Model Law – Rome Statute of the International Criminal Court

The Commonwealth

Office of Civil and Criminal Justice Reform

Model Law to Implement the Rome Statute of the International Criminal Court

The Commonwealth

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Printed and published by the Commonwealth Secretariat.

Introduction

Commonwealth Heads of Government have expressed continued commitment to end impunity for perpetrators of genocide, crimes against humanity and war crimes, as well as the importance attached to building national capacity through, inter alia, the implementation of the Rome Statute and other international humanitarian law instruments (IHL), such as the Geneva Conventions, to ensure effective domestic prosecutions.

The Secretariat has been mandated since 2002 to assist member countries specifically with the ratification and implementation of the Rome Statute of the International Criminal Court (ICC) and to work collaboratively with other partner organisations such as the International Committee of the Red Cross (ICRC) and the British Red Cross Society in promoting implementation of related IHL instruments.

Becoming a party to the Rome Statute is, however, but the first step and implementing legislation covering a range of matters, varying from State to State, is required. Accordingly, in 2004, a Commonwealth Model Law to Implement the Rome Statute was first developed to assist member countries in the implementation of the Rome Statute of the ICC.

At their meeting held in October 2010, Senior Officials of Commonwealth Law Ministries endorsed a recommendation made by the Commonwealth Secretariat to convene an Expert Group to review and revise the Commonwealth Model Law in line with current legal and policy developments following the Kampala Review Conference held in June 2010, so as to reflect the various amendments made to the Rome Statute.

In the process of revising the Model Law, Commonwealth experts noted that the practice of Commonwealth countries demonstrates that the Model Law may be used by national legislators in two ways:

(a) as a model legislation (i.e. a textual basis to be modified and adapted to a given national system); or

(b) as guidance to be used alongside other resources.

These alternative uses of the Model Law reflect the fact that there is no "one-size-fits-all" solution to the complex process of domestic implementation of the Rome Statute of the ICC.

The revised Model Law is further accompanied by the 2011 report of the Commonwealth Expert Group on Implementing Legislation for the Rome Statute of the International Criminal Court. Footnotes in the Model Law provide cross references to relevant sections of the report, and this provides further context and information to the model provisions.

Background

Following the recommendation of Senior Officials of Commonwealth Law Ministries to revise the Commonwealth Model Law, a Commonwealth Expert Group on Review of the Implementing Legislation for the Rome Statute of the International Criminal Court met at Marlborough House between 23 and 25 February 2011. The members of the Group were:

- Ms Esther Van Nes – Canada
- Mrs Emily Achieng Chweya – Kenya
- Mrs Aruna Narain – Mauritius
- Ms Juliet Hay – New Zealand
- Mr Eden Charles – Trinidad and Tobago
- Ambassador Mirjam Blaak – Uganda
- Chatham House – Ms Marika Giles Samson (Observer)
- International Criminal Court – Mr David Koller (Observer)
- Secretariat of the Assembly of States Parties – Ms Gaile Ramoutar (Observer)
- International Committee of the Red Cross (ICRC)– Mr Leonard Blazeby (Observer)
- Parliamentarians for Global Action (PGA) – Dr David Donat Cattin (Observer)
- British Red Cross – Professor Charles Garraway (Chair)

Comments were also received from Mr Dapo Akande of St Peter's College Oxford. The Working Group reviewed the text of the Model Law and, out of committee, the Report of the Commonwealth Expert Group on Review of the Implementing Legislation for the Rome Statute of the International Criminal Court of September 2004.

The outcomes of the Kampala Conference, the Commonwealth Stocktaking meeting held in October 2010, the deliberations of the February 2011 Expert Group, legislation of Commonwealth countries and other reference materials informed the revision of the Model Law as well as the accompanying report/commentary to the Model Law.

The Revised Model law with commentary, together with the Expert Group Chairman's Report were presented to Senior Officials and Law Ministers at their meeting held 11-14 July 2011, in Sydney, Australia. At that meeting, Commonwealth Law Ministers approved the revised Model Law for dissemination to Commonwealth member countries which are drafting implementing national legislation for the Rome Statute of the International Criminal Court.

Model Law

To Implement the Rome Statute of the International Criminal Court

Optional long title

AN ACT TO ENABLE (NAME OF COUNTRY) TO IMPLEMENT AND GIVE EFFECT TO ITS OBLIGATIONS UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT; AND FOR CONNECTED MATTERS.[1]

Note: This model law should be read with reference to the attached revised Report of the Commonwealth Expert Group on Implementing Legislation for the Rome Statute of the International Criminal Court. The footnotes to the sections provide cross references to relevant sections of the report.

Optional preamble

Preamble

RECOGNISING that genocide, crimes against humanity and war crimes, as the most serious crimes of concern to the international community must not go unpunished and effective prosecution must be ensured by taking measures at the national level and enhancing international co-operation;

EMPHASISING that the International Criminal Court established under the Rome Statute is complementary to national criminal jurisdictions**,** which have a responsibility to prosecute, to surrender to the ICC, or to extradite the persons alleged to be criminally responsible for the commission of crimes within the jurisdiction of the ICC;

MINDFUL of the need for (name of country) as a State Party to implement the obligations under the Rome Statute in domestic law;

NOW BE IT ENACTED by (Parliament) of (name of country) as follows:

Part I — Preliminary

1 Short title

This Act may be cited as the International Criminal Court Act (year)

Optional additional provision

[1A Purpose[2]

The International Criminal Court Act is intended to give the force of law in (name of country) to the Rome Statute adopted on 17 July 1998 [and ratified by (name of country) on (date)]:

1 If this long title is used the Preamble and Section 1A (Purpose) may not be required or may need consequential amendment. Countries should choose from these options those that are most appropriate for their legislation.

2 If adopted here, consequential amendments to the Long Title and Preamble may be

(a) To implement obligations assumed by (name of country) under the Statute;

(b) To make [further] provision in (name of country)'s law for the prevention and punishment of the international crimes of genocide, crimes against humanity and war crimes;[3]

(c) To enable the prosecution in (name of country) of persons alleged to have committed these crimes or related offences against the administration of justice;

(d) To enable (name of country) to co-operate fully with the International Criminal Court in the performance of its functions, including the investigation and prosecution of persons accused of having committed crimes within the jurisdiction of the International Criminal Court;

(e) To provide for the arrest and surrender to the International Criminal Court of persons alleged to have committed crimes within the jurisdiction of the International Criminal Court;

(f) To provide for various forms of requests for assistance by (name of country) to the International Criminal Court;

(g) To enable the International Criminal Court to conduct proceedings in (name of country) and;

(h) To provide for the enforcement of penalties and other orders of the International Criminal Court in (name of country).**]**

2 Act to bind the (Crown/Republic)[4]

This Act shall bind the (Crown/Republic) and shall apply to persons in the public service of the (Crown/Republic) and to property held for the purposes of the public service of the (Crown/Republic), in all respects, as it applies to other persons and property.

3 Interpretation

(1) In this Act, unless the context otherwise requires—

"the Agreement on the Privileges and Immunities of the ICC" means the agreement set out in Schedule 2 to this Act;

"crime within the jurisdiction of the ICC " means a crime over which the ICC has and can exercise jurisdiction under article 5 of the Statute;

"ICC" means the International Criminal Court established under the Statute;

"ICC prisoner" means a person on whom a sentence of imprisonment has been imposed by the ICC and includes a person who is held in custody at the request of the ICC during a sitting of the ICC in (name of country) ;

"Minister" means the Minister of .....; [5]

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necessary.

3 There is no reference to the crime of aggression given that the ICC cannot currently exercise jurisdiction over it. See further paragraphs 4 and 5 of the Report.

4 See discussion under Part XXVII of the Report on Sovereign Immunity.

5 See paragraph 82 of the Report. States need to consider who is the appropriate decision-maker in their legal system for the various roles given in this legislation. The 2011 Group considered the role should be reserved for a Minister in sections 25 and 90 because of their sensitive nature. There may be other provisions where this is also appropriate in the context of the particular legal system.

"offence against the administration of justice" means an offence against the administration of justice over which the ICC has jurisdiction under article 70 of the Statute;

"prescribed" means prescribed by regulations made under this Act;

"Pre-Trial Chamber" means the Pre-Trial Chamber of the ICC;

"property" means movable or immovable property of every description, whether situated in (name of country) or elsewhere and whether tangible or intangible; and includes an interest in any such movable or immovable property;

"Prosecutor" means the Prosecutor of the ICC;

"Restraining order" means an order prohibiting any person from dealing in the property specified in the order other than in accordance with the conditions and exceptions specified in the order;

"Rules" means the Rules of Procedure and Evidence adopted under article 51 of the Statute;

"Seizing order" means an order authorising a police officer to search for any property and to seize the property if found or any other property that the police officer believes on reasonable grounds may relate to the request from the ICC;

"Statute" means the Rome Statute of the ICC set out in Schedule 1 to this Act;

"Trial Chamber" means the Trial Chamber of the ICC.

Additional definition to be included if using the optional alternative offence provisions under section 5(2), 6(2) or 7(2)

["conventional international law" means a convention, treaty or other international agreement to which (name of country) is a party and for the time being in force;]

(2) For the purposes of this Act—

(a) a reference in this Act to a request by the ICC for assistance includes a reference to a request by the ICC for co-operation;

(b) a reference in this Act to a request by the ICC for assistance under a specified provision or in relation to a particular matter includes a reference to a request by the ICC for co-operation under that provision or in relation to that matter;

(c) a reference in this Act to a figure in brackets immediately following the number of an article of the Statute is a reference to the paragraph of that article with the number corresponding to the figure in brackets;

(d) a reference in this Act to a sentence of imprisonment imposed by the ICC includes a reference to a sentence of imprisonment extended by the ICC (whether for the non-payment of a fine or otherwise).

4 Obligations imposed by Statute or Rules

Where any provision of the Statute or the Rules confers or imposes a power or duty on, or assigns a function to, a State including but not limited to a power, duty or function relating to the execution of a request for assistance from the ICC, that

power, duty, or function may, unless there is provision to the contrary in this Act, be exercised, performed and discharged by the (Minister or other appropriate authority)[6] on behalf of the Government of (name of country).

Part II — International Crimes and Offences Against The Administration of Justice

International Crimes[7]

5 Genocide

(1) Every person who, in (name of country) or elsewhere—

(a) commits genocide ; or

(b) conspires or agrees with any person to commit genocide, whether that genocide is to be committed in (name of country) or elsewhere,

shall be guilty of an offence and shall be liable, on conviction after trial on indictment, to the penalty specified in subsection (3).

Offence definition provision (choose one of the following options:)

Option 1

(2) For the purposes of this section, "genocide" is an act referred to in article 6 of the Statute.[8]

OR[9]

Option 2

(2) For the purposes of this section, "genocide" is an act specified in article 6 of the Statute and includes any other act which, at the time and in the place of its commission, constitutes genocide according to customary international law or conventional international law or by virtue of it being criminal according to the general principles of law recognised by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

Penalty provision (choose one of the following options:)

Option 1

(3) The penalty for the offence referred to in subsection (1) shall—

(a) if the offence involves the wilful killing of a person, be [the same as the penalty for murder prescribed by the law of (name of country)] [life imprisonment]; and

(b) in any other case, be imprisonment for a term not exceeding 30 years or a term of life imprisonment when justified by the extreme gravity of the offence and the individual circumstances of the convicted person.

6 See discussion on the appropriate authority in paragraph 82 of the Report.

7 See discussion in the Report on offences and penalties in Part III (Substance) and Part V (Penalties).

8 The intention of Option 1 of subparagraph 2 of this section and sections 6 and 7 is to incorporate the crime definitions by reference to the Statute. If there are concerns about the sufficiency of incorporation by reference, the text of the Statute definitions can be replicated in the legislation.

9 In respect of the optional alternative offence provisions in sections 5(2), 6(2) and 7(2), see discussion in paragraph 10 of the Report on adopting a "living" definition.

OR

Option 2

(3) The penalty for an offence referred to in sub section (1) shall be (penalty consistent with domestic law).

6 Crimes against humanity

(1) Every person who, in (name of country) or elsewhere, commits a crime against humanity shall be guilty of an offence and shall be liable, on conviction after trial on indictment, to the penalty specified in subsection (3).

Offence definition provision (choose one of the following options:)

Option 1

(2) For the purposes of this section, a "crime against humanity" is an act specified in article 7 of the Statute.

OR

Option 2

(2) For the purposes of this section, "crime against humanity" is an act specified in article 7 of the Statute and includes any other act which, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of it being criminal according to the general principles of law recognised by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

Penalty provision (choose one of the following options:)

Option 1

(3) The penalty for the offence referred to in subsection (1) shall—

(a) if the offence involves the wilful killing of a person, be [the same as the penalty for murder prescribed by the law of (name of country)] [life imprisonment];and

(b) in any other case, be imprisonment for a term not exceeding 30 years or a term of life imprisonment when justified by the extreme gravity of the offence and the individual circumstances of the convicted person.

OR

Option 2

(3) The penalty for an offence referred to in subsection (1) shall be (penalty consistent with domestic law).

7 War crimes

(1) Every person who, in (name of country) or elsewhere, commits a war crime shall be guilty of an offence and shall be liable, on conviction after trial on indictment, to the penalty specified in subsection (3).

Offence definition provision (choose one of the following options:)

Option 1

(2) For the purposes of this section, a "war crime" is an act specified in—

(a) article 8(2)(a) of the Statute (which relates to grave breaches of the First, Second, Third, and Fourth Geneva Conventions); or

(b) article 8(2)(b) of the Statute (which relates to other serious violations of the laws and customs applicable in international armed conflict); or

(c) article 8(2)(c) of the Statute (which relates to serious violations of article 3 common to the four Geneva Conventions of 12 August,1949 in armed conflict not of an international character); or

(d) article 8(2)(e) of the Statute (which relates to other serious violations of the laws and customs applicable in armed conflict not of an international character).

OR

Option 2

(2) For the purposes of this section, a "war crime" means an act specified in article 8(2) of the Statute and any other act committed during an armed conflict which, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

Penalty provision (choose one of the following options:)

Option 1

(3) The penalty for an offence referred to in subsection (1) shall—

(a) if the offence involves the wilful killing of a person, be [the same as the penalty for murder prescribed by the law of (name of country)] [life imprisonment]; and

(b) in any other case, be imprisonment for a term not exceeding 30 years or a term of life imprisonment when justified by the extreme gravity of the offence and the individual circumstances of the convicted person.

OR

Option 2

(3) The penalty for an offence referred to in subsection (1) shall be (penalty consistent with domestic law).

Optional reference to Geneva Conventions Act

[4. Nothing in this section affects or limits the application of section .... of the Geneva Conventions Act (...)][10]

10 See discussion on interrelationship with legislation implementing the Geneva Conventions in paragraph 13 of the Report.

Interpretation and General Principles

8 Interpretation of articles 6, 7 and 8 of the Statute[11]

In interpreting and applying the provisions of articles 6, 7, and 8 of the Statute, a court [may][12] [shall] take into account any elements of crimes adopted and amended under article 9 of the Statute.

9 Defences under sections 5, 6, or 7 of this Act[13]

(1) [Subject to subsection 3,][14] a person charged with an offence under section 5, 6 or 7 of this Part may rely on any defence, excuse or justification available to him or her under the law of (name of country) or under international law.

(2) In the case of an inconsistency between the law of (name of country) and a principle or provision of international law, the principle or provision of international law shall prevail.

Optional subsection

[3. It shall not be a defence to an offence under section 5, 6 or 7 for the person charged with the offence to plead that the act constituting the offence was committed in obedience to, or in conformity with, the law in force at the time, and in the place at which such act was alleged to have been committed.]

10 Obedience to superior orders not a defence to offences under sections 5, 6 or 7[15]

(Choose one of the following options:)

Option 1

(1) Notwithstanding section 9, it shall not be a defence to an offence under section 5, 6 or 7 for the person charged with the offence to plead that he or she committed the act constituting such offence pursuant to an order by a Government or a superior, whether military or civilian unless-

(a) the person was under a legal obligation to obey the order of the Government or the superior in question;

(b) the person did not know that the order was unlawful; and

(c) the order was not manifestly unlawful.

(2) For the purposes of this section, orders to commit genocide or a crime against humanity shall be regarded as being manifestly unlawful.

OR

Option 2

Notwithstanding section 9, it shall not be a defence to an offence under section 5, 6 or 7 for the person charged with the offence to plead that he or she committed the act constituting the offence pursuant to an order by a Government or a superior, whether military or civilian.

OR

11 See discussion under Part XIV of the Report on General Interpretative Provision.
12 See discussion on Elements of Crimes in paragraph 49 of the Report.
13 See discussion of applicable law for defences under paragraphs 70 to 74 of the Report.
14 This will only be needed if optional subsection 3 is used.
15 See discussion of superior orders under paragraphs 76 to 78 of the Report.

Option 3

(Include no provision on superior orders in which case any existing defence available under domestic law relating to obedience to superior orders will apply but if there is none, no defence will be available. However if Option 2 under section 9 is included and international law defences are incorporated then the defences set out in Article 33 of the Rome Statute will be incorporated unless specifically excluded.)

11 Responsibility of commanders and other superiors[16]

(1) A military commander or a person effectively acting as a military commander shall be responsible for an offence under section 5, 6 or 7 committed by forces under his or her effective command and control or as the case may be, under his or her effective authority and control, as a result of his or her failure to exercise control properly over such forces where-

(a) he or she either knew, or owing to the circumstances at the time, should have known that the forces were committing or about to commit such offence; and

(b) he or she failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation or prosecution.

(2) With respect to superior and subordinate relationships not described in subsection (1), a superior shall be responsible for an offence under section 5, 6 or 7 committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control over such subordinates where-

(a) he or she either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such offence;

(b) the offences concerned activities that were within his or her effective responsibility and control; and

(c) he or she failed to take necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(3) A person responsible under this section for an offence under section 5, 6 or 7 shall, for the purposes of this Part of this Act, be regarded as having aided, abetted, counselled or procured the commission of that offence.

Optional additional provisions

[11A Pleas of autrefois acquit and convict[17]

(1) Where a person is alleged to have committed an act which constitutes an offence under section 5, 6 or 7 and that person has been tried and dealt with by a court in another state outside (name of country) in respect of that offence in such a manner that, had he or she been tried and dealt with in (name of country)

16 See discussion of command responsibility under paragraphs 63 to 65 of the Report.
17 See discussion of ne bis in idem in paragraphs 53 to 55 of the Report.

for that offence he or she would have been able to plead autrefois acquit, autrefois convict or pardon, he or she shall be deemed to have been so tried and dealt with.

(2) Notwithstanding anything in subsection (1), a person shall not be deemed to have been dealt with as provided in that subsection, if he or she had been tried and dealt with in a court outside (name of country) and the proceedings in such court-

(a) were for the purpose of shielding that person from criminal liability; or

(b) were not otherwise conducted independently or impartially in accordance with the norms of due process recognised by international law, and conducted in a manner that, in the circumstances, was inconsistent with an intention to bring the person to justice).]

[11B Knowledge and intent[18]

(1) Unless otherwise provided in the Statute or the Elements of Crimes, a person shall be regarded as having committed an act which constitutes an offence under section 5, 6 or 7 only if he or she has committed such act with intent and knowledge.

(2) For the purposes of this section-

(a) a person has intent-

(i) in relation to conduct, if he or she means to engage in such conduct;

(ii) in relation to a consequence, if he or she means to cause the consequence or is aware that it will occur in the ordinary course of events; and

(b) "knowledge" means awareness that a circumstance exists or that a consequence will occur in the ordinary course of events).]

Jurisdiction and procedure for offences under sections 5, 6 and 7

12 Temporal jurisdiction for offences under sections 5, 6 or 7[19]

(Choose one of the following options:)

Option 1

Include no provision on temporal jurisdiction in which case, by operation of law, proceedings will be prospective only, i.e. the Act will apply only to offences alleged to have been committed on or after the date on which this Act comes into force unless the domestic legal framework allows for the retrospective application of international crimes that were recognised as crimes under international law, as such, at the time in which they were committed.[20]

OR

Option 2

Proceedings for an offence under section 5 or 6 or 7 may be instituted if the act or omission constituting the offence is alleged to have been committed-

18 See discussion on mental element in paragraphs 67 to 69 of the Report.
19 See discussion under Part IV of the Report on Temporal Jurisdiction.
20 See discussion on retrospective application in paragraph 16 of the Report.

(a) on or after the date on which this Act comes into force; or

(b) on or after 1 July 2002 and before the date on which this Act comes into force .

Optional additional provision

[12 bis[21] Non-applicability of statute of limitations

The crimes within the jurisdiction of the ICC shall not be subject to any statute of limitations under the law of [name of country].]

13 Jurisdiction to try offences under sections 5, 6 or 7[22]

(Choose one of the following options:)

Option 1

Proceedings may be instituted against any person for an offence under section 5, 6 or 7 in (name of country), whether or not such person is a citizen or permanent resident of (name of country) and whether or not the act constituting such offence was committed within or outside the territory of (name of country).

Option 2

(1) Where an act constituting an offence under section 5 or 6 or 7 is committed by any person outside the territory of (name of country), proceedings may be instituted against that person for that offence in (name of country), if—

(a) the person is a citizen or permanent resident of (name of country);

Optional additional provision[23]

[(a bis) the person was a citizen or permanent resident of a state that was engaged in an armed conflict against (name of country), or was employed in a civilian or military capacity by (name of country) ;]

(b) the person has committed the offence against a citizen or permanent resident of (name of country); or

Optional additional provision

[(b bis) the person has committed the offence against a citizen or permanent resident of a state that was allied with (name of country) or of a neutral state in an armed conflict; or]

(c) the person is, after the commission of the offence, present in (name of country).

14 Consent required for prosecutions under sections 5, 6 or 7[24]

(1) No proceedings for an offence under section 5, 6 or 7 of this Act shall be instituted in any court in (name of country) except with the consent of (the authority responsible for public prosecutions).

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21 See discussion in paragraph 66 of the Report.
22 See discussion under Part VI of the Report on Jurisdiction to Prosecute.
23 In relation to these optional provisions (a bis and b bis), see discussion on jurisdiction in paragraph 29 of the Report.
24 See discussion under Part VII of the Report on Consent to Prosecution.

(2) Notwithstanding anything in subsection (1), a person charged with an offence under section 5, 6 or 7 may be arrested, or a warrant for his or her arrest may be issued and executed, and he or she may be remanded in custody or on bail, even though the consent of the (authority responsible for public prosecutions) for the institution of proceedings against that person for that offence has not been obtained, but no further steps shall be taken in the proceedings until that consent has been obtained.

Offences against administration of justice[25]

Section 15

(Choose one of the following options:)

Option 1

Extend existing administration of justice offences relating to domestic courts and proceedings to the ICC (extraterritorial jurisdiction is dealt with in section 16).

OR

Option 2

Create new offences based on the optional administration of justice offence provisions set out in sections 15A - 15G

Optional administration of justice provisions

[15A Corruption of Judges and certain elected officials of ICC

(1) A Judge who, in (name of country) or elsewhere, corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, a bribe for himself or herself or any other person in respect of an act—

(a) done or omitted to be done by that Judge in his or her judicial capacity; or

(b) to be done or to be omitted to be done by that Judge in his or her judicial capacity,

shall be guilty of an offence and shall be liable, on conviction after trial on indictment, to imprisonment for a term not exceeding .....years.

(2) A Judge, Registrar, Deputy Registrar, Prosecutor or Deputy Prosecutor who, in (name of country) or elsewhere, corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, a bribe for himself or herself or any other person in respect of an act—

(a) done or omitted to be done by that Judge, Registrar, or Deputy Registrar, Prosecutor, or Deputy Prosecutor, in his or her official capacity (other than an act or omission to which subsection (1) applies); or

(b) to be done or to be omitted to be done by that Judge, Registrar, Deputy Registrar, Prosecutor or Deputy Prosecutor in his or her official capacity (other than an act or omission to which subsection (1) applies),

shall be guilty of an offence and shall be liable, on conviction after trial on indictment, to imprisonment for a term not exceeding ..... years.

(3) In this section and in sections 15B and 15G-

25 See discussion under Part VIII of the Report on Article 70- Administration of Justice Offences

"Deputy Registrar" means a Deputy Registrar of the ICC;

"Judge" means a Judge of the ICC;

"Registrar" means the Registrar of the ICC;

"Prosecutor" means the Prosecutor of the ICC; and

"Deputy Prosecutor" means a Deputy Prosecutor of the ICC.

15B Bribery of Judges and certain elected officials of ICC

(1) Every person who, in (name of country) or elsewhere, corruptly gives or offers, or agrees to give, a bribe to any person with intent to influence a Judge in respect of any act or omission by that Judge in his or her judicial capacity shall be guilty of an offence and shall be liable, on conviction after trial on indictment, to imprisonment for a term not exceeding ..... years.

(2) (2) Every person who, in (name of country) or elsewhere, corruptly gives or offers, or agrees to give, a bribe to any person with intent to influence a Judge or the Registrar or the Deputy Registrar or the Prosecutor or the Deputy Prosecutor in respect of an act or omission by that Judge, Registrar, Deputy Registrar, Prosecutor or Deputy Prosecutor in his or her official capacity (other than an act or omission to which subsection (1) applies) shall be guilty of an offence and shall be liable, on conviction after trial on indictment, to imprisonment for a term not exceeding ..... years).

15C Corruption and bribery of official of ICC

(1) An official of the ICC who, in (name of country) or elsewhere, corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, a bribe for himself or herself or any other person in respect of an act—

(a) done or omitted to be done by that officer in his or her official capacity; or

(b) to be done or to be omitted to be done by that officer in his or her official capacity,

shall be guilty of an offence and shall be liable, on conviction after trial on indictment, to imprisonment for a term not exceeding ..... years.

(2) Every person who, in (name of country) or elsewhere, corruptly gives or offers, or agrees to give, a bribe to any person with intent to influence an official of the ICC in respect of an act or omission by that officer in his or her official capacity shall be guilty of an offence and shall be liable, on conviction after trial on indictment, to imprisonment for a term not exceeding ..... years.

(3) In this section and in section 15G "official of the ICC" means a person employed under article 44 of the Statute.

15D False evidence

(1) Every person who gives evidence for the purposes of a proceeding before the ICC or in connection with a request made by the ICC that contains an assertion that, if made in a judicial proceeding in (name of country) as evidence on oath, would constitute perjury, shall be deemed to have given false evidence.

(2) Every person, who in (name of country) or elsewhere, gives false evidence shall be guilty of an offence and shall be liable, on conviction after trial on indictment, to imprisonment for a term not exceeding .....years.

15E Fabricating evidence before ICC

Every person who, in (name of country) or elsewhere, with intent to mislead the ICC, fabricates evidence by any means other than by the giving of false evidence shall be guilty of an offence and shall be liable, on conviction after trial on indictment, to imprisonment for a term not exceeding .....years.

15F Conspiracy to defeat justice in ICC

Every person who, in (name of country) or elsewhere, in relation to any proceedings, request, or other matter referred to in the Statute, conspires to obstruct, prevent, pervert, or defeat the course of justice, shall be guilty of an offence and shall be liable, on conviction after trial on indictment, to imprisonment for a term not exceeding ..... years.

15G Interference with witnesses or officials

Every person who, in (name of country) or elsewhere—

(a) dissuades or attempts to dissuade any person, by threats, force, bribery or other means, from giving evidence for the purposes of a proceeding before the ICC or in connection with a request made by the ICC; or

(b) makes threats or uses force against any Judge, the Registrar, a Deputy Registrar, the Prosecutor or a Deputy Prosecutor or any official of the ICC with intent to influence or punish that person, in respect of an act-

(i) done or omitted by that person or any Judge, the Registrar, a Deputy Registrar, the Prosecutor or a Deputy Prosecutor or any official of the ICC, in his or her official capacity; or

(ii) to be done or omitted by that person or any Judge, the Registrar, a Deputy Registrar, the Prosecutor or a Deputy Prosecutor or any official of the ICC, in his or her official capacity; or

(c) intentionally attempts in any other way to obstruct, prevent, pervert, or defeat the course of justice, in relation to any proceedings, request, or other matter referred to in the Statute,

shall be guilty of an offence and shall be liable, on conviction after trial on indictment, to imprisonment for a term not exceeding .....years.]

16 Extraterritorial jurisdiction to try offences against the administration of justice[26]

(Choose one of the following options:)

Option 1

Where an act constituting an offence to which section 15 relates is committed by any person outside the territory of (name of country) proceedings may be instituted against that person for that offence in (name of country) if that person is a citizen of (name of country).

OR

26 See discussion under Part IX of the Report on Jurisdiction for the Administration of Justice Offences. Sections 16 and 17 should apply to offences against the administration of justice whether the state relies upon existing national offences or the new offences created under sections 15A to G.

Option 2[27]

(1) Where an act constituting an offence to which section 15 relates is committed by any person outside the territory of (name of country), proceedings may be instituted against that person for that offence in (name of country), if—

(a) the person is a citizen or permanent resident of (name of country);

(b) the person has committed the offence against a citizen or permanent resident of (name of country); or

(c) the person is, after the commission of the offence, present in (name of country).

17 Consent required for prosecutions for offences to which section 15 relates[28]

(1) No proceedings for an offence to which section 15 relates shall be instituted in any court in (name of country) except with the consent of the (authority responsible for public prosecutions).

(2) Notwithstanding anything in subsection (1), a person charged with an offence under section 15 may be arrested, or a warrant for his or her arrest may be issued and executed, and he or she may be remanded in custody or on bail, even though the consent of the (authority responsible for public prosecutions) for the institution of proceedings against that person for that offence has not been obtained, but no further steps shall be taken in the proceedings until that consent has been obtained.

General

Optional additional provisions

[17A Conspiracy[29]

Every person who conspires in (name of country) to commit an offence under this Part of this Act in or outside the territory of (name of country) or who conspires outside (name of country) to commit an offence under this Part of this Act in (name of country) shall be guilty of an offence and shall be liable, on conviction after trial on indictment, to the same penalty as the penalty prescribed for the first mentioned offence.]

[17B Other forms of criminal responsibility

Every person who-

(a) attempts to commit,

(b) counsels or procures the commission of ,

(c) orders, incites, solicits or induces the commission of,

(d) aids or abets or otherwise assists in the commission or attempted commission of,

27 Option 1 is the minimum required to implement Article 70(4)(a) of the Statute. Option 2 includes a number of optional additional heads of jurisdiction.

28 See discussion under Part XI of the Report on Consent to Prosecution of Administration of Justice Offences.

29 With reference to sections 17A and 17B see discussion under Part XII of the Report on Ancillary Offences for the Administration of Justice Offences.

(e) is an accessory after the fact in relation to,

(f) intentionally contributes in any other way to the commission or attempted commission of,

an offence under this Part of this Act shall be guilty of an offence and shall be liable, on conviction after trial on indictment, to the same penalty as the penalty prescribed for the first mentioned offence.]

18 Trial of offences committed outside (name of country)[30]

Where an act constituting an offence under this Part of this Act is alleged to have been committed by a person outside the territory of (name of country) proceedings may be instituted against such person for that offence in any court in (name of country) having jurisdiction to try offences on indictment, and such court shall have all the powers to try such offence as if the offence had been committed within the territorial limits of the court's jurisdiction.

Interpretation

For the avoidance of doubt "an offence under this Part of this Act" means an offence under sections 5, 6, 7, or to which section 15 relates.

Part III—General Provisions Relating to Requests For Assistance[31]

20 Application[32]

(1) With the exception of section 27, this Part of this Act shall apply to all requests for assistance received under Parts, IV, V and VI.

(2) Parts IV, V, and VII shall apply to every request made by the ICC, whether the acts under investigation or subject to prosecution are alleged to have been committed before or after the date on which this Act comes into force.

(3) Part VI shall apply to the enforcement of every sentence, penalty or order of the ICC, whether the offence to which the sentence, penalty or order relates was committed before or after the date on which this Act comes into force.

(4) Part VIII shall apply to every investigation or sitting of the ICC whether the alleged offence or offence to which the investigation or sitting relates was committed before or after the date on which this Act comes into force.

21 Requests for assistance

A request for assistance is a request made by the ICC in respect of an investigation or prosecution by the ICC, for:

(a) assistance in respect of any one or more of the following, namely—

(i) the provisional arrest, arrest, and surrender to the ICC of a person in relation to whom the ICC has issued an arrest warrant or given a judgment of conviction;

30 See discussion in Part XIII of the Report on Place of Trial and Relevant Court and Procedure.
31 See discussion on general provisions for requests for assistance in paragraphs 80 to 82 of the Report.
32 See discussion on jurisdiction regarding the co-operation regime in paragraph 79 of the Report.

(ii) the identification and whereabouts of persons or the location of items;

(iii) the taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the ICC;

(iv) the questioning of any person being investigated or prosecuted;

(v) the service of documents, including judicial documents;

(vi) facilitating the voluntary appearance of persons (other than prisoners) as witnesses or experts before the ICC;

(vii) the temporary transfer of prisoners;

(viii) the examination of places or sites, including the exhumation and examination of gravesites;

(ix) the execution of searches and seizures;

(x) the provision of records and documents, including official records and documents;

(xi) the protection of victims and witnesses and the preservation of evidence;

(xii) the identification, tracing and restraining, or seizure of proceeds or instrumentalities of crimes or other property or assets for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and

(b) any other type of assistance that is not prohibited by the law of (name of country) with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the ICC or offences against the administration of justice and the enforcement of orders of the ICC made after convictions for such crimes or offences.

22 Making of requests

(1) Subject to subsection (2), a request for assistance shall be made in writing, directly to the (Minister or other appropriate authority).[33]

(2) A request for provisional arrest under article 92 of the Statute or an urgent request for other forms of assistance under article 93 of the Statute may be made using any medium capable of delivering a written record including facsimile or electronic mail.

(3) Where a request is made, or supporting documents transmitted, by the use of facsimile or electronic mail, this Act shall apply as if the documents so sent were the originals and a copy of the facsimile or electronic mail shall be receivable in evidence.

(4) If a request is made by the use of facsimile or electronic mail in accordance with subsection (2), it shall be followed by a written request under subsection(1).

33 See discussion on appropriate authority in paragraph 82 of the Report.

23 Confidentiality of requests

A request for assistance and any document or part of a document supporting the request shall be kept confidential by any person dealing with the request in whole or in part, except to the extent that disclosure is necessary for execution of the request.

24 Execution of requests[34]

A request for assistance shall be executed in the manner specified in the request, including following any procedure outlined therein and permitting the presence and participation of persons specified in the request in the execution process, unless execution in this manner is prohibited under the law of (name of country).

25 State or diplomatic immunity[35]

(1) Any state or diplomatic immunity attaching to a person or premises by reason of a connection with a State Party to the Statute, or a state with respect to which the United Nations Security Council has referred the situation to the ICC, or a state not party to the Statute but which has accepted the jurisdiction of the ICC[36] does not prevent proceedings under Parts III to VIII of this Act, in relation to that person.

(2) If the Minister is of the opinion that a request for provisional arrest, arrest and surrender or other assistance would require (name of country) to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of another state which is not a party to the Statute, he or she shall consult with the ICC and request a determination as to whether article 98(1) of the Statute applies.

(3) If the Minister is of the opinion that a request for provisional arrest or arrest and surrender would require (name of country) to act inconsistently with its obligations under an international agreement with a State which is not a party to the Statute pursuant to which the consent of the sending State is required to surrender a person of that State to the ICC, he or she shall consult with the ICC and request a determination as to whether article 98(2) of the Statute applies.

26 Response to requests

(1) The (Minister or other appropriate authority) shall notify the ICC without undue delay of his or her response to a request for assistance and the outcome of any action that has been taken to execute the request.

(2) Before deciding to postpone or refuse a request the (Minister or other appropriate authority) shall consult with the ICC to ascertain whether the assistance sought could be provided subject to conditions or at a later date or in an alternative manner.

(3) If the Minister (other appropriate authority) decides, in accordance with the Statute and this Act,[37] to refuse or postpone the assistance requested, in whole or in part, the notification to the ICC shall set out the reasons for the decision.

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34 See discussion on execution of requests in paragraph 116 of the Report.
35 See discussion under Part XXVI of the Report on Conflicting Obligations under International Law (Article 98).
36 See discussion on the inclusion of categories of States that are not Party to the Statute in paragraph 161 of the Report.
37 This refers to the provisions of sections 30, 31, 67 and 68.

(4) If the request for assistance cannot be executed for any other reason, the (Minister or other appropriate authority) shall set out in the notification to the ICC, the reasons for the inability to execute the request.

(5) In the case of an urgent request for assistance, any documents or evidence transmitted in response shall, if the ICC so requests, be sent expeditiously to it.

Requests to the ICC for assistance

27 (Minister or other appropriate authority) may request assistance from ICC[38]

The (Minister or other appropriate authority) may, in accordance with Article 93(10) of the Statute, make a request to the ICC for assistance in an investigation into, or trial in respect of, conduct that may constitute a crime within the jurisdiction of the ICC or that constitutes a serious offence under the law of (name of country).

Part IV — Arrest and Surrender of Person to ICC[39]

28 Application of this Part

This Part of this Act applies to requests for assistance from the ICC for the arrest and surrender or the provisional arrest of a person.

29 Request for arrest and surrender

(1) Subject to sections 30 and 31, when the (Minister or other appropriate authority) receives a request for arrest and surrender of a person alleged to have committed a crime within the jurisdiction of the ICC or on whom a judgment of conviction has been imposed by the ICC the (Minister or other appropriate authority), if satisfied that the request is supported by the information and documents required by article 91 of the Statute shall without delay—

(a) transmit the request and any supporting documents to (a magistrate) and

(b) notify (the Director of Public Prosecutions).

(2) Upon receipt of a request under subsection (1) (a) (the magistrate) shall-

(a) if the request is accompanied by a warrant of arrest issued by the ICC, endorse the warrant for execution by a police officer in any part of (name of country); or

(b) if the request is accompanied by a judgment of conviction of the ICC, issue a warrant for the arrest of the person to whom the judgment relates, for execution by a police officer in any part of (name of country).

30 Refusal of request for arrest and surrender[40]

(1) The (Minister or other appropriate authority) shall refuse a request for arrest and surrender, at any time before the surrender of the person, only if—

(a) the ICC has determined that the case to which the request relates is inadmissible on any ground; or

38 See discussion on requests to the ICC in paragraph 123 of the Report.
39 See generally Part XVII of the Report on Arrest and Surrender.
40 See discussion on grounds of refusal in paragraphs 105 and 106 of the Report.

(b) the ICC advises that it does not intend to proceed with the request for any reason, including but not limited to a determination by the ICC that article 98 of the Statute applies to the execution of the request.

(2) The (Minister or other appropriate authority) may refuse a request for arrest and surrender of a person, at any time before the surrender of the person only if—

(a) there is a competing request from one or more states not party to the Statute for the extradition of the person for the same conduct as that which constitutes the crime for which the ICC seeks the person's surrender and a decision to extradite to a state is made in accordance with article 90 of the Statute and section 31; or

(b) there is a competing request from one or more states not party to the Statute for the extradition of the person for different conduct from that which constitutes the crime for which the ICC requests the person's surrender and a decision to extradite to a state is made in accordance with article 90 of the Statute and section 31.

(3) If the (Minister or other appropriate authority) decides to refuse a request for arrest and surrender in accordance with subsection (1) or (2) after he or she has transmitted a request under section 29, he or she shall notify (the magistrate) who shall cancel any warrant or delivery order issued by him or her and ensure the person's release from custody or conditions prescribed in relation to bail arising from that warrant or order.

31 Postponement of execution of request for arrest and surrender[41]

(1) The (Minister or other appropriate authority) may postpone the execution of a request for arrest and surrender at any time before the surrender of the person only if—

(a) a determination on admissibility is pending before the ICC;

(b) the request would interfere with an investigation or prosecution in (name of country) involving an offence of a serious nature[42] different from that for which surrender to the ICC is requested;

(c) the (Minister or other appropriate authority) is consulting with the ICC under section 25 as to whether or not article 98 of the Statute applies to the execution of the request.

(2) If execution of the request for arrest and surrender is postponed under subsection (1)(a) and the ICC decides that the case is admissible, the (Minister or other appropriate authority) shall proceed with the execution of the request as soon as possible after the decision of the ICC.

(3) If the execution of the request for arrest and surrender is postponed under subsection (1)(b), the (Minister or other appropriate authority) shall consult with the ICC and agree on a period of time for postponement of the execution of the request in accordance with article 94 of the Statute. Such period of time shall be no longer than necessary to complete the relevant investigation or

41 See discussion on postponement of execution of requests in paragraphs 103 and 104 of the Report.

42 See discussion on offences of a serious nature in paragraph 104 of the Report.

prosecution.[43] The (Minister or other appropriate authority) shall proceed with execution of the request after the lapse of that period, unless otherwise agreed with the ICC.

(4) If execution of the request for arrest and surrender is postponed under subsection (1)(c) and the ICC decides to proceed with the request, the (Minister or other appropriate authority) shall proceed with the execution of the request as soon as possible after the decision of the ICC.

(5) If the (Minister or other appropriate authority) decides to postpone execution of a request for arrest and surrender in accordance with this section after he or she has transmitted a request under section 29, he or she shall—

(a) notify (the magistrate) of the postponement and the magistrate shall adjourn any pending proceedings until further notice from the (Minister or other appropriate authority); and

(b) notify (the magistrate) at the relevant time whether the execution of the request is to proceed or not, and (the magistrate) shall proceed accordingly with the execution of the request or the discharge of the person.

(6) A decision by the (Minister or other appropriate authority) to postpone the execution of a request shall not affect the validity of any act that has been done or any warrant or order made under this Part of this Act prior to the decision, and any such warrant or order shall remain in force unless cancelled by (the magistrate) in accordance with subsection (5)(b).

32 Competing requests[44]

(1) Where a request for arrest and surrender of a person is received from the ICC and one or more states also request the extradition of the person for the same conduct as that which constitutes the crime for which the ICC seeks the person's surrender, the (Minister or other appropriate authority) —

(a) shall notify the ICC and the requesting state of that fact; and

(b) shall determine whether the person is to be surrendered to the ICC or to the requesting state.

(2) Where the request for extradition of a person for the same conduct as that which constitutes the crime for which the ICC seeks the person's surrender is made by a state which is a party to the Statute, priority shall be given to the request from the ICC if the ICC has determined under articles 18 or 19 of the Statute that the case is admissible; and where an admissibility decision is pending before the ICC, no person shall be extradited under the laws relating to extradition until the ICC makes a decision on admissibility and determines that the case is inadmissible.

(3) Where the request for extradition of a person for the same conduct as that which constitutes the crime for which the ICC seeks the person's surrender is made by a state which is not a party to the Statute, priority shall be given to the request for arrest and surrender from the ICC, if (name of country) is not under an international obligation to extradite the person to the requesting state and the ICC has determined under article 18 or 19 of the Statute that the case is admissible.

43 See discussion on duration of postponement in paragraph 104 of the Report.
44 See discussion of competing requests in paragraphs 99 and 100 of the Report.

(4) Where the request for extradition of a person for the same conduct as that which constitutes the crime for which the ICC seeks the person's surrender is made by a state which is not a party to the Statute and (name of country) is under an international obligation to extradite the person to the requesting state and the ICC has determined under article 18 or 19 of the Statute that the case is admissible, the (Minister or other appropriate authority) shall determine whether the person is to be surrendered to the ICC or extradited taking into consideration all the relevant factors including but not limited to, the respective dates of the requests, the interests of the requesting state including the gravity of the charge and, where relevant, whether the crime was committed in its territory, the nationality of the victims and the person sought to be extradited, and the possibility of subsequent surrender between the ICC and the requesting state.

(5) Where a request for arrest and surrender is received from the ICC and one or more states also request the extradition of the person for conduct other than that which constitutes the crime for which the ICC seeks the person's surrender, priority shall be given to the request from the ICC if (name of country) is not under an international obligation to extradite the person to any requesting state.

(6) Where a request for surrender is received from the ICC and one or more states also request the extradition of the person for conduct other than that which constitutes the crime for which the ICC seeks the person's surrender, and (name of country) is under an international obligation to extradite to one or more of the requesting states, the (Minister or other appropriate authority) shall determine whether the person is to be surrendered to the ICC or extradited to a requesting state taking into consideration all the relevant factors referred to in subsection (4) as well as the relative nature and gravity of the conduct in question.

33 Official capacity not a bar to arrest and surrender[45]

Subject to section 25, the existence of any immunity or special procedural rule attaching, under domestic or international law, to a person shall not be a ground for –

(a) refusing or postponing a request by the ICC for the arrest and surrender of that person;

(b) holding that that person is ineligible for arrest and surrender to the ICC.

Provisional arrest in urgent cases

34 Provisional arrest[46]

(1) Where the (Minister or other appropriate authority) receives a request from the ICC for provisional arrest of a person under article 92 of the Statute, he or she, if satisfied that the request is supported by the information required by paragraph (2) of article 92 of the Statute, shall, without delay transmit the request and any supporting documents to the (Inspector General of Police) with a direction for the arrest of the person.

Optional additional provision

[(1 bis) The (Minister or other appropriate authority) shall also transmit a copy of the direction to (the Director of Public Prosecutions)].[47]

45 See discussion under Part XXVII of the Report on Sovereign Immunity.
46 See general discussion of provisional arrest in paragraphs 85 and 86 of the Report.
47 Where the DPP is the appropriate authority in this case, this subsection may not be necessary.

(2) Where (the Inspector General of Police) receives a direction from the (Minister or other appropriate authority) under subsection (1) he or she shall instruct the police to carry out the direction.

Optional additional provision

[(2 bis) (The Inspector General of Police) shall ensure that the appropriate domestic warrant or other required documentation is obtained and in order.][48]

(3) (The Inspector of Police) shall after carrying out the direction referred to in subsection (1), notify the (Minister or other appropriate authority) and (the Director of Public Prosecutions) that he or she has done so.

(4) Where a person has been provisionally arrested under this section, and the (Minister or other appropriate authority) receives the formal request for arrest and surrender as provided in article 91 of the Statute, the (Minister or other appropriate authority) shall immediately send a notice to (the magistrate) and proceed with the transmission of the request in accordance with section 29.

35 Rights of arrested person[49]

(1) A person arrested under a warrant obtained in accordance with section 29 or pursuant to a direction under section 34 shall be brought before (a magistrate) within 48 hours.

(2) (The magistrate) may, of his or her own motion or at the request of the person, determine—

(a) whether the person was lawfully arrested in accordance with the warrant or the direction; and

(b) whether the person's rights have been respected in the course of the arrest.

(3) In making a determination under subsection (2) (the magistrate) shall apply the principles applicable to judicial review.

(4) If (the magistrate) determines that—

(a) the person was not lawfully arrested; or

(b) the person's rights were not respected,

(the magistrate) shall make a declaration to that effect with any explanation required but may not grant any other form of relief.

(5) (The magistrate) shall send any declaration made under subsection (4) to the (Minister or other appropriate authority), who shall transmit it to the ICC.

36 Person arrested on a provisional warrant

(1) Where a person has been provisionally arrested under section 34, (the magistrate) shall not proceed under section 38 until—

(a) (the magistrate) has received a notice from the (Minister or other appropriate authority) that the request for surrender and supporting documents required under article 91 of the Statute have been received; and

(b) the relevant documents have been transmitted to (the magistrate) by the (Minister or other appropriate authority) under section 34(4).

48 This subsection may not be necessary in all circumstances depending on domestic procedures.
49 See discussion of rights upon arrest in paragraphs 85 and 86 of the Report.

(2) Pending the receipt of the notice and documents under subsection (1), (the magistrate) may adjourn the proceedings from time to time.

(3) If (the magistrate) has not received the notice specified in subsection (1)(a) within 60 days of the date of the provisional arrest of the person, he or she shall release the person from custody or on bail unless satisfied that the period for submission of the notice should be extended in the interests of justice.

(4) The release of a person under subsection (3) shall be without prejudice to any subsequent proceedings that may be brought for the arrest and surrender of the person to the ICC whether for the same facts and offence or not.

Bail[50]

37 Application for bail

(1) A person brought before (a magistrate) under section 35 may make an application for bail.

(2) Where an application for bail is made under subsection (1), (the magistrate) shall adjourn the hearing of the application and notify the (Minister or other appropriate authority).

(3) The (Minister or other appropriate authority) shall, on receipt of a notification under subsection (2), consult immediately with the ICC to obtain any recommendations from the Pre-Trial Chamber under article 59(5) of the Statute, and shall convey those recommendations to (the magistrate).

(4) (The magistrate) shall give full consideration to any recommendations conveyed to him or her under subsection (3) before making a decision on the application for bail.

(5) Where no recommendations are received from the ICC within seven days of the (Minister or other appropriate authority) being notified of the application for bail, (the magistrate) may proceed to hear the application.

(6) (A magistrate) shall not release a person brought before him or her under section 35 on bail, unless (the magistrate) is satisfied that, having regard to the gravity of the crimes alleged to have been committed by that person, there are urgent and exceptional circumstances that justify the person's release on bail and that there are sufficient safeguards to ensure that (name of country) will be able to fulfil its obligations under the Statute to surrender such person to the ICC.

Surrender[51]

38 Surrender hearing

(1) (The magistrate) before whom a person arrested under section 29 or 34 is brought shall satisfy himself or herself that –

(a) there is a warrant for arrest issued by the ICC or a judgment of conviction by the ICC, in respect of that person; and

(b) the warrant or judgment relates to the person before (the magistrate).

50 See discussion on interim release in paragraphs 87 and 88 of the Report.
51 See discussion of evidence and structure for surrender procedure in paragraphs 90 to 93 of the Report.

(2) Upon (the magistrate) being satisfied of the matters referred to in paragraphs (a) and (b) of subsection(1) with respect to the arrested person, (the magistrate) shall, subject to section 36, issue a delivery order in respect of that person in accordance with article 59(7) of the Statute.

(3) Where (the magistrate) issues a delivery order under subsection (2) he or she shall —

(a) transmit the delivery order to (the Inspector General of Police) for execution;

(b) commit the person to custody pending the execution of the delivery order by (the Inspector General of Police);

(c) send a copy of the delivery order to the (Minister or other appropriate authority); and

(d) inform the person in ordinary language of his or her right to make an application to the appropriate court for a mandate in the nature of a writ of habeas corpus .

(4) If the person who is the subject of a delivery order —

(a) is in custody, (the magistrate) shall order the continued detention of the person under the delivery order and notify (the Commissioner of Prisons) and (the Superintendent of the prison), of the delivery order; or

(b) is not in custody, (the magistrate) shall, subject to any order with regard to bail, commit him or her to custody and shall notify (the Commissioner of Prisons) and (the Superintendent of the prison).

(5) Subject to subsection (6), (the Inspector General of Police) shall make arrangements with the ICC for the execution of the delivery order as soon as possible, and shall notify the (Minister or other appropriate authority) when the person has been surrendered to the ICC or the state of enforcement, in execution of the delivery order.

(6) Subject to section 40, (the Inspector General of Police) shall not make arrangements with the ICC for the execution of the delivery order -

(a) until after the expiration of the period prescribed by law for making an application for habeas corpus by the person to whom the order relates; or

(b) if an application for habeas corpus is made by such person within such period, until after the final determination of the application.[52]

(7) A delivery order issued under this section is sufficient authority for holding the person specified in the order in custody until his or her delivery to the ICC.

(8) In deciding whether to make a delivery order under this section[53] —

(a) (the magistrate) shall not require evidence to establish that the trial of the person for the crime that he or she is alleged to have committed is justified before the ICC or would be justified under the law of (name of country) if the act constituting such crime had been committed in (name of country); and

52 If the general law of the country does not provide for habeas corpus as an automatic right, a statutory provision giving the person a right to make such an application should be included. (See paragraph 96 of the Report).

53 See discussion on guidance on the role of the judge (magistrate) in surrender proceedings in paragraph 98 of the Report.

(b) (the magistrate) shall not receive evidence with respect to, nor adjudicate on, any claim by the person that he or she has been previously tried or convicted for the conduct for which the ICC seeks surrender of the person.

(9) If the person makes a claim, under subsection (8)(b), (the magistrate) shall advise the (Minister or other appropriate authority) of this claim and he or she shall transmit that information to the ICC.

39 (Magistrate) not to inquire into validity of warrant[54]

In proceedings under this Part of this Act (the magistrate) shall not inquire into, receive any evidence regarding, or make any decisions as to, the validity of any warrant or order issued or made by the ICC.

40 Surrender by consent

(1) A person may at any time notify (a magistrate) that he or she consents to being surrendered to the ICC for the crime or crimes for which the ICC seeks the surrender of the person.

(2) (The magistrate) may accept the notification of consent under subsection (1) if—

(a) the person is before (the magistrate) when notification of the consent to surrender is given; and

(b) (the magistrate) is satisfied that the person has freely consented to the surrender in full knowledge of its consequences.

(3) Nothing in this section shall be construed as preventing a person, in respect of whom (the magistrate) has made a delivery order, from subsequently notifying the (Minister or other appropriate authority) that he or she consents to surrender.

(4) For the avoidance of doubt a person arrested under a provisional warrant may consent to surrender before a request for surrender is received, in which case (the magistrate) may make an order under subsection (5).

(5) Where the consent to surrender has been given, (the magistrate) shall immediately make a delivery order in the same terms as section 38(2) and such of the provisions of sections 38 and 39 as are applicable shall thereupon apply.

41 Effect of delivery order

(1) A delivery order is sufficient authority for any person to receive the person to whom the order relates, keep him or her in custody and convey him or her to the place where he or she is to be delivered up into the custody of the ICC or of the state of enforcement, in accordance with arrangements made by (the Inspector General of Police).

(2) A person in respect of whom a delivery order is in force shall be deemed to be in legal custody pending delivery up under the order.

(3) If a person in respect of whom a delivery order is in force escapes or is unlawfully at large, he or she may be arrested without warrant and taken to the place where he or she is required to be or to be taken.

54 See discussion on guidance on the role of the judge (magistrate) in surrender proceedings in paragraph 98 of the Report.

42 Procedure where (magistrate) refuses order[55]

(1) Where (the magistrate) refuses to make a delivery order under section 38, he or she shall make an order remanding the person arrested in custody for fourteen days, and shall notify the (Minister or other appropriate authority) of his or her decision and of the grounds for it.

(2) The (Minister or other appropriate authority) may appeal to the (High Court) against the decision by (the magistrate) refusing to make a delivery order.

(3) Where (the magistrate) is informed that an appeal is to be taken against the decision, the order remanding the person arrested shall continue to have effect until the appeal is determined and the person is either discharged or the delivery order is executed.

(4) Where (the High Court) allows the appeal, it may make a delivery order or remit the case to (the magistrate) to make a delivery order in accordance with the decision of (the High Court).

(5) Where (the High Court) dismisses the appeal, the person shall be discharged in accordance with the decision of (the High Court).

43 Discharge of person not delivered up

(1) If the person in respect of whom a delivery order has been made is not delivered up under the order within 60 days after the expiration of the period prescribed by law for making an application for habeas corpus or, if such an application is made within 60 days, after the final determination of the application, that person or someone duly authorised by him or her may make an application to (the magistrate) who made the delivery order, for the persons discharge.

(2) On an application made under this section, (the magistrate) shall order the person's discharge unless reasonable cause is shown for the delay.

(3) The discharge of a person under subsection (2) shall be without prejudice to any subsequent proceedings that may be brought for the arrest and surrender of the person to the ICC whether for the same facts and offence or not.

44 Discharge of person no longer required to be surrendered

(1) Where the ICC informs the (Minister or other appropriate authority) that the person arrested upon the request of the ICC is no longer required to be surrendered, the (Minister or other appropriate authority) shall notify (the magistrate) of that fact and (the magistrate) shall on receipt of the notification make an order for the discharge of the person.

(2) The discharge of a person under subsection (1) shall be without prejudice to any subsequent proceedings that may be brought for the arrest and surrender of the person to the ICC whether for the same facts and offence or not.

45 Request for temporary surrender[56]

(1) Where a request for arrest and surrender by the ICC relates to a crime within the jurisdiction of the ICC but the person is subject to proceedings for a different offence in (name of country) which has not been finally disposed of or is liable to

55 See discussion on appeals in paragraphs 95 to 97 of the Report.
56 See discussion on temporary surrender in paragraph 101 of the Report.

serve a sentence of imprisonment imposed by a court in (name of country) for a different offence, the (Minister or other appropriate authority) may authorise the temporary transfer of that person to the ICC.

(2) The (Minister or other appropriate authority) may, before making an authorisation under subsection (1), seek an undertaking from the ICC that the person shall be returned on completion of proceedings before the ICC or service of sentence imposed by the ICC, as the case may be.

(3) Subsections (2), (3), (4) and (5) of section 60 shall apply to an authorisation under subsection (1) with any necessary modifications.

46 Request for transit of a person to ICC[57]

(1) Subject to subsection (4), where the (Minister or other appropriate authority) receives a request from the ICC for transit through the territory of (name of country) of a person—

(a) being surrendered or transferred by another state to the ICC;

(b) being transferred from the ICC to a state of enforcement;

(c) being transferred to or from the state of enforcement as a result of a review hearing or other appearance by the person before the ICC,

the (Minister or other appropriate authority) shall grant the request for transit and the person shall be deemed, during transit, to be in lawful custody and may be held in any police station, prison or any other place of detention which may be designated by the (Minister or other appropriate authority) in consultation with (other relevant authorities)[58]

(2) If a person referred to in subsection (1) arrives in (name of country) without prior consent to transit, a police officer may at the request of the officer who has custody of the person being transported, hold the person in custody for a maximum period of 96 hours pending receipt by the (Minister or other appropriate authority) of a request under subsection (1).

(3) No authorisation for transit is required if the person being transported is transported by air and no landing is scheduled on the territory of (name of country).

(4) Notwithstanding subsection (1), the (Minister or other appropriate authority) may refuse a request for transit if he or she considers that transit through (name of country) would impede or delay the surrender or transfer of the person being transported.

(5) If an unscheduled landing occurs on the territory of (name of country), the (Minister or other appropriate authority) may require the ICC to submit a request under subsection (1), for transit of the person being transported as soon as is reasonably practicable.

47 Waiver of requirements of article 101 of the Statute[59]

Where a person is surrendered to the ICC under this Part of this Act and the ICC requests the waiver of the requirements of paragraph (1) of article 101 of the Statute with respect to that person, the (Minister or other appropriate authority), having

57 See discussion on transit in paragraph 102 of the Report.
58 The relevant authorities might include Immigration, Police and Prisons authorities.
59 See discussion of the rule of specialty and Article 101 of the Statute in paragraph 107 of the Report.

regard to the information provided by the ICC with respect to that person, shall endeavour to consent to the person being proceeded against, punished or detained for conduct committed prior to surrender, not being conduct constituting crimes for which he or she has been surrendered to the ICC.

Part V — Requests For Other Types of Assistance[60]

48 Application of this Part

This Part of this Act applies to requests for assistance by the ICC, other than requests for arrest and surrender or the provisional arrest of a person.

49 Assistance in locating or identifying persons or items

(1) Where the ICC requests assistance in locating, or identifying and locating, a person or an item believed to be in (name of country) and the (Minister or other appropriate authority) has reasonable grounds to believe that the person to whom or the item to which the request relates is, or may be in (name of country), he or she shall without delay give authority for the request to proceed and transmit the request to (appropriate agency in country).

(2) Where a request is authorised and transmitted under subsection (1), (appropriate agency in country) shall, without delay—

(a) use its best endeavours to locate or, as the case may be, identify and locate, the person to whom or item to which the request relates; and

(b) advise the (Minister or other appropriate authority) of the outcome of those endeavours.

(3) This section shall not be construed as giving any person a power to enter property in order to locate a person or item.

50 Assistance in taking evidence

(1) Where the ICC requests assistance in the taking of evidence and the (Minister or other appropriate authority) has reasonable grounds to believe that the evidence can be taken in (name of country), he or she shall without delay give authority for the request to proceed and transmit the request to (a magistrate).

(2) Where a request is authorised and transmitted under subsection (1), (the magistrate) shall issue an order compelling the witness to appear at a specified time and place for his or her evidence to be taken.

(3) (The magistrate) shall, if so requested, permit a representative of the ICC or representative of the person to whom the request relates to be present at the taking of the evidence and to put questions to the witness.

(4) In taking evidence under this section, (the magistrate) shall do so in the manner specified in the request for assistance made by the ICC, including complying with any procedure outlined therein, unless the manner of execution or the procedure is prohibited under the law of (name of country).

(5) (The magistrate) taking evidence under this section shall—

(a) certify that the evidence was taken before him or her and that the persons named in the certificate were present when the evidence was taken; and

60 See general discussion of other forms of co-operation in paragraphs 108 to 111 of the Report.

(b) cause the evidence together with the certificate to be transmitted to the (Minister or other appropriate authority).

Optional additional provision

[50 bis Evidence by video-link or other technological means

(1) The (magistrate) may order evidence to be given to the ICC by video-link or other technological means.

(2) To facilitate the taking of such evidence, the (magistrate) may order the person to appear at any facility where the relevant technology is available.**]**

51 Assistance in production of documents and articles

(1) Where the ICC requests assistance in the production of documents or articles and the (Minister or other appropriate authority) has reasonable grounds to believe that the documents or articles can be produced in (name of country), he or she shall without delay give authority for the request to proceed and transmit the request to (a magistrate).

(2) Where a request is authorised and transmitted under subsection (1), (the magistrate) shall issue an order for the production of the documents or articles.

(3) The order may provide for any form of certification or authentication of the document or article as may be required by the ICC and may specify any other terms and conditions that may be appropriate in the circumstances.

(4) Where the documents and articles are produced duly authenticated or certified as required by the order made under subsection (3), (the magistrate) shall cause them to be sent to the (Minister or other appropriate authority), with a written statement signed by (the magistrate) that they were produced to him or her.

52 Applicable law

(1) The applicable law for the taking of evidence under section 50 or the production of documents or articles under section 51 shall be the Statute and Rules unless (the magistrate) orders that the evidence shall be taken in accordance with the laws of (name of country).

(2) Notwithstanding subsection (1), a person compelled to give evidence or produce documents shall have the same privileges as if the investigation or proceeding was conducted under the laws of (name of country) and the laws of (name of country) relating to the non-disclosure of information, including national security information, shall apply.

(3) Nothing in subsection (1) shall be construed as requiring a person to give evidence or answer any question or produce any document or article that the person could not be compelled to give or answer or produce in an investigation being conducted by the Prosecutor or in any proceedings before the ICC.

53 Assistance in questioning persons

(1) Where the ICC requests assistance in questioning a person who is being investigated or prosecuted by the ICC and the (Minister or other appropriate authority) has reasonable grounds to believe that the person is or may be in (name of country), he or she shall without delay give authority for the request to proceed and transmit the request to (the appropriate agency in country).

(2) Where a request is authorised and transmitted under subsection (1), (the appropriate agency in country) shall, without delay -

(a) use its best endeavours to undertake the questioning that the ICC has requested;

(b) ensure that the answers to the questions put are recorded in writing and make any other report on the questioning it considers to be appropriate in the circumstances; and

(c) advise the (Minister or other appropriate authority) of the outcome of those endeavours and, if relevant, deliver the record and any report of the questioning to the (Minister or other appropriate authority).

(3) A person questioned under this section shall notwithstanding anything to the contrary in any other law, be entitled to all the rights referred to in article 55 (2) of the Statute.

54 Assistance in arranging service of documents

(1) Where the ICC requests assistance in arranging for the service of a document in (name of country), and the (Minister or other appropriate authority) believes on reasonable grounds that the person or body to be served is or may be in (name of country), he or she shall without delay give authority for the request to proceed and transmit the request to (the appropriate agency in country).

(2) Where a request is authorised and transmitted under subsection (1), (the appropriate agency in country) shall, without delay—

(a) use its best endeavours to have the document served—

(i) in accordance with any procedure specified in the request; or

(ii) if that procedure would be unlawful or inappropriate in (name of country), or if no procedure is specified, in accordance with the law of (name of country); and

(b) transmit to the (Minister or other appropriate authority) —

(i) a certificate as to service, if the document is served; or

(ii) a statement of the reasons that prevented service, if the document is not served.

(3) In this section, "document" includes—

(a) a summons requiring a person to appear as a witness; and

(b) a summons to an accused that has been issued under article 58(7) of the Statute.

55 Assistance in facilitating the voluntary appearance of witness[61]

(1) Where the ICC requests assistance in facilitating the voluntary appearance of a witness before the ICC and the (Minister or other appropriate authority) has reasonable grounds to believe that the witness is or may be in (name of country), he or she shall without delay give authority for the request to proceed and transmit the request to (appropriate agency in country).

61 See discussion on attendance of witnesses in paragraph 115 of the Report.

(2) In this section and in section 56 and 57, "witness" includes a person who may give expert evidence; but does not include—

(a) a person who has been accused of a crime in the proceedings to which the request relates; or

(b) a prisoner who is detained in relation to an offence against the law of (name of country).

56 Consent required

The (Minister or other appropriate authority) to whom a request is transmitted under section 55 shall make such inquiries as may be necessary to ascertain whether the prospective witness consents to giving evidence or assisting the ICC.

57 (Minister or other appropriate authority) may facilitate appearance

(1) The (Minister or other appropriate authority) may assist in the making of arrangements to facilitate a witness' attendance before the ICC if the (Minister or other appropriate authority) is satisfied that—

(a) the prospective witness has consented to giving the evidence or assistance requested; and

(b) the ICC has given any assurance requested by the (Minister or other appropriate authority) in respect of the witness including but not limited to an assurance that the witness will not be prosecuted or detained by the ICC in respect of any specified act or omission that occurred before the witness' departure from (name of country).

(2) The (Minister or other appropriate authority) may—

(a) approve and make arrangements for the travel of the witness to the ICC at the cost of the ICC, including but not limited to, the obtaining of such approvals, authorities, and permissions as are required for that purpose, including, in the case of a person who although not liable to be detained in a prison is subject to a sentence—

(i) the variation, discharge, or suspension of the conditions of the person's release from prison; or

(ii) the variation, cancellation, or suspension of the person's sentence, or of the conditions of the person's sentence; and

(b) take such other action for the purposes of subsection (1) as the (Minister or other appropriate authority) thinks appropriate.

58 Assistance in facilitating temporary transfer of prisoner[62]

Where the ICC requests assistance in facilitating the temporary transfer to the ICC of a prisoner serving a sentence in (name of country) for an offence against the law of that country and the (Minister or other appropriate authority) has reasonable grounds to believe that the prisoner's assistance is sought for the purpose of identification or obtaining evidence or other assistance, he or she shall without delay give authority for the request to proceed and transmit the request to (the appropriate agency) in (name of country).

62 For sections 58 to 61, see discussion on witnesses in paragraph 115 of the Report.

59 Consent required and assurances may be sought

Where the (Minister or other appropriate authority) authorises and transmits a request under section 58, (the appropriate agency in country) shall without delay make such inquiries as may be necessary to ascertain whether the prisoner will consent to the transfer.

60 (Minister or other appropriate authority) may arrange for transfer

(1) The (Minister or other appropriate authority) may authorise the temporary transfer of a prisoner serving a sentence in (name of country) to the ICC if satisfied that—

(a) the prisoner has consented to giving the evidence or other assistance requested; and

(b) the ICC has given any assurances requested by the (Minister or other appropriate authority) including but not limited to an assurance that the prisoner will not be released without prior approval of the (Minister or other appropriate authority).

(2) Where the (Minister or other appropriate authority) authorises the temporary transfer of the prisoner serving a sentence in (name of country) to the ICC, the (Minister or other appropriate authority) may—

(a) direct that the prisoner be released from the prison in which that prisoner is detained, for the purpose of the transfer to the ICC; and

(b) make arrangements for the prisoner to travel to the ICC in the custody of a person authorised for the purpose by the ICC.

(3) A direction given by the (Minister or other appropriate authority) under subsection (2) in respect of a prisoner is sufficient authority for the release of the prisoner from the prison in which the prisoner is detained, for the purposes of the transfer.

(4) Every person released under a direction given under subsection (2) shall be treated, for the purposes of the law in force relating to escape from lawful custody and for that purpose only, as continuing to be in the legal custody of the officer in charge of a prison from which he or she is so released, while in (name of country) during the period of that release.

(5) Where there is any inconsistency between subsection (4) and any other law, subsection (4) shall prevail.

61 Effect of transfer on prisoner's sentences

Where a prisoner who is serving a sentence for an offence committed in (name of country) is transferred to the ICC—

(a) the prisoner shall be treated, while in custody outside (name of country) in connection with the request, as being in custody for the purposes of the sentence imposed for the offence committed in (name of country) which shall continue to run; and

(b) the (Minister or other appropriate authority) —

(i) may at any time notify the ICC that the prisoner is no longer required to be kept in custody; and

(ii) shall notify the ICC if the prisoner is no longer liable to be detained in a prison in (name of country).

62 Assistance in examining places or sites

(1) Where the ICC requests assistance in examining places or sites in (name of country) and the (Minister or other appropriate authority) has reasonable grounds to believe that the place or site is located in (name of country), he or she shall without delay give authority for the request to proceed and transmit the request to (the appropriate agency in country).

(2) The (Minister or other appropriate authority) may, if the ICC so requests, permit a representative of the ICC to be present at the examination of the place or site.[63]

(3) Where the (Minister or other appropriate authority) authorises and transmits the request under subsection (1), (the appropriate agency in country)—

(a) shall without delay use its best endeavours to undertake the examination of the place or site in the manner that the ICC has requested;

(b) shall make such report on the examination as it considers to be appropriate in the circumstances; and

(c) shall deliver the report of the examination to the (Minister or other appropriate authority); and

(d) may, where appropriate, apply to (a magistrate) for an exhumation order for the exhumation and examination of the remains at a grave site.

(4) An authorisation under this section shall be deemed to authorise (the appropriate agency) to enter a place or site for the purpose of examining it.[64]

63 Assistance involving search and seizure[65]

(1) Where the ICC makes a request for search and seizure and the (Minister or other appropriate authority) has reasonable grounds to believe that any item relevant to an investigation being conducted by the Prosecutor or proceeding before the ICC is or may be located in (name of country), he or she shall without delay give authority for the request to proceed and authorise, in writing, a police officer to apply to (a magistrate) for a search warrant.

(2) Upon an application under subsection (1), (the magistrate) may, if satisfied that the item specified in the request made by the ICC is located in (name of country), issue a warrant authorising that police officer or any other police officer specified in the warrant to search for and seize that item.

(3) (The magistrate) may issue a warrant under subsection (2) subject to such conditions as he or she may think fit to impose.

(4) The Magistrate may, if the ICC so requests, permit a representative of the ICC to be present at the execution of the warrant.

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63 See discussion on the presence of an ICC representative in paragraph 109 of the Report.
64 States may need to review this provision to ensure consistency with any constitutional provisions or human rights laws relating to search of property.
65 States may need to review this provision to ensure consistency with any constitutional provisions or human rights laws relating to search and seizure of property.

(5) Subject to any condition specified in the warrant, a warrant issued under subsection (2) shall authorise the police officer executing the warrant—

(a) to enter and search a place, or to stop and search a vehicle, in which the item specified in the warrant is believed to be located or held, at any time of day or night;

(b) to use such assistants as may be reasonable in the circumstances for the purpose of such entry and search;

(c) to use such force as is reasonable in the circumstances to effect entry to such place or to stop or board such vehicle, and to break any receptacle in which the item specified in the warrant is placed; and

(d) to search for and seize the item.

(6) A person called on to assist a police officer executing a warrant issued under subsection (2) may exercise the powers referred to in paragraphs (c) and (d) of subsection (5).

(7) A police officer executing a warrant issued under subsection (2) shall—

(a) produce such warrant on initial entry, and if required to do so, at any time thereafter;

(b) give to the owner of the item seized or any other person whom he or she has reason to believe has an interest in such item, a notice specifying—

(i) the date and time of execution of the warrant;

(ii) the name and position of the person executing the warrant;

(iii) the item seized under the warrant.

(8) A police officer seizing an item under the authority of a warrant issued under subsection (2) shall deliver it into the custody and control of (the Inspector General of Police).

(9) (The Inspector General of Police) shall inform the (Minister or other appropriate authority) that the item has been seized and await the (Minister's or other appropriate authority's) directions as to how the item is to be dealt with.

(10) Except as otherwise provided in this section, the law relating to search and seizure generally shall apply to a search and seizure under this section.

64 Assistance involving the use of other domestic investigative procedures[66]

(1) Where the ICC requests assistance in the gathering of evidence for an investigation and the (Minister or other appropriate authority) has reasonable grounds to believe that the assistance requested is not prohibited by the law of (name of country), he or she shall without delay give authority for the request to proceed and transmit the request to (the appropriate agency in country).

(2) Where a request is authorised and transmitted under subsection (1), (the appropriate agency in country) may

(a) make use of any domestic powers as would be available in a domestic investigation of a similar matter to gather such evidence and any such powers under domestic law shall apply with the necessary modifications;

66 See discussion on use of domestic powers in paragraph 110 of the Report.

(b) make such report as it considers to be appropriate in the circumstances; and

(c) deliver the report to the (Minister or other appropriate authority).

65 Assistance in protecting victims and witnesses and preserving evidence[67]

(1) Where the ICC requests—

(a) assistance under article 93(1)(j) of the Statute in protecting victims and witnesses or preserving evidence;

(b) assistance under article 19(8), or article 56(2) or (3), in preserving evidence;

in relation to an investigation by, or a proceeding before, the ICC and the (Minister or other appropriate authority) believes on reasonable grounds that the assistance requested is not prohibited by the law of (name of country), he or she shall without delay give authority for the request to proceed and transmit the request to (the appropriate agency in country).

(2) Where a request is authorised and transmitted under subsection (1), (the appropriate agency in country) shall without delay—

(a) use its best endeavours to give effect to the request;

(b) make such report on the outcome of its endeavours as it considers to be appropriate in the circumstances; and

(c) deliver the report to the (Minister or other appropriate authority).

66 Request for assistance in the restraining and seizure of property associated with crime[68]

(1) Where the ICC requests assistance in identifying, tracing and restraining or seizing property for the purpose of eventual forfeiture, and the (Minister or other appropriate authority) believes on reasonable grounds that the property is or may be located in (name of country), he or she shall without delay give authority for the request to proceed and transmit the request to (the appropriate agency in country).

(2) Where a request is authorised and transmitted under subsection (1), (the appropriate agency in country)—

(a) shall use its best endeavours to give effect to the request; or

(b) may, where appropriate, apply to (a magistrate) for a restraining or seizing order with respect to the property.

(3) An application under subsection 2(b) may be made *ex parte* and may be granted without a hearing.

(4) (The magistrate) considering an application under subsection 2(b) may make a restraining or seizing order, as appropriate, if satisfied—

(a) that a forfeiture order has been made in proceedings before the ICC; or

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67 See discussion on protection of victims and witnesses in paragraphs 112 to 114 of the Report.

68 See further discussion on freezing/restraint of assets in paragraphs 138 to 141 of the Report. This provision implements Article 93(1)(k) and relates to the situation where the ICC requests assistance but no ICC order has been made. There is an additional provision in section 85 which deals with the situation where the ICC has made an order and requests its enforcement.

(b) that there are reasonable grounds to believe that a forfeiture order may be made in such proceedings,

and that the property to which the application for the restraining or seizing order relates consists of or includes property that is or may be affected by such a forfeiture order. [69]

(5) A restraining or seizing order shall provide for notice to be given to any persons with an interest in the property or otherwise affected by the order.

(6) A person affected by the order may apply to (a magistrate) for an order to vary or discharge the restraining or seizing order in relation to his or her interest.

(7) (The magistrate) may vary or discharge the restraining or seizure order in relation to the interest of a person making an application under subsection (6) only if (the magistrate) is satisfied that the applicant has an interest in the property, was not in any way involved in the commission of the crime to which the property relates, and had no basis to believe that the property was the proceeds of, or associated with, the crime.

(8) Subject to subsection (7), the property shall remain subject to the restraining or seizing order until the ICC issues a relevant forfeiture order in respect of the property and that order has been registered for enforcement under section 85 or the ICC advises that no such order will be issued, in which case the property shall be discharged from the restraining or seizing order.

(9) (The appropriate agency in country) shall make such report to the (Minister or other appropriate authority) on action taken to give effect to the request as it considers to be appropriate in the circumstances.

Optional additional provisions

[66 bis. Assistance in relation to interim release[70]

(1) Where the ICC makes a request concerning the interim release of a person under prosecution before the ICC in (name of country), the (Minister or other appropriate authority) may enter into an arrangement with the ICC.

(2) Such arrangement shall specify the conditions to be applied to the person concerned within the territory of (name of country), including conditions that may facilitate his or her arrival and stay in (name of country), as well as his or her attendance at the ICC for relevant proceedings in person or by video-link or other technological means.

(3) The national law of (name of country) relating to persons on bail or interim release shall apply with any necessary modifications.

66 ter. Assistance in relation to other forms of release[71]

Where the ICC makes a request concerning the release of a person in (name of country) other than interim release, the (Minister or other appropriate authority) may enter into an arrangement with the ICC.]

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69 It may be necessary to place a time limitation on restraint orders or alternatively provide for a periodic review by a magistrate.

70 See discussion on requests to accept a person in respect of whom the ICC has made an interim release order in paragraph 111 of the Report.

71 See discussion on requests to accept a person in respect of whom the ICC has made some other order or decision for release in paragraph 111 of the Report.

67. Refusal of request[72]

(1) The (Minister or other appropriate authority) shall refuse a request for assistance under this Part only if—

(a) the ICC has determined that the case to which the request relates is inadmissible on any ground;

(b) the ICC advises that it does not intend to proceed with the request for any reason, including but not limited to a determination of the ICC that article 98(1) of the Statute applies to the execution of the request;

(c) the assistance sought is outside the listed types of assistance set out in article 93 (1) and the provision of the assistance is prohibited by the law of (name of country) and the ICC does not accept the conditions, as contemplated by article 93(5) of the Statute, subject to which the (Minister or other appropriate authority) was willing to provide the assistance; or

(d) the execution of a particular measure of assistance is prohibited in (name of country) on the basis of an existing fundamental legal principle of general application and the ICC does not accept the conditions, as contemplated by article 93(5) of the Statute, subject to which the (Minister or other appropriate authority) was willing to provide the assistance.

(2) The (Minister or other appropriate authority) may refuse a request for assistance under this Part of this Act only if —

(a) there are competing requests for assistance from the ICC and a state and the (Minister or other appropriate authority) has decided, in consultation with the ICC and the state, that it is not possible to execute both requests and has decided further to proceed with the execution of the request of the state, in accordance with the principles established by article 90 of the Statute and section 32; or

(b) the refusal is authorised under Part VII.

(3) If the (Minister or other appropriate authority) decides to refuse a request for assistance in accordance with subsection (1) or (2) after he or she has transmitted the request to (the appropriate agency in country), he or she shall inform that agency not to take any further steps to execute the request.

68. Postponement of execution of request for assistance[73]

(1) The (Minister or other appropriate authority) may postpone the execution of a request for assistance under this Part only if—

(a) a determination on admissibility is pending before the ICC, unless the ICC has specifically ordered that the Prosecutor may pursue the collection of evidence pursuant to article 18 or article 19 of the Statute;[74]

(b) the execution of the request would interfere with an investigation or prosecution in (name of country) involving a different offence from that to which the request relates;

72 See discussion on grounds of refusal in paragraphs 120 and 121 of the Report.
73 See discussion on postponement of execution of requests in paragraph 119 of the Report.
74 See discussion on postponement of requests in paragraph 119 of the Report.

(c) the (Minister or other appropriate authority) is consulting with the ICC under section 25(2) as to whether or not article 98(1) of the Statute applies to execution of the request; or

(d) there are competing requests for assistance from the ICC and a state, and the (Minister or other appropriate authority) in consultation with the ICC and the state decides to postpone the execution of the ICC's request.

(2) If execution of the request for assistance is postponed under subsection (1)(a) and the ICC decides that the case is admissible, the (Minister or other appropriate authority) shall proceed with the execution of the request as soon as possible after the decision of the ICC.

(3) If the execution of the request for assistance is postponed under subsection (1)(b), the (Minister or other appropriate authority) shall consult with the ICC and agree on a period of time for postponement of the execution of the request in accordance with article 94 of the Statute. Such period of time shall be no longer than necessary to complete the relevant investigation or prosecution. The (Minister or other appropriate authority) shall proceed with execution of the request after the lapse of the period unless otherwise agreed with the ICC.

(4) If execution of the request for assistance is postponed under subsection (1)(c) and the ICC decides to proceed with the request, the (Minister or other appropriate authority) shall proceed with the execution of the request as soon as possible after the decision of the ICC.

(5) If the execution of the request for assistance is postponed under subsection (1)(d), the (Minister or other appropriate authority) shall proceed with the execution of the ICC's request as soon as practicable.

(6) If the (Minister or other appropriate authority) decides to postpone execution of a request for assistance in accordance with this section after he or she has transmitted the request for execution to the appropriate agency in (name of country), he or she shall direct that agency to postpone the execution of the request for such period as is specified in the direction.

(7) A decision by the (Minister or other appropriate authority) to postpone the execution of a request shall not affect the validity of any act that has been done or any warrant or order made under this Part of this Act prior to the decision, and any such warrant or order shall remain in force unless cancelled.

Supplementary provisions

69 Verification or authentication of material[75]

Where, in order to comply with a request of the ICC for assistance, it is necessary for any evidence or other material obtained under this Part to be verified or authenticated in any manner, the (Minister or other appropriate authority) may give directions as to the manner in which such evidence or material shall be verified.

75 See discussion on authentication of documents in paragraphs 174 and 175 of the Report.

70 Transmission of material to ICC

(1) Any evidence or other material obtained under this Part by a person other than the (Minister or other appropriate authority) together with any requisite verification shall be sent to the (Minister or other appropriate authority) for transmission to the ICC unless the (Minister or other appropriate authority) authorises otherwise.

(2) Where any evidence or other material is to be transmitted to the ICC there shall be transmitted-

(a) where the material consists of a document, the original or a copy; and

(b) where the material consists of any other article, the article itself or a photograph or other description of it as may be necessary to comply with the request of the ICC.

71 Certificates issued by (Minister or other appropriate authority)[76]

(1) If the (Minister or other appropriate authority) receives a request for assistance from the ICC to which this Part of this Act applies, the (Minister or other appropriate authority) may issue a certificate certifying all or any of the following facts—

(a) that a request for assistance has been made by the ICC;

(b) that the request meets with the requirements of this Act; and

(c) that the request has been duly accepted under and in accordance with the provisions of this Act.

(2) In any proceeding under this Act, a certificate purporting to have been issued under subsection (1) shall, in the absence of proof to the contrary, be sufficient evidence of the facts certified therein.

Part VI—Enforcement Of Sentences And Orders Of The ICC In (Name Of Country)[77]

72 Application of this Part

This Part of this Act applies to the enforcement of sentences imposed by the ICC and of orders for the payment of fines, restraining orders, forfeiture orders and orders for reparation, made by the ICC.

Enforcement of sentences

73 (name of country) may act as state of enforcement[78]

(1) The (Minister or other appropriate authority) may notify the ICC that (name of country) is willing to allow persons who are ICC prisoners as a result of being sentenced to imprisonment by the ICC to serve those sentences in (name of country), subject to any conditions specified in the notification.

(2) The (Minister or other appropriate authority) shall, before issuing a notification under subsection (1), consult with any other relevant Minister or authority.

76 See discussion on certificates in paragraphs 174 and 175 of the Report.
77 See general discussion under Part XXI of the Report on Enforcement of Sentences.
78 See discussion on general powers of enforcement in paragraph 130 of the Report.

(3) The (Minister or other appropriate authority) may enter into an arrangement with the ICC allowing for the enforcement of sentences.

74 Request for sentence to be served in (name of country)

(1) Where—

(a) the (Minister or other appropriate authority) has issued a notification under section 73 and has not withdrawn that notification and the ICC imposes a sentence of imprisonment under the Statute on a person convicted of a crime within the jurisdiction of the ICC; and

(b) the ICC designates (name of country) under article 103 of the Statute, as the state in which the sentence is to be served, the (Minister or other appropriate authority) shall consider whether to accept the designation.

(2) The (Minister or other appropriate authority) may accept the designation of (name of country) as the state in which the sentence is to be served if satisfied that the ICC has agreed to the conditions specified in the notification made under section 73, and, in the case of a prisoner who is not a citizen of (name of country), any other relevant Minister or authority has consented to the sentence being served in (name of country).

75 Prisoner to be held in custody

(1) Where the (Minister or other appropriate authority) accepts the designation of (name of country) as the State in which a sentence of imprisonment imposed by the ICC is to be served, the ICC prisoner may be transported to (name of country) in the custody of a person authorised for the purpose by the ICC.

(2) On arrival in (name of country) or, if the person is already in (name of country) when the sentence is imposed, on the imposition of the sentence, the (Minister or other appropriate authority) shall issue an order of detention in respect of the ICC prisoner and shall cause a copy of the order to be sent to (the Commissioner of Prisons).

(3) The order of detention issued under subsection (2) shall be sufficient authority for the detention of the ICC prisoner until he or she completes, or is released from, the sentence or is transferred to another country.

(4) Subject to subsection (7), the ICC prisoner shall be detained in accordance with the laws of (name of country) as if he or she had been sentenced to imprisonment under the laws of (name of country).

(5) Notwithstanding anything in subsection (4) or in any other law—

(a) the ICC prisoner shall have the right to communicate on a confidential basis with the ICC, without impediment from any person;

(b) a Judge of the ICC or a member of the staff of the ICC may visit the ICC prisoner for the purpose of hearing any representations by the prisoner without the presence of any other person, except any representative of the prisoner.

(6) The enforcement of a sentence of imprisonment, including any decision to release or transfer the ICC prisoner, shall be in accordance with Part 10 of the Statute and the Rules.

(7) The laws of (name of country) relating to parole, remission, reduction or variation of sentence and pardon shall not apply to a sentence imposed by the ICC.[79]

76 Transfer of prisoner to ICC for review of sentence[80]

(1) Where the ICC, under article 110 of the Statute, decides to review the sentence of an ICC prisoner who is serving that sentence in (name of country), the (Minister or other appropriate authority) shall direct that the prisoner be transferred to the ICC, at the expense of the ICC, for the purposes of enabling the ICC to review the prisoner's sentence.

(2) The ICC prisoner shall be transferred to and from the ICC in the custody of a person authorised for the purpose by the ICC, at the expense of the ICC.

77 Transfer of prisoner to another State to complete sentence[81]

(1) An ICC prisoner serving a sentence in (name of country) may, at any time apply to the ICC to be transferred from (name of country) to complete service of sentence in another state.

(2) Where an ICC prisoner of any nationality is to be transferred from (name of country) to another State to complete that sentence, the prisoner may be transported from (name of country) to that State in the custody of a person authorised for the purpose by the ICC at the expense of ICC.

Removal Orders[82]

(Choose one of the following options:)

Option 1

Apply general immigration law provisions to the ICC prisoner.

OR

Option 2

Insert provisions (sections 78-83) relating to Removal Orders:

78 Procedure on completion of sentence

The (Minister or other appropriate authority) may issue a removal order for an ICC prisoner who is not a citizen of (name of country) upon-

(a) the completion of sentence in (name of country) by that ICC prisoner; or

(b) the release, on the direction of the ICC, of that ICC prisoner

79 Removal order

(1) A removal order made by the (Minister or other appropriate authority) under section 78—

(a) may either—

79 See discussion on non-modification of sentence in paragraph 131 of the Report.
80 See discussion of transfers in paragraph 134 of the Report.
81 See discussion of transfers in paragraph 134 of the Report.
82 See discussion on situation after service of sentence in paragraph 133 of the Report.

(i) require the person who is the subject of the order to be released into or taken into the custody of a police officer; or

(ii) if the person is not in custody, authorise any police officer to take the person into custody; and

(b) shall specify that the person is to be taken by a police officer and placed on board any aircraft or vessel for the purpose of effecting the person's removal from (name of country) to (destination); and

(c) may authorise the detention in custody of the person while awaiting removal from (name of country).

(2) A removal order made under this section shall continue in force until it is executed or cancelled.

80 Delay in removal

(1) If a person in respect of whom a removal order has been made is not conveyed out of (name of country) within (...hours/days) after the order has issued, the person shall be brought before (a magistrate) to determine, in accordance with subsection (2), whether the person should be detained in custody or released pending removal from (name of country).

(2) If a person is brought before (a magistrate) under subsection (1), (the magistrate) may, if satisfied that the person is the person named in the order—

(a) issue a warrant for the detention of the person in custody if (the magistrate) is satisfied that, if not detained, the person is likely to abscond; or

(b) order the release of the person subject to such conditions, if any, that (the magistrate) thinks fit to impose.

81 Special rules in certain cases[83]

(1) An ICC prisoner serving a sentence in (name of country) shall not, without the agreement of the ICC, —

(a) be extradited to another country on completion of his or her sentence; or

(b) be required to undergo trial for an offence under the law of (name of country) that relates to an act or omission alleged to have been committed prior to his or her arrival in (name of country) or to serve such sentence.

(2) Nothing in subsection (1) shall apply to an ICC prisoner who remains voluntarily in (name of country) for more than 30 days after the date of completion of, or release from, the sentence imposed on him or her by the ICC or who voluntarily returns to (name of country) after having left (name of country).

82 Immigration permit not required

A person to whom this Part of this Act applies shall not be required to hold a permit or other authorisation under the law of (name of country) relating to citizenship and immigration control if, and for so long as, he or she is in (name of country) in accordance with this Part, whether or not he or she is in custody.

83 See discussion on protections from other proceedings in paragraph 135 of the Report

83 Application to citizens of (name of country)

Nothing in this Part of this Act shall be deemed to authorise the making of a removal order under section 78 in respect of a citizen of (name of country).

Fines, forfeiture and other orders

84 Enforcement of fines[84]

(1) Where the ICC requests enforcement in accordance with article 109 of the Statute of an order for the payment of a fine made under article 77(2)(a) of the Statute and the (Minister or other appropriate authority) has reasonable grounds to believe that—

(a) neither the conviction in respect of which the order was imposed, nor the order for the payment of the fine, is subject to further appeal; and

(b) the order can be enforced in the manner provided in this section,

he or she shall without delay give authority for the request to proceed and refer the request to (the appropriate agency in country).

(2) (The appropriate agency in country) shall, without delay, cause such order to be filed in (the appropriate court).

(3) An order filed in (the appropriate court) under subsection (2) shall have the same force and effect as if it were an order for the payment of a fine imposed by that court and shall be enforced accordingly.

(4) (The appropriate agency in country) shall make such report to the (Minister or other appropriate authority) on the outcome of any action taken by it to enforce the order as it considers to be appropriate in the circumstances.

(5) Nothing in this section shall be construed as limiting or affecting the provision of other types of assistance to the ICC in relation to a penalty imposed under article 77 of the Statute or as empowering (the appropriate court) to modify or vary the order of the ICC.

85 Enforcement of forfeiture orders[85]

(1) Where the ICC requests enforcement in accordance with article 109 of the Statute, of an order for forfeiture of property made under article 77(2)(b) of the Statute and the (Minister or other appropriate authority) has reasonable grounds to believe that -

(a) neither the conviction in respect of which the order was imposed, nor the forfeiture order, is subject to further appeal; and

(b) the property identified by the ICC is located in (name of country) or that the person concerned, directly or indirectly, holds property in (name of country) that may be the subject of the forfeiture order,

he or she shall without delay give authority for the request to proceed and refer the request to (the Director of Public Prosecutions) for enforcement in accordance with this section.

84 See discussion on enforcement of fines in paragraph 137 of the Report.
85 See discussion of forfeiture orders in paragraph 141 of the Report.

(2) Upon receipt of a referral under subsection (1), (the Director of Public Prosecutions) shall without delay file the original or a certified copy of the forfeiture order of the ICC with (the appropriate court).

(3) Upon the filing of the order in (the appropriate court) under subsection (2), the court may direct (the Director of Public Prosecutions) to do either or both of the following—

(a) give notice of the filing, in the manner and within the time the court considers appropriate to such persons, other than a person convicted of a crime in respect of which the order was made, as the court has reason to believe may have an interest in the property;

(b) publish notice of the filing in the manner and within the time the court considers appropriate.

(4) A forfeiture order filed in (the appropriate court) under subsection (2) shall have, from the date it is filed, the same force and effect as if it were an order for the forfeiture of property issued by that court and shall be enforced accordingly.

(5) A forfeiture order filed under subsection (2) shall not be enforced until after the expiry of any period specified by (the appropriate court) in any notice given or published under subsection (3), or two months from the filing of the order, whichever is the longer period.

(6) Where a forfeiture order is filed in (the appropriate court) under subsection (2), a person, other than a person convicted of a crime in respect of which the order was made, who claims an interest in the property, may apply to the court, with notice to (the Director of Public Prosecutions).

(7) A person on whom notice of the hearing of the ICC held in connection with the making of the forfeiture order was served or who appeared at the hearing shall not make an application under subsection (6) without leave of (the appropriate court).

(8) (The appropriate court) shall grant leave under subsection (7) only where it determines that it would be contrary to the interests of justice not to do so.

(9) An application under subsection (6) shall be made before the expiry of any period specified in a notice made or published under subsection (3) or within two months of the filing of the order, whichever is the longer period, unless (the appropriate court) grants leave.

(10) On an application under subsection (6), (the appropriate court) may make an order for the enforcement of the forfeiture order subject to the interest of the applicant if satisfied that—

(a) the applicant has an interest in the property;

(b) the applicant did not receive notice of the hearing before the ICC or through no fault of his or her own, did not appear at the hearing;

(c) the applicant was not in any way involved in the commission of the crime in respect of which the order was made; and

(d) the applicant had no knowledge that the property constituted the proceeds of, or was associated with, the crime .

(11) Where (the appropriate court) makes an order under subsection (10), the court may—

(a) declare the nature, extent and value of the applicant's interest in the property; and

(b) either direct that the interest be transferred to the applicant or that payment be made to the applicant of an amount equivalent to the value of the interest.

(12) (The Director of Public Prosecutions) shall ensure that the (Minister or other appropriate authority) is notified without delay of the outcome of any action taken under this section.

86 Transfer of funds realised to ICC

The (Minister or other appropriate authority) shall arrange for the transfer of funds realised through the enforcement of a fine under section 84 or a forfeiture order under section 85 to the ICC, subject to the deduction of reasonable costs related to the enforcement procedure.

87 Orders for forfeiture of property on conviction by ICC

(1) Where any person is convicted by the ICC of a crime within the jurisdiction of the ICC, (the High Court) may, on an application made by (the Director of Public Prosecutions), order that any property situated in (name of country) –

(a) used for, or in connection with; or

(b) derived directly or indirectly from,

the commission of that crime, be forfeited to the State, if satisfied that no order of forfeiture has been or will be made by the ICC under article 77(2)(b) of the Statute in respect of that property.

(2) Before making an order under subsection (1), the court shall give every person appearing to have an interest in the property in respect of which the order is proposed to be made, an opportunity of being heard, and subsections (3), (4), (5), (6), (7), (8), (9), (10) (11) and (12) of section 85 shall, with any necessary modifications, apply to an order made under this section

(3) Property forfeited to the State under subsection (1) shall vest in the State[86]-

(a) if no appeal has been made against the order, at the end of the period within which an appeal may be made against the order; or

(b) if an appeal has been made against the order, on the final determination of the appeal.

88 Enforcement of orders for victim reparation[87]

(1) Where the ICC requests enforcement in accordance with article 109 of the Statute of an order requiring reparation made under article 75 of the Statute and the (Minister or other appropriate authority) has reasonable grounds to believe that—

(a) neither the conviction in respect of which the order was imposed nor the order requiring reparation is subject to further appeal; and

(b) the order can be enforced in the manner provided in this section,

86 See discussion on enforcement of victim reparation orders in paragraph 136 of the Report.
87 See discussion of reparations in paragraphs 142 to 144 of the Report.

he or she shall without delay give authority for the request to proceed and refer the request to (the appropriate agency in country).

(2) (The appropriate agency in country) shall without delay file such order in (the appropriate court).

(3) Every order filed in (the appropriate court) under subsection (2) shall-

(a) if the order requires a monetary payment, have force and effect as if it were an order for the payment of compensation imposed by that court; or

(b) if the order requires the restitution of assets, property or other tangible items, have force and effect as if it were an order for the restitution of property made by that court; or

(c) if the order requires the granting of any other relief, have force and effect as if it were an order for the granting of such relief made by that court,

and every such order shall be enforced accordingly.

(4) (The appropriate agency) shall without delay make such report to the (Minister or other appropriate authority) on the outcome of any action taken by it to enforce the order as it considers to be appropriate in the circumstances.

(5) Nothing in this section shall be construed as limiting or affecting the provision of other types of assistance to the ICC in relation to an order made under article 75 of the Statute or as empowering (the appropriate court) to modify the order of the ICC.

(6) The (Minister or other appropriate authority) shall consult with the ICC as to whether the funds realised through the enforcement of an order under this section should be transferred directly to specified victims or through the Victims Trust Fund of the ICC.

(7) The (Minister or other appropriate authority) shall make arrangements for the transfer of the funds realised through the enforcement of an order under this section as determined through the consultations under subsection (6).

89 Enforcement of ICC restraining order[88]

(1) Where the ICC requests enforcement of a restraining order issued by the ICC in respect of property in (name of country) and the (Minister or other appropriate authority) has reasonable grounds to believe that–

(a) the restraining order is not subject to further appeal; and

(b) the property is located in (name of country),

he or she shall without delay give authority for the request to proceed and refer the request to (the appropriate agency in country).

(2) (The appropriate agency in country) shall file such order in (the appropriate court).

(3) Every order filed in (the appropriate court) under subsection (2) shall have force and effect as if it were a restraining order made by that court and shall be enforced accordingly.

88 See discussion on freezing/restraint of assets in paragraphs 138 to 140 of the Report. This section deals with the enforcement of an order that the ICC has made. Section 66 deals with the situation where the requested country makes the order after a request for assistance from the ICC.

(4) Nothing in this section shall be construed as limiting or affecting the provision of other types of assistance to the ICC in relation to the enforcement of a restraining order made by it or as empowering the court to modify the order of the ICC.

(5) (The appropriate agency in country) shall without delay make such report to the (Minister or other appropriate authority) on the outcome of any action taken by it to enforce the order as it considers to be appropriate in the circumstances.

Part VII – National Security[89]

(Note: It will depend on domestic context as to whether any provisions on national security need to be included in the legislation.)

90 National security

(1) Where-

(a) the ICC requests assistance under Part V for the production of documents or the taking of evidence and the Minister[90] is of the opinion that the production of such documents or the disclosure of such evidence would be prejudicial to the national security of (name of country);or

(b) a person is required to disclose information to, or give evidence before, the ICC and the person refuses to do so on the ground that the disclosure of such information or the giving of such evidence would be prejudicial to the national security of (name of country) and the Minister confirms that in his or her opinion the disclosure of such information or the giving of such evidence would be prejudicial to the national security of (name of country);or

(c) the Minister is of the opinion that the disclosure of information to, or giving of evidence before, the ICC in circumstances other than the circumstances referred to in paragraphs (a) and (b) would be prejudicial to the national security of (name of country),

the Minister shall consult with the ICC and take all reasonable steps to resolve the matter in accordance with article 72(5) of the Statute.

(2) If, after consultation with the ICC, the Minister considers that there are no means or conditions under which the information, documents or evidence requested could be provided, disclosed or given without prejudice to the national security of (name of country), the Minister may refuse the request for the production of such document or the disclosure of such evidence or refuse the authorisation of the production of such document or the disclosure of such information and shall specify to the ICC his or her reasons for doing so, unless the specification of those reasons would itself be, in his or her opinion, prejudicial to the national security of (name of country).

89 See discussion under Part XXV on National Security.
90 See discussion on the appropriate authority in paragraph 82 of the Report

Part VIII – Sittings of the ICC in Name of country)[91]

91 Prosecutor may conduct investigations in (name of country)[92]

The Prosecutor may conduct investigations in the territory of (name of country)—

(a) in accordance with the provisions of Part 9 of the Statute;

(b) as authorised by the Pre-Trial Chamber under article 57(3)(d) of the Statute; or

(c) as authorised by national authorities.

92 ICC sittings in (name of country)

The ICC may sit in (name of country) for the purpose of discharging its functions under the Statute and under the Rules, including but not limited to—

(a) the taking of evidence;

(b) the conduct or continuation of a proceeding;

(c) the giving of a judgment in a proceeding; or

(d) the review of a sentence imposed by the ICC.

93 ICC powers while sitting in (name of country)

(Choose one of the following options:)

Option 1

(1) When the ICC is sitting in (name of country), it may discharge and exercise any or all of its functions and powers as provided for under the Statute and under the Rules.

(2) Without prejudice to the generality of subsection (1), the ICC shall have the power to-

(a) commit persons for contempt of its orders; or

(b) issue a summons or make other orders requiring the attendance of any person before the ICC or the production of any document or record for examination by the ICC;

(3) An order made or a summons issued by the ICC under this section, including a committal order for contempt, shall be enforced by the domestic authorities of (name of country) as if the summons or order had been issued or made by a domestic court in (name of country).

OR

Option 2

Include no specific provisions with the result that the ICC would need to make a request for assistance to compel witnesses to attend hearings. Such a request would then be dealt with under Part V.

91 See discussion under Part XXIII on ICC Sittings.

92 See discussion on direct execution by the Prosecutor in paragraphs 117 and 118 of the Report.

94 ICC may administer oaths in (name of country)

The ICC may, at any sitting of the ICC in (name of country), administer an oath or affirmation requiring a witness to give an undertaking as to truthfulness of the evidence given by the witness, in accordance with the Rules.

95 Orders made by ICC not subject to review

(1) The conduct of a trial or other proceeding by the ICC sitting in (name of country) is not subject to judicial or other challenge in a court in (name of country).

(2) In particular, none of the following proceedings may be brought or made in a court in (name of country) in respect of a judgment, order, determination, or step of the ICC given, made or taken at a sitting of the ICC in (name of country):

(a) any judicial review;

(b) an application for, or for relief in the nature of, a declaration, declaratory judgment or injunction;

(c) an application for, or for relief in the nature of, an order of mandamus or prohibition or certiorari;

(d) an application for, or for relief in the nature of, a writ of habeas corpus;

(e) an appeal.

96 Power to detain ICC prisoners in prison in (name of country)

(1) Where the ICC holds a sitting in (name of country) and requests that a person whose presence is required at that sitting be held in custody as an ICC prisoner while the sitting continues in (name of country), the (Minister or other appropriate authority) shall direct in writing that such person be held in custody at such location as is specified in the direction.

(2) A direction given under subsection (1) in respect of an ICC prisoner is sufficient authority for the detention of that prisoner in accordance with the terms of the direction.

(3) The law relating to prisons so far as is applicable with any necessary modifications shall apply to an ICC prisoner required to be detained in a prison by a direction under subsection (1) as if the prisoner had been remanded in custody or sentenced to imprisonment for an offence under the law of (name of country), as the case may require, and is liable to be detained in a prison under such an order or sentence.

(4) For the purposes of the application of the law relating to escape from lawful custody and aiding prisoners to escape, an ICC prisoner who is in custody in a prison or other detention facility in (name of country) shall be deemed to be in lawful custody while in (name of country).

97 Removal of ICC prisoner

If the (Minister or other appropriate authority) is satisfied that the presence in (name of country) of an ICC prisoner who was the subject of a direction under section 96 is no longer necessary, sections 78 to 83 shall apply to and in relation to that person with any necessary modifications .

Part IX – legal status of the ICC and Privileges and Immunities of Officials of the ICC[93]

98 Legal personality and privileges and immunities

(1) The ICC shall have legal personality in (name of country) with such legal capacity as may be necessary for the performance of its functions and the fulfilment of its purposes.

(2) Without prejudice to the generality of subsection (1), the ICC shall have the capacity to contract, to acquire and dispose of immovable and movable property and to institute legal proceedings, in name of country).

(3) The Judges, the Prosecutor, the Deputy Prosecutors, the Registrar, the Deputy Registrar, staff of the Office of the Prosecutor and of the Registry, counsel, experts, witnesses, and other persons required to be in (name of country) for the performance of official functions or for participation in proceedings before the ICC shall have the privileges and immunities set out in article 48 of the Statute and the Agreement on the Privileges and Immunities of the ICC.

(4) Article 48 of the Statute and articles 2 to 11, 13 to 22, 25 to 27, 29 and 30 of the Agreement on the Privileges and Immunities of the ICC shall have the force of law in (name of country), and references in those articles to the State Party shall, for this purpose, be construed as references to (name of country).

Optional additional provision

[(5) Notwithstanding anything in subsections (3) and (4), a national of a State which has made an election under article 23 of the Agreement on Privileges and Immunities of the ICC shall be entitled only to the privileges and immunities referred to in Article 23 of the Agreement on Privileges and Immunities.][94]

Part X - miscellaneous

99 Regulations[95]

(1) The (Minister or other appropriate authority) may make regulations for the purpose of giving effect to the principles and provisions of this Act.

(2) Without prejudice to the generality of subsection (1), the (Minister or other appropriate authority) may make regulations in respect of all or any of the following matters:-

(a) prescribing the procedure to be followed in dealing with requests made by the ICC, and providing for notification of the outcome of action taken to give effect to such requests;

(b) providing for temporary surrender of a person;

(c) prescribing the procedures for obtaining evidence or producing documents or other articles in accordance with a request made by the ICC;

93 See discussion under Part XXIV on Privileges and Immunities for ICC Officials and Other Relevant Persons.

94 See discussion on option of restricting application of certain immunities in paragraph 152 of the Report.

95 See discussion on regulatory powers in paragraph 174 of the Report.

(d) providing for the payment of fees, travelling allowances, and expenses to any person in (name of country) who gives or provides evidence or assistance pursuant to a request made by the ICC;

(e) prescribing conditions for the protection of any property sent to the ICC pursuant to a request made under this Act, and making provision for the return of property to (name of country);

(f) providing for the enforcement of any ICC sentence of imprisonment;

(g) providing for management and disposal of property under a restraining, seizing or forfeiture order;

(h) prescribing the forms of applications, notices, certificates, warrants and other documents for the purposes of this Act, and requiring the use of such forms;

(i) implementation of any obligation that is placed on States Parties by the Rules in so far as such obligation is not inconsistent with the provisions of this Act; and

(j) establishing a fund for the benefit of victims of crimes within the jurisdiction of the ICC.[96]

(3) Every regulation made by the (Minister or other appropriate authority) under subsection(1) shall be published in the Gazette and shall come into force on the date of its publication or on such later date as may be specified therein.

(4) Every regulation made by the (Minister or other appropriate authority) shall, as soon as convenient after its publication in the Gazette, be placed before (Parliament) for its approval. Every regulation which is not so approved shall be deemed to be rescinded as from the date of disapproval, but without prejudice to anything previously done thereunder.

(5) Notification of the date on which any regulation is deemed to be so rescinded shall be published in the Gazette.

SCHEDULE 1

The Rome Statute of the International Criminal Court

SCHEDULE 2

Agreement on the Privileges and Immunities of the International Criminal Court

96 See discussion on trust funds in paragraph 136 of the Report.

Report Of The Commonwealth Expert Group on Implementing Legislation for

The Rome Statute of the International Criminal Court

April 2011

Contents

I. Introduction

1. The original Commonwealth Expert Group (the 2004 Group) met in Marlborough House, 7-9 July, 2004. The meeting was sponsored by the Commonwealth Secretariat, with the generous financial support of the Government of the United Kingdom. The Group consisted of representatives of five Commonwealth countries plus observers from the Office of the Prosecutor and the Office of the Registrar of the International Criminal Court (ICC) and a representative of the International Committee of the Red Cross (ICRC). The Group considered the various components of implementing legislation and produced a Model Law to Implement the Rome Statute of the ICC (Rome Statute) for use by states in developing domestic legislation. Following the Review Conference of the Rome Statute held in Kampala in May/June 2010 and a Commonwealth Stocking meeting held in October 2010 a further Expert Group (the 2011 Group) met in Marlborough House, 23-25 February, 2011. The Group consisted of representatives of six Commonwealth countries plus observers from the International Criminal Court (ICC) (the Registry and Presidency) the Secretariat of the Assembly of States Parties to the Rome Statute of the ICC, the International Committee of the Red Cross (ICRC), Parliamentarians for Global Action (PGA) and Chatham House. The Group considered the various components of the implementing legislation in accordance with the Agenda. During the course of the meetings, both Groups examined a variety of reference materials, including legislation from around the Commonwealth. For the 2011 Group, a key reference was the 2004 model law.

2. For the ICC to function effectively, States Parties need to have in place comprehensive and up-to-date domestic legislation which implements the Rome Statute. The purpose of the 2011 meeting was to:

   - consider developments since the Rome Statute came into force;
   - review and update the 2004 model law;
   - review and update the commentary to the 2004 model law to assist legislative drafters to prepare national legislation.

3. The following is a revised commentary and summary of the discussions reflecting both the deliberations of the 2004 Expert Group as well as those of the 2011 Expert Group (referred to in this report respectively as the '2004 Group' and '2011 Group'). The 2011 Group reviewed the model law and, while still preserving the structure of the 2004 version, has recommended a number of amendments intended to clarify or improve the drafting of certain provisions. In some cases, the 2004 Group had recommended optional approaches for particular provisions. There are also some purely optional sections that are suggested for consideration. Many of these remain in the revised draft. Legislative examples are given for reference as appropriate and necessary.

II. Crime of Aggression

4. The crime of aggression was included in Article 5 of the Statute as a crime within the jurisdiction of the ICC but there could be no prosecutions until a definition and the conditions for the exercise of jurisdiction were adopted. A definition of the crime of aggression and related amendments were adopted at the 2010 ICC Review Conference in Kampala. The amendments cannot come into force before January 2017 and require at least 30 states to ratify them as well as a decision of the Assembly of States Parties to bring them into effect.

5. The 2011 Group considered whether to include provisions on the crime of aggression in the Commonwealth model law. A majority concluded that further work is required and inclusion would be premature. It considered that the issue should be revisited before 2017.

III. Genocide, Crimes Against Humanity and War Crimes - Substance

6. The 2004 Group first considered the establishment of genocide, crimes against humanity and war crimes under domestic law. Unlike other penal law conventions, such as the United Nations Convention against Transnational Organized Crime, the 1949 Geneva Conventions or the various counter-terrorism conventions, the Rome Statute does not contain specific provisions that oblige countries to create domestic offences for the crimes within the jurisdiction of the ICC, though it has sometimes been so interpreted.[1] Nevertheless, as the aim of the Rome Statute is to end impunity for the perpetrators of these grave crimes, the 2004 Group agreed that this is best accomplished if all states have the capacity to prosecute genocide, crimes against humanity and war crimes under domestic law. The Preamble of the Rome Statute recognises these principles in providing as follows:

   Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

   Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes...

7. The Preamble also affirms that "the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions". This concept is fundamental for the ICC to be effective. However, for this principle to operate in practice, states need to have a complete regime under domestic law for the prosecution of genocide, crimes against humanity and war crimes. Furthermore, the Statute provides that the Court has jurisdiction when a State Party is "unwilling or unable" to prosecute effectively the alleged perpetrators of the Statute crimes. One of the indicators of a state's inability to prosecute is the absence of adequate laws under which to prosecute. If a state does not incorporate the crimes of genocide, crimes against humanity and war crimes into its domestic law, then it will be forced to cede jurisdiction to the ICC, including for its own nationals. As the focus of the ICC may be on particular types of offenders – such as those who lead and orchestrate the most serious crimes- this may have the effect of allowing some offenders to escape justice. The legislation enacted to date within the Commonwealth has included domestic offences for genocide, crimes against humanity and war crimes. Unless for compelling domestic policy reasons a state wishes to provide solely for the strictly mandatory requirements of the Rome Statute i.e. co-operation, administration of justice offences, enforcement of fines, forfeiture and reparation orders, it is advisable to reflect in domestic legislation offences, jurisdiction and related provisions for genocide, crimes against humanity and war crimes. The resolution on complementarity adopted by consensus at the Kampala Review Conference on 11 June 2011 reaffirmed the legal principles enshrined in the Rome Statute, which includes the Preambular provisions cited

1 There are limited obligations under Article 70 to extend domestic law to administration of justice offences committed in relation to the Court.

above, as "it emphasize[d] the principle of complementarity as laid down in the Rome Statute and stress[ed] the obligations of States Parties flowing from the Rome Statute" (See para. 2, RC/Res.1).

8. After discussion, the 2004 Group was of the view that the key questions for incorporation of the crimes were:

   What crimes should be reflected?

   How should they be reflected?

9. To implement fully the Rome Statute, states should create offences reflecting genocide, crimes against humanity and war crimes as set out in Articles 6, 7 and 8. The Group was of the view that the simplest and most effective way to do so would be to refer to the relevant crimes as set out in Articles 6, 7 and 8 of the Rome Statute and schedule them to the legislation.

10. The Group recognised that this was the minimum standard that a state interested in complementarity would want to reflect in domestic law. It should be recognised here that all Commonwealth states are Party to the 1949 Geneva Conventions and most are Party to their 1977 Additional Protocols. Not all of the crimes contained in these instruments or in other treaties relating to international humanitarian law are currently captured in the Rome Statute. There are also a number of customary international law rules[2] that could be reflected in a state's domestic law on the Rome Statute. It is possible for a state, therefore, to include a provision that will allow for additional crimes to be included as domestic offences without the need for subsequent amendment to the law if a state accedes to a convention in future with new genocide, war crimes or crimes against humanity offences or if a new crime of the same nature is recognised under customary international law. This was the approach adopted in the legislation of Canada and Samoa. It is for each state to determine whether to restrict the legislation to genocide, crimes against humanity, and war crimes as defined in the Rome Statute or include additional offences. In relation to crimes against humanity, it should be noted that the crime of persecution in the Rome Statute requires it to be committed in connection with other crimes falling within the jurisdiction of the ICC. Some consider this to be more restrictive than customary international law and thus some implementing legislation, such as Germany, deletes the nexus requirement in the case of persecution. The Group was of the view the model law should contain a simple provision adopting the crimes as defined in the Rome Statute and an optional provision for additional crimes.

11. States also need to consider the incorporation of the amendment to Article 8.2(e) of the Rome Statute adopted at the Kampala Review Conference in 2010. The amendment extends the application of the prohibition of certain weapons[3] to armed conflicts not of an international character. The amendment is subject to ratification or acceptance. If a State has implemented the relevant crimes set out in Articles 6, 7 and 8 of the Rome Statute by scheduling them

2 The customary IHL rules mentioned here are discussed in the following publication: ICRC, Customary International Humanitarian Law, Henckaerts, Jean-Marie and Doswald-Beck, Louise; ICRC-Cambridge University Press, UK, 2009 Third Edition.

3 Article 8, paragraph 2 (e):
"(xiii) Employing poison or poisoned weapons;
(xiv) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
(xv) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions."

to the legislation, this new amendment can be added to that schedule. States employing another method of incorporation should ensure that they have made adequate provision to allow for the prosecution of these acts.

12. States will also wish to cover ancillary offences (see discussion below in paragraphs 45, 46 and 56-58). States should consider existing law on this point and ensure that both ancillary offences with appropriate jurisdiction provisions are adopted.

13. It is important for a State also to ensure that its domestic legislation covering the Rome Statute is coherent and consistent with its existing domestic law. Many Commonwealth states already have laws to incorporate the Geneva Conventions, and, where applicable, their 1977 Additional Protocols. This usually takes the form of a Geneva Conventions Act. It is necessary, as a consequence, to ensure that the provisions covering grave breaches and other serious violations covered by a Geneva Conventions Act are not adversely affected by the law incorporating the Rome Statute. As a Geneva Conventions Act invariably provides for universal jurisdiction for war crimes or at a minimum those considered grave breaches, care must be taken that this jurisdictional basis is not affected by the incorporating law for the Rome Statute. The 2011 Group therefore considered it useful to make reference to such legislation stating that the current law in no way is to affect or limit any Geneva Conventions Act.

14. States need also to ensure that there is no conflict with other domestic law or their obligations under other international treaties, for example, those States that are party to the 2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict are required to prohibit, in domestic law, the compulsory recruitment into their armed forces of children who have not attained the age of 18.[4] There would be a conflict should a State that has this requirement incorporate the war crime under Article 8(2)(b)(xxvi) of the Rome Statute into domestic law as it only prohibits the conscription of children under the age of 15. Such States should therefore ensure that the prohibition extends to those children who have not attained the age of 18.

Sections 5 to 7 of the Model Law

- Sections adopting the crimes set out in Articles 6, 7 and 8 of the Rome Statute using a Schedule to the legislation

  (See for example: Kenya s. 6; NZ ss. 9, 10 and 11; Uganda ss. 7, 8 and 9; UK s. 50).

Optional provisions

- A provision defining the crimes to include genocide, crimes against humanity and war crimes offences under any Convention to which the state is a party and similar offences which are at the time and place of commission offences under customary international law

  (See Canada s. 4(3); Samoa ss. 5, 6 and 7).

- A provision making reference to the state's Geneva Conventions Act.

4 Article 2: 'States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.'

IV. Genocide, Crimes Against Humanity And War Crimes – Temporal Jurisdiction

15. States implementing the Rome Statute have a choice between prospective application of the legislation with respect to the crimes – legislation applies to crimes committed after the coming into force of the legislation - and retrospective application – legislation applies to crimes committed prior to the coming into force of the legislation from a set point in time. Prospective application is the normal approach to penal legislation and hence would not require any special provisions in the legislation.

16. The other option is retrospective application. In general, the principle of legality prohibits retroactive application of a penal provision - criminalising conduct that was not criminal at the time it was committed. However, for genocide, crimes against humanity and war crimes, retrospective assertion of jurisdiction is permissible under international and domestic law. The International Covenant on Civil and Political Rights provides as follows in Article 15:

> "(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed....
>
> (2) Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."

17. As a general principle, genocide, crimes against humanity, and war crimes would fall within the category of crimes described in paragraph 2 of Article 15 though there is some doubt as to whether all of the conduct included in the definition of crimes against humanity in the Rome Statute was recognised at the time of its adoption (1998) as criminal under customary international law. Subject to arguments on this point, retrospective jurisdiction for these crimes would be permissible.

18. Retrospective application has advantages. First, if part of the purpose of incorporating the crimes is to be able to exercise jurisdiction under the complementarity regime, then retrospective application is necessary to provide a jurisdiction co-extensive with that of the ICC. Second, retrospective application helps reduce the prospect of impunity for crimes of the recent past.

19. States choosing retrospective application will have to decide on the date from which the definitions will be applied. As the Rome Statute entered into force on 1 July 2002 this date would be appropriate both for purposes of complementarity and reflect the principle of legality. Alternatively, states for which the Rome Statute entered into force after 1 July 2002 might choose the date of entry into force for their country. However, even in such cases, consideration should still be given to using 1 July 2002, given that the ICC could exercise jurisdiction over crimes as of that date (e.g. nationals of the state committing crimes in another territory or non-nationals committing crimes in the state's territory) and because declarations under article 12(3) of the Rome Statute may extend jurisdiction back to 1 July 2002. States could also choose an earlier date, such as 17 July 1998[5], as there is an argument that the definitions adopted were regarded by the negotiating states as customary international law at that date

5 The date the Rome Statute was adopted by the Conference.

and that the collective declaration by much of the international community is a persuasive statement of international law. If a state wishes to choose an even earlier date, problems may arise in terms of the principle of legality, because some of the crimes were comparatively new in 1998. To avoid this, states wishing to apply such definitions earlier than 1998 should consider the approach adopted by Canada.[6] Existing legislation should also be examined to determine the extent to which crimes may already be covered to ensure that whatever form of temporal jurisdiction is adopted it does not weaken any existing law. In this respect, states with existing laws on war crimes or genocide with existing entry into force dates will want to take those into account.

Section 12 of the Model Law

Two Options

- Act applicable with respect to crimes as of the entry into force of the legislation (as this is the normal rule, legislative note to indicate that the effect of silence is prospective application from the date of the legislation. This is of course subject to Article 15(2) of the International Covenant on Civil and Political Rights.); or
- Act applicable with respect to crimes as of 1 July 2002.

V. Genocide, Crimes Against Humanity And War Crimes - Penalties

20. The Rome Statute prescribes in Part 7 the penalties which the ICC may impose for the crimes referred to in Article 5 when the trial is held before the ICC. Article 77 provides that:

    "...the Court may impose one of the following penalties on a person convicted of a crime referred to in Article 5 of 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."

21. There are also provisions for fines and forfeiture of the proceeds of the crimes.

22. While the Statute penalties apply to proceedings before the ICC, a state may wish to incorporate analogous penalties in domestic law to those found in the Rome Statute.

23. However Article 80 of Part 7 of the Statute recognises that:

    "Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part."

24. While a state will wish to ensure that the applicable penalties are consistent in terms of severity with those in the Rome Statute, it may choose to adopt those which are consistent with penalties for analogous serious offences in domestic law.

6 See Crimes against Humanity and War Crimes Act, Canada s.4 (definition of crimes against humanity)

Sections 5(3), 6(3) and 7(3) of the Model Law

Two Options

- Penalty provision modelled on Article 77 of the Rome Statute; or
- Penalty provision consistent with domestic law (without necessarily specifying the actual penalty in the model provisions)

(See Uganda, ss. 7(3) (a), 8(3) (a), 9(3)(a)).

VI. Genocide, Crimes Against Humanity And War Crimes – Jurisdiction To Prosecute

25. Another issue to be considered is the jurisdiction to prosecute the crimes. Traditionally in the common law, jurisdiction is territorial with some exceptions allowing for jurisdiction over nationals for very serious offences. A state will have the jurisdiction to prosecute offences that occur within the territory of that state. Under international law other forms of jurisdiction are recognised for offences committed outside the territory of a state including where the offence is committed by or against a national/permanent resident of the state. In the case of very grave crimes, international law also recognises the right of a state to take extraterritorial jurisdiction over offences by whomsoever and wherever committed. However there is some division of opinion as to the circumstances in which such broad "universal" jurisdiction is permissible. Some argue that this jurisdiction should apply only where the person is present in that state after the commission of the offence, thereby providing a nexus to the state. Others are of the view that presence in the state is not a prerequisite as the crimes are sufficiently grave to allow for prosecution by any state regardless of where the person is located. In this latter case, as in absentia prosecutions are generally not permissible in common law systems, the person would need to be extradited for prosecution.

26. The Rome Statute does not specify what form of jurisdiction should be applied under national law. Under Article 12 of the Rome Statute, the ICC has jurisdiction over genocide, crimes against humanity and war crimes when they are committed in the territory of a State Party or by a national of a State Party. To ensure full complementarity a state would need to take similar jurisdiction over these crimes for acts in its territory or committed elsewhere by its nationals. This approach is consistent with the goals of the Statute and international law. It is similarly non-controversial to take jurisdiction over offences committed against a state's nationals. However, several states have elected to take even broader "universal" jurisdiction for these crimes, either with a precondition of presence or not. There are both benefits and disadvantages to this broad extension of extraterritorial jurisdiction. The application of universal jurisdiction is consistent with the ultimate aim of the Rome Statute – bringing an end to impunity for these grave crimes. If states have universal jurisdiction over these crimes under national law this will provide a broad base for prosecution on a global basis and give each state the flexibility to deal with all cases where it may be appropriate to prosecute. It is also consistent with the universal jurisdiction requirement for grave breaches of the 1949 Geneva Conventions. On the other hand, a state which applies universal jurisdiction to these crimes, particularly with no requirement for the presence of the person, may face arguments as to the consistency of that position with international law, particularly in relation to some acts that constitute war crimes which may be considered as less grave.

27. Despite arguments regarding the precise contours of universal jurisdiction, the 2004 Group was of the view that countries should apply universal jurisdiction to genocide, crimes against humanity and war crimes implemented in domestic law as it reflects the position most consistent with the aim and purpose of the Rome Statute. The Group therefore put forward two optional approaches that could be used to introduce this type of extraterritorial jurisdiction under national law.

28. The first involves the broadest form of extraterritorial jurisdiction and would provide that genocide, crimes against humanity and war crimes, wherever committed, were offences and then rely upon the consent of the Attorney General (or other prosecutorial authority) and the use of prosecutorial discretion to prevent the use and application of the provision in circumstances where there was no real connection to the state.

29. The second option is to establish an offence in the usual manner which, in accordance with the general law for most Commonwealth jurisdictions, would be subject to prosecution only when committed on the territory of that state. The provision would go on to extend jurisdiction extra-territorially when certain conditions were met namely:

    - the accused was a national or permanent resident; or
    - the victim of the crime was a national or permanent resident; or
    - the person, after the commission of the offence, is present in that state.

    The implementing legislation of Kenya contains additional jurisdictional conditions such as accused that are citizens or permanent residents of or were employed in a civilian or military capacity by a state that was engaged in an armed conflict against that state, or where the victim was from a state allied to that state or from a neutral state. It is possible therefore for implementing legislation to include such instances.

30. The advantages and disadvantages of each approach were discussed. By listing the specific conditions for the exercise of extraterritorial jurisdiction and excluding cases where the person has no connection to the state and is not present there, the chances of challenges to the legislation as overly broad are reduced. Also a state would not be subject to pressures to "take on" cases from other jurisdictions in the absence of a clear interest, which is a concern particularly for developing countries and small states with limited resources.

31. On the other hand, there may be instances where the direct connection is not apparent but a state may be the most appropriate for the prosecution. In the absence of the extended application of jurisdiction in the first option, it would not be possible to seek the extradition of the suspect and carry out the prosecution. It is for each state to decide, considering its domestic context, which approach would best serve its national interests and most effectively implement the Rome Statute.

Section 13 of the Model Law

Two options for jurisdiction over genocide, crimes against humanity, and war crimes

- Section providing for jurisdiction over the relevant crimes wherever committed

  (See NZ s. 8(1)(c)); or

- Section providing for jurisdiction when:

- committed by a national or permanent resident; or
- the victim of the crime was a national or permanent resident; or
- the person, after the commission of the offence, is present in that state
- (See Canada s. 8; Uganda s. 18: Kenya s. 8).
- optional provisions where the person was a citizen or permanent resident of a state that was engaged in an armed conflict against that state, or was employed in a civilian or military capacity by that state, or the victim was a citizen or permanent resident of a state that was allied with that state or of a neutral state in an armed conflict.

VII. Genocide, Crimes Against Humanity And War Crimes – Consent To Prosecution

32. The prosecution of these crimes under national law, especially where extraterritorial jurisdiction is being exercised, brings into play a number of special considerations including international obligations and the interrelationship between the ICC and national jurisdictions. To ensure that these obligations are respected and that there is proper communication and liaison with the ICC, it is advisable to have some form of "consent" to the institution of proceedings resting with an authority responsible for prosecutions within that state. A consent regime may also provide a protection against abuse and frivolous proceedings particularly in a system where private prosecutions are possible without the ability for intervention by state authorities to stop proceedings. At the same time, to guard against political interference with the prosecution of such cases, the consent responsibility should be vested in an authority that exercises independent judgement in the prosecution process. In most common law jurisdictions that will be either the Attorney General or a Director of Public Prosecutions (DPP). Given these considerations, the Group was of the view that a mechanism for consent to prosecution by the national authority responsible for public prosecutions was appropriate.

33. However each state would need to consider two issues. While the Attorney General would in many jurisdictions be the appropriate person to consent to the initiation of proceedings, in some countries the constitutional or legislative status of the DPP might make the DPP a more appropriate authority. So each state would need to decide on the appropriate authority (most likely a justice official) to give the consent to prosecution.

34. Secondly, consideration needs to be given, particularly in federal states or other states with divided responsibility for prosecutions, as to who has responsibility to institute and conduct the proceedings once consent is given. In some states there may be only one authority while in others a specific statement may need to be made in the law. This can also provide an additional protection with respect to private prosecution if exclusive prosecution authority is vested in one official.

Section 14 of the Model Law

- Section requiring the consent of the authority responsible for public prosecutions for the commencement of proceedings for these crimes

  (See for example Canada s. 9(3) (personal consent of the Attorney General required); New Zealand s. 13; Uganda s. 17; UK s. 53(3)).

VIII. Article 70 – Administration Of Justice Offences

35. In 2004 there was a lengthy discussion as to how best to reflect in domestic law the obligations under Article 70 of the Rome Statute. Strictly speaking, the provision mandates in subparagraph 4(a) that states extend their criminal law which penalises offences against the integrity of its own domestic investigation and prosecution process, to offences against the administration of justice in relation to the ICC as set out in Article 70. The Group recognised that states could employ optional approaches to implement this obligation including:

    - apply existing domestic offences to the ICC;
    - create a series of new/separate offences;
    - incorporate Article 70 by reference into domestic law;
    - employ a combination of points 1 and 2 above.

36. The Group was of the view that each state would need to make a policy decision as to the most effective approach, which would depend very much on existing domestic law. However, there were concerns expressed about using solely the approach of incorporation by reference given some of the vague language employed in Article 70.

37. In order to assist states, the Group ultimately recommended that relevant offence provisions should be drafted for all the offences listed in Article 70 and a state could review the list with reference to domestic law and determine which domestic provisions could be extended and where new offences would be required.

38. As there is divided jurisdiction between the ICC and states over the prosecution of such offences, in addition to incorporating the offences under domestic law, states should extend the international co-operation regime to administration of justice offences.

Sections 15 and 15A to 15G of the Model Law

Options

- Extension of existing administration of justice offences relating to domestic courts and proceedings to the ICC; or
- Offence provisions for each subparagraph of paragraph 1 of Article 70

(See NZ ss. 15-21; Uganda ss. 10-16).

IX. Jurisdiction For The Administration Of Justice Offences

39. The Rome Statute mandates that states have jurisdiction over these offences when committed on the territory of the state or by its nationals. Thus, as a minimum, the state will wish to provide for jurisdiction in those circumstances. A state that normally covers nationals and permanent residents under domestic law when taking extraterritorial jurisdiction on this basis might wish to similarly extend jurisdiction over these offences to permanent residents.

40. However, there may be practical considerations that would motivate a further extension of extraterritorial jurisdiction for these offences. The administration of justice offence provisions are established to support the integrity of the ICC

court process and therefore it may be appropriate to extend jurisdiction broadly to ensure sufficient flexibility to pursue these cases. There may be instances where a state would have a significant interest in conducting a prosecution. For example, one can envisage that if the retaliation involved the murder of a citizen, a state might want to have jurisdiction to prosecute. Similarly, while the offence and accused may have no direct connection to the state in which the accused is present, extradition elsewhere may be impossible and the ICC may not be able to deal with the case. In both circumstances it would be helpful to have extended extraterritorial jurisdiction on the basis of which a prosecution could be grounded. Furthermore, because of the possible scenarios with administration of justice offences generally, domestic law may provide for extraterritorial jurisdiction for such offences relating to national court process. A state would want to ensure similar extended jurisdiction in applying these offences to the ICC.

41. At the same time there is some risk that, given the limited requirements of the Statute, extended extraterritorial jurisdiction for these offences could be considered as going beyond what is recognised and permissible at international law.

42. Each state will need to make a policy decision and optional approaches should be reflected in the model law.

Section 16 of the Model Law

Two Options

- Jurisdiction for administration of justice offences on the basis of territory and extraterritorial jurisdiction on the basis of nationality

  (See UK s. 54(4)); or

- Jurisdiction on the basis of territory plus extraterritorial jurisdiction for administration of justice offences based on nationality of offender, nationality of victim and presence of the person in the territory after commission of the offence

  (See Uganda s. 18).

X. Penalties For Administration Of Justice Offences

43. To the extent that existing domestic offence provisions are extended to the ICC, it would be appropriate to apply the same penalties in application to the ICC. If new offences are created it is open to each state to adopt an appropriate penalty consistent with domestic law generally. Paragraph 3 of Article 70 provides for a term of imprisonment not exceeding five years or a fine as prescribed under Rule 166 of the Rules of Procedure and Evidence (RPE). However a state is in no way obligated to apply a similar penalty for these offences under domestic law.

Sections 15A-15G of the Model Law

- Penalty section for administration of justice offences with specific penalty left open.

XI. Consent To Prosection Of Administration Of Justice Offences

44. There are several reasons to require consent for the prosecution of these offences by the Attorney General or other appropriate authority as for genocide, crimes against humanity and war crimes. Jurisdiction over administration of justice offences is divided between the ICC and national jurisdictions with no clear indication as to which has primacy. There is also no guidance in the Statute as to how competing claims of jurisdiction will be addressed. Thus, any such case will require discussion with the ICC before any charges proceed and a requirement for consent will ensure that this can be done. Further, some of the offences could be applied in respect of staff and officials of the ICC including the judges and clearly such prosecutions should be authorised by the senior authority in a state responsible for prosecutions. Further, while the offences can be established and jurisdiction provided, the immunities accorded to officials of the ICC under the Agreement on Privileges and Immunities as reflected in domestic law would be applicable. Therefore any prosecution involving ICC officials and staff would require discussions with the ICC and could only proceed in national courts if the requisite waivers were provided by the ICC. A consent provision will provide protections in this regard as well. It should be understood that such consent should not be unreasonably withheld.

Section 17 of the Model Law

- Section requiring the consent of the AG/DPP or other appropriate authority to commence proceedings for the administration of justice offences

  (See Canada s. 9(4); NZ s. 22; Uganda s. 17; UK s. 54(5)).

XII. Ancillary Offences For The Administration Of Justice Offences

45. Offences of aiding and abetting, participation and conspiracy need to be covered with reference to the administration of justice offences as well as genocide, crimes against humanity, and war crimes (see discussion below in paragraphs 56-58 on Article 25). Most Commonwealth countries will have general provisions either in common law or statute providing for the relevant ancillary offences to apply to any offence. If not, specific provisions should be included and to assist on that point the 2004 Group recommended that the model law contain sections that states could use in case of any gaps in existing law.

46. One particular point that should be considered is whether existing conspiracy law is sufficiently broad to provide adequate coverage for the administration of justice offences. While domestic law will generally contain an offence of conspiracy, it may be applicable only to certain types of crime such as murder or it may not cover conspiracy both inside and outside of the jurisdiction. That is, it should be an offence in State A for persons to conspire within State A to commit an offence in State B. It should also be an offence in State A for persons to conspire in State B to commit an offence in State A. The Group recommended the inclusion of a statutory provision to this effect in the model law applicable to all of the offences – genocide, crimes against humanity, and war crimes, and administration of justice offences.

Sections 17A-17B of the Model Law

Optional Sections for use if not covered under general law:

- Conspiracy offences for conspiring within a state to commit an offence outside or conspiring outside the state to commit an offence within that state.
- Sections for aiding and abetting, being an accomplice, conspiracy, counselling and procuring.

XIII. Place Of Trial And Relevant Court And Procedure

47. As genocide, crimes against humanity and war crimes and administration of justice offences may occur outside the territory of the state, it may be necessary to specify the place within a state where the trial will be held, if that would normally be determined by the location within the country of the alleged offence. Similarly, if general criminal procedure laws would not automatically determine the relevant court for trial, this should be specified in the legislation. Finally, as necessary, the legislation should set out the relevant trial procedure which for most jurisdictions would be trial by indictment. This may be done in the offence provisions themselves as in the model law, or in a separate provision.

Section 18 of the Model Law

- Section on place of trial where the offence is extraterritorial

  (See Canada s. 9(1); UK ss. 53(2)(4) and (6)).

XIV. General Interpretative Provision

48. There was a discussion as to what, if anything, domestic courts should be advised or required to refer to in interpreting and applying the definitions of the crimes. There were divided approaches in the legislative examples including:
    - no reference;
    - reference to the Elements of Crimes;
    - references to the Elements of Crimes and ICC jurisprudence;
    - broad reference to Elements of Crimes, ICC jurisprudence and other relevant international jurisprudence.
49. The issue also arose as to whether any such references should be formulated as "shall take into account" or "may consider", the former requiring reference to the documents and the latter leaving a greater amount of discretion with the judges. Advantages and disadvantages with each approach were discussed. The references particularly to the Elements of Crimes would ensure better protection in terms of complementarity. References to ICC and international jurisprudence would encourage the use of this very helpful material in adjudicating on the cases. However, if the "shall" formulation were to be included with reference to such material it may prove quite difficult for countries with limited resources and access to such jurisprudence. The 2011 Group also considered that the text could be read as requiring the judges to follow the Elements of Crimes by using the words "shall take into account". Whilst this is a matter of statutory interpretation, some jurisdictions may prefer to use the word "may" to indicate that they are not binding. This option was therefore included. States could also choose to broaden the section to include reference to jurisprudence of the ICC or beyond.

Section 8 of the Model Law

Options

- Requirement for the domestic court to take into account the Elements of Crimes in interpreting and applying the definitions of the crimes

  (See Uganda s. 19 (4)(a); UK s. 50(2)(a)); or

- Discretion for the domestic court to take into account the Elements of Crimes in interpreting and applying the definitions of the crimes.

XV. General Principles Of Criminal Law

50. Part 3 of the Rome Statute sets out a framework of general principles of criminal law which the ICC will apply in adjudicating on cases before it. As the aim of the Statute was to establish an operational criminal court, it was necessary to include the basic principles of criminal law in this manner. Many of the principles in Part III reflect concepts found in the domestic laws of most common law states, albeit the formulation of them in the Statute may well be different. The articles were developed through a negotiation process that involved many states of different legal traditions. There are also some innovations in the principles that will be distinct from existing domestic law.

51. As a result, for domestic prosecutions there is an issue as to how to deal with Part 3 of the Statute in any implementing legislation. A state may decide that the general principles of domestic law will govern the prosecution of these cases so that, with one or two exceptions discussed below, Part III principles will not be reflected in domestic law. With this approach, those who will be investigating, prosecuting, defending or adjudicating any such cases will be applying familiar principles and concepts. This is clearly a practical advantage. However for some states this may not be a safe approach. There may be problems because of inadequate existing domestic law for prosecutions of this nature. Further, unless the same general principles apply, there will be uncertainty as to whether all of the same conduct and all of the same people can be the subject of prosecution domestically and before the ICC, such that complementarity will be affected. States with these concerns may choose to adopt much of Part III in domestic law. If this option is chosen, the legislation will need to clarify what happens where there is a conflict between domestic principles and Part III.

52. The 2004 Group discussed the different approaches adopted in existing legislation and bills. After consideration they decided that the way forward would be to review each of the Articles of Part III separately as different considerations may arise under each.

a) Articles 20 (Ne bis in idem), 22 (Nullum crimen sine lege), 23 (Nulla poena sine lege) and 24 (non-retroactivity ratione personae)

53. The 2004 Group was of the view that these articles reflected principles of such a fundamental nature that they would be recognised already in common law legal systems. On this basis, it recommended that these not be mentioned in the model law.

54. However one issue was identified with respect to ne bis in idem. This principle will apply under domestic law to prevent a prosecution where the person has been previously convicted/acquitted in relation to the same conduct, either domestically or in another state. In the case of convictions or acquittals in another state, generally domestic law will not permit a consideration of the

nature or bona fides of the previous proceedings. Under Article 20 of the Rome Statute, the principle of ne bis in idem is recognised but some exceptions are included in paragraph 3 where the proceedings in the other court "were for the purpose of shielding the person concerned from criminal responsibility for the crimes within the jurisdiction of the Court or otherwise were not conducted independently or impartially in accordance with the norms of due process recognised by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice".

55. Consideration can be given to including a similar kind of power and exception in domestic law. An example of this can be found in the Canadian and New Zealand laws.

Section 11A of the Model Law

Optional Section

- Section allowing domestic courts to go behind a conviction or acquittal in another state

  (See Canada s. 12; NZ s. 12(2)).

b) Article 25 Individual Criminal Responsibility;

56. Similarly to the previous articles, the 2004 Group was of the view that the principles captured in paragraphs 1, 2 and 4 of Article 25 need not be incorporated in domestic law.

57. However paragraph (3) of Article 25 is different and raises issues of modes of participation in offences that are directly relevant to the principle of complementarity. As discussed with reference to the administration of justice offences, most Commonwealth countries will have concepts such as participation, aiding and abetting, and conspiracy, either by statute or common law and thus will not need legislative provisions on this (with the exception again of a conspiracy in/conspiracy out section; see discussion under paragraph 46 above). However, some of the concepts captured in paragraph 3 of Article 25 may go beyond existing domestic law.

58. Each sub-paragraph needs to be considered carefully with reference to existing domestic law to ensure that the type of participation or conduct described would create individual criminal responsibility under domestic law. If not, the concept should be captured in the implementing legislation. In order to assist countries in this process the 2004 Group recommended that the model law contain optional legislative provisions for each sub-paragraph of Article 25(3) so states could be guided in their review and incorporate those which may be needed under domestic law.

Section 17A and 17B of the Model Law

Optional Sections for use if not already covered under national law

- Sections implementing each sub-paragraph of Article 25(3).

c) Article 26 Exclusion of jurisdiction over persons under eighteen

59. The background to Article 26 is important to consider in deciding how to approach the issue of young offenders in domestic law. During the negotiation of the Rome Statute no agreement could be reached as to the appropriate age

for distinguishing between adult and youth offenders. One can imagine the broad variation of views on this issue across the participating states. Further, there was a concern that the ICC would not be able to support a separate regime for juveniles, which would entail separate procedural and trial proceedings and detention facilities. For this reason a compromise had to be reached and this is what is reflected in Article 26. The question of age is dealt with purely as a jurisdictional issue. The ICC would not have jurisdiction over any person under 18 at the time of the alleged commission of the offence. The Article however is not intended to establish the appropriate age for prosecution for these crimes. In fact, the consensus was that where the offences involved persons under the age of 18 it would be best for such cases to be prosecuted domestically.

60. As a result, a state can choose its own policy on the prosecution of young persons for these crimes. While some states may choose to adopt new age limits, it is entirely consistent with the Statute to apply any existing rules regarding age of responsibility and the division between youth and adult offenders to those accused of these crimes.

61. The 2004 Group recommended no specific provision on age in the model law.

d) Article 27

62. This article on the irrelevance of official capacity is considered below in paragraphs 162-172.

e) Article 28 Responsibility of commanders and other superiors

63. This Article involves new concepts that will not be found in the existing laws of most common law states and therefore requires implementation through legislation. The 2004 Group discussed the alternative ways to do this. Article 28 can be simply incorporated "as is" into domestic law making it a mode for the commission of genocide, crimes against humanity, and war crimes. This is the most simple and direct approach.

64. However, in some countries there may be constitutional concerns with direct incorporation. Article 28 makes individuals liable for acts of genocide, crimes against humanity and war crimes by failing to exercise effective authority and control over their subordinates. The person will be convicted of offences which carry considerable "stigma" as the most serious of crimes on this indirect basis. For these reasons, some of the legislation adopted to date incorporates Article 28 principles by creating a separate offence, such as breach of responsibility by a military commander, rather than establishing a new mode of commission of genocide, crimes against humanity, and war crimes.

65. The Group recommended the direct approach be used in the model law. If there are constitutional or other concerns with this approach, section 7 of the Canadian legislation provides an example of the alternative approach of creating a separate offence.

Section 11 of the Model Law

- Section to incorporate Article 28 directly in domestic law

  (See s. UK s. 65).

f) Article 29 Statute of limitations

66. Genocide, crimes against humanity and war crimes are not usually subject to statutes of limitations. Article 29 of the Rome Statute states that genocide, crimes against humanity, and war crimes "shall not be subject to any statute of limitations". The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, to which some Commonwealth states are party, also prohibits time limitations for these crimes. Most common law jurisdictions will not have any statute of limitations applicable to crimes of this nature. The 2004 Group emphasised that if any do exist, full complementarity would require that the implementing legislation override them in light of Article 29 of the Statute, which makes it clear that no such restrictions apply to proceedings before the ICC. The 2011 Group decided to include an optional provision to be used in states in which statutes of limitation are applicable to genocide, crimes against humanity and war crimes.

Section 12 *bis* of the Model Law

Optional provision for non-applicability of a statute of limitations to the crimes under the Rome Statute.

g) Article 30 Mental element

67. There was an extensive discussion of Article 30 which raises complex issues as to effective implementation in domestic law. The requisite mental element for offences would be clearly established by statute or case law in Commonwealth countries. For most it will be the principles of the common law that govern and will likely be a broader mental element than that reflected in Article 30. For example, recklessness may be a sufficient mental element under the common law which is not necessarily reflected in Article 30. The requisite mental element is also addressed in the Elements of Crimes of the Rome Statute. Article 9 of the Statute indicates that the Elements of Crimes shall assist the ICC in the interpretation and application of Articles 6, 7 and 8 (genocide, crimes against humanity and war crimes). The Elements of Crimes expand on the applicable mental element for certain crimes with the result that some broader standards than those found generally in common law – such as the "should have known" standard – may apply for certain crimes.

68. The question therefore is whether Article 30 should be incorporated in domestic law or the issue of intent should be left to be determined under existing common law. A further issue raised, if the provision is incorporated, is how should the opening words of the chapeau - "Unless otherwise provided" - be interpreted in domestic law.

69. The 2004 Group was of the view that for most jurisdictions, the common law sufficiently incorporates the necessary intent reflected in Article 30 and was in fact likely broader. As well, a specific requirement for a court to consider the Elements of Crimes (see paragraphs 48-49) above would incorporate specific mental elements contained in certain crimes which were not of general application in the common law. However, the Group was of the view that if a state determines that existing domestic law is not sufficient to capture the necessary intent, the approach taken in the United Kingdom would be the most comprehensive and clear. A specific legislative provision could be included to incorporate Article 30 but interpreting "unless otherwise provided" to mean provided by the Statute or Elements of Crimes. An optional provision to this effect should be reflected in the model law.

Section 11B of the Model Law

Optional section for use if not already covered in national law

- Section incorporating Article 30 and providing that the mental element shall be as in Article 30 unless otherwise provided in the Statute or the Elements of Crimes

  (See UK s. 66(2)).

h) Article 31 Grounds for excluding criminal responsibility

70. Article 31 was another of the provisions of the Rome Statute agreed only after considerable debate - the product of negotiation and compromise. The Article was critically important for the internal operations of the ICC as it established the basic defences that would be available. However, most of the concepts reflected should be similarly found in domestic law and even if some broader defences are provided by the ICC, this will not affect complementarity as it will give a state a broader scope for prosecution. In light of this, the 2004 Group was of the opinion that the inclusion of Article 31 in implementing legislation would only serve to confuse the application of existing defences under domestic law. Therefore it was recommended that Article 31 should not be incorporated directly in domestic law.

71. However in a domestic prosecution of "international" crimes, there will be a question as to what defences are available because of the potential application of defences under domestic and international law. Therefore it is important that the legislation clarifies what defences are available to the person. The options are:

    - apply defences available under domestic and international law;
    - apply defences available under domestic law only;
    - apply domestic law defences and incorporate additional specific international law defences.

72. It is a policy decision for each state as to the approach to adopt. From the perspective of accused persons it would be most beneficial to have available all defences under international and domestic law, as he or she is accused of committing an international crime albeit the trial, legislation and prosecuting authority are of a domestic nature. However, the effect of incorporating defences at international law is that arguably all of the defences in the Rome Statute (Articles 31, 32 and 33) will be available. This may leave domestic courts with the difficult task of sorting out any conflicts between the defences reflected in the Statute and those under domestic law. It will also mean that the domestic courts will have to identify what defences are available generally under international law. A third option adopted by some states is to apply all defences - domestic and international - but then specifically exclude some international or domestic defences that are not appropriate.

73. As indicated, it is for the state to determine what defences will apply. For the purposes of the model law, the 2004 Group recommended three alternatives – defences under domestic law only, defences under domestic and international law or defences under domestic and international law but excluding some specified defences. If both domestic and international law defences are incorporated, in whole or in part, it may also be useful to provide what prevails in the case of any inconsistency as has been done in the New Zealand law. Here again it will be a policy decision as to whether international law or domestic

law will govern. On further consideration by the 2011 Group it was decided to include just one option in the model law in line with the general approach of streamlining the options under some provisions of the model law where possible in order to make the document more user-friendly.

Section 9 of the Model Law

- Section applying defences under domestic law and international law with provision for cases of inconsistency

  (See Canada s. 11; NZ s. 12(c); Uganda s. 19(1)(c). In case of inconsistency see NZ s. 12(3)).

74. The 2004 Group discussed the particular problem that can arise if a state has in place, by statute or common law, a domestic defence that the act which is the subject of crime was carried out in compliance with domestic law. Such a defence should not apply to genocide, crimes against humanity and war crimes as this may provide a defence if the alleged crimes are state authorised and supported. If a state has such a defence it should be overridden for the purpose of the domestic prosecution of these crimes.

Section 9(3) of the Model Law

Optional section for use if defence of obedience to domestic law exists

- Section removing defence of obedience to domestic law

  (See Canada s. 13; NZ s. 12(d)).

i) Article 32 Mistake of fact or mistake of law

75. Article 32 reflects common principles of law regarding mistake of law or fact recognised by most states. Should there be any doubt about the applicability of the principles a legislative provision could be included to incorporate Article 32 directly. The 2004 Group recommended no specific legislative provision be included in the model law.

j) Article 33 Superior orders and prescription of law

76. The defence of superior orders is not free from controversy. Some national military justice systems provide for a broad defence of superior orders, whereas significant international instruments indicate that there is no such defence (Nuremburg Charter, ICTY and ICTR Statutes). The Rome Statute features an intermediate position, allowing a narrow defence in some circumstances for war crimes.

77. There are three options for domestic legislation. The first option is to be silent, hence relying on existing common law or domestic statutes. The second option is to incorporate Article 33 expressly. This is useful if national law provides a defence of superior orders broader than the Rome Statute, in order to ensure that national prosecution is as effective as international prosecution. The third option is to negate expressly the defence of superior orders, an approach supported by previous international instruments. It is also important to note if the legislation incorporates international defences, then Article 33 of the Rome Statute will be incorporated in any event unless expressly excluded.

78. Each state will have to take a policy decision on this issue and to that end the 2004 Group recommended that the model law reflect the options.

Section 10 of the Model Law

Three Options

- Section incorporating Article 33 into domestic law

  (See NZ s. 12(1) xi; Uganda s. 19(1)xi); or

- Section providing that obedience to superior orders is not a defence

  (See Nuremburg Charter, ICTY Statute, ICTR Statute); or

- No provision with the result that silence will result in the application of any existing defence (or lack of defence) under domestic law.

XVI. Co-Operation With The ICC – General Provisions

a) Jurisdiction

79. Whatever policy decision is taken on the prospective or retrospective jurisdiction for offences outlined above in paragraphs 15-19, the domestic law should provide clearly that co-operation (assistance with requests for arrest and surrender and other forms of co-operation) enforcement of fines and forfeiture orders and sentences and sittings of the ICC will apply whether the underlying conduct occurred before or after the coming into force of the domestic law.

Section 20 of the Model Law

- Section on temporal jurisdiction relating to requests for assistance, enforcement of fines and forfeiture orders, enforcement of sentences and sittings of the ICC ensuring the relevant provisions will apply regardless of when the underlying offence occurred

  (See Uganda s. 2).

b) Requests for assistance

80. Article 87 of the Rome Statute sets out a number of general provisions relating to requests for assistance both for arrest and surrender and other forms of co-operation. While some of the paragraphs in the Article relate to ICC activity and need not be the subject of legislation, others should be reflected to guide domestic authorities in the applicable procedure and specifically addressing:

    - the designated channel and responsible authority (paragraph 1); and
    - confidentiality of requests (paragraph 3).

81. A state may also wish to set out the manner in which requests may be transmitted i.e. whether fax or other forms of electronic communication may be used.

82. The 2004 Group agreed it would be useful to have a general section in the model law setting out these procedural requirements. The 2004 model law gave a number of roles and functions to 'the Minister'. The 2011 Group noted that a Minister might not be the appropriate authority in every particular jurisdiction. It therefore amended a number of provisions to ensure that when drafting the implementing legislation, states should consider which office or officeholder in their legal system should be designated as the authority to carry out particular roles and functions. Exceptions to this, however, are in section 25 (State or diplomatic immunity) and section 90 (National security) where the Group agreed that the Minister should be the authority. Given the juridical nature of

most requests from the ICC, some states have designated as the appropriate national authority the "Director of Public Prosecutions", the central authority in charge of investigations and prosecutions or a similar independent authority that may issue directions to law-enforcement agencies and other relevant state authorities. It is important that states identify an appropriate authority within their legal system to handle any matter relating to assistance or co-operation requested by the ICC, in respect of which there is no specific provision in the model law. Section 4 provides such a generic provision.

Sections 21 to 24 of the Model Law

- A general part on requests for co-operation referring to designated channel, responsible authority, manner of transmission and confidentiality of requests

(See NZ ss. 24-26; Uganda ss. 21 and 23; UK s. 25).

XVII. Arrest And Surrender

a) General

83. The Rome Statute provides that a state must be able to surrender a person to the ICC in response to a request but does not specify the procedure that should be used to effect surrender. It is for each state to put in place a procedure under national law and to do so in accordance with its Constitution and fundamental principles. It was recognised that it is technically possible to use existing schemes for state to state extradition, amended as appropriate, to surrender to the ICC. However the 2004 Group recommended strongly against such an approach which will be complex and difficult both in terms of the development of legislation and its implementation in practice. The Group was of the opinion that, unless constitutional or other fundamental principles mandate it, the surrender process should be entirely distinct from extradition, given the unique nature of the ICC and the Statute.

84. The Group went on to consider fundamental policy questions for the development of the scheme for arrest and surrender to the ICC.

b) Provisional arrest and arrest on the basis of a complete request

85. The first phase of the surrender process will involve bringing the person before a court in the requested state. This will normally be accomplished through the arrest of the person. The scheme needs to be comprehensive covering the arrest of the person provisionally – prior to preparation and submission of the supporting documentation - and "straight" arrest – on the basis of a full request with supporting documents. Whether in respect of a person arrested provisionally or otherwise, the scheme should recognise the requirements of Article 59 respecting the procedure upon arrest. Article 59 mandates that, upon arrest, a person must be brought before a competent judicial authority. The judicial authority must determine that:

- the warrant applies to the person;
- the person has been arrested in accordance with proper process; and
- the person's rights have been respected.

86. In some states these requirements will be met as a matter of course under domestic law. Should there be any question, specific provisions to this effect should be included in the implementing legislation. A question does arise, however, as to what should happen if the domestic court were to find that the

person has not been arrested in accordance with procedure or his or her rights were violated. Clearly such findings should not prevent the ultimate surrender of the person to the ICC nor affect the validity of the arrest. The 2004 Group recommended a provision like that found in the UK legislation (s. 5(8)) where the domestic court makes a finding on the issue but gives no remedy, referring the matter to the ICC for consideration.

c) Interim release (Bail)

87. Paragraphs 3 to 6 of Article 59 provide that the person arrested should have a right to apply for interim release pending surrender. However, the Statute sets out a high test for release namely:

"the competent authority in the custodial State shall consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the Court".

88. Consideration needs to be given to the test that will apply to applications for release under domestic law. The 2004 Group recommended that the safest course would be to include this exact test in the legislation. There is also a requirement that the ICC be given an opportunity to express its views and that those views should be taken into account before a decision is made on interim release. This too should be provided for in the law. Article 59 further explicitly excludes the domestic court from going behind the ICC warrant. This needs to be reflected in the law to avoid any contrary arguments being raised.

d) Scope of application

89. The law should make it clear that the scheme applies to persons sought for prosecution or the imposition or service of a sentence i.e. a person who has escaped after conviction either before sentencing or after.

e) Evidence

90. Article 91 of the Rome Statute recognises that some states may need to require evidence in support of a request for surrender because of constitutional imperatives under domestic law. However, such requirements may not be more burdensome than those for extradition and should, if possible, be less burdensome, taking into account the distinct nature of the ICC.

91. In practical terms, unless a state has a constitutional requirement for supporting evidence this should not be incorporated into the legislation. Surrender should be available through a simple process founded on the submission of basic information about the case and a copy of the warrant of arrest, along with identification information. The 2004 Group was unanimously of the view that the model law should not include any requirements for evidence in support of the request.

f) Structure

92. It was recognised that the process for receiving and executing requests will involve both the judiciary and the executive. However, there should be only one "decision" on surrender by either the executive or the judiciary, unlike the two-phased procedure in many extradition schemes. As well, any such process should be as streamlined as possible. The legislation should also support and

encourage good communication between the executive and the judiciary to ensure the person is not surrendered before relevant processes have been completed.

93. There was discussion in 2004 as to whether the decision on surrender should be given to either the judiciary or the executive. The Group ultimately concluded that while the executive should be accorded the powers to receive, verify and refer the request, to consult with the ICC and communicate information, the actual decision on surrender should be made by the judiciary. As the Rome Statute does not provide any of the grounds for refusal of a request traditionally used in extradition proceedings the role of the executive should be a limited one.[7] The Group was further of the view that once the decision is made by the judiciary, the matter should be referred directly to an executing authority such as the police, with simply a notice to the executive.

94. As noted in paragraph 82, the 2011 Group reviewed the roles that the 2004 model law had given to the Executive ("Minister"). In light of the experience in some countries, it decided that the model law should allow more flexibility and has included the phrase "Minister or other appropriate authority" to flag that some of the roles or functions previously given to a Minister might be able to be given to another decision maker in particular legal systems. This would be desirable if it enabled requests to be dealt with more quickly. When adapting the model law, each state will need to look at the roles and functions under particular provisions in order to determine who is the appropriate decision maker in their legal system. In the case of surrender some states may decide to leave everything to the court to decide. Other states may wish to give particular roles to a Minister or a high-level justice officeholder as in the 2004 model law.

g) Appeal

95. It is important to have some form of appeal or review mechanism for the state and for the person. For the state, a statutory appeal right should be included because otherwise there may be an adverse decision by the judiciary for which there will be no mechanism for appeal.

96. For the person, the appropriate mechanism for review will depend on domestic law. If there is a constitutional or otherwise enshrined right to a habeas corpus review in all cases, this would be a sufficient review mechanism for the person and the legislation can be silent. If there is any doubt on the point then a specific statutory right to a habeas corpus review should be included.

97. Regardless of the approach adopted, the 2004 Group was of the view that there should be a procedural provision which ensures that no surrender order will be executed before the expiry of a specified period of time (10/15 days). This should be accompanied by a provision for waiver of the time delay. There should also be a power to detain the person in custody in the case of a state appeal.

Sections 28 to 47 of the Model Law

- A simplified scheme for the arrest and surrender of persons sought by the ICC for prosecution or the imposition or enforcement of a sentence, which incorporates the principles outlined above

  (See NZ Part IV; Uganda Part IV; UK Part 2).

7 See further paragraphs 105 and 106.

h) Guidance on the role of the judge in surrender proceedings

98. Many Commonwealth authorities, prosecutorial and judicial, will be familiar with the laws and procedures related to extradition. It needs to be made clear that extradition procedures will not be used in this process and that standard extradition grounds of refusal do not apply. The Group was of the view that the model law should include specific provisions to avoid the application of general extradition law to the surrender of persons to the ICC.

Section 39 of the Model Law

- Section that provides the judge in the surrender process is not to:
    - consider whether the ICC warrant was properly issued; or
    - require evidence to establish that a trial would be justified; or
    - receive evidence or adjudicate claims that the person has been previously tried and convicted or acquitted

  (See NZ s. 43(6); Uganda s. 33(6); UK ss. 5(2) and (5)).

i) Competing Requests

99. The Rome Statute sets out in Article 90 very specific rules where a state is faced with competing requests from another state and the ICC for the surrender of a person. As the decision as to which request will be executed is for the executive, a state could choose not to incorporate the rules on competing requests in domestic law and allow the executive to ensure that the requirements of Article 90 are met.

100. At the same time it may be very useful for domestic authorities called upon to deal with competing requests to have guidance in the legislation as to how to proceed. For this reason the 2004 Group was of the view that the model law should contain a provision reflecting the requirements of Article 90.

Section 32 of the Model Law

- A regime for dealing with competing requests in accordance with Article 90 of the Statute

  (See NZ ss. 61-65; Uganda s. 41).

j) Temporary Surrender

101. The Rome Statute does not resolve what happens if a person sought by the ICC is serving a sentence domestically or being prosecuted. Article 89(4) provides that in such situations there should be consultation with the ICC. However Rule 183 of the RPE recognises one practical way to resolve the problem would be through a temporary surrender power. If this is provided, a state can surrender temporarily a person who is serving a sentence or being prosecuted domestically, so that the trial may take place. At the conclusion of the trial the person can be returned to the state for the completion of any proceedings or sentence and then re-surrendered to the ICC to serve any sentence imposed there. To implement this procedure several technical amendments are required under domestic law to allow for the release and movement of the person and to meet related requirements. While not strictly mandated by the Statute, the 2004 Group was of the view that the model law should contain detailed provisions to empower the state to surrender temporarily.

Section 45 of the Model Law

- A scheme for the temporary surrender of a person serving a sentence or being prosecuted in the requested state

  (See: NZ ss. 49-52; Uganda s. 40; UK Schedule 2).

k) Transit

102. The regime for arrest and surrender will need to address the transit of persons being surrendered to the ICC and those being transferred to and from a state of enforcement and the ICC. The provisions can be minimal covering the power to agree to transit, the material required and importantly, the detention powers in the case of an unscheduled landing.

Section 46 of the Model Law

- Section on transit relating to surrender to the ICC and transit to and from a state of enforcement

  (See: Uganda s. 42).

l) Postponement of execution of requests

103. There may be circumstances where the execution of a request for arrest and surrender will have to be postponed. This possibility is recognised in Articles 94 and 95 where there is an ongoing domestic investigation or prosecution or if there is a challenge to the admissibility of the case before the ICC. In both circumstances, execution of the request would be postponed pending the conclusion of the domestic matter or a determination of the challenge. While legislation is probably not needed for execution of the request to be postponed, the 2004 Group was of the view that it would be useful to include a specific provision in the model law to serve as a guide for domestic authorities.

104. The 2011 Group decided to make two changes to the section. It added a requirement for the offence in the requested country to be of a "serious nature". This was intended to ensure that the ICC request, which would be in respect of the most serious international crimes, could not be postponed because of comparatively minor offending in the requested country. The second change was to make it clear that the postponement should be for as short a period as possible, again reflecting the significance of the proceedings in the ICC.

Section 31 of the Model Law

- A postponement power in recognition of Articles 94 and 95

  (See NZ s. 56; Uganda s. 61).

m) Grounds of Refusal

105. The Rome Statute does not provide for any of the traditional grounds of refusal for requests for arrest and surrender as can be found in state to state extradition regimes. Rather, there are simply circumstances where a request might not be proceeded with, such as where a decision is made under Article 90 to accede to a competing request or where the ICC rules the case inadmissible. There are also practical circumstances identified in Article 97 where a request might not be proceeded with because there is insufficient information, the person cannot be found or is the wrong person or surrender would result in the breach of pre-existing obligation.

106. There was discussion as to whether given the limited circumstances in which the request might not be executed, it was necessary to refer to any of these grounds in the legislation. Ultimately the 2004 Group decided that it would be advisable to be very clear in the model law as to the only circumstances in which a request might be refused by specifying those grounds and making it clear which authority is responsible to take any decision on refusal. As the basis for refusal relates to actions by the ICC or decisions on competing requests, it was considered most appropriate that the executive be responsible for the refusal of a request in the prescribed circumstances. However, the Group was of the view that the types of practical problems set out in Article 97 would not need to be referenced.

Section 30 of the Model Law

- Section detailing the only circumstances in which a request for arrest and surrender may be refused and giving the Minister or other appropriate authority the power to refuse in those cases

  (See NZ ss. 55-66; Uganda s. 27).

n) Specialty

107. Article 101 incorporates a rule of specialty with respect to the surrender of a person to the ICC. That is, the ICC can only proceed against the person for the conduct or course of conduct which forms the basis of the crimes for which that person was surrendered, unless the requested state waives the requirement. The 2004 Group was of the view that there is no need to legislate on the speciality obligation under Article 101 as compliance with the requirement rests with the ICC. However it may be helpful to specify in the model law which authority will deal with any requests for the waiver of specialty. It will be for each state to determine the proper authority in that regard so the model law should simply give options.

Section 47 of the Model Law

- Section on the waiver of specialty which specifies what authority (giving options including 'the Minister') is responsible to give the waiver on behalf of the state.

XVIII. Other Forms Of Co-Operation

a) General

108. Articles 87 and 93 of the Rome Statute mandate that states must comply with requests for other forms of co-operation as specified in Article 93. While a state may execute such requests in accordance with the procedures of national law, Article 88 requires that there be procedures available under national law for all the forms of assistance reflected in Article 93. Therefore, any effective implementing law will need to provide powers to implement all the measures of assistance in Article 93. Where a state has in place flexible, modern mutual legal assistance legislation, it may be possible to amend that legislation in order to apply it to requests for assistance from the ICC. This, for example, was the approach adopted in Canada.

109. For the benefit of those Commonwealth states which may not have such legislation, the 2004 Group was of the view that the model law should contain specific powers for each of the measures detailed in Article 93. This should include detailed but flexible procedures for matters such as taking evidence

from witnesses, search and seizure etc. Both Groups recommended the possibility of the presence of a representative of the ICC during the taking of evidence, search and seizure etc. (Sections 50(3), 62(2) and 63(4) of the revised model law.).

110. Article 93(1)(l) recognises that the ICC may seek other types of assistance not listed in the previous sub-paragraphs. To assist the ICC with these other types of measures as much as possible and to ensure the maximum use of domestic investigative powers, the Group was of the view that there should be an additional provision which allows for the use and, if necessary, adaptation of any domestic investigative powers to respond to a request by the ICC under Article 93.

111. The 2011 Group considered that a useful addition to the model law would be a specific provision to deal with the situation where the ICC sought assistance in cases where a person under prosecution was subject to interim or other forms of release. This would include release on acquittal but where an appeal was in progress or under Rule 185. Whilst this could be considered to fall under the "catch-all" provision of section 21(b) of the model law, it was considered appropriate to offer optional additional provisions (sections 66 bis and ter) for the avoidance of doubt.

Part V of the Model Law

- Detailed scheme to implement all of the measures outlined in Article 93 (1)

  (See Australia Part 4; NZ ss. 82-113; Uganda ss. 43-58: UK Part 3).

- Section allowing for the use of any domestic investigative power in response to a request submitted by the ICC.

b) Protection of victims and witnesses

112. There was discussion about how best to effectively reflect in domestic law suitable protections for witnesses and victims as visualised in sub-paragraph (1)(j) of Article 93. It was recognised that this will be difficult to do by legislation as such protections will involve a broad range of measures that will vary depending on the jurisdiction and its existing programmes for witnesses and victims.

113. In practical terms it is contemplated that the ICC may wish to enter into more detailed agreements with particular states regarding the protection available to witnesses and victims. To the extent necessary, domestic law should provide a sufficient basis for any such agreements between the ICC and a state.

114. Ultimately the 2004 Group was of the view that the model law should contain a provision which would recognise the importance of this sub-paragraph and encourage best efforts.

Section 65 of the Model Law

- Section on the protection of witnesses and victims in the context of Part 9

  (See NZ s. 110; Uganda s. 46).

c) Temporary transfer of witnesses

115. Legislation is not required to facilitate the appearance of witnesses before the ICC, provided those witnesses are free to travel to the place where the ICC is sitting. Whilst Part IX of the Rome Statute refers to the notion of voluntary appearance of witnesses, Part VI on the trial stipulates that the Trial Chamber

"in performing its functions prior to trial or during the course of the trial may, as necessary: [...] (b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute." The approach reflected in the model law is based on that used in legislation on mutual assistance in criminal matters and requires the consent of the witness with the state then facilitating his or her appearance at the ICC. If the witness does not consent, the ICC can instead request that evidence be taken in the requested state in which case that state would use its powers to require the witness to appear before a national court for evidence to be taken, with the usual sanctions applying if the person does not appear. This is, for instance, the approach taken in the New Zealand legislation. Other states have adopted different approaches. South Africa has introduced a provision in its implementing legislation which equates a witness required to attend ICC proceedings with a witness summoned to appear before a national court. Where the witness is serving a sentence in the requested state, additional legislative powers will be needed to secure that person's release from custody and transfer to the ICC. The 2004 Group recommended that a specific scheme be included in the model law for temporary transfers to the ICC.

Sections 55 to 61 of the Model Law

- Provisions for assistance in facilitating the appearance of a witness

  (See South Africa s. 19; Uganda ss. 43-51; New Zealand s. 94).

- A scheme for the temporary transfer of a witness in custody

  (See NZ ss. 95-99; Uganda ss. 52-55;).

d) Execution of requests

116. Article 99(1) reflects a key element of effective assistance to the ICC. It recognises that requests will be executed in accordance with the relevant procedures under national law but also, importantly, in the manner specified in the request unless prohibited by the law of the requested state. This would include following any procedures that the ICC may specify as to how evidence is to be gathered or rights which must be accorded during the course of the process. While strictly speaking this may not require legislation, the 2004 Group was of the view that the principle was of sufficient importance that it should be reflected in the model law, if only to guide the authorities called upon to execute the requests from the ICC.

Section 24 of the Model Law

- Section incorporating the principles of paragraph (1) of Article 99 regarding the execution of requests

  (See NZ s. 27).

e) Direct execution by the ICC Prosecutor

117. Paragraph 4 of Article 99 recognises the right of the ICC Prosecutor to directly gather evidence in certain circumstances. This is an important power for the Prosecutor as there may be circumstances where the involvement of state authorities would present an insurmountable hurdle to the gathering of the evidence sought.

118. The 2004 Group had to consider whether the rights for direct execution should be reflected in domestic law given that state authorities will not be involved except in any initial consultations. Ultimately the Group decided that while it may not be necessary to mention the powers under Article 99(4) specifically in domestic law, it would be advantageous to include a general provision recognising the ability of the Prosecutor to conduct investigations in accordance with Part 9 and Article 57(3)(d). This will give sufficient recognition to the powers accorded under paragraph 4 of Article 99. As noted above the 2011 Group recommended additional provisions to allow the presence of ICC officials when requests for certain types of assistance are executed.

Section 91 of the Model Law

- An enabling power for the Prosecutor to conduct investigations in accordance with Part 9 and Article 57(3)(d)

  (See Uganda s. 90; NZ s.166).

f) Postponement

119. As was the case with arrest and surrender, the circumstances set out in Articles 94 and 95 might also arise in the case of a request for other forms of co-operation thereby requiring a postponement. The 2004 Group recommended an analogous power for postponement for other forms of co-operation as in the case of arrest and surrender. The 2011 Group made similar amendments to this provision as in the postponement of surrender provision (offence of a "serious nature" and postponement "for no longer than necessary"). In addition the Group made a small amendment to section 68(1)(a) to reflect more accurately Article 95 of the Statute, allowing the collection of evidence to proceed despite an admissibility challenge.

Section 68 of the Model Law

- A postponement power in recognition of Articles 94 and 95

  (See NZ s. 115; Uganda s. 61).

g) Grounds of refusal

120. As with arrest and surrender, traditional grounds of refusal applicable in mutual assistance practice between states do not apply under the Rome Statute. However, there are three circumstances where a request might be refused:

    - under Article 93(1)(l) where the type of assistance sought is prohibited by law;
    - under Article 93(3) where the execution of the request is prohibited by an existing fundamental legal principle of general application;
    - under Article 93(4) in accordance with Article 72 on the grounds of national security.

121. As well, there are the practical circumstances where a request might not be executed, for example because of a lack of information. Again while not strictly needed, the 2004 Group recommended the inclusion of a section that would specify the only circumstances in which a request might be refused.

Section 67 of the Model Law

- Section detailing the only grounds on which request may be refused

  (See NZ s. 114(3); Uganda s. 60).

XIX. Costs

122. The 2004 Group was of the view that the provisions of Article 100 of the Statute relating to the costs surrounding the execution of a request need not be included in domestic law. They therefore recommended that the model law be silent on the point.

XX. Assistance By The ICC

123. Article 93(10) provides for assistance by the ICC in respect of a national investigation or prosecution with the ICC having discretion as to whether the assistance will be provided in any particular case. The 2004 Group was of the view that generally no provisions were required to implement Article 93(10) unless it was necessary to have the legislation empower domestic authorities to make requests to the ICC. The Group was of the view that this was the only power that needed to be included in the model law, again leaving the choice of authority to each state. The 2011 Group noted the importance of the ICC granting requests for assistance from countries in the investigation and prosecution of ICC crimes nationally or for the prosecution of other serious offences in the requesting country. It took the view that such assistance from the ICC would be supportive of the principle of complementarity and noted that Uganda has frequently asked for the assistance of the Court in connection with the national prosecution, before the Special War Crimes Division of the High Court, of accused persons (other than ICC indictees) in relation to the situation in Northern Uganda. It recommended moving the provision in the model law into the more general Part III and broadening the reference to "serious crime" consistent with Article 93(10).

Section 27 of the Model Law

- A power to make requests for assistance to the ICC, giving options as to the authority to be empowered

  (See: Australia s. 180; NZ s.173; Uganda s. 97).

XXI. Enforcement Of Sentences

124. The Rome Statute does not oblige states to have a legislative scheme in place to allow ICC prisoners to serve a sentence of imprisonment in that state. Each state can decide whether or not to agree to do so.

125. However, unless states accept to do so, the ICC will have grave difficulty in functioning in practice such that States Parties are therefore encouraged to render their full support to the ICC by providing for this in their implementing laws. There are also strong domestic policy reasons for a state to agree to do so. If nationals of that state are convicted by the ICC, the state might very well wish to have them serve their sentence in their home state where they will be in a familiar cultural context. As well, it would be advantageous if nationals and other persons from a region were able to serve their sentences in a place where they can be close to family and friends.

126. It is also important to note that the Statute provides safeguards for a state in relation to the service of sentences. At the time a state declares its willingness to accept prisoners it can set out general conditions to its acceptance. This could include conditions as to the types of prisoners that a state will accept. Further, in each individual case a state must indicate whether it agrees to take

the particular prisoner. There is therefore no danger that a state will be required to take prisoners in circumstances where it would be unacceptable in a domestic context.

127. Taking into account all of these factors, most states that have adopted implementing legislation to date have provided for ICC prisoners to serve their sentences in that state.

128. Despite the absence of an obligation, the 2004 Group agreed it would be important to include a scheme for sentence enforcement in the model law.

129. Consideration was given to some of the key policy questions in Part 10 that will impact on implementing legislation.

a) General powers

130. It was agreed that the scheme should begin with a power being ascribed to a particular authority (Minister, Cabinet, etc.) to make a declaration to the ICC that the country is prepared to accept prisoners.

b) Non-modification of sentence

131. The legislation must respect the enforcement regime under Article 105 whereby the national jurisdiction cannot modify the sentence imposed. This requires legislation to override any domestic law that might apply on parole, remission, pardon or other reduction or variation of sentence. In its discussion of this issue the 2011 Group noted that the ICC's sentence could well be different from the sentence a national court would impose for the same offence. However, this should not be a relevant consideration to the decision whether to accept an ICC prisoner as it was never envisaged that the ICC's sentences should be consistent with those imposed in the courts of States Parties which are also not consistent with one another. The Group emphasised that even where the prisoner is incarcerated in a receiving state, it is the ICC that determines when the prisoner should be released, that decision being made in accordance with the Statute and RPE.

c) Application of programmes or benefits

132. The state should take note of the requirements under Rule 211 of the RPE to notify the ICC if there is a programme or benefit which is to be applied to the ICC prisoner in the course of service of a sentence. The legislation should set out the requirement for a notice by domestic authorities to the ICC in such cases to allow the ICC to exercise its supervisory functions.

d) Situation after service of sentence

133. Another issue of concern for all states is what happens to the person once he or she has completed the service of the sentence. Except in the case of a national, in most states normal immigration laws will apply to allow for deportation. If there are any concerns about the speed or efficiency of general immigration law, it may be advisable to include specific provisions in the law on removal. Each state will need to carefully review existing immigration and refugee laws in this regard.

e) Transfers

134. The scheme will also need to take into account Article 110 of the Statute under which the prisoner may need to be transferred to and from the ICC for the purpose of a review hearing. Powers to transfer in such circumstances should be included. Similarly there should be a power to transfer if the prisoner is to be moved, with the consent of the ICC, to another state to finish his or her sentence.

f) Protections from other proceedings

135. The legislation should reflect Article 108 that the prisoner cannot be extradited to another state or prosecuted for conduct committed before transfer to the state of enforcement without the ICC's prior approval.

Sections 72 to 83 of the Model Law

- A scheme for the enforcement of sentences of imprisonment including all of the points outlined above

  (See NZ ss. 139-156; Uganda ss. 67-80; United Kingdom ss. 42-48).

XXII. Enforcement Of Fines, Forfeiture Orders And Reparation Orders

136. Part 10 of the Statute also obliges states to enforce orders of the ICC imposing fines, or reparations to victims or requiring the forfeiture of the proceeds of the crimes. On a related point, states need to be in a position to freeze the assets of a person for possible eventual forfeiture. The 2004 Group considered the types of provisions that need to be included to create an effective scheme for these enforcement measures. Funds realised through the enforcement of fines and forfeiture orders should be transferred to the ICC, with enforcement expenses being deducted. Funds recovered through the enforcement of victim reparation orders may be transferred directly to the victims or to the ICC Victims Trust Fund. The 2011 Group also recommended that a specific power be inserted in section 99 to permit the establishment of a national fund for the benefit of victims of crimes within the jurisdiction of the ICC. This could receive funds from victims' reparation orders.

a) Fines

137. The Group was of the view that the law should provide for a simple direct registration and enforcement regime for fines. This would allow for enforcement of the ICC fines as if they were domestic fines.

Section 84 of the Model Law

- Sections for the registration and direct enforcement of a fine ordered by the ICC

  (See NZ s.125; Uganda s. 65; UK s. 49).

b) Requests for the freezing/restraint of assets

138. There are two alternative ways in which the ICC might seek assistance from states in the freezing/restraint of assets, with a view to ultimate forfeiture as proceeds of crime. No specific power is given to the ICC to order the freezing or restraint of assets. However it is possible that the Pre-Trial Chamber may be empowered to do so under sub-paragraph 3(a) of Article 57, on application by the Prosecutor. It will depend on whether the ICC considers that such orders are "for the purpose of an investigation". If that is the case, a state may be asked to enforce the restraining order made by the ICC. In such circumstances it would be most efficient to have a legislative regime whereby such an order can be "registered" and enforced as if it were a domestic order for the freezing/restraint of assets.

139. Alternatively, the ICC can seek assistance under sub-paragraph 1(k) of Article 93 with the freezing/restraint of assets, in which instance the state should be able to use the information provided to obtain a domestic order.

140. If a state has in place general proceeds of crime legislation, then the powers under that law can be applied relatively easily to allow for freezing/restraint of assets or can be amended as required. However, as some Commonwealth states may not yet have such a scheme, it was considered useful to provide for a separate scheme in the model law.

Sections 66 and 89 of the Model Law

- Sections for the registration and direct enforcement of an order made by the ICC for freezing/restraint of assets

  (See: Canada s. 57; NZ s. 112(2)).

- Simplified scheme for obtaining an order for freezing/restraint of assets in response to a request from the ICC

  (See Uganda s. 59).

c) Forfeiture orders (including where there is no ICC order)

141. As in the case of the enforcement of fines, a simple registration and direct enforcement power for orders of forfeiture made by the ICC should be included in any legislation. However, there may be circumstances where the ICC is not able to make a forfeiture order but proceeds of these crimes are located in a state. While not mandated by the Statute, it would be useful to also provide powers to obtain domestic forfeiture orders in such cases. Again because of the possible absence of general proceeds legislation in some states, the 2004 Group recommended that a simple domestic forfeiture power be included in the model law.

Sections 85 to 87 of the Model Law

- Provisions for the direct registration and enforcement of an ICC forfeiture order

  (See Australia ss. 155-159; Canada s. 57; NZ ss. 126-134; Uganda s. 66; UK s. 49).

- Simplified scheme for obtaining a domestic order for forfeiture where there is no ICC order but proceeds of crime are in the state

  (See Part VIII: Commonwealth Model Legislative Provisions on Measures to Combat Terrorism).

d) Reparations

142. Under Article 75 of the Statute the ICC may make orders for reparations to or in respect of victims including restitution, compensation and rehabilitation. States are obliged to enforce such orders.

143. For monetary reparation orders, the 2004 Group was of the view that the model law should similarly allow for registration and direct enforcement. This can be accomplished through a cross reference to existing victim compensation laws or through the creation of a separate scheme.

144. Consideration was also given as to how to provide for the enforcement of non-monetary reparation orders under domestic law. While the practical difficulties were acknowledged, the Group considered it sufficiently important to highlight this through a separate legislative provision reflecting 'best efforts' for enforcement.

Section 88 of the Model Law

- A power to enforce monetary reparation orders

  (See Canada s. 57; NZ s. 124; Uganda s. 64).

- A power to enforce non-monetary orders.

  (See NZ s. 124; Uganda s. 64)

XXIII. ICC Sittings

145. Article 3 of the Rome Statute provides that the seat of the ICC shall be The Hague but the ICC may sit elsewhere whenever it considers it desirable as provided in the Statute. States need to provide for this under domestic law. Two issues were identified under this topic:

    - How to provide for the ICC to sit within the jurisdiction in accordance with paragraph 3 of Article 3;
    - How to provide the ICC with adequate powers during the course of the sittings.

146. States may face constitutional or other problems with the concept of the ICC "sitting" within the jurisdiction. The 2004 Group recognised that different legislative options have been employed to address this issue. In many states the ICC has simply been granted a power to sit. In other states, an authority may be empowered to allow the ICC to sit on a case by case basis and in still others, the ICC may sit but under the auspices of a "domestic court". The Group was of the view that it would be useful to incorporate these optional approaches into the model law.

147. A secondary issue was the powers accorded to the ICC when sitting in a jurisdiction. The ICC would need a power to administer oaths and there should be provisions to allow for the detention in custody of accused persons appearing at an ICC hearing in the state. In addition, to effectively carry out its functions the ICC will need to have enforceable powers in particular to require

the attendance of witnesses and the production of documents. The Group discussed some of the optional approaches to incorporating such powers into domestic law including:

- having any relevant orders issued directly by a domestic court on request of the ICC with normal enforcement powers;
- giving the ICC the direct power to issue relevant orders and to have those enforced under domestic laws;
- leaving it to the ICC to use the co-operation regime under Part 9 to have the domestic authorities issue the relevant orders.

148. Each of these approaches has advantages and disadvantages. While empowering the ICC to issue the orders directly might be the most efficient approach, some states may have constitutional or policy concerns about empowering the ICC to do so. As a result the Group was of the view that each state would need to decide on the most suitable way in the domestic context and for this reason the model law should set out options for states to consider.

Sections 92 to 97 of the Model Law

Two options on ICC sittings

- A general power for the ICC to sit in the jurisdiction

  (See NZ s. 167; Uganda s. 91); or
- A section allowing the ICC to sit under the auspices of a domestic court.

Three options on powers of the ICC when sitting

- A direct power to the ICC

  (See Australia ss. 108-110; NZ ss. 168 and 169; Uganda ss. 92-96); or
- Using domestic courts; or
- Use of mutual assistance legislation (Noting that silence will leave mutual assistance as the default option).

XXIV. Privileges And Immunities For ICC Officials And Other Relevant Persons

149. Article 4 of the Statute provides that the ICC shall have legal personality and capacity necessary to exercise its functions and fulfil its purposes. Article 48 of the Statute provides that the ICC shall enjoy privileges and immunities. It further provides that court officials, counsel, experts, witnesses and other persons shall have specified privileges and immunities as set out in the Agreement on Privileges and Immunities of the ICC (the Agreement). That Agreement is in force. Each state is obliged to ensure that these various privileges and immunities are given under domestic law.

150. It was clear that the approach adopted in each state would depend very much on existing law. Some states may have an existing law of general application which directly implements any agreement on privileges and immunities which would be applied to the Agreement. Other states may have existing laws that accord privileges and immunities to international organisations which can be adapted but in that case careful consideration will have to be given to whether the protections are sufficient in light of the scope of the Agreement in terms

of content and application. An alternative method is to directly incorporate the provisions of the Agreement in the law by including it in a schedule. If this approach is used however a state would need to ensure that some provisions are given force of law to override conflicting domestic law relating to taxes, customs etc.

151. The 2004 Group was of the view that the model legislation should adopt the simple approach of providing directly for legal status and capacity and implementing the Agreement. Concern was expressed in the 2011 Group about the possible breadth of some of the privileges and immunities included in the Agreement. However, this was not felt to be a matter that could be addressed by the model law.

152. The Group also noted that Article 23 of the Agreement allows states to make a declaration restricting the application of some of the privileges and immunities with regard to nationals of the state. If that declaration is made, the state will need to reflect this in the national law.

153. It was important to reiterate again under this topic the interrelationship between administration of justice offences and the immunities accorded to ICC officials. As discussed in paragraph 38, while a state may provide for offences and jurisdiction to prosecute these offences where court officials may be implicated, this is without prejudice to the application of the relevant immunities. Any prosecution of such offences of court officials by a state would require a waiver as in the normal course.

154. Although not covered in the Agreement, when discussing this section, the 2011 Group also considered the recommendation of the Assembly of States Parties which had urged states "to take the necessary measures to provide for the protection of the name, abbreviations and emblems of the ICC in accordance with their national laws" (ICC-ASP/6/Res.2, para.25). The Group observed that such measures could raise copyright and other issues which went considerably beyond the scope and purposes of the model law and concluded that such measures should therefore not be included in the model law but could be dealt with elsewhere by states.

Part IX of the Model Law:

- A section according legal status and capacity.
- A section incorporating the relevant privileges and immunities as set out in the Agreement with force of law sections and an optional adoption of the restricted immunities for nationals under Article 23 of the Agreement

  (See Uganda s. 101).

XXV. National Security

155. Article 72 of the Statute sets out an elaborate procedure for the determination of national security issues that may arise at various stages of the ICC process. For the purposes of domestic law, the 2004 Group recommended that the model law include simple provisions identifying the domestic authority responsible to deal with national security questions, mandating internal consultations and consultations with the ICC as required by Article 72 and incorporating a ground of refusal in the co-operation provisions after exhaustion of the process under Article 72.

156. For some states the issue of national security may be particularly sensitive and it may be a subject which will be given considerable profile during any parliamentary process. For these states it may be useful to include more detailed provisions in the legislation. If that is the case, reference can be made to Part VII of the Ugandan legislation.

Part VII of the Model Law

- A procedural section on Article 72 identifying the authority and requiring internal and external consultation.
- A ground of refusal after exhaustion of the process

  (See NZ s. 114(2)(a)).

XXVI. Conflicting Obligations Under International Law (Article 98)

157. There was extensive discussion of Article 98 of the Rome Statute. This Article addresses the issue of a request from the ICC that would require a state to act inconsistently with its obligations under international law. Paragraph 1 of Article 98 was included in the Statute because many delegations were concerned about the obligations owed to visiting Heads of State or Government or Ministers from another country or to a diplomat by virtue of obligations under the Vienna Convention on Diplomatic Relations. The Vienna Convention obligations would also arise with respect to requests for search and seizure if they related to diplomatic property or premises. Paragraph 2 of Article 98 was incorporated because of possible conflicts between a request from the ICC and obligations under Status of Forces agreements.

158. In terms of implementation, it is not strictly necessary to include provisions on Article 98 in domestic law in so far as any such cases will be handled by the executive in consultation with the ICC. However, the 2004 Group was of the view that the model law should provide clear guidance to domestic authorities on the procedure to be followed should such cases arise and therefore recommended inclusion of provisions in the model law.

159. As to the content, the Group discussed several issues. It will be useful for the legislation to identify the responsible domestic authority and allow for postponement of execution of the request while the issue is being considered by the ICC.

160. The Group also looked at some of the existing legislative provisions related to Article 98. Section 23(1) of the UK law makes a distinction on the basis of whether the immunity relates to an official of a State Party or of a State that is not a Party. In the case of a State Party, there will be no need for the ICC to seek a waiver under Article 98(1), as the State Party will have accepted the application of Article 27 of the Statute which provides that official capacity is irrelevant. The Group was of the view that this approach is entirely consistent with the Statute obligations and has the benefit of reducing the number of cases where the ICC will have to pursue a waiver. They recommended that the model law follow this approach. In addition, it was highlighted that Article 98(1) will only apply where the obligation with respect to state or diplomatic immunity exists under international law. In each case a determination needs to be made that there is an existing obligation under international law which would be breached if the request were executed. While the Statute is not specific on the point, the Group was of the

view that the final decision on this point should be made by the ICC. Both the New Zealand and the Ugandan legislation state this principle explicitly and the Group recommended that the model law also include a provision to this effect.

161. The 2011 Group noted that section 25(1) makes a distinction between the immunities of States Parties to the Statute and non-States Parties. Like the Statute itself, the model law did not deal with the situation where the UN Security Council has made a referral with respect to a non-State party or a non-State Party has accepted the jurisdiction of the ICC under Article 12. The Group recommended a revision to ensure that both these situations are expressly identified.

Sections 25 (State or diplomatic immunity), 31 and 68 (postponement of requests):

- Procedural sections identifying the relevant authority and allowing for postponement of execution.
- Section which distinguishes the procedure in the case of a State Party and a non-State Party.
- Section providing for consultation and referral to the ICC for a decision by the ICC in the case of a non-State Party

(See UK s. 23(1) and Uganda s. 24(6)).

XXVII. Sovereign Immunity

162. Article 27 provides that the Statute applies equally to all persons regardless of official capacity. It recognises that capacity shall in no case exempt a person from criminal responsibility, constitute a ground for reduction of sentence or bar the ICC from exercising its jurisdiction over such a person. The combined effect of Article 27 and Part 9 of the Statute is that States Parties are obliged to provide for the surrender of persons in response to a request from the ICC no matter what the official capacity of such persons.

163. There was a lengthy discussion about implementation of Article 27 in relation to a country's own Head of State or of Government. For states that do not have constitutional provisions with respect to the immunity of a Head of State, this obligation can be met relatively easily with an explicit statutory provision. The law should bind the Head of State personally and individuals acting in an official capacity for the state. The legislative language that will be used to accomplish this will vary from state to state (for example referring to the Crown generally or to the Head of State by title, e.g. Her Majesty). Each state will need to adopt the appropriate language for a domestic context to ensure that Heads of State and of Government are covered.

164. However, in some countries a Head of State or Government may enjoy constitutionally enshrined immunities which can be unlimited or applicable while the person is in office. For these states implementation of this obligation under domestic law can be quite challenging. As several states which have adopted implementing legislation had faced this problem, the 2004 Group considered some of the approaches used by those states – both legislative and otherwise – to overcome this problem.

165. As a starting point, no action may be needed if that immunity may be waived or there are procedures for overriding it, which could be applied in the case of a request from the ICC. This approach would be acceptable only if the waiver or override procedures are a realistic option.

166. If waiver or override is not possible, the best option is to amend the Constitution to make an exception for ICC crimes to ensure that the immunities do not impede the fulfilment of the state's obligations under the Rome Statute. The 2004 Group strongly recommended that this approach be adopted in so far as possible. As examples, both France and Portugal have opted for this.

167. However it was recognised that in some countries constitutional amendment is simply not a realistic option for a range of reasons. Where this is the case, there are other options to consider.

168. One possibility is the interpretative approach that was adopted by Norway. Norway's constitution states, "The King's person is sacred; he cannot be censured or accused." Norway decided not to amend its Constitution and instead interpreted the constitutional provision as being inapplicable to war crimes, crimes against humanity and genocide. A strong point in support is that a constitution exists to ensure the application of the rule of law and not to encourage lawlessness. Spain has also used this interpretative method.

169. There is also the "probability ratio" approach, which Liechtenstein has adopted. It considered that the probability of its Head of State committing an ICC crime was sufficiently remote that it did not need to amend the constitution. In its view, this approach does not conflict with its treaty obligations. Should the unlikely case arise, Liechtenstein has expressed the intention to take immediate steps to remedy any inconsistency with the Statute. A state looking at this option will want to consider the nature of the Head of State's authority and his or her responsibilities in relation to the armed forces of the state. Probability will diminish if the Head of State has very limited legal authority and no responsibility for the armed forces. There may be other factors that will need to be taken into account in deciding whether this approach is suitable for a state.

170. Within the context of these various options, each country would need to make a policy choice as to which approach to adopt with respect to Head of State immunity in order to comply with the obligations under the Statute. It was emphasised that several countries with significant problems in relation to this obligation have found acceptable solutions.

171. For the purposes of the model law the 2004 Group recommended a provision binding a Head of State or Government, with optional legislative language, leaving each state to resolve any broader issue of constitutional limitations.

172. The Group also recommended that the model law should contain a procedural provision mirroring Article 27 to preclude official capacity being raised as a bar to surrender.

Sections 2 and 33 of the Model Law

- A section binding the Crown or Head of State including optional terminology

  (See Canada s. 3; NZ s. 3).

- A section in the co-operation part on arrest and surrender to provide that official capacity is not a bar to surrender

  (See Uganda s. 25; NZ s. 31).

XXVIII. Relations With Other Legislation (Geneva Convemtions)

173. In enacting this legislation, states will need to consider its relationship with any existing laws such as those implementing the Geneva Conventions and Protocols, the Genocide Convention, the Hague Cultural Property Convention or the Ottawa Land Mines Convention. If any of those laws are to be repealed in light of the new legislation, careful review is needed to ensure that none of the relevant legislative provisions are lost. The 2011 Group recommended an optional additional provision in the model law to reflect this position (see section 7(4)).

XXIX. Miscellaneous Provisions

174. The 2004 Group briefly discussed some additional provisions in existing legislation dealing with the use of certificates to prove factual, non-contentious issues (such as whether a request for assistance had been made) and a regulation making power. Both of these were considered useful for the model law.

175. There was also a discussion as to what, if any, requirements should be included regarding authentication of documents. The Group was of the view that there should be no authentication requirements respecting incoming documentation from the ICC, i.e. prescribing how documents from the ICC need to be certified. It would be useful, however, to include a general power to certify or authenticate documents in accordance with any procedure requested by the ICC.

Sections 69 to 71 and 99 of the Model Law

- Provision for certificates to prove requests for assistance

  (See NZ s. 178; Uganda s. 100).

- A regulation making power

  (See: SA s. 39; Uganda s. 102).

- A provision to allow for authentication of documents as requested by the ICC.

176. The 2004 Group also discussed the extent to which the legislation needed to provide for legal representation. It was determined that general law would be sufficient. States wishing to include a more specific reference can have regard to section 13 of Ghana's draft legislation.

177. The 2004 Group further discussed whether any additional powers were needed to prevent a subsequent prosecution in a state, in an instance where the person has been prosecuted and convicted or acquitted by the ICC. It was decided that existing law would be sufficient.

The Commonwealth

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