duplicative adjudications of the same issues and abuse of process.

If domestic law does not make provision for the registration and direct enforcement of an ICC forfeiture order, then steps would have to be taken to obtain a domestic forfeiture order either under specific ICC powers or applying general proceeds of crime legislation.

5.2 Does the Rome Statute address the freezing and forfeiture of the instrumentalities of crime?

There is an inconsistency in the ICC Statute regarding the instrumentalities of crimes. Under Article 93 the Court may seek assistance with the tracing, freezing or seizing of the instrumentalities of crimes with a view to ultimate forfeiture. This would cover weapons, property and other instrumentalities used to carry out the crimes. However, nowhere is the Court specifically empowered to order the forfeiture of such instrumentalities following freezing or seizure, and it is difficult to imply such a power. Article 77(2) makes reference only to fines and the forfeiture of proceeds, property and assets derived from the crime, not property used in the commission of the relevant crime.

At best it is likely that the Court could seek assistance with forfeiture of instrumentalities from the requested State. Such a request would perforce be executed by a State using domestic law powers of forfeiture based on information provided by the Court.

6 Investigative Assistance by the Court

Earlier in this chapter, we considered the assistance that national authorities will be asked to provide to the Court. The provisions of the ICC Statute are also relevant to national authorities who, acting under the complementarity regime, may be carrying out domestic investigations of ICC crimes or other serious crimes under the national law of the requesting State .

Importantly, Article 93(10) provides for assistance by the Court to national authorities, albeit the Court has the discretion whether to accede to the request or not. Specific types of assistance contemplated include the transmission of statements, documents or other types of evidence, and the questioning of persons detained by the Court.

Authorities carrying out domestic investigations should consider whether the ICC might be in possession of information, evidence or persons of relevance to those investigations. It might be useful to carry out informal discussions with officials at the Court prior to presenting a request to determine what might be available and to identify any possible obstacles to assistance.

In this regard there are protections built into the ICC Statute surrounding the rendering of assistance by the Court. If the documents or information sought were provided by a State, that State must consent to the transmission of the material. If the material sought was provided by a witness or expert, the provisions of the ICC Statute relating to protection of witnesses and victims apply.

