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The Emerging Enforcement Practice of the International Criminal Court

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The Emerging Enforcement Practice of the International Criminal Court

Hirad Abtahi & Steven Arrigg Koh[†]

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Abstract

The dual enforcement regime of the International Criminal Court constitutes a fundamental pillar of the Rome Statute of the International Criminal Court.

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inal Court and represents a novel system within the history of international criminal law. This article is the first to focus on the emerging practice of the Court as it begins developing and implementing this unique enforcement regime. Drawing directly from the recent history within the Presidency and focusing on the current activities of the Trust Fund for Victims, this Article explains how, why, and in what direction the Court's enforcement practice is evolving.

Introduction

As Judge Philippe Kirsch, first President of the International Criminal Court ("the Court") once stated, the Rome Statute of the International Criminal Court ("the Statute") is a two-pillar system—a judicial pillar represented by the Court, and an enforcement pillar represented by the States—which undertake a legal obligation to cooperate with the Court through the Statute.¹ Indeed, the Court's enforcement regime and its practical application constitute an essential part of any evaluation of the Court's legitimacy.²

Early on in the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court ("the Rome Conference"), delegations recognized enforcement as integral to an effectively functioning Court,³ and at no point during the Statute negotiations did anyone question the crucial importance of the enforcement of sentences.⁴ In fact, these negotiations underscored the critical nature of enforcement, as both enforcement and international cooperation—initially fused in the same Part of the Statute—were ultimately separated, partially in order to highlight the distinct nature of enforcement.⁵ When the Rules of

1. Judge Philippe Kirsch, President of the International Criminal Court, Opening Remarks at the Fifth Session of the Assembly of States Parties 3 (Nov. 23, 2006), available at http://www.icc-cpi.int/iccdocs/asp_docs/library/organs/presidency/?PK_20061123_en.pdf ("In establishing the ICC, States set up a system designed on two pillars. The Court itself is the judicial pillar. The enforcement pillar belongs to States. In national systems, the two pillars are intertwined. Courts rely automatically on the enforcement powers of the State. In the case of the ICC, the two have been separated. The Court depends on the cooperation of States Parties. With the support and cooperation of States Parties, the Court will continue to be a strong, credible judicial institution.").

2. See Claus Kress & Göran Sluiter, *Preliminary Remarks*, in 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1751, 1752–53 (Antonio Cassese et al. eds., 2002) [hereinafter THE ROME STATUTE: A COMMENTARY]. See generally Hiram Abtahi, *L'exécution de la peine*, in DROIT INTERNATIONAL PÉNAL, Chapter 75 (H. Ascensio et al. eds., 2d ed. forthcoming 2012).

3. Trevor Pascal Chimimba, *Establishing an Enforcement Regime*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 345, 345 (Roy S. Lee ed., 1999) [hereinafter MAKING OF THE ROME STATUTE]. See generally M. Cherif Bassiouni, *The Making of the International Criminal Court*, in 3 INTERNATIONAL CRIMINAL LAW: INTERNATIONAL ENFORCEMENT 117, 132–44 (M. Cherif Bassiouni ed., 3d ed. 2008) (describing the context and process of the Rome Conference).

4. Kress & Sluiter, *supra* note 2, at 1752–53.

5. See *id.* at 1752 ("The close relationship between the enforcement regime and that on international cooperation is . . . demonstrated by the fact that during the negotiations of the ICC Statute, what became Parts 9 and 10 were for a long time discussed together under the general heading 'international cooperation and judicial assistance'.

Procedure and Evidence (“the Rules”) were adopted by the Assembly of States Parties (“the ASP”) four years after Rome and only two months after the Statute entered into force, responsibility for the enforcement of sentences was entrusted to the Presidency,⁶ a distinct organ of the Court.⁷

So what, then, is this enforcement regime, this pillar of the Court that is explicitly elevated to Presidential oversight in the Rules? This Article answers this question in a novel fashion by being the first to focus on the emerging practice of the Court. Drawing directly from the experiences of the Court, this article explains how, why, and in what direction its enforcement practice is evolving.

A comparative review of the Court’s enforcement regime and an overview of the relevant articles in the Statute, Rules, and Regulations of the Court (“the Regulations”) both underscore the importance of enforcement and provide the necessary background for this Article. The Court has a dual enforcement regime in which the Chambers may order (1) a sentence of imprisonment, and/or (2) a fine or forfeiture of proceeds, property, and assets.⁸ The enforcement pillar emphasizes the rights of the sentenced per-

Towards the end of negotiations, however, the discussions on ‘enforcement’ and on ‘international cooperation and judicial assistance’ developed separately and, partly, on the basis of quite different approaches. Accordingly, the ICC Statute does not use the term ‘enforcement’ as a sub-category of the term ‘cooperation’”).

6. See Rules of Procedure and Evidence of the International Criminal Court, Rule 199, ICC-ASP/1/3 (Sept. 9, 2002), available at <http://www.icc-cpi.int/Menus/ICC/?Legal+Texts+and+Tools/Official+Journal/Rules+of+Procedure+and+Evidence.htm> [hereinafter ICC Rules] (“Unless provided otherwise in the Rules, the functions of the Court under Part 10 shall be exercised by the Presidency.”).

7. Rome Statute of the International Criminal Court art. 34, July 17, 1998, U.N. Doc. A/CONF.183/9, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute] (“The Court shall be composed of the following organs: (a) The Presidency; (b) An Appeals Division, a Trial Division and a Pre-Trial Division; (c) The Office of the Prosecutor; and (d) The Registry.”).

A note on the Court’s enforcement structure provides further background for the discussion in this Article. As noted above, according to the Rules, the Presidency exercises the functions of the Court under Part 10 of the Statute, unless the Rules explicitly state otherwise. ICC Rules, *supra* note 6, at Rule 199 (“Unless provided otherwise in the Rules, the functions of the Court under Part 10 shall be exercised by the Presidency.”). The Presidency of the Court consists of the President, First Vice-President, and Second Vice-President, and exercises the Court’s functions by means of its responsibility over both the proper administration of the Court and the other functions that the Statute confers upon it. Rome Statute, *supra* note 7 art. 38(3) (“The President, together with the First and Second Vice-Presidents, shall constitute the Presidency, which shall be responsible for: (a) The proper administration of the Court, with the exception of the Office of the Prosecutor; and (b) The other functions conferred upon it in accordance with this Statute.”). More specifically, the Presidency’s three main responsibilities are proper administration of the Court, external relations, and judicial and legal functions. *The Presidency*, INT’L CRIM. CT., <http://www.icc-cpi.int/?Menus/ICC/Structure+of+the+Court/Presidency> (last visited Dec. 1, 2011). In the latter category, the Presidency, *inter alia*, constitutes and assigns cases to Chambers, conducts judicial review of certain decisions of the Registrar, and oversees enforcement pursuant to Part 10 of the Statute. See *id.* For further, general information regarding the structure of the Court, see generally *Structure of the Court*, INT’L CRIM. CT., <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/> (last visited Dec. 1, 2011).

8. Rome Statute, *supra* note 7 art. 77 (“1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in

son through a number of safeguards, each ensuring that the treatment of the prisoner complies with widely accepted international standards.

Both parts of the dual enforcement regime are unique within the history of international criminal law. With regard to the enforcement of sentences, as Schabas explains:

The International Military Tribunals took no part in the enforcement of their sentences When the Security Council established the *ad hoc* tribunals, it delegated enforcement of sentences to national justice systems, subject to some supervision by the international tribunals Although the International Criminal Court also assigns detention of sentenced persons to national prison systems, it retains much more direct control over the enforcement than is the case at the *ad hoc* tribunals.⁹

Hybrid tribunals, like the Special Court for Sierra Leone (“the SCSL”), are modeled more on the *ad hoc* international criminal tribunals’ statutes.¹⁰ In contrast, the Statute balances sentence enforcement between the Court and the States Parties. This regime has been characterized as founded on three broad principles.¹¹ First, sentences are served in the State of enforcement’s prison facilities, subject to that State’s laws.¹² Second, the Court supervises the enforcement of the sentence.¹³ Finally, the State of enforcement is bound by the sentence that the Court imposes.¹⁴ Thus, the tension at stake here—between the State’s enforcement and the Court’s sentence and supervision—creates a unique system for the enforcement of sentences.

The Court’s authority to impose fines, forfeiture measures, and reparation orders is also a novel system within the history of international criminal law due to its comprehensiveness.¹⁵ Additionally, as will be discussed

article 5 of this Statute: (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person. 2. In addition to imprisonment, the Court may order: (a) A fine under the criteria provided for in the Rules of Procedure and Evidence; (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.”)

9. WILLIAM A. SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 1066–67 (2010); see also Claus Kress & Göran Sluiter, *Imprisonment, in THE ROME STATUTE: A COMMENTARY*, *supra* note 2, at 1757, 1764 (“The main difference between the two enforcement regimes at Nuremberg and Tokyo consists in the fact that at Nuremberg, the four occupying powers assumed joint responsibility for the actual enforcement, whereas at Tokyo, the actual enforcement was entrusted to Japan. Nuremberg marks a precedent for a multi-national enforcement regime—in the case of Tokyo, the national State of the sentenced persons was designated as enforcement State. . . . Despite this striking difference, the two regimes have one element in common which is perhaps even more important: the highly political character of the enforcement and the lack of judicial involvement.”).

10. Kress & Sluiter, *supra* note 9, at 1782–83.

11. SCHABAS, *supra* note 9, at 1066.

12. *Id.*

13. *Id.*

14. *Id.*

15. See Claus Kress & Göran Sluiter, *Fines and Forfeiture Orders*, in *THE ROME STATUTE: A COMMENTARY*, *supra* note 2, at 1823, 1823–24 (“The Military Tribunals of Nuremberg and Tokyo did not impose fines or forfeiture measures, although the imposition of these penalties was not excluded by their Statutes. The *Ad Hoc* Tribunals cannot impose

in greater detail below, the Trust Fund for Victims (“the Trust Fund”) represents a novel means of realizing the Court’s mission to help victims who have suffered from crimes within the Court’s jurisdiction. By contrast, the *ad hoc* international criminal tribunals¹⁶ and SCSL¹⁷ only allow for some degree of restitution of property and proceeds as well as compensation at the domestic level,¹⁸ while the Extraordinary Chambers in the Courts of

fines for the international crimes under their jurisdiction, nor can they order the forfeiture of proceeds, property, and assets deriving from such crimes.”).

16. See, e.g., Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia since 1991, S.C. Res. 807, art. 24(3), U.N. Doc. S/RES/827 (May 25, 1993) (“In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.”); see also Rules of Procedure and Evidence of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia since 1991, Rules 105-106, U.N. Doc. IT/32/Rev.7 (Jan. 8, 1996) [hereinafter ICTY Rules] (Rule 105 states that “(A) After a judgement of conviction containing a specific finding . . . the Trial Chamber shall, at the request of the Prosecutor, or may, *proprio motu*, hold a special hearing to determine the matter of the restitution of the property or the proceeds thereof, and may in the meantime order such provisional measures for the preservation and protection of the property or proceeds as it considers appropriate. (B) The determination may extend to such property or its proceeds, even in the hands of third parties not otherwise connected with the crime of which the convicted person has been found guilty. (C) Such third parties shall be summoned before the Trial Chamber and be given an opportunity to justify their claim to the property or its proceeds. (D) Should the Trial Chamber be able to determine the rightful owner on the balance of probabilities, it shall order the restitution either of the property or the proceeds or make such other order as it may deem appropriate. (E) Should the Trial Chamber not be able to determine ownership, it shall notify the competent national authorities and request them so to determine. (F) Upon notice from the national authorities that an affirmative determination has been made, the Trial Chamber shall order the restitution either of the property or the proceeds or make such other order as it may deem appropriate. (G) The Registrar shall transmit to the competent national authorities any summonses, orders and requests issued by a Trial Chamber pursuant to paragraphs (C), (D), (E) and (F).” Rule 106 states that “(A) The Registrar shall transmit to the competent authorities of the States concerned the judgement finding the accused guilty of a crime which has caused injury to a victim. (B) Pursuant to the relevant national legislation, a victim or persons claiming through the victim may bring an action in a national court or other competent body to obtain compensation. (C) For the purposes of a claim made under paragraph (B) the judgement of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury.”); Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, art. 23(3), U.N. Doc. S/RES/955 (Nov. 8, 1994) (“In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.”); Birte Timm, *The Legal Position of Victims in the Rules of Procedure and Evidence*, in INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW: CURRENT DEVELOPMENTS 289, 301 (Horst Fischer et al. eds., 2001) (“[T]he competences of the [Court] are more extensive than those of the [ICTY] and [ICTR].”).

17. See Statute for the Special Court of Sierra Leone art. 19(3), Jan. 16, 2002, 2178 U.N.T.S. 145 (“In addition to imprisonment, the Trial Chamber may order the forfeiture of the property, proceeds and any assets acquired unlawfully or by criminal conduct, and their return to their rightful owner or to the State of Sierra Leone.”).

18. See U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, ¶ 114, U.N. Doc. S/25704 (May 3, 1993) (“In addition to imprisonment, property and proceeds acquired by criminal conduct should be confiscated and returned to their rightful owners. This would include the return of

Cambodia allows for personal property, money, and real property acquired unlawfully or by criminal conduct to be returned to the State,¹⁹ and the Special Tribunal for Lebanon provides for compensation to victims pursuant to domestic Lebanese proceedings.²⁰

This Article begins with an analysis of the three phases of the enforcement of sentences, followed by a discussion of the enforcement of fines, forfeiture measures, and reparation orders. Part I describes the enforcement of sentences of imprisonment, from the conviction and sentencing by Chambers to the transfer of the person upon completion of their sentence. Part II reviews the enforcement of fines, forfeitures measures, and reparation orders, including a discussion of the Trust Fund.

I. Enforcement of Sentences of Imprisonment

This Part will review the role of the Presidency in enforcing sentences imposed by Chambers. This discussion begins with an analysis of pre-enforcement requirements and procedures, followed by a consideration of the particulars of the supervision and conditions of imprisonment as well as circumstances that may affect such imprisonment.

A. Pre-Enforcement Requirements and Procedures

Before a sentence of enforcement is served in a State, the State must accept both its designation and the convicted person pursuant to a system of “double-consent” described in the Statute.²¹ Under this system, the State must first be placed on the list of States willing to enforce sentences (“the List”), and then must accept the Presidency’s designation in an individual case.²²

property wrongfully acquired by means of duress. In this connection the Secretary-General recalls that in resolution 779 (1992) of 6 October 1992, the Security Council endorsed the principle that all statements or commitments made under duress, particularly those relating to land and property, are wholly null and void.”).

19. See Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, art. 39, NS/RKM/1004/006 (Oct. 24, 2004) (“In addition to imprisonment, the Extraordinary Chamber of the trial court may order the confiscation of personal property, money, and real property acquired unlawfully or by criminal conduct. The confiscated property shall be returned to the State.”).

20. Statute of the Special Tribunal for Lebanon, S.C. Res. 1757, art. 25, U.N. Doc. S/RES/1757 (May 30, 2007) (“1. The Special Tribunal may identify victims who have suffered harm as a result of the commission of crimes by an accused convicted by the Tribunal. 2. The Registrar shall transmit to the competent authorities of the State concerned the judgement finding the accused guilty of a crime that has caused harm to a victim. 3. Based on the decision of the Special Tribunal and pursuant to the relevant national legislation, a victim or persons claiming through the victim, whether or not such victim had been identified as such by the Tribunal under paragraph 1 of this article, may bring an action in a national court or other competent body to obtain compensation. 4. For the purposes of a claim made under paragraph 3 of this article, the judgement of the Special Tribunal shall be final and binding as to the criminal responsibility of the convicted person.”).

21. Kress & Sluiter, *supra* note 9, at 1787.

22. Rome Statute, *supra* note 7, art. 103; *see also id.*

1. *The List*

Once a Chamber has convicted a person and sentenced him or her to imprisonment, the person must serve their sentence in a State that the Court designates.²³ The Presidency makes this designation by choosing from the List,²⁴ which the Registrar maintains.²⁵ When a State first declares its willingness to accept sentenced persons, it may attach conditions to its acceptance in accordance with Part 10 of the Statute.²⁶ However, if the Presidency does not agree with these conditions, it need not include the State on the List, or may request the State to provide additional information.²⁷ Furthermore, the State may, at any time, withdraw or amend its conditions; although, the Presidency must confirm any such amendments or additions.²⁸ A State's withdrawal from the List would not affect any sentences that it has already accepted to enforce prior to withdrawal.²⁹

In practice, the Court enters into bilateral arrangements with States that establish a framework for the acceptance of sentenced persons.³⁰ These arrangements must be consistent with the Statute,³¹ and are concluded by the President and the relevant State.³² At this stage in the Court's history, the negotiation and conclusion of bilateral enforcement agreements have proven to be the most developed aspect of the Court's sentence enforcement practice. Due to the complexity of the provisions on enforcement spread throughout the Statute and Rules, the Presidency uses a Model Enforcement Agreement ("the MEA") to facilitate the conclusion of these bilateral enforcement agreements.³³ The content of the MEA is culled from the relevant provisions of the Statute, Rules, and Regulations, and is further aided by the practice of the *ad hoc* international criminal tribunals.³⁴ Thus, when first contacting and requesting that States join the List, the President provides individual States Parties with the MEA. For countries that express a preliminary interest in joining the List, a negotiation process ensues between the Presidency's Enforcement Unit and the relevant channel of communication the State Party designates for review and

23. See Rome Statute, *supra* note 7, art. 103(1)(a).

24. *Id.*

25. ICC Rules, *supra* note 6, Rule 200(1).

26. Rome Statute, *supra* note 7, art. 103(1)(b).

27. ICC Rules, *supra* note 6, Rule 200(2).

28. *Id.* Rule 200(3).

29. *Id.* Rule 200(4).

30. *Id.* Rule 200(5).

31. *Id.*

32. International Criminal Court, Regulations of the Court, Reg. 114, ICC-BD/01-01-04 (May 26, 2004), available at http://www.icc-cpi.int/NR/rdonlyres/B920AD62-DF49-4010-8907-E0D8CC61EBA4/277527/Regulations_of_the_Court_170604EN.pdf [hereinafter ICC Regulations].

33. See Gerard A.M. Strijards, *Article 103: Role of States in Enforcement of Sentences of Imprisonment*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 1647, 1653 (Otto Triffterer ed., 2d ed. 2008) [hereinafter TRIFFTERER COMMENTARY].

34. See *id.*

consideration—usually the Ministry of Justice or Ministry of Foreign Affairs.³⁵ If necessary, the negotiation process that ensues, based on the MEA, allows the State Party to formally attach any aforementioned conditions to acceptance.³⁶

Triffterer has suggested that “there will not be much margins within which to reject conditions” due to the Court’s “relative helplessness,” as it lacks a penitentiary system within which to enforce sentences.³⁷ Thus far, the Presidency’s experience has not conformed with such a despairing scenario. Although States Parties have modified the MEA to varying degrees, there have been no dramatic modifications included in the final agreement since, as Triffterer notes, the Presidency always ensures that a State Party’s conditions are “compatible with the object and goal of the Statute itself.”³⁸ As of the time of writing, the Court has concluded agreements with Austria, Belgium, Colombia, Denmark, Finland, Mali, Serbia, and the United Kingdom.³⁹

Depending on each State’s domestic system, the agreement enters into force either immediately or requires internal ratification pursuant to

35. For those States whose prison systems are not yet up to international prison standards, Norway introduced a proposal to amend Article 103(1) of the Statute at the Court’s Review Conference in Kampala, Uganda (“the Kampala Review Conference”). ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION, REPORT OF THE ROUND TABLE MEETING OF LEGAL EXPERTS ON THE REVIEW CONFERENCE OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 41 (2010), available at <http://www.aalco.int/?converted%20report%20ICC%202010/WorkingSession3.pdf>. Norway argued that the proposed amendment would enable those States “whose prison systems might not yet be up to international standards to conclude international or regional arrangements enabling them to qualify for assistance in order to do so, including through the receipt of voluntary financial contributions or other technical assistance.” *Id.* Although this amendment was ultimately not adopted, a resolution was eventually issued that, *inter alia*, confirmed that a sentence of imprisonment could be served in a State via an international or regional organization, mechanism, or agency, and urged States on the List to promote international cooperation at all levels. *See id.* at 42; *see also* William A. Schabas, *Introductory Note to Documents of the Review Conference of the International Criminal Court*, 49 INT’L LEGAL MATERIALS 1325, 1325 (2010).

36. *See* Rome Statute, *supra* note 7, art. 103(1)(b).

37. Strijards, *supra* note 33, at 1653.

38. *Id.*

39. *See Official Journal of the International Criminal Court*, INT’L CRIM. CT., <http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/> (last visited Jan. 25, 2012) [hereinafter *ICC Official Journal*] (listing agreements with Austria, Belgium, Finland, Mali, Serbia, and the United Kingdom); *see also The ICC Signs Enforcement Agreements with Belgium, Denmark, and Finland*, INT’L CRIM. CT., <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20%282010%29/pr533> (last visited Dec. 5, 2011); *ICC President to Sign Enforcement of Sentences Agreement During his Visit to Colombia*, INT’L CRIM. CT., <http://www.icc-cpi.int/Menus/ASP/Press+Releases/Press+Releases+2011/ICC+President+to+sign+enforcement+of+sentences+agreement+during+his+visit+to+Colombia.htm> (last visited Dec. 5, 2011). Due to ratification procedures within Colombia and Denmark, these two enforcement agreements have not yet come into force.

After the conclusion of the negotiations, a signing ceremony occurs in which the President and a high-ranking official of the State Party—often the Minister of Justice—sign the enforcement agreement. The ceremony may take place at the Court, in the State, or at a third location. For example, the Belgian, Danish, and Finnish agreements were signed during the Kampala Review Conference.

domestic procedures.⁴⁰ Following any necessary domestic procedures, the agreement comes into effect and is published in the Court's Official Journal.⁴¹

2. Designation of a State of Enforcement

When exercising its discretion to designate a State of enforcement from the List, the Presidency must consider principles of equitable distribution,⁴² widely accepted international treaty standards that govern the treatment of prisoners, the views and nationality of the sentenced person, and any other relevant information relating to the particular circumstances of the crime, the person sentenced, or the effective enforcement of the sentence.⁴³ The designated State must then promptly notify the Court of its

40. *Compare* Agreement Between the International Criminal Court and the Government of the Republic of Finland on the Enforcement of Sentences of the International Criminal Court art. 20, June 1, 2010, ICC-PRES/07-01-11 (entered into force Apr. 24, 2011), available at <http://www.icc-cpi.int/NR/rdonlyres/F21AB53F-7257-45C8-A5EB-42B17D86B65B/283222/SentencingAgreementwithFinland.pdf> [hereinafter *Finland Agreement*] ("This Agreement shall enter into force on the 30th day following receipt by the Court of the notification of Finland that it has completed its constitutional requirements for the entry into force of this Agreement."), with Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the International Criminal Court on the Enforcement of Sentences Imposed by the International Criminal Court art. 18, Nov. 8, 2007, ICC-PRES/04-01-07 (entered into force Dec. 8, 2007), available at <http://www.icc-cpi.int/NR/rdonlyres/C540B3EF-F3FF-4AD0-93F5-DA85E96B1522/0/ICCPres040107ENG.pdf> [hereinafter *U.K. Agreement*] ("This Agreement shall enter into force 30 days after signature by both Parties.").

41. See generally *ICC Official Journal*, *supra* note 39.

42. Regarding principles of equitable distribution, the Presidency may consider "[t]he principle of equitable geographical distribution . . . [t]he need to afford each State on the list an opportunity to receive sentenced persons . . . [t]he number of sentenced persons already received by that State and other States of enforcement [and] . . . [a]ny other relevant factors." ICC Rules, *supra* note 6, Rule 201.

43. Rome Statute, *supra* note 7, art. 103(3). Obtaining the views of the sentenced person is further emphasized in the Rules. See, e.g., ICC Rules, *supra* note 6, Rule 203 ("1. The Presidency shall give notice in writing to the sentenced person that it is addressing the designation of a State of enforcement. The sentenced person shall, within such time limit as the Presidency shall prescribe, submit in writing his or her views on the question to the Presidency. 2. The Presidency may allow the sentenced person to make oral presentations. 3. The Presidency shall allow the sentenced person: (a) To be assisted, as appropriate, by a competent interpreter and to benefit from any translation necessary for the presentation of his or her views; (b) To be granted adequate time and facilities necessary to prepare for the presentation of his or her views.").

When notifying a State of its designation, the Presidency also transmits information and documents including "[t]he name, nationality, date and place of birth of the sentenced person; . . . [a] copy of the final judgement of conviction and of the sentence imposed; . . . [t]he length and commencement date of the sentence and the time remaining to be served; [and] . . . [a]fter having heard the views of the sentenced person, any necessary information concerning the state of his or her health, including any medical treatment that he or she is receiving." *Id.* Rule 204. The Registrar must ultimately report its choice of designated State to both the Prosecutor and the sentenced person. *Id.* Rule 206(1). It is also noteworthy that a number of States Parties to the Statute have separately made a declaration under Article 103(1). See, e.g., http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en; <http://treaties.un.org/doc/Publication/CN/2012/CN.75.2012-Eng.pdf>.

decision to accept the designation.⁴⁴ If the State declines, the Presidency may designate another State.⁴⁵ If the State does accept the designation, the Court may nonetheless transfer a sentenced person to a prison of another State.⁴⁶

When the Court cannot designate a particular State of enforcement, the sentenced person will serve his or her term of imprisonment in a facility furnished by the host State.⁴⁷ In such a circumstance, the Headquarters Agreement between the International Criminal Court and the host State (“the Headquarters Agreement”) will govern all the conditions of enforcement.⁴⁸ The Headquarters Agreement explicitly provides for this contingency, referring to the Statute and Rules for the relevant provisions governing supervision of the enforcement of sentences and conditions of imprisonment.⁴⁹

The Presidency must give written notice to the sentenced person that it is poised to designate a State of enforcement. *Id.* Rule 203(1). The sentenced person may then submit to the Presidency his or her written views on the matter, and may also make oral presentations if the Presidency so allows. *Id.* Rule 203(1)–(2). The sentenced person may be assisted by both an interpreter and any necessary translation. *Id.* Rule 203(3)(a). The sentenced person must also be provided with adequate time and facilities to prepare for the presentation of his or her views. *Id.* Rule 203(3)(b).

44. Rome Statute, *supra* note 7, art. 103(1)(c).

45. ICC Rules, *supra* note 6, Rule 205.

46. Rome Statute, *supra* note 7, art. 104(1); see SCHABAS, *supra* note 9, at 107 (“It was felt necessary to contemplate a change in the designation of the State of enforcement because of non-compliance with the human rights conditions required in article 105.”).

47. Rome Statute, *supra* note 7, art. 103(4).

48. *Id.*

49. See Headquarters Agreement Between the International Criminal Court and the Host State art. 49, June 7, 2007, ICC-BD/04-01-08 (entered into force Mar. 1, 2008) available at <http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+?Journal/Headquarter+Agreement+between+the+International+Criminal+Court+and+the+Host+State.htm> (“1. The Court shall endeavour to designate a State of enforcement in accordance with article 103, paragraph 1, of the Statute. 2. If no State is designated under article 103, paragraph 1, of the Statute, the Court shall inform the host State about the necessity to enforce a sentence in a prison facility made available by the host State in accordance with article 103, paragraph 4, of the Statute. 3. After the commencement of the enforcement of a sentence under article 103, paragraph 4, of the Statute the Court shall continue its endeavours to designate a State of enforcement under article 103, paragraph 1, of the Statute. The Court will communicate to the host State developments that it considers relevant, which relate to the list referred to in article 103, paragraph 1, of the Statute. The Court shall inform the host State as soon as a State of enforcement has accepted the Court’s designation under article 103, paragraph 1, of the Statute. 4. The enforcement of a sentence shall be governed by the Statute, in particular the provisions of Part 10, and the Rules of Procedure and Evidence, in particular the relevant provisions of Chapter 12. The conditions of imprisonment shall be governed by the law of the host State, as provided in article 106, paragraph 2, of the Statute. 5. The host State may communicate to the Court for its consideration humanitarian concerns or other concerns related to the conditions or modalities of enforcement for the purposes of supervision of enforcement of sentences and conditions of imprisonment. 6. Further conditions of enforcement, as well as other arrangements, shall be laid down in a separate agreement between the Court and the host State. The Court and the host State shall make practical arrangements as to the implementation of enforcement in each case referred to in paragraph 2 of this article.”).

B. The Enforcement of the Sentence

Once the State of enforcement accepts its designation, the sentenced person is delivered to that State as soon as possible.⁵⁰ The Registrar, in consultation with the State of enforcement and the host State, ensures that this is done properly.⁵¹

1. Supervision and Conditions of Imprisonment

Crucially, the sentence of enforcement is binding on the State of enforcement, and the State cannot modify it⁵² nor can the State release the

50. ICC Rules, *supra* note 6, Rule 206(2). In a scenario where “the sentenced person is transported by air and no landing is scheduled on the territory of the transit State,” no authorization is required by the State. *Id.* Rule 207(1). However, “[i]f an unscheduled landing occurs on the territory of the transit State, that State shall . . . detain the sentenced person in custody” until there has been a transit request for surrender to the Court, a provisional arrest, or transit through its territory for purposes of enforcement of the sentence. *Id.* Moreover, “[t]o the extent possible under the procedure of national law, a State Party shall authorize the transit of a sentenced person through its territory.” *Id.* Rule 207(2). In so doing, “[a] copy of the final judgment of conviction and of the sentence imposed shall be attached to such request for transit.” *Id.*

51. *Id.* Rule 206(3).

52. Rome Statute, *supra* note 7, art. 105(1); see Roger S. Clark, *Article 105: Enforcement of the Sentence*, in TRIFFTERER COMMENTARY, *supra* note 33, at 1661, 1662 (“This is the key statement of the essential position that the State where the sentence is carried out must have its legislative and administrative house in order so that it can carry out the sentence as ordered (or modified) by the ICC.”).

The Appeals Chamber initially reviews the sentence and considers reduction either when the person has served two thirds of his or her sentence or, in the case of life imprisonment, after the person has served a sentence for twenty-five years. Rome Statute, *supra* note 7, art. 110(3). In determining whether to provide a person with a sentence reduction, factors the Court may consider include “[t]he early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions” and the person’s “voluntary assistance . . . in enabling the enforcement of the judgments and orders of the Court in other cases,” particularly regarding the location of “assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims.” *Id.* art. 110(4). The Court may also consider “[o]ther factors establishing a clear and significant change of circumstances” that justify reducing the sentence. *Id.* art. 110(4)(c). If, at the conclusion of this review, the Court concludes that a reduction of sentence is inappropriate, it must reconsider the question of reduction “at such intervals and applying such criteria as provided for in the Rules of Procedure and Evidence.” *Id.* art. 110(5).

The Rules provide very specific guidance on the structure of the initial review. “[T]hree judges of the Appeals Chamber appointed by that Chamber” conduct the hearing, barring any exceptional circumstances. ICC Rules, *supra* note 6, Rule 224(1). The hearing must take place in the presence of the sentenced person, the Prosecutor, “the State of enforcement of any penalty under article 77 or any reparation order pursuant to article 75 and, to the extent possible, the victims or their legal representatives who participated in the proceedings.” *Id.* Each of these parties may “participate in the hearing or . . . submit written observations.” *Id.* The judges will then, as soon as possible, communicate their decision and reasoning “to all those who participated in the review proceedings.” *Id.* Rule 224(2).

With regard to any subsequent review, the judges consider reducing the sentence every three years, unless they establish a shorter interval in their initial decision. *Id.* Rule 224(3). In cases of “a significant change in circumstances,” the sentenced person may be permitted to apply for review “within the three-year period or such shorter period as may have been set by the three judges.” *Id.* Similar to the initial review process, any

person before their sentence expires.⁵³ As such, the enforcement of the sentence is subject to the supervision of the Court and must be consistent with widely accepted international treaty standards governing the treatment of prisoners.⁵⁴ This arrangement strikes a key balance between the carceral system within the State of enforcement and the widely accepted international standards grounded in human rights treaties.⁵⁵ However, given this potential tension, this provision was among the most delicately drafted in the enforcement section.⁵⁶ Indeed, the division “represent[s] the consensus achieved in trying to balance the Court’s overall responsibility for sentence enforcement, with the reality that the sentence will be administered within a State [of enforcement], in accordance with the applicable enforcement regime.”⁵⁷

According to Triffterer, the word “treaty” was probably inserted into the language of Article 106(1) of the Statute because the delegations at Rome shared reservations about international customary law.⁵⁸ Nonetheless, States may choose to remove the word “treaty” from their enforcement agreement in an effort to encompass soft law. For example, the enforcement agreement concluded with Finland states that “[t]he conditions of imprisonment shall be governed by the law of Finland and shall be consistent with widely accepted international standards governing treatment of prisoners”⁵⁹

The laws of the State of enforcement govern the conditions of imprisonment, and these conditions must be equivalent to those of other prison-

subsequent review may transpire with the “written representations from the sentenced person or his or her counsel, the Prosecutor, the State of enforcement of any penalty under article 77 and any reparation order pursuant to article 75 and, to the extent possible, the victims or their legal representatives who participated in the proceedings.” *Id.* Rule 224(4). Furthermore, the three judges must communicate their decision and reasoning to all parties as soon as possible. *Id.* Rule 224(5).

During either the initial review or any subsequent review, the three judges considering a reduction of sentence may also consider the following criteria: “[t]he conduct of the sentenced person while in detention, which shows a genuine dissociation from his or her crime; . . . [t]he prospect of the resocialization and successful resettlement of the sentenced person; . . . [w]hether the early release of the sentenced person would give rise to significant social instability; . . . [a]ny significant action taken by the sentenced person for the benefit of the victims as well as any impact on the victims and their families as a result of the early release; [and] . . . [i]ndividual circumstances of the sentenced person, including a worsening state of physical or mental health or advanced age.” *Id.* Rule 223.

53. Rome Statute, *supra* note 7, art. 110(1).

54. *Id.* art. 106(1).

55. SCHABAS, *supra* note 9, at 1080.

56. *See id.* at 1081.

57. Kimberly Prost, *Enforcement, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE* 673, 675 (Roy S. Lee ed., 2001).

58. Roger S. Clark, *Article 106: Supervision of Enforcement of Sentences of Imprisonment, in TRIFFTERER COMMENTARY, supra* note 33, at 1663, 1663. The language of Article 106(1) of the Rome Statute states, in full, that “The enforcement of a sentence of imprisonment shall be subject to the supervision of the Court and shall be consistent with widely accepted international treaty standards governing treatment of prisoners.” Rome Statute, *supra* note 7, art. 106(1).

59. Finland Agreement, *supra* note 40, art. 6(1).

ers in the State who have been convicted of similar offences.⁶⁰ Thus far, the Court's practice has included an additional provision requiring the State of enforcement to allow for the inspection of prison conditions at any time.⁶¹ Though many States have opted for inspection by the International Committee of the Red Cross ("the ICRC"),⁶² others have allowed for inspection by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment⁶³ or an entity the Court may desig-

60. Rome Statute, *supra* note 7, art. 106(2). More generally, the Presidency must request the State to inform it of any important events relating to the sentenced person, including circumstances in which the person is prosecuted for an event occurring after his or her transfer. ICC Rules, *supra* note 6, Rule 216.

Furthermore, "[c]ommunications between a sentenced person and the Court shall be unimpeded and confidential," and the Presidency—in conjunction with the State of enforcement—must ensure that these rights are respected when "establishing appropriate arrangements" for the exercise of the sentenced person's right to communicate. Rome Statute, *supra* note 7, art. 106(3); ICC Rules, *supra* note 6, Rule 211. When supervising the enforcement of imprisonment sentences, the Presidency may also "request any information, report or expert opinion from the State of enforcement or from any reliable sources" and "delegate a judge of the Court or a member of the staff of the Court" who may meet the sentenced person and hear his or her views "without the presence of national authorities." ICC Rules, *supra* note 6, Rule 211(1)(b)-(c). In the latter case, the Court "[m]ay, where appropriate, give the State of enforcement an opportunity to comment on the views" the sentenced person expressed. *Id.* Rule 211(1)(d). Finally, if the sentenced person becomes "eligible for a prison programme or benefit available under the domestic law of the State of enforcement which may entail some activity outside the prison facility," the State must notify the Presidency so that the Court may "exercise its supervisory function." *Id.* Rule 211(2).

61. See, e.g., Finland Agreement, *supra* note 40, art. 7 ("1. The competent national authorities of Finland shall allow the inspection of the conditions of imprisonment and treatment of the sentenced person(s) by the International Committee of the Red Cross (hereinafter referred to as 'the ICRC') at any time and on a periodic basis, the frequency of visits to be determined by the ICRC. The ICRC will submit a confidential report based on the findings of these inspections to Finland and to the Presidency. 2. Finland and the Presidency shall consult each other on the findings of the reports referred to in paragraph 1 of this article. The Presidency may thereafter request Finland to report to it any changes in the conditions of imprisonment suggested by the ICRC.").

62. See, e.g., Agreement Between the International Criminal Court and the Government of the Kingdom of Belgium on the Enforcement of Sentences of the International Criminal Court art. 7(1), June 1, 2010, ICC-PRES/06-01-10 (entered into force June 1, 2010), available at <http://www.icc-cpi.int/NR/rdonlyres/9218659C-1853-4FE6-82D6-ECFD758512ED/282729/AgreementBelgiumEng.pdf> ("Belgium shall allow the inspection of the conditions of imprisonment and treatment of the sentenced person(s) by the International Committee of the Red Cross (hereinafter referred to as 'the ICRC') at any time and on a periodic basis, the frequency of visits to be determined by the ICRC. The ICRC will submit a confidential report based on the findings of these inspections to Belgium and to the Presidency.").

63. See, e.g., U.K. Agreement, *supra* note 40, art. 6 ("1. The competent national authorities of the United Kingdom shall allow the inspection of the conditions of imprisonment and treatment of the sentenced person(s), detained under this Agreement, by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter 'the CPT') at any time and on a periodic basis, the frequency of visits to be determined by the CPT. The CPT will submit a confidential report based on the findings of these inspections to the Foreign and Commonwealth Office and to the Presidency. The confidential report shall not be released by the Presidency of the Court to any third person or body, without the consent of the Government of the United Kingdom. 2. The United Kingdom and the Presidency shall consult each other on the findings of the reports referred to in paragraph 1 of this Article. The Presi-

nate.⁶⁴ More generally, it is notable that this language—taken from the practice of the ICTY and ICTR—further reinforces the many other safeguards that are provided for in the Statute and the Rules.⁶⁵

The costs of enforcement are clearly explicated in the Rules. The State of enforcement bears the ordinary enforcement costs.⁶⁶ If the sentence is served in the host State pursuant to the Headquarters Agreement, the Court shall bear the enforcement costs.⁶⁷ Finally, the Court bears any other costs.⁶⁸ For example, the Court must pay for the transport of the sentenced person,⁶⁹ travel and subsistence costs for the elected officials and staff of the Court, any expert opinions or reports, and the transport of a person who has been surrendered to the Court.⁷⁰

2. *Circumstances Affecting Imprisonment*

A variety of circumstances may affect the imprisonment of the sentenced person in the State of enforcement. Although the most common occurrence is that the person is transferred upon completion of their sentence, other circumstances—such as extradition, change in designation, or escape—may alter the imprisonment of the sentenced person. Such situations are described below.

gency may thereafter request the United Kingdom to report to it any changes in the conditions of imprisonment suggested by the CPT 3. In order to supervise the enforcement of sentences of imprisonment, the Presidency may, when necessary, request any information, report or expert opinion from the United Kingdom.”).

64. See, e.g., Agreement Between the International Criminal Court and the Federal Government of Austria on the Enforcement of Sentences of the International Criminal Court art. 7, Oct. 27, 2005, ICC-PRES/01-01-05 (entered into force Nov. 26, 2005), available at http://www.icc-cpi.int/NR/rdonlyres/975246DC-383B-42EF-A78B-D0773B?EB20A4/140155/ICCPRES010105_en.pdf (“1. The competent national authorities of Austria shall allow the inspection of the conditions of imprisonment and treatment of the sentenced person(s) by the Court, or an entity designated by it, at any time and on a periodic basis, the frequency of visits to be determined by the Court. A confidential report based on the findings of these inspections shall be submitted to Austria and to the Presidency. 2. Austria and the Presidency shall consult each other on the findings of the reports referred to in paragraph 1 of this article. The Presidency may thereafter request Austria to report to it any changes in the conditions of imprisonment suggested in the report.”).

65. See, e.g., Rome Statute, *supra* note 7, arts. 103(3)(c), 107(1). The Court has also negotiated an agreement with the ICRC regarding detainees held in the Court’s Detention Center. See generally Agreement Between the International Criminal Court and the International Committee of the Red Cross on Visits to Persons Deprived of Liberty Pursuant to the Jurisdiction of the International Criminal Court, Mar. 29–Apr. 13, 2006, ICC-PRES/02-01-06 (entered into force Apr. 13, 2006), available at http://www.icc-cpi.int/NR/rdonlyres/A542057C-FB5F-4729-8DD4-8C0699DDE0A3/?140159/ICCPRES020106_English.pdf.

66. ICC Rules, *supra* note 6, Rule 208(1).

67. Rome Statute, *supra* note 7, art. 103(4).

68. ICC Rules, *supra* note 6, Rule 208(2).

69. *Id.*

70. Rome Statute, *supra* note 7, art. 100(1)(c)–(e).

a. Transfer of the Sentenced Person upon Completion of Their Sentence

If the sentenced person is not a national of the State of enforcement, once the person has completed his or her sentence, the State of enforcement may, after taking into account the wishes of the sentenced person, act in a variety of ways.⁷¹ First, it may transfer the person to another State that is obliged to receive him or her.⁷² Second, it may transfer the person to another State that agrees to it, taking into consideration the wishes of the person.⁷³ Finally, if authorized by the State of enforcement, it may permit the person to remain in the territory where he or she is.⁷⁴

In the case of a request submitted to the Court regarding the enforcement of a sentence, the sentenced person must *first* serve the full sentence pronounced by the Court.⁷⁵ After that point, it may serve the subsequent sentence either in the State that the Court has designated or in a third State to which the person has been extradited.⁷⁶

b. Extradition, Punishment or Prosecution of Other Offences

The Presidency has authority over the temporary extradition of the sentenced person to a third State for the purposes of prosecution.⁷⁷ However, it may only do so after obtaining sufficient assurances that the person will be placed in the third State's custody and, after the prosecution, the person will be returned to the State of enforcement so that he or she may continue serving their sentence.⁷⁸

If a third State has previously requested that a person be extradited or surrendered to it for a trial or the enforcement of a sentence, the State of enforcement may extradite or surrender the person to that third State.⁷⁹ However, no such extradition, nor any prosecution or punishment for conduct that the person engaged in prior to arriving in the State of enforcement, may occur unless the Court—at the request of the State of enforcement—has approved of such action.⁸⁰

In order to make a request for extradition, the State of enforcement must notify the Presidency of its desire for extradition, prosecution or punishment and transmit a series of documents to the Court.⁸¹ If a third State

71. See Rome Statute, *supra* note 7, art. 107(1).

72. *Id.*

73. *Id.*

74. *Id.* In the first and second scenarios, the Court shall bear the costs of transferring the person to another State if no other State bears such cost. *Id.* art. 107(2).

75. ICC Rules, *supra* note 6, Rule 215(2).

76. *Id.*

77. *Id.* Rule 215(3)

78. *Id.*

79. Rome Statute, *supra* note 7, art. 107(3).

80. *Id.* art. 108(1).

81. ICC Rules, *supra* note 6, Rule 214(3). The State of enforcement must also transmit the following documents to the Presidency: “[a] statement of the facts of the case and their legal characterization; . . . any applicable legal provisions, including those concerning the statute of limitation and the applicable penalties; . . . [a] copy of any sentence, warrant of arrest or other document having the same force, or of any other legal writ which the State intends to enforce; [and] . . . [a] protocol containing views of

requests extradition, the State of enforcement must sufficiently inform the sentenced person about the extradition request and then transmit the request to the Presidency together with the sentenced person's views regarding the possibility of extradition.⁸² The Presidency has the power to request any additional information from both the State of enforcement and the State that is requesting extradition.⁸³

c. Changing the State of Enforcement

If any circumstances materially affect the terms or extent of the sentenced person's imprisonment, the State of enforcement must give the Court forty-five days prior notice and refrain from acting in a way that prejudices its enforcement obligations.⁸⁴ If the Presidency does not agree to the circumstances that have arisen, it must notify the State of enforcement and may proceed with a decision to transfer the person to another State.⁸⁵ Before making its decision, however, the Presidency may request the views of both the sentenced person and the State of enforcement, as well as consider information from other sources, including expert opinion and written and oral presentations by the sentenced person and the Prosecutor.⁸⁶ In the event that the Presidency decides not to transfer the person to another State, it must inform the sentenced person, the Prosecutor, the Registrar, and the State of enforcement as soon as possible.⁸⁷

d. Escape

Upon being informed by the State of enforcement of an escape, the Presidency will work with the State, in accordance with Part 9 of the Statute, to locate the sentenced person who has escaped.⁸⁸ If the person leaves the State of enforcement, the State may—in consultation with the Court—either request the person's surrender from the relevant third State pursuant to any existing arrangements, or, alternatively, request that the Court seek such a surrender, in accordance with the provisions in the Statute gov-

the sentenced person obtained after the person has been informed sufficiently about the proceedings." *Id.* Rule 214(1).

82. *Id.* Rule 214(2).

83. *Id.* Rule 214(3). If a State *other* than the State of enforcement or the State seeking extradition surrenders the sentenced person to the Court, the Presidency will consult with, and take into account, the views of the State that surrendered the person. *Id.* Rule 214(4). In doing so, the Presidency may conduct a hearing. *Id.* Rule 214(6). Regardless of whether it does conduct a hearing, the Presidency must decide on the matter as soon as possible and notify all participating parties of its decision. *Id.* Rule 215(1). The State of enforcement has a duty to notify the Presidency, upon its request, of any important events relating to the sentenced person, or any prosecution of that person for events following his or her transfer. *Id.* Rule 216.

84. Rome Statute, *supra* note 7, art. 103(2)(a).

85. *Id.* arts. 103(2)(b), 104(1).

86. ICC Rules, *supra* note 6, Rule 210(1) ("Before deciding to change the designation of a State of enforcement, the Presidency may . . . [c]onsider written or oral presentations of the sentenced person and the Prosecutor; . . . [c]onsider written or oral expert opinion; [and] . . . [o]btain any other relevant information from any reliable sources.").

87. *Id.* Rule 210(3).

88. *See id.* Rule 225(1).

erning international cooperation and judicial assistance.⁸⁹ In so doing, the Court may direct that the person be returned to the State of enforcement or to a State that the Court has newly designated.⁹⁰

II. Enforcement of Fines, Forfeiture Measures and Reparation Orders

Having reviewed the enforcement of sentences in the section above, Part II now turns to the enforcement of fines, forfeiture measures and reparation orders. In so doing, it focuses first on the role of the Trust Fund and its two mandates, one of which relates directly to the enforcement of reparation orders. Second, it discusses the role of the Presidency in enforcing fines, forfeiture and reparation orders, its authority to sentence in the case of a failure to make a payment, and its role in monitoring the financial situation of the sentenced person.

A. The Role of the Trust Fund

Pursuant to the Statute, the ASP has established a Trust Fund that can, by an order from the Chambers, receive money and other property collected through fines, forfeiture or reparations.⁹¹ The Trust Fund operates for the benefit of both the victims and the families of victims of crimes within the Court's jurisdiction.⁹² Moreover, the Trust Fund is a novel feature of the Court, unprecedented in the history of international criminal law, and one that was clearly preferred during the initial debate in the

89. Rome Statute, *supra* note 7, art. 111.

90. *Id.*; see ICC Rules, *supra* note 6, Rule 225(3) ("Nevertheless, the Presidency may, acting on its own motion or at the request of the Prosecutor or of the initial State of enforcement and in accordance with article 103 and rules 203 to 206, designate another State, including the State to the territory of which the sentenced person has fled.").

91. See Rome Statute, *supra* note 7, art. 79 ("1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims. 2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund. 3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties."); see also *id.* art. 75(2) ("The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79."); ICC Rules, *supra* note 6, Rule 98 ("1. Individual awards for reparations shall be made directly against a convicted person. 2. The Court may order that an award for reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim. The award for reparations thus deposited in the Trust Fund shall be separated from other resources of the Trust Fund and shall be forwarded to each victim as soon as possible. 3. The Court may order that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate. 4. Following consultations with interested States and the Trust Fund, the Court may order that an award for reparations be made through the Trust Fund to an intergovernmental, international or national organization approved by the Trust Fund. 5. Other resources of the Trust Fund may be used for the benefit of victims subject to the provisions of article 79.").

92. Rome Statute, *supra* note 7, art. 79(1).

Working Group on Penalties at the Rome Conference.⁹³ It also constitutes a crucial component of the Court's emphasis on assisting victims.⁹⁴

The Trust Fund has two mandates.⁹⁵ First, under its reparations mandate, the Trust Fund implements "Court-ordered reparations awards against a convicted person when directed by the Court to do so."⁹⁶ Second, under its general assistance mandate, the Trust Fund uses voluntary contributions from donors to provide a number of services, including physical rehabilitation,⁹⁷ material support,⁹⁸ and psychological rehabilitation⁹⁹ to victims and their families.¹⁰⁰

It is worth emphasizing that the income of the Trust Fund is not based solely on transfers of money or property pursuant to a Court order.¹⁰¹ Indeed, as of the time of writing, there have been no sentences handed down by the Chambers, and the Trust Fund has been operating exclusively

93. See SCHABAS, *supra* note 9, at 909-10; Mark Jennings, *Article 79: Trust Fund*, in TRIFFTERER COMMENTARY, *supra* note 33, at 1439, 1439 ("The concept of a Trust Fund received strong support from a range of delegations in the Preparatory Committee."); see also Rolf Einar Fife, *Penalties*, in MAKING OF THE ROME STATUTE, *supra* note 3, at 319, 343 ("On the basis of a proposal made by the International Law Commission, there was broad support during the deliberations of the Preparatory Committee that money and other property collected through fines and forfeiture should be transferred to a Trust Fund.")

94. See SCHABAS, *supra* note 9, at 909; Jennings, *supra* note 93, at 1439 ("The Trust Fund is a key element of the regime created by the Statute for the assistance of victims.")

95. *The Two Roles of the TFV*, TRUST FUND FOR VICTIMS, <http://www.trustfundforvictims.org/two-roles-tfv> (last visited Dec. 1, 2011) [hereinafter *TFV: Two Roles*]; see also ICC Rules, *supra* note 6, at Rule 98(2)-(5).

96. *TFV: Two Roles*, *supra* note 95; see also ICC Rules, *supra* note 6, Rule 98(2)-(4).

97. Physical rehabilitation is the provision of "care and rehabilitation to victims who have suffered physical injury so they can recover and resume their roles as productive and contributing members of their societies." THE TRUST FUND FOR VICTIMS, LEARNING FROM THE TFV'S SECOND MANDATE: FROM IMPLEMENTING REHABILITATION ASSISTANCE TO REPARATIONS 5 (2010), available at <http://www.trustfundforvictims.org/sites/default/files/imce/TFV%20Programme%20Report%20Fall%202010.pdf> [hereinafter *TFV: SECOND MANDATE*].

98. Material support is the improvement of "the livelihoods of victims and their families through education, training, economic empowerment and local capacity building." *Id.*

99. Psychological rehabilitation is the provision of "appropriate psychological and social support to heal trauma, assist in recovery and reconciliation, and address stigma and discrimination among victims, families and affected communities." *Id.*

100. *TFV: Two Roles*, *supra* note 95; see also ICC Rules, *supra* note 6, Rule 98(5).

101. See Establishment of a Fund for the Benefit of Victims of Crimes Within the Jurisdiction of the Court, and of the Families of Such Victims, Assembly of States Parties to the Rome Statute of the International Criminal Court, 1st Sess., 3d plen. mtg. at ¶ 2, ICC-ASP/1/Res.6 (Sept. 9, 2002) ("The Assembly of States Parties . . . [d]ecides also that the Trust Fund shall be funded by: (a) Voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties; (b) Money and other property collected through fines or forfeiture transferred to the Trust Fund if ordered by the Court pursuant to article 79, paragraph 2, of the Statute; (c) Resources collected through awards for reparations if ordered by the Court pursuant to rule 98 of the Rules of Procedure and Evidence; (d) Such resources, other than assessed contributions, as the Assembly of States Parties may decide to allocate to the Trust Fund.")

under its second mandate with the support of voluntary contributions from donors.¹⁰² Interestingly, while the Rules have clearly defined the term “victims” and the Appeals Chamber has clarified this definition in the context of victims’ participation, the issue of reparations in connection to victims is yet to be addressed.¹⁰³ Thus, the Trust Fund does not interpret its second mandate as linked to a specific case before the Court, but rather to a broader conception of victims at the situation level.¹⁰⁴ It assists individual and collective victims at the community level facing either individual categories of harm or dealing with specific needs across a range of categories of harm, as well as targets community peace-builders (i.e., leaders from the relevant communities).¹⁰⁵ This work includes specific projects tailored to the needs of victims, but also larger projects that help communities rebuild themselves and establish an enduring peace and reconciliation.¹⁰⁶

102. See SCHABAS, *supra* note 9, at 909; see also *TFV: Two Roles*, *supra* note 95. By November 2010, total voluntary contributions to the Trust Fund were €5.8 million. *TFV: SECOND MANDATE*, *supra* note 97, at 40. Operating solely under its second mandate, the Trust Fund has 34 approved projects generally, with 16 active projects in northern Uganda and 13 active projects in the Democratic Republic of the Congo (“the DRC”). *Id.* at 7. The Trust Fund’s most recent report highlights the scope of its current activities:

Since late 2008, the [Trust Fund for Victims] has directly reached an estimated 70,000 victims of crimes under the jurisdiction of the ICC. The great majority of these are victims from affected communities (72%) who are being reached through the [Trust Fund for Victims]’ reconciliation projects. Victims receiving other forms of direct assistance include mutilated victims (4%), children orphaned by and/or made vulnerable by crimes under the ICC’s jurisdiction (5%), victims of [sexual and gender-based violence] (7%), and a general category including other victims and their families impacted by mass crimes (8%).

Id.

103. See ICC Rules, *supra* note 6, Rule 85 (“For the purposes of the Statute and the Rules of Procedure and Evidence: (a) ‘Victims’ means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.”); see also *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06 OA 9 OA 10, Judgment on the Appeals of The Prosecutor and The Defence Against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008 (July 11, 2008), available at <http://www.icc-cpi.int/iccdocs/doc/?doc529076.PDF>; *Situation in the Democratic Republic of the Congo*, Case No. ICC-01/04 OA4 OA5 OA6, Judgment on Victim Participation in the Investigation Stage of the Proceedings in the Appeal of the OPCD Against the Decision of Pre-Trial Chamber I of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor Against the Decision of Pre-Trial Chamber I of 24 December 2007 (Dec. 19, 2008), available at <http://www.icc-cpi.int/iccdocs/doc/doc612293.pdf>.

104. See *TFV: SECOND MANDATE*, *supra* note 97, at 5–6; Regulations of the Trust Fund for Victims, ¶ 50(a), ICC-ASP/4/Res.3 (Dec. 3, 2005), available at <http://www.icc-cpi.int/menus/icc/legal%20texts%20and%20tools/official%20journal/regulations%20of%20the%20trust%20fund%20for%20victims>.

105. See *TFV: SECOND MANDATE*, *supra* note 97, at 5–6.

106. See generally *Welcome/Bienvenue*, TRUST FUND FOR VICTIMS, <http://www.trustfundforvictims.org> (last visited Dec. 1, 2011).

B. The Role of the Presidency

The Presidency also plays a central role in the enforcement of fines, forfeiture and reparation orders. As of the time of this writing, there is no practice on such enforcement. Nonetheless, it is important to provide a structured overview of the procedure of enforcement and the Presidency's authority when a sentenced person fails to pay a fine.

1. Procedure of Enforcement

When Chambers orders fines or forfeitures pursuant to Part 7 of the Statute, States Parties must give effect to such orders.¹⁰⁷ When a State Party cannot give effect to an order for forfeiture, it must undertake measures to recover the value of the proceeds, property or assets that the Court ordered to be forfeited.¹⁰⁸ If a State Party obtains property, the proceeds of the sale of real property, or the sale of other property as a result of its enforcement of a judgment, it shall transfer it to the Court.¹⁰⁹ For its part, the Presidency must assist the States in carrying out the necessary enforcement measures.¹¹⁰

a. Forfeiture and Reparation Orders

The Presidency must seek cooperation and measures for enforcement as well as transmit copies of the orders for the enforcement of fines, forfeitures,¹¹¹ or reparations¹¹² to any State with which the sentenced person

107. Rome Statute, *supra* note 7, art. 109(1).

108. *Id.* art. 109(2).

109. *Id.* art. 109(3).

110. ICC Rules, *supra* note 6, Rule 222 (“The Presidency shall assist the State in the enforcement of fines, forfeiture or reparation orders, as requested, with the service of any relevant notification on the sentenced person or any other relevant persons, or the carrying out of any other measures necessary for the enforcement of the order under the procedure of the national law of the enforcement State.”). Furthermore, in cases where a person is serving a sentence, but where the Court has also ordered the enforcement of fines, forfeiture measures, or reparation orders, the Presidency may request that the State transmit any relevant information regarding the State’s intention to permit the sentenced person to remain in its territory or the location to which it will transfer the person. *Id.* Rule 212.

111. A State may give a forfeiture order effect only if it specifies the following: “[t]he identity of the person against whom the order has been issued; . . . [t]he proceeds, property and assets that have been ordered by the Court to be forfeited; and . . . [i]f the State Party is unable to give effect to the order for forfeiture in relation to the specified proceeds, property or assets, it shall take measures to recover the value of the same.” *Id.* Rule 218(1). In the case of a request for cooperation and measures for enforcement, the Court must supply information regarding the location of the proceeds, property, and assets that the order of forfeiture covered. *Id.* Rule 218(2).

112. In the case of an order for reparation, the order must specify: “[t]he identity of the person against whom the order has been issued; . . . [with respect to] reparations of a financial nature, the identity of the victims to whom individual reparations have been granted, and, where the award for reparations shall be deposited with the Trust Fund, the particulars of the Trust Fund for the deposit of the award; and . . . [t]he scope and nature of the reparations ordered by the Court, including, where applicable, the property and assets for which restitution has been ordered.” *Id.* Rule 218(3). Finally, when the reparations are to individuals, a copy of the reparation order must be transmitted to the relevant victim. *Id.* Rule 218(4).

has a direct connection based on factors including nationality, domicile or residence, location of the sentenced person's assets and property, or location of assets and property with which the victim has a connection.¹¹³ When appropriate, the Presidency may also inform the State of third-party claims or the fact that no claim was presented by a person who received notification of any reparations proceedings.¹¹⁴

When transmitting the copies of the reparation order to States Parties, the Presidency must make clear that the State cannot modify the Court-specified reparations and must facilitate the order's enforcement.¹¹⁵ Moreover, when transmitting copies of judgments in which fines were imposed, the Presidency must inform the national authorities that they should not modify the fines in any way.¹¹⁶

b. Transmission of Fines and Forfeited Assets

As noted above, a State Party must transfer to the Court the property, proceeds of the sale of real property, or the sale of other property that the State Party obtains when enforcing a judgment of the Court.¹¹⁷ When enforcing fines, forfeiture orders and reparation orders, the Presidency must make the necessary arrangements to receive the payment of fines, receive property, the proceeds of the sale of real property, or the sale of other property, account for any interest gained on the money received under either of the aforementioned scenarios, or ensure the transfer of the money to either the Trust Fund or to the relevant victims.¹¹⁸ If property or assets are transferred to or deposited in the Trust Fund as a result of the enforcement of an order of Chambers, the Presidency will decide on their disposition or allocation.¹¹⁹

After the transfer to or the deposit of property or assets in the Trust Fund, the Presidency consults with the Prosecutor, the sentenced person, the victims or their legal representatives, authorities from the State of enforcement or any relevant third party, or representatives of the Trust Fund.¹²⁰ In so doing, the Presidency decides "on all matters related to the disposition or allocation of property or assets realized through enforcement of an order of the Court."¹²¹ Priority is given "to the enforcement of measures concerning reparations to victims."¹²²

2. *Failure of the Sentenced Person to Pay a Fine*

In cases where the convicted person continuously fails to pay the imposed fine, and the Presidency believes that all available enforcement

113. *Id.* Rule 217.

114. *Id.*

115. *Id.* Rule 219.

116. *Id.* Rule 220.

117. Rome Statute, *supra* note 7, art. 109(3).

118. ICC Regulations, *supra* note 32, Reg. 116(1).

119. *Id.* Reg. 116(2).

120. ICC Rules, *supra* note 6, Rule 221(1).

121. *Id.*

122. *Id.* Rule 221(2).

measures have been exhausted, the Presidency has the authority to extend the term of imprisonment.¹²³ This is a remarkable occurrence within the Statute, as the Presidency's role is normally solely one of enforcement after a person has been sentenced by Chambers.¹²⁴ However, in this case, the Presidency itself has the authority to extend the sentence for a person who fails to pay.

Such extensions cannot exceed a quarter of a term or five years, whichever is less.¹²⁵ In order to determine whether, and to what extent, it should extend the term of imprisonment, the Presidency may sit in camera to hear the views of both the sentenced person—who may be assisted by counsel—and the Prosecutor.¹²⁶ Furthermore, in making its decision, the Presidency may ask for observations from States in which attempts to enforce fines were unsuccessful, as well as for observations from the State of enforcement.¹²⁷ If, after the Presidency extends the term of imprisonment, the sentenced person pays all, or a portion, of their fine, the Presidency must either revoke or, in case of partial payment, reduce the extension of the term of imprisonment.¹²⁸

Conclusion

This Article paints a picture of the Court's practice as it takes its first steps toward realizing what this Article has called its "dual enforcement" system. The Court's regime is truly novel, representing the culmination of an eight-year process that has produced a fair and detailed enforcement regime. The foundation for these provisions was created in the Statute, supplemented by the Rules, and, finally, nuanced by the Regulations. Thus, the Court's enforcement system reflects the sincere, determined efforts of numerous stakeholders—from diverse States Parties to the Court's own judges. Furthermore, because this regime ensures that the views and considerations of the sentenced person are respected throughout the period of enforcement, it guarantees that a myriad of safeguards protect the person's human rights. Indeed, from the decision to designate a State of enforce-

123. *Id.* Rule 146(5). The Presidency, with the assistance of the Registrar, continuously monitors the financial situation of the sentenced person, including while the Court's sentence is being served. ICC Regulations, *supra* note 32, Reg. 117. In so doing, the Presidency may request relevant information, expert opinions or reports, communicate with the sentenced person and his or her counsel for the purposes of inquiring into the sentenced person's financial situation, and ask for the observations of the Prosecutor, victims and the legal representatives of the victims. *Id.*

124. *See, e.g.*, ICTY Rules, *supra* note 16, Rule 19(a) ("The President shall coordinate the work of the Chambers and supervise the activities of the Registry . . ."); *id.* Rule 33 *bis* ("The Deputy Registrar, in consultation with the President, shall . . . take all appropriate measures so that the decisions rendered by the Chambers and Judges are executed, especially sentences and penalties . . .").

125. ICC Rules, *supra* note 6, Rule 146(5).

126. *Id.* Rule 146(6).

127. ICC Regulations, *supra* note 32, Reg. 118(1).

128. *Id.* Reg. 118(2).

ment¹²⁹ to the final transfer of the individual upon completion of their sentence,¹³⁰ the Court always requests the views of the individual.

As for the Court's practice, the Trust Fund and the Presidency are actively engaged in their respective functions and mandates. With regard to the former, the Trust Fund begins its activities under its second mandate, earning voluntary contributions and expanding its undertakings with dozens of projects in numerous countries. With regard to the latter, the Presidency is actively concluding enforcement agreements now and, with the establishment of the Enforcement Unit, will ensure the proper supervision of the enforcement of sentences, conditions of imprisonment, and the enforcement of fines, forfeiture and reparation orders.¹³¹ As noted above, a resolution was adopted at the Kampala Review Conference urging States Parties to join the List, confirming that sentences may be served in a State through an international or regional organization, mechanism, or agency, and encouraging States already on the List to promote international cooperation at all levels.¹³² This link between enforcement and cooperation—a crucial pillar of the Statute—confirms a key aspect of the discussions at the Rome Conference: the enforcement of sentences is part and parcel of State cooperation.

129. Rome Statute, *supra* note 7, art. 103(3)(c) (“In exercising its discretion to make a designation . . . the Court shall take into account the . . . views of the sentenced person.”).

130. *Id.* art. 107(1) (“Following completion of the sentence, a person who is not a national of the State of enforcement may, in accordance with the law of the State of enforcement, be transferred to a State which is obliged to receive him or her, or to another State which agrees to receive him or her, taking into account any wishes of the person to be transferred to that State, unless the State of enforcement authorizes the person to remain in its territory.”).

131. ICC Regulations, *supra* note 32, Reg. 113 (“The Presidency shall establish an enforcement unit within the Presidency to assist it in the exercise of its functions under Part 10 of the Statute, in particular: (a) The supervision of enforcement of sentences and conditions of imprisonment; and (b) The enforcement of fines, forfeiture orders and reparation orders.”)

132. Strengthening the Enforcement of Sentences, Assembly of States Parties to the Rome Statute of the International Criminal Court, 9th plen. mtg., RC/Res.3 (June 8, 2010), available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.3-ENG.pdf (“The Review Conference . . . 1. Calls upon States to indicate to the Court their willingness to accept sentenced persons in accordance with the Statute; . . . 3. Urges States Parties and States that have indicated their willingness to accept sentenced persons, directly or through competent international organizations, to promote actively international cooperation at all levels, particularly at the regional and sub regional levels; 4. Requests the Secretary-General of the United Nations to bring this resolution to the attention of all members of the United Nations, with a view to encouraging that the above objectives may be considered, as appropriate, in the relevant programmes of assistance of the World Bank, the regional banks, the United Nations Development Programme, and other relevant multilateral and national agencies.”).

