

**REPORT OF THE COMMONWEALTH  
EXPERT GROUP ON IMPLEMENTING  
LEGISLATION FOR  
THE ROME STATUTE OF THE  
INTERNATIONAL CRIMINAL COURT**

**7- 9 July 2004**

**Marlborough House, London**

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# REPORT OF THE COMMONWEALTH EXPERT GROUP ON IMPLEMENTING LEGISLATION FOR THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

## I INTRODUCTION

1. The Expert Group met in Marlborough House July 7-9, 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) (see Annex 1 Participant List). The Government of New Zealand, the ICC and the ICRC contributed their experts for the meeting. The Group considered the various components of implementing legislation in accordance with the draft Agenda (See Annex 2 Draft Agenda). During the course of the meeting, the Group examined reference material, including existing Commonwealth ICC legislation and draft bills. A list of the documents referred to is attached (see Annex 3 List of Reference Material).

2. For the ICC to function effectively, State Parties need to have in place comprehensive domestic legislation which implements the Rome Statute. The purpose of this meeting was to consider the issues surrounding the development of implementing legislation for the Rome Statute of the International Criminal Court and set out drafting instructions that could be used by a legislative drafter to prepare a model law, for use by states in developing domestic legislation. The following is a summary of the discussions of the Group and the drafting instructions agreed upon for the model law. The sections to be included in the law are captured in bold text. They have been numbered sequentially as Clauses I-48 for convenience of reference but the actual order in the model law will be left to the discretion of the legislative drafter. In some cases, the Group recommends optional approaches for particular provisions. There are also some purely optional sections that are suggested for consideration and these are reflected in italics. Legislative examples are given for reference as appropriate and necessary.

## II CORE CRIMES – SUBSTANCE

3. The first issue considered was the establishment of core crimes under domestic law. Unlike other penal law conventions, such as the *United Nations Convention against Transnational Organized Crime* or the various counter-terrorism conventions, the Rome Statute of the International Criminal Court (Rome Statute) does not oblige countries to create domestic offences for the crimes within the jurisdiction of the Court.<sup>1</sup> However, the aim of the Rome Statute is to end impunity for the perpetrators of these grave crimes and this is best accomplished if all states have the capacity to prosecute these offences under domestic law. The Preamble of the Rome Statute recognizes 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 crime...*

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

4. 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 an effective Court. However, for this principle to operate in practice, States need to have a complete regime under domestic law for the prosecution of these offences. This will also enable States to deal with their own nationals rather than having to surrender them to the ICC. Further if a State does not incorporate the core crimes in domestic law then it will be forced to cede jurisdiction to the ICC. As the focus of the ICC may be solely 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 adopted to date within the Commonwealth has included domestic offences for the core crimes. Unless for compelling domestic policy reasons a State wishes to provide solely for the strictly mandatory requirements of the Rome Statute i.e. cooperation, administration of justice offences, enforcement of fines, forfeiture and reparation orders, it is advisable to reflect in domestic legislation offence, jurisdiction and related provisions for the core crimes. Furthermore the Statute provides that the Court has jurisdiction when a State Party is “unwilling or unable” to effectively prosecute 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 and accordingly it is in the interests of a State wishing to retain responsibility for the prosecution of crimes under the Statute to have effective and full legislation, which includes provisions for the domestic prosecution of the crimes.

5. After discussion, the 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?

6. To fully implement the crimes under the Rome Statute, States should adopt offences of crimes against humanity, war crimes and genocide as set out in Articles 6, 7 and 8. The Group was of the view that the simple 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.

7. The Group recognized that this was the minimum standard that a State interested in complementarity would want to reflect in domestic law. It may be economical in terms of legislative drafting resources and Parliamentary process to use the same legislation to cover other international crimes in domestic law, such as those contained in the Geneva Conventions and Additional Protocols (distinct from the offences of a similar nature captured in the Rome Statute). It is also possible for a State to include a provision that will allow for crimes to be included as domestic offences without additional 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 recognized under customary international law. This was the approach adopted under the Canadian legislation. It is for each state to determine whether to restrict the legislation to core crimes of the Rome Statute or include additional offences. The Group was of the view the model law should contain a simple provision adopting the core crimes and optional provisions for additional crimes.

8. States will also wish to cover ancillary offences for the core crimes (See discussion below in paragraphs 39, 40 and 50-52). States should consider existing law on this point and ensure that both ancillary offences with appropriate jurisdiction provisions are adopted.

**Clause 1**  
**DRAFT:**

- **Section adopting the core crimes set out in Articles 6, 7 and 8 of the Rome Statute using a Schedule to the legislation**  
(See: Ghana s.2; NZ ss. 9, 10, 11; Uganda ss.7, 8 and 9; UK s. 50)

#### *Optional Sections*

- *A provision incorporating offences from the Geneva Conventions and Additional Protocols using a Schedule to the legislation;*
- *A provision defining the crimes to include genocide, war crimes and crimes against humanity 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); Ghana Bill s. 77 Consequential amendments (1.Courts Act)

### **III CORE CRIMES – TEMPORAL JURISDICTION**

9. 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.

10. The other option is retrospective application. In general, the principle of legality prohibits *retroactive* application of a penal provision - criminalizing conduct that was not criminal at the time it was committed. However, for genocide, crimes against humanity and war crimes, some *retrospective* assertion of jurisdiction may be 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.”

11. As a general principle, the core crimes of the Rome Statute would fall within the category of crime 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 recognized at that time as criminal under customary international law. Subject to arguments on this point, retrospective jurisdiction for these crimes would be permissible.

12. 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 International Criminal Court (ICC). Second, retrospective application helps reduce the prospect of impunity for crimes of the recent past.

13. 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 is appropriate both for purposes of complementarity and reflects 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 1 July 2002, given that the ICC may 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 11 of the Rome Statute may extend jurisdiction back to 1 July 2002. States could also choose an earlier date, such as 17 July 1998<sup>2</sup>, as there is an argument that the definitions adopted were regarded by the negotiating states as customary international law at that date 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 definitions earlier than 1998 should consider the approach adopted by Canada.<sup>3</sup> 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 that into account.

## **Clause 2**

### **DRAFT:**

#### **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 the effect of silence is prospective application from the date of the legislation); or**
- **Act applicable with respect to crimes as of 1 July 2002.**

## **IV CORE CRIMES – PENALTIES**

14. The Rome Statute prescribes in Part 7 the penalties which the Court may impose for the core crimes 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.”

15. There are as well provisions for fines and forfeiture of the proceeds of the crimes.

16. 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.

17. However Article 80 of Part 7 of the Statute recognizes 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.”

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<sup>2</sup> The date the Rome Statute was adopted by the Conference.

<sup>3</sup> See Crimes against Humanity and War Crimes Act, Canada s.4 (definition of crimes against humanity)

18. 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.

### **Clause 3**

#### **DRAFT:**

#### **Two Options**

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

(See Uganda Bill, s.7(3) (a), 8(3) (a), 9(3)(a))

## **V CORE CRIMES – JURISDICTION TO PROSECUTE**

19. 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. At international law other forms of jurisdiction are recognized 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 recognizes the right of a State to take extraterritorial jurisdiction over offences by whomever, 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.

20. 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 the core 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 the core 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 the core 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 the core 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. On the other hand, a State which applies universal jurisdiction to all of the core 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.

21. Despite possible arguments of this nature however, the Group was of the view that countries should apply universal jurisdiction to the core crimes implemented in domestic law as it reflects the position most consistent with the aim and purpose of the Rome Statute. The Group put forward two optional approaches that could be used to introduce this type of extraterritorial jurisdiction under national law.

22. The first option is to establish an offence in the usual manner which, by 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.

23. The second involves the broadest form of extraterritorial jurisdiction and would provide that the core crimes, wherever committed, were offences and then rely upon Attorney General consent 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.

24. 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.

25. 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 second 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.

#### **Clause 4**

##### **DRAFT:**

##### **Two options**

- **Section providing for jurisdiction over the core crimes 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)
- **Section providing for jurisdiction over the core crimes wherever committed**  
(See Ghana s. 2; NZ s. 8(1)(c))

## **VI CONSENT TO PROSECUTION**

26. 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 Court, 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 also provides 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 some form of independent judgement in the prosecution process. In most common law jurisdictions that will be either the Attorney General or a Director of Public Prosecutions. Given these considerations, the Group was of the view that a mechanism for Attorney General or other appropriate official consent to prosecution was appropriate.

27. 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 him or her a more appropriate authority. So each State would need to decide on the appropriate justice official to issue the consent to prosecution.

28. 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.

**Clause 5**  
**DRAFT:**

- **Section requiring the consent of the AG/ DPP for the commencement of proceedings for the core crimes**  
(See Canada s. 9(3);Ghana s. 8; NZ s 13; Uganda s. 17; UK s. 53(3))

*Optional Section*

- *Section on authority responsible for the conduct of prosecutions*  
(See Canada s9(3))

**VII ARTICLE 70 – ADMINISTRATION OF JUSTICE OFFENCES**

29. 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 penalizes 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 recognized 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.

30. 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.

31. In order to assist States, the Group ultimately recommended that relevant offence provisions should be drafted for all of 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.

32. As there is divided jurisdiction between the Court and States over the prosecution of such crimes, in addition to incorporating the crimes under domestic law, States should extend the international cooperation regime applicable to the core crimes to administration of justice offences.

## **Clause 6**

### **DRAFT:**

#### *Optional Section*

- *Offence provisions for each subparagraph of paragraph 1 of Article 70.*  
(See NZ ss. 15-21; Uganda ss. 10-16)

## **VIII JURISDICTION FOR THE ADMINISTRATION OF JUSTICE OFFENCES**

33. 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.

34. 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 Court 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.

35. 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 recognized and permissible at international law.

36. Each State will need to make a policy decision and optional approaches should be reflected in the model law.

## **Clause 7**

### **DRAFT:**

#### **Two Options**

- **Jurisdiction for administration of justice offences on the basis of territory and extraterritorial jurisdiction on the basis of nationality; or**  
(See UK s. 54(4))
- **Jurisdiction on the basis of territory plus extraterritorial jurisdiction for administration of justice offences based on alternative conditions of nationality of offender, nationality of victim and presence of the person in the territory after commission of the offence.**  
(See Uganda s. 18)

## **IX PENALTIES FOR ADMINISTRATION OF JUSTICE OFFENCES**

37. 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.

### **Clause 8**

#### **DRAFT:**

- **Penalty section for administration of justice offences with specific penalty left open**

## **X CONSENT TO PROSECUTION OF ADMINISTRATION OF JUSTICE OFFENCES**

38. There are several reasons to require consent for the prosecution of these offences by the Attorney General or an equivalent authority, similar to the core crimes. Jurisdiction over these offences is divided as between the Court 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 Court 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 Court including the judges of the Court and clearly such prosecutions should be authorized 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 court 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.

### **Clause 9**

#### **DRAFT:**

- **Section requiring the consent of the AG/DPP to commence proceedings for the administration of justice offences**  
(See Canada s. ((3); NZ s. 22; Uganda s. 17; UK s.54(5))

## **XI ANCILLARY OFFENCES FOR THE ADMINISTRATION OF JUSTICE OFFENCES**

39. Offences of aiding and abetting, participation and conspiracy need to be covered with reference to the administration of justice offences as well as the core crimes. (See discussion below in paragraphs 50-52 on Article 25). Most Commonwealth countries will have general provisions either by common law or statute providing for the relevant ancillary offences to apply to any crime. If not, specific provisions should be included and to assist on that point the Group recommended that the model law contain sections that States could use in case of any gaps in existing law.

40. 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 which can be made applicable to all of the offences – core crimes and administration of justice offences.

### **Clause 10**

#### **DRAFT:**

*Optional Sections for use if not covered under general law:*

- *Sections for aiding and abetting, being an accomplice, conspiracy, counselling and procuring*
- *Conspiracy offences for conspiring within a state to commit an offence outside or conspiring outside the state to commit an offence within that state.*

## **XII PLACE OF TRIAL AND RELEVANT COURT AND PROCEDURE**

41. As both the core 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.

### **Clause 11**

#### **DRAFT:**

- **Section on place of trial where the offence is extraterritorial;**
- **Section on relevant court and trial by indictment**  
(See Canada s.9(1); UK s. 53(2)(4) and (6))

## **XIII GENERAL INTERPRETATIVE PROVISION**

42. 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.

43. 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 Crime 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. After consideration, the Group recommended that the model law should make reference only to the Elements of Crime on a “shall take into account” basis. Countries could however choose to broaden the reference to jurisprudence of the ICC or beyond.

#### **Clause 12**

##### **DRAFT:**

- **Requirement for the Court to take into account the Elements of Crime in interpreting and applying the definitions of the crimes.**  
(See Uganda s. 19 (4)a; UK s. 50(2)(a))

#### **XIV GENERAL PRINCIPLES OF CRIMINAL LAW**

44. Part 3 of the Rome Statute sets out a framework of general principles of criminal law which the Court 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.

45. 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 an advantage. However for other 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 Court, 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.

46. The 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)**

47. The Group was of the view that these articles reflected principles of such a fundamental nature that they would be recognized already in common law legal systems. On this basis, it was recommended that these not be mentioned in the model law.

48. 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 recognized 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 recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice*”.

49. 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.

**Clause 13  
DRAFT**

*Optional Section*

- *Section allowing for 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;**

50. Similarly to the previous articles, the 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.

51. 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 member countries will have concepts such as participation, aid 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 40 above). However, some of the concepts captured in paragraph 3 of Article 25 may go beyond existing domestic law.

52. 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 Group

recommended that the model law contain optional legislative provisions for each sub-paragraph of 25(3) so states could be guided in their review and incorporate those which may be needed under domestic law.

#### **Clause 14**

##### **DRAFT:**

*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**

53. The background to Article 26 is important to consider in deciding on 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 Court 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 International Criminal Court 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.

54. 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.

55. The Group recommended no specific provision on age in the model law.

#### **d) Article 27**

This article on the irrelevance of official capacity is considered below in paragraphs 150-160.

#### **e) Article 28 Responsibility of commanders and other superiors**

56. 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 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 the core crimes. This is the most simple and direct approach.

57. 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 the core crimes.

58. 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.

#### **Clause 15**

##### **DRAFT:**

- **Section to incorporate Article 28 directly in domestic law.**  
(See s. UK s. 65)

#### **f) Article 29 Statute of Limitations**

59. Most common law jurisdictions will not have any statute of limitations applicable to crimes of this nature. However, the Group emphasized 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.

#### **g) Article 30 Mental Element**

60. 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 Court in the interpretation and application of Articles 6, 7 and 8 (core 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.

61. 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.

62. The 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 45-46) 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.

#### **Clause 16**

##### **DRAFT:**

*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**

63. 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 Court 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 Court, this will not affect complementarity as it will give a state a broader scope for prosecution. In light of this, the 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.

64. 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.

65. 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 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.

66. As indicated it is for the State to determine what defences will apply. For the purposes of the model law, the 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.

#### **Clause 17**

##### **DRAFT:**

##### **Three options:**

- **Section applying defences under domestic law only; or**  
(See UK s. 56)
- **Section applying defences under domestic law and international law with provision for cases of inconsistency; or**

(See Canada s. 11; NZ s. 12(c); Uganda s. 19(1)(c); In case of inconsistency see NZ s. 12(3))

- **Section applying defences under domestic law and international law but excluding certain defences.**
- (See Canada s. 11 ( which makes defences subject to points specified in ss. 12-14))

67. The 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 the core crimes reflected in the Rome Statute as this may provide a defence if the alleged crimes are state authorized and supported. If a State has such a defence it should be overridden for the purpose of the domestic prosecution of these crimes.

## **Clause 18 DRAFT**

*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**

68. Article 32 reflects common principles of law regarding mistake of law or fact recognized 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 Group recommended no specific legislative provision.

### **j) Article 33 Superior Orders and Prescription of Law**

69. 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.

70. 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.

71. Each State will have to take a policy decision on this issue and to that end the Group recommended that the model law reflect the options.

## **Clause 19 DRAFT:**

### **Three Options**

- **Drafter to note in the legislation that silence will result in the application of any existing defence (or lack of defence) under domestic law;**

- **Section incorporating Article 33 into domestic law;**  
(See NZ s. 12(1) xi; Uganda s. 19(1)xi)
- **Section providing that obedience to superior orders is not a defence.**  
(See Nuremburg Charter, ICTY Statute, ICTR Statute)

## **XV COOPERATION WITH THE COURT – GENERAL PROVISIONS**

### **a) Jurisdiction**

72. Whatever policy decision is taken on the prospective or retrospective jurisdiction for offences outlined above in paragraphs 9-13, the domestic law should provide clearly that cooperation (assistance with requests for arrest and surrender and other forms of cooperation) enforcement of fines and forfeiture orders and sentences and sittings of the Court will apply whether the underlying conduct occurred before or after the coming into force of the domestic law.

#### **Clause 20**

##### **DRAFT:**

- **Section on temporal jurisdiction relating to requests for assistance, enforcement of fines and forfeiture orders, enforcement of sentences and sittings of the Court ensuring the relevant provisions will apply regardless of when the underlying offence occurred.**  
(See Uganda s. 2)

### **b) Requests for Assistance**

73. 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 cooperation. While some of the paragraphs in the Article relate to Court 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)

74. 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.

75. The Group agreed it would be useful to have a general section in the model law setting out these procedural requirements.

#### **Clause 21**

##### **DRAFT:**

- **A General Part on requests for cooperation referring to designated channel, responsible authority, manner of transmission and confidentiality of requests.**  
(See NZ ss. 24-26; Uganda ss. 21, 23; UK s. 25)

## **XVI ARREST AND SURRENDER**

### **a) General**

76. The Rome Statute provides that a State must be able to surrender a person to the Court in response to a request though it 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 to do so in accordance with its constitution and fundamental principles. It was recognized that it is technically possible to use existing schemes for state to state extradition, amended as appropriate, to surrender to the Court. However the 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 Court and the Statute.

77. The Group went on to consider fundamental policy questions for the development of the Scheme for arrest and surrender to the Court.

#### **b) Provisional arrest and arrest on the basis of a complete request**

78. 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 recognize 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

79. 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 and samples should be set out in the model law. 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 accord with procedure or his or her rights were violated. Clearly such findings should not prevent the ultimate surrender of the person to the Court nor affect the validity of the arrest. The Group recommended a provision like that found in the UK legislation (s5(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)**

80. 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”

81. Consideration needs to be given to the test that will apply to applications for release under domestic law. The Group recommended that the safest course would be to include this exact test in the legislation. There is also a requirement that the Court 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**

82. 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**

83. Article 91 of the Rome Statute recognizes 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 Court.

84. 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 Group was unanimously of the view that there should not be any requirements for evidence in support of the request in the model law.

#### **f) Structure**

85. It was recognized 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.

86. There was discussion 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 Court and communicate information, the actual decision on surrender should be made by the judiciary. As the Rome Statute does not provide any grounds for refusal of a request the role of the executive should be a limited one. 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.

#### **g) Appeal**

87. 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.

88. 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 than a specific statutory right to a *habeas corpus* review should be included.

89. Whatever approach is adopted, the 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.

#### **Clause 22**

##### **DRAFT:**

- **A simplified scheme for the arrest and surrender of persons sought by the Court for prosecution or the imposition or enforcement of a sentence which incorporates the principles outlined above.**  
(See Ghana Part III; NZ Part IV; Uganda Part IV; UK Part 2)

#### **h) Guidance on the Role of the Judge in Surrender Proceedings**

90. 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 prevent the application of general extradition law to the surrender of persons to the ICC.

#### **Clause 23**

##### **DRAFT:**

- **Section that provides the judge in the surrender process is not to:**
  - **Consider whether the ICC warrant was properly issued;**
  - **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 33(6); UK 5(2) and (5))

#### **i) Competing Requests**

91. The Rome Statute sets out in Article 90 very specific rules where a State is faced with competing requests from another State and the International Criminal Court 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.

92. 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 Group was of the view that the model law should contain a provision reflecting the requirements of Article 90.

#### **Clause 24**

##### **DRAFT:**

- **A regime for dealing with competing requests in accordance with Article 90 of the Statute.**

(See NZ s. 61-65; Uganda s. 41)

#### **j) Temporary Surrender**

93. The Rome Statute does not resolve what happens if a person sought by the Court is serving a sentence domestically or being prosecuted. Article 89(4) provides that in such situations there should be consultation with the Court. However Rule 183 of the RPE recognizes 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 Court 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 Group was of the view that the model law should contain detailed provisions to empower the State to surrender temporarily.

#### **Clause 25**

##### **DRAFT:**

- **A scheme for the temporary surrender of a person serving a sentence or being prosecuted in the requested State.**  
(See: NZss. 49-52; Uganda s. 40; UK Schedule 2)

#### **k) Transit**

94. The regime for arrest and surrender will need to address the transit of persons being surrendered to the Court and those being transferred to and from a State of enforcement and the Court. 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.

#### **Clause 26**

##### **DRAFT:**

- **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 Request**

95. There may be circumstances where the execution of a request for arrest and surrender will have to be postponed. This possibility is recognized 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 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.

#### **Clause 27**

##### **DRAFT:**

- **A postponement power in recognition of Articles 94 and 95.**  
(See NZ s. 56; Uganda s. 61)

#### **m) Grounds of Refusal**

96. 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 Court 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.

97. 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 it was 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 Court 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.

#### **Clause 28**

##### **DRAFT:**

- **Section detailing the only circumstances in which a request for arrest and surrender may be refused and giving the Executive authority the power to refuse in those cases.**  
(See NZ ss. 55-66; Uganda s27)

#### **n) Specialty**

98. Article 101 incorporates a rule of specialty with respect to the surrender of a person to the Court. That is, the Court 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 Group was of the view that there is no need to legislate on the specialty obligation under Article 101 as compliance with the requirement rests with the Court. However it may be helpful to specify in the 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 such as AG/DPP/Minister.

#### **Clause 29**

##### **DRAFT:**

- **Section on the waiver of specialty which specifies what authority (giving options) is responsible to give the waiver on behalf of the State.**

### **XVII OTHER FORMS OF COOPERATION**

#### **a) General**

99. Articles 87 and 93 of the Rome Statute mandate that States must comply with requests for other forms of cooperation 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 Court. This, for example, was the approach adopted in Canada.

100. However, it was recognized that many Commonwealth States may not have such legislation in place as of yet. For this reason, the 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.

101. Article 93(1)(l) recognizes that the Court may seek other types of assistance not listed in the previous sub-paragraphs. To assist the Court 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 Court under Article 93.

#### **Clause 30**

##### **DRAFT:**

- **Detailed Scheme to implement all of the measures outlined in Article 93 (1)**  
(See Australia Part 4; NZss. 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**

102. There was discussion about how best to effectively reflect in domestic law suitable protections for witnesses and victims as visualized in subparagraph (1)(j) of Article 93. It was recognized 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 programs for witnesses and victims.

103. In practical terms it is contemplated that the Court may wish to enter into more detailed agreements with particular States regarding the protections available to witnesses and victims. To the extent necessary, domestic law should provide a sufficient basis for any such agreements between the Court and a State.

104. Ultimately the Group was of the view that the model law should contain a provision which would recognize the importance of this subparagraph and encourage best efforts.

#### **Clause 31**

##### **DRAFT:**

- **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**

105. Legislation is not required to facilitate the appearance of witnesses before the Court, provided those witnesses are free to travel to the seat of the Court. However, if the individual who is sought is serving a sentence in the requested State, legislative powers will be needed to secure that person's transfer to the Court. This is recognized in paragraph 7 of Article 93 of the Rome Statute which provides for the temporary transfer of such persons upon consent and with the agreement of the State. The Group recommended that a specific scheme be included in the model law for temporary transfers to the ICC.

#### **Clause 32 DRAFT**

- **A scheme for the temporary transfer of a witness in custody.**  
(See NZ ss. 95-99; Uganda ss. 52-55;)

### **d) Execution of Requests**

106. Article 99(1) reflects a key element of effective assistance to the Court. It recognizes 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 Court 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 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 Court.

#### **Clause 33 DRAFT:**

- **Section incorporating the principles of paragraph (1) of Article 99 regarding the execution of requests**  
(See NZ s. 27)

### **e) Direct Execution by the Prosecutor**

107. Paragraph 4 of Article 99 recognizes the right of the 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.

108. However the Group had to consider whether the rights for direct execution should be reflected in domestic law given that state authorities will not be involved other than in any initial consultations. Ultimately the Group was of the view 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 recognizing 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.

#### **Clause 34 DRAFT:**

- **An enabling power for the Prosecutor to conduct investigations in accord with Part 9 and Article 57(3) d.**

(See Uganda Section 90; NZ s.166)

#### **f) Postponement**

109. 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 cooperation thereby requiring a postponement. The Group recommended an analogous power for postponement for other forms of cooperation as in the case of arrest and surrender.

#### **Clause 35**

##### **DRAFT:**

- **A postponement power in recognition of Articles 94 and 95.**  
(See NZ s. 115; Uganda s. 61)

#### **g) Grounds of Refusal**

110. 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.

111. 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 Group recommended the inclusion of section that would specify the only circumstances in which a request might be refused.

#### **Clause 36**

##### **DRAFT:**

- **Section detailing the only grounds on which request may be refused.**  
(See NZ 114(3); Uganda s. 60)

### **XVIII COSTS**

112. The 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.

### **XIX ASSISTANCE BY THE COURT**

113. Article 93(10) provides for assistance by the Court in respect of a national investigation or prosecution with the Court having discretion as to whether the assistance will be provided in any particular case. The 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 Court. 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.

### **Clause 37**

#### **DRAFT:**

- **A power to make requests for assistance to the Court, giving options as to the authority to be empowered.**

(See: Aust. S. 180; NZ s.173; Uganda s. 97)

## **XX ENFORCEMENT OF SENTENCES**

114. 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.

115. However, unless States accept to do so, the Court will have grave difficulty in functioning in practice such that States Parties are encouraged to render their full support to the Court 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 Court, 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.

116. 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.

117. 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.

118. Despite the absence of an obligation, the Group agreed it would be important to include a scheme for sentence enforcement in the model law.

119. Consideration was given to some of the key policy questions in Part 10 that will impact on implementing legislation.

### **a) General Powers**

120. 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 Court that the country is prepared to accept prisoners.

### **b) Non-modification of sentence**

121. 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.

### **c) Application of programs or benefits**

122. The State should take note of the requirements under Rule 211 of the RPE to notify the Court if there is a program 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 Court in such cases to allow the Court to exercise its supervisory functions.

### **d) Situation after service of sentence**

123. 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**

124. 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 Court 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 Court, to another State to finish his or her sentence.

### **f) Protections from other proceedings**

125. 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.

## **Clause 38 DRAFT**

- **A scheme for the enforcement of sentences of imprisonment including all of the points outlined above.**  
(See Ghana ss. 58-62; NZ ss 139-156; Uganda ss.67-80; United Kingdom ss.42-48)

## **XXI ENFORCEMENT OF FINES, FORFEITURE ORDERS AND REPARATION ORDERS**

126. Part 10 of the Statute also obliges States to enforce orders of the Court 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 Group considered the types of provisions that need to be included to create an effective scheme for these enforcement measures.

### **a) Fines**

127. Consistent with all of the legislation enacted to date, 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.

## **Clause 39**

### **DRAFT:**

- **Sections for the registration and direct enforcement of a fine ordered by the Court.**  
(See Ghana s. 64; s.125 NZ; Uganda s. 65;s. 49 UK)

### **b) Requests for the freezing/restraint of assets**

128. There are two alternative ways in which the Court 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 Court 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 Court considers that such orders are “for the purpose of an investigation”. If that is the case, a State may be asked to enforce the restraint order issued by the Court. 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 of assets.

129. Alternatively, the Court will seek assistance under subparagraph 1(k) of Article 93 with the freezing of assets, in which instance the State should be able to use the information provided to obtain a domestic order.

130. 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 restraint or freezing or can be amended as required. However, as some Commonwealth States may not have such a Scheme as of yet, it was considered useful to provide for a separate scheme for restraint in the model law.

## **Clause 40**

### **DRAFT:**

- **Sections for the registration and direct enforcement of a restraint/freezing order issued by the Court.**  
(See: Canada s. 57; NZ s. 112(2))
- **Simplified scheme for obtaining a restraint/freezing order in response to a request from the Court.**  
(See Ghana ss. 51- 54; Uganda s. 59)

### **c) Forfeiture orders**

131. As in the case of the enforcement of fines, a simple registration and direct enforcement power for orders of forfeiture issued by the Court should be included in any legislation. However, there may be circumstances where the Court is not able to issue an order of forfeiture 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 Group recommended that a simple domestic forfeiture power be included in the model law.

## **Clause 41**

### **DRAFT:**

- **Provisions for the direct registration and enforcement of a forfeiture order**  
(See Australia ss.155-159; Canada s. 57; NZ s. 126-134; Uganda s.66; UK s. 49)

- **Simplified scheme for obtaining a domestic order for forfeiture**  
(See Part VIII: Commonwealth Model Legislative Provisions on Measures to Combat Terrorism)

#### **d) Reparations**

132. Under Article 75 of the Statute the Court may make orders for reparations to or in respect of victims including restitution, compensation and rehabilitation. States are obligated to enforce such orders.

133. For monetary reparation orders, the 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.

134. 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.

#### **Clause 42**

##### **DRAFT:**

- **A power to enforce monetary reparation orders**  
(See Canada s.57; Ghana s.63; NZ s.124; Uganda s. 64)
- **A power to enforce non-monetary orders.**  
(See New Zealand s.124; Uganda s. 64)

## **XXII ICC SITTINGS**

135. Article 3 of the Rome Statute provides that the seat of the Court shall be The Hague but the Court 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 Court to sit within the jurisdiction in accordance with paragraph 3 of Article 3.
- How to provide the Court with adequate powers during the course of the sittings.

136. States may face constitutional or other problems with the concept of the ICC “sitting” within the jurisdiction. The Group recognized that different legislative options have been employed to address this issue. In many states the Court has simply been granted a power to sit. In other states, an authority may be empowered to allow the Court to sit on a case by case basis and in still others, the Court 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.

137. A secondary issue was the powers accorded to the Court when sitting in a jurisdiction. The Court 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 Court 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 have those enforced under domestic laws;
- Leaving it to the Court to use the co-operation regime under Part 9 to have the domestic authorities issue the relevant orders.

138. Each of these approaches has advantages and disadvantages. While empowering the Court to issue the orders directly might be the most efficient approach, some States may have constitutional or policy concerns about empowering the Court 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.

### **Clause 43 DRAFT**

#### **Two options on ICC sittings:**

- **A general power for the ICC to sit in the jurisdiction**  
(See: s. 167 NZ; s. 91 Uganda)
- **A section allowing the Court to sit under the auspices of a domestic court**  
(See Ghana ss. 16 and 74)

#### **Three options on powers of the ICC when sitting:**

- **A direct power to the ICC**  
(See: Aust. ss. 108-110; NZ ss. 168; 169; Uganda ss. 92-96)
- **Using domestic courts**  
(See Ghana s 74)  
**Use of mutual assistance (Note in legislation that silence will leave mutual assistance as the option)**

## **XXIII PRIVILEGES AND IMMUNITIES FOR COURT OFFICIALS AND OTHER RELEVANT PERSONS**

139. Article 4 of the Statute provides that the Court shall have legal personality and capacity necessary to exercise its functions and fulfil its purposes. Article 48 of the Statute provides that the Court 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 Court. That agreement is now in force. Each State is obligated to ensure that these various privileges and immunities are given under domestic law.

140. 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 ICC agreement. Other States may have existing laws that accord privileges and immunities to international organizations 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 ICC

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.

141. The 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 on privileges and immunities.

142. 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.

143. It was important to reiterate again under this topic the interrelationship between administration of justice offences and the immunities accorded to Court 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 prosecutions of such offences of court officials by a State would require a waiver as in the normal course.

#### **Clause 44**

##### **DRAFT:**

- **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)

## **XXIV NATIONAL SECURITY**

144. 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 Group recommended that the model include simple provisions identifying the domestic authority responsible to deal with national security questions, mandating internal consultations and consultations with the Court as required by Article 72 and incorporating a ground of refusal in the Cooperation provisions after exhaustion of the process under Article 72.

145. 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.

#### **Clause 45**

##### **DRAFT**

- **A procedural section on Article 72 identifying the authority and requiring internal and external consultation.**
- **A ground of refusal after exhaustion of the process to be included in the cooperation section**

(See Ghana ss. 36, 37; NZ s. 114(2) (a) )

## **XXV CONFLICTING OBLIGATIONS UNDER INTERNATIONAL LAW (Article 98)**

146. There was extensive discussion of Article 98 of the Rome Statute. This Article addresses the issue of a request from the Court 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 Court and obligations under Status of Forces agreements.

147. 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 Court. However, the 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.

148. 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 Court.

149. 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 Court 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 Court. Both the New Zealand law and the Ugandan bill state this principle explicitly and the Group recommended that the model law also include a provision to this effect.

### **Clause 46**

#### **DRAFT:**

- **Procedural sections identifying the relevant authority and allowing for postponement of execution;**
- **Section which distinguishes the procedure in the case of State Party and Non State Party;**
- **Section providing for consultation and referral to the Court for a decision by the Court in the case of a non State Party.**  
(Merge UK s. 23(1) and Uganda s. (24(6))

## XXVI SOVEREIGN IMMUNITY

150. Article 27 provides that the Statute applies equally to all persons regardless of official capacity. It recognizes that capacity shall in no case exempt a person from criminal responsibility, constitute a ground for reduction of sentence or bar the Court from exercising its jurisdiction over such a person. The combined effect of Article 27 and Part 9 of the Statute is that State Parties are obliged to provide for the surrender of persons in response to a request from the Court no matter what the official capacity of such persons.

151. 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 the Heads of State and of Government are covered.

152. 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 already have faced this problem the Group considered some of the approaches used by those States – both legislative and otherwise – to overcome this problem.

153. 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 Court. This approach would be acceptable only if the waiver or override procedures are a realistic option.

154. 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 Group strongly recommended that this approach be adopted in so far as possible. As examples, both France and Portugal have opted for this.

155. However it was recognized 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.

156. 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 their 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.

157. There is also the "**probability ratio**" approach, which Liechtenstein has adopted. They considered that the probability of their Head of State committing an ICC crime was sufficiently remote such that they did not need to amend their constitution. In their view, this approach does not conflict with their treaty obligations. Should the unlikely case arise, they have 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.

158. 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 emphasized that several countries with significant problems in relation to this obligation have found acceptable solutions.

159. For the purposes of the model law the 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.

160. 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.

#### **Clause 47**

##### **DRAFT**

- **A section binding the Crown or Head of State including optional terminology**  
(See: Canada s. 3; NZ s. 3)  
**A section in the cooperation part on arrest and surrender to provide that official capacity is not a bar to surrender.**  
(See Uganda s. 25; NZ s.31)

## **XXVII RELATIONS WITH OTHER LEGISLATION (Geneva Conventions)**

161. 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.

## **XXVIII MISCELLANEOUS PROVISIONS**

162. The 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.

163. 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 Court, i.e. prescribing how documents from the Court 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 Court.

#### **Clause 48**

##### **DRAFT**

- **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 Court.**  
(See Ghana s. 72)

164. The 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 the Ghana bill.

165. The 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.

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## **Annex 2 - Agenda**

### **WEDNESDAY 7 JULY**

- 9:00 Registration/ Refreshments
- 9:30 – 9:45 Opening/Introduction by the Secretariat
- 9:45 – 10:15 Discussion of approach/Adoption of Agenda

### **PART I – CRIMES**

- 10:15 – 11:00 Core Crimes- Genocide, Crimes against Humanity and War Crimes – Substantive provisions and Jurisdiction (Articles 6, 7 and 8)
- 11:00 – 11:15 Health Break
- 11:15 – 12:00 Administration of Justice Offences – Substantive provisions and Jurisdiction
- 12:00 – 1:00 General Principles of Criminal Law (including procedures, substantive law, defences)
- 1:00 – 2:00 Lunch

### **PART II – COOPERATION WITH THE COURT**

- 2:00 – 2:30 General provisions relating to requests
- 2:30 – 3:15 Arrest and Surrender (including transit)
- 3:15 – 3:30 Health Break
- 3:30 – 4:00 Arrest and Surrender (cont.)
- 4:00 – 5:00 Other Forms of Cooperation
- 5:30 – 7:30 Welcome Reception

### **THURSDAY 8 JULY**

- 9:00 – 10:00 Other forms of cooperation (cont)
- 10:00 – 11:00 Enforcement of fines, forfeiture, restitution
- 11:00 – 11:15 Health Break
- 11:15 – 12:30 Enforcement of Sentences of Imprisonment
- 12:30 – 1:30 Lunch

### **PART III – IMMUNITIES AND PRIVILEGES**

- 1:30 – 2:45 Sovereign/Diplomatic Immunity (Articles 27 and 98)

2:45 – 3:15 Privileges and Immunities for officials of the court

3:15 – 3:30 Health Break

**PART IV - MISCELLANEOUS**

3:30 – 4:00 National Security

4:00 – 4:30 ICC sittings

4:30 – 5:00 Assistance by the Court

**FRIDAY 9 JULY**

10:00 - 10:30 Additional miscellaneous provisions

10:30 – 12:30 Review of Recommendations/Drafting Instructions

12:30 Lunch

Meeting adjourned

## **Annex 3 - List of Reference Material**

### **Part I**

- Rome Statute
- Rules of Procedure and Evidence
- Elements of Crimes
- Australia Legislation
- Canadian Legislation
- New Zealand Legislation

### **Part II**

- Ratification and Implementation Manual
- South African Bill and Note
- UK Legislation and Notes
- Ghana Bill
- Uganda Bill
- Privileges and Immunities Agreement

The end