


2001

The Cooperation of States With the International Criminal Court

Valerie Oosterveld

Follow this and additional works at: <https://ir.lib.uwo.ca/lawpub>

 Part of the [Administrative Law Commons](#), [Criminal Law Commons](#), [Criminal Procedure Commons](#), and the [Internet Law Commons](#)

Citation of this paper:

Valerie Oosterveld, Mike Perry, and John McManus, The Cooperation of States With the International Criminal Court , 25 Fordham Int'l L.J. 767 (2001). Available at: <https://ir.lawnet.fordham.edu/ilj/vol25/iss3/14>

Fordham International Law Journal

Volume 25, Issue 3

2001

Article 14

The Cooperation of States With the International Criminal Court

Valerie Oosterveld*

Mike Perry[†]

John McManus[‡]

*

†

‡

Copyright ©2001 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

The Cooperation of States With the International Criminal Court

Valerie Oosterveld, Mike Perry, and John McManus

Abstract

This Article explores the various cooperation obligations included within the Rome Statute related to arrest and surrender; investigation and evidence gathering; privileges and immunities of Court officials; witness protection; enforcement of ICC sentences, fines, and forfeiture orders; and offenses against the administration of justice. The nature of each obligation will be discussed within the context of the Rome Statute itself, its negotiation history, and a comparison of how Canada, Switzerland, and the United Kingdom have implemented their obligations to cooperate with the ICC into their domestic law, to the end of providing technical assistance to States undertaking the important task of implementing the Rome Statute.

THE COOPERATION OF STATES WITH THE INTERNATIONAL CRIMINAL COURT

Valerie Oosterveld, Mike Perry,** & John McManus****

INTRODUCTION

The success of the International Criminal Court (“ICC” or “Court”) will be determined by the level of cooperation it receives from States. Having no police force, military, or territory of its own, the ICC will need to rely on States Parties to, among other things, arrest individuals and surrender them to the Court, collect evidence, and serve documents in their respective territories. Without this assistance, the ICC will encounter great difficulty conducting its proceedings.

The Rome Statute of the International Criminal Court¹ (“Rome Statute”) recognizes the importance of State cooperation to the effective operation of the ICC—an entire Part of the Rome Statute is dedicated to matters of international cooperation and judicial assistance.² The duty to cooperate with the ICC imposed on States Parties by the Rome Statute is twofold: a general commitment to cooperate, and an obligation to amend their domestic laws to permit cooperation with the Court. Articles 86 and 88 form the foundation of the obligation on States Parties to cooperate with the ICC. According to Article 86, “States Parties shall, in accordance with the provisions of this

* Valerie Oosterveld is a Legal Officer with the United Nations, Criminal and Treaty Law Division of the Canadian Department of Foreign Affairs and International Trade. She is a member of Canada’s delegation to the International Criminal Court Preparatory Commission and was a member of the Canadian delegation to the Rome Diplomatic Conference.

** Mike Perry is Canada’s International Criminal Court Campaign Coordinator, with the United Nations, Criminal and Treaty Law Division of the Canadian Department of Foreign Affairs and International Trade. He has been a guest member of Canada’s delegation to the International Criminal Court Preparatory Commission.

*** John McManus is Counsel with the Crimes Against Humanity and War Crimes Section of Canada’s Department of Justice. He is also a past President of the Canadian Council on International Law.

The authors thank Annemieke Holthius, Olivier Thormann, and Alan Weeks for their helpful comments and review of this Article.

1. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9* (1998), available at <http://www.un.org/law/icc/statute/romefra.htm> [hereinafter Rome Statute].

2. See *id.* pt. 9.

Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.”³

This general requirement is supplemented by further articles of the Rome Statute and the ICC’s Rules of Procedure and Evidence⁴ that govern specific aspects of cooperation in such contexts as the arrest and surrender of individuals and the collection of evidence. Article 88 obliges States to adopt domestic laws to permit cooperation with the ICC.⁵

Despite the rapid pace of the ratification of the Rome Statute, very few States to date have passed the domestic laws necessary to cooperate with the ICC. However, it is very important that all States Parties adopt comprehensive legislation implementing the obligations under the Rome Statute by the time the ICC is established, likely in 2002. This will allow the Court to begin its work immediately, without being repeatedly frustrated by States that do not yet have laws in place that allow them to comply. Canada, Switzerland, and the United Kingdom are among the countries that have undertaken ambitious legislative initiatives to ensure their ability to cooperate with the Court when it opens its doors.

Canada’s ICC legislation, entitled the Crimes Against Humanity and War Crimes Act (“Canada Act”),⁶ was adopted on June 29, 2000 and enabled Canada to ratify the Rome Statute on July 7, 2000.⁷ Switzerland’s Federal Law on Co-operation with the International Criminal Court (“Swiss Law”)⁸ was adopted on June 22, 2001 and is one of several discrete laws that have been

3. *Id.* art. 86.

4. *Finalized draft text of the Rules of Procedure and Evidence*, U.N. Doc. PCNICC/2000/1/Add.1 (Nov. 2, 2000) [hereinafter *Rules*].

5. *See* Rome Statute, *supra* note 1, art. 88. Article 88 provides that “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.” *Id.*

6. Crimes Against Humanity and War Crimes Act, R.S.C., c. 24 (2000) (Can.) [hereinafter *Canada Act*].

7. *See* News Release, Canadian Department of Foreign Affairs and International Trade, International Criminal Court Legislation Receives Royal Assent (June 23, 2000); News Release, Canadian Department of Foreign Affairs and International Trade, Canada Ratifies International Criminal Court Statute and Optional Protocol on Children in Armed Conflict (July 7, 2000). News releases of the Department of Foreign Affairs and International Trade are available at <http://www.dfait-maeci.gc.ca/menu-e.asp>.

8. FF 2000, 2748 [hereinafter *Swiss Law*]. An unofficial English translation is available at [http://www.legal.coe.int/criminal/icc/docs/Consult_ICC\(2001\)/ConsultICC\(2001\)32E.pdf](http://www.legal.coe.int/criminal/icc/docs/Consult_ICC(2001)/ConsultICC(2001)32E.pdf).

adopted by Switzerland to implement the Rome Statute.⁹ Switzerland ratified the Rome Statute on October 12, 2001.¹⁰ The United Kingdom adopted its International Criminal Court Act 2001 ("UK Act")¹¹ on May 11, 2001 and ratified the Rome Statute on October 4, 2001.¹² The legislative experience of each of these countries provides instructive guidance for others planning to implement the Rome Statute.

This Article explores the various cooperation obligations included within the Rome Statute related to arrest and surrender; investigation and evidence gathering; privileges and immunities of Court officials; witness protection; enforcement of ICC sentences, fines, and forfeiture orders; and offenses against the administration of justice. The nature of each obligation will be discussed within the context of the Rome Statute itself, its negotiation history, and a comparison of how Canada, Switzerland, and the United Kingdom have implemented their obligations to cooperate with the ICC into their domestic law, to the end of providing technical assistance to States undertaking the important task of implementing the Rome Statute.

I. ARREST AND SURRENDER

The obligation on States Parties to arrest and surrender accused is found in several articles of the Rome Statute. The general obligation to "cooperate fully with the Court in its investigation and prosecution of crimes" of Article 86¹³ is supplemented by Article 89, which specifically addresses "surrender of persons to the Court."¹⁴ Under Article 89(1), the Court can transmit a request for the arrest and surrender of a person, together with

9. See FF 2001, 2768; see also FF 2001, 2801. These laws are available online in French at http://www.admin.ch/ch/f/ff/2001/index0_26.html.

10. See News Release, Departement Federal des Affaires Etrangeres, La Suisse ad-here à la Cour pénale internationale (Oct. 12, 2001), available at http://www.admin.ch/cp/f/3bc6bf51_1@fwsrvg.bfi.admin.ch.html.

11. International Criminal Court Act 2001, 2001, c. 17 (Eng.), available at <http://www.hmso.gov.uk/acts2001/20010017.htm> [hereinafter UK Act].

12. See News Release, United Kingdom Foreign and Commonwealth Office, UK Ratifies the Rome Statute of the International Criminal Court (Oct. 4, 2001), available at <http://www.fco.gov.uk/news/newstext.asp?5372>. The United Kingdom's ratification of the Rome Statute followed the adoption by the Scottish Parliament of the International Criminal Court (Scotland) Act, which is available at <http://www.scotland-legislation.hmso.gov.uk/legislation/scotland/acts2001/20010013.htm>.

13. Rome Statute, *supra* note 1, art. 86.

14. *Id.* art. 89.

material supporting that request,¹⁵ to a State on the territory of which that person may be found. The Statute is clear as to the obligation of States Parties upon receiving such a request: they must comply.¹⁶

During the negotiation of the Rome Statute, States disagreed as to the process that should be used to arrest and bring persons before the Court. The term "arrest" raised the question as to whether States could use their national custodial powers or would need to follow ICC-specific arrest procedures to take individuals into custody. This question was linked to the issue of cooperation more generally: for some, national laws varied so much that use of those laws could conceivably limit the Court's ability to discharge its basic functions, whereas for others, any derogation from their national laws would be deemed unacceptable as an invasion of sovereignty.¹⁷ States eventually agreed to a compromise under which the Rome Statute would refer both to specific obligations for arrest and surrender and acknowledge procedures in existence under domestic laws.

Another debate occurred regarding the wording and mech-

15. *See id.* art. 89(1). Article 91 outlines the kind of written material that must accompany the request for arrest and surrender.

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 [ICC's] Pre-Trial Chamber . . . 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.

Id. art. 91(2). In the case of a person already convicted by the ICC but who has escaped, the request must contain:

- (a) A copy of any warrant for arrest of 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.

Id. art. 91(3).

16. *See id.* art. 89(1) ("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.").

17. *See* Phakiso Mochochoko, *International Cooperation and Judicial Assistance, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS* 308 (Roy S. Lee ed., 1999) [hereinafter *MAKING OF ROME STATUTE*].

anism that would be used to arrest individuals and send them to the Court. Some countries argued for a simple transfer mechanism, where they could send a person to the ICC with little or no domestic process. Other countries argued for the use of extradition, especially to transfer nationals. A majority of countries, however, argued for a *sui generis* approach. In the end, the term "surrender" was specifically chosen to be used in the Rome Statute, as it refers to the process of States turning over individuals to treaty-based international bodies, a process quite different from extradition, which takes place only between States. Extradition laws encompass the rights and duties of States to hand individuals over to one another for prosecution. The ICC presents quite a different situation, however. It is an international body created by multilateral agreement that provides detailed rights and protections for individuals accused of crimes, with clear procedures for their arrest and transfer that are known to all States. For this reason, States agreed to create a process for the ICC that is somewhat more streamlined than State-to-State extradition.¹⁸

The solution adopted was to oblige States to "surrender" persons to the Court, with the procedure to be followed left to the individual States, subject to certain limitations.¹⁹ Accordingly, under Article 91(2)(c) of the Rome Statute, the procedural requirements imposed by States for the surrender of persons to the ICC:

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.²⁰

Given the flexibility provided by the Rome Statute, States have two options when implementing the obligation to surrender in-

18. One way the process was streamlined was by eliminating grounds traditionally permitted to refuse extradition. No such grounds are included in Article 89 of the Rome Statute. See Rome Statute, *supra* note 1, art. 89.

19. In order to ensure that there was no confusion between the terms "surrender" and "extradition," Article 102 was included in the Rome Statute, providing definitions for both. See *id.* art. 102. According to Article 102, "'surrender' means the delivering up of a person by a State to the Court . . ." and "'extradition' means the delivering up of a person by one State to another as provided by treaty, convention or national legislation." *Id.*

20. *Id.* art. 91(2)(c).

dividuals to the ICC: create a separate legal procedure or amend existing extradition laws.

Certain provisions of the Rome Statute governing arrest and surrender are directly related to the actions States Parties must undertake in specific circumstances. These situations include procedures for arrest and surrender as well as provisional arrest, challenges by an accused or a State of the admissibility or jurisdiction of the Court, the actual surrender of individuals and their transit through the territories of States Parties, and instances of competing requests for arrest and surrender.

The procedure for States Parties to execute requests to arrest and surrender individuals in their territories is straightforward: the Court transmits the request together with the supporting material required by Article 91 of the Rome Statute. Upon receipt of requests from the ICC, States Parties follow their domestic laws, which must be in accordance with the provisions of the Rome Statute. Rule 184 of the Rules of Procedure and Evidence stipulates that requested States must immediately inform the ICC's Registrar in the event persons under indictment of the Court are available for surrender.²¹ States and the Registrar must agree on the date and manner of the surrender.²²

In urgent cases, the Court may request States to arrest an individual provisionally, until the requests for that person's surrender and the required documentation can be provided. Provisional arrests may be required, for example, when the ICC receives information that a person is preparing to flee the jurisdiction. In such cases, the Court may make a request for provisional arrest "by any medium capable of delivering a written record."²³ Upon receiving this information, requested States must perform the arrest and keep that person in custody. If States do not receive requests for surrender from the Court

21. *See Rules, supra* note 4, rule 184.

22. *See id.*

23. Rome Statute, *supra* note 1, art. 92. Requests must 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 . . .
- (c) A statement of the existence of a warrant of arrest or a judgment of conviction against the person sought; and
- (d) A statement that a request for surrender of the person sought will follow.

within sixty days of the dates of the provisional arrests, they may release the detained person from custody.²⁴ Release does not prejudice the subsequent arrest and surrender of persons if additional requests for surrender are received at a later date.²⁵

In the event that persons challenge their arrest before national courts on the basis of *ne bis in idem* under Article 20 of the Rome Statute, Article 89(2) stipulates that requested States must consult immediately with the Court to determine if there has been a relevant ruling on admissibility. If so, and the case was found to be admissible, then States shall execute the request. If an admissibility case is indeed pending, requested States may postpone surrender until the Court rules on admissibility.²⁶

The Rome Statute also provides for the practical reality that, on many occasions, persons being surrendered to the Court cannot be taken directly from their points of arrest to the ICC's detention facilities in The Hague without transiting through one or more States. If transit through the territory of a State Party is required, under Article 89(3), that State Party must authorize, in accordance with its domestic law and procedures, transportation of the person, unless transit through the State would impede or delay surrender.²⁷ The person being transported must be detained in custody during the entirety of the transit process. The Court will need to seek voluntary cooperation for transiting persons through the territories of non-States Parties, as the Rome Statute does not bind them.

During the surrender process, the officials responsible for transporting the individuals may need to make unscheduled landings in States where the Court has not sought prior authorization. Article 89(3) of the Rome Statute and Rule 182 address this situation, stating that the Court, if required under the laws of transit States, may submit urgent requests for transits by any means capable of transmitting written requests (e.g., facsimile or e-mail).²⁸ The Court has ninety-six hours in which to submit such requests, and during this period, States must detain the ar-

24. *See id.* art. 92(3); *Rules, supra* note 4, rule 188.

25. *See* Rome Statute, *supra* note 1, art. 92(4).

26. *See id.* art. 89(2).

27. *See id.* art. 89(3). However, under Article 89(3)(d), no authorization is required if the arrested person is transported by air and no landing is scheduled on the territory of the transit State. *See id.*

28. *See id.* art. 89(3); *Rules, supra* note 4, rule 182.

rested person on behalf of the Court. If a transit State has not received the Court's request by the expiration of the allotted time, the State must release the person from custody. Similar to the cases of provisional arrests, releases in the context of unauthorized landings do not prejudice the right of the Court to arrest persons later. States Parties, in implementing their obligations pertaining to unscheduled transit, may enact legislation to allow for transit without the requirement of prior formal request or simply opt to stipulate that formal requests are indeed required within the ninety-six hour time limit of the Rome Statute.

Another complication for surrender exists when a State receives a request from the ICC for the surrender of a person, and an extradition request from another State for the same person for the same conduct. Article 90 addresses the procedure to be followed in the event of competing requests, which begins with notifying the Court and the requesting State. If the requesting State is a State Party, the requested State must give priority to the ICC's request where the Court determines that the case is admissible, taking into account any investigation and/or prosecution conducted by the State requesting extradition.²⁹ If this determination has been made and the requesting State is not a party to the Rome Statute, the requested State shall give priority to the Court only if it is not under an international obligation to extradite the person to the requesting State.³⁰ Should the requested State be under an international obligation to extradite, it must consider the respective dates of the requests and the interests of the requesting State, including whether the crime was committed in its territory, the nationalities of the victims and the person sought, and the possibility of subsequent surrender between the Court and the requesting State.³¹ The Rules of Procedure and Evidence also address the complex issues that arise from competing requests.³²

The Rome Statute and ICC's Rules of Procedure and Evidence oblige States to take certain action with regard to arresting persons and surrendering them to the Court. Accordingly, States must be able to cooperate with the ICC in these areas in

29. See Rome Statute, *supra* note 1, art. 90(2).

30. See *id.* art. 90(4).

31. See *id.* art. 90(6).

32. See Rules, *supra* note 4, rule 186.

order to ensure an effective Court. Cooperation by States customarily requires national legislation. The legislative efforts of Canada, the United Kingdom, and Switzerland are instructive as to how States that have ratified the Rome Statute can implement their obligation to execute requests by the ICC to arrest and surrender persons accused of crimes within the Court's jurisdiction.

A. *Domestic Legislation Relating to Arrest and Surrender Obligations*

1. Canada

The Canada Act addresses arrest and surrender by amending the Extradition Act³³ to include a separate procedure for the surrender of persons to the ICC, which is, in essence, a shortened, modified version of the extradition process. This approach, as opposed to creating a *sui generis* procedure, was taken as the Extradition Act had been amended one year earlier to include surrender to the International Criminal Tribunals for the Former Yugoslavia³⁴ ("ICTY") and Rwanda³⁵ ("ICTR"). In addition, Canada's extradition process has passed constitutional adjudication by the Supreme Court, and the creation of a streamlined surrender process for the ICC within existing Canadian extradition law is more likely to accord with established constitutional standards.³⁶ This surrender process for the ICC was created through several amendments to the Extradition Act.

First, the ICC was added to the definitions of terms list contained in the Extradition Act.³⁷ Second, the Extradition Act was revised to ensure that persons subject to requests for surrender by the ICC would not be able to claim immunity under common law or by statute. Accordingly, and deserving of note, it states

33. Extradition Act, S.C., ch. 18 (1999) (Can.).

34. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/RES/827 (1993), amended by U.N. Doc. S/RES/1166 (1998); U.N. Doc. S/RES/1329 (2000).

35. Statute of International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring states, between January 1, 1994 and December 31, 1994, U.N. Doc. S/RES/955 (1994), amended by U.N. Doc. S/RES/1165 (1998); U.N. Doc. S/RES/1329 (2000).

36. See, e.g., *Canada v. Schmidt*, [1987] 1 S.C.R. 500; *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779; *McVey v. United States of America*, [1992] 3 S.C.R. 475.

37. See Extradition Act, S.C., ch. 18, § 2 (1999) (Can.).

that immunity claims cannot bar surrender to the ICC from Canada.³⁸ Third, the Extradition Act was amended to eliminate the mandatory and discretionary grounds traditionally available to the executive to refuse surrender that could otherwise apply to ICC surrender requests.³⁹

In addition to these general principles, the Canada Act establishes a separate process for surrender to the ICC. When persons are arrested on the request of the ICC, the judges before whom they are brought must order their detention in custody⁴⁰ unless they demonstrate that their detention is not justified under § 522(2) of the Canadian Criminal Code.⁴¹ If a judge is satisfied, upon consideration of the gravity of the alleged offense, that there are urgent and exceptional circumstances that justify the release of a person arrested in accordance with an ICC request, and that the person will appear as required, the judge may order the person released. The person may be released with or without conditions.⁴² Applications for judicial interim release must be adjourned, however, at the request of the Attorney General of Canada, in the event that recommendations from the Pre-Trial Chamber of the ICC or the release (or not) of the person arrested are pending. The existence of this adjournment power implements Article 59 of the Rome Statute into Canadian law. If the recommendations are not received within six days of the adjournments granted, judges may hear the applications accordingly.⁴³ If the ICC's Pre-Trial Chamber indeed submits recommendations on release, judges must consider them before they rule.⁴⁴ In extradition cases, all information presented is subject to Canada's rules of evidence, however, evidence may be

38. *See id.* § 6.1.

39. *See id.* § 47.1.

40. *See id.* § 18.

41. *See id.* § 18(1)(a)(i). Section 522(2) of the Criminal Code states:

Where an accused is charged with an offence listed in section 469 [various indictable offences including those under sections 4-7 of the Crimes Against Humanity and War Crimes Act], a judge of or a judge presiding in a superior court of criminal jurisdiction for the province in which the accused is charged shall order that the accused be detained in custody unless the accused, having been given a reasonable opportunity to do so, shows cause why his detention in custody is not justified within the meaning of subsection 515(10).

Criminal Code, R.S.C., § 522(2) (1985) (Can.) [hereinafter Criminal Code].

42. *See* Extradition Act, S.C., ch. 18, § 18(1)(a)(ii) (1999) (Can.).

43. *See id.* § 18(1.1).

44. *See id.* § 18(1.2).

submitted in the form of a record of the case in proceedings for surrender of persons to the ICC.⁴⁵

Section 76 of the Extradition Act was amended to deal with unscheduled landings in Canada of persons en route to the ICC.⁴⁶ Under this section, peace officers may hold persons being surrendered to the ICC who land in Canada without prior consent to transit Canadian territory in custody for up to ninety-six hours, pending receipt of a request for consent to transit from the ICC.⁴⁷

The United Kingdom also presents innovative options for implementing the Rome Statute's arrest and surrender obligations.

2. The United Kingdom

One of the purposes of the UK Act is to enable its courts and other authorities to honor requests for the arrest and surrender of persons wanted by the ICC and, accordingly, Part 2 of the UK Act covers the "arrest and delivery of persons."⁴⁸ The process implemented by the UK Act is based on legislation originally drafted for the swift transfer of suspects between the United Kingdom and Ireland, which became the model for the arrest and surrender of suspects to the ICTY and ICTR.⁴⁹ Unlike the Canada Act, however, the UK Act does not follow a modified extradition model for surrender of persons from the United Kingdom to the ICC, but rather creates a separate procedure.

Under § 2 of the UK Act, when the Secretary of State receives requests from the ICC for the arrest and surrender of persons alleged to have committed a crime within the jurisdiction of the ICC, he or she shall transmit the requests and accompanying documents to the appropriate judicial officers.⁵⁰ The judicial officers are to endorse ICC warrants for execution in the United Kingdom when they are satisfied that the warrant transmitted

45. See *id.* § 33.

46. See *id.* § 76.

47. See *id.* § 76(a).

48. See UK Act, *supra* note 11, pt. 2.

49. See COUNCIL OF EUROPE, PROGRESS REPORT BY THE UNITED KINGDOM 3 (2001), available at [http://www.legal.coe.int/criminal/icc/docs/Consult_ICC\(2001\)/Consult_ICC\(2001\)31E.pdf](http://www.legal.coe.int/criminal/icc/docs/Consult_ICC(2001)/Consult_ICC(2001)31E.pdf).

50. See UK Act, *supra* note 11, § 2(1). Section 2(2) addresses the transmittal of a request to a Scottish Minister. See *id.* § 2(2).

appears to have been issued by the ICC.⁵¹ In cases involving requests from the Court for provisional arrest, the Secretary of State will transmit each request to a constable and direct that constable to apply for a warrant for the arrest of the person.

Provisional warrant applications brought by constables will include statements under oath that they have reason to believe that a request for provisional arrest has been made by the ICC on the basis of urgency and that the person is in, or en route to, the United Kingdom. Upon the successful bringing of an application, an appropriate judicial officer shall issue a warrant for the arrest of the person identified in the warrant⁵² and notify the Secretary of State.⁵³ Persons arrested under provisional warrants must be brought before a United Kingdom court as soon as is practicable and, if by that time the ICC has in fact provided a request for arrest and surrender and a regular warrant has been issued under section 2 of the UK Act, the United Kingdom court proceeds under that warrant.⁵⁴ If requests for surrender are not received from the ICC within the time prescribed in the ICC's Rules of Procedure and Evidence,⁵⁵ the arrested person is released.⁵⁶ Persons brought into custody and involved in proceedings that relate to arrest warrants may request to be released on bail.⁵⁷

Similar to the Canadian and Swiss laws, the Secretary of State must consult with the ICC on applications for bail and bail cannot be granted absent the full consideration of any recommendations made by the Court.⁵⁸ In deciding applications for bail, the United Kingdom courts must also determine whether, considering the gravity of the crimes alleged, urgent and exceptional circumstances exist to justify the person's release and whether any measures have been, or will be, taken to ensure the person's surrender into custody in accordance with the terms of

51. *See id.* § 2(3). Section 2(4) deals with cases where the request relates to a person who has already been convicted. *See id.* § 2(4).

52. *See id.* § 3(2). Section 3(3) addresses applications that should be made in Scotland. *See id.* § 3(3).

53. *See id.* § 3(4).

54. *See id.* § 4(2).

55. *See Rules, supra* note 4, rule 188.

56. *See UK Act, supra* note 11, § 4(6).

57. *See id.* § 16.

58. *See id.* § 18. This implements article 59 of the Rome Statute.

the bail order.⁵⁹

The United Kingdom adopted a streamlined approach to the surrender of individuals to the ICC. Under section 5 of the UK Act, a surrender order (called a "delivery order") may issue from a competent United Kingdom court that is satisfied that the arrest warrant is from the ICC, has been endorsed under section 2(3), and that the person brought before the United Kingdom court is indeed the person named or described in the warrant.⁶⁰ In this way, the United Kingdom has gone further than the Canadian legislation as it has eliminated the evidence requirements from the process of surrender to the ICC. The UK Act requires only satisfaction as to the existence of the arrest warrant and the identity of the accused.⁶¹ In cases where admissibility or the jurisdiction of the ICC is challenged, the United Kingdom court may adjourn the proceedings pending the ICC adjudication of these preliminary issues.⁶²

Consent may also play a role in surrenders to the ICC of persons in the United Kingdom. As under the Swiss Law,⁶³ the UK Act allows persons to consent to being delivered to the ICC.⁶⁴ Consent must be given in writing and given by the person himself or herself, or by an appropriate person acting on his or her behalf if the person has a relevant physical or mental condition.⁶⁵ Once a United Kingdom court issues a delivery order, persons are either committed into custody or granted bail while awaiting the directions of the Secretary of State as to the execution of the order.⁶⁶ Persons are also informed of their right to request judicial review of their delivery orders within fifteen days of the date on which the order was issued.⁶⁷ Any waivers of the

59. *See id.* § 18(3).

60. *See id.* § 5(2). Under Section 25, the copy of the warrant issued by the ICC that is transmitted to the Secretary of State is treated as if it were the original warrant. *See id.* § 25. This is efficient as it ensures that an original warrant need not be given to the Secretary of State. For example, a facsimile version is acceptable.

61. *See id.* § 5(5). Section 5(5) specifically states that "in deciding whether to make a delivery order, the court is not concerned to enquire whether any warrant issued by the ICC was duly issued, . . . or whether there is evidence to justify [the person's] trial for the offence [he or she] is alleged to have committed." *Id.*

62. *See id.* § 5(4).

63. *See* Swiss Law, *supra* note 8, art. 23.

64. *See* UK Act, *supra* note 11, § 7.

65. *See id.* § 7(2)-(3).

66. *See id.* § 11(3).

67. *See id.* §§ 11(1)(b), 12.

right to have a delivery order reviewed must be in writing.⁶⁸ The UK Act also provides for an efficient response to issues of transit.

Under section 21, requests from the ICC for persons being surrendered by another State to transit the United Kingdom must be directed to the Secretary of State.⁶⁹ Requests granted by the Secretary of State will be treated as requests from the ICC for arrest and surrender of persons in the United Kingdom and transiting persons will be treated accordingly upon their arrival in the United Kingdom,⁷⁰ but they will not be eligible for bail.⁷¹ Persons that make unscheduled landings in the United Kingdom en route to the ICC may be arrested by constables and must be brought before a competent United Kingdom court as soon as practicable.⁷² The court must remand these persons in custody pending receipt by the Secretary of State of a request by the ICC for their transit and the Secretary of State's decision whether to grant the request.⁷³ Upon receiving and deciding the request, the Secretary of State must notify the court without delay.⁷⁴ If the ICC's request is granted, it will be treated like a regular request from the ICC for transit through the United Kingdom of persons being surrendered to the Court. Should the Secretary of State decline the request, the United Kingdom court must release the arrested person.⁷⁵ Implementing Article 89(3)(e) of the Rome Statute, section 22(3) of the UK Act provides for the release of persons if the ICC does not request their transit within ninety-six hours of any unscheduled landings.⁷⁶

Like the Canadian legislation, the UK Act addresses immunity in the context of the arrest and surrender of persons to the ICC. Section 23 is entitled "Provisions as to state or diplomatic immunity" and mandates that State or diplomatic immunity attaching to persons connected to States Parties cannot prevent proceedings for arrest and surrender to the ICC.⁷⁷ In other words, the United Kingdom will arrest or surrender persons con-

68. *See id.* § 13(3).

69. *See id.* § 21(1).

70. *See id.* § 21(2).

71. *See id.* § 21(3).

72. *See id.* § 22(1).

73. *See id.* § 22(2).

74. *See id.* § 22(4).

75. *See id.* § 22(6).

76. *See id.* § 22(3).

77. *See id.* § 23(1).

nected to States Parties regardless of any claims that they enjoy State or diplomatic immunity. Where persons who claim immunity are connected to countries that are not parties to the Rome Statute, however, proceedings for their arrest and surrender will be permitted only in the event that the ICC obtains waivers of their immunity.⁷⁸

The example of the Swiss Law provides useful insight into issues of ICC arrest and surrender implementation from the perspective of the civil law tradition.

3. Switzerland

The Swiss Law creates a Central Authority, administered through the Federal Office of Justice, to which responsibility is delegated to, *inter alia*, surrender to the Court persons being prosecuted and transmit the results of the execution of the request.⁷⁹ Article 5 of the Swiss Law mandates that cantonal and federal authorities perform all measures ordered by the Central Authority to cooperate with the Court and the means prescribed by the Central Authority to implement requests from the ICC must be executed expeditiously without being subjected to the substantive procedures of the designated cantonal or federal authority.⁸⁰ The acts undertaken by the cantonal and federal authorities ordered by the Central Authority to fulfill ICC requests cannot be appealed. This general, centralized model applies to all requests by the ICC for cooperation from Switzerland, including those for the arrest and surrender of persons to the Court. As to their form, all requests must be in writing and virtually no restriction exists as to the means by which requests are conveyed.⁸¹

The content and documentation required by Switzerland pursuant to Article 91(2)(c) of the Rome Statute for the execution of requests for arrest from the ICC are set out in Article 18 of the Swiss Law. Article 91(2)(c) of the Rome Statute mandates that the Court provide, in addition to the arrest warrant and information on persons sought sufficient to ascertain their identities and whereabouts, “[s]uch documents, statements or infor-

78. *See id.* § 23(2).

79. Swiss Law, *supra* note 8, art. 3(1)(e).

80. *See id.* art. 5.

81. *See id.* art. 10.

mation . . . necessary to meet the requirements for the surrender process" in the country.⁸² Accordingly, in order to execute requests from the ICC for arrest, the Swiss Law requires that the reasons for the arrest be specified by the Court, a concise statement of the relevant facts sufficient for a legal assessment of the impugned act be provided, and that the applicable provisions of the Rome Statute and its Rules of Procedure and Evidence be cited.⁸³

The Swiss Law also addresses provisional arrests. To fulfill requests for provisional arrests under Article 92 of the Rome Statute, Article 18 of the Swiss Law requires that they contain:

- (a) Information as accurate and complete as possible describing the person sought, including information as to the person's probable location; (b) A short statement of the facts including, where possible, the date and place of the act; (c) A statement of the existence of a valid warrant of arrest or a judgment of conviction against the person; (d) A statement that a request for surrender will follow.⁸⁴

If the Central Authority honors the provisional request, it will initiate a search for the person and, if necessary, effect the person's arrest.⁸⁵ Upon arrest, the arresting authority is permitted to seize objects and assets that may serve as evidence in proceedings before the ICC or that may have been derived from the commission of criminal acts.⁸⁶ All arrests are to be reported immediately to the Central Authority, which will inform the Court promptly and ask that a request for surrender be made.⁸⁷

The Swiss Law also contains provisions for persons involved in arrest and surrender proceedings to be considered for bail. Under Article 20 of the Swiss Law, the Central Authority makes determinations as to whether arrested persons remain in detention pending their surrender or if interim release is justified. The general principle is that persons should be kept in deten-

82. Rome Statute, *supra* note 1, art. 91(2)(c).

83. *See* Swiss Law, *supra* note 8, art. 17(1)(c), 17(3). With respect to a request for arrest and surrender of a person already convicted, the Swiss law reiterates the requirements found in article 91(3) of the Rome Statute in its article 17(2) and (3). *See id.* art. 17(2)-(3).

84. *Id.* art. 18(1).

85. *See id.* art. 18(2).

86. *See id.* art. 18(3).

87. *See id.* art. 18(4).

tion pending surrender to the Court.⁸⁸ However, in exceptional circumstances, persons might be granted interim release, but only after the Swiss court has given full consideration to any recommendations of the ICC in the matter.⁸⁹ The decisions of the Central Authority for warrants for detention pending surrender may be appealed to the Federal Supreme Court within ten days of the date the ruling is issued in writing.⁹⁰

In addition to provisions governing arrest, the Swiss Law includes provisions specific to surrender. Article 16 of the Swiss Law sets out the principle for Switzerland's cooperation on surrender of persons to the ICC. Subparagraph 1 states that "[a] person shall be surrendered to the Court if the request and supporting documents indicated that the act is within the jurisdiction of the Court."⁹¹ This provision demonstrates Switzerland's intention to comply fully with requests for surrender.

Persons subject to surrender to the ICC from Switzerland are also accorded rights under the Swiss Law. The rights of the accused in the surrender process are set out in Article 22 of the Swiss Law. Requests from the ICC for surrender and supporting documentation must be provided to arrested persons and, if applicable, their lawyer.⁹² The authorities executing the request must explain the conditions of surrender and simplified surrender to persons being surrendered,⁹³ as well as inform them of their right to challenge the jurisdiction of the Court and be represented by counsel of their choice or an official or assigned counsel in the event that they do not have access to a lawyer.⁹⁴ The Swiss authorities may briefly question persons subject to surrender to the ICC to determine their personal circumstances and for what reasons, if any, they object to being surrendered. Counsel may assist at these hearings.⁹⁵

Surrenders authorized by the Central Authority will be ef-

88. *See id.* art. 20(1).

89. *See id.* art. 20(2).

90. *See id.* art. 19(4).

91. *Id.* art. 16(1).

92. *See id.* art. 22.

93. Switzerland has created two processes: surrender and simplified surrender. Simplified surrender applies in those cases where the arrested person waives the right to surrender proceedings. Simplified surrender is provided for in Article 23 of the Swiss Law. *See id.* art. 23.

94. *See id.* art. 22(2).

95. *See id.* art. 22(3).

fectured immediately,⁹⁶ however, surrender may be postponed for a period of time agreed upon with the ICC, in the event that persons being surrendered are the subject of prosecutions in Switzerland for other criminal acts or are in detention in Switzerland at the time the surrender order is issued.⁹⁷ The Central Authority may also authorize, after consultations with the ICC, temporary transfer of persons being surrendered to the Court,⁹⁸ however, temporary transfer may only be effected with the consent of the transferee.⁹⁹

Requests for transit are addressed somewhat more specifically by the Swiss Law. Under Article 13, the Central Authority may authorize the transit of persons in detention through Swiss territory and dictate the means for their transit, upon request of the ICC and without input from the persons being transited.¹⁰⁰ The Central Authority's authorization of transit cannot be appealed.¹⁰¹ The Swiss Law also implements Article 89(3)(d) of the Rome Statute, which deals with transit by air in stating that "[n]o authorization is required if the person in detention is to be transported by air over Swiss territory and no landing is scheduled."¹⁰² The Swiss Law provides that persons who arrive in Switzerland by way of unscheduled landings during transit shall be kept in custody and the Central Authority must immediately ask the ICC to make a request for transit. If the request from the Court is not received within ninety-six hours, the person will be released. In the event of release, persons may be re-arrested, and transit authorized, provided a request from the ICC is duly received.¹⁰³

The Swiss Law also addresses the specific issue of competing requests. If Switzerland receives a request from the ICC for surrender of a person and a request from a State for his or her extradition, the Central Authority will decide how to proceed, following Article 90 of the Rome Statute.¹⁰⁴ If the Central Au-

96. *See id.* art. 25(1).

97. *See id.* art. 25(2).

98. *See id.* art. 26.

99. *See id.* art. 26(2).

100. *See id.* art. 13.

101. *See id.* art. 13(4).

102. *Id.* art. 13(2).

103. *See id.* art. 13(3).

104. *See id.* art. 14(1).

thority gives priority to an extradition request that is subsequently denied, it must notify the Court without delay.

The Swiss Law provides compensation for unjustified detention. The procedures and conditions for awards of compensation for the unjustified detention of persons subject to arrest and surrender to the ICC are the same as those provided in Switzerland under its federal law.¹⁰⁵ Amounts of compensation, however, may be reduced or claims denied altogether, where claimants are deemed to have provoked detention or have obstructed or delayed the proceedings without reason.¹⁰⁶ Compensation for unjustified detention in Switzerland may also be reduced when requests by the ICC for arrest for the purposes of surrender are withdrawn or not submitted with the required supporting documentation before expiration of the deadline.¹⁰⁷ In addition, compensation shall be refused to the extent that the Court has awarded or denied compensation in accordance with Article 85 of the Rome Statute.¹⁰⁸

As a general matter, similar to the Canadian and United Kingdom implementing legislation, subparagraph 2 of Article 16 of the Swiss Law permits the Central Authority to postpone the execution of requests for surrender if the Court is considering issues of admissibility or challenges to its jurisdiction brought pursuant to Articles 17-19 of the Rome Statute. The Swiss Law permits postponement while the Court considers issues of admissibility or jurisdiction, including where Swiss citizens or the country of Switzerland are parties to challenges.¹⁰⁹

The Swiss Law also addresses further citizenship issues. Subparagraph 3 of Article 16 states that “[i]f a Swiss citizen is surrendered to the Court, the Central Authority shall request the repatriation of the citizen upon completion of the proceedings.”¹¹⁰ While other States might wish to address the repatriation of its nationals through agreement with the Court, Switzerland has chosen to have its Central Authority request repatriation and has

105. *See id.* art. 15(1).

106. *See id.* art. 15(2).

107. *See id.* art. 15(3).

108. *See id.* art. 15(4).

109. This approach is also seen in Article 24. *See id.* art. 24(2) (“If the arrested person or the Central Authority challenges the jurisdiction of the Court, the authorization for surrender shall be postponed until the Court has decided.”).

110. *Id.* art. 16(3).

given notice in its law that it will seek the repatriation of Swiss citizens at the conclusion of all cases.

Two additional articles in the Swiss Law are also significant. Article 27 addresses the rule of specialty, stating that "[a] person surrendered to the Court may be prosecuted, punished or detained by the Court for any act within its jurisdiction"¹¹¹ and Article 28 provides that the personal property of persons being prosecuted may be applied to the costs of the Swiss process with the proviso that the property is not subject to being transmitted to the ICC.¹¹²

The Canadian, United Kingdom, and Swiss legislative experiences provide insight into the options States may consider when implementing their obligations of arrest and surrender under the Rome Statute. Another important area of cooperation with States upon which the effective functioning of the ICC will rely is the investigation and gathering of evidence for the prosecution of crimes within the Court's jurisdiction.

II. INVESTIGATION AND EVIDENCE GATHERING

The aim of the Rome Statute and domestic legislation implementing the Rome Statute is to enable the Court's investigators to conduct thorough investigations as soon as possible after the commission of offenses. One key element to successful investigations will be the willingness of States to provide assistance with investigations in a timely manner. Accordingly, a thorough analysis of the utility of domestic legislation will be possible only once ICC officials have undertaken an investigation, and the legislation, as well as the State Party's willingness to cooperate with the investigation, are put to the test. Before addressing issues of investigations and evidence gathering, however, it is essential to recall that the Rome Statute is founded upon the principle of complementarity.¹¹³

111. *Id.* art. 27.

112. *See id.* art. 28.

113. Article 17 of the Rome Statute formulates the complementarity regime of the ICC:

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;

The Preamble and Article 1 of the Rome Statute emphasize that the ICC's jurisdiction shall be "complementary to national criminal jurisdictions."¹¹⁴ This specification prohibits the Court from exercising jurisdiction over individuals where States that have properly exercised jurisdiction over the person have conducted, or will conduct, investigations into the crimes alleged and, if evidence warrants, proceed against the accused. The ICC is only able to exercise jurisdiction over persons accused of crimes when States are unwilling or genuinely unable to carry out investigations or prosecutions.¹¹⁵ Given the status of the ICC—existing within a regime of complementarity—as a court of "last resort," the best form of cooperation that States could provide the Court with would be to ensure that their domestic criminal laws: (1) are sufficient to enable thorough investigations of individuals alleged to have committed crimes within the jurisdiction of the Court, (2) provide for the indictment and trial of individuals implicated by evidence of ICC crimes, and (3) are complemented by policies, procedures, and practices that support investigative and judicial processes. Until humanity achieves this laudable legislative ideal, it is likely that the ICC will have to call upon States Parties to cooperate in criminal investigations.

Article 88 of the Rome Statute requires that States Parties ensure the existence of procedures under their domestic law that enable them to cooperate with the Court's investigative and evidentiary matters.¹¹⁶ This duty exists in addition to the general obligation upon States Parties to cooperate fully with the "investigation and prosecution of crimes within the jurisdiction of the

-
- (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.

Rome Statute, *supra* note 1, art. 17(1). Article 17 of the Rome Statute proceeds to specify the factors the Court *must* consider when determining whether a State is indeed unwilling or unable to proceed. *Id.* art. 17(2), 17(3).

114. *Id.* pmb., art. 1.

115. *See id.* art. 17(1).

116. *See id.* art. 88.

Court.”¹¹⁷ For the purposes of this section, a distinction must be drawn between investigations commenced pursuant to powers of the Court contained within the Rome Statute and those initiated by the Security Council. Investigations commenced pursuant to the powers of the Court are initiated by either States Parties that refer situations to the Court according to Articles 13(a) and 14 of the Rome Statute, or the Prosecutor launching investigations *proprio motu* pursuant to Articles 13(c) and 15. These investigations will be governed by the Rome Statute and conducted with the assistance of States Parties mandated by Article 86. States that are not parties to the Rome Statute have no *prima facie* obligation to cooperate with ICC investigators.¹¹⁸ The other type of investigations are those triggered by referrals to the ICC by the U.N. Security Council acting under Chapter VII of the Charter of the United Nations (“U.N. Charter”).¹¹⁹

Referrals from the Security Council would be founded upon the Council’s concern for, and its powers to address, issues of international peace and security as outlined in Article 39 of the U.N. Charter. Article 25 of the U.N. Charter requires all member States to accept and execute the decisions of the Security Council.¹²⁰ Article 49 of the U.N. Charter also requires its members to provide “assistance in carrying out the measures decided upon by the Security Council.”¹²¹ Given the Security Council’s over-arching authority, the referral to the ICC of cases by the Security Council could arguably permit investigators to obtain the assistance of Member States that are not parties to the Rome Statute. Taken to the extreme, Security Council referrals would allow the ICC to operate under Chapter VII in a manner similar to the ICTY and the ICTR.¹²² Because of the uncertainty sur-

117. *Id.* art. 86; *see also* Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/Conf 39/28, UKTS 58 (1980), 8 I.L.M. 679, art. 26, *available at* <http://fletcher.tufts.edu/multi/texts/BH538.txt>.

118. However, it should be noted that pursuant to Article 87(5) of the Rome Statute, the Court may invite a non-Party State to provide assistance in an investigation on an *ad hoc* basis. *See* Rome Statute, *supra* note 1, art. 87(5).

119. U.N. CHARTER ch. VII.

120. *See id.* art. 25.

121. *Id.* art. 49.

122. *See William A. Schabas, An Introduction to the International Criminal Court* 101 (2001), where it is suggested that the issues of admissibility criteria and complementarity following a Security Council referral have been left (perhaps intentionally) unresolved. During the summer 2001 course on the International Criminal Court held in Galway, Professor Schabas expressed the opinion that a Security Council referral would

rounding this issue, the following analysis will address only ICC investigations undertaken upon the referrals of States Parties or initiated by the Prosecutor *proprio motu*.

The Rome Statute sets out the duties and powers of the Prosecutor with respect to investigations,¹²³ and establishes a regime for cooperation—from States Parties and non-States Parties alike—in the conducting of investigations. The Prosecutor's role is made clear under Article 54(1)(a):

[The Prosecutor shall,] *[i]n 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.*¹²⁴

The Court's ability to obtain the assistance of States in the conducting of such rigorous investigations is mandated under Article 54(3)(c) of the Rome Statute, which empowers the Prosecutor to "[s]eek the cooperation of any State."¹²⁵ The Prosecutor is directed to conduct investigations on the territory of a State in accordance with the provisions of Part 9.¹²⁶ The Rome Statute also affords rights to persons during investigations of crimes within the jurisdiction of the Court.

The rights of individuals during investigations are established under Article 55,¹²⁷ and include some of the fundamental rights enshrined in the Universal Declaration of Human

not trump the Statute of the Court. However, the issue of investigatory procedures in these instances was not explored. His position on this issue was reaffirmed in an e-mail from Professor Schabas to John McManus dated January 9, 2002 (on file with author). See also Jelena Pejic, *The International Criminal Court Statute: An Appraisal of the Rome Package*, 34 INT'L LAW. 65 (2000).

123. See Rome Statute, *supra* note 1, art. 54. See generally *id.* pts. 5, 9.

124. *Id.* art. 54(1)(a) (emphasis added).

125. *Id.* art. 54(3)(c).

126. See *id.* art. 54(2)(a). Article 54(2)(b) deals with an exception to the general requirement to obtain a State's cooperation in the conduct of investigations. The subparagraph refers to paragraph 57(3)(d), pursuant to which the Pre-Trial Chamber may authorize the Prosecutor to conduct specified investigations on the territory of a State Party without that State's cooperation in situations where the State is "clearly unable to execute a request for cooperation due to the unavailability of any [State organ] . . . competent to execute the request for cooperation under Part 9." *Id.* art. 57(3)(d).

127. See *id.* art. 55. Article 55 reads:

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

Rights,¹²⁸ the International Covenant on Civil and Political Rights,¹²⁹ and the Torture Convention.¹³⁰

Article 87 of the Rome Statute sets out the general provisions governing requests by the ICC for cooperation with investigations and includes recourse for the Court in the event that States Parties fail to comply with its requests. Upon a finding by the Court of failure by a State Party to cooperate, the dispute may be referred to either the Assembly of States Parties or to the United Nations Security Council for resolution.¹³¹ Similar to re-

- 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 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;
 - (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

Id.

128. The Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, U.N. Doc. A/810, arts. 3, 5 (1948), *available at* <http://www.unhchr.ch/udhr/lang/eng.hum> (visited Dec. 11, 2001) (the right to liberty and the right not to be subjected to torture or to cruel, inhuman, or degrading treatment).

129. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

130. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987), *available at* http://www.unhchr.ch/html/menu3/b/h_cat39.htm (visited Dec. 11, 2001).

131. *See* Rome Statute, *supra* note 1, art. 87(7). For an interesting discussion of the Court's (in)ability to enforce compliance with requests, and the impact of the ICTY's

quests for arrest and surrender, the terms of the Rome Statute mandating cooperation with the Court in a general capacity are equally relevant to demands for cooperation in investigations and for the collection of evidence.

Article 93 of the Rome Statute reaffirms the obligation of States Parties to comply with requests for assistance from the Court, in accordance with the provisions of Part 9 of the Rome Statute and pursuant to their national procedures.¹³² Part 9 identifies the many precise forms of cooperation that States Parties are obliged to provide to the Court, and refers specifically to the production of evidence. States Parties are required to facilitate the ICC's requests for assistance in, *inter alia*, identifying and tracking persons or things;¹³³ taking evidence and testimony under oath as well as producing evidence;¹³⁴ questioning individuals;¹³⁵ examining places or sites, and exhuming and examining grave sites; executing searches and seizures; effecting the provision of records and documents;¹³⁶ and guaranteeing the preservation of evidence.¹³⁷ The list of these means of cooperation concludes with a blanket clause that obligates States Parties to provide all other types of assistance "not prohibited by the law of the requested State" and which will facilitate investigations or prosecutions.¹³⁸

Article 93 also enables the ICC to provide assurances to witnesses that the Court will not detain them for acts or omissions that occurred prior to their arrival at the Court;¹³⁹ a power likely to be used to obtain evidence from lower-level alleged perpetrators who are reluctant to testify against their superiors. Article 93 further establishes procedures for dealing with: (1) requests

Blaskic decision on this process, see Jacob Katz Cogan, *The Problem of Obtaining Evidence for International Criminal Courts*, 22 HUM. RTS. Q. 404 (2000) (No. 2).

132. See Rome Statute, *supra* note 1, art. 93. Article 96 establishes guidelines for the contents of requests. See *id.* art. 96. Article 99 governs the execution of requests "in accordance with the relevant provisions under the law of the requested State and, unless prohibited by such law, in the manner specified in the request." *Id.* art. 99. Article 100 stipulates that costs, other than those exempted by this Article, are to be borne by the requested State. See *id.* art. 100.

133. See *id.* art. 93(1)(a).

134. See *id.* art. 93(1)(b).

135. See *id.* art. 93(1)(c).

136. See *id.* art. 93(1)(i).

137. See *id.* art. 93(1)(j).

138. *Id.* art. 93(1)(l).

139. See *id.* art. 93(2).

for assistance the specifics of which may conflict with the general legal principles of the requested States Party;¹⁴⁰ (2) denials by States Parties of requests for documents or evidence the disclosure of which is considered to threaten national security;¹⁴¹ (3) conditional denials of requests;¹⁴² (4) confidential documents and information;¹⁴³ (5) competing requests from the Court and States;¹⁴⁴ and (6) cooperation when State Parties are conducting investigations or trials of crimes that are within the Court's jurisdiction or under their national laws.¹⁴⁵

As established by this elaboration of relevant provisions, the Rome Statute establishes an extensive regime governing the conduct of investigations, the collection of evidence in ICC proceedings, and the forms of cooperation required from States Parties to make them effective. Until States Parties incorporate their obligations under the Rome Statute to assist the Court into their domestic laws and procedures and enable ICC investigations to be conducted within their territories, the Prosecutor's most fundamental efforts to conduct thorough investigations in accordance with Article 54 will be stymied. For this reason, the legislative initiatives of some of the countries that have implemented their obligations to cooperate with the ICC in investigations and evidence collection are particularly important as examples to States that have yet to ratify and implement the Rome Statute.

A. Domestic Legislation Relating to Investigation and Evidence Gathering Obligations

1. Canada

The provisions in the Canada Act that amend the Mutual Legal Assistance in Criminal Matters Act ("MLA Act"),¹⁴⁶ will allow Canada to provide assistance to the ICC in investigations and

140. *See id.* art. 93(3).

141. *See id.* art. 93(4). The actual procedure to be followed in these circumstances is set out under Article 72.

142. *See id.* art. 93(5)-(6). Article 97 governs consultations between the State Party and the Court in the event that problems arise that impede or prevent the compliance with the request.

143. *See id.* art. 93(8).

144. *See id.* art. 93(9).

145. *See id.* art. 93(10).

146. Mutual Legal Assistance in Criminal Matters Act, R.S.C., ch. 30 (1985) (Can.) [hereinafter MLA Act].

evidence gathering in manners similar to the way in which Canada currently provides assistance to States and other entities.

In terms of creating a legislative regime for Canada's provision of investigative and evidence gathering assistance to the ICC, the Canada Act began by adding the ICC to the definitions section of the MLA Act.¹⁴⁷ The next step—adding the ICC to the Schedule of the MLA Act so it is considered a “designated entity” from which Canada may entertain requests for cooperation—will occur when the Rome Statute enters into force. Once this addition is made by regulation of the Minister of Justice, Canada will be in a position to assist the ICC with executing searches and seizures and questioning witnesses.

Canada can assist the ICC with searches for, and seizures of, evidence of the commission of offenses and searches for individuals suspected of having committed crimes thought to be in Canada. Searches and seizures in Canada, conducted upon request of the ICC, generally require judicially-authorized warrants. Once the ICC is added to the Schedule of the MLA Act, the Minister of Justice will be empowered to initiate the process required to seek warrants on behalf of the ICC. Upon receipt of requests from the Court for searches for, or seizures of, evidence of the commission of offenses, the Minister of Justice will be able to authorize a “competent authority”¹⁴⁸ to apply for warrants on an *ex parte* basis.¹⁴⁹ The Minister must first approve requests from the ICC for assistance. Essentially, Canada's Criminal Code will govern the processes of obtaining and executing search warrants, subject to such variations as the circumstances may require.¹⁵⁰ Warrants obtained from Canadian courts upon request of the ICC could allow peace officers, working on behalf of ICC investigators, to enter places or premises to conduct searches, seize material evidence,¹⁵¹ or obtain information through the use of any devices or investigative techniques¹⁵² that may reveal

147. *See id.* § 2.

148. *Id.* A “competent authority” is defined in the MLA Act as being “the Attorney General of Canada, the attorney general of a province or any person or authority with responsibility in Canada for the investigation or prosecution of offences.” *Id.*

149. *See id.* § 11(2).

150. *See id.* §§ 10, 12(4), 13.1(2).

151. *See id.* § 13.

152. *See id.* § 13.1(1).

the whereabouts of individuals suspected of having committed offenses.

After the ICC is added to the schedule of the MLA Act, Canadian courts may also assist the Court by authorizing a formal process to question witnesses. Upon the approval by the Canadian Minister of Justice of requests from the ICC, a designated Canadian authority may apply to a judge *ex parte* for an order requiring individuals named in warrants to appear for examination under oath at places specified in the warrants. Persons named in such warrants may also be required to produce copies of records in their possession or control.¹⁵³ Individuals who refuse to answer properly asked questions, or willingly fail to produce records or things required under the orders, are liable to be found in contempt of court.¹⁵⁴ Refusal to attend examinations may result in the issuance of warrants for arrest and detention of absentees.¹⁵⁵

Orders for examinations and the production of documents may include terms or conditions that Canadian courts consider desirable, "including those relating to the protection of the interests of the person named therein and of third parties."¹⁵⁶ This provision is important because applications for orders for examination are brought on an *ex parte* basis.

Canada's MLA Act not only provides the power to order questioning in Canada, but also addresses the process by which examinations may be conducted. Subsection 18(7) provides that the questioning of individuals named in orders for examination must follow the rules of procedure and evidence of the requesting State or entity; in this case, the ICC.¹⁵⁷ This section of the MLA Act, however, permits individuals to refuse to answer questions or produce records, if the refusal is permitted under the Canadian law of non-disclosure or the information is considered privileged in Canada.¹⁵⁸ Finally, in terms of specific forms of cooperation, ICC investigators may request opportunities to examine particular sites in Canada, or exhume and examine gravesites. The "competent authority," designated by the Minis-

153. *See id.* § 18(2)(a).

154. *See id.* § 22(1).

155. *See id.* § 23(1), (3).

156. *Id.* § 18(5).

157. *See id.* § 18(7).

158. *See id.*

ter of Justice following his or her approval of the request, may apply *ex parte* for judicially-authorized orders permitting these investigatory activities.¹⁵⁹

Another type of cooperation between Canada and the ICC could occur at the initial stages of investigations and would likely be governed by Memoranda of Understanding ("MOUs") between the Government of Canada and the Prosecutor's office.¹⁶⁰ MOUs could provide ICC investigators with expeditious and effective assistance in their efforts to trace and interview voluntary witnesses. MOUs could also be used to allow ICC investigators to view public sites, provided that the sites do not require modification and are not disturbed. The adoption of MOUs to permit ICC investigators to interview voluntary witnesses in Canada on an informal basis would mirror the process already established under standard MOUs governing mutual legal assistance between States, and between States and other international entities. This process would allow for speedy and flexible cooperation between ICC investigators and Canadian police for activities, which do not require judicial oversight or approval.

In conclusion, it is clear that, instead of creating new processes within its domestic laws to allow for cooperation with ICC investigators, Canada chose to access existing legislation and legal practices and simply extended them to facilitate ICC investigations in Canada. Obtaining judicially-authorized warrants for more formal or intrusive investigative activities such as searches and seizures would follow the procedures currently used by Canadian law enforcement officials on a regular basis. Beyond administrative efficacy, requiring that the execution of ICC requests for assistance follow existing and well-established procedures ensures knowledgeable and competent cooperation. It also reduces the potential that the investigatory activities would be found, after the fact, to have violated the principles of the Canadian Charter of Rights and Freedoms.¹⁶¹ While the Canadian model of providing cooperation to the ICC in investigations and the collection of evidence is an instructive example of the implementation of States' obligations in this regard under

159. *See id.* § 23.1.

160. It should be noted that the assistance normally provided through an MOU can be provided on an *ad hoc* basis pursuant to a request from another State or entity. The MOU simply standardizes and formalizes the process.

161. Canadian Charter of Rights and Freedoms, S.C., c.11 (1982) (Can.).

the Rome Statute, the United Kingdom's ICC legislation also provides illustrative options for implementation.

2. The United Kingdom

Like Canada, the United Kingdom chose to enact a single omnibus bill—the UK Act¹⁶²—to address both the criminal and administrative requirements of the Rome Statute. Part 3 of the UK Act confers powers upon the Secretary of State to provide assistance to the ICC in investigations that have been initiated by the Court and where any proceedings have not been completed.¹⁶³ The United Kingdom's approach to cooperation is similar to that established in Canada's MLA Act.

In order to obtain State cooperation in the conduct of investigations or evidence gathering activities in the United Kingdom, the ICC must forward a request for assistance to the Secretary of State. As in Canada, the methods used to obtain the necessary legal authority to execute these requests are similar to the procedures traditionally used by national investigators in the usual course of their duties. For example, to exercise powers of entry, search, and seizure in response to ICC requests, the Secretary of State is empowered to direct constables to apply for warrants under the applicable United Kingdom legislation.¹⁶⁴ Further, Part 3 of the UK Act permits United Kingdom authorities to execute requests from the ICC for: (1) the service of summons or other documents upon the individual living in the UK,¹⁶⁵ (2) the transfer of UK prisoners to the Court to provide evidence or assist investigations¹⁶⁶ upon the prisoners' consent;¹⁶⁷ (3) taking of fingerprints or non-intimate samples;¹⁶⁸ (4) obtaining orders for

162. UK Act, *supra* note 11.

163. *See id.* § 27.

164. *See id.* § 33. Section 33 refers to Part 2 of the Police and Criminal Evidence Act, 1984, c. 60 (Eng.) [hereinafter UK Evidence Act] or Part III of the Police and Criminal Evidence (Northern Ireland) Order, 1989, No. 1341 (N.I. 12) [hereinafter Northern Ireland Order].

165. *See* UK Act, *supra* note 11, § 31.

166. *See id.* § 32.

167. *See id.* § 32(4).

168. *See id.* § 34, sched. 4. Schedule 4, consisting of eight Sections, outlines the rights of those requested to provide samples, and the powers and obligations of the police in obtaining those samples. *See id.* sched. 4. Both the UK Evidence Act and the Northern Ireland Order are referenced.

exhumation;¹⁶⁹ (5) the provision of records or documents to the ICC from proceedings or investigations in the United Kingdom “in respect of conduct which would constitute an ICC crime”;¹⁷⁰ (6) the provision of assistance to trace and seize the proceeds of ICC crimes;¹⁷¹ (7) the verification of any materials or evidence obtained under Part 3;¹⁷² and (8) the transmission of materials to the Court.¹⁷³ The UK Act protects documents or information obtained by these measures, proscribing disclosure in cases where it would prejudice the security of the United Kingdom.¹⁷⁴

In this way, the UK Act provides a full array of procedures designed to facilitate ICC investigations in UK territory. While enacting legislative provisions specifically to assist with ICC investigations whenever possible, the drafters of the UK Act also accessed existing methods of obtaining evidence. The United Kingdom drafters referenced various United Kingdom statutes, such as the Evidence Act,¹⁷⁵ which governs the conduct of criminal investigations and the collection of evidence by law enforcement personnel in national investigations. The application of United Kingdom procedural law to ICC requests for cooperation will ensure that UK law enforcement officials will be able to provide the Court’s investigators with the appropriate assistance in a timely and effective manner as they will be already familiar with the procedures required to obtain the means requested by the ICC.

In the civil law context, Switzerland has also taken measures to fulfill its investigative and evidentiary obligations under the Rome Statute.

3. Switzerland

The Swiss Law¹⁷⁶ is more narrowly focused than that of the Canadian or the United Kingdom laws in terms of the incorpora-

169. *See id.* § 35. Section 35 references the Coroners Act, 1988, c.13 (Eng.) and the Coroners Act (Northern Ireland), 1959, c.15 (N.I.).

170. UK Act, *supra* note 11, § 36.

171. *See id.* § 37, sched. 5. Schedule 5, consisting of 11 Sections, provides detailed procedures for obtaining production or access orders and search warrants. *See id.* sched. 11.

172. *See id.* § 40.

173. *See id.* § 41.

174. *See id.* § 39(1).

175. *See* UK Evidence Act, *supra* note 164.

176. Swiss Law, *supra* note 8.

tion of the Rome Statute's requirements for cooperation into domestic law and practice. The Swiss Law is entirely procedural in nature and deals exclusively with Switzerland's cooperation with the Court. Chapter 4 of the Swiss Law governs Switzerland's handling of requests for judicial assistance from the ICC and includes provisions relevant to cooperation in investigations.¹⁷⁷

Article 3(1) of the Swiss Law establishes that the Federal Office of Justice will administer a Central Authority to receive all requests and oversee the execution of all measures undertaken to assist the ICC.¹⁷⁸ The Central Authority will, *inter alia*, determine whether, and in what manner, Switzerland will comply with the ICC's requests¹⁷⁹ and order the appropriate authorities to execute the measures necessary for them to be fulfilled.¹⁸⁰ Again, Article 5 of the Swiss Law mandates cantonal and federal authorities to implement requests from the ICC, which must be executed expeditiously without subjecting them to their specific substantive procedures.¹⁸¹ Upon receiving a request, the Central Authority will determine, based on the supporting documentation, whether the act of cooperation requested is within the jurisdiction of the Court.¹⁸² In the event of an affirmative determination, the Central Authority will take the steps necessary to execute the request.

To this end, Article 30 of the Swiss Law provides that "[c]ooperation according to this chapter may include any procedural acts not prohibited by Swiss law that facilitate the investigation and prosecution of crimes within the jurisdiction of the Court or that serve to produce the proceeds of such crimes"¹⁸³ This broad introduction is followed by a list of particular areas of criminal investigation in which the Central Authority would provide assistance to the ICC. The list includes forms of cooperation identical to those enumerated in the Canadian and United Kingdom legislation and mirrors the means of cooperation States are obliged to provide to the Court under Article 93

177. *See id.* ch. 4.

178. *See id.* art. 3(1), 3(2)(a).

179. *See id.* art. 3(2)(b).

180. *See id.* art. 3(2)(c).

181. *See id.* art. 5.

182. *See id.* art. 29(1).

183. *Id.* art. 30.

of the Rome Statute.¹⁸⁴ The list included in the Swiss Law is supplemented, however, by a unique provision that permits preventive measures to be undertaken to preserve existing conditions or endangered evidence.¹⁸⁵ This provision, distinct to the Swiss Law, would be available only on an emergency basis, and be applicable especially if delay would threaten or jeopardize proceedings.

Other articles of the Swiss Law govern: (1) temporary transfer of persons in detention to the ICC for investigative purposes;¹⁸⁶ (2) handing over to the Court objects, documents, or assets that have been seized as evidence;¹⁸⁷ (subject to legitimate third party claims);¹⁸⁸ (3) submission of objects or assets to the Court under forfeiture, to be transferred to the Court's Trust Fund or used as restitution;¹⁸⁹ (4) denial of requests for cooperation on the ground of national security;¹⁹⁰ and (5) other procedural issues.¹⁹¹ Despite this extremely detailed procedural regime, the Swiss Law, unlike the common law legislation, permits that, in instances where the Court so requests, the means of assistance will be carried out in the manner specified by the ICC, and

184. *Id.* The list reads:

- a) the identification and determination of the whereabouts of persons not being prosecuted by the Court or the location of objects;
- 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) the temporary transfer of persons in detention as provided in article 39 [which mirrors the conditions found in Article. 93(7) of the Rome Statute];
- f) the examination of places or sites, including the exhumation and examination of grave sites;
- g) the execution of search warrants;
- h) the provision of records and documents, including official records and documents;
- i) the protection of victims and witnesses and the preservation of evidence;
- j) the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture.

Id.

185. *See id.* art. 31.

186. *See id.* art. 39.

187. *See id.* art. 40(1).

188. *See id.* art. 40(2).

189. *See id.* art. 41.

190. *See id.* art. 44.

191. *See id.* arts. 42-43, 45-52.

not necessarily in conformity with Swiss practice.¹⁹² While neither the Canadian or United Kingdom legislation explicitly contain a similar provision, their national investigative procedures will likely be subordinated at the insistence of the Court upon a specific means of cooperation, provided that the form of assistance is permissible under domestic law.

The rights of individuals involved in ICC investigations and the subject of requests for evidence are also specifically addressed in the Swiss Law. Chapter 4 of the Swiss legislation affirms individuals' rights, and mandates that they be informed of their rights within the investigation and evidence gathering process in Switzerland.¹⁹³ These rights include the right to competent interpreters for proceedings¹⁹⁴ and the right to refuse to make statements that would be self-incriminating¹⁹⁵ or disclose confidential information pertaining to national security.¹⁹⁶

Persons suspected of having committed crimes within the jurisdiction of the Court and are questioned formally by the authorities are provided rights under Article 35. These rights are the rights of individuals to: (1) be informed of their rights¹⁹⁷ and that they are suspects, prior to being questioned;¹⁹⁸ (2) remain silent without the exercise of that right being used against them;¹⁹⁹ (3) obtain counsel either of their choice, or as assigned by the Central Authority, or as provided by a public defender;²⁰⁰ and (4) be questioned in the presence of their lawyer.²⁰¹ As a final matter, the Swiss Law provides for requests from the ICC for investigative and evidentiary assistance to be executed directly and in the absence of Swiss officials.

The Swiss Law empowers the Central Authority to authorize the ICC Prosecutor, upon request, to conduct the investigative measures on Swiss territory as envisioned in Article 99(4) of the

192. *See id.* art. 32.

193. *See id.* art. 34(3). The list includes many of the requirements set out in Article 55 of the Rome Statute establishing the rights of witnesses, including the notification requirements for interviews of suspects.

194. *See id.* art. 34(1).

195. *See id.* art. 34(2)(a).

196. *See id.* art. 34(2)(b).

197. *See id.* art. 35(2).

198. *See id.* art. 35(1)(a).

199. *See id.* art. 35(1)(b).

200. *See id.* art. 35(1)(c).

201. *See id.* art. 35(1)(d).

Rome Statute.²⁰² Accordingly, the ICC can execute requests directly for the questioning of voluntary witnesses and examinations of public sites, under the circumstances specified by Article 99(4), in Swiss territory without national representatives present.

The discretionary power held by the Central Authority to administer requests by the ICC for assistance from Switzerland in its investigations is well-tempered by the specific provision of the law, making this civil law model a creative and instructive example of ICC implementation. Indeed the Canadian, United Kingdom, and Swiss examples provide insight in the legislative mechanisms and consideration needed for States to implement their obligations under the Rome Statute. While the effective provision of cooperation in this area will be key to the Court's success for obvious reasons, another matter with which States implementing their obligations under the Rome Statute will have to contend is the accordance of privileges and immunities to ICC officials.

III. PRIVILEGES AND IMMUNITIES OF COURT OFFICIALS

There are two types of immunity recognized under international law: diplomatic immunity for State representatives based on reciprocity between States and immunity for personnel conducting affairs in the context of international conventions pursuant to international agreements. Both types of immunity may be seen as being derived from the principle of functional necessity; that individuals assigned specific duties require the powers and protections necessary to perform their functions. The privileges and immunities accorded to individuals are not for their personal benefit, but rather to enable them to perform their duties in an expedient and independent manner. This basic tenet of immunity is articulated in the Preamble of the primary international document on immunities, the Vienna Convention on Diplomatic Relations ("Vienna Convention").²⁰³ The diplomatic immunities established under the Vienna Convention are based on reciprocity between sovereign States. International organiza-

202. *Id.* art. 38.

203. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, pmbl., available at http://www.unog.ch/genet/vien_61.htm ("the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States") [hereinafter Vienna Convention]; see also Swiss Law, *supra* note 8, art. 38.

tions, however, lack the status of States and capacity of reciprocal relations, yet still require the protection of individuals charged with carrying out their purposes in order to continue to function effectively as institutions. Accordingly, international organizations have established rules according privileges and immunities to their personnel pursuant to specific agreements between the organizations' States Parties. The model for such agreements is the Convention on the Privileges and Immunities of the United Nations.²⁰⁴ In order to ensure the efficient performance of their functions—that is, the effective prosecution of core international crimes—ICC officials will require a form of immunity while conducting the work of the Court. The privileges and immunities for ICC officials are set out in the Rome Statute itself and in the Agreement on the Privileges and Immunities of the International Criminal Court.²⁰⁵

Article 48 of the Rome Statute provides various levels of immunity to specified officials of the ICC, dependent upon the individual's role or function within the Court. Article 48 opens with a general, purposive statement: "The Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfillment of its purpose."²⁰⁶ Pursuant to Article 48(2) of the Rome Statute, Judges, the Prosecutor, Deputy Prosecutors, and Registrar are accorded privileges and immunities equivalent to those enjoyed by heads of diplomatic missions when engaged in the business of the Court.²⁰⁷ The Rome Statute provides immunity for legal process of any kind for "words spoken or written and acts performed by them in their official capacity"²⁰⁸ even after the ICC's Judges, Prosecu-

204. Convention on the Privileges and Immunities of the United Nations; G.A. Res. 22A, GAOR, 1st Sess., at 25, U.N. Doc. A/64 (1946), available at http://www.unog.ch/archives/un_priv.htm [hereinafter U.N. P&I Convention]. ICTY and ICTR personnel, as members of a United Nations organ established by the Security Council, are covered by this Convention.

205. See Rome Statute, *supra* note 1, art. 48; *Report of the Working Group, Draft Agreement on the Privileges and Immunities of the International Criminal Court*, U.N. Doc. PCNICC/2001/WGAPIC/L.1 (Oct. 3, 2001) [hereinafter *APIC*].

206. Rome Statute, *supra* note 1, art. 48(1).

207. See *id.* art. 48(2).

208. *Id.* These include freedom of movement and travel within the host territory, Vienna Convention, *supra* note 203, art. 26, freedom of communication, *id.* art. 27, freedom from arrest or detention, *id.* art. 28, inviolability of residence and papers and correspondence, *id.* art. 30, and immunity from criminal jurisdiction and civil and administrative jurisdiction (with exceptions), *id.* art. 31.

tors, Deputy Prosecutors, and Registrars have completed their tenure with the Court. Paragraph 48(3) of the Rome Statute mandates the assignment of privileges and immunities to the Deputy Registrar and the staffs of the Offices of the Prosecutor and the Registry in accordance with the Agreement on the Privileges and Immunities of the Court.²⁰⁹

In its Final Act, the United Nations Diplomatic Conference of Plenipotentiaries established the Preparatory Commission for the International Criminal Court.²¹⁰ The Preparatory Commission was mandated to “prepare proposals for practical arrangements for the establishment and coming into operation of the Court, including the draft texts of . . . [*inter alia*,] [a]n agreement on the privileges and immunities of the Court.”²¹¹ The final draft Agreement on Privileges and Immunities of the Court (“Agreement”) was completed at the September/October 2001 meeting of the Preparatory Commission in New York.

Article 15 of the Agreement sets out the details of the privileges and immunities that will be accorded to the Judges, Prosecutor, Deputy Prosecutors, and Registrar of the Court.²¹² These officials, while passing through States Parties on ICC business, are also afforded the privileges, immunities, and facilities granted to diplomats in similar circumstances under the Vienna Convention²¹³ and privileges and immunities are extended to their “families forming part of their households” in certain circumstances.²¹⁴ The privileges include the right to enter or leave any country where the Court is sitting. The holders of these privileges are also entitled to diplomatic privileges, immunities, and facilities during their residency in any country of which they are not citizens or permanent residents when they are in the country to be at the disposal of the Court and enjoy “the same repatriation facilities in time of international crisis as are accorded to diplomatic agents under the [Vienna Convention on Diplomatic Relations].”²¹⁵

209. See Rome Statute, *supra* note 1, art. 48(3).

210. See Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/10* (1998), Resolution F.

211. *Id.* Resolution F(5)(f).

212. See APIC, *supra* note 205, art. 15.

213. See *id.* art. 15(2).

214. *Id.*

215. *Id.* art. 15(4); see Vienna Convention, *supra* note 203, art. 44. Article 44 re-

Article 16 of the Agreement governs privileges and immunities for the Deputy Registrar and the staffs of the Office of Prosecutor and of the Registry. These immunities include: immunity from arrest or detention, or the seizure of personal baggage;²¹⁶ continuing immunity from legal process for statements made or acts performed in their official capacities;²¹⁷ and inviolability for all official documents,²¹⁸ as well as exemptions from income tax,²¹⁹ national service obligations,²²⁰ immigration restrictions, alien registration,²²¹ and the inspection of personal baggage.²²² Privileges with respect to currency exchanges,²²³ repatriation facilities in times of international crisis,²²⁴ and duty free importation and exportation rights for personal effects²²⁵ are also prescribed under Article 16 of the Agreement. The privileges and immunities in Articles 15 and 16 are designed to afford established and specific protections to officials of the Court and their families during their stays in host States and ensure that ICC officials, particularly those engaged in ICC investigations, possess the privileges and immunities necessary to conduct their investigations free of interference. The privileges and immunities are broad and, as mentioned, generally of a nature and scope similar to those found in the Vienna Convention and the United Nations Convention on Privileges and Immunities. Defense

quires host States to enable "persons enjoying privileges and immunities . . . and members of their families . . . to leave at the earliest possible moment. It must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property." *Id.*

216. *See APIC, supra* note 205, art. 16(1)(a).

217. *See id.* art. 16(1)(b).

218. *See id.* art. 16(1)(c).

219. *See id.* 16(1)(d). The exemption is for all income paid to the individual by the Court. *See id.* The host State can take the incomes into consideration when determining taxes on income from other sources. *See id.*

220. *See id.* art. 16(1)(e).

221. *See id.* art. 16(1)(f). Families are included in this exemption.

222. *See id.* art. 16(1)(g). Exemptions and conditions include the host State's right to inspect where serious grounds exist to believe that the baggage contains "articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the State Party concerned." *Id.* Any such inspection will be conducted in the presence of the official concerned. *See id.*

223. *See id.* art. 16(1)(h). This privilege is to be the same as "accorded to officials of comparable rank of diplomatic missions established in the State Party concerned." *Id.*

224. *See id.* para. 16(1)(i). This privilege extends to family members, and is the same as for diplomatic agents under Article 44 of the Vienna Convention. *See id.*

225. *See id.* para. 16(1)(j).

counselors are accorded certain privileges and immunities under Article 18 of the Agreement. Locally-recruited personnel employed by the ICC are also afforded privileges and immunities under the Agreement.²²⁶

Given the extent and importance of the duties performed by ICC personnel and the privileges and immunities mandated by the Rome Statute and instituted by the Agreement accordingly, their respect and implementation by States Parties will be key to the success of the Court. Just as ICTY Prosecutor Louise Arbour was denied entry to Kosovo to investigate the scene of alleged crimes against humanity in 1999,²²⁷ it is unfortunately likely that there may be occasions when State Parties to the Rome Statute will refuse to honor their obligations regarding the privileges and immunities under the Rome Statute. The resolution of this issue will only occur when the Security Council establishes a precedent of strong support for ICC investigations and more countries implement the Rome Statute into their national law and honor them in good faith. To this end, the legislative experience of Canada, the United Kingdom, and Switzerland provide guidance for the implementation of the Rome Statute's provisions on privileges and immunities.

A. *Domestic Legislation on Obligations Relating to Privileges and Immunities of Court Officials*

The extension by States of privileges and immunities to ICC personnel is among the most easily implemented obligations of the Rome Statute. Most countries simply require the addition of a single amendment to their existing legislation in order to pro-

226. *See id.* art. 17. Article 17 governs immunities for locally-recruited ICC personnel and provides protection limited to basic functional necessity:

Personnel recruited by the Court locally and not otherwise covered by the present Agreement shall be accorded immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity for the Court. Such immunity shall continue to be accorded after termination of employment with the Court for activities carried out on behalf of the Court. During their employment, they shall also be accorded such other facilities as may be necessary for the independent exercise of their functions for the Court.

Id.

227. For an interesting account of the incident, see CAROL OFF, *THE LION, THE FOX AND THE EAGLE* 344-45 (2000).

vide for the privileges and immunities demanded by the Rome Statute and the Agreement on Privileges and Immunities.

1. Canada

The Canada Act amends section 5(1) of the Canadian Foreign Missions and International Organizations Act,²²⁸ by adding a reference to the privileges and immunities of ICC personnel. The provision essentially validates the Agreement under Canadian law and, reads, in part:

[T]he judges, officials and staff of the International Criminal Court, as defined in subsection 2(1) of the *Crimes Against Humanity and War Crimes Act*, and 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, as defined in that subsection, and the agreement on privileges and immunities contemplated in that Article.²²⁹

This provision will require an Order-in-Council to be issued to incorporate the privileges and immunities provided for in the Agreement. The Order, which will be part of a larger regulatory initiative undertaken in Canada to address many details of Canada's laws with regard to the ICC,²³⁰ is expected to be passed soon after entry-into-force of the Rome Statute and the adoption of the Agreement by the Assembly of States Parties.

2. United Kingdom

In the United Kingdom, the granting of privileges and immunities to ICC personnel is similarly administrative. Schedule 1 of the UK Act states that Her Majesty may, by Order-in-Council, provide the ICC and its officials with the privileges and immunities required for giving effect to the ICC or any related agreement. Such an Order-in-Council has not been proclaimed in the United Kingdom as of the date of writing, but must clearly afford the privileges and immunities contained in the Rome Statute and subsequent Agreement.

228. Foreign Missions and International Organizations Act, S.C., ch. 41 (1991) (Can.).

229. Canada Act, *supra* note 6, § 54.

230. For example, the technical addition by Ministerial regulation of the ICC to the Schedules of the MLA Act and Canada's Extradition Act.

3. Switzerland

Switzerland did not implement Article 48 of the Rome Statute into domestic legislation, as Swiss authorities considered the provision to be self-executing and thus applicable without the authorization of Swiss law. This is a result of the monist approach to the implementation of international agreements followed by Switzerland. While the issue of the implementation of the Agreement is expected to be considered in the near future, like Article 48, it is expected that comprehensive domestic legislation would not be required to give it effect.²³¹ Somewhat more challenging, however, is the implementation of the Rome Statute's obligations for States Parties to protect its witnesses and enforce its orders for fines and forfeiture.

IV. PROTECTION OF WITNESSES

The ICC represents a progressive innovation²³² in the role and status of victims and witnesses before international tribunals, allowing victims to participate actively and extensively throughout ICC proceedings.²³³ As with any court, the success of the ICC will be predicated on its ability to procure the testimony of witnesses. This ability will likewise depend on the ability of the ICC to protect witnesses.²³⁴ Witnesses before the ICC will be extremely diverse with varying needs, interests, and roles ranging from experts in methods of evidence collection to victims who have survived the most horrific crimes imaginable.²³⁵ Witnesses coming before the ICC should not have to compro-

231. E-mail exchanges between John McManus and Dr. Jürg Lindenmann, Deputy Legal Advisor, Federal Department of Foreign Affairs, Switzerland (Dec. 12, 2001) (on file with author).

232. For example, the Rome Statute mandates the establishment of a Victims and Witnesses Unit with the Registry of the ICC. See Rome Statute, *supra* note 1, art. 43(6). The Unit will provide protective measures and security arrangements, counseling, and other assistance for witnesses and victims who appear before the Court and others who are at risk on account of testimony to be given in the course of ICC proceedings. See *id.* The Unit will have staff with expertise in trauma, including trauma related to crimes of sexual violence. See *id.*

233. See Silvia A. Fernández de Gurmendi, *Victims and Witnesses*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 427 (Roy S. Lee ed., 2001) [hereinafter ELEMENTS OF CRIMES].

234. See Helen Brady, *Protective and Special Measures for Victims and Witnesses*, in ELEMENTS OF CRIMES, *supra* note 233, at 434-35.

235. See *Rules*, *supra* note 4, rule 85(a).

mise their personal safety.²³⁶ Accordingly, the Rome Statute and its corresponding draft Rules of Procedure and Evidence include several provisions designed to enable the ICC to issue orders specifically to protect witnesses, not only when they testify but throughout their entire involvement in the Court's proceedings.²³⁷ Indeed, as the ICC's power to protect witnesses is manifest in the form of orders issued by the Court, the efficiency of ICC prosecutions will depend greatly on the fulfillment by States Parties of requests by the ICC to honor its witness protection orders.

The ability of the ICC to provide for the physical protection of witnesses is found under Article 68(1) of the Rome Statute:

The Court shall take appropriate measures to protect the safety, physical and psychological well-being 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 nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children.²³⁸

In terms of protecting witnesses during the evidentiary and testimonial phases of ICC proceedings, such as during investigations and especially at trials, the Rome Statute permits the Court to order creative evidentiary procedures. Article 68(2) provides for the holding of parts of proceedings and the giving of testimony *in camera* as well as the presentation of evidence by special means.²³⁹ Article 69(2) permits technical innovation for taking of witnesses' testimony and, equally as important, the provision of testimony in documentary form.²⁴⁰ These specific provisions are reinforced by a general obligation contained within the Rome Statute. In order to ensure the cooperation of States Parties in providing the protection to witnesses by the means ordered by the Court, Article 93(1)(j) of the Rome Statute provides that: "1) States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply

236. See Brady, *supra* note 234, at 435.

237. See Rules, *supra* note 4, rules 87-88.

238. Rome Statute, *supra* note 1, art. 68(1).

239. See *id.* art. 68(2).

240. See *id.* art. 69(2) ("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 . . .").

with requests by the Court to provide the following assistance in relation to investigations or prosecutions: . . . (j) The protection of victims and witnesses and the preservation of evidence.”²⁴¹

Additionally, the issuance and application of the orders required to obtain the protective measures,²⁴² *in camera* proceedings,²⁴³ and alternative means of testimony,²⁴⁴ available under

241. *Id.* art. 93(1)(j).

242. *See Rules, supra* note 4, rule 87. Rule 87 is entitled “Protective Measures” and provides that:

- 1) Upon the motion of the Prosecutor or the defence or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness pursuant to article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, wherever possible, the consent of the person in respect of whom the protective measure is sought prior to ordering the protective measure.

Id. rule 87(1).

243. *See id.* rule 87(3)(e).

- 3) A chamber may, on a motion or request under sub-rule 1, hold a hearing, which shall be conducted *in camera*, to determine whether to order measures to prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness or other person at risk on account of testimony given by a witness by ordering, *inter alia*: . . . (e) That a Chamber conduct part of its proceeding *in camera*.

Id. (emphasis added).

244. *See id.* rule 87(3)(c).

- 3) A chamber may, on a motion or request under sub-rule 1, hold a hearing, which shall be conducted *in camera*, to determine whether to order measures to prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness or other person at risk on account of testimony given by a witness by ordering, *inter alia*: . . . (c) That testimony be presented by electronic or other special means, including the use of technical means enabling the alteration of pictures or voice, the use of audio-visual technology, in particular videoconferencing and closed-circuit television, and the exclusive use of sound media . . .

Id. Rule 67 is also pertinent:

- 1) In accordance with article 69, paragraph (2), a Chamber may allow a witness to give *viva voce* (oral) testimony before the Chamber by means of audio or video technology, provided that such technology permits the witnesses to be examined by the Prosecutor, the defence and by the Chamber itself, at the time that the witness so testifies.
- 2) The examination of a witness under this rule shall be conducted in accordance with the relevant rules of this chapter.
- 3) The Chamber, with the assistance of the Registry, shall ensure that the venue chosen for the conduct of the audio or video link testimony is conducive to the giving of truthful and open testimony and to the safety, physical and psychological well-being, dignity and privacy of the witness.

Id. rule 67 (emphasis added).

Articles 68(1), 68(2), and 69(2) of the Rome Statute, are governed by the draft Rules of Procedure and Evidence. As many of the measures ordered by the Court for the protection of witnesses must be implemented by the Victims and Witnesses Unit ("Unit") created under the Rome Statute,²⁴⁵ it is foreseeable that the Unit will need to have a formal and cooperative relationship with the States Parties.

For the purposes of examining the implementation of the obligations of the Rome Statute on States Parties for the protection of witnesses, the means of witness protection available to the Court²⁴⁶ may be included in two basic categories: orders for the physical protection of witness under protective orders,²⁴⁷ and orders for the protection of witnesses during the evidentiary and testimonial phases of ICC proceedings (i.e., the ability to order *in camera* proceedings at trials,²⁴⁸ creative evidentiary procedures,²⁴⁹ special measures,²⁵⁰ and other protective measures²⁵¹).

245. See Rome Statute, *supra* note 1, art. 43(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 arrangement, counseling 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.

Id. (emphasis added).

246. The ICC may implement the measures for the protection of witnesses under Articles 61, 68, and 69 of the Rome Statute on its own initiative or motion. See *Rules*, *supra* note 4, rules 67(1), 87-88.

247. See Rome Statute, *supra* note 1, art. 68(1).

248. See *id.* art. 68(3).

249. See *id.* art. 68(2) ("evidence by electronic or other special means"), art. 69(2) ("testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts . . .").

250. See *Rules*, *supra* note 4, rule 88. Rule 88 provides in pertinent part:

- 1) Upon motion of the Prosecutor or the defence, or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may, taking into account the views of the victim or witness, order special measures, such as, but not limited to, measures to facilitate the testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence, pursuant to article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the special measure is sought prior to ordering that measure.
- 2) A Chamber may hold a hearing on a motion or a request under sub-rule 1, if necessary in camera or ex parte, to determine whether to order any such special measure, including but not limited to an order that a counsel, a legal representative, a psychologist or a family member be permitted to attend during the testimony of the victim or witness . . .

Both of these categories may create obligations for the cooperation of States Parties with the ICC to protect witnesses. The second category may be further subdivided to include: taking evidence within the territories of States Parties during the ICC proceedings (as parts of proceedings may be ordered conducted by "special means"²⁵² and testimony may be provided by written transcript²⁵³); and/or provision within the territories of States Parties of electronic or audio testimony at trial.²⁵⁴ Additional, albeit more general, authority for cooperation with the ICC on the strictly evidentiary aspects of witness protection may be found in Article 91(1)(b) of the Rome Statute.

Article 91(1)(b) requires that States Parties, under their domestic laws, comply with requests to enforce the Court's orders issued with regard to the taking of evidence, including testimony under oath, and the production of evidence.²⁵⁵ Accordingly, albeit not drafted for the express purpose of witness protection,

-
- 5) Taking into consideration that violations of the privacy of a witness or victim may create risk to his or her security, a Chamber shall be vigilant in controlling the manner of questioning a witness or victim so as to avoid any harassment or intimidation, paying particular attention to attacks on victims of crimes of sexual violence.

Id.

251. See, e.g., *id.* rule 87(3)(a)-(b), (d). These provisions state:

- 3) A chamber may, on a motion or request under sub-rule 1, hold a hearing, which shall be conducted in camera, to determine whether to order measures to prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness or other person at risk on account of testimony given by a witness by ordering, *inter alia*:
- (a) That the name of the victim, witness or other person at risk on account of testimony given by a witness or any information which could lead to his or her identification, be expunged from the public records of the Chamber;
 - (b) That the Prosecutor, the defence or any other participant in the proceedings be prohibited from disclosing such information to a third party; . . .
 - (d) That a pseudonym be used for a victim, a witness or other person at risk on account of testimony given by a witness.

Id. While similar in ends, to facilitate the testimony of witnesses before the ICC, rules 87 and 88 serve quite distinct purposes. Rule 87 serves to protect the identity or location of witnesses at risk, whereas rule 88 for special measures is more flexible, allowing the Court to devise means to facilitate the testimony of particularly vulnerable witnesses (i.e., by ordering, but not limited to, the attendance at trial of a legal representative, psychologist, or family member of the victim). See Brady, *supra* note 234, at 440.

252. Rome Statute, *supra* note 1, art. 68(2).

253. See *id.* art. 69(2).

254. See *id.* arts. 68(2), 69(2); Rules, *supra* note 4, rules 67, 87.

255. See Rome Statute, *supra* note 1, art. 91(1)(b).

Article 91(1)(b) provides an additional mandate for States Parties to facilitate, upon request of the Court, the taking of evidence “by special means”²⁵⁶ and “testimony of . . . witnesses by [the] . . . introduction of documents or written transcripts,”²⁵⁷ as well as the use of the electronic and video technology permitted under the Rome Statute.²⁵⁸ Accordingly, States Parties will need to make arrangements for witnesses to be interviewed during investigations and their live testimony at trials from their territories where the ICC so orders that such is required to protect witnesses.

While the majority of the Rome Statute negotiations focused on procedural innovations and witness-oriented means of protection in the conduct of fair trials,²⁵⁹ relatively little has been debated about, or written on, the duties that Articles 68(1), 68(2), and 69(2) may impose on States Parties.²⁶⁰ Witness protection has been analyzed primarily within the context, and rightfully so, of the balance between the means available to the ICC to protect witnesses and the right to a fair trial.²⁶¹ Fortunately, in terms of the obligations the protection of witnesses imposes on States Parties, States that have implemented the Rome Statute have acted proactively to fill the void of negotiation history and academic commentary with legislative guidance.

A. *Domestic Legislation Relating to Witness Protection Obligations*

1. Canada

The Canada Act both created new law and amended existing Canadian legislation. In order to fulfill its obligations under Article 93(1)(j) of the Rome Statute and be able to coop-

256. *Id.* art. 68(2).

257. *Id.* art. 69(2).

258. *See id.* arts. 68(2), 69(2).

259. None of the protective means may be ordered by the ICC where they would be prejudicial to the accused or inconsistent with the rights of the accused to a fair and impartial trial. *See id.* arts. 68(1), 68(3), 69(2).

260. For example, the only protective measure in rule 87 to attract significant debate during the Preparatory Commission was rule 87(3)(b), which permits the Court to prohibit certain parties from disclosing the identity and/or locations of witnesses to third parties. *See Rules, supra* note 4, rule 87(3)(b); Brady, *supra* note 234, at 440. In this case, the debate was focused on the parties from whom the Court could order the information withheld. *See id.*

261. *See, e.g.,* Hans-Jorg Behrens, *The Trial Proceedings, in MAKING OF ROME STATUTE, supra* note 17, at 243-46.

erate with the Court and protect witnesses, Canada passed implementing legislation, which, *inter alia*, amended its pre-existing Witness Protection Program Act ("Witness Protection Act").²⁶² The purpose of Canada's Witness Protection Act is to facilitate the protection of persons who provide direct or indirect assistance in the law enforcement activities of the Royal Canadian Mounted Police ("RCMP") or law enforcement agencies with which Canada has entered into agreements.²⁶³ The means of protection available under the Witness Protection Act may include relocation, accommodation, and changes of identity, or even counseling and financial support to ensure the security of persons receiving protection, facilitate persons' re-establishment, or assist their becoming self-sufficient.²⁶⁴ Canada will extend identical protection to witnesses of the ICC.

The Canada Act amended the Witness Protection Act to ensure that its protective measures are extended to persons who provide assistance to the activities conducted by "any international criminal court."²⁶⁵ Because the Witness Protection Act only protects persons who provide assistance to law enforcement agencies with which Canada has entered into an agreement,²⁶⁶ the Witness Protection Act was amended²⁶⁷ to empower the Solicitor General of Canada ("Solicitor General") to enter into agreements with the ICC.²⁶⁸ Accordingly, the ICC is treated akin to a State for the purpose of arrangements under the Witness Protection Act.²⁶⁹

Mirroring the Witness Protection Act's provisions governing reciprocal arrangements with the governments of foreign jurisdictions,²⁷⁰ the Solicitor General is empowered under § 14(3) to enter into arrangements with the ICC to afford witnesses protection.²⁷¹ Identical to the Witness Protection Act's requirements

262. Witness Protection Program Act, S.C., ch. 15 (1996) (Can.) [hereinafter WPPA].

263. *See id.* § 3.

264. *See id.* § 2.

265. *Id.* § 3(b). The WPPA was amended through Section 71 of the Canada Act.

266. *See id.* § 3(b). The Commissioner of the Royal Canadian Mounted Police is empowered to enter into protection agreements with other law enforcement agencies. *Id.* § 2.

267. *See Canada Act, supra* note 6, § 74.

268. *See WPPA, supra* note 262, § 14(3).

269. *See id.* § 14(1), 14(3).

270. *See id.* § 14(2).

271. *See id.* § 14(3).

for arrangements made with States,²⁷² no ICC witnesses may be admitted to Canada without the consent of the Minister of Citizenship and Immigration nor receive protection without the consent of the Solicitor General.²⁷³

The Canada Act further amended²⁷⁴ the Witness Protection Act to require that recommendations for protection be made by the ICC in order for witnesses to be eligible for protection in Canada.²⁷⁵ Further, similar to the requirements for other witnesses, the Commissioner must be provided with ICC witnesses' personal information sufficient to make²⁷⁶ determinations of their eligibility²⁷⁷ for protection. Also, agreements must be entered into between the Commissioner and each witness—ICC or otherwise—to establish the obligations of each party in order for protection to be afforded.²⁷⁸ The ICC, like law enforcement agencies under the Witness Protection Act, must be provided with written reasons to enable the Court to understand the basis for any decisions to refuse to grant its requests to protect witnesses.²⁷⁹ In addition to protecting witnesses directly, ensuring their personal safety while giving evidence is also necessary.

To this end, the ICC may request Canada to implement creative evidentiary measures, which it orders pursuant to Article 68(2) of the Rome Statute, or to facilitate the written testimony

272. *See id.* § 14(2).

273. *See id.* § 14(3).

274. *See* Canada Act, *supra* note 6, § 72.

275. *See* WPPA, *supra* note 262, § 6(a).

276. *See id.* § 6(b).

277. Section 7 of the WPPA explains the factors to be considered in determining if a witness should be admitted:

- (a) the nature of the risk to the security of the witness;
- (b) the danger to the community if the witness is admitted to the Program;
- (c) the nature of the inquiry, investigation or prosecution involving the witness and the importance of the witness to the matter;
- (d) the value to the information or evidence given or agreed to be given or of the participation by the witness;
- (e) the likelihood of the witness being able to adjust to the Program, having regard to the witness's maturity, judgment and other personal characteristics and the family relationships of the witness;
- (f) the cost of maintaining the witness in the Program;
- (g) alternate methods of protecting the witness without admitting the witness to the Program; and
- (h) such other factors as the Commissioner [of the RCMP] deems relevant.

Id. § 7.

278. *See id.* § 6(1)(c).

279. *See id.* § 10(a).

of witnesses before the Court under Article 69(2) (which could take place from within Canada for the witness' protection).²⁸⁰ The Canada Act amended the MLA Act accordingly.²⁸¹ Canada's MLA Act allows for requests from States or entities to obtain evidence by order from a Canadian court.²⁸² The Minister of Justice shall, upon approving requests to obtain evidence regarding offenses, provide the authority competent to apply for the court order with the documents and information necessary to bring application.²⁸³ Once a Canadian court approves requests by the ICC to interview witnesses or take their testimonies by writing, presumably the government of Canada will facilitate the attendance in Canada of ICC investigators for these purposes. The retention of judicial control under the Canada Act over the administration and execution of ICC requests is notable.

Canada's MLA Act also specifically provides for witnesses' appearances before the ICC via video link;²⁸⁴ an option available through the same procedure used to consider requests from the ICC to comply with its other evidentiary orders. Where the Minister of Justice approves the requests of States or entities—including the ICC²⁸⁵—to compel persons to provide evidence or testimony by means of video technology, the Minister shall provide the competent authority with any documents or information necessary to apply for an order before Canadian courts. Canada's other provisions for the collection of evidence under the MLA Act would presumably cover any other creative evidentiary requests by the ICC to protect witnesses. The United Kingdom implements its obligations under the Rome Statute for the protection of ICC witness in a similar manner.

2. United Kingdom

The United Kingdom fulfilled its obligation to protect ICC

280. Of course, it is foreseeable that written transcripts of testimony could be sent to the Court, examined by agents of the Prosecution and defense in Canada, thereby not requiring the attendance of ICC personnel in Canada for the purposes of taking statements in every case.

281. See Canada Act, *supra* note 6, § 67.

282. See MLA Act, *supra* note 146, § 17.

283. See Canada Act, *supra* note 6, § 62.

284. See MLA Act, *supra* note 146, § 22.1(1).

285. Recall that the ICC will qualify as a State or entity under the MLA Act once the Rome Statute enters into force.

witnesses in the part of its implementing legislation that creates ICC offenses under its domestic law.²⁸⁶ The UK Act invokes the Criminal Evidence (Northern Ireland) Order 1999 (“Criminal Evidence Order”),²⁸⁷ thereby extending the statutory regime already in place in the United Kingdom for the protection of witnesses²⁸⁸ in its domestic criminal proceedings²⁸⁹ to witnesses to ICC-related and ancillary offenses,²⁹⁰ offenses that it also creates nationally.²⁹¹ Accordingly, the UK Act makes requests to fulfill ICC measures ordered in relation to witness protection governed by the Criminal Evidence Order.²⁹²

The Criminal Evidence Order is an extensive piece of legislation that provides assistance to witnesses where the United Kingdom courts are satisfied that the quality of evidence given by witnesses is likely to be diminished by reason of fear or distress in connection with testifying.²⁹³ The Criminal Evidence Order does not specify either the nationality of the witnesses that may qualify for its assistance nor the type of criminal proceeding it governs,²⁹⁴ thereby making it applicable to ICC witnesses. For determining whether witnesses qualify for assistance due to their fear or distress about testifying, the UK’s courts are required to take into account, *inter alia*, the nature and alleged circumstances of the proceedings,²⁹⁵ and the social, cultural, ethnic,²⁹⁶ and religious²⁹⁷ backgrounds of witnesses, in addition to behav-

286. See UK Act, *supra* note 11, pt. 5.

287. See Criminal Evidence (Northern Ireland) Order, 1999, No. 2789 (N.I. 8) [hereinafter Criminal Evidence Order]; UK Act, *supra* note 11, § 64(2). The UK Act also applies the Sexual Offences (Northern Ireland) Order, 1978, No. 460 (N.I. 15) and the Sexual Offences Order (Amendment) Act, 1992, c. 34 (Eng.) for the protection of witnesses to ICC offenses.

288. See *id.* § 64.

289. See *id.* § 64(1)(a).

290. See *id.* § 64(b). For the prohibition of offenses ancillary to genocide, crimes against humanity, and war crimes, see *id.* § 59. Ancillary offenses include, *inter alia*, aiding, abetting, counseling, assistance, or incitement of genocide, crimes against humanity, or war crimes. See *id.* § 62.

291. See *id.* § 56.

292. See *id.* § 64(2).

293. See Criminal Evidence Order, *supra* note 287, §§ 5(1), 7(1).

294. The Criminal Evidence Order defines “witness” for the purposes of the act sufficiently broadly to apply to ICC witnesses: “any person called, or proposed to be called, to give evidence in relation to any criminal proceedings.” *Id.* § 2(2). Note that no reference is made to exclusively United Kingdom criminal proceedings.

295. See *id.* § 5(2)(a).

296. See *id.* § 5(2)(c)(i).

297. See *id.* § 5(2)(c)(iii).

ior toward the witnesses on the part of accused persons.²⁹⁸ If eligible for protection,²⁹⁹ a special measures direction³⁰⁰ must be obtained from the UK's courts.

The special measures available under the UK Criminal Order include the standard forms of witness protection during testimony such as the use of a screen to prevent the witness from seeing the accused,³⁰¹ and evidence being given in private³⁰² or through an intermediary.³⁰³ Special measures directions may be granted upon application brought by any party to the proceedings³⁰⁴ or upon the court's own motion.³⁰⁵

In order to grant applications for special measures directions, the United Kingdom courts first determine that witnesses are indeed eligible³⁰⁶ for protection and then establish, on a case-by-case basis, whether the special measures available under the Criminal Evidence Order, or a combination thereof, would likely improve the quality of the evidence given by the witnesses.³⁰⁷

The Criminal Evidence Order mandates the United Kingdom courts to consider any special measure that they are considering to grant with the goal of maximizing the quality of the evidence as much as practicable³⁰⁸ and then order such special measures accordingly.³⁰⁹ The United Kingdom courts may vary special measures directions if the interests of justice so require³¹⁰ and special measures cannot be ordered unless the United Kingdom courts have been notified by the Secretary of State that relevant arrangements may be made available to implement the

298. *See id.* § 5(2)(d)(i).

299. *See id.* §§ 4-6.

300. *See id.* § 7.

301. *See id.* § 11(1).

302. *See id.* § 13.

303. *See id.* § 17.

304. *See id.* § 7(1)(a). It is interesting to note that, unlike the other provisions of the UK Act that require applications to be brought before national courts in relation to requests from the ICC, *see* UK Act, *supra* note 11, § 38(a), the UK Act here neither designates nor empowers the government to assign, a person to act on behalf of the government or the ICC to bring the applications required to obtain special protective measures in relation to ICC requests for the protection of witnesses.

305. *See* Criminal Evidence Order, *supra* note 287, § 7(1)(b).

306. *See id.* § 7(2).

307. *See id.* § 7(2)(a).

308. *See id.* § 7(2)(b)(i).

309. *See id.* § 7(2)(b)(ii).

310. *See id.* § 8(2).

measure³¹¹ in the district the proceedings will be conducted. In addition to being able to fulfill requests from the Court to enforce orders that may entail creative terms in order to protect witnesses, the United Kingdom must also be able to assist with requests from the ICC to comply with orders it issues pursuant to Articles 68(2) or 69(2) of the Rome Statute.

Article 69(2) provides for the submission of evidence by written statement which may, as in the Canadian context and along with the "special means" provision of Article 68(2), require interviewing or taking testimony from ICC witnesses in the United Kingdom at any time during the proceedings in order to ensure their protection. For these ends to be fulfilled, the procedures of Part 3 of the UK Act governing taking or production of evidence³¹² would apply.

The UK Act includes specific provisions that apply when the Secretary of State receives requests from the ICC for compliance with orders the Court has issued with regard to the taking or production of evidence.³¹³ In such cases, the Secretary of State may nominate a United Kingdom court³¹⁴ to receive the evidence to which the request relates.³¹⁵ Consistent with the preference of States to submit ICC requests to national judicial scrutiny, the UK Act specifies that the nominated United Kingdom court will retain the same powers to ensure the attendance of witnesses pursuant to ICC requests as it would exercise over its own proceedings.³¹⁶ Similarly, the UK Act specifies that no one shall be compelled to give evidence in relation to the execution of an ICC request that he or she could not otherwise be compelled to give in criminal proceedings within the nominated court's jurisdiction.³¹⁷ Furthermore, anticipating that some evidence collected for the ICC may require procedural safeguards to protect witnesses, the UK Act specifies that the United Kingdom courts nominated to receive the evidence requested by the ICC³¹⁸ may, if the court considered it necessary to protect a wit-

311. *See id.* § 6(3).

312. *See* UK Act, *supra* note 11, §§ 29-30.

313. *See id.* § 29(1).

314. In England and Wales or Northern Ireland. *See id.* § 29(2).

315. *See id.* § 29(2).

316. *See id.* § 29(3)(a).

317. *See id.* § 29(4).

318. *See id.* § 29.

ness,³¹⁹ direct that the public be excluded from the court.³²⁰ Video testimony from the United Kingdom is also an evidentiary option for ICC proceedings.

Testimony by video link is one of the special measures³²¹ included in the Criminal Evidence Order, available upon application³²² to a United Kingdom court. The Criminal Evidence Order provides specific guidance³²³ and permits both the cross-examination and re-examination of witnesses by video recording.³²⁴ Accordingly, upon order of the Court and approval by the United Kingdom, witnesses will be able to be interviewed and testify in ICC proceedings by video from the United Kingdom to ensure their protection.

In terms of the important civil law perspective on issues of witness protection, Switzerland's implementation of the Rome Statute provides important insight.

3. Switzerland

The Swiss Law addresses the protection of ICC witnesses in the context of its obligation to provide the ICC with the general "forms of cooperation"³²⁵ enumerated in Article 93 of the Rome Statute.

Article 30 of the Swiss Law enumerates the grounds of cooperation to be provided to the ICC by Switzerland and parallels almost identically Article 93 of the Rome Statute. The Swiss Law specifically cites the protection of witnesses as a form of cooperation required to be extended to the Court.³²⁶

The Swiss Law adopts an inclusive approach to the fulfillment of all requests for cooperation with the ICC—by any and all procedural acts that are not prohibited by Swiss Law³²⁷—and specifies that requests from the ICC are to be executed in the manner indicated by the Court. This approach to the execution

319. *See id.* § 30(2)(a).

320. *See id.* § 30(2).

321. "A special measures direction may provide for the witness to give evidence by means of a live link." Criminal Evidence Order, *supra* note 287, § 12(1); *see also id.* §§ 12, 15-16.

322. *See id.* § 7.

323. *See id.* § 12.

324. *See id.* §§ 15-16.

325. Swiss Law, *supra* note 8, ch. 4.

326. *See id.* art. 30(i).

327. *See id.* art. 30.

of ICC requests gives potentially broad flexibility to the Court—vicariously through the Central Authority—in that the particulars of procedural acts ordered by the Central Authority may be novel. Moreover, enforcement measures undertaken to comply with ICC witness protection orders are not required to be in accordance with pre-existing Swiss law but rather need only not be *prohibited* by Swiss law.³²⁸ This result is important given that Swiss law contains relatively few provisions for the protection of victims and witnesses.

The Swiss Law stipulates that measures may be taken to ensure the safety or physical and psychological well-being of witnesses and their families.³²⁹ In terms of the logistics of Switzerland's execution of requests from the ICC, the Swiss Law creates a highly centralized and administratively powerful procedural regime.

The Swiss Law appoints a Central Authority, administered by the Federal Office of Justice³³⁰ to receive,³³¹ decide upon,³³² and order the necessary measures³³³ corresponding to the execution³³⁴ of all requests for cooperation from the ICC,³³⁵ including requests to comply with ICC orders that take measures to protect witnesses.³³⁶ Provided that requests from the Court for cooperation are identified in Article 30 of the Swiss Law, within the jurisdiction of the ICC³³⁷ and do not violate Swiss law, they may be approved. Upon granting approval, the Central Authority authorizes the appropriate canton to designate the competent authority to execute requests and order the measures to be undertaken for their execution.³³⁸ Requests by the ICC for the direct, physical protection of witnesses, special evidentiary measures, or the taking of written evidence or testimonial transcripts in the context of witness protection would be administered, like

328. *See id.*

329. *See id.* art. 32(c).

330. *See id.* art. 3(1).

331. *See id.* arts. 3(2)(a), 10.

332. *See id.* art. 3(2)(b).

333. *See id.* art. 3(2)(c).

334. The cantonal and federal authorities designated to execute requests of the Court shall execute the measures ordered by the Central Authority. *See id.* art. 5.

335. *See id.* art. 3(1).

336. *See id.* art. 30(i).

337. *See id.* art. 29(1).

338. *See id.* art. 43(1).

all requests from the ICC for cooperation, by the Central Authority.

Cooperation with the Court specifically to protect witnesses—presumably directly and physically—as well as upon requests related to the taking of evidence, including testimony under oath, and the production of evidence, is mandated by Article 30 of the Swiss Law. Accordingly, the Central Authority would be authorized to administer the compliance with orders issued by the ICC for testimony in Switzerland under “special measures” or to obtain written evidence or testimony issued pursuant to Articles 68(2) or 69(2) of the Rome Statute during the ICC process for the protection for witnesses.

While not provided for expressly within the Swiss Law, orders issued by the Court for testimony by video link from Switzerland could fall within the provisions of Article 30 for the protection of witnesses³³⁹ and the general taking of evidence, including testimony under oath.³⁴⁰ Given that the Central Authority may grant requests from the ICC for assistance³⁴¹ provided that the means to execute the requests are not prohibited by Swiss Law,³⁴² requests from the ICC for testimony by video would be able to be granted provided that this form of testimony is not offensive to Swiss law. It is not.³⁴³

V. ENFORCEMENT OF FORFEITURE ORDERS AND ICC FINES

The Rome Statute enables the ICC to issue orders for the forfeiture of property considered to be derived from crimes within the ICC’s jurisdiction. In order to effect forfeiture, the Court is also empowered to issue orders freezing assets that are the proceeds of crime³⁴⁴ located within the territories of States Parties. The Rome Statute also permits orders for the forfeiture of individuals’ property derived from crime³⁴⁵ to be imposed as part of the sentences, either in and of themselves or in addition

339. *See id.* art. 30(i).

340. *See id.* art. 30(b).

341. *See id.* art. 43.

342. *See id.* art. 30.

343. Message relatif au Statut de Rome de la Cour pénale internationale, à la loi fédérale sur la coopération avec la Cour pénale internationale ainsi qu’à une révision du droit pénal, FF 2000, 2375, available at <http://www.admin.ch/ch/f/ff/2001/359.pdf>.

344. *See* Rome Statute, *supra* note 1, art. 93(1)(k).

345. *See id.* art. 77(2)(b).

to prison terms, that may be imposed by the Court on individuals convicted of crimes within its jurisdiction.³⁴⁶ Finally, in terms of enforcement of the Court's financial punitive powers, the ICC represents an innovation in international criminal sanction as the first-ever international tribunal explicitly empowered to impose fines³⁴⁷ against individuals.³⁴⁸ All of these important powers of the criminal judicial process allotted to the Court by the Rome Statute must be affirmed nationally by its States Parties in order to be enforceable and thereby have an efficient and effective ICC.

With regard to enabling the ICC to be proactive and to have an additional means by which to combat international crime by seizing the proceeds of crime more generally, the Rome Statute empowers the Court to order measures to effect its orders for forfeiture of the proceeds of crimes within its jurisdiction.³⁴⁹

Orders for forfeiture are also available as sentences under the Rome Statute. Article 77(2) addresses the Court's ability to order forfeiture of property derived from crime as part of a convicted individual's sentence. In addition to imprisonment, the

346. *See id.* Under Article 77, imprisonment and fine/forfeiture are permitted as penalties for genocide, crimes against humanity, war crimes and (eventually) aggression, whereas fines/forfeiture may be a penalty in and of itself only for crimes against the administration of justice under Article 70. *See id.*

347. *See id.* art. 77(2)(a).

348. The Nuremberg Tribunal had broad remedial discretion but never imposed a fine. *See* Charter of the International Military Tribunal, art. 27, *in* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 58 Stat. 1544, 82 U.N.T.S. 280 ("The Tribunal shall have the right to impose upon a defendant, on conviction, death or such other punishment as shall be determined by it to be just."). Neither the ICTR nor the ICTY are empowered to impose fines, although both Tribunals have adopted provisions for fines as penalties for procedural misconduct, such as contempt of the Tribunals. *See* ICTR Rules of Procedure and Evidence, rules 77(A), 91(D), *available at* <http://www.ictr.org> [hereinafter ICTR Rules]; ICTY Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.21, rules 77(H), 77bis, 91(E), *available at* http://www.un.org/icty/basic/rpe/IT32_rev21con.htm [hereinafter ICTY Rules]; *see also* Rolf Einar Fife, *Penalties*, *in* ELEMENTS OF CRIMES, *supra* note 233, at 555-73.

349. *See* Rome Statute, *supra* note 1, art. 93(1). Article 93(1) of the Rome Statute provides in pertinent part:

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: . . . (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.

Id. art. 93(1)(k).

Court may order the forfeiture of proceeds, property, and assets derived directly or indirectly from the crime, without prejudice to the rights of *bona fide* third parties. Article 77(2) also enables the Court to impose fines as part of the sentences it levies.³⁵⁰

Accordingly, both the ICC's proactive and remedial powers that affect property hold consequences for States Parties as requests to freeze assets for forfeiture as the proceeds of crimes and to comply with sentences that order forfeiture or impose fines, which will invariably be made by the Court. States Parties are obligated to cooperate. Part 10 of the Rome Statute addresses the enforcement of the ICC's sentences and orders, and specifically imposes a duty on States Parties to enforce fines and forfeiture measures as penalties.³⁵¹

Article 109 interrelates with Article 88 found in Part 9 of the Rome Statute, which mandates that States Parties must ensure that there are procedures available under their national law for all forms of cooperation. While this Article is specific to the measures prescribed in Part 9, the interrelationship of Article 88 with Article 109 was obvious during the negotiations of the Rome Statute.³⁵² But of what use is mandating States to collect fines and effect forfeiture if the proceeds and property of the subject of ICC's orders remain within the borders of its States Parties? Anticipating this potential impediment, Article 109(3) of the Rome Statute states that "[p]roperty, 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 judgment of Court shall be transferred to the Court."³⁵³

350. See *id.* art. 77(2) ("In addition to imprisonment, the Court may order: (a) A fine under the criteria provided for in the Rules of Procedure and Evidence.").

351. Article 109(1) of the Rome Statute provides that "States Parties shall give effect to fines or forfeiture 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." *Id.* art. 109(1). A duty on States Parties to use national procedures to trace, freeze, or seize the proceeds of crimes within the jurisdiction of the ICC in order to facilitate eventual forfeiture orders, has already been identified as existing under Article 93(1)(k). Article 109(2) requires that "[i]f a State Party is unable to give effect to an order of 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." *Id.* art. 109(2).

352. See Trevor Pascal Chimimba, *Establishing an Enforcement Regime, in MAKING OF ROME STATUTE*, *supra* note 17, at 349.

353. Rome Statute, *supra* note 1, art. 109(3). Proceeds collected by the Court from

Accordingly, under the Rome Statute and the Rules of Procedure and Evidence, States Parties must ensure that they have laws and procedures in place to perform four primary functions: (1) trace, freeze, and seize the proceeds of ICC crime;³⁵⁴ (2) effect forfeiture of the proceeds of crime;³⁵⁵ (3) collect fines;³⁵⁶ and (4) transfer to the Court any property or proceeds they obtain as a result of their enforcement of a judgment of the Court.³⁵⁷ States have proceeded in distinct and creative manners in implementing these obligations within their domestic laws.

A. *Domestic Legislation Implementing Obligations Related to Fines and Forfeitures*

1. Canada

In fulfilling its national obligations for freezing assets for forfeiture and enforcing sentences of forfeiture or fines, the Canada Act amended the pre-existing MLA Act to adopt and include the definition of the ICC.³⁵⁸ In order to fully apply to the ICC, the ICC will need to be added to the MLA Act's schedule, joining the International Criminal Tribunals. This addition is expected to occur soon after entry-into-force of the Rome Stat-

fines and orders for forfeiture enforced by States Parties will be transferred to the Trust Fund created by Article 79 of the Rome Statute. *See Rules, supra* note 4, rule 148.

354. This is an inherent part of imposing fines and forfeiture.

355. *See Rules, supra* note 4, rule 147. Forfeiture as part of a sentence is provided by order, and at any hearing to consider an order of forfeiture, *see id.* rule 147(1), the Court shall hear evidence on the identification of the specific proceeds, *see id.* rule 147(1), and consider the interests, if made aware, *see id.* rule 147(2), of bona fide third parties in the property sought forfeited, *see id.* rule 147(4). Orders for forfeiture must specify, *inter alia*, the identity of the person, *see id.* rule 218(1)(a), the proceeds and property ordered forfeited, *see id.* rule 218(1)(b), information on the location of the property covered by the order, *see id.* rule 218(2), and that the State, if unable to give effect to the order, shall undertake to recover value of the same, *see id.* rule 218(1).

356. *See id.* rule 146. Rule 146 outlines the criteria to be considered by the Court in deciding whether to levy a fine and the consequences of non-payment. *See id.* It is interesting to note that rule 220 provides for the non-modification of judgments, in which fines are imposed, by mandating that the Presidency inform the State Party in which the fine is sought enforced that the fines imposed shall not be modified by the enforcement efforts of their national authorities. *See id.* rule 220.

357. *See id.* rule 148. Rule 148 provides that "[b]efore making an order pursuant to article 79, paragraph 2, a Chamber may request the representatives of the Fund to submit written or oral observations to it." *Id.* The significance of this rule is that orders for transfer may be effected by the Court with consultation.

358. *See Canada Act, supra* note 6, § 2(1).

ute, thereafter allowing the ICC to receive the same kind of enforcement assistance as Canada provides to other designated States and entities.

In addition, the MLA Act was amended, through two procedurally similar yet substantively different provisions, to include new provisions allowing Canada to provide specific assistance to enforce ICC orders and judgments for forfeiture and collection of ICC fines.³⁵⁹ These provisions may be categorized as: (1) those relating to ICC requests for the freezing of assets of the proceeds of crime for their ultimate forfeiture to the Court, pursuant to States Parties' obligations under Article 91(1)(k) of the Rome Statute, and (2) those relating to the enforcement of orders by the ICC for forfeiture as sentencing provisions and the collection of ICC fines, both imposed under Article 77(2) of the Rome Statute.

The fulfillment of requests from the ICC to enforce orders to restrain or seize the proceeds of crime for ultimate forfeiture to the Court,³⁶⁰ as well as those to enforce reparation or forfeiture orders and collect fines, are at the discretion of the Minister of Justice.³⁶¹ The Minister of Justice may authorize the Attorney General of Canada³⁶² to make arrangements for the enforcement of the orders. The Attorney General of Canada may file these ICC orders with the Canadian court for enforcement.³⁶³ However, before filing requests for enforcement of orders that seek reparations or forfeiture, or impose fines, the Attorney General must be satisfied³⁶⁴ that the person subject to the order has been convicted of a crime within the ICC's jurisdiction³⁶⁵ and that the conviction and the order are final.³⁶⁶ The distinction between the two kinds of requests is predictable, as a slightly higher burden of procedural certainty must be attached to de-

359. *See id.* § 57. This section created sections 9.1 and 9.2 of the MLA Act. *See* MLA Act, *supra* note 146, §§ 9.1, 9.2.

360. The Canada Act uses "restraint or seizure of proceeds of crime" in section 57 (creating section 9.1(1) of the MLA Act), Canada Act, *supra* note 6, § 57, as the statutory language equivalent to "identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes" required in Article 93(1)(k) of the Rome Statute. Rome Statute, *supra* note 1, art. 93(1)(k).

361. *See* MLA Act, *supra* note 146, §§ 9.1(1), 9.2(1).

362. *See id.*

363. *See id.* § 9.1(1), (3).

364. *See id.* § 9.2(3).

365. *See id.* § 9.2(3)(a).

366. *See id.* § 9.2(3)(b).

priving persons convicted of ICC crimes of their property than for restraining or seizing proceeds associated with crime more generally.³⁶⁷

Under the MLA Act, orders of the ICC for the restraint and seizure of proceeds of crimes for forfeiture are enforced as if they were special search warrants for the proceeds of crime under the Canadian Criminal Code.³⁶⁸ Accordingly, similar to the enforcement of warrants for the proceeds of crime issued by Canadian courts, property may be detained and recorded³⁶⁹ in order to freeze assets in fulfillment of an ICC order. ICC orders relating to the proceeds of crimes for forfeiture may also be enforced as restraint orders issued under the Criminal Code, which prevent persons from disposing, or otherwise dealing with, interests in property specified in the order.³⁷⁰

The enforcement of ICC orders to freeze assets (whether for the purpose of enforcing an order or sentence) benefits from a streamlined process. Once the order or sentence is authorized by the Minister of Justice and filed by the Attorney General, the order or sentence is afforded the status of its Canadian equivalent and is entered for enforcement accordingly, precluding any issuing process and accompanying review or scrutiny by Canadian courts.³⁷¹

367. It is important to note that orders for reparations are also governed by the slightly higher procedural standards of section 9.2(3) of the MLA Act. As well, under the Canada Act, ICC orders that effect personal property represent a streamlined process relative to the enforcement of its equivalents issued by States. Most States under Canadian law would have to, at least, have their judgments scrutinized by a Canadian court. This reduction of the enforcement standards is due mainly to the special nature of the ICC as a truly international court negotiated multilaterally. See Philippe Kirsch, *The Development of the Rome Statute*, in *MAKING OF ROME STATUTE*, *supra* note 17, at 451. In addition, orders for fines and forfeiture and the restraint and seizure of the proceeds of crime will have been considered by a panel of judges before having been issued.

368. Criminal Code, R.S., c. C-34 (1970) (Can.) [hereinafter Criminal Code]. ICC orders for restraint and seizure are to be enforced as warrants of Section 462.32(1) or orders made pursuant to Section 462.33(3) of the Criminal Code.

369. *See id.* § 462.32(4).

370. *See id.* § 462.33(3).

371. This point is important as the orders, and especially civil judgments, of other States often go through a process of judicial scrutiny, and sometimes they are required to originate in process in Canada in order to be enforced. That national procedures for acquiring orders are not applicable is also important as revision of the order or fine is precluded. It was agreed during the negotiation of the Rome Statute that States' national courts should not alter or modify ICC orders in terms of their nature, amounts, or general principles. See Kimberly Prost, *Enforcement*, in *ELEMENTS OF CRIMES*, *supra* note 233, at 695-96. Hence rule 220 of the ICC Rules of Procedure and Evidence,

In implementing its obligations related to forfeiture and fines under the Rome Statute, Canada also needed to balance this undertaking with the need to protect the interests of *bona fide* third parties in the property potentially encumbered by ICC orders. The Canada Act therefore amended the MLA Act to provide that the provisions of the Canadian Criminal Code dealing with the power of national courts to restore property to its lawful owner(s)³⁷² and the ability of persons to claim relief from forfeiture³⁷³ apply.³⁷⁴

Finally, consistent with the obligation under the Rome Statute to transfer to the ICC all funds collected by successful enforcement efforts of the Court's property orders,³⁷⁵ Canada amended the MLA Act to include a new section that directs, subject to the interests and claims of third parties, the proceeds of the enforcement of forfeiture orders, sentences that mandate forfeiture, and ICC fines into a specific Fund.³⁷⁶ The Canada Act creates a Crimes Against Humanity Fund³⁷⁷ in which to deposit all moneys collected through enforcement of ICC orders by Canada³⁷⁸ and other related funds.³⁷⁹ The Attorney General of Canada is granted absolute discretion³⁸⁰ over the Fund to make payments, with or without the deduction of costs, to the Trust Fund of the ICC,³⁸¹ to victims of offenses under Canada's Act or within the jurisdiction of the Rome Statute, or to their

which requires the Presidency, when transmitting copies of judgments in which fines are imposed, to inform the State Party that in enforcing the fine(s) imposed, their national courts or authorities shall not modify them. *See Rules, supra* note 4, rule 220.

372. *See* Criminal Code, *supra* note 368, § 462.42(3).

373. *See id.* § 462.42. Other than the accused or persons who acquired title or right to possession of the property from the accused under circumstances that reasonably infer that the transfer was executed to avoid forfeiture of the property.

374. *See* MLA Act, *supra* note 146, § 9.2(8).

375. *See* Rome Statute, *supra* note 1, art. 109(3).

376. *See* MLA Act, *supra* note 146, § 9.2(5).

377. *See* Canada Act, *supra* note 6, § 30.

378. *See id.* § 30(1)(a).

379. For example, donations, *see id.* § 30(1)(c), and net proceeds from the disposition of property derived as a result of the commission of an offense under the Canada Act, *see id.* §§ 30(1)(b), 31.

380. The section establishing the Fund prescribes beneficiaries for the distribution of the proceeds, but also includes the phrase: "or otherwise as the Attorney General sees fit." *Id.* § 30(2).

381. Established under Article 79 of the Rome Statute out of a concern that victims be the priority interest and immediate beneficiaries of moneys collected pursuant to ICC fines or orders. *See Fife, supra* note 348, at 555-75.

families.³⁸²

2. United Kingdom

In its ICC legislation, the United Kingdom adopted a more delegated approach to cooperation with the ICC on requests for the freezing of the proceeds of crime for forfeiture, the enforcement of forfeiture orders as sentences, and the collection of fines than did the Canadian legislation. The UK Act confers the majority of the powers needed to cooperate with the ICC to the discretion, in the form of regulatory power, of the Secretary of State.

The UK Act first of all separates cooperation on requests from the ICC to freeze property liable to forfeiture³⁸³ from the national legislative means for the enforcement of ICC sentences. Provisions governing ICC requests to freeze property are dealt with in Part 3 of the UK Act, which is a general section dealing with “other forms of assistance,”³⁸⁴ whereas national means for handling requests for the enforcement of ICC forfeiture orders as components of sentences or the collection of ICC fines are set out in Part 4, dedicated to “enforcement of sentences and orders.”³⁸⁵

Part 3 of the UK Act begins by stating that the powers conferred by the Part on the Secretary of State are exercisable for the purpose of providing assistance to the ICC in relation to investigations where an investigation has actually been initiated by the Court³⁸⁶ and is ongoing.³⁸⁷ Under this Part of the UK Act, section 38 deals specifically with freezing assets located in the United Kingdom upon the request of the ICC. Like the Canada Act, the UK Act governs the freezing of assets upon request of the ICC exclusively in the context of the proceeds of crime for the purposes of forfeiture.³⁸⁸ Again, similar to the Canadian approach, the UK Act essentially converts ICC requests regarding

382. See Canada Act, *supra* note 6, § 30(2).

383. See UK Act, *supra* note 11, pt. 3.

384. See *id.* This parallels the “other forms of cooperation” in Article 93 of the Rome Statute. See Rome Statute, *supra* note 1, art. 93.

385. UK Act, *supra* note 11, pt. 4.

386. See *id.* § 27(1)(a).

387. See *id.* § 27(1)(b).

388. See *id.* § 38. Under the UK Act, forfeiture may be obtained by the ICC only for the freezing, or seizure of proceeds, property, and assets or instrumentalities of crime.

property into orders issued by its national courts. Rather than amending existing legislation to create provisions regarding ICC requests for forfeiture, however, the UK Act includes a self-contained procedural regime (in Schedule 6) for executing requests from the ICC for freezing the proceeds of crime. Under this regime, the UK Act incorporates judicial scrutiny of requests from the ICC regarding property³⁸⁹ purported to be the proceeds of crime for forfeiture located in the United Kingdom, in that, to execute requests, the UK Act requires the obtaining of a “freezing order” in respect of property or assets liable to be frozen for ultimate forfeiture.³⁹⁰

In order to bring a freezing order, the Secretary of State will designate a person to act on behalf of the ICC³⁹¹ and direct that person to apply for an order³⁹² according to the procedures dictated in Schedule 6. Applications³⁹³ required to obtain “freezing orders” must be brought before the High Court.³⁹⁴ The applications may be made without notice and without hearings³⁹⁵ if the High Court is satisfied that an order for the forfeiture of the proceeds of crime has been issued,³⁹⁶ or there are reasonable grounds that one will be made³⁹⁷ in ICC proceedings and that the assets or property subject to the order indeed consists of or includes property that falls or may fall under a forfeiture order.³⁹⁸ Notice is given to everyone affected by the freezing order³⁹⁹ and provision is made for freezing orders to be varied or discharged upon application by anyone affected.⁴⁰⁰ These requirements are consistent with the United Kingdom’s obligation

389. “Property” includes money and all other property, real or personal, heritable or movable, and including things in action and other intangible or incorporeal property. *See id.* sched. 6, § 14(1)(a). This broad definition adopted by the UK Act is helpful as debts and moneys owing on accounts are potentially subject to being “frozen.”

390. *See id.* § 38. “Freezing orders” prohibit any person from dealing with the property specified in the orders otherwise than in accordance with terms that may be specified in the orders. *See id.* sched. 6, § 3(1).

391. *See id.* § 38(a).

392. *See id.* § 30(b).

393. *See id.* sched. 6, § 1(1).

394. *See id.* sched. 6, § 1(1).

395. *See id.* sched. 6, § 1(2)(a). An application may also be made before a judge in chambers in Northern Ireland. *See id.* § 1(2)(b).

396. *See id.* sched. 6, § 2(a).

397. *See id.* sched. 6, § 2(b).

398. *See id.* sched. 6, § 2.

399. *See id.* sched. 6, § 3(2).

400. *See id.* sched. 6, § 4(1).

under the Rome Statute to ensure that the freezing of any assets in cooperation with a request from the ICC does not prejudice the rights of *bona fide* third parties.⁴⁰¹ While freezing orders are discharged automatically upon the conclusion of the particular ICC proceeding for which they were issued,⁴⁰² ICC proceedings are not considered concluded until there is no further possibility of a forfeiture order being issued by the Court in the proceeding⁴⁰³ or the order has been satisfied, whether by the recovery of all of the property liable to being recovered, or otherwise.⁴⁰⁴ The UK Act also provides for the appointment of a receiver by the High Court, and subject to its directions,⁴⁰⁵ to manage property forfeited.⁴⁰⁶ Further, the UK Act provides specific power to the police to seize property that is the subject of a freezing order for the purpose of preventing it from being removed from the jurisdiction of the High Court.⁴⁰⁷ The UK Act likewise anticipates that freezing orders for forfeiture granted in ICC proceedings may obtain legal status equivalent to interested parties in contexts such as registered land,⁴⁰⁸ bankruptcy proceedings,⁴⁰⁹ and corporate windings-up and insolvencies.⁴¹⁰

Requests from the ICC to enforce its general forfeiture orders and collect fines levied by the Court are governed under the general terms of “power to make provision for enforcement of other orders” in Part 4 of the UK Act.⁴¹¹ Under this Part, the Secretary of State is given broad discretion⁴¹² to create regulations⁴¹³ specifically for the enforcement of ICC fines or forfeiture orders.⁴¹⁴ These regulations must provide for the registration of the forfeiture order or fine by a UK court as a precondition

401. See Rome Statute, *supra* note 1, art. 93(1)(k).

402. See UK Act, *supra* note 11, sched. 6, § 4(2).

403. See *id.* sched. 6, § 14(2)(a).

404. See *id.* sched. 6, § 14(2)(b).

405. See *id.* sched. 6, § 5(2)(b).

406. See *id.* sched. 6, § 5.

407. See *id.* sched. 6, § 6(1).

408. See *id.* sched. 6, §§ 7-8.

409. See *id.* sched. 6, §§ 9-10.

410. See *id.* sched. 6, §§ 11-13.

411. *Id.* pt. 4.

412. “The Secretary of State *may* make provision by regulations for the enforcement of . . . fines or forfeitures ordered by the ICC.” *Id.* § 49(1) (emphasis added).

413. In England, Wales, and Northern Ireland. *Id.* § 49.

414. See *id.* § 49(1)(a).

tion of enforcement.⁴¹⁵ Accordingly, the Enforcement of Fines, Forfeiture and Reparation Orders Regulations 2001⁴¹⁶ (“UK Enforcement Regulations”) permit the Secretary of State, upon receipt of an order of the ICC, to appoint a person to act on behalf of the ICC for the purposes of enforcing the order⁴¹⁷ and may direct the person to apply to a UK court for registration of the order.⁴¹⁸ The UK Enforcement Regulations mandate that, upon application, UK courts will register ICC orders as a pre-condition to their enforcement.⁴¹⁹ This requirement provides the element of national judicial scrutiny of ICC orders desired by most States. The UK Act, similar to the Canada Act, provides two preconditions on the registration of ICC forfeiture orders and fines: that they be in force and final.⁴²⁰

As noted, the UK Act empowers the Secretary of State to, at her or his discretion,⁴²¹ dictate that the regulations governing the requests by the ICC to honor its forfeiture orders and fines include that orders, once registered, must be of equivalent force and effect⁴²² and have the same proceedings⁴²³ and powers⁴²⁴ available for their enforcement as would the orders of United Kingdom courts.⁴²⁵ In this way—again, similar to the Canada Act—the UK Act exhibits consistency with the international preference of granting “equivalent status” to ICC orders by affording the same procedures and enforcement mechanisms to ICC orders as to its national judgments. Section 5 of the UK Enforcement Regulations states:

415. *See id.* § 49(3). The Secretary of State is accordingly mandated under the UK Act to appoint a person to act on behalf of the ICC for the purposes of enforcing the order and give such directions to the appointment person as may be necessary. *See id.* § 49(2)(a)(b).

416. *See* The International Criminal Court Act 2001 (Enforcement of Fines, Forfeiture and Reparation Orders) Regulations, 2001, United Kingdom Reg. No. 2379 (issued June 29, 2001), available at <http://www.legislation.hmso.gov.uk/si/si2001/20012379.htm> (on file with authors) [hereinafter UK Enforcement Reg.].

417. *See id.* § 3.

418. *See id.* § 4(1)

419. *See id.* § 4(2), 4(3).

420. *See* UK Act, *supra* note 11, § 49(3).

421. *See id.*

422. *See id.* § 49(4)(a).

423. *See id.* § 49(4)(c).

424. *See id.* § 49(4)(b).

425. And those of Wales or Northern Ireland. *See id.* § 49(4).

For the purpose of enforcement of the Order when registered,

- (a) the Order has the same force and effect;
- (b) the same powers are exercisable in relation to its enforcement; and
- (c) proceedings for its enforcement may be taken in the same way, as if the Order were an order of a court in England and Wales or Northern Ireland.⁴²⁶

However, a United Kingdom court, regardless of whether the ICC order has been successfully registered, cannot enforce orders granted pursuant to the Secretary of State's regulations unless the United Kingdom court is satisfied that a reasonable opportunity has been given to all persons holding an interest in the property to make submissions to the court⁴²⁷ and that the exercise of the court's enforcement power would not prejudice the rights of *bona fide* third parties.⁴²⁸ In this way, the UK Act implements a dual—and potentially competing—obligation under the Rome Statute;⁴²⁹ giving effect to the forfeiture orders and fines of the ICC while maintaining the property rights and interests of persons not involved in the proceedings.

3. Switzerland

The Swiss Law provides for the administration and execution of requests from the ICC for the freezing of the proceeds of crime and of forfeiture sentencing orders and fines like any other request of Switzerland for cooperation from the Court.⁴³⁰ Decisions on whether or not to proceed to execute requests from the ICC to enforce orders for freezing the proceeds of crime for eventual forfeiture lie with the Central Authority.⁴³¹ The Central Authority can also take preventative, or preserving measures to maintain existing conditions, protect threatened legal interests, or preserve endangered evidence.⁴³² In addition, objects or assets subject to precautionary seizure specifically cited may, at any time, upon request, be transmitted to the ICC

426. UK Enforcement Reg., *supra* note 416, § 5.

427. *See* UK Act, *supra* note 11, § 49(5)(a).

428. *See id.* § 49(5)(b).

429. *See* Rome Statute, *supra* note 1, art. 109(1).

430. *See* Swiss Law, *supra* note 8, art. 30(j).

431. *See id.* art. 43(1).

432. *See id.* art. 31(1).

for the purpose of forfeiture.⁴³³

The Central Authority may postpone the execution of an ICC request for cooperation, including freezing of the proceeds of crime for forfeiture, for a period of time to be agreed upon with the Court in the event that immediate execution of the request would interfere with the ongoing investigation or prosecution of a different case.⁴³⁴ The Central Authority may postpone the execution of requests from the Court,⁴³⁵ including requests to freeze the proceeds of crime, in the event of a challenge to the Court's jurisdiction⁴³⁶ pending adjudication of the challenge.⁴³⁷

While the Central Authority's decisions on requests for cooperation are generally without appeal,⁴³⁸ persons who are not accused,⁴³⁹ are directly affected by a measure,⁴⁴⁰ have an interest worthy of protection in the modification or suspension of the decision,⁴⁴¹ and cannot assert their rights before the ICC or be reasonably expected to do so,⁴⁴² may appeal the Central Authority's decisions⁴⁴³ to the Federal Supreme Court⁴⁴⁴ on grounds limited to violations of Swiss law, including excesses and abuses of discretion.⁴⁴⁵ These provisions allow persons whose property interests are affected by ICC requests for cooperation to appeal, in fulfillment of the obligation under the Rome Statute that measures toward forfeiture cannot affect the rights of *bona fide* third parties.⁴⁴⁶ Further implementing this duty, the Swiss Law specifies that the objects and assets seized as the proceeds of crime requested by the ICC for forfeiture to the Court may remain in Switzerland where a person not involved in the criminal acts claims that he or she acquired rights to the objects or assets

433. *See id.* art. 41(1).

434. *See id.* art. 43(2).

435. Except for orders for preventative measures. *See id.* art. 29(1).

436. Under Articles 17-19 of the Rome Statute. *See id.* art. 29(2).

437. *See id.* art. 29(2).

438. *See id.* art. 43(1).

439. *See id.* art. 50(a).

440. *See id.* art. 50(b).

441. *See id.* art. 50(c).

442. *See id.* art. 50(d).

443. *See id.* art. 50.

444. *See id.* art. 59.

445. *See id.* art. 51.

446. *See Rome Statute, supra note 1, art. 93(1)(k).*

in good faith.⁴⁴⁷

While the articles of the Swiss Law concerning penalties deal mainly with sentences of imprisonment,⁴⁴⁸ the law does provide specific guidance as to the enforcement of forfeiture orders and fines as dispositions of ICC sentences. The Swiss Law specifically permits Switzerland to accept the enforcement of the “final and executable sentencing decisions”⁴⁴⁹ (which would include fines) of the ICC provided that the convicted person is a Swiss citizen or is usually resident in Switzerland.⁴⁵⁰ Fines may still be executed against persons convicted by the ICC even though they do not reside in Switzerland, provided their assets are located in the country.⁴⁵¹

Specifically addressing forfeiture in the context of sentencing, Article 58 of the Swiss Law notes that, if the ICC has already decided on the disposition of the objects or assets in accordance with the reparations or trust fund provisions of the Rome Statute,⁴⁵² then the general forfeiture provisions of Article 41⁴⁵³ apply by analogy.⁴⁵⁴ Articles 3(2) and 53(2) of the Swiss Law combine to enable the Central Authority to enforce fines directly.

VI. ADMINISTRATION OF JUSTICE

Under Article 70 of the Rome Statute, the ICC has jurisdiction over offenses against the administration of justice. The first type of offense covered by Article 70 is “[g]iving false testimony when under an obligation . . . to tell the truth.”⁴⁵⁵ The second is

447. See Swiss Law, *supra* note 8, art. 41(4)(c). The rights to the property must have been acquired in good faith *in Switzerland* or in a foreign country, provided that the person’s usual residence is in Switzerland.

448. See *id.* arts. 54-56.

449. See *id.* art. 53.

450. See *id.* art. 53(1), (2).

451. See *id.* art. 53(2).

452. See Rome Statute, *supra* note 1, arts. 75, 79.

453. See Swiss Law, *supra* note 8, art. 41.

454. See *id.* art. 58.

455. Rome Statute, *supra* note 1, art. 70(1)(a). This is in contrast to the similar offense created under rule 91 of the Rules of Procedure and Evidence for the ICTY, which concerns witnesses who “knowingly and willfully” give false testimony. See ICTY Rules, *supra* note 348, rule 91. The essential elements under rule 91 appear to be: knowingly giving false testimony and willfully giving that testimony. See *id.* This wording appears to capture both the intent (“willfully”) to give the testimony and knowledge that that testimony is false. This same terminology is used in rule 91 of the International Criminal Tribunal for Rwanda: See ICTR Rules, *supra* note 348, rule 91.

“[p]resenting evidence that the party knows is false or forged.”⁴⁵⁶ The third listed offense relates to the protection of witnesses and evidence: “[c]orruptly 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.”⁴⁵⁷ The first part of this definition is meant to protect witnesses who will provide or who have provided evidence before the Court. The second part makes it an offense to subvert efforts by ICC investigators to gather evidence of offenses. The remaining offenses relate to the protection of officials of the Court from direct or indirect interference in their ability to perform their duties. “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” is the fourth offense.⁴⁵⁸ The fifth offense is “[r]etaliating against an official of the Court on account of duties performed by that or another official” and the sixth is “[s]oliciting or accepting a bribe as an official of the Court in connection with his or her official duties.”⁴⁵⁹ The Court can impose a sentence of up to five years imprisonment or a fine for these offenses.⁴⁶⁰

Upon the request of the ICC, States Parties are expected to prosecute these offenses against the administration of justice. The authorities of the States Parties are to “treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively.”⁴⁶¹ In order for States Parties to be in a position to prosecute offenses against the administration of justice, each one must “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 [Article 70], committed on its territory, or by one of its nationals.”⁴⁶² Domestic implementation is therefore crucial to States’ abilities

456. Rome Statute, *supra* note 1, art. 70(1)(b).

457. *Id.* art. 70(1)(c).

458. *Id.* art. 70(1)(d).

459. *Id.* art. 70(1)(e)-(f).

460. *See id.* art. 70(3).

461. *Id.* art. 70(4)(b).

462. *Id.* art. 70(4)(a).

to cooperate with the ICC on ensuring prosecution of these offenses.

A. *Domestic Implementation of the Administration of Justice Offenses*

1. Canada

Sections 16 to 26 of the Canada Act were enacted to comply with the obligation under Article 70(4) of the Rome Statute. Each section addresses a distinct aspect of the offenses listed under Article 70(4). In addition to covering the offenses listed in Article 70(4), Canada also criminalizes additional offenses against the administration of justice taken from the Canadian Criminal Code, updated and reworded to apply to the special circumstances of the ICC.

Subsection 16(1) is a general clause that criminalizes the interference with the administration of justice of the ICC.⁴⁶³ Assistance in interpreting the phrase “wilfully attempt to obstruct, pervert or defeat the course of justice”⁴⁶⁴ is provided under subsection 16(2).⁴⁶⁵

Interference with the collection or provision of evidence is also criminalized by the Act. Paragraph 16(2)(a) criminalizes efforts to interfere with a witness giving evidence.⁴⁶⁶ A witness attempting to obtain compensation in return for abstaining from giving evidence is captured by paragraph 16(2)(b).⁴⁶⁷ This provision goes beyond the Rome Statute obligations, which do not refer to witnesses attempting to obtain compensation for refusing to give evidence.

Section 19 of the Canada Act makes perjury before a judge

463. “Every person who wilfully attempts in any manner to obstruct, pervert or defeat the course of justice of the International Criminal Court is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years.” Canada Act, *supra* note 6, § 16(1).

464. This wording parallels the offense of Obstructing Justice under section 139 of the Canadian Criminal Code, which reads in part: “Everyone who wilfully attempts in any manner to obstruct, pervert or defeat the course of justice in a judicial proceeding.” Criminal Code, *supra* note 368, § 139.

465. Subsection 16(2) deems the following acts to constitute offenses under subsection 16(1): “(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.” Canada Act, *supra* note 6, § 16(2).

466. *See id.* § 16(2)(a).

467. *See id.* § 16(2)(b).

of the ICC or other official of the ICC authorized to take statements an offense.⁴⁶⁸ This includes evidence provided through video links and other forms of technology used in taking evidence. The subjective knowledge of the witness that the evidence is false is an essential element of this offense.⁴⁶⁹ This offense is extended under section 20 to include providing contradictory evidence before separate proceedings before the Court.⁴⁷⁰

The provision of fabricated evidence by means other than perjury is made an offense pursuant to section 21 of the Act.⁴⁷¹ There are two levels of intent associated with this offense. The first is simply "to mislead." The second intent is that the fabricated evidence is intended to be used as evidence in an ongoing or proposed proceeding of the ICC.

Section 23 is an extremely broadly worded section that criminalizes any act done for the purpose of having a person abstain from doing anything he or she has a lawful right to do, or to do anything he or she has a legal right to abstain from doing, "in relation to a proceeding of the International Criminal Court."⁴⁷² The act must be one that causes the targeted individual to fear for his or her safety or the safety of anyone known to them. The test to determine whether that fear is valid is one of reasonableness under all of the circumstances, that is, an objective test.

All of the above sections refer to acts that occur in Canada. Sections 25 and 26 criminalize, for the purposes of Canadian domestic jurisdiction, similar acts performed by Canadian citizens while outside Canada.⁴⁷³

Finally, already existing domestic legislation governing offenses against the administration of justice in Canada would govern any proceeding under the Canada Act, as these proceedings would be conducted pursuant to Canadian rules of procedure and evidence governing criminal trials.

468. *See id.* § 19.

469. The pertinent phrase of the subsection reads: "makes a false statement knowing that it is false." *Id.*

470. *See id.* § 20.

471. *See id.* § 21.

472. *Id.* § 23.

473. *See id.* §§ 25-26.

2. United Kingdom

The United Kingdom implemented the offenses against the administration of justice listed in Article 70(1) of the Rome Statute by permitting them to be “dealt with as for the corresponding domestic offence.”⁴⁷⁴ The corresponding domestic offenses are listed in the UK Act to avoid any confusion.⁴⁷⁵ The UK Act ensures that the national courts take into account any relevant judgments or decisions of the ICC, and also permits the national courts to take account of any other relevant international jurisprudence.⁴⁷⁶ The UK Act covers offenses committed within the country, or outside the United Kingdom by a United Kingdom national, resident, or person subject to United Kingdom service jurisdiction.⁴⁷⁷

3. Switzerland

Switzerland adopted a very simple and straightforward approach to implementing its obligation to ensure that the administration of justice contained in Article 70 of the Rome Statute perpetrated against the ICC were also offenses under Swiss law. Switzerland passed the Swiss Law on the Modification of the Penal Code and the Military Penal Code (“Swiss Penal Code Law”)⁴⁷⁸ to extend its criminal law penalizing offenses against the administration of justice to those committed against the Court on Swiss territory or by Swiss citizens. Article 1 of the Swiss Penal Code Law⁴⁷⁹ creates Article 309 of the Swiss Penal Code⁴⁸⁰ extending Articles 307-308, which criminalize acts against the administration of justice under Swiss law, to apply, *inter alia*, to the proceedings of international tribunals (including the ICC) whose jurisdiction is recognized by Switzerland. The Swiss Penal Code Law also extends the offenses against the administration of justice for its military service members, contained in the Military

474. UK Act, *supra* note 11, §§ 54(1), 61(1).

475. *See id.* §§ 54(3), 61(3).

476. *See id.* §§ 54(2), 61(2).

477. *See id.* §§ 54(4), 61(4).

478. FF 2001, 2768. A French version is available at <http://www.admin.ch/ch/ff/ff/2001/2768.pdf>.

479. *Id.* art. 1.

480. RS 311.0. A French version is available at <http://www.admin.ch/ch/f/rs/3/311.0.fr.pdf>.

Penal Code,⁴⁸¹ to the proceedings of international tribunals, including the ICC.⁴⁸²

CONCLUSION

The ICC will rely heavily on the cooperation of States Parties for its success. States Parties will be asked to arrest and surrender suspects, investigate and collect evidence, extend privileges and immunities to ICC officials, protect witnesses, enforce ICC orders for fines and forfeiture and, at times, prosecute those who have committed offenses against the administration of justice. Key to this cooperation will be domestic legislation permitting the State Party to assist the ICC when requested. This article has examined in some detail how the domestic ICC legislation implemented in three countries—Canada, the United Kingdom, and Switzerland—has addressed the cooperation obligations listed in the Rome Statute.

While Canada, the United Kingdom, and Switzerland may use different approaches to incorporate the same obligation, they do so by meeting the requirements of the Rome Statute. Although the current pace of ratification is rapid, unfortunately not many States have adopted comprehensive ICC legislation on cooperation. The future of the ICC depends on all States Parties adopting the requisite laws that will enable each country to cooperate with the Court.

481. RS 321.0. A French version is available at <http://www.admin.ch/ch/f/rs/3/321.0.pdf>.

482. See FF 2001, 2769, art. 2. Article 2 created Article 179b of the Military Penal Code.