

**THE INTERNATIONAL CRIMES ACT, 2008**

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**AN ACT of Parliament to make provision for the punishment of certain international crimes, namely genocide, crimes against humanity and war crimes, and to enable Kenya to co-operate with the International Criminal Court established by the Rome Statute in the performance of its functions**

**PART I—PRELIMINARY**

Short title and commencement.

**1.** This Act may be cited as the International Crimes Act, 2008, and shall come into operation on 1<sup>st</sup> January, 2009.

Interpretation.

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

“Appeals Chamber” means the appeals Chamber of the ICC;

“forfeiture order” means an order made by the ICC under paragraph 2 (b) of article 77 of the Rome Statute or under the ICC Rules for the forfeiture of property, and includes a forfeiture order that is treated for the purposes of enforcement as a pecuniary penalty order under section 126;

“ICC” means the International Criminal Court established by the Rome Statute, and includes any of the organs of the Court that are referred to in that Statute;

“ICC prisoner” means a person who is—

(a) sentenced to imprisonment by the ICC; or

(b) the subject of a request by the ICC under section 166 (1) (b) to be held in custody during a sitting of the ICC in Kenya;

“ICC Rules” means the Rules of Procedure and Evidence made under article 51 of the Rome Statute;

“international crime” means, in relation to the ICC, a crime in respect of which the ICC has jurisdiction under

article 5 of the Rome Statute;

“Kenyan prisoner” or “prisoner” means a person who is for the time being in the legal custody of the officer in charge of any Kenyan prison, whether or not that person has been convicted of an offence;

“Minister” means the Minister for the time being responsible for matters relating to national security;

“official”, in relation to the International Criminal Court, means the Prosecutor, Registrar, Deputy Prosecutor, Deputy Registrar or other staff of the organs of the Court;

“person” means a natural person, a company or association or body of persons corporate or unincorporated;

“Pre-Trial Chamber” means the Pre-Trial Chamber of the ICC;

“property” means real or personal property of every description, whether situated in Kenya or elsewhere and whether tangible or intangible, and includes an interest in any such real or personal property;

“Prosecutor” means the Prosecutor of the ICC;

“Rome Statute” means the Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on 17th July, 1998, as corrected by the *procès-verbaux* of 10th November, 1998, 12th July, 1999, 30th November, 1999 and 8th May, 2000, a copy of the English text of which is set out in the Schedule to this Act.

“Trial Chamber” means the Trial Chamber of the ICC.

(2) In this Act—

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

(b) a reference to a request by the ICC for assistance

under a specified provision or in relation to a particular matter includes a reference to a request by the ICC for co-operation under that provision or in relation to that matter;

- (c) a reference to a sentence of imprisonment imposed by the ICC includes a reference to a sentence of imprisonment extended by the ICC (whether for the non-payment of a fine or otherwise);
- (d) a reference to a sentence of imprisonment imposed by the ICC for an international crime or an offence against the administration of justice includes a reference to a sentence of imprisonment imposed by the ICC for non-payment of a fine that was a penalty for that crime or offence, as the case may be.

Act to bind the Government.

**3.** This Act shall be binding on the Government.

Rome Statute to have force of law.

**4.** (1) The provisions of the Rome Statute specified in subsection (2) shall have the force of law in Kenya in relation to the following matters—

- (a) the making of requests by the ICC to Kenya for assistance and the method of dealing with those requests;
- (b) the conduct of an investigation by the Prosecutor or the ICC;
- (c) the bringing and determination of proceedings before the ICC;
- (d) the enforcement in Kenya of sentences of imprisonment or other measures imposed by the ICC, and any related matters;
- (e) the making of requests by Kenya to the ICC for assistance and the method of dealing with those requests.

(2) The relevant provisions of the Rome Statute are—

- (a) Part 2 (which relates to jurisdiction, admissibility, and applicable law);

- (b) Part 3 (which relates to general principles of criminal law);
- (c) articles 51 and 52 (which relate respectively to the Rules of Procedure and Evidence, and Regulations of the Court);
- (d) Part 5 (which relates to the investigation and prosecution of crimes within the jurisdiction of the ICC);
- (e) Part 6 (which relates to the conduct of trials);
- (f) Part 7 (which relates to penalties);
- (g) Part 8 (which relates to appeals and revision of acquittals, convictions, or sentences);
- (h) Part 9 (which relates to international co-operation and judicial assistance);
- (i) Part 10 (which relates to the enforcement of sentences and other measures imposed by the ICC).

Obligations  
imposed by Rome  
Statute or ICC  
Rules.

**5.** For the purposes of any provision of the Rome Statute or the ICC Rules that confers or imposes a power, duty or function on a State, that power, duty or function may be exercised or carried

relation to, or who counsels in relation to, an offence mentioned in subsection (1) is guilty of an offence.

(3) A person who commits an offence under subsection (1) or (2) shall on conviction be liable—

- (a) to be punished as for murder, if an intentional killing forms the basis of the offence; or
- (b) to imprisonment for life or for a lesser term, in any other case.

(4) In this section—

“crime against humanity” has the meaning ascribed to it in article 7 of the Rome Statute and includes an act defined as a crime against humanity in conventional international law or customary international law that is not otherwise dealt with in the Rome Statute or in this Act;

“genocide” has the meaning ascribed to it in article 6 of the Rome statute;

“war crime” has the meaning ascribed to it in paragraph 2 of article 8 of the Rome Statute.

General principles  
of criminal law.

**7.** (1) For the purposes of proceedings for an offence under section 6, the following provisions of the Rome Statute shall apply, with any necessary modifications—

- (a) article 20 (which relates to crimes for which a person has previously been acquitted or convicted);
- (b) article 21 (which deals with the law applicable at proceedings at international level)
- (c) paragraph 2 of article 22 (which relates to principles of interpretation to be applied to the definition of crimes);
- (d) article 25 (which relates to principles of individual criminal responsibility);
- (e) article 26 (which relates to the exclusion of jurisdiction over persons under eighteen years);
- (f) article 28 (which relates to the responsibility of

- commanders and other superiors);
- (g) article 29 (which excludes any statute of limitations);
- (h) article 30 (which relates to the mental element of crimes);
- (i) article 31 (which specifies grounds for excluding criminal responsibility);
- (j) article 32 (which relates to mistakes of fact or law);
- (k) article 33 (which relates to superior orders and prescription of law).

(2) For the purposes of any such proceedings—

- (a) the provisions of Kenyan law and the principles of criminal law applicable to the offence under Kenyan law shall apply; and
- (b) a person charged with the offence may rely on any justification, excuse, or defence available under the laws of Kenya or under international law:

Provided that—

- (i) in the event of any inconsistency between the provisions specified in subsection (1) and the provisions and principles specified in paragraph (a) of this subsection, the provisions specified in subsection (1) shall prevail; and
- (ii) the fact that an act done outside Kenya is not an offence under the law of the place where it was done shall not be held to be any justification, excuse, or defence.

(4) For the purposes of subsection (1), the articles of the Rome Statute specified in that subsection (other than article 20) shall apply as if—

- (a) a reference to the ICC were a reference to the Kenyan court exercising jurisdiction in respect of the proceedings; and
- (b) a reference to the Rome Statute included a

reference to this Act.

(5) For the purposes of interpreting and applying articles 6 to 8 of the Rome Statute in proceedings for an offence under section 6—

(a) the Kenyan Court exercising jurisdiction in the proceedings shall have regard to any elements of crimes adopted or amended in accordance with article 9 of the Rome Statute; and

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(b) provisions of the Penal Code, to the extent of any inconsistency with the application of paragraph (a), shall not apply.

Jurisdiction to try offences under section 6.

**8.** A person who is alleged to have committed an offence under section 6 may be tried and punished in Kenya for that offence if—

(a) the act or omission constituting the offence is alleged to have been committed in Kenya ; or

(b) at the time the offence is alleged to have been committed—

(i) the person was a Kenyan citizen or was employed by the Government of Kenya in a civilian or military capacity;

(ii) the person was a citizen of a state that was engaged in an armed conflict against Kenya, or was employed in a civilian or military capacity by such a state;

(iii) the victim of the alleged offence was a Kenyan citizen; or

(iv) the victim of the alleged offence was a citizen of a state that was allied with Kenya in an armed conflict; or

(c) the person is, after commission of the offence, present in Kenya

(2) A trial authorized by this section to be conducted in Kenya shall be conducted in the High Court.

Bribery of judges  
and officials.

**9.** (1) A person who, being a judge or an official of the ICC, corruptly accepts, obtains, agrees to accept or attempts to obtain for himself or any other person any money, valuable consideration, office, place or employment—

(a) in respect of anything done or omitted, or to be done or omitted, by him in his official capacity; or

(b) with intent to interfere in any other way with the administration of justice of the ICC,

is guilty of an offence and liable on conviction to imprisonment for a term of not more than fourteen years.

(2) A person who corruptly gives or offers to a judge or an official of the ICC any money, valuable consideration, office, place or employment—

(a) in respect of anything done or omitted, or to be done or omitted, by him in his official capacity, or

(b) with intent to interfere in any other way with the administration of justice of the ICC,

is guilty of an offence and liable on conviction to imprisonment for a term of not more than fourteen years.

Obstructing  
justice.

**10.** (1) A person who wilfully attempts in any manner to obstruct, pervert or defeat the course of justice of the ICC is guilty of an offence and liable on conviction to imprisonment for a term of not more than five years.

(2) Without limiting the generality of subsection (1), a person shall be deemed wilfully to attempt to obstruct, pervert or defeat the course of justice if, in any existing or proposed proceedings of the ICC, he—

(a) dissuades or attempts to dissuade a person by threats, bribes or other corrupt means from giving evidence; or

(b) accepts, obtains, agrees to accept or attempts to obtain a bribe or other corrupt consideration to abstain from giving evidence.

Obstructing  
officials.

**11.** A person who resists or wilfully obstructs an official of the ICC in the execution of his duty, or any person lawfully acting in aid of such an official, is guilty of an offence and liable on conviction to imprisonment for a term of not more than two years.

Perjury.

**12.** (1) A person who, with intent to mislead, makes a false statement under oath or solemn affirmation before a judge of the ICC or an official of that Court who is authorized by the Court to permit statements to be made before him, knowing that the statement is false, is guilty of the offence of perjury and liable on conviction to imprisonment for a term of not more than seven years.

(2) Subsection (1) shall apply—

- (a) whether or not the statement is made in judicial proceedings of the ICC; and
- (b) whether the statement is made by affidavit, solemn declaration or deposition or orally.

(3) Subsection (1) shall not apply to a statement that is made by a person who is not specially permitted, authorized or required by law to make that statement.

Witness giving  
contradictory  
evidence.

**13.** (1) A person who—

- (a) being a witness in any proceedings of the ICC, gives evidence with respect to any matter of fact or knowledge;
- (b) later, in any proceedings of the Court, gives evidence that is contrary to his previous evidence; and
- (c) in giving his evidence in either proceedings, does so with intent to mislead,

is guilty of an offence and liable on conviction to imprisonment for a term of not more than two years, whether or not the prior or later evidence is true.

(2) In this section, “evidence” does not include evidence that is not material.

(3) If a person is charged with an offence under this

section, a certificate that specifies with reasonable particularity the proceedings in which the person is alleged to have given the evidence in respect of which the offence is charged shall be evidence that it was given in proceedings of the ICC.

(4) A certificate referred to in subsection (3) shall be admissible without proof of the signature or official character of the person by whom the certificate purports to be signed, if it purports to be signed by the Registrar of the ICC or another official having the custody of the record of the proceedings concerned or by his lawful deputy.

Fabricating evidence.

**14.** Every person who, with intent to mislead, fabricates anything with intent that it be used as evidence in any existing or proposed proceedings of the ICC, by any means other than perjury or incitement to perjury, is guilty of an offence and liable on conviction to imprisonment for a term of not more than seven years.

Offences relating to affidavits.

**15.** A person who, in respect of any existing or proposed proceedings of the ICC—

- (a) signs a document that purports to be an affidavit or statutory declaration and to have been sworn or declared before him when the document was not so sworn or declared or when he knows that he has no authority to administer the oath or declaration;
- (b) uses or offers for use any document writing purporting to be an affidavit or statutory declaration that he knows was not sworn or declared, as the case may be, by the affiant or declarant or before a person authorized to administer the oath or declaration; or
- (c) signs as affiant or declarant a document that purports to be an affidavit or statutory declaration and to have been sworn or declared by him, as the case may be, when the document was not so sworn or declared,

is guilty of an offence and liable on conviction to imprisonment for a term of not more than two years.

Intimidation.

**16.** Every person who, wrongfully and without lawful authority—

- (a) for the purpose of compelling another person to abstain from doing anything that the person has a lawful right to do; or
- (b) to do anything that the person has a lawful right to abstain from doing,

in relation to any proceedings of the ICC, causes the person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to the person is guilty of an offence and liable on conviction to imprisonment for a term of not more than five years.

Retaliation against witnesses.

**17.** (1) A person who, by act or omission, does any thing against a person or a member of the person's family in retaliation for the person's having given testimony before the ICC is guilty of an offence and liable on conviction to imprisonment for a term of not more than five years.

(2) A person who conspires or attempts to commit, or is an accessory after the fact in relation to, or counsels in relation to, an offence under subsection (1) is guilty of an offence and liable on conviction to imprisonment for a term of not more than five years.

Jurisdiction to try offences under sections 9-17.

**18.** A person who is alleged to have committed an offence under any of sections 9 to 17 may be tried and punished in Kenya for that offence if—

- (a) the act or omission constituting the offence is alleged to have been committed in Kenya or on board an aircraft or vessel which is registered in Kenya; or
- (b) at the time the offence is alleged to have been committed, the person was a Kenyan citizen or was employed by Kenya in a civilian or military capacity; or
- (c) the person is, after commission of the offence, present in Kenya

(2) A trial authorised by this section to be conducted in Kenya may be conducted in any court of competent jurisdiction.

Co-operation as regards offences against administration of justice.

**19.** (1) If the ICC makes a request for assistance in any investigation or proceedings involving an offence against the administration of justice, that request shall be dealt with—

- (a) in the case of a request for surrender— in the manner provided in Parts III and IV, which Parts shall apply with any necessary modifications and subject to any contrary provision in the Rome Statute or the ICC Rules;
- (b) in the case of a request for enforcement of an order requiring reparation or the payment of a fine or a forfeiture order— in the manner provided in Parts III and VI, which Parts shall apply with any necessary modifications and subject to any contrary provision in the Rome Statute or the ICC Rules;
- (c) in the case of a request for transit— in the manner provided in sections 131 to 133 and 145 to 151, which sections shall apply with any necessary modifications and subject to any contrary provision in the Rome Statute or the ICC Rules; and
- (d) in the case of a request for any other type of assistance— in the manner provided in Parts III and V, which Parts (and, if applicable, Part VIII) shall apply with any necessary modifications and subject to any contrary provision in the Rome Statute or the ICC Rules.

(2) In addition to the grounds of refusal or postponement specified in Parts IV and V, a request for surrender or other assistance that relates to an offence involving the administration of justice may be refused if, in the opinion of the Minister or the Attorney-General, as the case may be, there are exceptional circumstances that would make it unjust or oppressive to surrender the person or give the assistance requested.

(3) Where, pursuant to subsection (2), the Minister or the

Attorney-General is of the opinion that there are exceptional circumstances that would make it unjust or oppressive to surrender the person or give the assistance requested, the Minister or the Attorney General, as the case may be, shall give the reasons underlying his opinion.

**PART III—GENERAL PROVISIONS RELATING TO  
REQUESTS FOR ASSISTANCE**

Requests for assistance.  
(*Cf.* Rome Statute, articles 86, 87 (1) (a), 93 (1).)

**20.** (1) This Part shall apply to a request by the ICC for assistance that is made under—

- (a) Part 9 of the Rome Statute, in relation to—
- (i) the provisional arrest, the arrest, and the surrender to the ICC of a person in relation to whom the ICC has issued an arrest warrant or given a judgment of conviction;
  - (ii) the identification and whereabouts of persons or the location of items;
  - (iii) the taking of evidence, including testimony under oath, and the production of evidence, expert opinions, and reports necessary to the ICC;
  - (iv) the questioning of any person being investigated or prosecuted;
  - (v) the service of documents, including judicial documents;
  - (vi) facilitating the voluntary appearance of persons as witnesses or experts before the ICC;
  - (vii) the temporary transfer of prisoners;
  - (viii) the examination of places or sites, including the exhumation and examination of grave sites;
  - (ix) the execution of searches and seizures;
  - (x) the provision of records and documents, including official records and documents;
  - (xi) the protection of victims and witnesses and the preservation of evidence;
  - (xii) the identification, tracing and freezing, or seizure of proceeds, property and assets, and

- instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; or
- (xiii) any other type of assistance that is not prohibited by the law of Kenya, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the ICC; or
- (b) any of the following provisions of the Rome Statute—
- (i) paragraph 8 of article 19 (which relates to various steps that the Prosecutor may take with the authority of the ICC);
  - (ii) article 56 (which relates to various measures that can be taken by the Pre-Trial Chamber);
  - (iii) article 64 (which relates to various measures that can be taken by the Trial Chamber);
  - (iv) article 76 (which relates to the imposition of sentence by the Trial Chamber);
  - (v) article 109 (which relates to the enforcement of fines and forfeiture measures).
- (2) Nothing in this section—
- (a) limits the type of assistance that the ICC may request under the Rome Statute or the ICC Rules (whether in relation to the provision of information or otherwise); or
  - (b) prevents the provision of assistance to the ICC otherwise than under this Act, including assistance of an informal nature.

Requests to be made through authorised channel.  
(*Cf.* Rome Statute, articles 87 (1) (a) and (b).)

- 21.** (1) A request for assistance shall be made through an authorised channel and—
- (a) in the case of a request to which Part IV applies, be transmitted to the Minister; or
  - (b) in any other case, be transmitted to the Attorney-General or a person authorised by the Attorney-General to receive requests.

- (2) In this section, “authorised channel” means—

- (a) the diplomatic channel to the Minister responsible for foreign affairs; or
- (b) any other appropriate channel that Kenya may designate at the time it ratifies the Rome Statute or at any subsequent time in accordance with the ICC Rules.

(3) This section has effect subject to section 22.

Urgent requests.  
(Cf. Rome Statute articles 87.1 (b), 91 (1), 96 (1).)

**22.** (1) In urgent cases a request for assistance (including a request for provisional arrest) may be—

- (a) made using any medium capable of delivering a written record; or
- (b) transmitted through the International Criminal Police Organisation or any other appropriate regional organisation, instead of through an authorised channel (as defined in section 21).

(2) If a request is made or transmitted in the first instance in the manner specified in subsection (1), it shall be followed as soon as practicable by a formal request transmitted in the manner specified in section 21.

Execution of requests.  
(Cf. Rome Statute articles 88, 99 (1).)

**23.** (1) If the ICC makes a request for assistance, the request shall be dealt with in accordance with the relevant procedure under the law of Kenya (as provided in this Act).

(2) If the request for assistance specifies that it should be executed in a particular manner that is not prohibited by Kenyan law or by using a particular procedure that is not prohibited by Kenyan law, the Attorney-General or the Minister, as the case may be, shall use his best endeavours to ensure that the request is executed in that manner or using that procedure, as the case may require.

Consultation.  
(Cf. Rome Statute, articles 93 (5), 93 (8) (b) and (c), 97)

**24.** (1) The Attorney-General or the Minister, as the case may be, shall consult with the ICC without delay if—

- (a) a request for assistance is received from the ICC that does not contain or is not accompanied by the

appropriate information or the appropriate documents specified in articles 87, 91, 92, 93, or 96 of the Rome Statute;

- (b) the ICC has not provided sufficient information for a request for assistance to be executed;
- (c) in the case of a request for surrender—
  - (i) the person sought cannot be located in Kenya; or
  - (ii) it appears that the person in Kenya is clearly not the person named in the warrant or judgment, as the case may be;
- (d) execution of a request for assistance in its current form would require the breach of an existing treaty obligation to another State; or
- (e) for any other reason there are or may be difficulties with the execution of a request for assistance received from the ICC.

(2) Before refusing any request for assistance, the Attorney-General or the Minister, as the case may be, shall consult with the ICC to ascertain whether the assistance sought could be provided—

- (a) subject to conditions; or
- (b) at a later date or in an alternative manner.

(3) Without limiting the types of conditions under which assistance may be provided, the Attorney-General may agree to the transmission of documents or information to the Prosecutor on a confidential basis, on the condition that the Prosecutor will use them solely for the purpose of generating new evidence.

(4) If the Attorney-General transmits documents or information subject to the condition specified in subsection (3), the Attorney-General may subsequently consent to the disclosure of such documents or information for use as evidence under the provisions of Parts 5 and 6 of the Rome Statute and in accordance with the ICC Rules.

Confidentiality of request.  
(Cf. Rome Statute, articles 87 (3) and 87 (4).)

**25.** (1) A request for assistance and any documents supporting the request shall be kept confidential by the Kenyan authorities who deal with the request, except to the extent that the disclosure is necessary for execution of the request.

(2) Without limiting the generality of subsection (1), if the ICC requests that particular information that is made available with a request for assistance be provided and handled in a manner that protects the safety and physical or psychological well-being of any victims, potential witnesses, and their families, the Kenyan authorities shall use their best endeavours to give effect to that request.

(3) In this section, “Kenyan authorities” means—

- (a) the Attorney-General;
- (b) the Minister;
- (c) every member of the police force;
- (d) every prison officer; and
- (e) every employee of or contractor engaged by a Kenyan agency that is authorised to deal with the request.

Response to be sent to ICC.  
(Cf. Rome Statute, articles 86, 90 (8), 93 (6).)

**26.** (1) The Attorney-General or the Minister, as the case may be, shall notify the ICC, without delay, of his response to a request for assistance and of the outcome of any action that has been taken in relation to it.

(2) If the Attorney-General or the Minister decides, in accordance with the Rome Statute and this Act, to refuse or postpone the assistance requested, in whole or in part, the notice to the ICC shall set out the reasons for the decision.

(3) If the request for assistance cannot be executed for any other reason, the notice to the ICC shall set out the reasons for the inability or failure to execute the request.

(4) In the case of an urgent request for assistance, any documents or evidence produced in response shall, at the

request of the ICC, be sent urgently to it.

(5) Documents or evidence provided or produced in response to a request for assistance from the ICC shall be transmitted to the ICC in their original language and form.

Official capacity of person no bar to request.  
(Cf. Rome Statute, article 27 (2).)

**27.** (1) The existence of any immunity or special procedural rule attaching to the official capacity of any person shall not constitute a ground for—

- (a) refusing or postponing the execution of a request for surrender or other assistance by the ICC;
- (b) holding that a person is ineligible for surrender, transfer, or removal to the ICC or another State under this Act; or
- (c) holding that a person is not obliged to provide the assistance sought in a request by the ICC.

(2) Subsection (1) shall have effect subject to sections 62 and 115, but notwithstanding any other enactment or rule of law.

#### **PART IV—ARREST AND SURRENDER OF PERSONS TO ICC**

Request for arrest and surrender.  
(Cf. Rome Statute, articles 58, 60 (5), 91 (2)-(4), 92 (1).)

**28.** (1) This Part shall apply to a request made by the ICC under paragraph 1 of article 89 of the Rome Statute for the arrest and surrender from Kenya of—

- (a) a person in respect of whom the Pre-Trial Chamber has issued a warrant of arrest under article 58 or article 60 of the Rome Statute for an international crime; or
- (b) a person who has been convicted by the ICC of an international crime.

(2) This Part shall apply to a request made under article 92 of the Rome Statute for the provisional arrest of a person accused or convicted of an international crime.

(3) The provisions of this Part applying in respect

of—

- (a) arrest where a request for surrender is received (sections 29 to 31);
- (b) provisional arrest in urgent cases (sections 32 to 34);
- (c) remand and bail (sections 35 to 38);
- (d) eligibility for surrender (sections 39 to 42); and
- (e) surrender and temporary surrender (sections 43 to 50),

shall have effect subject to sections 51 to 62 (which prescribe restrictions on surrender and the execution of a request for surrender).

Minister to request issue of arrest warrant. (Cf. Rome Statute, article 59 (1).)

**29.** (1) If a request for surrender is received, other than a request for provisional arrest referred to in section 28 (2), the Minister shall, if satisfied that the request is supported by the information and documents required by article 91 of the Rome Statute, notify a Judge of the High Court in writing that it has been made and request that the Judge issue a warrant for the arrest of the person whose surrender is sought.

(2) If a notice is sent to a Judge under subsection (1), the Minister shall also send to the Judge a copy of the request and supporting documents.

Issue of arrest warrant.

**30.** (1) After receiving a request under section 29, the Judge may issue a warrant in the prescribed form for the arrest of the person if the Judge is satisfied on the basis of information presented to him that—

- (a) the person is or is suspected of being in Kenya or may come to Kenya; and
- (b) there are reasonable grounds to believe that that person is the person to whom the request for surrender from the ICC relates.

(2) The Judge shall give reasons for the issue or refusal to issue a warrant under subsection (1)

Cancellation of warrant.

**31.** (1) The Minister may at any time, apply to High Court for the cancellation of the warrant.

(2) If under this section the High Court orders the cancellation of a warrant, the warrant ceases to have effect and any person arrested under the warrant shall be released, unless the person is otherwise liable to be detained in custody.

*Provisional Arrest in Certain Cases*

Provisional arrest warrant.  
(Cf. Rome Statute, article 92)

**32.** (1) A Judge of the High Court may issue a provisional warrant in the prescribed form for the arrest of a person if the Judge is satisfied on the basis of the information presented to him that—

- (a) a warrant for the arrest of a person has been issued by the ICC or, in the case of a convicted person, a judgment of conviction has been given in relation to an international crime;
- (b) the person named in the warrant or judgment is or is suspected of being in Kenya or may come to Kenya; and
- (c) it is necessary or desirable for an arrest warrant to be issued urgently.

(2) A warrant may be issued under this section even though no request for surrender has yet been made or received from the ICC.

Notice to be given to Minister.

**33.** (1) If a Judge issues a provisional arrest warrant under section 32, the applicant for the warrant shall report the issue of the warrant to the Minister without delay.

(2) The applicant shall include in the report to the Minister a copy of the warrant issued by the ICC, or the judgment of conviction, as applicable, and the other documentary evidence that the applicant produced to the Judge.

Procedure where provisional arrest warrant issued.

**34.** (1) If a person has been arrested on a provisional arrest warrant issued under section 32, the following

(Cf. Rome Statute, article 92 (1).) provisions shall apply—

- (a) the hearing of the proceedings shall not proceed until the High Court receives from the Minister a notice in writing stating that a request for the surrender of the person has been transmitted to the Minister in the manner specified in section 21;
- (b) pending the receipt of the notice from the Minister, the proceedings may from time to time be adjourned;
- (c) the High Court shall set a date by which the notice is to be transmitted to it, and in so doing shall have regard to—
  - (i) any provision in the ICC Rules that prescribes the maximum period for transmission by the ICC of the request and supporting documents to the requested State;
  - (ii) if there is no such provision, the time it is likely to take for the ICC to prepare and transmit the request and supporting documents to Kenya;
  - (iii) the time it is likely to take for the Minister to consider the request after receipt and for the notice to be transmitted to the High Court;
- (d) if the High Court does not receive the notice within the time fixed by the Court under paragraph (c), and does not extend that time under subsection (2), the High Court shall discharge the person.

(2) The High Court may, from time to time, in its discretion, extend any time fixed by it under subsection (1)(c).

#### *Remand and Bail*

Procedure following arrest. (Cf. Rome Statute, article 59 (2)-(4).)

**35.** (1) A person arrested on a warrant issued under section 30 or section 32 shall, unless sooner discharged, be brought before the High Court as soon as possible.

(2) The person—

- (a) is not entitled to bail as of right; and
- (b) shall not be permitted to go at large without bail.

(3) If the High Court remands the person on bail, the Court may impose any conditions of bail it thinks fit.

(4) Without limiting the factors it may take into account in making a decision to grant bail, the High Court shall have regard to the following—

- (a) the gravity of the alleged crimes;
- (b) whether there are urgent and exceptional circumstances that favour the grant of bail; and
- (c) whether necessary safeguards exist to ensure that Kenya can fulfil its duty under the Rome Statute to surrender the person to the ICC.

(5) In making a decision to grant bail, the High Court shall not be concerned to inquire whether any warrant of arrest or judgment issued by the ICC was properly issued in accordance with the Rome Statute.

Procedure for bail.  
(Cf. Rome Statute,  
article 59 (2)-(6).)

**36.** (1) If an application for bail is made, the Minister shall notify the ICC, which may make recommendations to the Minister, which shall be conveyed to the High Court.

(2) Before rendering its decision, the High Court shall consider any recommendations that the ICC has made, including any recommendations on measures to prevent the escape of the person.

(3) If the person is granted bail, the Minister shall, if the ICC requests, provide periodic reports to the ICC on the person's bail status.

(4) This section shall apply, with any necessary modifications, to any bail application made during the period until the person is surrendered to the ICC or discharged according to law.

Powers of High Court.

**37.** In proceedings under this Part, except as expressly provided in this Act or in regulations made under this Act, the High Court shall have the same jurisdiction and powers, and shall conduct the proceedings in the same manner, as if the person were charged with an offence alleged to have been committed within Kenyan jurisdiction.

Detention in place other than prison. (Cf. Rome Statute, article 59 (5).)

**38.** (1) This section shall apply where the High Court orders the detention of a person at any time under this Part.

(2) If the High Court concludes that detaining the person in prison would risk the person's life or health or be undesirable for any reason, the Court may order that the person be held in custody—

(a) at the place where the person is for the time being; or

(b) at any other place that the Court considers appropriate, having regard to the risk or reason involved.

(3) The person may be held as specified in subsection (2) until—

(a) the person can be detained in a prison without risk to that person's life or health;

(b) the reason for not detaining the person in prison no longer applies; or

(c) the person is surrendered or discharged according to law.

(4) In making the order specified in subsection (2), the High Court shall have regard to any recommendations that the ICC may make regarding the place of the person's detention.

#### *Eligibility for Surrender*

Determination of eligibility for

**39.** (1) If a person is brought before a High Court under this Part, the Court shall determine whether the

surrender.  
(Cf. Rome Statute,  
article 59 (2).) person is eligible for surrender in relation to the  
international crime or crimes for which surrender is  
sought.

(2) Subsection (1) shall have effect subject to sections  
34 and 41.

(3) The person is eligible for surrender if—

- (a) a warrant for the arrest of the person issued by the  
ICC or a judgment of conviction for an  
international crime given by the ICC has been  
produced to the High Court;
- (b) the Court is satisfied that the person is the person  
to whom the warrant or judgment relates;
- (c) the Court is satisfied that the person was arrested  
in accordance with the proper process as provided  
in paragraph 2 (b) of article 59 of the Rome  
Statute; and
- (d) the Court is satisfied that the person's rights were  
respected as provided in paragraph 2 (c) of article  
59 of the Rome Statute.

(4) Neither subsection (3) (c) nor subsection (3) (d)  
shall apply unless the person concerned puts the matter at  
issue.

(5) Notwithstanding subsection (3), the person is not  
eligible for surrender if he satisfies the High Court that a  
mandatory restriction on the surrender of the person  
specified in section 51 (1) applies.

(6) In any proceedings under this section—

- (a) the person to whom the proceedings relate is not  
entitled to adduce, and the High Court is not  
entitled to receive, evidence to contradict an  
allegation that the person has engaged in conduct  
that constitutes the offence for which the  
surrender is sought; and
- (b) in the case of a person accused of an offence,  
nothing in this section requires evidence to be  
produced or given at the hearing to establish,

according to the law of Kenya, that the trial of the person would be justified if the conduct constituting the offence had occurred within the jurisdiction of Kenya.

Adjournment of hearing.

**40.** (1) The High Court may adjourn the hearing for such period as it considers reasonable to allow a deficiency or deficiencies to be remedied if—

- (a) a document or documents containing a deficiency or deficiencies of relevance to the proceedings are produced; and
- (b) the High Court considers the deficiency or deficiencies to be of a minor character.

(2) Subsection (1) does not limit the circumstances in which the High Court may adjourn a hearing.

Surrender by consent.  
(Cf. Rome Statute, article 92 (3).)

**41.** (1) A person may at any time notify the High Court that he consents to being surrendered to the ICC for the international crime or crimes for which his surrender is sought.

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

- (a) the person is before the Court when notification of the consent to surrender is given;
- (b) the person has been legally represented in the proceedings; and
- (c) the Court is satisfied that the person has freely consented to the surrender in full knowledge of its consequences.

(3) Nothing in this Part prevents a person, in respect of whom a determination of eligibility for surrender is made by the High Court under section 39, from subsequently notifying the Minister that he consents to surrender.

(4) A person arrested under a provisional warrant may consent to surrender before a request for surrender is

received, in which case—

- (a) the Minister may make a surrender order as if a request for surrender had been received; and
- (b) section 34 (1) (a) shall not apply.

Procedure following determination on eligibility or consent to surrender.

**42.** (1) This section shall apply if—

- (a) the High Court has determined in accordance with section 39 that a person is eligible for surrender; or
- (b) a person has consented to surrender to the ICC in accordance with section 41.

(2) If this section applies, the High Court shall—

- (a) issue a warrant for the detention of the person in a prison or other place authorised in accordance with section 38, pending the surrender of the person to the ICC or his discharge according to law;
- (b) send to the Minister a copy of the warrant of detention and such report on the case as the court thinks fit;
- (c) inform a person to whom subsection (1) (a) applies that—
  - (i) subject to section 65, the person will not be surrendered until the expiration of fifteen days after the date of the issue of the warrant;
  - (ii) during that time the person has the right to make an application for a writ of habeas corpus; and
  - (iii) the person has the right to lodge an appeal under section 63;
- (d) inform a person to whom subsection (1) applies that the Minister is to determine whether to issue a surrender order before the person can be surrendered to the ICC; and
- (e) inform the person that if a surrender order is made and the person is not removed within two months, the person may apply to be discharged under section 69.

(3) If the High Court issues a warrant under subsection (2), the Court may grant bail to the person in accordance with section 35.

(4) If the High Court is not satisfied that the person is eligible for surrender, it shall discharge the person, unless under section 69 it orders that the person continue to be detained or issues a warrant for the arrest and detention of the person, pending the determination of an appeal under section 63.

#### *Surrender and Temporary Surrender*

Minister to determine whether person to be surrendered.  
(Cf. Rome Statute, article 59 (1) and 59 (7).)

**43.** (1) If the High Court issues a warrant for the detention of a person under section 42, the Minister shall determine whether to order that the person be surrendered, giving reasons to the High Court. for any refusal to order surrender.

(2) The Minister shall make a surrender order in respect of the person concerned unless—

- (a) the Minister is satisfied that surrender of the person must be refused because a mandatory restriction on surrender specified in section 51 (1) applies;
- (b) the Minister is satisfied that one of the discretionary restrictions on surrender specified in section 51 (2) applies and that it is appropriate in the circumstances that surrender be refused;
- (c) the Minister postpones the execution of a request for surrender in accordance with section 52; or
- (d) the Minister makes a temporary surrender order under section 45.

(3) The Minister shall not make a surrender order in respect of a person until the later of the following times—

- (a) until the expiration of fifteen days after the date of the issue of the warrant of detention of that person under section 42 (2) (a); or
- (b) if an appeal, or an application for review or

habeas corpus in respect of a determination under this Act, or any appeal from such an appeal or application, is pending, until after the date that the proceedings are finally determined and the result is that the person is eligible to be surrendered.

(4) Nothing in subsection (3) shall apply to—

(a) a person who has consented to surrender under section 41, whether

(6) Subject to section 44, once the Minister has made a surrender order, the Minister shall ensure that the person is delivered up to the ICC without delay in accordance with this Act and any applicable ICC Rules.

Surrender order may take effect at later date.  
(*Cf.* Rome Statute, article 89 (4).)

**44.** (1) This section shall apply if the Minister has determined under section 43 that in all other respects it is appropriate to make a surrender order, but the person is liable to be detained in a prison because of a sentence of imprisonment imposed for a different offence against the law of Kenya.

(2) If this section applies, the Minister may, after consultation with the ICC, instead of making a surrender order that has immediate effect, or a temporary surrender order under section 45, make an order for the surrender of the person that is to come into effect when the person ceases to be liable to be detained.

Temporary surrender to ICC.  
(*Cf.* Rome Statute, article 89 (4).)

**45.** (1) This section shall apply if—

- (a) the request by the ICC for surrender relates to an international crime of which the person is accused;
- (b) the Minister has determined under section 43 that in all other respects it is appropriate to make a surrender order but the person sought is either—
  - (i) the subject of proceedings for a different offence against Kenyan law that has not been finally disposed of; or
  - (ii) liable to be detained in a prison because of a sentence of imprisonment imposed for a different offence against the law of Kenya; and
- (c) after consultation by the Minister with the ICC, the ICC requests that the person be surrendered temporarily.

(2) The Minister may make a temporary surrender order in respect of the person concerned.

(3) Before making a temporary surrender order, the Minister may seek undertakings from the ICC relating to one or more of the following matters—

- (a) the return of the person to Kenya;
- (b) the custody of the person while travelling to and from and while in the ICC's jurisdiction;
- (c) such other matters, if any, that the Minister thinks appropriate.

Decision to return to Kenya after trial.

**46.** (1) The Minister shall review whether it is appropriate for a person who has been surrendered to the ICC under a temporary surrender order to be returned to Kenya in accordance with undertakings received from the ICC, if the person is convicted by the ICC of an international crime and sentenced to imprisonment.

(2) The Minister may determine that he no longer requires the undertaking relating to return to be complied with and, if so, shall inform the ICC without delay.

Request to return to ICC after temporary surrender.

**47.** (1) The Minister may make a surrender order in relation to a person who was surrendered to the ICC under a temporary surrender order if—

- (a) the person has been convicted by the ICC of an international crime and sentenced to imprisonment;
- (b) the person is returned to Kenya in order for the Kenyan proceedings or sentence to be completed; and
- (c) the ICC, at any time before the person ceases to be the subject of Kenyan proceedings or ceases to be liable to be detained in a Kenyan prison, requests that, when he ceases to be the subject of such proceedings or ceases to be so liable, the person be surrendered to serve the sentence imposed by the ICC.

(2) An order under subsection (1) shall not be made unless the Minister has determined, in accordance with section 43, that the person is to be surrendered.

(3) If a surrender order is made under this section, the order takes effect on the same day that the person ceases to be subject to the Kenyan proceedings or ceases to be liable to be detained in a Kenyan prison.

Kenyan sentences  
continue to run.

**48.** (1) If a person who is subject to a sentence of imprisonment is released from a Kenyan prison under a surrender order made under section 43 or a temporary surrender order made under section 45, the person shall be treated, while in custody in connection with the request or the crime to which the request related, as the case may be (including custody outside Kenya), as being in custody for the purposes of the Kenyan sentence, which, subject to subsection (3), shall continue to run.

(2) If, while a person is within the jurisdiction of the ICC under a temporary surrender order or surrender order, the person ceases to be liable to be detained in a Kenyan prison, the Minister shall inform the ICC that any undertakings relating to custody referred to in section 45 (3) (a) and section 45 (3) (b) no longer need to be complied with.

(3) Nothing in this section affects the ICC's power to direct that any sentence of imprisonment that it imposes shall be cumulative on a sentence imposed under Kenyan law.

Form and  
execution of  
surrender order or  
temporary  
surrender order.

**49.** A surrender order made under section 43 or a temporary surrender order made under section 45 shall be in the prescribed form, if any, and shall—

(a) specify all the international crimes in relation to which the person is being surrendered;

(b) either—

(i) require the person in whose custody the person to be surrendered is being held (if the person is being held in custody) to release the person to be surrendered into the custody of a member of the police force, or a prison officer; or

(ii) if the person to be surrendered is on bail,

authorise any member of the police force to take the person into custody;

- (c) authorise the member of the police force or prison officer, as the case may be, to transport the person in custody and, if necessary or convenient, to detain the person in custody, for the purpose of enabling the person to be placed in the custody of a person who is, in the opinion of the Minister, duly authorised to receive the person to be surrendered in the name of and on behalf of the ICC; and
- (d) authorise the duly authorised person referred to in paragraph (c) to take the person to be surrendered into custody and transport the person out of Kenya as soon as practicable to the ICC, there to be dealt with according to law.

Surrender to State of enforcement.  
(Cf. Rome Statute, article 111.)

**50.** (1) If a request for surrender relates to a convicted person who has escaped from custody and the ICC directs, under article 111 of the Rome Statute, that the person be delivered to the State in which the person was serving the sentence or to any other State designated by the ICC, the Minister shall arrange for the person to be delivered to the State specified in the direction.

(2) In any case in which subsection (1) applies, the surrender order may specify that the person be surrendered into the custody of duly authorised representatives of the State specified in the direction.

#### *Restrictions on Surrender*

Refusal of surrender.

**51.** (1) The Minister shall refuse a request by the ICC for the surrender of a person if—

- (a) there have been previous proceedings against the person and section 53 (3) applies;
- (b) the ICC determines that the case is inadmissible and section 55 (3) or section 56 (2) applies; or
- (c) section 62 (2) applies.

(2) The Minister may refuse a request by the ICC for the surrender of a person if—

- (a) there are competing requests from the ICC and a State that is not a party to the Rome Statute relating to the same conduct and section 59 (4) applies; or
- (b) there are competing requests from the ICC and a State that is not a party to the Rome Statute relating to different conduct and section 60 (3) applies.

request, the postponement may be for a reasonable time and may, if the Minister considers it desirable, be extended from time to time.

(4) A decision by the Minister to postpone the execution of a request—

(a) does not limit or affect—

(i) the High Court's ability to accept notification of consent to the surrender;

(ii) the ability to continue to detain a person under any warrant issued under this Part; and

(b) does not affect the validity of any act that has been done or any warrant or order made under this Part before the decision was made.

(5) If no decision on the execution of the request for surrender is made within six months after the date of the Minister's decision to postpone the execution of the request, the person may apply to a Judge of the High Court to be discharged.

(6) If an application to be discharged is made under subsection (5), the Judge may, on proof that reasonable notice of the intention to make the application has been given to the Minister, unless sufficient cause is shown against the discharge—

(a) discharge any order made under this Act; and

(b) order the discharge of the person from the place where the person is detained, if the person is not liable to be detained under any other order for detention.

Previous proceedings against person sought.  
(*Cf.* Rome Statute, articles 20 (1), 20 (3), 89 (2).)

**53.** (1) Where the person whose surrender is sought alleges that—

(a) the case is one to which paragraph 1 of article 20 of the Rome Statute applies (because it relates to conduct that formed the basis of crimes for which the person has been convicted or acquitted by the ICC); or

(b) the person has been tried by another court for

conduct also proscribed under article 6, 7, or 8 of the Rome Statute and the case is not one to which paragraph 3 (a) and (b) of article 20 of the Rome Statute applies,

the Minister shall immediately consult with the ICC to determine if there has been a relevant ruling on admissibility under the Rome Statute.

(2) If the ICC has ruled that the case is admissible, surrender cannot be refused on the ground there have been previous proceedings.

(3) If the ICC has ruled that the case is inadmissible under article 20 of the Rome Statute, surrender shall be refused on the ground that there have been previous proceedings.

(4) If an admissibility ruling is pending, the Minister may postpone the execution of a request until the ICC has made a determination on admissibility.

Ongoing Kenyan investigation or proceedings involving different conduct.  
(*Cf.* Rome Statute, article 94.)

**54.** (1) Where the ICC makes a request for surrender that would interfere with any investigation or proceedings in Kenya involving different conduct, the Minister may, after consultation with the ICC—

- (a) proceed with the execution of the request in accordance with section 52 (2), despite the Kenyan investigation or proceedings; or
- (b) postpone the execution of the request until the Kenyan investigation or proceedings have been finally disposed of.

(2) Nothing in this section limits or affects section 44 which allows the Minister, after consultation with the ICC, to make a surrender order that comes into force at a later date if a person is serving a sentence for a different offence against Kenyan law.

Person being prosecuted in Kenya for same conduct.  
(*Cf.* Rome Statute,

**55.** (1) This section shall apply if—

- (a) the ICC makes a request for surrender;
- (b) the request relates to conduct that would con-

articles 17 (1), 19  
(2) (b), 95.)

stitute an offence under Kenyan law;

(c) either—

(i) the conduct is being investigated or prosecuted in Kenya; or

(ii) the conduct had been investigated in Kenya and a decision was made not to prosecute the person sought, that decision not being due to the unwillingness or genuine inability to prosecute; and

(d) a challenge to the admissibility of the case is being or has been made to the ICC under paragraph 2 (b) of article 19 of the Rome Statute.

(2) If this section applies, the Minister may postpone the execution of the request for surrender until the ICC has made its determination on admissibility.

(3) If the ICC determines that the case is inadmissible, surrender shall be refused.

(4) If the ICC determines that the case is admissible and there is no other ground for refusing or postponing the request, the request shall continue to be dealt with under this Part.

Other challenges  
to admissibility.  
(Cf. Rome statute,  
article 95.)

**56.** (1) If the ICC is considering an admissibility challenge under article 18 or article 19 of the Rome Statute, other than a challenge of the kind referred to in section 53 or section 55, the Minister may postpone the execution of a request under this Part pending a determination by the ICC.

(2) If the ICC determines that the case is inadmissible, surrender shall be refused.

(3) If the ICC determines that the case is admissible, and there is no other ground for refusing or postponing the request, the request shall continue to be dealt with under this Part.

Request from ICC  
and other State

**57.** If a request for surrender of a person is received

relating to same conduct.  
(Cf. Rome Statute, article 90 (1).)

from the ICC and one or more States also request the extradition of the person for the same conduct that forms the basis of the crime for which the ICC seeks the person's surrender, the Minister—

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- (a) shall notify the ICC and the requesting State of that fact; and
- (b) shall determine, in accordance with section 58 or section 59, but without regard to any provision of the Extradition (Commonwealth Countries) Act or the Extradition (Contiguous and Foreign Countries) Act, whether the person is to be surrendered to the ICC or to the requesting State.

Procedure where competing request from State Party.  
(Cf. Rome Statute, article 90 (2).)

**58.** (1) If section 57 applies and the requesting State is a party to the Rome Statute, priority shall be given to the request from the ICC if—

- (a) the ICC has, under article 18 or article 19 of the Rome Statute, made a determination that the case in respect of which surrender is sought is admissible and that determination takes into account the investigation or prosecution conducted by the requesting State in respect of its request for extradition; or
- (b) the ICC makes such a determination after receiving notification of the competing request.

(2) If the request is one to which subsection (1) (b) relates, then, pending the ICC's determination—

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- (a) the steps required to be taken under the Extradition (Commonwealth Countries) Act or the Extradition (Contiguous and Foreign Countries) Act, as the case may be, in relation to a request for extradition may continue to be taken; and
- (b) no person may be surrendered under the relevant Act unless and until the ICC makes its decision on admissibility and determines that the case is inadmissible.

Procedure where competing request from non-State

**59.** (1) If section 57 applies and the requesting State is not a party to the Rome Statute, priority shall be given to

Party.  
(Cf. Rome Statute,  
article 90 (4)-(6).)

the request for surrender from the ICC if—

- (a) Kenya is not under an international obligation to extradite the person to the requesting State; and
- (b) the ICC has determined under article 18 or article 19 of the Rome Statute that the case is admissible.

(2) If section 57 applies and the requesting State is not a party to the Rome Statute, the request for extradition may continue to be dealt with if—

- (a) Kenya is not under an international obligation to extradite the person to the requesting State; and
- (b) the ICC has not yet determined under article 18 and article 19 of the Rome Statute that the case is admissible.

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(3) Notwithstanding subsection (2), no person may be surrendered under the Extradition (Commonwealth Countries) Act or the Extradition (Contiguous and Foreign Countries) Act, as the case may be, unless and until the ICC makes its decision on admissibility and determines that the case is inadmissible.

(4) If section 57 applies, and the requesting State is not a party to the Rome Statute, and Kenya is under an international obligation to extradite the person to the requesting State, the Minister shall determine whether to surrender the person to the ICC or extradite the person to the requesting State.

(5) In making the determination under subsection (4), the Minister shall consider all the relevant factors, including—

- (a) the respective dates of the requests;
- (b) the interests of the requesting State, including, if relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought; and
- (c) the possibility of subsequent surrender between the ICC and the requesting State.

Request from ICC and other State relating to different conduct. (Cf. Rome Statute, article 90 (7).)

**60.** (1) If a request for surrender of a person is received from the ICC and a request for the extradition of that person is received from one or more States for conduct other than that which constitutes the crime for which the ICC seeks the person's surrender, the Minister shall determine whether the person is to be surrendered to the ICC or to the requesting State.

(2) If Kenya is not under an existing international obligation to extradite the person to the requesting State, priority shall be given to the request from the ICC.

(3) If Kenya is under an existing international obligation to extradite the person to the requesting State, the Minister shall determine whether to surrender the person to the ICC or to extradite the person to the requesting State.

(4) In making the determination under subsection (3), the Minister shall consider all the relevant factors, including those matters specified in section 59, but shall give special consideration to the relative seriousness of the offences for which surrender is sought.

Notification of decision on extradition to requesting State. (Cf. Rome Statute, article 90 (8).) Cap. 77. Cap. 76.

**61.** (1) If, following notification under article 90 of the Rome Statute, the ICC has determined that a case is inadmissible and the Minister subsequently refuses extradition of the person to the requesting State under the Extradition (Commonwealth Countries) Act or the Extradition (Contiguous and Foreign Countries) Act, as the case may be, the Minister shall notify the ICC of this decision.

(2) The obligation in this section is in addition to the requirement in section 26 for the Minister to respond formally to the request from the ICC.

Conflict with obligations to another State. (Cf. Rome Statute, article 98.)

**62.** (1) Where—

- (a) the ICC makes a request for surrender;
- (b) the ICC has not previously made a final determination on whether or not article 98 of the Rome Statute applies to that request; and

- (c) a request is made to the ICC to determine whether or not article 98 of the Rome Statute applies to the request for surrender,

the Minister may postpone the request for surrender until the ICC advises whether or not it intends to proceed with the request for surrender.

(2) If the ICC advises that it does not intend to proceed with the request, surrender shall be refused.

(3) If the ICC advises that it intends to proceed with the request for surrender, and there is no other ground for refusing or postponing the request, the request shall continue to be dealt with under this Part.

*Appeals against Determinations of Eligibility for Surrender*

Appeal on question of law by way of case stated.

**63.** (1) If the High Court determines under section 39 that a person is or is not eligible for surrender in relation to any crime for which surrender is sought, and either party considers the determination erroneous in point of law, the party may appeal against the determination to the Court of Appeal on a question of law only.

(2) To lodge an appeal the party shall, within fifteen days after the determination, file in the office of the court that made the determination a notice of appeal in the prescribed form.

Custody pending determination of appeal.

**64.** (1) The High Court may order that the person who is the subject of the determination continue to be detained or, as the case may be, issue a warrant for the arrest and detention of the person, pending the determination of the appeal if—

- (a) the High Court makes a determination under section 39; and
- (b) immediately after the High Court makes the determination, either party informs the High Court that the party intends to appeal against the determination.

(2) The High Court or the Court of Appeal may order that the person who is the subject of the determination continue to be detained or, as the case may be, issue a warrant for the arrest and detention of the person, pending the determination of the appeal if—

- (a) the High Court makes a determination under section 39; and
- (b) either party files a notice of appeal against the determination.

(3) If a person is detained under an order made under this section or is arrested and detained under a warrant issued under this section, sections 35 to 38 shall apply, with any necessary modifications, to the detention of the person as if the appeal proceedings were proceedings under section 39 to determine whether or not the person is eligible for surrender.

Waiver of rights to apply for habeas corpus or to lodge appeal.

**65.** Without limiting the operation of section 41, a person whose surrender is sought may, by a waiver in the prescribed form, waive the following rights—

- (a) the right to make an application for a writ of habeas corpus within fifteen days after the issue of a warrant of detention; and
- (b) the right, in relation to any international crime or crimes for which the High Court has determined that the person is eligible for surrender, to lodge an appeal under this Part.

Powers of court on appeal.

**66.** (1) The Court of Appeal shall hear and determine the question or questions of law arising on any case transmitted to it, and do one or more of the following things—

- (a) reverse, confirm, or amend the determination in respect of which the case has been stated;
- (b) remit the determination to the High Court for reconsideration together with the opinion of the Court of Appeal on the determination;
- (c) remit the determination to the High Court with a direction that the proceedings to determine whether the person is eligible for surrender be

reheard;

- (d) make any other order in relation to the determination that it thinks fit.

(2) In hearing and determining the question or questions of law arising on any case transmitted to it, the Court of Appeal—

- (a) shall not have regard to any evidence of a fact or opinion that was not before the High Court when it made the determination appealed against; and
- (b) may in the same proceedings hear and determine any application for a writ of habeas corpus made in respect of the detention of the person whose surrender is sought.

Further provisions relating to powers of court on appeal.

**67.** (1) If the appeal is against a determination that a person is eligible for surrender, and the Court of Appeal reverses the determination, the Court of Appeal shall also either—

- (a) discharge the person; or
- (b) remit the determination to the High Court with a direction that the proceedings to determine whether the person is eligible for surrender be reheard.

(2) If the appeal is against a determination that a person is eligible for surrender in respect of two or more international crimes, and the Court of Appeal finds that the determination includes an error of law that relates to only one or some of those international crimes, the Court of Appeal may amend the determination and—

- (a) discharge the person in respect of that international crime or those international crimes; or
- (b) remit the determination to the High Court with a direction that the proceedings to determine whether the person is eligible for surrender be reheard in respect of that international crime or those international crimes.

(3) Notwithstanding subsections (1) and (2), if an

appeal is against a determination that a person is eligible for surrender, and the Court of Appeal finds that there has been an error of law, it may nevertheless decline to reverse or amend the determination in respect of which the case has been stated if it considers that no substantial wrong or miscarriage of justice has occurred and that the determination ought to be upheld.

(4) If the appeal is against a determination that a person is not eligible for surrender, and the Court of Appeal finds that the determination includes an error of law, the Court of Appeal may—

- (a) exercise the powers of a High Court under section 42 as if it were the High Court (for which purpose subsection (2) (c) of that section shall not apply); or
- (b) if it remits the determination to the High Court, issue a warrant for the arrest and detention of the person pending the High Court's reconsideration of the determination or rehearing of the proceedings to determine whether the person is eligible for surrender; and section 64 (3) shall apply to any warrant issued under this paragraph as if the warrant were issued under that section.

(5) Subsections (1), (2), and (4) do not limit the operation of section 66.

#### *Discharge of Person*

Discharge of person if Minister declines to order surrender.

**68.** If the Minister determines under section 43 that the person is not to be surrendered, the person shall be discharged from custody immediately unless the person is subject to any other order for detention.

Discharge of person if not surrendered within two months.

**69.** (1) This section shall apply if a person is not surrendered and conveyed out of Kenya under a surrender order or a temporary surrender order made under this Part within two months—

- (a) after the date of the issue of the warrant for the detention of the person under section 42 pending

surrender, if no appeal or application for review or habeas corpus, in respect of a determination under this Act, or any appeal from such an appeal or application, is pending;

- (b) if an appeal, or an application for review or habeas corpus, in respect of a determination under this Act, or any appeal from such an appeal or application, is pending, after the date that the proceedings are finally determined; or
- (c) if a surrender order is made under section 44, after the date that the order takes effect.

(2) If this section applies, the person may apply to a Judge of the High Court to be discharged.

(3) If an application to be discharged is made under subsection (2), the Judge may, on proof that reasonable notice of the intention to make the application has been given to the Minister, unless sufficient cause is shown against the discharge—

- (a) discharge the surrender order or temporary surrender order, as the case may be; and
- (b) order the discharge of the person from the place where the person is detained, if the person is not liable to be detained under any other order for detention.

Discharge of person if not resurrendered.

**70.** (1) If a person has been surrendered under a temporary surrender order made under section 45, nothing in section 69 prevents an order being made under section 47.

(2) Where—

- (a) an order is made under section 47; and
- (b) the person is not surrendered and conveyed out of Kenya under this Part within two months after the date that the person ceases to be liable to be detained under the sentence of imprisonment imposed by a Kenyan court,

the person may apply to a Judge of the High Court to be

discharged.

(3) If an application to be discharged is made under subsection (2), the Judge may, on proof that reasonable notice of the intention to make the application has been given to the Minister, unless sufficient cause is shown against the discharge—

- (a) discharge the surrender order; and
- (b) order the discharge of the person from the place where the person is detained, if the person is not liable to be detained under any other order for detention.

Discharge of person under this Part does not preclude further proceedings. (Cf. Rome Statute, article 92 (4).)

**71.** The discharge of a person under any provision of this Part does not preclude further proceedings under this Act, whether or not they are based on the same conduct, to surrender the person to the ICC.

*Miscellaneous Provisions relating to Arrest and Surrender*

Search and seizure on arrest.

**72.** (1) If a person is arrested on a warrant issued under this Part, a member of the police force may, without further warrant, search the person arrested and may seize any thing, including any sum of money, found on him or in his possession if the member of the police force believes on reasonable grounds that the thing on the person or in his possession may be evidence as to the commission of any offence in relation to which the warrant to arrest was issued or for which the surrender of the person is sought by the ICC.

(2) If there is no suitable searcher available at the place where the search is to take place, the person to be searched may be taken to another place to be searched.

(3) Nothing in this section limits or affects the right at common law of a constable to search a person on that person's arrest or any statutory power conferred on a member of the police force.

(4) If any thing is seized under subsection (1) from the person arrested—

- (a) the member of the police force shall make a report to the Minister specifying the items seized and any other relevant information; and
- (b) the Minister shall, on receipt of the report referred to in paragraph (a), provide the ICC with a report on the seizure.

Disposal of  
property seized.

**73.** (1) If the Minister makes a surrender order or temporary surrender order under this Act, the Minister may also direct that any thing that was seized under section 72 that may be evidence of the offence the person is alleged to have committed or has committed be delivered with the person on his surrender to the ICC.

(2) If the person cannot be surrendered or temporarily surrendered by reason of the person's death or escape from custody, the Minister may direct that any thing that was seized under section 72 that may be evidence of the offence the person is alleged to have committed or has committed be delivered up to the ICC.

(3) If a person is discharged under this Act without being surrendered or temporarily surrendered, the Minister may direct that any thing seized under section 72 be returned to the person from whom it was seized.

(4) The Minister may refuse to direct that any thing referred to in subsection (1) or subsection (2) be delivered to the ICC if the thing is required for the investigation of an offence within the jurisdiction of Kenya.

(5) The Minister may refuse to direct that any thing referred to in subsection (3) be returned to the person if—

- (a) the thing is the subject of a dispute as to who is entitled to it;
- (b) the thing is required for the investigation of an offence within the jurisdiction of Kenya; or
- (c) possession of the thing by the person would be unlawful in Kenya.

Information about time spent in custody in Kenya. (Cf. Rome Statute, article 78 (2).)

**74.** (1) If the ICC requests the surrender of a person, and that person is detained in a Kenyan prison or any other place at any time pending surrender, the officer in charge of the prison or other place shall keep a record of the time spent in custody as if the person were charged with an offence against the law of Kenya and were on remand.

(2) The officer in charge shall, if requested, provide to the Minister a certificate recording—

- (a) the date on which the person was admitted to a prison or any other place to be held in custody in relation to the request;
- (b) the total period during which the person was detained in custody during the process leading to the surrender of the person to Kenya in relation to the offence or offences; and
- (c) whether the person was, at any time during the period in custody in relation to the surrender, also serving a sentence for an offence against Kenyan law.

(3) The Minister shall provide to the ICC at the time of the surrender of the person, or as soon as possible after that, a certificate recording the information specified in subsection (2) and such other information relating to any period spent in custody in relation to the surrender as the ICC may request.

Consent to trial of surrendered person for previous offences. (Cf. Rome Statute, articles 91, 101.)

**75.** (1) Where—

- (a) a person is surrendered to the ICC under this Act; and
- (b) the ICC requests a waiver of the requirements of paragraph 1 of article 101 of the Rome Statute (which relates to the rule of speciality),

the Minister may consent to the person being proceeded against, punished, or detained for conduct committed before surrender (not being the conduct or course of conduct that forms the basis of the crimes for which that person has been surrendered).

(2) The consent given under subsection (1) may relate to the person's surrender to another State.

(3) Before giving consent under subsection (1), the Minister—

(a) may request that additional information be provided in accordance with article 91 of the Rome Statute; and

(b) may seek such assurances from the ICC as the Minister thinks fit.

#### **PART V—DOMESTIC PROCEDURES FOR OTHER TYPES OF CO-OPERATION**

##### *Finding Persons or Things, and Obtaining Evidence*

Assistance in locating or identifying persons or things. (Cf. Rome Statute, articles 19 (8), 56, 64, 93 (1) (a).)

**76.** (1) Where the ICC requests assistance under paragraph 8 of article 19, article 56, article 64 or paragraph 1 (a) of article 93 of the Rome Statute in locating, or identifying and locating, a person or a thing believed to be in Kenya, the Attorney-General shall give authority for the request to proceed if he is satisfied that—

(a) the request relates to an investigation being conducted by the Prosecutor or any proceedings before the ICC; and

(b) the person to whom or thing to which the request relates is or may be in Kenya.

(2) If the Attorney-General gives authority for the request to proceed—

(a) the Attorney-General shall forward the request to the appropriate Kenyan agency; and

(b) that agency shall, without delay—

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

- (ii) advise the Attorney-General of the outcome of those endeavours.

Assistance in gathering evidence.

(Cf. Rome Statute, articles 19 (8), 56, 64, 93 (1) (a).)

**77.** (1) This section shall apply if the ICC requests, under paragraph 8 of article 19, article 56, article 64 or paragraph 1 (b) of article 93 of the Rome Statute, that—

- (a) evidence be taken in Kenya; or
- (b) documents or other articles in Kenya be produced.

(2) The Attorney-General shall give authority for the request to proceed if the Attorney-General is satisfied that—

- (a) the request relates to an investigation being conducted by the Prosecutor or to any proceedings before the ICC; and
- (b) there are reasonable grounds for believing that the evidence can be taken or, as the case may be, the documents or other articles can be produced in Kenya.

Taking evidence.

**78.** (1) If the Attorney-General gives authority for a request relating to the taking of evidence to proceed, the statement of each witness shall be taken in writing on the oath or affirmation of that witness by a Judge of the High Court.

(2) The Judge who takes evidence under subsection (1) shall—

- (a) certify that the evidence was taken by the Judge; and
- (b) ensure that the evidence, as certified, is sent to the Attorney-General.

Producing documents or other articles.

**79.** (1) If the Attorney-General gives authority for a request relating to the production of documents or other articles to proceed, a Judge of the High Court may make an order requiring their production.

(2) If the documents or other articles are produced, the

Judge shall send them to the Attorney-General together with a written statement certifying that they were produced to the Judge.

(3) Notwithstanding subsection (2), in the case of documents that are produced, the Judge may send to the Attorney-General copies of the documents certified by the Judge to be true copies instead of the originals.

Protection of witnesses.

**80.** (1) The applicable law with respect to compelling a person to appear before a Judge under section 78 or 79 and to give evidence or answer questions, or to produce documents or other articles, is the law specified in subsection (2), which law shall apply with any necessary modifications.

(2) For the purposes of subsection (1), the applicable law is the law of Kenya that applies to the giving of evidence or the answering of questions or the production of documents or other articles on the hearing of a charge against a person for an offence against the law of Kenya.

(3) Notwithstanding subsection (1), for the purposes of sections 78 and 79, the person to whom the investigation being conducted by the Prosecutor, or the proceedings before the ICC, relates is competent but not compellable to give evidence.

(4) Notwithstanding subsection (1), a person who is required under section 78 or 79 to give evidence, or to produce documents or other articles, is not required to give any evidence, or to produce any document or article, that the person could not be compelled to give or produce in the investigation being conducted by the Prosecutor or the proceedings before the ICC.

(5) A person who is required under section 78 or 79 to give evidence or to produce documents or other articles—

(a) has the same privileges in relation to the answering of questions and the production of documents or articles as if the investigation were

being conducted in Kenya or the proceedings were pending in a Kenyan court, as the case may be; and

- (b) shall be given a copy of any statement required to be given to a witness under the ICC Rules in the manner and form required by those Rules.

(6) Subsections (4) and (5) shall have effect subject to section 27 and any contrary provision in the Rome Statute or the ICC Rules.

ICC may give evidence certificate.

**81.** (1) In this section, “evidence certificate” means a certificate or declaration that—

- (a) is given or made by or on behalf of the ICC; and
- (b) specifies or declares whether, under the Rome Statute or the ICC Rules, a specified person or class of persons could or could not be required to answer a specified question or to produce a specified document—
  - (i) generally;
  - (ii) in specified proceedings; or
  - (iii) in specified circumstances.

(2) An evidence certificate authenticated under subsection (3) is admissible in proceedings for the purposes of the application of section 80 (4) as prima facie evidence of the matters stated in the certificate.

(3) A certificate is authenticated for the purposes of subsection (2) if it purports to be—

- (a) signed or certified by a Judge, the Registrar, the Deputy Registrar, or a member of the staff of the ICC; or
- (b) authenticated in any other manner authorised by the Rome Statute or the ICC Rules.

Certain persons may appear.

**82.** (1) The following persons may appear and be legally represented at a hearing held under section 78 or 79—

- (a) the person to whom the proceedings before the ICC or the investigation conducted by the Prosecutor relates;
- (b) any other person giving evidence or producing documents or other articles at the hearing;
- (c) a representative of the Prosecutor or ICC.

(2) This section shall have effect subject to any contrary provision of the Rome Statute or the ICC Rules.

(3) A certificate by a Judge under section 78 (2) or section 79 (2) shall state whether any of the persons specified in subsection (1) were present when the evidence was taken or the documents or other articles were produced.

Powers of Judge may be exercised by Registrar.

**83.** (1) The Chief Justice may authorise the Registrar of the High Court to exercise the powers of a Judge under section 78 or 79 in respect of any particular case.

(2) An authorisation given under subsection (1) may be revoked at any time by the Chief Justice

(3) If a matter in respect of which the Registrar has jurisdiction under an authorisation given under subsection (1) appears to the Registrar to be one of special difficulty, the Registrar may refer the matter to a Judge, who may—

- (a) dispose of the matter; or
- (b) refer it back to the Registrar with such directions as the Judge thinks fit.

(4) Nothing in this section prevents the exercise by any Judge of any jurisdiction or powers conferred on any Registrar under this section.

#### *Questioning persons*

Assistance in questioning persons.

**84.** (1) Where the ICC requests assistance under paragraph 8 of article 19, article 56, article 64 or paragraph 1 (c) of article 93 of the Rome Statute in

questioning a person who is being investigated or prosecuted, the Attorney-General may give authority for the request to proceed if he is satisfied that—

- (a) the request relates to an investigation being conducted by the Prosecutor or any proceedings before the ICC; and
- (b) the person is or may be in Kenya.

(2) If the Attorney-General gives authority to proceed—

- (a) he shall forward the request to the appropriate Kenyan agency; and
- (b) that agency shall, without delay—
  - (i) use its best endeavours to undertake the questioning that the ICC has requested;
  - (ii) ensure that the answers to the questions put are recorded in writing and make any other report on the questioning as it considers to be appropriate in the circumstances; and
  - (iii) advise the Attorney-General of the outcome of those endeavours and, if relevant, deliver to him the record and any report of the questioning.

Procedure where questioning by Kenyan agency. (Cf. Rome Statute, article 55.)

**85.** (1) Where there are grounds to believe that a person who is to be questioned by a Kenyan agency following a request under paragraph 1 (c) of article 91 of the Rome Statute has committed a crime within the jurisdiction of the ICC, the person—

- (a) shall not be compelled to incriminate himself or herself or to confess guilt;
- (b) shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;
- (c) shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness;

and

- (d) shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in the Rome Statute; and
- (e) shall be informed, before being questioned, that there are grounds to believe that he has committed a crime within the jurisdiction of the ICC and that he has the right—
  - (i) to remain silent, without such silence being a consideration in the determination of his guilt or innocence;
  - (ii) to have legal assistance of his choosing, or, if he does not have legal assistance, to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; and
  - (iii) to be questioned in the presence of a lawyer unless he voluntarily waives the right to counsel.

(3) If there is any inconsistency between subsection (2) and any other written law, subsection (2) shall prevail to the extent of the inconsistency.

(4) If the person seeks to have legal assistance assigned under subsection (2) (e) (ii), the Attorney-General shall cause such assistance to be provided.

(5) This section does not give any person a power to require another person to answer questions.

#### *Service of Documents and Appearance of Witnesses*

Assistance in arranging service of documents.  
(*Cf.* Rome Statute, articles 19 (8), 56, 58 (7), 59 (7), 64,

**86.** (1) Where the ICC requests assistance under paragraph 8 of article 19, article 56, paragraph 7 of article 58, article 64 or paragraph 1 (d) of article 93 of the Rome Statute in arranging for the service of a document in

93 (1) (d.) Kenya, the Attorney-General ~~may~~ **shall** give authority for the request to proceed if he is satisfied that—

- (a) the request relates to an investigation being conducted by the Prosecutor or any proceedings before the ICC; and
- (b) the person or body to be served is or may be in Kenya.

(2) If the Attorney-General gives authority for the request to proceed, he shall forward the request for service to the appropriate Kenyan agency, and that agency shall, without delay—

- (a) use its best endeavours to have the process served—
  - (i) in accordance with any procedure specified in the request; or
  - (ii) if that procedure would be unlawful or inappropriate in Kenya, or if no procedure is specified, in accordance with the law of Kenya; and
- (b) transmit to the Attorney-General—
  - (i) a certificate as to service, if the document is served; or
  - (ii) a statement of the reasons that prevented service, if the document is not served.

(3) In this section, “document” includes—

- (a) a summons requiring a person to appear as a witness; and
- (b) a summons to an accused that has been issued under paragraph 7 of article 58 of the Rome Statute.

Request for voluntary appearance of witness.  
(Cf. Rome Statute, articles 19 (8), 56, 64, 93 (1) (e).)

**87.** (1) Where the ICC requests assistance under paragraph 8 of article 19, article 56, paragraph 7 of article 58, article 64 or paragraph 1 (e) of article 93 of the Rome Statute in facilitating the voluntary appearance of a witness before the ICC, the Attorney-General may give authority for the request to proceed if he is satisfied that—

- (a) the request relates to an investigation being conducted by the Prosecutor or any proceedings before the ICC; and
- (b) the witness's attendance is sought so that the witness can give evidence or information relating to the investigation or proceedings; and
- (c) the witness is or may be in Kenya.

(2) In this section and sections 88 and 89, "witness" includes a person who may give expert evidence, but does not include a person who has been accused of an international crime in the proceedings to which the request relates

Consent required and assurances may be sought. (Cf. Rome Statute, article 93 (2).)

**88.** (1) If the Attorney-General gives authority for the request to facilitate the voluntary appearance of a witness to proceed, he shall forward the request to the appropriate Kenyan agency.

(2) The Kenyan agency to which a request is forwarded under subsection (1) shall make such inquiries as may be necessary to ascertain if the prospective witness consents to giving evidence or assisting the ICC.

(3) The Attorney-General may, at any time, ask the ICC to give one or more of the following assurances—

- (a) that the witness will not be prosecuted, detained, or subjected to any restriction of personal freedom by the ICC in respect of all or any specified acts or omissions that occurred before the person's departure from Kenya;
- (b) that the witness will be returned to Kenya as soon as practicable in accordance with arrangements agreed to by the Attorney-General;
- (c) an assurance relating to such other matters as the Attorney-General thinks appropriate.

Attorney-General may facilitate appearance.

**89.** (1) The Attorney-General shall assist in the making of arrangements to facilitate a witness's attendance before the ICC if he is satisfied that—

- (a) the prospective witness has consented to giving the evidence or assistance requested; and
  - (b) the ICC has given adequate assurances where appropriate.
- (2) The Attorney-General shall —
- (a) approve and arrange the travel of the witness to the ICC;
  - (b) obtain such approvals, authorities, and permissions as are required for that purpose, including, in the case of a person who although not liable to be detained in a prison is subject to a sentence—
    - (i) the variation, discharge, or suspension of the conditions of the person's release from prison; or
    - (ii) the variation or suspension of the person's sentence, or of the conditions of the person's sentence; and
  - (c) take such other action for the purposes of subsection (1) as he thinks appropriate.

*Temporary Transfer of Prisoners*

Request for temporary transfer of prisoner.  
(Cf. Rome Statute, articles 93 (1) (f) and (7).)

**90.** Where the ICC requests assistance under paragraph 1 (f) of article 93 of the Rome Statute in facilitating the temporary transfer to the ICC of a Kenyan prisoner, the Attorney-General shall give authority for the request to proceed if he is satisfied that—

- (a) the request relates to an investigation being conducted by the Prosecutor or any proceedings before the ICC; and
- (b) the prisoner's attendance is sought for the purposes of identification or for obtaining evidence or other assistance.

Consent required and assurances may be sought.

**91.** (1) If the Attorney-General gives authority for the request to facilitate the temporary transfer of a Kenyan prisoner to proceed, he shall forward the request to the

appropriate Kenyan agency.

(2) The Kenyan agency to which a request is forwarded under subsection (1) shall make such inquiries as may be necessary to ascertain if the prisoner will consent to the transfer.

(3) The Attorney-General may ask the ICC to give one or more of the following assurances—

- (a) that the prisoner will not be released from custody without the prior approval of the Attorney-General;
- (b) that the prisoner will be returned to Kenya without delay in accordance with arrangements agreed to by the Attorney-General;
- (c) assurances relating to such other matters as he thinks appropriate.

Attorney-General may arrange for transfer.

**92.** (1) The Attorney-General may authorise the temporary transfer of a Kenyan prisoner to the ICC if he is satisfied that—

- (a) the prisoner has consented to giving the evidence or assistance requested; and
- (b) the ICC has given adequate assurances where appropriate.

(2) If the Attorney-General authorises the temporary transfer of the prisoner to the ICC, he may—

- (a) direct that the prisoner be released from the prison in which that person is detained, for the purpose of the transfer to the ICC; and
- (b) make arrangements for the prisoner to travel to the ICC in the custody of—
  - (i) a member of the police force;
  - (ii) a prison officer; or
  - (iii) a person authorised for the purpose by the ICC.

(3) A direction given by the Attorney-General under

subsection (2) in respect of a prisoner is sufficient authority for the release of the prisoner from the prison in which the prisoner is detained, for the purposes of the direction.

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(4) Every person released under a direction given under subsection (2) is to be treated, for the purposes of sections 122, 123 and 124 of the Penal Code, (which relate to rescue or escape from lawful custody), as continuing to be in lawful custody while in Kenya during the period of that release.

Effect of transfer on prisoner's sentence.

**93.** (1) If a prisoner who is charged with or convicted of an offence against the law of Kenya is transferred to the ICC under section 92, the provisions of section 94 shall apply to any period that the person spends in custody outside Kenya in connection with the request before sentence is imposed for the Kenyan offence.

(2) If a prisoner who is serving a sentence for a Kenyan offence is transferred to the ICC under section 92—

- (a) the prisoner is to be treated, while in custody outside Kenya in connection with the request, as being in custody for the purposes of the Kenyan sentence, which shall continue to run; and
- (b) the Attorney-General—
  - (i) may at any time notify the ICC that the prisoner is no longer required to be kept in custody; and
  - (ii) shall notify the ICC if the prisoner is no longer liable to be detained in a Kenyan prison.

Request for

(b) request the ICC to provide a certificate recording the total period during which the prisoner was detained outside Kenya in connection with the request until sentence was imposed for the Kenyan offence.

(2) A certificate obtained under subsection (1) shall be presumed to be accurate in the absence of any evidence to the contrary.

(3) The Attorney-General may issue a certificate setting out the date and period specified in subsection (1) if—

- (a) the ICC does not provide a certificate within a reasonable time after the Attorney-General makes a request under subsection (1); and
- (b) the Attorney-General is satisfied on such information that he has that an accurate calculation can be made of the period referred to in paragraph (b) of subsection (1).

#### *Evidence*

Assistance in examining places or sites.  
(Cf. Rome Statute, articles 19 (8), 56, 64, 93 (1) (g).)

**95.** (1) Where the ICC requests assistance under paragraph 8 of article 19, article 56, article 64 or paragraph 1 (g) of article 93 of the Rome Statute in examining places or sites in Kenya, the Attorney-General shall give authority for the request to proceed if he is satisfied that the request relates to an investigation being conducted by the Prosecutor or any proceedings before the ICC.

(2) If the Attorney-General gives authority for the request to proceed—

- (a) he shall forward the request to the appropriate Kenyan agency; and
- (b) that agency shall, without delay—
  - (i) use its best endeavours to undertake the examination of the place or site in the manner that the ICC has requested;

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

(iii) deliver the report of the examination to the Attorney-General.

(3) This section does not confer on any person a power to enter a place or site.

Request for search and seizure.  
(Cf. Rome Statute, articles 19 (8), 56, 64, 93 (1) (b).)

**96.** (1) Where the ICC makes a request under paragraph 8 of article 19, article 56, article 64 or paragraph 1 (h) of article 93 of the Rome Statute for search and seizure, the Attorney-General shall give authority for the request to proceed if he is satisfied that—

(a) the request relates to an investigation being conducted by the Prosecutor or any proceedings before the ICC; and

(b) any thing relevant to the investigation or proceedings is or may be located in Kenya.

(2) If the Attorney-General gives authority for the request to proceed, he may authorise a member of the police force, in writing, to apply to a Judge of the High Court for a search warrant under section 97.

Issue of search warrant.

**97.** (1) Where a Judge of the High Court, on an application in writing made on oath or affirmation by a member of the police force, is satisfied that there are reasonable grounds for believing that there is in or on any place or thing—

(a) any thing on or in respect of which an international crime has been, or is suspected of having been, committed; or

(b) any thing that may be evidence as to the commission of any such crime,

the Judge shall issue a warrant in respect of that thing.

(2) A Judge shall not issue a warrant under this section unless the application contains, or the applicant otherwise supplies to the Judge, such information as the

Judge requires concerning the grounds on which the warrant is sought.

(3) A Judge may issue a warrant under this section subject to such conditions as he thinks fit.

Form and content of search warrant.

**98.** A warrant issued under section 97 shall—

- (a) be in the prescribed form;
- (b) be directed to a member of the police force by name, or to any class of members of the police specified in the warrant, or generally to every member of the police force; and
- (c) specify any conditions that the Judge has imposed under section 97 (3).

Powers conferred by warrant.

**99.** (1) Subject to any conditions specified in the warrant under section 98, a warrant issued under section 97 authorises the member of the police force executing the warrant—

- (a) to enter and search the place or thing specified in the warrant at any time by day or night during the currency of the warrant;
- (b) to use such assistants as may be reasonable in the circumstances for the purpose of the entry and search;
- (c) to use such force as is reasonable in the circumstances for the purposes of effecting entry, and for breaking open any thing in or on the place searched; and
- (d) to search for and seize any thing referred to in section 97 (1).

(2) A person called on to assist any member of the police force executing a warrant issued under section 97 has the powers described in paragraphs (c) and (d) of subsection (1).

Power to stop vehicles.

**100.** (1) A member of the police force may stop a vehicle (other than an aircraft which is airborne) for the purpose of exercising a search power conferred by a

warrant issued under section 97.

(2) A person who fails to stop a vehicle when required to do so by virtue of this section is guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding six months or to a fine, or both.

Person executing warrant to produce evidence of authority.

**101.** Every member of the police force executing any warrant issued under section 97—

- (a) shall have that warrant with him;
- (b) shall produce it on initial entry and, if requested, at any subsequent time; and
- (c) shall, if requested at the time of the execution of the warrant or at any subsequent time, provide a copy of the warrant within seven days after the request is made.

Notice of execution of warrant.

**102.** (1) Every member of the police force who executes a warrant issued under section 97 shall, not later than seven days after the seizure of any thing under that warrant, give to the owner or occupier of the place or thing searched, and to every other person whom the member of the police force has reason to believe may have an interest in the thing seized, a written notice specifying—

- (a) the date and time of the execution of the warrant;
- (b) the identity of the person who executed the warrant; and
- (c) the thing seized under the warrant.

(2) If the warrant is executed, a report on the execution of the warrant, together with a copy of any notice given under subsection (1) shall be sent to the Attorney-General, without delay.

(3) If the warrant is not able to be executed, a report explaining the reasons for this shall be sent to the Attorney-General without delay.

Disposal of things

**103.** (1) If a member of the police force seizes a thing

seized.

under a warrant issued under section 97, it shall be delivered into the custody and control of—

- (a) the Commissioner of Police; or
- (b) a commissioned officer of police designated by the Commissioner to receive things seized under this Act.

(2) The Commissioner of Police or designated officer shall—

- (a) inform the Attorney-General, without delay, that the thing has been so delivered;
- (b) retain the thing for a period not exceeding three months from the day on which the thing was seized, pending the Attorney-General's direction under subsection (3) about how to deal with it; and
- (c) comply with any direction that the Attorney-General gives him.

(3) The Attorney-General may, by written notice, give the Commissioner of Police or the designated officer a direction—

- (a) requiring the Commissioner or designated officer to send the thing to the ICC; or
- (b) requiring the Commissioner or designated officer to deal with it in some other way.

(4) The Attorney-General shall direct the Commissioner of Police or the designated officer to return the thing seized to the person from whose possession it was seized as soon as practicable, if—

- (a) the ICC advises that the thing is not required for the Prosecutor's investigation or its proceedings; or
- (b) no other direction is given by the Attorney-General before the expiry of three months from the day on which the thing was seized.

(5) Notwithstanding subsection (4), the Attorney-

General may refuse to return the thing to the person from whom it was seized if—

- (a) the thing is the subject of a dispute as to who is entitled to it;
- (b) the thing is required for the investigation of an offence within the jurisdiction of Kenya; or
- (c) possession of the thing by the person would be unlawful in Kenya.

Facilitating provision of records and documents.  
(Cf. Rome Statute, article 93 (1) (i).)

**104.** (1) Where the ICC makes a request under paragraph 1 (i) of article 93 of the Rome Statute for the provision of records and documents, including official records and documents, the Attorney-General shall give authority for the request to proceed if he is satisfied that—

- (a) the request relates to an investigation being conducted by the Prosecutor or any proceedings before the ICC; and
- (b) the document or record sought is or may be in Kenya.

(2) If the Attorney-General gives authority for the request to proceed—

- (a) he shall forward the request to the appropriate Kenyan agency; and
- (b) that agency shall, without delay—
  - (i) use its best endeavours to locate and make available the document or record sought;
  - (ii) make such report on its endeavours as it considers to be appropriate in the circumstances; and
  - (iii) deliver the document or record, if located, to the Attorney-General.

(3) This section does not confer on any person power to require the production of a document or record.

Protecting victims and witnesses and preserving

**105.** (1) This section shall apply if the ICC requests—  
(a) assistance under paragraph 1 (j) of article 93 of

evidence.  
(*Cf.* Rome Statute,  
articles 19(8), 56  
(2) and (3), 68, 93  
(1) (j).)

the Rome Statute in protecting victims and witnesses or preserving evidence; or

- (b) assistance under paragraph 8 of article 19, or paragraphs 2 or 3 of article 56, in preserving evidence.

(2) The Attorney-General shall give authority for the request to proceed if he is satisfied that—

- (a) the request relates to an investigation being conducted by the Prosecutor or any proceedings before the ICC; and
- (b) the assistance sought is not prohibited by Kenyan law.

(3) If the Attorney-General gives authority for the request to proceed—

- (a) he shall—
  - (i) take such steps as he thinks appropriate in the particular case; and
  - (ii) forward the request to the appropriate Kenyan agency; and
- (b) that agency shall, without delay—
  - (i) use its best endeavours to give effect to the request;
  - (ii) make such report on its endeavours as it considers to be appropriate in the circumstances; and
  - (iii) deliver the report to the Attorney-General.

*Identifying, Freezing or Seizing Property associated with International Crimes*

Request relating to property associated with crime.  
(*Cf.* Rome Statute, articles 57 (3) (e), 93 (1) (k).)

**106.** Where the ICC requests assistance under paragraph 1 (k) of article 93 of the Rome Statute in identifying, tracing and freezing, or seizing, any property for the purpose of eventual forfeiture, the Attorney-General shall give authority for the request to proceed if he is satisfied that—

- (a) the request relates to an international crime that is

being investigated by the Prosecutor, or which is the subject of proceedings before the ICC; and

(b) the property concerned is or may be located in Kenya.

Attorney-General may authorise measures.

**107.** If the Attorney-General gives authority for the request for assistance in identifying, tracing and freezing, or seizing, property to proceed, he may authorise the appropriate Kenyan authority to apply for one or more of the following orders or warrants—

- (a) a search warrant in respect of property under Part B of the Second Schedule;
- (b) a restraining order under Part C of the Second Schedule;
- (c) a production order under Part D of the Second Schedule;
- (d) a monitoring order under Part E of the Second Schedule.

*Other Types of Assistance*

Request for other types of assistance. (Cf. Rome Statute, article 93 (1) (l), (2) and (5).)

**108.** (1) Where the ICC requests any other type of assistance under paragraph 1 (l) of article 93 of the Rome Statute for the purposes of facilitating the investigation and prosecution of crimes within the jurisdiction of the ICC, the Attorney-General shall give authority for the request to proceed if he is satisfied that—

- (a) the request relates to an investigation being conducted by the Prosecutor or any proceedings before the ICC; and
- (b) the assistance sought is in accordance with Kenyan law.

(2) If the Attorney-General gives authority for the request to proceed—

- (a) he shall—
  - (i) take such steps as the Attorney-General thinks appropriate in the particular case; and
  - (ii) forward the request to the appropriate Kenyan

agency; and

- (b) that agency shall, without delay—
  - (i) use its best endeavours to give effect to the request;
  - (ii) make such report on its endeavours as it considers to be appropriate in the circumstances; and
  - (iii) deliver the report to the Attorney-General.

(3) If the Attorney-General considers that the assistance sought cannot lawfully be provided, he shall, before refusing the request, and in accordance with paragraph 5 of article 93 of the Rome Statute—

- (a) consult with the ICC; and
- (b) consider whether the assistance can be provided subject to conditions or whether it can be provided at a later date or in an alternative manner.

*Restrictions on Provision of Assistance*

Refusal of  
assistance.

**109.** (1) The Attorney-General shall refuse a request by the ICC for assistance to which this Part applies if—

- (a) the ICC does not accept the conditions suggested in order to implement the request as contemplated by paragraph 5 of article 93 of the Rome Statute and section 108 (3);
- (b) the ICC determines under article 18 or article 19 of the Rome Statute that the case to which the request relates is inadmissible and section 113 (4) applies; or
- (c) section 115 (4) applies.

(2) The Attorney-General may refuse a request by the ICC to which this Part applies if—

- (a) Part VIII (which relates to the protection of national security or third party information) applies;
- (b) there are competing requests from the ICC and a

State that is not a party to the Rome Statute relating to the same conduct and section 59 (4) (as applied by section 114) applies; or

- (c) there are competing requests from the ICC and a State that is not a party to the Rome Statute relating to different conduct and section 60 (3) (as applied by section 114) applies.

Postponement of execution of assistance. (Cf. Rome Statute, articles 93 (9), 94, 95.)

**110.** (1) The Attorney-General may postpone the execution of a request for assistance under this Part if, and only if—

- (a) the execution of the request would interfere with an ongoing investigation or prosecution for a different offence and section 112 applies;
- (b) a ruling on admissibility is pending before the ICC and section 113 applies;
- (c) there are competing requests from the ICC and from another State to which Kenya is under an international obligation and section 114 (2) (a) applies;
- (d) the request is for assistance under paragraph 1 (l) of article 93 of the Rome Statute and is one to which section 108 (3) applies; or
- (e) a request of the kind referred to in section 115 (2) (c) is made to the ICC.

(2) Even if a case is one to which subsection (1) applies, the Attorney-General may decide not to postpone the execution of the request, and in that event the request shall be dealt with in accordance with this Part.

(3) If the Attorney-General postpones the execution of a request for assistance under this Part, the postponement may be for a reasonable time and may, if the Attorney-General considers it desirable, be extended from time to time.

Procedure if execution of assistance precluded under

**111.** If the execution of a particular measure of assistance specified in a request to which this Part applies is prohibited in Kenya, then, notwithstanding any other

Kenyan law.  
(Cf. Rome Statute,  
article 93 (3).)

provision in this Part, the Attorney-General shall—

- (a) consider whether the assistance can be provided in another manner or subject to conditions; and
- (b) promptly consult with the ICC in order to resolve the matter.

Postponement  
where ongoing  
investigation or  
prosecution.  
(Cf. Rome Statute,  
article 94.)

**112.** (1) If the immediate execution of a request by the ICC for assistance to which this Part applies would interfere with an ongoing investigation or prosecution of a case different from that to which the request relates, the Attorney-General may postpone the execution of the request for a period of time agreed between him and the ICC.

(2) Notwithstanding section 110 (3), the period of postponement may be no longer than is reasonably necessary to complete the investigation or prosecution.

(3) Before making a decision to postpone the execution of a request, the Attorney-General shall consider whether the assistance could be provided immediately subject to certain conditions.

(4) If the Attorney-General decides to postpone the execution of a request and the ICC seeks assistance in the preservation of evidence under paragraph 1 (j) of article 93 of the Rome Statute, he shall deal with that request in accordance with this Part.

Postponement  
where  
admissibility  
challenge.  
(Cf. Rome Statute,  
article 95.)

**113.** (1) This section shall apply if the ICC is considering an admissibility challenge under article 18 or article 19 of the Rome Statute in respect of a case that a request to which this Part applies relates.

(2) If the ICC has not made an order under article 18 or article 19 of the Rome Statute allowing the Prosecutor to collect evidence to which the request relates, the Attorney-General may postpone the execution of the request until the ICC's determination on admissibility is issued.

(3) If the ICC has made an order under article 18 or

article 19 of the Rome Statute allowing the Prosecutor to collect evidence to which the request relates, the Attorney-General may not postpone the execution of a request under this section but shall deal with it under this Part.

(4) If the ICC determines that the case to which the request relates is inadmissible, the request shall be refused.

(5) If the ICC determines that the case to which the request relates is admissible, and there is no other ground for refusing or postponing the request, the request shall continue to be dealt with under this Part.

Competing requests.

(Cf. Rome Statute, articles 90, 93 (9) (a).)

**114.** (1) If the Attorney-General receives competing requests for assistance from the ICC and from another State to which Kenya is under an obligation to respond, he shall endeavour, after consultation with the ICC and the other State, to satisfy both requests.

(2) For the purposes of subsection (1), the Attorney-General may do either or both of the following—

- (a) postpone the execution of either of the competing requests;
- (b) attach conditions to the provision of assistance under either or both of the requests.

(3) If it is not possible to resolve the issue by consultation, the method of dealing with the competing requests shall be resolved in accordance with article 90 of the Rome Statute, and sections 57 to 61 shall apply, with any necessary modifications.

Requests involving conflict with other international obligations.  
(Cf. Rome Statute, article 98 (1).)

**115.** (1) If a request by the ICC for assistance to which this Part applies concerns persons who, or information or property that, are subject to the control of another State or an international organisation under an international agreement, the Attorney-General shall inform the ICC to enable it to direct its request to the other State or international organisation.

(2) Where—

- (a) the ICC makes a request for assistance;
- (b) the ICC has not previously made a final determination on whether or not paragraph 1 of article 98 of the Rome Statute applies to that request; and
- (c) a request is made to the ICC to determine whether or not paragraph 1 of article 98 applies to the request for surrender,

the Minister may postpone the request for assistance until the ICC advises whether or not it wishes to proceed with the request for assistance.

(4) (3) If the ICC advises that it does not intend to proceed with the request, the request for assistance shall be refused.

(5) (4) If the ICC advises that it intends to proceed with the request for assistance, and there is no other ground for refusing or postponing the request, the request shall continue to be dealt with under this Part.

#### *Miscellaneous*

Effect of authority to proceed.

**116.** At any time before a formal response is sent to the ICC, the Attorney-General may decide that a request by the ICC for assistance to which this Part applies will be refused or the execution of the request postponed, on a ground specified in section 109 or section 110, even if he has previously given authority for the request to proceed.

Request may relate to assistance sought by defence. (Cf. Rome Statute, article 57 (3) (b).)

**117.** A request made by the ICC under Part 9 of the Rome Statute to assist a defendant in the preparation of his defence shall be dealt with in the same manner as a like request to assist the Prosecutor.

Execution of request by Prosecutor. (Cf. Rome Statute, article 99 (4) and

**118.** (1) The Prosecutor may execute a request that does not involve any compulsory measures on Kenyan territory in the circumstances specified in paragraph 4 of article 99 of the Rome Statute.



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- payment, take such steps as are necessary to enforce the order as if it were a judgment of the High Court in favour of the Republic in a civil matter for an amount equal to the amount of the monetary payment;
- (ii) in a case where the order requires the restitution of assets, property or other tangible items, take such steps as are necessary to enforce the order as if it were a writ of restitution awarded in favour of the Republic under section 178 of the Criminal Procedure Code; or
- (iii) in a case where the order requires another remedy, take such steps as are necessary to enforce the order as if it were enforceable under the High Court Rules; and
- (c) that agency shall, without delay, make such report to the Attorney-General on the results of any action taken as it considers to be appropriate in the circumstances.

(4) Nothing in this section limits or affects the provision of other types of assistance to the ICC in relation to an order made under article 75 of the Rome Statute.

Enforcement of fines.  
(*Cf.* Rome Statute, articles 77 (2) (a), 109 (1).)

**120.** (1) This section shall apply if—

- (a) the ICC—
- (i) orders payment of a fine under paragraph 2 (a) of article 77 of the Rome Statute; and
- (i) requests that the order be enforced in accordance with article 109 of the Rome Statute; and
- (b) neither the conviction in respect of which the order was imposed nor the order for payment of a fine is subject to further appeal.

(2) The Attorney-General shall give authority for the request to proceed if he is satisfied that the order—

- (a) involves a monetary penalty; and
- (b) is of a kind that can be enforced in the manner provided in this section.

(3) If the Attorney-General gives authority for the request to proceed—

(a) he shall refer the request to the appropriate Kenyan agency; and

(b) that agency shall, without delay—

(i) take such steps as are necessary to enforce the order as if it were a fine imposed on conviction under the Penal Code; and

(ii) make such report to the Attorney-General on the results of any action taken as it considers to be appropriate in the circumstances.

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(4) Upon recovery the fine shall be disposed of in such manner as the ICC order may specify.

(5) Nothing in this section limits or affects the provision of other types of assistance to the ICC in relation to a penalty imposed under article 77 of the Rome Statute.

#### *Assistance with Enforcement of Forfeiture Orders*

Request for forfeiture of property.  
(Cf. Rome Statute, articles 77 (2) (b), 109 (1).)

**121.** Where—

(a) the ICC makes an order under paragraph 2 (b) of article 77 of the Rome Statute for the forfeiture of any property and requests assistance under paragraph 1 of article 109 of the Rome Statute to enforce the forfeiture order; and

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

the Attorney-General may act on the request if he is satisfied that the order is of a kind that can be enforced in the manner provided in sections 122 to 126.

Application for registration of forfeiture order.

**122.** (1) The Attorney-General may apply to the High Court for the registration of a forfeiture order or an amendment to such an order.

(2) On an application under subsection (1), the Court shall register the order or the amendment to the order under section 123 if it is satisfied that the order or amendment to the order is in force.

Manner of registration of order.

**123.** (1) A forfeiture order, or an amendment to such an order, shall be registered in the High Court by the registration in accordance with the prescribed procedure, if any, of—

- (a) a copy of the order or amendment sealed by the ICC; or
- (b) a copy of the order or amendment authenticated in accordance with subsection (2).

(2) A document is authenticated for the purposes of subsection (1) (b) if it purports to be—

- (a) signed or certified by a Judge, the Registrar, the Deputy Registrar, or an authorized member of the staff of the ICC; or
- (b) authenticated in any other manner authorised by the Rome Statute or the ICC Rules.

(3) An amendment to a forfeiture order does not, for the purposes of this Act, have any effect until it is registered.

(4) A facsimile copy of a sealed or authenticated copy of an order or an amendment of an order has the same effect, for the purposes of this Act, as the sealed or authenticated copy that is not a facsimile.

(5) Notwithstanding subsection (4), registration effected by means of a facsimile copy ceases to have effect on the expiry of the period of twenty-one days commencing on the date of registration unless, before the expiry of that period, the sealed or authenticated copy is registered.

Notice of registration of order.

**124.** If the High Court registers an order under section 123, the Court may direct the Attorney-General to do either or both of the following—

- (a) give notice of the registration, in the manner and within the time the Court considers appropriate, to such persons (other than a person convicted of an offence in respect of which the order was made) as the Court has reason to believe may have an interest in the property;
- (b) publish notice of the registration in the manner and within the time the Court considers appropriate.

Effect of  
registration of  
order.

**125.** (1) Where a forfeiture order is registered under section 123—

- (a) the property shall, to the extent of the estate, interest or rights (if any) specified in the forfeiture order, be thereby vested in the Republic;
- (b) the property is so vested subject to every charge or encumbrance to which the property was subject immediately before the forfeiture order was made and, in the case of land under the provisions of the Registration of Titles Act, is subject to every mortgage, lease or other interest recorded under that Act;
- (c) if the property is not already in the possession of the Republic, the Republic may take possession of the property;
- (d) the property shall not, except with the leave of the High Court and in accordance with any directions of the Court, be disposed of, or otherwise dealt with, by or on behalf of the Republic, before the relevant time; and
- (e) if, at the relevant time, the forfeiture order has not been discharged or revoked—
  - (i) the property shall be disposed of in accordance with any direction of the High Court; and
  - (ii) the proceeds shall be dealt with in accordance with section 130.

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(2) In subsection (1), “relevant time”, in relation to property that is the subject of a forfeiture order, means—

- (a) if no appeal against either the forfeiture order or the conviction in respect of which it was made is lodged within the period prescribed for doing so—the expiration of that period; or
- (b) if any such appeals are lodged—the time when all such appeals have lapsed or been finally determined.

(3) Subsection (1) shall have effect subject to sections 127 and 128.

Forfeiture order may be treated as pecuniary penalty order.  
(Cf. Rome Statute, article 109 (2).)

**126.** (1) If the Attorney-General is unable to give effect to a forfeiture order, the Attorney-General shall take measures to recover—

- (a) the value specified by the ICC as the value of the property ordered by the ICC to be forfeited; or
- (b) if the ICC has not specified the value of the property, the value that, in the opinion of the Attorney-General, is the value of the property ordered by the ICC to be forfeited.

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(2) In a case to which subsection (1) applies, the forfeiture order is to be treated as a fine ordered to be paid under the Penal Code for the equivalent amount and may be enforced accordingly as if it were a fine imposed on the date the forfeiture order was registered under this Act.

Third parties may apply for relief.  
(Cf. Rome Statute, articles 77 (2) (b), 109 (1).)

**127.** (1) If a forfeiture order is registered under section 123, a person (other than a person convicted of an offence in respect of which the order was made) who claims an interest in any of the property to which the order relates may apply to the High Court for an order under section 128.

(2) A person on whom notice of the hearing of the ICC held in connection with the making of the forfeiture order was served, or who appeared at the hearing, may not make an application under subsection (1) without the leave of the High Court.

(3) The High Court shall not grant leave under

subsection (2) unless it is satisfied that—

- (a) the applicant had good reason for failing to attend the hearing held by the ICC in connection with the making of the forfeiture order;
- (b) evidence proposed to be adduced by the applicant in connection with the application under subsection (1) was not reasonably available to the applicant at the time of the hearing of the ICC; or
- (c) there are special reasons justifying the grant of leave.

(4) An application under subsection (1) shall be made before the expiry of the period of two months beginning on the date on which the forfeiture order is registered in the High Court.

(5) Notwithstanding subsection (4), the High Court may grant a person leave to make an application under subsection (1) after the expiry of the period referred to in subsection (4) if it is satisfied that the person's failure to apply within that period was not owing to any neglect on the person's part.

(6) A person who makes an application under subsection (1) shall serve notice of the application on the Attorney-General, who shall be a party to any proceedings on the application.

(7) This section and section 128 shall have effect subject to any contrary provision in the Rome Statute or the ICC Rules.

Court may grant relief to third party.

**128.** (1) This section shall apply if—

- (a) a person applies to the High Court for an order under this section in respect of an interest in property; and
- (b) the Court is satisfied that the applicant's claim is valid.

(2) The High Court shall make an order—

- (a) declaring the nature, extent, and value of the applicant's interest in the property; and
- (b) either—
  - (i) directing that the interest be transferred to the applicant; or
  - (ii) declaring that payment be made to the applicant of an amount equal to the value of the interest declared by the Court.

(3) Notwithstanding subsection (2), the Court may, if it thinks fit, refuse to make an order under that subsection if it is satisfied that—

- (a) the applicant was, in any respect, involved in the commission of the offence in respect of which the order was made; or
- (b) although the applicant acquired the interest at the time of or after the commission of the offence, it was not acquired in good faith and for value.

Cancellation of registration of order.

**129.** (1) If a forfeiture order has been registered under section 123, the Attorney-General may apply to the High Court for cancellation of the registration.

(2) Without limiting the generality of subsection (1), the Attorney-General may act under that subsection in relation to a forfeiture order if—

- (a) the order has, since its registration in Kenya, ceased to have effect;
- (b) the order was registered in contravention of section 121;
- (c) the Attorney-General considers that cancellation is appropriate having regard to the arrangements in force with the ICC in relation to the enforcement of orders of that kind; or
- (d) the ICC so requests.

(3) If, in accordance with subsection (1), the Attorney-General applies to the High Court for cancellation of the registration of a forfeiture order, the Court shall cancel the registration accordingly.

(4) If a forfeiture order registered under section 123 is discharged (in whole or in part) or is revoked, that discharge or revocation constitutes a ground for an application for cancellation of the order under this section.

*Transfer of Money or Property Recovered under this Part*

Money or property recovered to be transferred to ICC. (Cf. Rome Statute, articles 75 (5), 109 (3).)

**130.** (1) Any money or property, including the proceeds of sale of property, recovered as a result of the enforcement under this Part of an order of the ICC shall be transferred to the ICC.

(2) Subsection (1) shall have effect notwithstanding any other provision in this Part or in any other Act.

**PART VII—PERSONS IN TRANSIT TO ICC OR SERVING SENTENCES IMPOSED BY ICC**

*Person in Transit*

Transit by person being surrendered or transferred to ICC. (Cf. Rome Statute, article s 89 (3), 93 (1) (f) and (7).)

**131.** (1) This section and sections 132, 133, and 145 to 151 shall apply to a person (hereinafter referred to as “the transferee”) who—

- (a) is being surrendered to the ICC by another State under article 89 of the Rome Statute;
- (b) is a person to whom paragraph 7 of article 93 of the Rome Statute applies, and is being temporarily transferred to the ICC by another State; or
- (c) is a person sentenced to imprisonment by the ICC and who is being transferred to or from the ICC, or between States, in connection with that sentence.

(2) The transferee may be transported through Kenya for the purpose of being surrendered or transferred to the ICC or to another State, as the case may be.

(3) Before the transferee is transported through Kenya

under subsection (2), the ICC shall first transmit a request for transit in accordance with article 87 of the Rome Statute that contains the following information and documents—

- (a) a description of the transferee;
- (b) in the case of a person described in subsection (1) (a)—
  - (i) a brief statement of the facts of the case and their legal characterisation; and
  - (ii) a copy of the warrant for arrest and surrender;
- (c) in the case of a person described in subsection (1) (b), such information as the Minister may request about the reasons for the temporary transfer.

(4) Notwithstanding subsection (3), the Minister shall not refuse a request for transit unless the Minister considers that transit through Kenya would impede or delay the surrender or transfer of the transferee.

(5) Notwithstanding subsection (3), no authorisation for transit is required if the transferee is transported by air and no landing is scheduled on Kenyan territory.

(6) If an unscheduled landing occurs on Kenyan territory, the Minister may require the ICC to submit a request for transit of the transferee under subsection (3) as soon as is reasonably practicable.

Transferee to be held in custody. (Cf. Rome Statute, article 89 (3).)

**132.** (1) The transferee shall, during the period of transit, be detained in custody in accordance with subsection (2).

(2) If the aircraft or ship that transports a transferee lands or calls at any place in Kenya—

- (a) the person holding the transferee in custody before the landing or call is made may hold the transferee in his custody or in police custody for a period not exceeding ninety-six hours; and
- (b) a High Court may, on the application of a member

of the police force, order that the transferee be held in custody for such further period or periods as the Court considers reasonably necessary to facilitate the transportation of the transferee to the ICC or to another State, as the case may be.

(3) If an unscheduled landing occurs and the ICC is required under section 131 (6) to submit a request for transit, the transferee shall be held in custody under subsection (2).

(4) If subsection (3) applies, the period of detention of the transferee may not be extended beyond ninety-six hours from the time of the unscheduled landing, unless the request for transit from the ICC is received within that time.

(5) If the High Court orders, under subsection (2) (b), that a transferee be held in custody, the transferee may be detained in a prison or any other place in which a person could be detained under section 38.

Minister to make removal order or issue certificate.

**133.** (1) If a transferee is not removed before or at the expiry of all periods of custody under section 132 (2), the Minister shall either—

- (a) make a removal order under section 148; or
- (b) issue a certificate under section 145 giving the transferee temporary authority to remain in Kenya.

(2) Notwithstanding subsection (1), no removal order may be made under section 148 unless—

- (a) the Minister first consults with the ICC; and
- (b) it is not possible for the Minister and the ICC to reach agreement relating to the prompt removal of the transferee.

(3) The Minister shall not issue the certificate referred to in subsection (1) (b) unless the Minister is satisfied that, because of the special circumstances of the transferee, it would be inappropriate to make a removal

order.

*Enforcement of Sentences in Kenya*

Kenya may act as State of enforcement. (Cf. Rome Statute, article 103 (1) and (2).)

**134.** (1) The Minister may advise the ICC that Kenya is willing to allow persons who are ICC prisoners as a result of being sentenced to imprisonment by the ICC to serve those sentences in Kenya, subject to any specified conditions.

(2) If advice is given under subsection (1), the Minister may, at any time, advise the ICC—

- (a) of further conditions that Kenya wishes to impose in relation to the serving of sentences in Kenya by ICC prisoners; or
- (b) that it wishes to withdraw a condition referred to in subsection (1) or paragraph (a).

(3) Before providing advice under subsection (1) or subsection (2), the Minister shall consult with—

- (a) the Commissioner of Police;
- (b) the permanent secretary in the Ministry responsible for prisons; and
- (c) the permanent secretary in the Ministry responsible for labour.

(4) If advice is given under subsection (1), the Minister may, at any time, advise the ICC that Kenya is no longer willing to allow ICC prisoners to serve their sentences in Kenya.

(5) Any advice given under subsection (4) does not affect the enforcement of sentences for which the Minister has accepted the designation of the ICC under section 135 (1) (c).

Request for sentence to be served in Kenya.

**135.** (1) This section and sections 136 to 151 shall apply if—

- (a) the Minister has given advice under section

134 (1) and has not withdrawn that advice under section 134(4);

- (b) the ICC imposes a sentence of imprisonment on a person—
  - (i) convicted of an international crime; or
  - (ii) convicted of an offence against the administration of justice; and
- (c) the ICC designates Kenya, under article 103 of the Rome Statute, as the State in which the sentence is to be served.

(2) If the Minister accepts the designation, the Minister shall issue an order for detention in the prescribed form, and forward that order and any information about the person supplied by the ICC to each of the following persons—

- (a) the Commissioner of Police;
- (b) the permanent secretary in the Ministry responsible for prisons; and
- (c) the permanent secretary in the Ministry responsible for labour.

(3) The Minister may, at any time, ask the ICC to give one or more of the following assurances—

- (a) that all or part of the transportation costs incurred by Kenya in the enforcement of the sentence will be met by the ICC;
- (b) that the ICC will arrange for the transportation of the ICC prisoner who is the subject of the designation—
  - (i) to Kenya, for the purpose of enabling his sentence to be enforced in Kenya; or
  - (ii) from Kenya, on the completion of the sentence, or if the ICC prisoner is to be transferred to another country;
- (c) an assurance relating to such other matters as the Minister thinks appropriate.

Prisoner to be held

**136.** (1) If the Minister accepts the designation of

in custody.  
(Cf. Rome Statute,  
articles 106, 110  
(1).)

Kenya as the State in which a sentence of imprisonment imposed by the ICC is to be served, the ICC prisoner may be transported to Kenya in the custody of—

- (a) a member of the police force;
- (b) a prison officer; or
- (c) a person authorised for the purpose by the ICC.

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(2) On arrival in Kenya or, if the person is already in Kenya when the sentence is imposed, on the imposition of the sentence, the ICC prisoner shall be detained in accordance with the Prisons Act as if the prisoner had been sentenced to imprisonment under Kenyan law.

(3) Notwithstanding subsection (2) and any other enactment—

- (a) the ICC prisoner has the right to communicate on a confidential basis with the ICC, without impediment from any person; and
- (b) a Judge of the ICC or a member of the staff of the ICC may visit the ICC prisoner for the purpose of hearing any representations by the prisoner without the presence of any other person, except any representative of the prisoner;

Order for  
detention to act as  
authority for  
detention.  
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**137.** The order for detention issued by the Minister under section 135 (2) shall, for the purposes of this Part and the Prisons Act, be sufficient authority for the detention of the prisoner to which the notice relates—

- (a) until the ICC prisoner completes, or is released from, the sentence or is transferred to another country; and
- (b) during any further period that the ICC prisoner is required to serve the sentence if the ICC makes an order for recall of the prisoner.

Sentence to be  
served in  
accordance with  
Rome Statute.  
(Cf. Rome Statute,  
articles 106 (1),  
110 (1) and (2).)

**138.** (1) The administration of a sentence of imprisonment imposed by the ICC that is served in Kenya, including any decision to release or transfer the ICC prisoner, shall be undertaken in accordance with Part 10 of the Rome Statute and the ICC Rules.

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(2) If, in relation to the administration of a sentence of imprisonment that is served in Kenya by an ICC prisoner, there is any inconsistency between the provisions of the Penal Code or the Prisons Act and the provisions of the Rome Statute and the ICC Rules, the provisions of that Statute and those Rules shall prevail.

Transfer of  
prisoner to ICC  
for review of  
sentence.  
(Cf. Rome Statute,  
articles 105 (2),  
110 (3) and (5).)

**139.** (1) Where the ICC, under article 110 of the Rome Statute, decides to review the sentence of an ICC prisoner who is serving that sentence in Kenya, the Minister shall direct that the prisoner be transferred to the ICC for the purposes of enabling the ICC to review the prisoner's sentence if the Minister is satisfied that—

- (a) the prisoner is entitled to appear before the ICC at the review of the prisoner's sentence;
- (b) the ICC has requested the prisoner to appear before it at the review; or
- (c) the interests of justice require the prisoner's attendance at the ICC.

(2) If the Minister gives a direction under subsection (1), the Minister shall forward a notice of the direction to each of the following persons—

- (a) the Commissioner of Police;
- (b) the permanent secretary in the Ministry responsible for prisons; and
- (c) the permanent secretary in the Ministry responsible for labour.

(3) On the giving of a direction under subsection (1), the prisoner may be transported to the ICC and, if necessary, from the ICC in the custody of—

- (a) a member of the police force; or
- (b) a prison officer; or
- (c) a person authorised for the purpose by the ICC.

Transfer of  
prisoner to ICC

**140.** (1) This section shall apply if the ICC—

for other purposes

- (a) directs that an ICC prisoner appear before it to give evidence in another case; or
- (b) requests that an ICC prisoner appear before it for any other reason.

(2) The Minister—

- (a) if subsection (1) (a) applies, shall direct that the ICC prisoner be transferred to the ICC; or
- (b) if subsection (1) (b) applies, may direct that the ICC prisoner be transferred to the ICC if the Minister is satisfied that the interests of justice require the prisoner's attendance at the ICC.

(3) If the Minister gives a direction under subsection (2), section 139 (2) and (3) shall apply, with any necessary modifications.

(4) This section shall not apply if the request by the ICC is a request to which section 90 (1) applies.

Transfer of prisoner to another State to complete sentence.  
(Cf. Rome Statute, article 104 (1).)

**141.** If an ICC prisoner of any nationality is to be transferred from Kenya to another State to complete that sentence, the prisoner may be transported from Kenya to that State in the custody of—

- (a) a member of the police force;
- (b) a prison officer; or
- (c) a person authorised for the purpose by the ICC.

Minister to make removal order or issue certificate.  
(Cf. Rome Statute, article 107 (1).)

**142.** (1) If an ICC prisoner is to complete his sentence in Kenya or to be released at the direction of the ICC while in Kenya and the prisoner is not a Kenyan citizen, the Minister shall, before the date of completion or release, either—

- (a) make a removal order under section 148; or
- (b) issue a certificate under section 145 giving the prisoner temporary authority to remain in Kenya.

(2) The Minister shall not issue the certificate referred to in subsection (1) (b) unless the Minister is satisfied

that—

- (a) because of the special circumstances of the ICC prisoner, it would be inappropriate to make a removal order; or
- (b) it is desirable to issue a certificate under section 145 in order to facilitate the processing of a request for extradition of the ICC prisoner, or the investigation of an offence, or to enable the prisoner to serve another sentence in Kenya, or for any other reason in the interests of justice.

(3) This section shall have effect subject to section 143.

Special rules in certain cases.  
(*Cf.* Rome Statute, articles 107 (3), 108.)  
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**143.** (1) An ICC prisoner serving a sentence in Kenya may—

- (a) be extradited to another country in accordance with the Extradition (Commonwealth Countries) Act or the Extradition (Contiguous and Foreign Countries) Act, either—
  - (i) at the completion of the sentence; or
  - (ii) during the sentence, but only for a temporary period;
- (b) be required to remain in Kenya in order to serve any sentence that the prisoner is liable to serve under Kenyan law; or
- (c) be required to remain in Kenya to undergo trial for an offence under Kenyan law.

(2) Notwithstanding subsection (1)—

- (a) a person to whom subsection (1) (a) applies may not be extradited to another country without the prior agreement of the ICC;
- (b) a person to whom subsection (1) (b) or subsection (1) (c) applies may not be required to serve a sentence in Kenya or to undergo trial for an offence under Kenyan law, as the case may be, that relates to an act or omission that occurred before the designation referred to in section 135 (1) (c), without the prior agreement of the

ICC.

- (3) Subsection (2) shall not apply to a person who—
- (a) remains voluntarily in Kenya for more than thirty days after the date of completion of, or release from, the sentence imposed by the ICC; or
  - (b) voluntarily returns to Kenya after having left it.

Extradition of  
escaped ICC  
prisoner.  
(*Cf.* Rome Statute,  
article 111.)

**144.** (1) Where—

- (a) an ICC prisoner serving a sentence in another State escapes from custody and is located in Kenya; and
- (b) the State designated by the ICC as the State of enforcement of the sentence makes a request to Kenya for extradition in accordance with article 111 of the Rome Statute,

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the provisions of the Extradition (Commonwealth Countries) Act or the Extradition (Contiguous and Foreign Countries) Act, as the case may require, shall, with any necessary modifications, apply to a request for extradition as if the request related to a person who had been convicted of an extradition offence or extradition crime within the meaning of the relevant Act.

(2) Where—

- (a) an ICC prisoner serving a sentence in Kenya escapes from custody and is located in another State; and
- (b) the Minister wishes to make a request to that State for the person's extradition in accordance with article 111,

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the Minister may make a request for the prisoner's extradition under the Extradition (Commonwealth Countries) Act or the Extradition (Contiguous and Foreign Countries) Act, and the relevant Act shall, with any necessary modifications, apply as if the request related to a person who had been convicted of an extradition offence or extradition crime within the meaning of the relevant Act.

Certificate giving temporary authority to remain in Kenya.

**145.** (1) A certificate issued by the Minister under this section—

- (a) may be issued for a period, not exceeding three months, specified in the certificate;
- (b) may, from time to time, be renewed for one further period not exceeding three months; and
- (c) may, if the Minister thinks fit, order that the person named in the certificate be taken into custody.

(2) The certificate is, while it remains in force, sufficient authority for the person named in the certificate to remain in Kenya.

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(3) If the Minister issues a certificate, he may refer the person's case to the Minister responsible for immigration for consideration under section 5 of the Immigration Act and, in that case, that section shall apply for the purposes of this section as if the person were a person required to hold a permit under that Act to be in Kenya.

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(4) Except as provided in subsection (3), nothing in the Immigration Act shall apply to the person named in the certificate while the certificate is in force.

Cancellation of certificate.

**146.** The Minister shall cancel the certificate issued under section 145 and make a removal order under section 148 in respect of a person if—

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- (a) where the Minister referred the person's case to the Minister responsible for immigration under section 145 (3)—
  - (i) the Minister responsible for immigration declines to grant a permit under the Immigration Act; and
  - (ii) there do not appear to the Minister to be any other grounds on which the person should be permitted to remain in Kenya; or
- (b) in any other case, there do not appear to the Minister to be any other grounds on which the person should be permitted to remain in Kenya.

Further provisions relating to certificate.

**147.** (1) If a certificate issued under section 145 orders that a person be taken into custody, the certificate is sufficient authority for a member of the police force to arrest the person and take him into custody.

(2) A person who is taken into custody under this section shall, unless sooner released, be brought before a Judge of the High Court—

(a) as soon as possible; and

(b) after that, every twenty-one days while the certificate is in force,

to determine, in accordance with subsection (3), if the person should be detained in custody or released pending the decisions referred to in section 145.

(3) If a person is brought before a Judge of the High Court under subsection (2), the Judge may, if the Judge is satisfied that the person is the person named in the certificate—

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

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

(4) A warrant for the detention of the person issued under subsection (3) (a) may authorise the detention of the person in a prison or any other place in which a person could be detained under section 38.

Removal order.

**148.** (1) A removal order made by the Minister under this section—

(a) may either—

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

(ii) if the person is not in custody, authorise any member of the police force to take the person

into custody;

(b) shall specify that the person is to be taken by a member of the police force and placed on board any craft for the purpose of effecting the person's removal from Kenya; and

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

(2) The removal order shall be served on the person named in the order by personal service.

(3) If the removal order authorises the detention of the person in custody, the person may be detained—

(a) in a prison, or any other place in which a person could be detained under section 38; or

(b) at a seaport or airport.

(4) A removal order made under this section continues in force until it is executed or cancelled.

Delay in removal.

**149.** (1) If a person is not able to be conveyed out of Kenya within forty-eight hours after service of a removal order issued under section 148, the person shall be brought before a Judge of the High Court to determine, in accordance with subsection (2), whether the person should be detained in custody or released pending removal from Kenya.

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

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

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

(3) A warrant for the detention of the person issued under subsection (2) (a) may authorise the detention of

the person in any place specified in section 148 (3).

Immigration permit not required.

**150.** A person to whom this Part applies is not required to hold a permit under the Immigration Act if, and for so long as, he is in Kenya in accordance with this Part (whether or not he is in custody).

Kenyan citizens.

**151.** Nothing in this Part authorises the making of a removal order under section 148 in respect of a Kenyan citizen.

### **PART VIII—PROTECTION OF NATIONAL SECURITY OR THIRD PARTY INFORMATION**

#### *National Security*

National security issues to be dealt with under article 72.  
(*Cf.* Rome Statute, article 72 (1) and (4).)

**152.** If an issue relating to Kenya's national security interests arises at any stage of any proceedings before the ICC, the issue shall be dealt with in the manner provided in article 72 of the Rome Statute and this Part.

Part 9 request involving national security.  
(*Cf.* Rome Statute, articles 72 (1), 93 (4), 99 (5).)

**153.** (1) If a request for assistance made under Part 9 of the Rome Statute appears to concern the production of any documents or disclosure of evidence that would, in the opinion of the Attorney-General, prejudice Kenya's national security interests, that request shall be dealt with in accordance with the process specified in sections 156 and 157.

(2) If, having followed the specified process the matter is not able to be resolved, the Attorney-General may refuse the request or decline to authorise the production of the documents or giving of the evidence, as the case may be.

Information or evidence involving national security.  
(*Cf.* Rome Statute, articles 72 (2), 93 (4).)

**154.** (1) Where a person who has been requested to give information or evidence—  
(a) refuses to do so on the ground that disclosure would prejudice the national security interests of Kenya; or

(b) refers the matter to the Attorney-General on the ground that disclosure would prejudice the national security interests of Kenya,

the Attorney-General shall determine whether or not he is of the opinion that the giving of information or evidence would prejudice Kenya's national security interests.

(2) If the Attorney-General confirms that he is of the opinion that disclosure would prejudice Kenya's national security interests, the matter shall be dealt with in accordance with the process specified in sections 156 and 157.

(3) If, having following the specified process, the matter has not been resolved, the Attorney-General may refuse the request or decline to authorise the provision of the information or giving of the evidence, as the case may be.

Other situations involving national security.  
(Cf. Rome Statute, articles 72 (4) and (7) (b) (i), 93 (4).)

**155.** (1) If, in any circumstances other than those specified in sections 153 and 154, the Attorney-General is of the opinion that the disclosure of information or documents to the ICC would prejudice Kenya's national security interests, the matter shall be dealt with in accordance with the process specified in sections 156 and 157.

(2) Without limiting subsection (1), this section shall apply if the Attorney-General learns that information or documents are being, or are likely to be, disclosed at any stage of the proceedings, and intervenes in accordance with paragraph 4 of article 72 of the Rome Statute.

(3) If, having followed the specified process, the matter has not been resolved and the ICC has not made an order for disclosure under paragraph 7 (b) (i) of article 72 of the Rome Statute, the Attorney-General may refuse the request or decline to authorise the provision of the information or giving of the evidence, as the case may be.

Consultation with ICC required.  
(Cf. Rome Statute,

**156.** The Attorney-General shall consult with the ICC and, if appropriate, the defence, in accordance with

article 72 (5).) paragraph 5 of article 72 of the Rome Statute.

Procedure where  
no resolution.  
(Cf. Rome Statute,  
articles 72 (6) and  
(7), 93 (4).)

**157.** (1) If, after consultation, the Attorney-General considers that there are no means or conditions under which the information or documents or evidence could be provided or disclosed or given without prejudice to Kenya's national security interests, he shall notify the ICC, in accordance with paragraph 6 of article 72 of the Rome Statute, of the specific reasons for his decision, unless a specific description of the reasons would result itself in prejudice to Kenya's national security interests.

(2) The Attorney-General shall use his best endeavours with a view to reaching a mutually satisfactory outcome if—

- (a) the ICC determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused;
- (b) the issue of disclosure arises in the circumstances specified in section 153 or section 154 and the Attorney-General is of the opinion that Kenya's national security interests would be prejudiced by disclosure; and
- (c) the ICC requests further consultations for the purpose of considering the representations, which may include hearings *in camera* and *ex parte*.

(3) The Attorney-General shall comply with an ICC disclosure order if—

- (a) the ICC determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the defendant;
- (b) the issue of disclosure arises in the circumstances specified in section 155 (1); and
- (c) the ICC orders disclosure in accordance with paragraph 7 (b) (i) of article 72 of the Rome Statute.

Attorney-General  
to take into  
account ICC's

**158.** In determining what action to take in relation to a matter to which this Part applies, the Attorney-General

ability to refer matter to Security Council.  
(Cf. Rome Statute, articles 72 (7) (a) (ii), 87 (7).)

shall take into account the power of the ICC to refer a matter to the Assembly of States Parties or to the Security Council in accordance with paragraph 7 of article 87 of the Rome Statute if the ICC considers that a requested State is not acting in accordance with its obligations under the Rome Statute.

*Information Provided by Third Parties*

Disclosure of information provided by third party.  
(Cf. Rome Statute, articles 72, 73.)

**159.** (1) If the ICC requests the provision of a document or information that was provided or disclosed to Kenya in confidence by another State, intergovernmental organisation, or international organisation, the Attorney-General shall seek the consent of the originator before providing that document or information to the ICC.

(2) If the originator is a State Party that consents to disclosure of the information or document, the Attorney-General shall, subject to article 72 of the Rome Statute, provide that information or document to the ICC.

(3) If the originator is a State Party that undertakes to resolve the issue of disclosure with the ICC under article 73, the Attorney-General shall inform the ICC of that undertaking.

(4) If the originator is not a State Party and refuses to consent to disclosure, the Attorney-General shall inform the ICC that he is unable to provide the document or

(1) (b) does not prevent the Attorney-General from refusing the assistance sought in accordance with section 159 (4).

**PART IX—INVESTIGATIONS OR SITTINGS OF ICC IN KENYA**

Prosecutor may conduct investigations in Kenya.  
(Cf. Rome Statute, articles 54 (3), 57 (3) (d), 99 (1) and (4).)

**161.** The Prosecutor may conduct investigations in Kenyan territory—

- (a) in accordance with the provisions of Part 9 of the Rome Statute and as specified in section 23; or
- (b) as authorised by the Pre-Trial Chamber under paragraph 3 (d) of article 57 of the Rome Statute.

ICC sittings in Kenya.  
(Cf. Rome Statute, articles 3 (3), 62.)

**162.** The ICC may sit in Kenya for the purpose of performing any of its functions under the Rome Statute and under the ICC Rules, including any of the following—

- (a) taking evidence;
- (b) conducting or continuing any proceedings;
- (c) giving judgment in any proceedings;
- (d) reviewing a sentence.

ICC's powers while sitting in Kenya.  
(Cf. Rome Statute, articles 4 (2), 64.)

**163.** While the ICC is sitting in Kenya, it may exercise its functions and powers as provided under the Rome Statute and under the ICC Rules.

ICC may administer oaths in Kenya.  
(Cf. Rome Statute, article 69 (1).)

**164.** The ICC may, at any sitting of the ICC in Kenya, administer an oath or affirmation giving an undertaking as to truthfulness in accordance with the practice and procedure of the ICC.

Orders made by ICC not subject to review.

**165.** No application for review under any provision of the enacted law, and no application for an order of mandamus or prohibition or certiorari or for a declaration or injunction may be brought in respect of any judgment or order or determination of the ICC that is made or given at a sitting of the ICC in Kenya.

Power to detain ICC prisoners in Kenya prisons if ICC holds sitting in Kenya.  
(*Cf.* Rome Statute, article 63.)

**166.** (1) A person in Kenya shall be kept in custody as the Minister directs in writing if—

- (a) the ICC holds any sitting in Kenya; and
- (b) the ICC requests that the person whose presence is required at the proceedings be held in custody as an ICC prisoner while the sitting continues in Kenya.

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

Cap. 90.

(3) If an ICC prisoner is directed to be detained in a prison under subsection (1), the prisoner shall be treated in conformity with international human rights law and the Prisons Act, so far as applicable and with all necessary modifications, shall apply with respect to that prisoner as if the prisoner had been remanded in custody or sentenced to imprisonment for an offence against the law of Kenya, as the case may require, and is liable to be detained in a prison under such an order or sentence.

Cap. 63.

(4) For the purposes of sections 122, 123 and 124 of the Penal Code, (which relate to rescue or escape from lawful custody), an ICC prisoner who is in custody in a Kenyan prison or other detention facility shall be deemed to be in lawful custody while in Kenya.

Removal of ICC prisoner.

**167.** If the Minister is satisfied that the presence of an ICC prisoner who was the subject of a direction under section 166 (1) is no longer necessary, sections 145 to 151 shall apply, with any necessary modifications, to that person.

#### **PART X—REQUESTS TO ICC FOR ASSISTANCE**

Attorney-General or Minister may request assistance from ICC.  
(*Cf.* Rome Statute, article 93 (1).)

**168.** The Attorney-General or the Minister, as the case may be, may make a request to the ICC for assistance in accordance with this Part in an investigation into, or trial in respect of, conduct that may constitute a crime within the jurisdiction of the ICC or that constitutes a crime for

which the maximum penalty under Kenyan law is a term of imprisonment of not less than five years.

Making of request.  
(Cf. Rome Statute, article 96 (4).)

**169.** An urgent request for assistance may be made or transmitted to the ICC in the manner specified in section 22 (1).

Types of requests to ICC.  
(Cf. Rome Statute, article 93 (10) (b) (i).)

**170.** A request may be made under this Part for any assistance that the ICC may lawfully give, including—

- (a) the transmission of statements, documents, or other types of evidence obtained in the course of an investigation or a trial conducted by the ICC; and
- (b) the questioning of any person detained by order of the ICC.

## **PART XI—MISCELLANEOUS PROVISIONS AND CONSEQUENTIAL AMENDMENTS**

### *Miscellaneous Provisions*

Certificates given by Attorney-General.

**171.** (1) If the Attorney-General receives a request for assistance from the ICC to which Part V relates, the Attorney-General may give a certificate certifying all or any of the following facts—

- (a) that a request for assistance has been made by the ICC;
- (b) that the request meets the requirements of this Act;
- (c) that the acceptance of the request has been duly made under and in accordance with this Act.

(2) In any proceedings under this Act, a certificate purporting to have been given under subsection (1) is, in the absence of proof to the contrary, sufficient evidence of the matters certified by the certificate.

Regulations.

**172.** The Minister may make regulations, not inconsistent with this Act, for any of the following purposes—

- (a) prescribing the procedure to be followed in dealing with requests made by the ICC, and providing for notification of the results of action taken in accordance with any such request;
- (b) prescribing the procedures for obtaining evidence or producing documents or other articles in accordance with a request made by the ICC;
- (c) providing for the payment of fees, travelling allowances and expenses to any person in Kenya who gives or provides evidence or assistance pursuant to a request made by the ICC;
- (d) prescribing conditions for the protection of any property sent to the ICC pursuant to a request made under this Act, and making provision for the return of property in Kenya in accordance with a request;
- (e) prescribing the forms of applications, notices, certificates, warrants, and other documents for the purposes of this Act, and requiring the use of such forms;
- (f) providing for any other matters contemplated by this Act, necessary for its administration, or necessary for giving it full effect.

Regulations to implement Rules of Evidence and Procedure.

**173.** Without limiting section 174, the Minister may make regulations to implement any obligation that is placed on State Parties by the ICC Rules if that obligation is not inconsistent with the provisions of this Act.

#### *Consequential Amendments*

Amendment of Cap. 179.

**174.** The Privileges and Immunities Act is amended by inserting the following section after section 9—

The International Criminal Court.

**9A.** The judges, officials and staff of the International Criminal Court, and any counsel, experts, witnesses and other persons required to be present at the seat of that Court, shall have the privileges and immunities set out in article 48 of the

Rome Statute and the agreement on privileges and immunities contemplated in that article.

**FIRST SCHEDULE**

(S. 2)

**ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT \***

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[This table is not part of the Statute and is included for convenience]

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### PREAMBLE

The States Parties to this Statute,

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

Recognizing that such grave crimes threaten the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

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

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

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,

Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the

internal affairs of any State,

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

Resolved to guarantee lasting respect for and the enforcement of international justice,

Have agreed as follows:

## PART 1. ESTABLISHMENT OF THE COURT

### Article 1

#### The Court

An International Criminal Court (the Court) is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

### Article 2

#### Relationship of the Court with the United Nations

The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.

### Article 3

#### Seat of the Court

1. The seat of the Court shall be established at The Hague in the Netherlands (the host State).
2. The Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.
3. The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.

Article 4

Legal status and powers of the Court

1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.
2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Article 5

Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
  - (a) The crime of genocide;
  - (b) Crimes against humanity;
  - (c) War crimes;
  - (d) The crime of aggression.
2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Article 6

Genocide

For the purpose of this Statute, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Article 7

Crimes against humanity

1. For the purpose of this Statute, crime against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

- (a) “Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
- (b) “Extermination” includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
- (c) “Enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
- (d) “Deportation or forcible transfer of population” means forced

displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) “Torture” means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) “Forced pregnancy” means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) “Persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) “The crime of apartheid” means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) “Enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term “gender” refers to the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from the above.

## Article 8

### War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, “war crimes” means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) wilful killing;

(ii) torture or inhuman treatment, including biological

- experiments;
- (iii) wilfully causing great suffering, or serious injury to body or health;
- (iv) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (v) compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
- (vi) wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
- (vii) unlawful deportation or transfer or unlawful confinement;
- (viii) taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

- (i) intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- (ii) intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
- (iii) intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- (iv) intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
- (v) attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
- (vi) killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
- (vii) making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
- (viii) the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the

- population of the occupied territory within or outside this territory;
- (ix) intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
  - (x) subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
  - (xi) killing or wounding treacherously individuals belonging to the hostile nation or army;
  - (xii) declaring that no quarter will be given;
  - (xiii) destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
  - (xiv) declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
  - (xv) compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
  - (xvi) pillaging a town or place, even when taken by assault;
  - (xvii) employing poison or poisoned weapons;
  - (xviii) employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
  - (xix) employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
  - (xx) employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;
  - (xxi) committing outrages upon personal dignity, in particular humiliating and degrading treatment;
  - (xxii) committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced

sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

- (xxiii) utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
- (xxiv) intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- (xxv) intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
- (xxvi) conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

- (i) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (ii) committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (iii) taking of hostages;
- (iv) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

- (i) intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- (ii) intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in



means.

Article 9

Elements of Crimes

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Elements of Crimes may be proposed by:

- (a) Any State Party;
- (b) The judges acting by an absolute majority;
- (c) The Prosecutor.

Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

3. The Elements of Crimes and amendments thereto shall be consistent with this Statute.

Article 10

Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

Article 11

Jurisdiction *ratione temporis*

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

Article 12

Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

### Article 13

#### Exercise of jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

### Article 14

#### Referral of a situation by a State Party

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

### Article 15

#### Prosecutor

1. The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.

2. The Prosecutor shall analyse the seriousness of the information

received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.

6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

#### Article 16

##### Deferral of investigation or prosecution

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

#### Article 17

##### Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

## Article 18

### Preliminary rulings regarding admissibility

1. When a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States.

2. Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

3. The Prosecutor's deferral to a State's investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation.

4. The State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber, in accordance with article 82. The appeal may be heard on an expedited basis.

5. When the Prosecutor has deferred an investigation in accordance with paragraph 2, the Prosecutor may request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions. States Parties shall respond to such requests without undue delay.

6. Pending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has deferred an investigation under this article, the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available.

7. A State which has challenged a ruling of the Pre-Trial Chamber under this article may challenge the admissibility of a case under article 19 on the grounds of additional significant facts or significant change of circumstances.

#### Article 19

##### Challenges to the jurisdiction of the Court or the admissibility of a case

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.

2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:

(a) An accused or a person for whom a warrant of arrest or a summons

to appear has been issued under article 58;

(b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or

(c) A State from which acceptance of jurisdiction is required under article 12.

3. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.

4. The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c).

5. A State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity.

6. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82.

7. If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17.

8. Pending a ruling by the Court, the Prosecutor may seek authority from the Court:

(a) To pursue necessary investigative steps of the kind referred to in article 18, paragraph 6;

(b) To take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and

(c) In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58.

9. The making of a challenge shall not affect the validity of any act

performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge.

10. If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17.

11. If the Prosecutor, having regard to the matters referred to in article 17, defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. That information shall, at the request of the State concerned, be confidential. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State to which deferral of the proceedings has taken place.

#### Article 20

##### *Ne bis in idem*

1 Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.

3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) 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.

#### Article 21

##### Applicable law

1. The Court shall apply:

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established

principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

### PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW

#### Article 22

##### *Nullum crimen sine lege*

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.

2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

#### Article 23

##### *Nulla poena sine lege*

A person convicted by the Court may be punished only in accordance with this Statute.

#### Article 24

##### *Non-retroactivity ratione personae*

1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.

2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

Article 25

Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

- (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
- (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
  - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
  - (ii) Be made in the knowledge of the intention of the group to commit the crime;
- (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
- (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Article 26

Exclusion of jurisdiction over persons under eighteen

The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

Article 27

Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 28

Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

- (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
- (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described

in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

- (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
- (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
- (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

#### Article 29

##### Non-applicability of statute of limitations

The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

#### Article 30

##### Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
  - (a) In relation to conduct, that person means to engage in the conduct;
  - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, knowledge means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. Know and knowingly shall be construed accordingly.

#### Article 31

##### Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:
  - (a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the

requirements of law;

(b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

- (i) Made by other persons; or
- (ii) Constituted by other circumstances beyond that person's control.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

#### Article 32

##### Mistake of fact or mistake of law

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for

excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

Article 33

Superior orders and prescription of law

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

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

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

(c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

PART 4. COMPOSITION AND ADMINISTRATION OF THE COURT

Article 34

Organs of the Court

The Court shall be composed of the following organs:

(a) The Presidency;

(b) An Appeals Division, a Trial Division and a Pre-Trial Division;

(c) The Office of the Prosecutor;

(d) The Registry.

Article 35

Service of judges

1. All judges shall be elected as full-time members of the Court and shall be available to serve on that basis from the commencement of their terms of office.

2. The judges composing the Presidency shall serve on a full-time basis as soon as they are elected.

3. The Presidency may, on the basis of the workload of the Court and in consultation with its members, decide from time to time to what extent the remaining judges shall be required to serve on a full-time basis. Any such arrangement shall be without prejudice to the provisions of article 40.

4. The financial arrangements for judges not required to serve on a full-time basis shall be made in accordance with article 49.

Article 36

Qualifications, nomination and election of judges

1. Subject to the provisions of paragraph 2, there shall be 18 judges of the Court.

2. (a) The Presidency, acting on behalf of the Court, may propose an increase in the number of judges specified in paragraph 1, indicating the reasons why this is considered necessary and appropriate. The Registrar shall promptly circulate any such proposal to all States Parties.

(b) Any such proposal shall then be considered at a meeting of the Assembly of States Parties to be convened in accordance with article 112. The proposal shall be considered adopted if approved at the meeting by a vote of two thirds of the members of the Assembly of States Parties and shall enter into force at such time as decided by the Assembly of States Parties.

(c) (i) Once a proposal for an increase in the number of judges has been adopted under subparagraph (b), the election of the additional judges shall take place at the next session of the Assembly of States Parties in accordance with paragraphs 3 to 8, and article 37, paragraph 2;

(ii) Once a proposal for an increase in the number of judges has been adopted and brought into effect under subparagraphs (b) and (c) (i), it shall be open to the Presidency at any time thereafter, if the workload of the Court justifies it, to propose a reduction in the number of judges, provided that the number of judges shall not be reduced below that specified in paragraph 1. The proposal shall be dealt with in accordance with the procedure laid down in subparagraphs (a) and (b). In the event that the proposal is adopted, the number of judges shall be progressively decreased as the terms of office of serving judges expire, until the necessary number has been reached.

3. (a) The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.

(b) Every candidate for election to the Court shall:

(i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal

proceedings; or

- (ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court;

(c) Every candidate for election to the Court shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. (a) Nominations of candidates for election to the Court may be made by any State Party to this Statute, and shall be made either:

- (i) By the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question; or
- (ii) By the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court.

Nominations shall be accompanied by a statement in the necessary detail specifying how the candidate fulfils the requirements of paragraph 3.

(b) Each State Party may put forward one candidate for any given election who need not necessarily be a national of that State Party but shall in any case be a national of a State Party.

(c) The Assembly of States Parties may decide to establish, if appropriate, an Advisory Committee on nominations. In that event, the Committee's composition and mandate shall be established by the Assembly of States Parties.

5. For the purposes of the election, there shall be two lists of candidates:

List A containing the names of candidates with the qualifications specified in paragraph 3 (b) (i); and

List B containing the names of candidates with the qualifications specified in paragraph 3 (b) (ii).

A candidate with sufficient qualifications for both lists may choose on which list to appear. At the first election to the Court, at least nine judges shall be elected from list A and at least five judges from list B. Subsequent elections shall be so organized as to maintain the equivalent proportion on the Court of judges qualified on the two lists.

6. (a) The judges shall be elected by secret ballot at a meeting of the Assembly of States Parties convened for that purpose under article 112. Subject to paragraph 7, the persons elected to the Court shall be the 18 candidates who obtain the highest number of votes and a two-thirds majority of the States Parties present and voting.

(b) In the event that a sufficient number of judges is not elected on the first ballot, successive ballots shall be held in accordance with the procedures laid down in subparagraph (a) until the remaining places have been filled.

7. No two judges may be nationals of the same State. A person who, for the purposes of membership of the Court, could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.

8. (a) The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:

- (i) The representation of the principal legal systems of the world;
- (ii) Equitable geographical representation; and
- (iii) A fair representation of female and male judges.

(b) States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.

9. (a) Subject to subparagraph (b), judges shall hold office for a term of nine years and, subject to subparagraph (c) and to article 37, paragraph 2, shall not be eligible for re-election.

(b) At the first election, one third of the judges elected shall be selected by lot to serve for a term of three years; one third of the judges elected shall be selected by lot to serve for a term of six years; and the remainder shall serve for a term of nine years.

(c) A judge who is selected to serve for a term of three years under subparagraph (b) shall be eligible for re-election for a full term.

10. Notwithstanding paragraph 9, a judge assigned to a Trial or Appeals Chamber in accordance with article 39 shall continue in office to complete any trial or appeal the hearing of which has already commenced before that Chamber.

#### Article 37

##### Judicial vacancies

1. In the event of a vacancy, an election shall be held in accordance with article 36 to fill the vacancy.

2. A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term and, if that period is three years or less, shall be eligible for re-election for a full term under article 36.

#### Article 38

The Presidency

1. The President and the First and Second Vice-Presidents shall be elected by an absolute majority of the judges. They shall each serve for a term of three years or until the end of their respective terms of office as judges, whichever expires earlier. They shall be eligible for re-election once.
2. The First Vice-President shall act in place of the President in the event that the President is unavailable or disqualified. The Second Vice-President shall act in place of the President in the event that both the President and the First Vice-President are unavailable or disqualified.
3. The President, together with the First and Second Vice-Presidents, shall constitute the Presidency, which shall be responsible for:
  - (a) The proper administration of the Court, with the exception of the Office of the Prosecutor; and
  - (b) The other functions conferred upon it in accordance with this Statute.
4. In discharging its responsibility under paragraph 3 (a), the Presidency shall coordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern.

Article 39

Chambers

1. As soon as possible after the election of the judges, the Court shall organize itself into the divisions specified in article 34, paragraph (b). The Appeals Division shall be composed of the President and four other judges, the Trial Division of not less than six judges and the Pre-Trial Division of not less than six judges. The assignment of judges to divisions shall be based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law. The Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience.
2. (a) The judicial functions of the Court shall be carried out in each division by Chambers.
  - (b) (i) The Appeals Chamber shall be composed of all the judges of the Appeals Division;
  - (ii) The functions of the Trial Chamber shall be carried out by three judges of the Trial Division;
  - (iii) The functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single

judge of that division in accordance with this Statute and the Rules of Procedure and Evidence;

(c) Nothing in this paragraph shall preclude the simultaneous constitution of more than one Trial Chamber or Pre-Trial Chamber when the efficient management of the Court's workload so requires.

3. (a) Judges assigned to the Trial and Pre-Trial Divisions shall serve in those divisions for a period of three years, and thereafter until the completion of any case the hearing of which has already commenced in the division concerned.

(b) Judges assigned to the Appeals Division shall serve in that division for their entire term of office.

4. Judges assigned to the Appeals Division shall serve only in that division. Nothing in this article shall, however, preclude the temporary attachment of judges from the Trial Division to the Pre-Trial Division or vice versa, if the Presidency considers that the efficient management of the Court's workload so requires, provided that under no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case.

#### Article 40

##### Independence of the judges

1. The judges shall be independent in the performance of their functions.
2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.
3. Judges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature.
4. Any question regarding the application of paragraphs 2 and 3 shall be decided by an absolute majority of the judges. Where any such question concerns an individual judge, that judge shall not take part in the decision.

#### Article 41

##### Excusing and disqualification of judges

1. The Presidency may, at the request of a judge, excuse that judge from the exercise of a function under this Statute, in accordance with the Rules of Procedure and Evidence.
2. (a) A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, inter alia, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the

person being investigated or prosecuted. A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence.

(b) The Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph.

(c) Any question as to the disqualification of a judge shall be decided by an absolute majority of the judges. The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision.

#### Article 42

##### The Office of the Prosecutor

1. The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.

2. The Office shall be headed by the Prosecutor. The Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof. The Prosecutor shall be assisted by one or more Deputy Prosecutors, who shall be entitled to carry out any of the acts required of the Prosecutor under this Statute. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. They shall serve on a full-time basis.

3. The Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. They shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The Prosecutor shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties. The Deputy Prosecutors shall be elected in the same way from a list of candidates provided by the Prosecutor. The Prosecutor shall nominate three candidates for each position of Deputy Prosecutor to be filled. Unless a shorter term is decided upon at the time of their election, the Prosecutor and the Deputy Prosecutors shall hold office for a term of nine years and shall not be eligible for re-election.

5. Neither the Prosecutor nor a Deputy Prosecutor shall engage in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence. They shall not engage in any other occupation of a professional nature.

6. The Presidency may excuse the Prosecutor or a Deputy Prosecutor, at his or her request, from acting in a particular case.

7. Neither the Prosecutor nor a Deputy Prosecutor shall participate in any matter in which their impartiality might reasonably be doubted on any ground. They shall be disqualified from a case in accordance with this paragraph if, inter alia, they have previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted.

8. Any question as to the disqualification of the Prosecutor or a Deputy Prosecutor shall be decided by the Appeals Chamber.

(a) The person being investigated or prosecuted may at any time request the disqualification of the Prosecutor or a Deputy Prosecutor on the grounds set out in this article;

(b) The Prosecutor or the Deputy Prosecutor, as appropriate, shall be entitled to present his or her comments on the matter;

9. The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children.

#### Article 43

##### The Registry

1. The Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor in accordance with article 42.

2. The Registry shall be headed by the Registrar, who shall be the principal administrative officer of the Court. The Registrar shall exercise his or her functions under the authority of the President of the Court.

3. The Registrar and the Deputy Registrar shall be persons of high moral character, be highly competent and have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The judges shall elect the Registrar by an absolute majority by secret ballot, taking into account any recommendation by the Assembly of States Parties. If the need arises and upon the recommendation of the Registrar, the judges shall elect, in the same manner, a Deputy Registrar.

5. The Registrar shall hold office for a term of five years, shall be eligible for re-election once and shall serve on a full-time basis. The Deputy Registrar shall hold office for a term of five years or such shorter term as may be decided upon by an absolute majority of the judges, and may be

elected on the basis that the Deputy Registrar shall be called upon to serve as required.

6. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

#### Article 44

##### Staff

1. The Prosecutor and the Registrar shall appoint such qualified staff as may be required to their respective offices. In the case of the Prosecutor, this shall include the appointment of investigators.

2. In the employment of staff, the Prosecutor and the Registrar shall ensure the highest standards of efficiency, competency and integrity, and shall have regard, *mutatis mutandis*, to the criteria set forth in article 36, paragraph 8.

3. The Registrar, with the agreement of the Presidency and the Prosecutor, shall propose Staff Regulations which include the terms and conditions upon which the staff of the Court shall be appointed, remunerated and dismissed. The Staff Regulations shall be approved by the Assembly of States Parties.

4. The Court may, in exceptional circumstances, employ the expertise of *gratis* personnel offered by States Parties, intergovernmental organizations or non-governmental organizations to assist with the work of any of the organs of the Court. The Prosecutor may accept any such offer on behalf of the Office of the Prosecutor. Such *gratis* personnel shall be employed in accordance with guidelines to be established by the Assembly of States Parties.

#### Article 45

##### Solemn undertaking

Before taking up their respective duties under this Statute, the judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall each make a solemn undertaking in open court to exercise his or her respective functions impartially and conscientiously.

Article 46

Removal from office

1. A judge, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar shall be removed from office if a decision to this effect is made in accordance with paragraph 2, in cases where that person:

(a) Is found to have committed serious misconduct or a serious breach of his or her duties under this Statute, as provided for in the Rules of Procedure and Evidence; or

(b) Is unable to exercise the functions required by this Statute.

2. A decision as to the removal from office of a judge, the Prosecutor or a Deputy Prosecutor under paragraph 1 shall be made by the Assembly of States Parties, by secret ballot:

(a) In the case of a judge, by a two-thirds majority of the States Parties upon a recommendation adopted by a two-thirds majority of the other judges;

(b) In the case of the Prosecutor, by an absolute majority of the States Parties;

(c) In the case of a Deputy Prosecutor, by an absolute majority of the States Parties upon the recommendation of the Prosecutor.

3. A decision as to the removal from office of the Registrar or Deputy Registrar shall be made by an absolute majority of the judges.

4. A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar whose conduct or ability to exercise the functions of the office as required by this Statute is challenged under this article shall have full opportunity to present and receive evidence and to make submissions in accordance with the Rules of Procedure and Evidence. The person in question shall not otherwise participate in the consideration of the matter.

Article 47

Disciplinary measures

A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar who has committed misconduct of a less serious nature than that set out in article 46, paragraph 1, shall be subject to disciplinary measures, in accordance with the Rules of Procedure and Evidence.

Article 48

Privileges and immunities

1. The Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfilment of its purposes.

2. The judges, the Prosecutor, the Deputy Prosecutors and the Registrar shall, when engaged on or with respect to the business of the Court, enjoy the same privileges and immunities as are accorded to heads of diplomatic missions and shall, after the expiry of their terms of office, continue to be accorded immunity from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity.

3. The Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry shall enjoy the privileges and immunities and facilities necessary for the performance of their functions, in accordance with the agreement on the privileges and immunities of the Court.

4. Counsel, experts, witnesses or any other person required to be present at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on the privileges and immunities of the Court.

5. The privileges and immunities of:

(a) A judge or the Prosecutor may be waived by an absolute majority of the judges;

(b) The Registrar may be waived by the Presidency;

(c) The Deputy Prosecutors and staff of the Office of the Prosecutor may be waived by the Prosecutor;

(d) The Deputy Registrar and staff of the Registry may be waived by the Registrar.

#### Article 49

##### Salaries, allowances and expenses

The judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall receive such salaries, allowances and expenses as may be decided upon by the Assembly of States Parties. These salaries and allowances shall not be reduced during their terms of office.

#### Article 50

##### Official and working languages

1. The official languages of the Court shall be Arabic, Chinese, English, French, Russian and Spanish. The judgements of the Court, as well as other decisions resolving fundamental issues before the Court, shall be published in the official languages. The Presidency shall, in accordance with the criteria established by the Rules of Procedure and Evidence, determine which decisions may be considered as resolving fundamental issues for the purposes of this paragraph.

2. The working languages of the Court shall be English and French. The Rules of Procedure and Evidence shall determine the cases in which other official languages may be used as working languages.

3. At the request of any party to a proceeding or a State allowed to intervene in a proceeding, the Court shall authorize a language other than English or French to be used by such a party or State, provided that the Court considers such authorization to be adequately justified.

#### Article 51

##### Rules of Procedure and Evidence

1. The Rules of Procedure and Evidence shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Rules of Procedure and Evidence may be proposed by:

- (a) Any State Party;
- (b) The judges acting by an absolute majority; or
- (c) The Prosecutor.

Such amendments shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

3. After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties.

4. The Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute. Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.

5. In the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail.

#### Article 52

##### Regulations of the Court

1. The judges shall, in accordance with this Statute and the Rules of Procedure and Evidence, adopt, by an absolute majority, the Regulations of the Court necessary for its routine functioning.

2. The Prosecutor and the Registrar shall be consulted in the elaboration of the Regulations and any amendments thereto.

3. The Regulations and any amendments thereto shall take effect upon adoption unless otherwise decided by the judges. Immediately upon adoption, they shall be circulated to States Parties for comments. If within six months there are no objections from a majority of States Parties, they shall remain in force.

## PART 5. INVESTIGATION AND PROSECUTION

### Article 53

#### Initiation of an investigation

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

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

(b) The case is or would be admissible under article 17; and

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

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

(a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;

(b) The case is inadmissible under article 17; or

(c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime;

the Prosecutor shall inform the Pre

Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.

(b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.

4. The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.

#### Article 54

##### Duties and powers of the Prosecutor with respect to investigations

1. The Prosecutor shall:

(a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;

(b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children; and

(c) Fully respect the rights of persons arising under this Statute.

2. The Prosecutor may conduct investigations on the territory of a State:

(a) In accordance with the provisions of Part 9; or

(b) As authorized by the Pre-Trial Chamber under article 57, paragraph 3 (d).

3. The Prosecutor may:

(a) Collect and examine evidence;

(b) Request the presence of and question persons being investigated, victims and witnesses;

(c) Seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate;

(d) Enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person;

- (e) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and
- (f) Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.

Article 55

Rights of persons during an investigation

1. In respect of an investigation under this Statute, a person:

- (a) Shall not be compelled to incriminate himself or herself or to confess guilt;
- (b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;
- (c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and
- (d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.

2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:

- (a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;
- (b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;
- (c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and
- (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

Article 56

Role of the Pre-Trial Chamber in relation to a unique investigative opportunity

1. (a) Where the Prosecutor considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial, the Prosecutor shall so inform the Pre-Trial Chamber.  
(b) In that case, the Pre-Trial Chamber may, upon request of the Prosecutor, take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence.  
(c) Unless the Pre-Trial Chamber orders otherwise, the Prosecutor shall provide the relevant information to the person who has been arrested or appeared in response to a summons in connection with the investigation referred to in subparagraph (a), in order that he or she may be heard on the matter.
2. The measures referred to in paragraph 1 (b) may include:
  - (a) Making recommendations or orders regarding procedures to be followed;
  - (b) Directing that a record be made of the proceedings;
  - (c) Appointing an expert to assist;
  - (d) Authorizing counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance or counsel has not been designated, appointing another counsel to attend and represent the interests of the defence;
  - (e) Naming one of its members or, if necessary, another available judge of the Pre-Trial or Trial Division to observe and make recommendations or orders regarding the collection and preservation of evidence and the questioning of persons;
  - (f) Taking such other action as may be necessary to collect or preserve evidence.
3. (a) Where the Prosecutor has not sought measures pursuant to this article but the Pre-Trial Chamber considers that such measures are required to preserve evidence that it deems would be essential for the defence at trial, it shall consult with the Prosecutor as to whether there is good reason for the Prosecutor's failure to request the measures. If upon consultation, the Pre-Trial Chamber concludes that the Prosecutor's failure to request such measures is unjustified, the Pre-Trial Chamber may take such measures on its own initiative.

(b) A decision of the Pre-Trial Chamber to act on its own initiative under this paragraph may be appealed by the Prosecutor. The appeal shall be heard on an expedited basis.

4. The admissibility of evidence preserved or collected for trial pursuant to this article, or the record thereof, shall be governed at trial by article 69, and given such weight as determined by the Trial Chamber.

#### Article 57

##### Functions and powers of the Pre-Trial Chamber

1. Unless otherwise provided in this Statute, the Pre-Trial Chamber shall exercise its functions in accordance with the provisions of this article.

2. (a) Orders or rulings of the Pre-Trial Chamber issued under articles 15, 18, 19, 54, paragraph 2, 61, paragraph 7, and 72 must be concurred in by a majority of its judges.

(b) In all other cases, a single judge of the Pre-Trial Chamber may exercise the functions provided for in this Statute, unless otherwise provided for in the Rules of Procedure and Evidence or by a majority of the Pre-Trial Chamber.

3. In addition to its other functions under this Statute, the Pre-Trial Chamber may:

(a) At the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation;

(b) Upon the request of a person who has been arrested or has appeared pursuant to a summons under article 58, issue such orders, including measures such as those described in article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence;

(c) Where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information;

(d) Authorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State under Part 9 if, whenever possible having regard to the views of the State concerned, the Pre-Trial Chamber has determined in that case that the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9.

(e) Where a warrant of arrest or a summons has been issued under article 58, and having due regard to the strength of the evidence and the

rights of the parties concerned, as provided for in this Statute and the Rules of Procedure and Evidence, seek the cooperation of States pursuant to article 93, paragraph 1 (k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims.

Article 58

Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear

1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

- (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and
- (b) The arrest of the person appears necessary:
  - (i) To ensure the person's appearance at trial,
  - (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or
  - (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

2. The application of the Prosecutor shall contain:

- (a) The name of the person and any other relevant identifying information;
- (b) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed;
- (c) A concise statement of the facts which are alleged to constitute those crimes;
- (d) A summary of the evidence and any other information which establish reasonable grounds to believe that the person committed those crimes; and
- (e) The reason why the Prosecutor believes that the arrest of the person is necessary.

3. The warrant of arrest shall contain:

- (a) The name of the person and any other relevant identifying information;
- (b) A specific reference to the crimes within the jurisdiction of the Court for which the person's arrest is sought; and

(c) A concise statement of the facts which are alleged to constitute those crimes.

4. The warrant of arrest shall remain in effect until otherwise ordered by the Court.

5. On the basis of the warrant of arrest, the Court may request the provisional arrest or the arrest and surrender of the person under Part 9.

6. The Prosecutor may request the Pre-Trial Chamber to amend the warrant of arrest by modifying or adding to the crimes specified therein. The Pre-Trial Chamber shall so amend the warrant if it is satisfied that there are reasonable grounds to believe that the person committed the modified or additional crimes.

7. As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear. The summons shall contain:

- (a) The name of the person and any other relevant identifying information;
- (b) The specified date on which the person is to appear;
- (c) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed; and
- (d) A concise statement of the facts which are alleged to constitute the crime.

The summons shall be served on the person.

#### Article 59

##### Arrest proceedings in the custodial State

1. A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9.

2. A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:

- (a) The warrant applies to that person;
- (b) The person has been arrested in accordance with the proper process; and

(c) The person's rights have been respected.

3. The person arrested shall have the right to apply to the competent authority in the custodial State for interim release pending surrender.

4. In reaching a decision on any such application, 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. It shall not be open to the competent authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b).

5. The Pre-Trial Chamber shall be notified of any request for interim release and shall make recommendations to the competent authority in the custodial State. The competent authority in the custodial State shall give full consideration to such recommendations, including any recommendations on measures to prevent the escape of the person, before rendering its decision.

6. If the person is granted interim release, the Pre-Trial Chamber may request periodic reports on the status of the interim release.

7. Once ordered to be surrendered by the custodial State, the person shall be delivered to the Court as soon as possible.

#### Article 60

##### Initial proceedings before the Court

1. Upon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under this Statute, including the right to apply for interim release pending trial.

2. A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.

3. The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.

4. The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions.

5. If necessary, the Pre-Trial Chamber may issue a warrant of arrest to secure the presence of a person who has been released.

#### Article 61

##### Confirmation of the charges before trial

1. Subject to the provisions of paragraph 2, within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel.

2. The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has:

(a) Waived his or her right to be present; or

(b) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held.

In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice.

3. Within a reasonable time before the hearing, the person shall:

(a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and

(b) Be informed of the evidence on which the Prosecutor intends to rely at the hearing.

The Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of the hearing.

4. Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any charges. The person shall be given reasonable notice before the hearing of any amendment to or withdrawal of charges. In case of a withdrawal of charges, the Prosecutor shall notify the Pre-Trial Chamber of the reasons for the withdrawal.

5. At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person

committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.

6. At the hearing, the person may:

- (a) Object to the charges;
- (b) Challenge the evidence presented by the Prosecutor; and
- (c) Present evidence.

7. The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:

- (a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;
- (b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence;
- (c) Adjourn the hearing and request the Prosecutor to consider:
  - (i) Providing further evidence or conducting further investigation with respect to a particular charge; or
  - (ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

8. Where the Pre-Trial Chamber declines to confirm a charge, the Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence.

9. After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.

10. Any warrant previously issued shall cease to have effect with respect to any charges which have not been confirmed by the Pre-Trial Chamber or which have been withdrawn by the Prosecutor.

11. Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the



functioning, refer preliminary issues to the Pre-Trial Chamber or, if necessary, to another available judge of the Pre-Trial Division.

5. Upon notice to the parties, the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused.

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

(a) Exercise any functions of the Pre-Trial Chamber referred to in article 61, paragraph 11;

(b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute;

(c) Provide for the protection of confidential information;

(d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties;

(e) Provide for the protection of the accused, witnesses and victims; and

(f) Rule on any other relevant matters.

7. The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence.

8. (a) At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber. The Trial Chamber shall satisfy itself that the accused understands the nature of the charges. It shall afford him or her the opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty.

(b) At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute.

9. The Trial Chamber shall have, *inter alia*, the power on application of a party or on its own motion to:

(a) Rule on the admissibility or relevance of evidence; and

(b) Take all necessary steps to maintain order in the course of a hearing.

10. The Trial Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is made and that it is

maintained and preserved by the Registrar.

Article 65

Proceedings on an admission of guilt

1. Where the accused makes an admission of guilt pursuant to article 64, paragraph 8 (a), the Trial Chamber shall determine whether:

(a) The accused understands the nature and consequences of the admission of guilt;

(b) The admission is voluntarily made by the accused after sufficient consultation with defence counsel; and

(c) The admission of guilt is supported by the facts of the case that are contained in:

(i) The charges brought by the Prosecutor and admitted by the accused;

(ii) Any materials presented by the Prosecutor which supplement the charges and which the accused accepts; and

(iii) Any other evidence, such as the testimony of witnesses, presented by the Prosecutor or the accused.

2. Where the Trial Chamber is satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt, together with any additional evidence presented, as establishing all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime.

3. Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt as not having been made, in which case it shall order that the trial be continued under the ordinary trial procedures provided by this Statute and may remit the case to another Trial Chamber.

4. Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims, the Trial Chamber may:

(a) Request the Prosecutor to present additional evidence, including the testimony of witnesses; or

(b) Order that the trial be continued under the ordinary trial procedures provided by this Statute, in which case it shall consider the admission of guilt as not having been made and may remit the case to another Trial Chamber.

5. Any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court.

Article 66

Presumption of innocence

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.
2. The onus is on the Prosecutor to prove the guilt of the accused.
3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

Article 67

Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

(c) To be tried without undue delay;

(d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks;

(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

(h) To make an unsworn oral or written statement in his or her defence; and

(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

#### Article 68

##### Protection of the victims and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6.

5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information.

Article 69

Evidence

1. Before testifying, each witness shall, in accordance with the Rules of Procedure and Evidence, give an undertaking as to the truthfulness of the evidence to be given by that witness.

2. The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.

3. The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

4. The Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

5. The Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence.

6. The Court shall not require proof of facts of common knowledge but may take judicial notice of them.

7. Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

(a) The violation casts substantial doubt on the reliability of the evidence; or

(b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

8. When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law.

#### Article 70

##### Offences against the administration of justice

1. The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:

(a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;

(b) Presenting evidence that the party knows is false or forged;

(c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;

(d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;

(e) Retaliating against an official of the Court on account of duties performed by that or another official;

(f) Soliciting or accepting a bribe as an official of the Court in connection with his or her official duties.

2. The principles and procedures governing the Court's exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence. The conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State.

3. In the event of conviction, the Court may impose a term of imprisonment not exceeding five years, or a fine in accordance with the Rules of Procedure and Evidence, or both.

4. (a) Each State Party shall extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this article, committed on its territory, or by one of its nationals;

(b) Upon request by the Court, whenever it deems it proper, the State Party shall submit the case to its competent authorities for the purpose of prosecution. Those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively.

Article 71

Sanctions for misconduct before the Court

1. The Court may sanction persons present before it who commit misconduct, including disruption of its proceedings or deliberate refusal to comply with its directions, by administrative measures other than imprisonment, such as temporary or permanent removal from the courtroom, a fine or other similar measures provided for in the Rules of Procedure and Evidence.

2. The procedures governing the imposition of the measures set forth in paragraph 1 shall be those provided for in the Rules of Procedure and Evidence.

Article 72

Protection of national security information

1. This article applies in any case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests. Such cases include those falling within the scope of article 56, paragraphs 2 and 3, article 61, paragraph 3, article 64, paragraph 3, article 67, paragraph 2, article 68, paragraph 6, article 87, paragraph 6 and article 93, as well as cases arising at any other stage of the proceedings where such disclosure may be at issue.

2. This article shall also apply when a person who has been requested to give information or evidence has refused to do so or has referred the matter to the State on the ground that disclosure would prejudice the national security interests of a State and the State concerned confirms that it is of the opinion that disclosure would prejudice its national security interests.

3. Nothing in this article shall prejudice the requirements of confidentiality applicable under article 54, paragraph 3 (e) and (f), or the application of article 73.

4. If a State learns that information or documents of the State are being, or are likely to be, disclosed at any stage of the proceedings, and it is of the opinion that disclosure would prejudice its national security interests, that State shall have the right to intervene in order to obtain resolution of the issue in accordance with this article.

5. If, in the opinion of a State, disclosure of information would prejudice

its national security interests, all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor, the defence or the Pre-Trial Chamber or Trial Chamber, as the case may be, to seek to resolve the matter by cooperative means. Such steps may include:

(a) Modification or clarification of the request;

(b) A determination by the Court regarding the relevance of the information or evidence sought, or a determination as to whether the evidence, though relevant, could be or has been obtained from a source other than the requested State;

(c) Obtaining the information or evidence from a different source or in a different form; or

(d) Agreement on conditions under which the assistance could be provided including, among other things, providing summaries or redactions, limitations on disclosure, use of *in camera* or *ex parte* proceedings, or other protective measures permissible under the Statute and the Rules of Procedure and Evidence.

6. Once all reasonable steps have been taken to resolve the matter through cooperative means, and if the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it shall so notify the Prosecutor or the Court of the specific reasons for its decision, unless a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests.

7. Thereafter, if the Court determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused, the Court may undertake the following actions:

(a) Where disclosure of the information or document is sought pursuant to a request for cooperation under Part 9 or the circumstances described in paragraph 2, and the State has invoked the ground for refusal referred to in article 93, paragraph 4:

(i) The Court may, before making any conclusion referred to in subparagraph 7 (a) (ii), request further consultations for the purpose of considering the State's representations, which may include, as appropriate, hearings *in camera* and *ex parte*;

(ii) If the Court concludes that, by invoking the ground for refusal under article 93, paragraph 4, in the circumstances of the case, the requested State is not acting in accordance with its obligations under this Statute, the Court may refer the matter in accordance with article 87, paragraph 7, specifying the reasons for its conclusion; and

(iii) The Court may make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances; or

(b) In all other circumstances:

- (i) Order disclosure; or
- (ii) To the extent it does not order disclosure, make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances.

### Article 73

#### Third-party information or documents

If a State Party is requested by the Court to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a State, intergovernmental organization or international organization, it shall seek the consent of the originator to disclose that document or information. If the originator is a State Party, it shall either consent to disclosure of the information or document or undertake to resolve the issue of disclosure with the Court, subject to the provisions of article 72. If the originator is not a State Party and refuses to consent to disclosure, the requested State shall inform the Court that it is unable to provide the document or information because of a pre-existing obligation of confidentiality to the originator.

### Article 74

#### Requirements for the decision

1. All the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations. The Presidency may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending.
2. The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.
3. The judges shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges.
4. The deliberations of the Trial Chamber shall remain secret.
5. The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be

delivered in open court.

Article 75

Reparations to victims

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.

4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.

5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.

6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

Article 76

Sentencing

1. In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence.

2. Except where article 65 applies and before the completion of the trial, the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence.

3. Where paragraph 2 applies, any representations under article 75 shall be heard during the further hearing referred to in paragraph 2 and, if necessary, during any additional hearing.

4. The sentence shall be pronounced in public and, wherever possible, in the presence of the accused.

## PART 7. PENALTIES

### Article 77

#### Applicable penalties

1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:

(a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or

(b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

2. In addition to imprisonment, the Court may order:

(a) A fine under the criteria provided for in the Rules of Procedure and Evidence;

(b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

### Article 78

#### Determination of the sentence

1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.

3. When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with article 77, paragraph 1 (b).

Article 79

Trust Fund

1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.
2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.
3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

Article 80

Non-prejudice to national application of penalties and national laws

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.

PART 8. APPEAL AND REVISION

Article 81

Appeal against decision of acquittal or conviction or against sentence

1. A decision under article 74 may be appealed in accordance with the Rules of Procedure and Evidence as follows:
  - (a) The Prosecutor may make an appeal on any of the following grounds:
    - (i) Procedural error,
    - (ii) Error of fact, or
    - (iii) Error of law;
  - (b) The convicted person, or the Prosecutor on that person's behalf, may make an appeal on any of the following grounds:
    - (i) Procedural error,
    - (ii) Error of fact,
    - (iii) Error of law, or
    - (iv) Any other ground that affects the fairness or reliability of the proceedings or decision.
2. (a) A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence;

(b) If on an appeal against sentence the Court considers that there are grounds on which the conviction might be set aside, wholly or in part, it may invite the Prosecutor and the convicted person to submit grounds under article 81, paragraph 1 (a) or (b), and may render a decision on conviction in accordance with article 83;

(c) The same procedure applies when the Court, on an appeal against conviction only, considers that there are grounds to reduce the sentence under paragraph 2 (a).

3. (a) Unless the Trial Chamber orders otherwise, a convicted person shall remain in custody pending an appeal;

(b) When a convicted person's time in custody exceeds the sentence of imprisonment imposed, that person shall be released, except that if the Prosecutor is also appealing, the release may be subject to the conditions under subparagraph (c) below;

(c) In case of an acquittal, the accused shall be released immediately, subject to the following:

(i) Under exceptional circumstances, and having regard, *inter alia*, to the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal, the Trial Chamber, at the request of the Prosecutor, may maintain the detention of the person pending appeal;

(ii) A decision by the Trial Chamber under subparagraph (c) (i) may be appealed in accordance with the Rules of Procedure and Evidence.

4. Subject to the provisions of paragraph 3 (a) and (b), execution of the decision or sentence shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings.

## Article 82

### Appeal against other decisions

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

(a) A decision with respect to jurisdiction or admissibility;

(b) A decision granting or denying release of the person being investigated or prosecuted;

(c) A decision of the Pre-Trial Chamber to act on its own initiative under article 56, paragraph 3;

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the

proceedings.

2. A decision of the Pre-Trial Chamber under article 57, paragraph 3 (d), may be appealed against by the State concerned or by the Prosecutor, with the leave of the Pre-Trial Chamber. The appeal shall be heard on an expedited basis.

3. An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence.

4. A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 75 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence.

### Article 83

#### Proceedings on appeal

1. For the purposes of proceedings under article 81 and this article, the Appeals Chamber shall have all the powers of the Trial Chamber.

2. If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may:

- (a) Reverse or amend the decision or sentence; or
- (b) Order a new trial before a different Trial Chamber.

For these purposes, the Appeals Chamber may remand a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly, or may itself call evidence to determine the issue. When the decision or sentence has been appealed only by the person convicted, or the Prosecutor on that person's behalf, it cannot be amended to his or her detriment.

3. If in an appeal against sentence the Appeals Chamber finds that the sentence is disproportionate to the crime, it may vary the sentence in accordance with Part 7.

4. The judgement of the Appeals Chamber shall be taken by a majority of the judges and shall be delivered in open court. The judgement shall state the reasons on which it is based. When there is no unanimity, the judgement of the Appeals Chamber shall contain the views of the majority and the minority, but a judge may deliver a separate or dissenting opinion on a question of law.

5. The Appeals Chamber may deliver its judgement in the absence of the person acquitted or convicted.

Article 84

Revision of conviction or sentence

1. The convicted person or, after death, spouses, children, parents or one person alive at the time of the accused's death who has been given express written instructions from the accused to bring such a claim, or the Prosecutor on the person's behalf, may apply to the Appeals Chamber to revise the final judgement of conviction or sentence on the grounds that:

(a) New evidence has been discovered that:

(i) Was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and

(ii) Is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict;

(b) It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified;

(c) One or more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under article 46.

2. The Appeals Chamber shall reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:

(a) Reconvene the original Trial Chamber;

(b) Constitute a new Trial Chamber; or

(c) Retain jurisdiction over the matter,

with a view to, after hearing the parties in the manner set forth in the Rules of Procedure and Evidence, arriving at a determination on whether the judgement should be revised.

Article 85

Compensation to an arrested or convicted person

1. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

2. When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that

there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.

3. In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.

## PART 9. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

### Article 86

#### General obligation to cooperate

States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

### Article 87

#### Requests for cooperation: general provisions

1. (a) The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession.

Subsequent changes to the designation shall be made by each State Party in accordance with the Rules of Procedure and Evidence.

(b) When appropriate, without prejudice to the provisions of subparagraph (a), requests may also be transmitted through the International Criminal Police Organization or any appropriate regional organization.

2. Requests for cooperation and any documents supporting the request shall either be in or be accompanied by a translation into an official language of the requested State or one of the working languages of the Court, in accordance with the choice made by that State upon ratification, acceptance, approval or accession.

Subsequent changes to this choice shall be made in accordance with the Rules of Procedure and Evidence.

3. The requested State shall keep confidential a request for cooperation and any documents supporting the request, except to the extent that the disclosure is necessary for execution of the request.

4. In relation to any request for assistance presented under this Part, the Court may take such measures, including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families. The Court may request that any information that is made available under this Part shall be provided and handled in a manner that protects the safety and physical or psychological well-being of any victims, potential witnesses and their families.

5. (a) The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.

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

6. The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate.

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

#### Article 88

##### Availability of procedures under national law

States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.

#### Article 89

##### Surrender of persons to the Court

1. The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article

91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.

2. Where the person sought for surrender brings a challenge before a national court on the basis of the principle of *ne bis in idem* as provided in article 20, the requested State shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the requested State shall proceed with the execution of the request. If an admissibility ruling is pending, the requested State may postpone the execution of the request for surrender of the person until the Court makes a determination on admissibility.

3. (a) A State Party shall authorize, in accordance with its national procedural law, transportation through its territory of a person being surrendered to the Court by another State, except where transit through that State would impede or delay the surrender.

(b) A request by the Court for transit shall be transmitted in accordance with article 87. The request for transit shall contain:

- (i) A description of the person being transported;
- (ii) A brief statement of the facts of the case and their legal characterization; and
- (iii) The warrant for arrest and surrender;

(c) A person being transported shall be detained in custody during the period of transit;

(d) No authorization is required if the person is transported by air and no landing is scheduled on the territory of the transit State;

(e) If an unscheduled landing occurs on the territory of the transit State, that State may require a request for transit from the Court as provided for in subparagraph (b). The transit State shall detain the person being transported until the request for transit is received and the transit is effected, provided that detention for purposes of this subparagraph may not be extended beyond 96 hours from the unscheduled landing unless the request is received within that time.

4. If the person sought is being proceeded against or is serving a sentence in the requested State for a crime different from that for which surrender to the Court is sought, the requested State, after making its decision to grant the request, shall consult with the Court.

#### Article 90

##### Competing requests

1. A State Party which receives a request from the Court for the surrender

of a person under article 89 shall, if it also receives a request from any other State for the extradition of the same person for the same conduct which forms the basis of the crime for which the Court seeks the person's surrender, notify the Court and the requesting State of that fact.

2. Where the requesting State is a State Party, the requested State shall give priority to the request from the Court if:

(a) The Court has, pursuant to article 18 or 19, made a determination that the case in respect of which surrender is sought is admissible and that determination takes into account the investigation or prosecution conducted by the requesting State in respect of its request for extradition; or

(b) The Court makes the determination described in subparagraph (a) pursuant to the requested State's notification under paragraph 1.

3. Where a determination under paragraph 2 (a) has not been made, the requested State may, at its discretion, pending the determination of the Court under paragraph 2 (b), proceed to deal with the request for extradition from the requesting State but shall not extradite the person until the Court has determined that the case is inadmissible. The Court's determination shall be made on an expedited basis.

4. If the requesting State is a State not Party to this Statute the requested State, if it is not under an international obligation to extradite the person to the requesting State, shall give priority to the request for surrender from the Court, if the Court has determined that the case is admissible.

5. Where a case under paragraph 4 has not been determined to be admissible by the Court, the requested State may, at its discretion, proceed to deal with the request for extradition from the requesting State.

6. In cases where paragraph 4 applies except that the requested State is under an existing international obligation to extradite the person to the requesting State not Party to this Statute, the requested State shall determine whether to surrender the person to the Court or extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to:

(a) The respective dates of the requests;

(b) The interests of the requesting State including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought; and

(c) The possibility of subsequent surrender between the Court and the requesting State.

7. Where a State Party which receives a request from the Court for the surrender of a person also receives a request from any State for the

extradition of the same person for conduct other than that which constitutes the crime for which the Court seeks the person's surrender:

(a) The requested State shall, if it is not under an existing international obligation to extradite the person to the requesting State, give priority to the request from the Court;

(b) The requested State shall, if it is under an existing international obligation to extradite the person to the requesting State, determine whether to surrender the person to the Court or to extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to those set out in paragraph 6, but shall give special consideration to the relative nature and gravity of the conduct in question.

8. Where pursuant to a notification under this article, the Court has determined a case to be inadmissible, and subsequently extradition to the requesting State is refused, the requested State shall notify the Court of this decision.

#### Article 91

##### Contents of request for arrest and surrender

1. A request for arrest and surrender shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1 (a).

2. In the case of a request for the arrest and surrender of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber under article 58, the request shall contain or be supported by:

(a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;

(b) A copy of the warrant of arrest; and

(c) Such documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State, except that those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court.

3. In the case of a request for the arrest and surrender of a person already convicted, the request shall contain or be supported by:

(a) A copy of any warrant of arrest for that person;

(b) A copy of the judgement of conviction;

(c) Information to demonstrate that the person sought is the one referred

to in the judgement of conviction; and

(d) If the person sought has been sentenced, a copy of the sentence imposed and, in the case of a sentence for imprisonment, a statement of any time already served and the time remaining to be served.

4. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (c). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

#### Article 92

##### Provisional arrest

1. In urgent cases, the Court may request the provisional arrest of the person sought, pending presentation of the request for surrender and the documents supporting the request as specified in article 91.

2. The request for provisional arrest shall be made by any medium capable of delivering a written record and shall contain:

(a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;

(b) A concise statement of the crimes for which the person's arrest is sought and of the facts which are alleged to constitute those crimes, including, where possible, the date and location of the crime;

(c) A statement of the existence of a warrant of arrest or a judgement of conviction against the person sought; and

(d) A statement that a request for surrender of the person sought will follow.

3. A person who is provisionally arrested may be released from custody if the requested State has not received the request for surrender and the documents supporting the request as specified in article 91 within the time limits specified in the Rules of Procedure and Evidence. However, the person may consent to surrender before the expiration of this period if permitted by the law of the requested State. In such a case, the requested State shall proceed to surrender the person to the Court as soon as possible.

4. The fact that the person sought has been released from custody pursuant to paragraph 3 shall not prejudice the subsequent arrest and surrender of that person if the request for surrender and the documents supporting the request are delivered at a later date.

#### Article 93

Other forms of cooperation

1. States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:

- (a) The identification and whereabouts of persons or the location of items;
- (b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;
- (c) The questioning of any person being investigated or prosecuted;
- (d) The service of documents, including judicial documents;
- (e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;
- (f) The temporary transfer of persons as provided in paragraph 7;
- (g) The examination of places or sites, including the exhumation and examination of grave sites;
- (h) The execution of searches and seizures;
- (i) The provision of records and documents, including official records and documents;
- (j) The protection of victims and witnesses and the preservation of evidence;
- (k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and
- (l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.

2. The Court shall have the authority to provide an assurance to a witness or an expert appearing before the Court that he or she will not be prosecuted, detained or subjected to any restriction of personal freedom by the Court in respect of any act or omission that preceded the departure of that person from the requested State.

3. Where execution of a particular measure of assistance detailed in a request presented under paragraph 1, is prohibited in the requested State on the basis of an existing fundamental legal principle of general application, the requested State shall promptly consult with the Court to try to resolve the matter. In the consultations, consideration should be given to whether the assistance can be rendered in another manner or

subject to conditions. If after consultations the matter cannot be resolved, the Court shall modify the request as necessary.

4. In accordance with article 72, a State Party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security.

5. Before denying a request for assistance under paragraph 1 (l), the requested State shall consider whether the assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later date or in an alternative manner, provided that if the Court or the Prosecutor accepts the assistance subject to conditions, the Court or the Prosecutor shall abide by them.

6. If a request for assistance is denied, the requested State Party shall promptly inform the Court or the Prosecutor of the reasons for such denial.

7. (a) The Court may request the temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance. The person may be transferred if the following conditions are fulfilled:

- (i) The person freely gives his or her informed consent to the transfer; and
- (ii) The requested State agrees to the transfer, subject to such conditions as that State and the Court may agree.

(b) The person being transferred shall remain in custody. When the purposes of the transfer have been fulfilled, the Court shall return the person without delay to the requested State.

8. (a) The Court shall ensure the confidentiality of documents and information, except as required for the investigation and proceedings described in the request.

(b) The requested State may, when necessary, transmit documents or information to the Prosecutor on a confidential basis. The Prosecutor may then use them solely for the purpose of generating new evidence.

(c) The requested State may, on its own motion or at the request of the Prosecutor, subsequently consent to the disclosure of such documents or information. They may then be used as evidence pursuant to the provisions of Parts 5 and 6 and in accordance with the Rules of Procedure and Evidence.

9. (a) (i) In the event that a State Party receives competing requests, other than for surrender or extradition, from the Court and from another State pursuant to an international obligation, the State Party shall endeavour, in consultation with the Court

and the other State, to meet both requests, if necessary by postponing or attaching conditions to one or the other request.

(ii) Failing that, competing requests shall be resolved in accordance with the principles established in article 90.

(b) Where, however, the request from the Court concerns information, property or persons which are subject to the control of a third State or an international organization by virtue of an international agreement, the requested States shall so inform the Court and the Court shall direct its request to the third State or international organization.

10. (a) The Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State.

(b) (i) The assistance provided under subparagraph (a) shall include, inter alia:

- a. The transmission of statements, documents or other types of evidence obtained in the course of an investigation or a trial conducted by the Court; and
- b. The questioning of any person detained by order of the Court;

(ii) In the case of assistance under subparagraph (b) (i) a:

- a. If the documents or other types of evidence have been obtained with the assistance of a State, such transmission shall require the consent of that State;
- b. If the statements, documents or other types of evidence have been provided by a witness or expert, such transmission shall be subject to the provisions of article 68.

(c) The Court may, under the conditions set out in this paragraph, grant a request for assistance under this paragraph from a State which is not a Party to this Statute.

#### Article 94

#### Postponement of execution of a request in respect of ongoing investigation or prosecution

1. If the immediate execution of a request would interfere with an ongoing investigation or prosecution of a case different from that to which the request relates, the requested State may postpone the execution of the request for a period of time agreed upon with the Court. However, the postponement shall be no longer than is necessary to complete the relevant investigation or prosecution in the requested State. Before making a decision to postpone, the requested State should consider whether the assistance may be immediately provided subject to certain conditions.

2. If a decision to postpone is taken pursuant to paragraph 1, the Prosecutor may, however, seek measures to preserve evidence, pursuant to article 93, paragraph 1 (j).

Article 95

Postponement of execution of a request in respect of an admissibility challenge

Where there is an admissibility challenge under consideration by the Court pursuant to article 18 or 19, the requested State may postpone the execution of a request under this Part pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to article 18 or 19.

Article 96

Contents of request for other forms of assistance under article 93

1. A request for other forms of assistance referred to in article 93 shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1 (a).

2. The request shall, as applicable, contain or be supported by the following:

(a) A concise statement of the purpose of the request and the assistance sought, including the legal basis and the grounds for the request;

(b) As much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided;

(c) A concise statement of the essential facts underlying the request;

(d) The reasons for and details of any procedure or requirement to be followed;

(e) Such information as may be required under the law of the requested State in order to execute the request; and

(f) Any other information relevant in order for the assistance sought to be provided.

3. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (e). During the consultations, the State Party shall advise the Court of the

specific requirements of its national law.

4. The provisions of this article shall, where applicable, also apply in respect of a request for assistance made to the Court.

Article 97

Consultations

Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter. Such problems may include, inter alia :

(a) Insufficient information to execute the request;

(b) In the case of a request for surrender, the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant; or

(c) The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State.

Article 98

Cooperation with respect to waiver of immunity and consent to surrender

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

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

Article 99

Execution of requests under articles 93 and 96

1. Requests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request, including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process.

2. In the case of an urgent request, the documents or evidence produced in response shall, at the request of the Court, be sent urgently.

3. Replies from the requested State shall be transmitted in their original language and form.

4. Without prejudice to other articles in this Part, where it is necessary for the successful execution of a request which can be executed without any compulsory measures, including specifically the interview of or taking evidence from a person on a voluntary basis, including doing so without the presence of the authorities of the requested State Party if it is essential for the request to be executed, and the examination without modification of a public site or other public place, the Prosecutor may execute such request directly on the territory of a State as follows:

(a) When the State Party requested is a State on the territory of which the crime is alleged to have been committed, and there has been a determination of admissibility pursuant to article 18 or 19, the Prosecutor may directly execute such request following all possible consultations with the requested State Party;

(b) In other cases, the Prosecutor may execute such request following consultations with the requested State Party and subject to any reasonable conditions or concerns raised by that State Party. Where the requested State Party identifies problems with the execution of a request pursuant to this subparagraph it shall, without delay, consult with the Court to resolve the matter.

5. Provisions allowing a person heard or examined by the Court under article 72 to invoke restrictions designed to prevent disclosure of confidential information connected with national security shall also apply to the execution of requests for assistance under this article.

#### Article 100

##### Costs

1. The ordinary costs for execution of requests in the territory of the requested State shall

(e) Costs associated with the transport of a person being surrendered to the Court by a custodial State; and

(f) Following consultations, any extraordinary costs that may result from the execution of a request.

2. The provisions of paragraph 1 shall, as appropriate, apply to requests from States Parties to the Court. In that case, the Court shall bear the ordinary costs of execution.

#### Article 101

##### Rule of speciality

1. A person surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered.

2. The Court may request a waiver of the requirements of paragraph 1 from the State which surrendered the person to the Court and, if necessary, the Court shall provide additional information in accordance with article 91. States Parties shall have the authority to provide a waiver to the Court and should endeavour to do so.

#### Article 102

##### Use of terms

For the purposes of this Statute:

(a) “surrender” means the delivering up of a person by a State to the Court, pursuant to this Statute.

(b) “extradition” means the delivering up of a person by one State to another as provided by treaty, convention or national legislation.

### PART 10. ENFORCEMENT

#### Article 103

##### Role of States in enforcement of sentences of imprisonment

1. (a) A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.

(b) At the time of declaring its willingness to accept sentenced persons, a State may attach conditions to its acceptance as agreed by the Court and in accordance with this Part.

(c) A State designated in a particular case shall promptly inform the Court whether it accepts the Court’s designation.

2. (a) The State of enforcement shall notify the Court of any circumstances, including the exercise of any conditions agreed under paragraph 1, which could materially affect the terms or extent of the imprisonment. The Court shall be given at least 45 days' notice of any such known or foreseeable circumstances. During this period, the State of enforcement shall take no action that might prejudice its obligations under article 110.

(b) Where the Court cannot agree to the circumstances referred to in subparagraph (a), it shall notify the State of enforcement and proceed in accordance with article 104, paragraph 1.

3. In exercising its discretion to make a designation under paragraph 1, the Court shall take into account the following:

(a) The principle that States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution, as provided in the Rules of Procedure and Evidence;

(b) The application of widely accepted international treaty standards governing the treatment of prisoners;

(c) The views of the sentenced person;

(d) The nationality of the sentenced person;

(e) Such other factors regarding the circumstances of the crime or the person sentenced, or the effective enforcement of the sentence, as may be appropriate in designating the State of enforcement.

4. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State, in accordance with the conditions set out in the headquarters agreement referred to in article 3, paragraph 2. In such a case, the costs arising out of the enforcement of a sentence of imprisonment shall be borne by the Court.

#### Article 104

##### Change in designation of State of enforcement

1. The Court may, at any time, decide to transfer a sentenced person to a prison of another State.

2. A sentenced person may, at any time, apply to the Court to be transferred from the State of enforcement.

#### Article 105

##### Enforcement of the sentence

1. Subject to conditions which a State may have specified in accordance with article 103, paragraph 1 (b), the sentence of imprisonment shall be binding on the States Parties, which shall in no case modify it.
2. The Court alone shall have the right to decide any application for appeal and revision. The State of enforcement shall not impede the making of any such application by a sentenced person.

Article 106

Supervision of enforcement of sentences and conditions of imprisonment

1. The enforcement of a sentence of imprisonment shall be subject to the supervision of the Court and shall be consistent with widely accepted international treaty standards governing treatment of prisoners.
2. The conditions of imprisonment shall be governed by the law of the State of enforcement and shall be consistent with widely accepted international treaty standards governing treatment of prisoners; in no case shall such conditions be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.
3. Communications between a sentenced person and the Court shall be unimpeded and confidential.

Article 107

Transfer of the person upon completion of sentence

1. Following completion of the sentence, a person who is not a national of the State of enforcement may, in accordance with the law of the State of enforcement, be transferred to a State which is obliged to receive him or her, or to another State which agrees to receive him or her, taking into account any wishes of the person to be transferred to that State, unless the State of enforcement authorizes the person to remain in its territory.
2. If no State bears the costs arising out of transferring the person to another State pursuant to paragraph 1, such costs shall be borne by the Court.
3. Subject to the provisions of article 108, the State of enforcement may also, in accordance with its national law, extradite or otherwise surrender the person to a State which has requested the extradition or surrender of the person for purposes of trial or enforcement of a sentence.

Article 108

Limitation on the prosecution or punishment of other offences

1. A sentenced person in the custody of the State of enforcement shall not

be subject to prosecution or punishment or to extradition to a third State for any conduct engaged in prior to that person's delivery to the State of enforcement, unless such prosecution, punishment or extradition has been approved by the Court at the request of the State of enforcement.

2. The Court shall decide the matter after having heard the views of the sentenced person.

3. Paragraph 1 shall cease to apply if the sentenced person remains voluntarily for more than 30 days in the territory of the State of enforcement after having served the full sentence imposed by the Court, or returns to the territory of that State after having left it.

#### Article 109

##### Enforcement of fines and forfeiture measures

1. States Parties shall give effect to fines or forfeitures ordered by the Court under Part 7, without prejudice to the rights of bona fide third parties, and in accordance with the procedure of their national law.

2. If a State Party is unable to give effect to an order for forfeiture, it shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties.

3. Property, or the proceeds of the sale of real property or, where appropriate, the sale of other property, which is obtained by a State Party as a result of its enforcement of a judgement of the Court shall be transferred to the Court.

#### Article 110

##### Review by the Court concerning reduction of sentence

1. The State of enforcement shall not release the person before expiry of the sentence pronounced by the Court.

2. The Court alone shall have the right to decide any reduction of sentence, and shall rule on the matter after having heard the person.

3. When the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time.

4. In its review under paragraph 3, the Court may reduce the sentence if it finds that one or more of the following factors are present:

(a) The early and continuing willingness of the person to cooperate with

the Court in its investigations and prosecutions;

(b) The voluntary assistance of the person in enabling the enforcement of the judgements and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims; or

(c) Other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules of Procedure and Evidence.

5. If the Court determines in its initial review under paragraph 3 that it is not appropriate to reduce the sentence, it shall thereafter review the question of reduction of sentence at such intervals and applying such criteria as provided for in the Rules of Procedure and Evidence.

#### Article 111

##### Escape

If a convicted person escapes from custody and flees the State of enforcement, that State may, after consultation with the Court, request the person's surrender from the State in which the person is located pursuant to existing bilateral or multilateral arrangements, or may request that the Court seek the person's surrender, in accordance with Part 9. It may direct that the person be delivered to the State in which he or she was serving the sentence or to another State designated by the Court.

### PART 11. ASSEMBLY OF STATES PARTIES

#### Article 112

##### Assembly of States Parties

1. An Assembly of States Parties to this Statute is hereby established. Each State Party shall have one representative in the Assembly who may be accompanied by alternates and advisers. Other States which have signed this Statute or the Final Act may be observers in the Assembly.

2. The Assembly shall:

(a) Consider and adopt, as appropriate, recommendations of the Preparatory Commission;

(b) Provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court;

(c) Consider the reports and activities of the Bureau established under paragraph 3 and take appropriate action in regard thereto;

(d) Consider and decide the budget for the Court;

(e) Decide whether to alter, in accordance with article 36, the number of

judges;

(f) Consider pursuant to article 87, paragraphs 5 and 7, any question relating to non-cooperation;

(g) Perform any other function consistent with this Statute or the Rules of Procedure and Evidence.

3. (a) The Assembly shall have a Bureau consisting of a President, two Vice-Presidents and 18 members elected by the Assembly for three-year terms.

(b) The Bureau shall have a representative character, taking into account, in particular, equitable geographical distribution and the adequate representation of the principal legal systems of the world.

(c) The Bureau shall meet as often as necessary, but at least once a year. It shall assist the Assembly in the discharge of its responsibilities.

4. The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy.

5. The President of the Court, the Prosecutor and the Registrar or their representatives may participate, as appropriate, in meetings of the Assembly and of the Bureau.

6. The Assembly shall meet at the seat of the Court or at the Headquarters of the United Nations once a year and, when circumstances so require, hold special sessions. Except as otherwise specified in this Statute, special sessions shall be convened by the Bureau on its own initiative or at the request of one third of the States Parties.

7. Each State Party shall have one vote. Every effort shall be made to reach decisions by consensus in the Assembly and in the Bureau. If consensus cannot be reached, except as otherwise provided in the Statute:

(a) Decisions on matters of substance must be approved by a two-thirds majority of those present and voting provided that an absolute majority of States Parties constitutes the quorum for voting;

(b) Decisions on matters of procedure shall be taken by a simple majority of States Parties present and voting.

8. A State Party which is in arrears in the payment of its financial contributions towards the costs of the Court shall have no vote in the Assembly and in the Bureau if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The Assembly may, nevertheless, permit such a State Party to vote in the Assembly and in the Bureau if it is satisfied that the failure to pay is due to conditions beyond the control of the State Party.

9. The Assembly shall adopt its own rules of procedure.

10. The official and working languages of the Assembly shall be those of the General Assembly of the United Nations.

## PART 12. FINANCING

### Article 113

#### Financial Regulations

Except as otherwise specifically provided, all financial matters related to the Court and the meetings of the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be governed by this Statute and the Financial Regulations and Rules adopted by the Assembly of States Parties.

### Article 114

#### Payment of expenses

Expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be paid from the funds of the Court.

### Article 115

#### Funds of the Court and of the Assembly of States Parties

The expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources:

- (a) Assessed contributions made by States Parties;
- (b) Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.

### Article 116

#### Voluntary contributions

Without prejudice to article 115, the Court may receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties.

### Article 117

Assessment of contributions

The contributions of States Parties shall be assessed in accordance with an agreed scale of assessment, based on the scale adopted by the United Nations for its regular budget and adjusted in accordance with the principles on which that scale is based.

Article 118

Annual audit

The records, books and accounts of the Court, including its annual financial statements, shall be audited annually by an independent auditor.

PART 13. FINAL CLAUSES

Article 119

Settlement of disputes

1. Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.
2. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.

Article 120

Reservations

No reservations may be made to this Statute.

Article 121

Amendments

1. After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties.
2. No sooner than three months from the date of notification, the Assembly of States Parties, at its next meeting, shall, by a majority of those present and voting, decide whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review

Conference if the issue involved so warrants.

3. The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.

4. Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.

5. Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

6. If an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect, notwithstanding article 127, paragraph 1, but subject to article 127, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.

7. The Secretary-General of the United Nations shall circulate to all States Parties any amendment adopted at a meeting of the Assembly of States Parties or at a Review Conference.

#### Article 122

##### Amendments to provisions of an institutional nature

1. Amendments to provisions of this Statute which are of an exclusively institutional nature, namely, article 35, article 36, paragraphs 8 and 9, article 37, article 38, article 39, paragraphs 1 (first two sentences), 2 and 4, article 42, paragraphs 4 to 9, article 43, paragraphs 2 and 3, and articles 44, 46, 47 and 49, may be proposed at any time, notwithstanding article 121, paragraph 1, by any State Party. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations or such other person designated by the Assembly of States Parties who shall promptly circulate it to all States Parties and to others participating in the Assembly.

2. Amendments under this article on which consensus cannot be reached shall be adopted by the Assembly of States Parties or by a Review Conference, by a two-thirds majority of States Parties. Such amendments shall enter into force for all States Parties six months after their adoption

by the Assembly or, as the case may be, by the Conference.

Article 123

Review of the Statute

1. Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.
2. At any time thereafter, at the request of a State Party and for the purposes set out in paragraph 1, the Secretary-General of the United Nations shall, upon approval by a majority of States Parties, convene a Review Conference.
3. The provisions of article 121, paragraphs 3 to 7, shall apply to the adoption and entry into force of any amendment to the Statute considered at a Review Conference.

Article 124

Transitional Provision

Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.

Article 125

Signature, ratification, acceptance, approval or accession

1. This Statute shall be open for signature by all States in Rome, at the headquarters of the Food and Agriculture Organization of the United Nations, on 17 July 1998. Thereafter, it shall remain open for signature in Rome at the Ministry of Foreign Affairs of Italy until 17 October 1998. After that date, the Statute shall remain open for signature in New York, at United Nations Headquarters, until 31 December 2000.
2. This Statute is subject to ratification, acceptance or approval by signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.
3. This Statute shall be open to accession by all States. Instruments of

accession shall be deposited with the Secretary-General of the United Nations.

Article 126

Entry into force

1. This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

2. For each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 127

Withdrawal

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

2. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

Article 128

Authentic texts

The original of this Statute, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Statute.

DONE at Rome, this 17th day of July 1998.

**SECOND SCHEDULE** (s. 107)

**WARRANTS AND ORDERS IN RESPECT OF PROPERTY**

*Part A—Preliminary*

- Definitions. 1. In this Schedule—  
“financial institution” means—  
    (a) a bank or credit union; or  
    (b) an institution prescribed by rules made under this Act.  
“ICC property request” means a request referred to in paragraph 2 of this Schedule;  
“property” includes proceeds and assets;  
“production order” means an order under Part D of this Schedule;  
“restraining order” means an order under Part C of this Schedule.
- Application of this Schedule. 2. This Schedule applies where the ICC has made a request for assistance under paragraph 1 (k) of article 93 of the Rome Statute for or with respect to identifying, tracing and freezing, or seizing, any property which is or may be liable to forfeiture under paragraph 2 (b) of article 77 of that Statute.

*Part B—Search Warrants*

- Issue of warrant. 3. (1) Where authorised under this Act by the Attorney-General to do so, a member of the police force may apply to a magistrate for the issue of a search warrant under this Part if he has reasonable grounds for believing that there is, or that within 72 hours there will be, in or on any premises any property of a particular kind which is the subject of an ICC property request.
- (2) The magistrate to whom the application is made may, if satisfied that there are reasonable grounds for doing so, issue a search warrant authorising any member of the police force—

- (a) to enter the premises; and
- (b) to search the premises for property of the kind mentioned in subparagraph (1).

(3) There shall be set out in a warrant issued under this Part—

- (a) a statement of the purpose for which the warrant is issued, which shall include a reference to the nature of the relevant international crime; and
- (b) a description of the kind of property authorised to be seized.

Cap. 75.

(4) The provisions of sections 119, 120 and 122 of the Criminal Procedure Code shall apply, with any necessary modifications, to a warrant under this Part.

Seizure of property pursuant to warrant.

4. (1) A member of the police force executing a search warrant issued under this Part may seize property of the kind specified in the warrant.

(2) If, in the course of searching, in accordance with a warrant issued under this Part, for property that is the subject of an ICC property request, being property of a kind specified in the warrant, a member of the police force—

- (a) finds any property that the member believes on reasonable grounds to be property directly or indirectly derived from the relevant international crime, although not of a kind specified in the warrant; and
- (b) believes on reasonable grounds that it is necessary to seize that property in order to prevent its concealment, loss or destruction,

the warrant shall be deemed to authorise the member to seize that property.

(3) The power conferred by this paragraph to seize a thing includes—

- (a) a power to remove the thing from the premises where it is found; and
- (b) a power to guard the thing in or on those premises.

Commissioner of Police responsible

5. If property is seized pursuant to a warrant issued under this Part, the Commissioner of Police shall arrange for the

for seized property. property to be kept until it is dealt with in accordance with this Act, and shall ensure that all reasonable steps are taken to preserve the property while it is so kept.

Return of seized property.

6. Where—

- (a) property has been seized pursuant to a warrant issued under this Part; and
- (b) the ICC has declined to make a forfeiture order in respect of the property in relation to the relevant international crime, or has not done so within a period of six months after the property was seized,

the Commissioner of Police shall cause the property to be returned to the person from whose possession it was seized.

Obstruction of execution of warrant.

7. A person who, without reasonable excuse, obstructs or hinders a person executing a search warrant issued under this Part is guilty of an offence and liable on conviction to imprisonment for a term not exceeding two years.

### **Part C—Restraining Orders**

8. (1) In this paragraph, “the offender” means the person whose property is the subject of an ICC property request.

(2) Where authorised under this Act by the Attorney-General to do so, a member of the police force may apply *ex parte* to the High Court for an order in respect of—

- (a) specified property of the offender;
- (b) all the property of the offender (including property acquired after the making of the order);
- (c) specified property of the offender and all other property of the offender (including property acquired after the making of the order);
- (d) all the property of the offender (including property acquired after the making of the order) other than specified property; or
- (e) specified property of a person other than the offender.

(2) Where the application is supported by evidence from the Attorney-General that an order under this paragraph is necessary to comply with an ICC property request, the High Court may, by order—

- (a) direct that the property, or such part of the property as is specified in the order, is not to be disposed of, or otherwise dealt with, by the defendant or by any other person, except in such manner and in such circumstances (if any) as are specified in the order; and
- (b) if the Court considers that the circumstances so require, direct the Public Trustee to take control of the property, or such part of the property as is specified in the order.

(3) A restraining order may be made subject to such conditions as the High Court thinks fit.

(4) Without limiting the generality of subparagraph (3), a restraining order may make provision for meeting out of the property, or a specified part of the property, to which the order applies all or any of the following—

- (a) the defendant's reasonable living expenses (including the reasonable living expenses of the defendant's dependants, if any) and reasonable business expenses;
- (b) the defendant's reasonable expenses in defending any charge that he has committed an international crime.

(5) The High Court shall not make an order in respect of property of a person other than the offender unless it is satisfied that the property concerned, although not property of the offender, is effectively under the offender's control.

Notice of applications and orders.

9. (1) Where an application has been made to the High Court for a restraining order in respect of property—

- (a) the Court may, if it thinks fit, require the officer making the application to give notice of the application to a person who the Court has reason to believe has an interest in the property or part of the property; and
- (b) a person to whom the Court requires notice to be given under paragraph (a) is entitled to appear and to adduce evidence at the hearing of the application.

(2) Where—

- (a) a restraining order has been made in respect of a person's property; and

- (b) the person was not notified of the application for the making of the restraining order,

the officer who made the application shall give notice to the person, as prescribed by rules made under this Act, of the making of the order.

Court may make further orders.

10. (1) If the High Court makes a restraining order, the Court may, at the time when it makes the restraining order or at any later time, make any ancillary orders that the Court considers appropriate, including any one or more of the following orders—

- (a) an order varying the restraining order in respect of the property to which it relates;
- (b) an order varying any condition to which the restraining order was subject;
- (c) an order for the examination on oath of—
  - (i) a person (in this paragraph called the *owner*) whose property is subject to the restraining order; or
  - (ii) another person,

before the Court, or before an officer of the Court prescribed by rules made under this Act, concerning the affairs of the owner, including the nature and location of any property of the owner;

- (d) if the restraining order directs the Public Trustee to take control of property—
  - (i) an order regulating the manner in which the Public Trustee may exercise his functions under the restraining order; or
  - (ii) an order determining any question relating to the property to which the restraining order relates, including any question relating to the liabilities of the owner, or the exercise of the functions of the Public Trustee, with respect to the property;
  - (iii) an order directing the owner (or, if the owner is a body corporate, a director of the body corporate specified by the Court) to furnish to the Public Trustee, within a period specified in the order, a statement, verified by the oath or affirmation of the person making the statement, setting out such particulars of the property, or dealings with the property, of the owner as the Court thinks proper.

(2) Without affecting the generality of subparagraph (1), where the High Court makes, or has made, a restraining order, the Court may, at the time it makes the restraining order or at any later time, whether on application made to it or on its own motion, make an order authorising another court—

- (a) to make an order setting aside the restraining order in respect of the whole or a part of the property; or
- (b) to make other orders in relation to the operation of the restraining order,

to the extent and in the circumstances specified in the order of the Court.

(3) An order under subparagraph (1) or (2) may be made on application—

- (a) by an appropriate officer;
- (b) by the owner;
- (c) where the restraining order directed the Public Trustee to take control of property—by the Public Trustee; or
- (d) with the leave of the High Court—by any other person.

(4) Where a person is examined before the High Court or an officer of the High Court pursuant to an order under subparagraph (1), the person is not excused from answering a question when required to do so by the Court or officer on the ground that the answer to the question might tend to incriminate the person or make the person liable to a forfeiture or penalty.

(5) Where a person is examined before the High Court or an officer of the High Court pursuant to an order under subparagraph (1), a statement or disclosure made by the person in answer to a question put in the course of the examination, and any information, document or thing obtained as a direct or indirect consequence of the statement or disclosure, is not admissible against the person in any civil or criminal proceedings in Kenya, other than proceedings in respect of the giving of false testimony in the course of the examination.

(6) A person directed by an order under subparagraph (1) to furnish a statement to the Public Trustee is not excused from furnishing the statement, or setting out particulars in the statement, on the ground that the statement or particulars might tend to incriminate the person or make the person liable to a

forfeiture or penalty.

(7) If a person furnishes a statement to the Public Trustee under an order made under subparagraph (1), neither the statement nor any information, document or thing obtained as a direct or indirect consequence of the statement, is admissible against the person in any criminal proceedings in Kenya, other than proceedings in respect of the falsity of the statement.

Registration of  
restraining orders.

11. (1) If a restraining order applies to property of a particular kind and the provisions of any law of the Republic provide for the registration of title to, or charges over, property of that kind, the authority responsible for administering those provisions shall, on application by an appropriate officer, record on the register kept under those provisions the particulars of the restraining order.

(2) If the particulars of a restraining order are so recorded, a person who subsequently deals with the property shall, for the purposes of paragraph 12, be deemed to have notice of the restraining order.

Contravention of  
restraining orders.

12. (1) A person who knowingly contravenes a restraining order by disposing of, or otherwise dealing with, property that is subject to the restraining order is guilty of an offence and liable, on conviction, to a fine equivalent to the value of the property (as determined by the High Court) or to imprisonment for a period not exceeding two years, or both.

(2) Where—

- (a) a restraining order is made against property;
- (b) the property is disposed of, or otherwise dealt with, in contravention of the restraining order; and
- (c) the disposition or dealing was either not for sufficient consideration or not in favour of a person who acted in good faith,

an appropriate officer may apply to the High Court for an order that the disposition or dealing be set aside.

(3) If an application is made under subparagraph (2) in relation to a disposition or dealing, the Court may make an order—

- (a) setting aside the disposition or dealing as from the day on which the disposition or dealing took place; or

- (b) setting aside the disposition or dealing as from the day of the order under this subparagraph and declaring the respective rights of any persons who acquired interests in the property on or after the day on which the disposition or dealing took place and before the day of the order.

Obstruction of  
Public Trustee.

13. (1) A person who hinders or obstructs the Public Trustee in the performance of the Public Trustee's obligations under a restraining order is guilty of an offence and liable on conviction to a fine not exceeding one hundred thousand shillings or imprisonment for a term not exceeding six months, or both.

(2) In this paragraph, "Public Trustee" includes any deputies, officers, employees and agents of the Public Trustee.

Protection of Public  
Trustee from  
liability in certain  
cases.

14. (1) No matter or thing done or omitted by the Public Trustee shall, if the matter or thing was done or omitted in good faith in the exercise or purported exercise of his functions under this Schedule, subject him to any liability, claim, suit or demand whatsoever.

(2) The Public Trustee is not personally liable for any rates, land tax or municipal or other statutory charges imposed by or under a law of the Republic on or in respect of property of which the Public Trustee has been directed by a restraining order to take control, being rates, land tax or municipal or other statutory charges that fall due on or after the date of the restraining order, except to the extent (if any) of the rents and profits received by the Public Trustee in respect of that property on or after the date of the restraining order.

(3) In this paragraph, "Public Trustee" includes any deputies, officers, employees and agents of the Public Trustee.

Fees payable to  
Public Trustee.

15. If the Public Trustee takes control of property in accordance with a restraining order, the Public Trustee is entitled to receive such fees, in respect of the exercise of his functions in relation to the property, as may be prescribed by rules made under this Act.

Certificate by Public  
Trustee.

16. If a restraining order is made directing the Public Trustee to take control of property, a certificate under the hand of the Public Trustee—

- (a) certifying that the restraining order has been made and is in force; and
- (b) stating the terms of the restraining order,

shall be accepted by all courts, officers and other persons, whether acting under any Act or not, as evidence of the matters so certified and stated and of the Public Trustee's right to act under the restraining order, without production of any other proof.

***Part D—Production Orders***

Applications for production orders.

17. (1) Where authorised under this Act by the Attorney-General to do so, a member of the police force may apply to the High Court for a production order against a person reasonably suspected of having possession or control of any documents relating to property that is the subject of an ICC property request.

(2) Where the application is supported by evidence from the Attorney-General that an order under this paragraph is necessary to comply with an ICC property request, the High Court may, by order, require the person—

- (a) to produce to a specified police officer any documents of a specified class or description that are in the person's possession or control; or
- (b) to make available to a specified police officer, for inspection, any documents of a specified class or description that are in the person's possession or control.

(3) An order under subparagraph (1) (a) shall not be made in respect of bankers' books.

(4) In subparagraph (3), "bankers' books" means any accounting records used in the ordinary business of banking, and includes ledgers, day-books, cash-books and account books.

Form of production order.

18. (1) A production order that a person produce a document or documents to an officer shall specify the time when and the place where the document is or documents are to be produced.

(2) A production order that a person make a document

available to an officer for inspection shall specify the time or times when the document is or documents are to be made available.

Powers under  
production orders.

19. (1) If a document is produced to an officer under a production order, the authorised officer may do any one or more of the fol

would be in breach of an obligation (whether imposed by enactment or otherwise) of the person not to disclose the existence or contents of the document.

(2) If a person produces or makes available a document under a production order, neither the production or making available of the document; nor any information, document or thing obtained as a direct or indirect consequence of the production or making available of the document, is admissible against the person in any criminal proceedings in Kenya, other than proceedings for an offence under this Part.

(3) For the purposes of subparagraph (2), proceedings on an application under this Schedule are not criminal proceedings.

Variation of production order.

21. Where the High Court makes a production order requiring a person to produce a document to an officer, the person may apply to the Court for a variation of the order and, if the Court is satisfied that the document is essential to the business activities of the applicant, the Court may vary the production order so that it requires the applicant to make the document available to an officer for inspection.

Failure to comply with production order.

22. (1) Where a person is required by a production order to produce a document to an officer or to make a document available to an officer for inspection, the person is guilty of an offence if the person—

- (a) contravenes the order without reasonable excuse; or
- (b) in purported compliance with the order, produces or makes available a document known to the person to be false or misleading in a material particular without—
  - (i) indicating to the officer to whom the document is produced or made available that the document is false or misleading and the particulars in which the document is false or misleading; and
  - (ii) providing correct information to the officer if the person is in possession of, or can reasonably acquire, the correct information.

(2) A person who is guilty of an offence under this paragraph is liable on conviction to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding two years, or both.

***Part E—Monitoring Orders***

Making of  
monitoring order.

23. (1) Where authorised under this Act by the Attorney-General to do so, a member of the police force may apply to the High Court for an order directing a financial institution to give information of the kind referred to in subparagraph (2) to an appropriate Kenyan authority.

(2) Where the application is supported by evidence from the Attorney-General that an order under this paragraph is necessary to comply with an ICC property request, the High Court may by order direct a financial institution to give information obtained by the institution about transactions conducted through an account held by a particular person with the institution.

(3) A monitoring order shall apply in relation to transactions conducted during the period specified in the order, being a period commencing not earlier than the day on which notice of the order is given to the financial institution and ending not later than three months after the date of the order.

(4) A reference in this paragraph to a transaction conducted through an account includes a reference to—

- (a) the making of a fixed term deposit; and
- (b) in relation to a fixed term deposit—the transfer of the amount deposited, or any part of it, at the end of the term.

Form of monitoring  
order.

24. (1) A monitoring order shall specify—

- (a) the name or names in which the account is believed to be held;
- (b) the kind of information that the institution is required to give;
- (c) the Kenyan authority to which the information is to be given; and
- (d) the manner in which the information is to be given.

(2) A financial institution that has been given notice of a monitoring order and which knowingly—

- (a) contravenes the order; or
- (b) provides false or misleading information in purported compliance with the order,

is guilty of an offence and liable on conviction to a fine not

exceeding five hundred thousand shillings.

Confidentiality of  
monitoring order.

25. (1) A financial institution that is, or has been, subject to a monitoring order shall not disclose the existence or the operation of the order to any person (including the person to whom the order relates) except—

- (a) if the order specifies the Commissioner of Police as the appropriate Kenyan authority to which information is to be given—the Commissioner of Police or a member of the police force;
- (b) if the order specifies some other Kenyan authority as the authority to which information is to be given—a member, or member of staff, of the authority;
- (c) an officer or agent of the institution, for the purpose of ensuring that the order is complied with; or
- (d) an advocate, for the purpose of obtaining legal advice or representation in relation to the order.

(2) A person of a kind referred to in subparagraph (1) (a), (b), (c) or (d) to whom the existence or operation of a monitoring order has been disclosed (whether in accordance with subparagraph (1) or a previous application of this subparagraph or otherwise) shall not—

- (a) while he is such a person—disclose the existence or operation of the order, except to another person of a kind referred to in subparagraph (1) (a), (b), (c) or (d) for the purpose of—
  - (i) the performance of that person's duties, if the disclosure is made by a person referred to in subparagraph (1) (a) or (b);
  - (ii) ensuring that the order is complied with or obtaining legal advice or representation in relation to the order, if the disclosure is made by an officer or agent of the institution; or
  - (iii) giving legal advice, or making representations, in relation to the order, if the disclosure is made by an advocate; or
- (b) when he or she is no longer such a person—make a record of, or disclose, the existence or the operation of the order in any circumstances.

(3) Nothing in subparagraph (2) prevents the disclosure by a person of a kind referred to in subparagraph (1) (a) or (b) of the existence or operation of a monitoring order—

- (a) for the purposes of, or in connection with, legal proceedings; or
- (b) in the course of proceedings before a court.

(4) A person of a kind referred to in subparagraph (1) (a) or (b) shall not be required to disclose to any court the existence or operation of a monitoring order.

(5) A reference in this paragraph to disclosing the existence or operation of a monitoring order to a person includes a reference to disclosing information to the person from which the person could reasonably be expected to infer the existence or operation of the monitoring order.

Communication of information by financial institutions to prescribed authorities.

26. (1) If a financial institution has information about an account held with the institution and the institution has reasonable grounds for believing that—

- (a) the information may be relevant to an investigation of, or the prosecution of a person for, an international crime; or
- (b) the information would otherwise be of assistance in the enforcement of this Act or any rules made under this Act,

the institution may give the information to a prescribed authority.

(2) No action, claim, suit or demand may be brought against a financial institution, or any officer, employee or agent of the institution acting in the course of his employment or agency, in relation to any action taken by or on behalf of the institution or person pursuant to subparagraph (1).