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COMMITTEE OF THE WHOLE
Working Group on International Cooperation
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ROLLING TEXT OF ARTICLES 87, 90, 90 TER AND 90 QUATER

Article 87

[Surrender] [Transfer] [Extradition] of persons to the Court

1. The Court may transmit a request for the arrest and [surrender] [transfer] [extradition] of a person, along with the supporting material outlined in article 88, to any State on the territory of which that person may be found, and shall request the cooperation of that State in the arrest and [surrender] [transfer] [extradition] of such person. States Parties shall, in accordance with the provisions of this Part [and the procedure under their national law], comply with requests for arrest and [surrender] [transfer] [extradition].
2. Deleted
3. Pending
4. Pending
5. Deleted
6. Pending
7. Deleted
8. Pending
9. Pending
10. Deleted

GE.98-71319 (E)
ROM.98-1927

11. Transit of [surrendered] [transferred] [extradited] person

(a) A State Party shall, except where transit through that State would impede or delay the surrender, authorize transportation under its national procedural law through its territory of a person being [surrendered] [transferred] [extradited] to the Court by another State. A request by the Court for transit shall be transmitted in accordance with article 86. The request for transit shall contain a description of the person being transported, a brief statement of the facts of the case and the legal characterization and the warrant for arrest and [transfer] [surrender] [extradition]. A person in transit shall be detained in custody during the period of transit.

(b) No authorization is required where air transportation is used and no landing is scheduled on the territory of the State of transit.

(c) If an unscheduled landing occurs on the territory of the State of transit, it may require a request for transit as provided for in subparagraph (a). The State of transit shall detain the person to be transported until the request for transit is received and the transit is effected, so long as the request is received within 96 hours of the unscheduled landing.

Article 90

Other forms of cooperation

1. States Parties shall, in accordance with the provisions of this Part [and their national [procedural] law], comply with requests by the Court to provide assistance as follows:

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

(b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions or reports necessary to the Court;

(c) The questioning of any suspect or accused;

(d) The service of documents, including judicial documents;

(e) Facilitating the appearance of persons as witnesses and experts before the Court, which shall be voluntary; ¹

¹This includes the notion that witnesses or experts may not be compelled to travel to appear before the Court.

(f) The temporary transfer of persons as provided in paragraph 1 ter of article 90;

(g) The examination of places or sites, including the exhumation and examination of grave sites;

(h) The execution of searches and seizures;

(i) The provision of records and documents, including official records and documents;

(j) The protection of victims and witnesses and the preservation of evidence;

(k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture without prejudice to the rights of bona fide third parties;² and

(l) Any other types of assistance with a view to facilitating the investigation and prosecution of crimes under the Statute which are not prohibited by the law of the requested State.

1 bis. The Court shall have the authority to provide an assurance to a witness or expert appearing before the Court that he or she will not be prosecuted, detained or submitted to any restriction of personal freedom by the Court in respect of any acts or omissions that preceded the departure of that person from the requested State.

1 ter. (a) The Court may request the temporary transfer of a person in custody for purposes of testimony, identification or other assistance. The person may be transferred if the following conditions are fulfilled:

(i) The person freely gives his or her informed consent; and

(ii) The requested State agrees to the transfer, subject to such conditions as that State and the Court may agree.

(b) The person transferred shall remain in custody, and when the purposes of the transfer have been fulfilled the Court shall return the person without delay to the requested State.

2. Pending.

3. Pending.

4. Pending

²The issue of whether the Court is to be vested with such powers is linked with article 75 in Part 7 on Penalties.

5. Pending

6. Confidentiality³

(a) The Court shall ensure the confidentiality of documents and information except as required for the investigation and proceedings described in the request.

(b) The requested State may, when necessary, transmit documents or information to the Prosecutor on a confidential basis. The Prosecutor may then use them solely for the purpose of generating new evidence.

(c) The requested State may, on its own motion or at the request of the Prosecutor, subsequently consent to the disclosure of such documents or information. They may then be used as evidence pursuant to the provisions of Parts 5 and 6 of the Statute and related Rules of Procedure and Evidence.

7. Assistance by the Court

(a) The Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of acts which constitute a crime under this Statute or which constitute a serious crime under the national law of the requesting State.

(b)⁴

(i) The assistance provided under subparagraph (a) shall include, among others:

- (1) The transmission of statements, documents or other types of evidence obtained in the course of an investigation or a trial conducted by the Court; and
- (2) The questioning of any person detained by the Court;

(ii) In the case of assistance under subparagraph (b) (i) (1):

- (1) If the documents or other types of evidence have been obtained with the assistance of a State, such transmission shall require the consent of that State;⁵

³Views have also been expressed that subparagraphs (b) and (c) should be addressed in the Rules of Procedure and Evidence.

⁴Views have been expressed that this subparagraph should be addressed in the Rules of Procedure and Evidence.

⁵The relationship with article 92 needs to be considered.

(2) If the statements, documents or other types of evidence have been provided by a witness or expert, such transmission shall be subject to the provisions of article 68.

(c) The Court may, under the conditions set out in this paragraph, grant a request for assistance under this paragraph from a non-State Party.

8. Deleted

Article 90 ter

Consultations

Where a State Party receives a request under this Part and identifies problems with the request, which may impede or prevent its execution, including but not limited to:

(a) Insufficient information to execute the request; or

(b) In the case of a request for surrender, despite best efforts, that the person sought cannot be located or that investigation conducted has determined that the person in the custodial State is clearly not the person named in the warrant; or

(c) That execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken to another State,
the requested State shall, without delay, consult with the Court to resolve the matter.

Article 90 quater

Waiver of immunity

Where compliance with the request for surrender/cooperation would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, the Court shall, in addition, obtain under this Part the cooperation of that third State for the waiver of the immunity.
