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Conclusion

Malta

Amnesty International's concerns with the International Criminal Court Act 2002

The International Criminal Court Act contains many positive elements, which Amnesty International would like to welcome. In particular, we welcome the inclusion of all of the crimes under the Rome Statute of the International Criminal Court (Rome Statute); the inclusion of the necessary mental elements for these crimes; the exclusion of the death penalty; the detailed provisions on arrest and surrender to the Court; the inclusion of offences against the administration of justice; the possibility that Malta will accept prisoners from the Court; and the provision for the enforcement of fines and forfeiture measures in Malta. Some of these provisions could be strengthened further, as outlined below.

In addition, this commentary describes a number of concerns that Amnesty International has with the International Criminal Court Act (the Act), enacted by Malta in 2002. The commentary provides suggestions for amendment of the Act, in order to allow Malta to fulfil more adequately its obligations in relation to the International Criminal Court (Court), as well as other obligations under international law. Every effort has been made to consult with national legal experts in preparing these comments. However, we are not experts in Maltese law. We would therefore welcome any clarification of points raised in this commentary from experts in Maltese law. It would be helpful to publish an explanatory memorandum to accompany the Act which could address the concerns and queries raised in this commentary.

Amnesty International was disappointed that the government did not undertake a broad consultation with civil society before beginning to draft the Act and then to draft the legislation in a transparent manner. Other countries have conducted such broad consultations with civil society as part of a transparent drafting process and the final versions of the bills submitted to parliaments have greatly benefited from this approach. Such countries have included Brazil, the Democratic Republic of Congo, Senegal and the United Kingdom. We hope that such an approach will be adopted with respect to drafting the amendments to the Act recommended below and with respect to the regulations that must be promulgated to implement various provisions of the Act.

The main recommendations of this commentary are:

- **Commencing an investigation:** Decisions whether to investigate or to prosecute crimes within the Court's jurisdiction should be taken by an independent prosecutor pursuant to neutral criteria and subject to judicial review. These decisions should not be taken by the Attorney General, a political official, as is currently provided for in the Act.¹
- **Jurisdiction:** The Act should incorporate universal jurisdiction to the full extent permitted under international law for crimes under the jurisdiction of the Court. Malta's current criminal law provides universal jurisdiction if the suspect is present for other serious crimes such as wilful homicide, rape and grievous bodily harm. In addition, the Geneva Conventions of 1949 envisage states opening criminal investigations over persons suspected of grave breaches not present with a view to requesting extradition for trial and there is no requirement under Maltese law that a person suspected of grave breaches abroad be present in order to open an investigation or to seek extradition for trial.²
- **Immunities:** The Minister of Justice should have no discretion to prevent proceedings for surrender to the Court against a person with state or diplomatic immunity. The Rome Statute is clear that this decision is to be taken only by the Court itself.³
- **Agreement on Privileges and Immunities:** the Act should protect the privileges and immunities of the Court staff, as required both by Article 48 of the Rome Statute and the Agreement on Privileges and Immunities (Agreement) which was adopted by the Assembly of States Parties in September 2002. Malta should take immediate steps to sign and ratify this Agreement, and should also incorporate the provisions of the Agreement into national law, in order to extend full protection to the staff of the Court, counsel for victims and accused and others, as well as to the Court's property, communications, evidence and other matters covered by the Agreement.⁴

These comments are based on the Rome Statute, supplementary instruments adopted by the Assembly of States Parties and the following Amnesty International documents: *International Criminal Court: Checklist for Effective Implementation* (IOR 40/11/2000), *International Criminal Court: Making the Right Choices, Parts One to Five*, (IOR 40/01-06/97), *International Criminal Court: Checklist to ensure the nomination of the highest qualified candidates for judges* (IOR 40/023/2002) and

¹ See Part 1 D: Requirement that a political official authorise any prosecution.

² See Part 1 B: Scope of the jurisdiction of Maltese courts.

³ See Part 2 A: Immunities.

⁴ See Part 2 B: The Court.

Universal Jurisdiction: the duty of states to enact and implement legislation (IOR 53/002-018/2001). These documents are available on our website:
<http://www.amnesty.org/icc/>.

Part 1: Complementarity

A. Definitions of crimes covered by the Act

Amnesty International welcomes the amendment made to the Criminal Code by Article 13 of the Act, in order to include all of the crimes under the Rome Statute in national law. However, in addition to defining these crimes as crimes under national law, we recommend that Malta also includes other crimes under customary and conventional international law in their implementing legislation. These crimes include war crimes not included in the Rome Statute (such as certain grave breaches and other serious violations of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I) and certain violations of international humanitarian law in non-international armed conflict), enforced disappearances and extrajudicial executions that are not committed as part of a widespread or systematic attack on a civilian population. We note that Malta has already included the crime of torture in its Criminal Code.

B. Scope of the jurisdiction of Maltese courts

There is a danger that under the current legislation, Malta could become a safe haven for persons suspected of the worst crimes known to humanity.

Article 5 of the Criminal Code provides that Malta has jurisdiction for crimes, including the Rome Statute crimes now incorporated into the Code, over those who commit an offence in Malta. Article 54G of the Criminal Code additionally provides for jurisdiction over Rome Statute crimes if the person is subject to Maltese military law, even if the crime is committed outside Malta, and also over Maltese citizens or permanent residents if they conspire to commit such a crime even if the offence is to be committed outside Malta. In addition, Malta has been able to exercise universal jurisdiction over grave breaches of the Geneva Conventions of 1949 since 1959.⁵

⁵ The United Kingdom's Geneva Conventions Act (Colonial Territories) Order in Council 1959, applies the United Kingdom's Geneva Conventions Act 1957, which provides universal jurisdiction

These limited provisions regarding extraterritorial jurisdiction mean that non-Maltese citizens or non-permanent residents suspected of genocide, crimes against humanity and war crimes who are present in Malta can escape prosecution for these acts. This situation could arise because:

- the International Criminal Court will only be able to try a limited number of cases since:
 - it will have no jurisdiction over crimes committed before 1 July 2002,
 - apart from exceptional circumstances, it will not have jurisdiction over crimes which were committed outside the territory of a state party by a national of a non-state party,
 - even when the Court has jurisdiction, it will not be able to take a case unless it is of sufficient gravity, and
 - it is not likely to have the resources to try all individuals over whom it has jurisdiction, even when the cases are sufficiently grave.
- extradition will be difficult or impossible in many cases, either because of:
 - absence of extradition agreements with all states,
 - inadequate extradition arrangements with many states,
 - absence of legislation in other states making genocide, crimes against humanity or war crimes under national law and giving their courts both territorial and universal jurisdiction over these crimes,
 - failure of states to request extradition,

over grave breaches to Malta. There is no requirement in the 1957 Act of the 1959 Order in Council that a suspect be present in the jurisdiction in order to open a criminal investigation or to seek extradition for trial. Malta became independent on 21 September 1964, and, as far as is known, the 1959 Order in Council was not repealed either before or after independence with respect to Malta.

- legitimate public policy reasons for denying extradition requests, such as the possibility of the application of the death penalty, the imposition of other cruel, inhuman or degrading treatment or punishments or unfair or sham trials.

The amendment of Article 54G to include universal jurisdiction for genocide, crimes against humanity and war crimes would be consistent with Malta's approach to jurisdiction for many other serious crimes and with grave breaches of the Geneva Conventions of 1949. Article 5(1)(g) of the Criminal Code includes universal jurisdiction when the suspect is present in Malta for many serious crimes, including torture, rape, hostage taking, abduction, wilful homicide and grievous bodily harm. Many acts that constitute genocide, crimes against humanity and war crimes will fall within these domestic crimes. However, including the serious crimes under the Rome Statute in these provisions is necessary so that Maltese authorities can investigate and prosecute those suspected of these serious crimes in all cases, and for the full range of acts they are alleged to have committed. Moreover, to ensure that the Maltese criminal justice system can act effectively to repress crimes under international law, both by being able to open criminal investigations before a suspect is expected to enter Malta and in other cases to share the responsibility of acting as an agent of the international community, the Act should not require presence of the suspect in order to open a criminal investigation or to seek extradition for trial in Malta. This approach would be consistent with the 1959 Order in Council with regards to grave breaches of the Geneva Conventions.

C. Principles of criminal responsibility

1. General principles of criminal responsibility

The International Criminal Court Act does not incorporate all of the principles of criminal responsibility from Article 25 of the Rome Statute. Indeed, direct and public incitement to genocide is the only provision of Article 25 specifically included in the Act.⁶

However, many of the provisions of Article 25 of the Rome Statute are covered in the current Maltese Criminal Code in similar terms to the Rome Statute. For example, liability for attempt is provided in Article 41 in similar terms to Article 25(3)(f) of the Rome Statute. Amnesty International would welcome any clarification

⁶ Included in Art 54B(2) of the amendment to the Criminal Code.

regarding the scope of the concept of attempt in Maltese criminal law. Specifically, clarification as to whether the concept of attempt is wider or narrower as defined in the Rome Statute would be useful. The Maltese definition of attempt should not lead to an acquittal for a crime under the Rome Statute, where a conviction would have resulted for the same conduct if the case were tried by the Court.

Similarly, Article 42 of the Criminal Code provides for accomplice liability, in a similar way to Article 25 (3) (b) and (c) of the Rome Statute. The Maltese Criminal Code seems to cover all of the acts mentioned in these provisions of the Rome Statute, as well as:

42 (a) instigates the commission of a crime by means of bribes, promises, threats, machinations, or culpable devices, or by abuse of authority or power....

(e) incites or strengthens the determination of another to commit the crime, or promises to give assistance, aid or reward after the fact.

Amnesty International would welcome clarification over whether the principle of criminal responsibility for contributing to the commission or attempt of a crime by a group of persons acting with a common purpose is included in Maltese criminal law. This is included in Article 25 (3) (d) of the Rome Statute, and should therefore also be included in Maltese criminal law.

2. Command and superior responsibility

It is a matter of concern that article 54E of the amendment to the Criminal Code incorporates command responsibility for military commanders and civilian superiors in the same terms as Article 28 of the Rome Statute. Due to a political compromise made at the Rome Diplomatic Conference, as a result of pressure by the United States of America and a few other states, Article 28, which applies only in trials before the International Criminal Court, is not in accordance with customary international law. Customary international law, as reflected in Protocol I of the Geneva Conventions, Article 7 (3) of the Statute of the ICTY, Article 6 (3) of the Statute of the ICTR and Article 6 (3) of the Statute of the Special Court for Sierra Leone, holds civilian superiors to the same standards as military commanders. Malta, as a state party to Protocol I, is required to implement this strict uniform standard in national law. Therefore, Amnesty International recommends that Article 54E be amended to include the same standards for civilian superiors as are included for military commanders. Nothing in the Statute or international law prevents a state from

adopting stricter standards of command or superior responsibility than provided in the Statute.

3. Mental elements

Amnesty International welcomes the inclusion of the mental elements of the crimes in Article 54F of the Criminal Code, in the same terms as Article 30 of the Rome Statute.

4. Grounds for excluding criminal responsibility

Defences in national law should not be any broader than those permitted in the Rome Statute and, in some cases, should be narrower to be consistent with customary international law.

The existing Maltese Criminal Code contains some defences that are based on similar principles to those in the Rome Statute. However, it is not clear to what extent these defences would be applied in the same way as under the Rome Statute, or to what extent Maltese courts would look to the Rome Statute when interpreting defences under the Criminal Code.

For example, Article 33 of the Maltese Criminal Code includes the defence of insanity, however it contains no definition of this term. Amnesty International would welcome any clarification as to the definition of this defence in Maltese criminal law, and to what extent this definition corresponds with the defence of a mental disease or defect in Article 31(1)(a) of the Rome Statute. The definition should not lead to an acquittal on facts that would have led to a conviction in the International Criminal Court.

Article 34 of the Criminal Code defines the defence of intoxication in substantially different terms from the same defence in Article 31(1)(b) of the Rome Statute. In order to satisfy the requirements of the defence of intoxication under Maltese criminal law, it is necessary to show that 'the state of intoxication was caused without his consent by the malicious or negligent act of another person'.⁷ Under the Rome Statute, it is not necessary to show that intoxication was without the consent of the accused. It must merely be shown that the accused did not become 'voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct

⁷ Malta Criminal Code, art 34 (2) (a).

constituting a crime within the jurisdiction of the Court'.⁸ It is, of course, open to a state party to allow defences in a narrower range of circumstances than are allowed under the Rome Statute, provided that restrictions on defences are consistent with due process, and Amnesty International could welcome clarification that the scope of this defence is narrower than Article 31 (1) (b) of the Rome Statute.

Article 223 of the Criminal Code includes the justification of self-defence (or defence of another person) for homicide or bodily harm. The definition of this defence appears to be narrower in certain aspects than the definition included in Article 31(1)(c) of the Rome Statute. For example, it does not allow for the defence of property, but it appears to apply only when an intruder is breaking into a property. However, Article 223 extends the scope of the defence to cases where the victim is committing theft or plunder, or in the defence of 'one's own chastity or the chastity of another person'.

As a general rule, different definitions of defences may only pose a problem in a situation where the defence as defined in Maltese law leads to an accused person being acquitted, where a conviction would have resulted in the same case if tried by the International Criminal Court. In this regard, Amnesty International would welcome information on the extent that the defences allowed under Maltese criminal law are broader than those allowed under the Rome Statute. To the extent that such defences are broader than those in the Rome Statute, they should be amended. Amnesty International recommends the express exclusion of the defence of superior orders for all crimes under international law, including war crimes and torture, in all circumstances.

D. Requirement that a political official authorise any prosecution

One of the most serious flaws of the Act is the requirement that a political official rather than an independent prosecutor decide whether proceedings for genocide, crimes against humanity and war crimes may be instituted, as well as for offences against the administration of justice. This requirement is contained in Article 54I(2) of the amendment to the Criminal Code for genocide, crimes against humanity and war crimes. The requirement is also contained in Article 7(4) in relation to crimes against the administration of justice. No criteria are included for the political officials to use in deciding whether or not to commence a criminal proceeding. Amnesty International

⁸ Rome Statute, Art 31 (1) (b).

recommends that these provisions be amended, in order to give this power to an independent prosecutor, who will base his or her decision on the normal objective grounds used by prosecutors in domestic cases – such as whether there is sufficient admissible evidence to justify a prosecution or that the suspect is unfit to stand trial. Any other criteria guiding decisions whether to prosecute should be neutral, objective criteria that are adopted after consultation with civil society and made public. The criteria should also be consistent with the duty of states to bring to justice all those responsible for crimes under international law. This power can be made subject to appropriate judicial scrutiny.

E. Rights of the accused

Amnesty International welcomes the exclusion of the death penalty, under Article 54I(4) of the Act. Amnesty International also welcomes the inclusion of many of the rights of the accused at trial as guaranteed by Article 67 of the Rome Statute, in Chapter IV of the Constitution.⁹ Some of the rights of a person during an investigation, according to Article 55 of the Rome Statute, also appear to be protected by provisions of the Maltese Constitution.

However, Amnesty International would welcome any clarification on the extent to which the following rights under the Rome Statute are protected by Maltese law:

- during questioning, 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 it¹⁰
- to be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel¹¹
- during trial, to make an unsworn oral or written statement in his or her defence¹²

If these rights are not part of Maltese law, they should be incorporated into the Criminal Code, and be applicable to both domestic and international investigations and trials. The Act should also provide for proceedings on an admission of guilt, that are fully consistent with Article 65 of the Rome Statute, which contains important

⁹ See Arts 34, 36 and 39 of the Maltese Constitution.

¹⁰ *Ibid*, Art 55 (2) (c).

¹¹ *Ibid*, Art 55 (2) (d).

¹² *Ibid*, Art 67 (1) (h).

safeguards for victims, the accused and the general public with respect to admissions of guilt. By guaranteeing the same rights in criminal proceedings in Malta as recognised in the Rome Statute with regard to proceedings in the International Criminal Court, Malta will not only ensure that '[a]ll persons shall be equal before the courts and tribunals' as required by Article 14(1) of the International Covenant on Civil and Political Rights, but also will ensure that its criminal proceedings are consistent with the broadest protections in international law.

F. Statutes of limitations and amnesties

Article 29 of the Rome Statute provides that '[t]he crimes within the jurisdiction of the court shall not be subject to any statute of limitations'. Although this provision is self-executing, Amnesty International believes that it would be best if the Act expressly ruled out statutes of limitations for all crimes within the Court's jurisdiction, as well as other crimes under international law, such as torture. An express provision stating that statutes of limitation do not apply has been included in the legislation of Bosnia-Herzegovina, Estonia and the Netherlands, as well as the draft legislation of Brazil, and the Democratic Republic of Congo.¹³ The Act should also provide that Malta will not recognise any amnesties, pardons or similar measures of impunity by any state. Such national measures that prevent judicial determinations of guilt or innocence in a criminal trial, the discovery of the truth or full reparations to victims are contrary to international law.¹⁴ As the Special Court for Sierra Leone held on 13 March 2004, they cannot bind the Court or the courts of other states.¹⁵ Explicit acknowledgment of this principle has been included in the draft legislation of Brazil and the Democratic Republic of Congo.¹⁶

Part 2: Cooperation

A. Immunities

¹³ This legislation is available at <http://www.amnesty.org/icc/>.

¹⁴ Amnesty International, *Universal Jurisdiction – the duty of states to enact and enforce legislation*, Chapter 14 (IOR 53/017/2001); Amnesty International, *Sierra Leone: Special Court for Sierra Leone, the denial of the right to appeal and the prohibition of amnesties for crimes under international law* (AFR 51/012/2003).

¹⁵ *Prosecutor v Kallon*, Case No SCSL-2004-15-AR72(E), Special Court for Sierra Leone, 13 March 2004, para. 88.

¹⁶ This legislation is available at <http://www.amnesty.org/icc/>.

Article 26S of the amendment to the Extradition Act gives the Minister of Justice discretion to prevent proceedings for surrender against a person with state or diplomatic immunity, after consultation with the state concerned and the Court. This applies to both nationals of state parties and non-state parties. The Minister of Justice should have no discretion to prevent or stop proceedings in these circumstances. Under the Rome Statute, decisions whether such immunity may prevent proceedings or surrender to the Court are to be taken only by the Court itself.

Article 27 of the Rome Statute expressly provides:

“1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”

The legislation of Canada, Bosnia-Herzegovina and South Africa, as well as the draft legislation of Brazil and Ireland, all expressly exclude any possible immunity for anyone from prosecution in their own courts for the crimes under the Rome Statute.¹⁷

To the extent that Article 98 precludes the Court from proceeding with a request for surrender on the ground that it would require the requested state to act inconsistently with its obligations under international law, it is clear that this Article applies only to the Court itself. It is for the Court alone to determine whether Article 98 precludes proceeding with the request and requires it to seek the cooperation of the third state or a waiver of immunity. It is not for states parties to make that determination or to seek cooperation or a waiver.

Article 98(2) of the Rome Statute was intended to apply to existing Status of Forces Agreements (SOFAs) only, and therefore Malta should not enter into any bi-lateral agreement with any other state to prevent surrender of the state's nationals to

¹⁷ This legislation is available at <http://www.amnesty.org/icc/>

the Court. Amnesty International welcomes the fact that Malta has not entered into such an agreement with the United States of America. Further information on the unlawful nature of such agreements under international law can be found at: <http://www.amnesty.org/icc/>.

B. The Court

The Act does not include any provisions for the Court to sit in the territory of Malta. This is allowed under Articles 3(3) and 62 of the Rome Statute, and has been incorporated into the implementing legislation of Australia, Germany, New Zealand, South Africa and the United Kingdom.¹⁸ Malta should ensure that the Court has the necessary legal capacity under national law so that the Court can exercise its functions and powers effectively on the territory of Malta and that the Court can fulfil its purposes.

The Act also does not protect the privileges and immunities of the Court staff, as required both by Article 48 of the Rome Statute and the Agreement on Privileges and Immunities of the International Criminal Court (Agreement) which was adopted by the Assembly of States Parties in September 2002. Malta should take immediate steps to sign and ratify this Agreement, and should also incorporate the provisions of the Agreement into national law, in order to extend full protection to the staff of the Court, counsel for victims and accused and others, as well as to the Court's property, communications, evidence and other matters covered by the Agreement.

C. Nomination of candidates to be judges or the Prosecutor

The Act does not contain any provisions on the process for the nomination of a judge or the prosecutor for the Court. Amnesty International recommends that the legislation be amended to include such provisions. The procedure adopted should be open and involve the broadest possible consultation, in order to ensure the nomination of the best possible candidate. Amnesty International has previously recommended that the executive should make a public call for all possible nominations for the selection process; that the nomination of the greatest number of candidates should be encouraged; and that civil society and other interested parties should have an opportunity to comment on the knowledge and experience of each candidate.¹⁹

¹⁸ This legislation is available at <http://www.amnesty.org/icc/>

¹⁹ See: Amnesty International, *International Criminal Court: Checklist to ensure the nomination of the highest qualified candidates for judges* (AI Index: IOR 40/023/2002), available at: <http://www.amnesty.org/icc/>.

D. Cooperation with investigations and prosecutions

1. Basic obligation to cooperate with the ICC

The Act does not contain any provision concerning the basic obligation of national authorities to cooperate with the Court. This basic obligation is contained in Article 86 of the Rome Statute: 'States Parties shall, in accordance with this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court'. The Act should incorporate this mandatory language to make it clear to all national authorities that they have a duty to cooperate with the Court in the investigation and prosecution of crimes within the jurisdiction of the Court. Article 4 of the Act merely provides that the Minister 'may' make regulations providing for cooperation with the Court, and Article 3(3) provides that nothing in Part 2 should be read as 'preventing' assistance to the Court. This language is in marked contrast to provisions in the legislation of Georgia, Norway and Slovenia and draft legislation of Argentina and Uruguay, which require full cooperation.²⁰

The Act contains a list of possible purposes for which the Minister may make regulations.²¹ This list is similar to the list contained in Article 93(1) of the Rome Statute. However, not all provisions of this Article are included in the list. The Act should be amended to include the following provisions:

- the identification and whereabouts of persons or the location of items²²
- facilitating the voluntary appearance of persons as witnesses or experts before the Court²³
- the protection of victims and witnesses and the preservation of evidence²⁴

In addition, some items listed in the Act are not as detailed as the list contained in the Rome Statute. For example, the Act states that the Minister may make regulations concerning 'the exhumation of any body'.²⁵ However, the equivalent provision in the Rome Statute refers to 'the examination of places or sites, including the exhumation and

²⁰ This legislation is available at <http://www.amnesty.org/icc/>.

²¹ International Criminal Court Act, Art 4.

²² Rome Statute, Art 93 (1) (a).

²³ *Ibid*, Art 93 (1) (e).

²⁴ *Ibid*, Art 93 (1) (j).

²⁵ International Criminal Court Act, Art 4(g).

examination of grave sites'.²⁶ The Minister should include this more detailed provision in the regulations. Similarly, the Act states that the Minister may make regulations concerning 'the freezing or seizure of proceeds for eventual forfeiture'.²⁷ However, the equivalent provision in the Rome Statute provides for '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**' [emphasis added].²⁸ The Minister should include this more detailed provision in the regulations.

However, Amnesty International welcomes the inclusion in the list of types of assistance that are not specifically included in the Rome Statute, particularly the verification of any evidence or other material.²⁹

2. National security information

Article 5 of the Act covers national security information. It states that no evidence will be produced which would be prejudicial to the security of Malta and that a certificate from the Prime Minister stating that the production would be prejudicial will be conclusive evidence of that fact. However, Article 72 of the Rome Statute sets out a detailed procedure for determining how to deal with requests for information which a state believes would be harmful to its national security. This Article provides that it is up to the Court to determine whether a state is not acting in accordance with its obligations under the Statute. Unfortunately, the Act does not contain any of the detailed provisions outlined in this article of the Statute. In the event that the Court determines that a state has failed to fulfil its obligations, it can refer the matter to the Assembly of States Parties, or the Security Council in the case of a Security Council referral, to decide what steps should be taken to ensure that the state fulfils its legal obligations. Article 5 of the Act should be amended to provide that Malta will promptly and fully implement the decision of the Court and comply with any decision by the Assembly of States Parties or the Security Council under Article 87 if this situation arises.

3. Compelling witnesses to testify

As noted above, the Act does not contain any provisions on providing assistance for the voluntary appearance of persons as witnesses before the Court. The Act only deals with

²⁶ Rome Statute, Art 93(1)(g).

²⁷ International Criminal Court Act, Art 4(j).

²⁸ Rome Statute, Art 93(1)(k).

²⁹ *Ibid*, Art 4(k).

the situation of a voluntary transfer of a person in custody to testify at the Court.³⁰ The voluntary transfer of a person in custody to the Court is treated as a special case in Article 93 (1) (f) and (7), reflecting the traditional concerns found in state-to-state mutual legal assistance treaties and agreements. However, to be fully consistent with the Rome Statute, Amnesty International recommends that the Act be amended to include provisions not only for the voluntary appearance of witnesses before the Court, but also for compulsory attendance, if necessary, so that the Court's orders compelling the attendance and testimony of witnesses can be effectively implemented.

Article 64 (6) (b) of the Rome Statute expressly provides that the Trial Chamber may '[r]equire the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute'. Therefore, Malta should ensure that witnesses whose presence has been requested by the Court – whether sought by the Prosecutor, the defence or by the Trial Chamber – must testify before the Court, subject to any privilege under Article 69 (5) or international law or standards. In particular, the obligation to ensure that witnesses for the defence appear before the Court flows from the Trial Chamber's express duty under Article 64 (2) to ensure a fair trial. Witnesses can be compelled to testify at the Court under the legislation of Australia, Canada, Finland and South Africa, as well as in the current draft of Ireland's implementing legislation. Malta should therefore incorporate a similar provision into its legislation.³¹

Although Article 93 (1) (e) only mentions the obligation of states to facilitate the voluntary appearance of persons as witnesses or experts, the basic obligation in Article 86, coupled with the power of the Court pursuant to Article 64 (6) (b), requires states to ensure the compulsory attendance and testimony of witnesses and experts before the Court at its seat or in video conferences. Moreover, the express list of types of assistance in Article 93 (1) is not exhaustive and requested states are expected to provide any other type of assistance not prohibited by the law of the requested state.

E. Arrest and surrender of accused persons

1. Ensuring there are no obstacles to arrest and surrender

The Act contains in Part 6 amendments to the Extradition Act, in order to allow arrest and surrender to the Court. The amendments provide that a request for the arrest of a suspect from the Court will be transmitted from the Minister of Justice to the Attorney General. If

³⁰ *Ibid*, Art 4(d).

³¹ This legislation is available at <http://www.amnesty.org/jcc/>.

the Attorney General is satisfied that the warrant appears to have been issued by the Court, the Attorney General shall apply to a Magistrate to authorise the execution of the warrant. The Magistrate will execute the warrant if the Magistrate is satisfied that the warrant has been issued by the Court.³² Similar provisions apply for the provisional arrest of a suspect.³³ The amendments also provide a detailed procedure, in conformity with the corresponding articles of the Rome Statute, for the transit of a suspect through Malta, including unscheduled landings.³⁴

Amnesty International welcomes these detailed provisions regarding arrest and surrender to the Court. However, the organisation believes that the Act would benefit from a provision stating that there will be immediate action to arrest a suspect and providing that surrender proceedings will take place on an expedited basis, with priority over other proceedings. Immediate action to arrest a suspect is required under Article 59(1) of the Rome Statute. In many states, extradition proceedings can be extremely lengthy and it is essential that surrender proceedings not suffer from similar delays.

2. Consent to surrender

Provisions allowing a suspect to consent to surrender are provided in Article 26G of the amendment to the Extradition Act. This Article provides that if a suspect voluntarily consents to surrender there will be no appeal allowed from the delivery order made. It is not clear from this provision whether the suspect will be informed of this right to appeal if they have not consented to surrender. The Act should therefore be amended to require the competent court to inform persons consenting to surrender of their right to appeal this decision if they do not consent, and that the court must satisfy itself that such persons have made an informed decision, advised by counsel.

3. Respecting the rights of those arrested

Once a person is arrested and brought before a competent judicial authority, this body can determine only whether the warrant applies to that person and whether the person has been arrested in accordance with the proper process.³⁵ There is no requirement that the judicial authority consider whether the person's rights have been respected. This important element is expressly included in Article 59 (2) (c) of the Rome Statute, which states:

³² Extradition Act, Art 26C.

³³ *Ibid*, Art 26D and 26E.

³⁴ *Ibid*, Art 26Q and 26R.

³⁵ *Ibid*, Art 26F.

‘A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:

- ...
(c) The person’s rights have been respected.

This provision should therefore be included in the Act.

In terms of other rights of those arrested, the Act does include provisions relating to interim release, in the same terms as Article 59(4) and (5) of the Rome Statute.³⁶

4. *Giving priority to the requests of the court over the requests of other states*

The Act does not incorporate the detailed provisions of Article 90 of the Rome Statute regarding the priority to be given if there is a competing request for surrender from the Court and for extradition from a state. The Act merely states that the Minister for Justice may make regulations to deal with this situation.³⁷ Amnesty International recommends that the Minister makes such regulations in accordance with Article 90 of the Rome Statute, giving priority to the request of the Court to the maximum extent possible. In order to reduce unnecessary delay in the case of competing requests, Malta should provide in all bilateral and multilateral extradition agreements and arrangements that Court requests should have priority over state requests. Amnesty International urges that the Minister prepare the regulations in a transparent manner in close consultation with civil society.

F. Justice for victims

The Act states that the Minister may make regulations to provide for the enforcement of orders by the Court specifying reparations for victims.³⁸ Amnesty International urges the Minister to do so, in accordance with Article 75 of the Rome Statute. Amnesty International urges that the Minister prepare the regulations in a transparent manner in close consultation with civil society. The Act should also include provisions for making voluntary contributions to the International Criminal Court’s Trust Fund for Victims. Malta should also consider establishing a national Trust Fund for

³⁶ *Ibid*, Art 26N.

³⁷ *Ibid*, Art 26T.

³⁸ International Criminal Court Act, Art 12(b).

victims of crimes under international law, as Canada has done.³⁹ The Act should also include an obligation on national authorities to protect victims and witnesses, in accordance with Article 93 (1) (j) of the Rome Statute.

G. Offences against the administration of justice

Amnesty International welcomes the inclusion in the Act of all of the offences against the administration of justice included in the Rome Statute.⁴⁰ However, as noted above, it should not be up to a political official to decide whether to prosecute one of these crimes. Rather, the decision should be made by an independent prosecutor, based on the normal objective grounds used by prosecutors in domestic cases – such as whether there is sufficient admissible evidence to justify a prosecution or whether the suspect is fit to stand trial. Any other criteria guiding decisions whether to prosecute should be neutral, objective criteria that are adopted after consultation with civil society and made public.

Article 7 of the Act allows prosecution of Maltese citizens or permanent residents for these offences, including when the crime was committed outside Malta. This provision is a step in the right direction. However, Malta should extend the jurisdiction over these crimes to include universal jurisdiction to ensure that there are no safe havens for persons who commit such offences undermining international justice.

H. Enforcement of judgments and sentences

The Act provides in Article 12 that the Minister may make regulations to provide for the enforcement of fines or forfeitures ordered by the Court, as well as orders against convicted persons specifying reparations to victims. Amnesty International urges the Minister to adopt such regulations, in accordance with Article 109 of the Rome Statute, in a transparent process that involves consultation with civil society.

Amnesty International welcomes the provision for Malta to accept prisoners from the Court.⁴¹ Article 11 (4) of the Act deals with the possibility of a prisoner escaping from custody.

However, the Act does not contain any provisions on the conditions of detention for such prisoners. The provisions of Article 106 of the Rome Statute should, therefore,

³⁹ Canada: Crimes Against Humanity and War Crimes Act 2000, s 30-32, available at <http://www.amnesty.org/icc/>.

⁴⁰ International Criminal Court Act, Art 7.

⁴¹ International Criminal Court Act, Art 9(1).

be incorporated into the Act, in order to ensure that the conditions of detention comply with international law and standards. In particular, the Act should include provisions that allow unimpeded and confidential communications between a sentenced person and the Court and allow access to the prisoner by staff of the Court.

The Act also does not include any provisions for the release of convicted persons at the completion of their sentence or for transfer at the completion of the sentence. This should be included in the Act, in accordance with Articles 107 and 110 of the Rome Statute. Malta needs to provide opportunities for transfer of persons who have completed their sentences and who are not nationals, and should assist the Court by bearing the expenses of the transfer. Malta should ensure that in exercising its discretion concerning transfers that such persons are not extradited or otherwise surrendered to another state where the person faces the risk of serious violations of human rights, such as torture, unfair trial or the death penalty.

I. Public education and training of officials

Amnesty International recommends that States should develop and implement programs for the training of judges, prosecutors, defence lawyers, police, army and court officials and foreign affairs officials concerning their respective obligations under the Rome Statute. Malta should also update the military manuals to incorporate appropriate references to the Statute.

Consultation with the International Criminal Court

In reviewing and considering the comments in this letter, it would be useful to consult the Presidency, Registry and Office of the Prosecutor of the Court for their expert advice, which was not available at the time the Act was drafted and adopted by Parliament.

Annex: Table comparing provisions of Maltese law with the Rome Statute of the International Criminal Court

Rome Statute	Malta legislation
Part 1. Establishment of the	

Court	
Article 1	
Article 2	
Article 3	There does not appear to be a corresponding provision in the legislation.
Article 4	
Part 2. Jurisdiction, admissibility and applicable law	
Article 5	
Article 6	Criminal Code, Art 54B
Article 7	Criminal Code, Art 54C
Article 8	Criminal Code, Art 54D
Article 9	
Article 10	
Article 11	
Article 12	
Article 13	
Article 14	
Article 15	
Article 16	
Article 17	
Article 18	
Article 19	
Article 20	
Article 21	
Part 3. General principles of criminal law	
Article 22	
Article 23	
Article 24	
Article 25	Criminal Code, Art 41, 42, 48A, 54B(2)
Article 26	Criminal Code, Art 35
Article 27	Extradition Act, Art 26S
Article 28	Criminal Code, Art 54E
Article 29	There does not appear to be a corresponding provision in the legislation.
Article 30	Criminal Code, Art 54F; ICC Act, Art 8

Article 31	Criminal Code, Art 33-34, 223
Article 32	
Article 33	
Part 4. Composition and administration of the Court	
Article 34	
Article 35	
Article 36	There does not appear to be a corresponding provision in the legislation.
Article 37	
Article 38	
Article 39	
Article 40	
Article 41	
Article 42	
Article 43	
Article 44	
Article 45	
Article 46	
Article 47	
Article 48	There does not appear to be a corresponding provision in the legislation.
Article 49	
Article 50	
Article 51	
Article 52	
Part 5. Investigation and criminal proceedings	
Article 53	
Article 54	
Article 55	Constitution, Art 34, 36
Article 56	
Article 57	
Article 58	
Article 59	Extradition Act, Art 26F(2), 26N
Article 60	
Article 61	

Part 6. Judgment	
Article 62	There does not appear to be a corresponding provision in the legislation.
Article 63	Criminal Code, Art 374-375, 443
Article 64	Constitution, Art 39
Article 65	
Article 66	Constitution, Art 39(5)
Article 67	Constitution, Art 39; Criminal Code, Art 374-375, 392-393, 443, 458
Article 68	
Article 69	
Article 70	International Criminal Court Act, Art 7
Article 71	
Article 72	International Criminal Court Act, Art 5
Article 73	
Article 74	
Article 75	International Criminal Court Act, Art 12
Article 76	
Part 7. Penalties	
Article 77	Criminal Code, Art 54I(4)
Article 78	
Article 79	
Article 80	Criminal Code, Art 54I(4)
Part 8. Appeal and revision	
Articles 81 to 85	
Part 9. International cooperation	
Article 86	International Criminal Court Act, Art 3
Article 87	
Article 88	
Article 89	Extradition Act, Art 26F, 26Q, 26R, 26T
Article 90	Extradition Act, Art 26T
Article 91	Extradition Act, Art 26C
Article 92	Extradition Act, Art 26D, 26E
Article 93	International Criminal Court Act, Art 4; Criminal Code, Art 54H
Article 94	

Article 95	
Article 96	
Article 97	
Article 98	Extradition Act, Art 26S
Article 99	
Article 100	
Article 101	
Article 102	
Part 10. Enforcement	
Article 103	International Criminal Court Act, Art 9
Article 104	International Criminal Court Act, Art 10
Article 105	
Article 106	There does not appear to be a corresponding provision in the legislation.
Article 107	There does not appear to be a corresponding provision in the legislation.
Article 108	
Article 109	International Criminal Court Act, Art 12
Article 110	There does not appear to be a corresponding provision in the legislation.
Article 111	International Criminal Court Act, Art 11
Part 11. Assembly of States Parties	
Article 112	
Part 12. Finance	
Article 113 to 118	
Part 13. Final clauses	
Articles 119 to 128	