MEETING OF SENIOR OFFICIALS OF LAW MINISTRIES

LONDON, 19 - 21 JUNE 1989

MINUTES

Monday 19 June 1989

MR WILLIAM MONTGOMERY (Assistant Secretary-General) called the Meeting to order and made the following opening remarks:

"Ladies and Gentlemen - It gives me very great pleasure to welcome you on behalf of the Commonwealth Secretary-General, to this meeting of Senior Officials from Commonwealth Law Ministries. It is always a happy occasion for Commonwealth lawyers to meet at Marlborough House, or here at Lancaster House, as both venues have witnessed historic Commonwealth achievements to which we as lawyers have been able fully to contribute. This is, then, a setting to which imagination, flair and enterprise are no strangers. It will be for you to continue in the established Commonwealth legal tradition, establishing standards for those who will follow.

Your meeting is a very special occasion and testimony to the growth of legal co-operation between Commonwealth jurisdictions. It is perhaps worth recalling that the modern Commonwealth inherited a web of mutual assistance arrangements. Many, principally in the area of private law, survived the process of independence and continue to serve private litigants in Commonwealth courts.

It was in the area of mutual assistance in criminal matters, touching as it does on delicate matters of sovereignty, that arrangements such as extradition and the removal of prisoners were placed in position on the emergence of a Commonwealth of 48 independent nations.

Thus it was to extradition (or, if you prefer, to the rendition of fugitive offenders) that the Commonwealth Secretariat first directed its attention. Just one year after the Secretariat itself was founded in 1965, Commonwealth extradition arrangements were agreed here in London, embodied in what was in its time the most wide-ranging of all international arrangements. Time has since taken its toll on our collective claim to having the most efficient of all multi-lateral extradition arrangements, and a proposal by our Canadian colleagues is before you this week. I hope that I may be allowed to voice the view that this suggested streamlining of the prima facie case requirement deserves your most careful consideration.

From extradition, the focus of Commonwealth endeavour in the legal field has moved to mutual legal assistance in criminal matters. But whereas in extradition, countries have been able to draw on the accumulated experience of centuries of state practice, in mutual legal assistance our conceptual thinking has had to be informed not by the practices of the past, but by the needs of the present. For lawyers, conditioned as we are to working within conceptual frameworks which broaden but slowly, this area of endeavour has been especially challenging. Confronted with a spectacular growth in international crime, much of it related to trafficking in illicit drugs, and constrained by traditional thinking in which one country does not in general enforce the criminal laws of another, it was plain that attitudes would have to change. And change they have.

The Scheme Relating to Mutual Assistance in Criminal Matters as between Commonwealth Jurisdictions, which Senior Officials prepared and which was adopted by Law Ministers in Harare in 1986 was in itself a major achievement. It is, as you know, fully supported by Commonwealth Heads of Government, and it paved the way for the wider international community to agree on last December's United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The UN Convention focuses in particular on mutual legal assistance, and does so in ways which accord fully with the Commonwealth Scheme. This is important, as if they are to work effectively, mutual legal assistance arrangements need to be as direct and complementary as possible. A welter of conflicting arrangements can only operate to the benefit of the international criminal, whose activities now pose such a threat to us all as individuals, to our societies and to the very processes of government.

But Schemes and Conventions are only a beginning. They must be translated into effective domestic legislation and then into daily practice. It is in recognition of this that your Law Ministers also decided at Harare that Senior Officials should meet from time to time to review progress with implementation, to exchange experience in overcoming points of difficulty and, where necessary, to recommend any necessary changes to existing Schemes for their consideration. This week you will have before you all three existing Commonwealth Schemes - on extradition, on mutual legal assistance in criminal matters and on the transfer of convicted offenders.

It is not enough however that our legal systems provide maximum assistance to each other. A shared heritage renders intra-Commonwealth co-operation readily achievable, but all of us have non-Commonwealth neighbours and none of us can ignore the world beyond our association. For this reason the Commonwealth has studiously avoided any attempt to duplicate arrangements which have been achieved in other fora, such as the Hague Conference on Private International Law. Indeed, when international child abduction was discussed by Law Ministers at their meeting in Barbados in 1980 they decided not to pursue a Commonwealth approach to the problem but that the Commonwealth should actively join in the Hague Conferences's quest for a solution. This we did, and that is why the topic may well arise at a convenient point in your discussion this week. It is one of the reasons why we welcome the representative of the Hague Conference to our deliberations this week. The Hague Conference has borne much of the load in providing an international framework for judicial procedures in civil matters, such as the service of process, the taking of evidence abroad, and legislation. We also are delighted to welcome the representative of ICPO-Interpol, and to record our very great indebtedness to Interpol for the help and support we have received from headquarters in St Cloud.

The Commonwealth initiatives in recent times will take time and effort to translate into reality. But the need is compelling, and this is why in the course of 1988 the Secretariat organised three well-attended regional workshops on the new arrangements - in Sydney, Lusaka and Bermuda. This is why the Secretariat has also published four volumes of materials to assist you in your work. This is why, too, we are gathered here today looking forward to a week of hard work and of fruitful deliberation, and in the expectation that when Commonwealth Law Ministers gather in New Zealand in April of next year each Minister will be able to report substantial progress to his or her colleagues.

Ladies and gentlemen, I will not detain you further. I wish you the very best of good fortune and a happy, harmonious and profitable week's work. Commonwealth legal gatherings invariably have a very special quality. I am sure this meeting will be no exception."

MR MONTGOMERY called for nominations for Chairman and declared the Hon TAN BOON TEIK (Attorney-General of Singapore) elected unanimously on the nomination of TRINIDAD & TOBAGO, seconded by ZIMBABWE.

THE CHAIRMAN thanked the delegates for the honour they had conferred upon him in electing him to chair their deliberations. He said that he proposed to follow the practice established at earlier ad hoc meetings of Senior Officials from Law Ministries, and invite other delegates to chair certain aspects of the proceedings. He also suggested that the meeting might wish to establish a small drafting group, with the membership of Australia, Britain, Canada, Jamaica, Zambia, Zimbabwe and the Chairman (ex officio) and invited volunteers to join the group. India and New Zealand both offered to join the group, and these offers were accepted.

The draft agenda was adopted. Heads of delegations introduced their delegations to the Meeting.

AGENDA ITEM 5

THE CHAIRMAN invited delegations in turn to report progress with implementation of the "London Scheme".

THE DELEGATE FOR AUSTRALIA advised that Australia had implemented the London Scheme in 1966. It had, to the best of its ability, incorporated in Acts enacted since then the 1983 and 1986 amendments. There had been some minor variations to account for local conditions. Australia's legislation applied to all Commonwealth countries.

THE DELEGATE FOR THE BAHAMAS reported that his country had not yet taken any formal steps to implement the London Scheme but still operated under the UK legislation of 1870 and 1967. The enactment of legislation along the lines of the London Scheme was expected shortly, but this was to be preceded by discussions with non-Commonwealth neighbours which were expected to conclude by about September of this year.

THE DELEGATE FOR BANGLADESH said that his country's 1974 enactment covered most of the matters contained in the London Scheme. This provided for treaties with any country, including a Commonwealth country, for the rendition of fugitive offenders. Where there was no treaty, Bangladesh could, on receipt of a request from any country, consider the return of a fugitive to the requesting country subject to certain conditions. Offences were scheduled, and discussions were taking place with view to possible abolition of the enumeration of offences which could be subject of extradition proceedings.

THE DELEGATE FOR BARBADOS said that the London Scheme had been adopted by his country in 1979. It had been tested in his country's courts on only a few occasions, and no serious difficulties had been accounted.

THE DELEGATE FOR BERMUDA reported that, as a dependent territory, his country of necessity proceeded under the 1967 Fugitive Offenders Act of the U.K. He assumed that if and when the UK implemented the amendments to the London Scheme, these would be extended to Bermuda.

THE DELEGATE FOR BOTSWANA advised that his country had extradition legislation applying to the whole of the Commonwealth, although in practical terms they had run into problems with some of their neighbours to the extent that, in terms of their own Acts, the reciprocity which Botswana considered was basic to extradition did not appear to be present.

THE DELEGATE FOR BRITAIN was glad to be able to report that their extradition arrangements had been reformed by the Criminal Justice Act 1988. That Act had two purposes. First, it was intended to improve substantially extradition arrangement with non-Commonwealth countries where the old arrangements were not satisfactory. Second, it was intended to take account of many of the amendments for Commonwealth extradition which were adopted at

the meetings of Law Ministers in 1983 and 1986. The next step would be to consolidate all of the UK's law on extradition into a single Act. At present they had the Extradition Act of 1870 and a series of amending Acts, which was somewhat confusing. They hoped by the end of the year to have brought all the measures together in a single new Act (incorporating the changes in the 1988 Criminal Justice Act). Thus from 1 January 1990 they hoped to have a single and effective Extradition Act.

THE DELEGATE FOR BRUNEI noted that extradition was still dealt with under the Imperial legislation.

THE DELEGATE FOR CANADA advised that Canada afforded rendition to countries which recognised the Queen as Head of State, providing assistance under the Imperial 1881 statute. They had attempted in 1978 to implement the 1966 scheme, but had not been successful in doing so. There was also an Extradition Act for non-Commonwealth countries under which treaties could be negotiated. Like the UK, they were attempting to rationalise their two pieces of legislation, and modernise the procedures. They had faced additional challenges with their Charter of Rights and Freedoms, but had won a number of court battles when fugitives had attempted to invoke the Charter.

THE DELEGATE FOR CYPRUS said that the Fugitive Offenders Law 1970 governed extradition to and from Cyprus, under which most Commonwealth countries had been designated as "designated Commonwealth countries". Cyprus had also ratified the European Convention on Extradition in 1970, but had not yet implemented the amendments to the London scheme of 1983 and 1986.

THE DELEGATE FOR DOMINICA reported that his country now operated under its 1981 legislation which to a large extent implemented the London Scheme. This applied to non-Commonwealth countries as well as to Commonwealth countries. They found the "list of offences" approach unsatisfactory, and were examining the possibility of applying the sentence criteria rather than the list criteria.

THE DELEGATE FOR GHANA advised that his country's extradition laws applied to all countries, both Commonwealth and non-Commonwealth. Recently there had been efforts to modify the arrangements, including a move to provide for the return of convicted offenders to serve their sentences. They had recently concluded an arrangement with Nigeria and the Republic of Benin to this end. This arrangement was working quite successfully.

THE DELEGATE FOR GUYANA said that his country had adopted the London Scheme by its Fugitive Offenders Act 1988. This only came into force in August, 1988 and it was too early to judge how well it was going to work. It applied to all Commonwealth territories as well as foreign territories.

THE DELEGATE FOR HONG KONG advised that the legislation in his jurisdiction was to be found in the Fugitive Offenders (Hong Kong) Order 1967. This Order extended the UK's Fugitive Offenders Act 1967 to Hong Kong with certain necessary modifications. The 1983 and 1986 amendments had not been incorporated in UK legislation as applied to Hong Kong to date. Nor could the extension of this legislation to Hong Kong survive 1997, so that Hong Kong would, under suitable authority, have to conclude its own arrangements in a form which could survive beyond 1997. Hong Kong would be examining its legislation to see what, if any, amendments were desirable. In recent years they had had a very active extradition traffic both with Commonwealth and non-Commonwealth countries, but they had encountered very few problems. They had not yet reached the stage of negotiating with other countries.

THE DELEGATE FOR INDIA explained that in his country the Extradition Act 1962 governed the subject. It was based mainly on the UK model. It treated Commonwealth countries separately from non-Commonwealth countries, insisting on treaties with the latter. The

main problem in implementing the London Scheme was the definition of "political offence" as there had been terrorist offences committed abroad which in some places were treated as political acts, and in others as criminal acts. The "no list" approach and the "no prima facie case" approaches both awaited a consensus upon which India would be happy to act.

THE DELEGATE FOR JAMAICA explained that extradition legislation had been introduced into the Jamaican Parliament designed to implement the recent amendments to the London Scheme, and also embracing non-Commonwealth countries. However the Bill had lapsed on the disolution of Parliament. The incoming government was examining the proposed extradition legislation with a view to its reintroduction into Parliament at an early date.

THE DELEGATE FOR JERSEY noted that the UK Fugitive Offenders Act 1967 applied directly to Jersey. There was a power to modify that Act by Order in Council but it had not proved necessary to do so. In fact no single request had been made for the extradition of any person to or from any Commonwealth country.

THE DELEGATE FOR KENYA said that they had implemented the London Scheme but had not yet made the amendments recommended in 1983 and 1986.

THE DELEGATE FOR KIRIBATI advised that his country had also enacted its own Extradition Act 1981, based on the London Scheme. The Act also repealed the Imperial Extradition Acts of the United Kingdom and the Fugitive Offenders Act 1967 of the UK as applied to Kiribati. Unfortunately the changes recommended in Sri Lanka and Harare had not yet been incorporated, but this was to be looked into. Since 1981 there had been no need to invoke their extradition law, and he suspected that in the South Pacific extradition had a somewhat low focus.

THE DELEGATE FOR LESOTHO reported that they had their own extradition legislation which applied to Commonwealth and to non-Commonwealth countries. Where there were no arrangements with another country, it was sometimes possible to proceed administratively. His country had not yet implemented the 1983 and 1986 amendments.

THE DELEGATE FOR MALAWI reported that his country operated under the UK Act of 1967 and they were looking at the recommendations made at Harare. Being a small jurisdiction, they had only ever received one request under their extradition legislation.

THE DELEGATE FOR MALAYSIA referred to her country's Extradition Ordinance 1958 and Commonwealth Fugitive Criminals Act 1967. The latter had been passed to implement the London Scheme. It did not apply automatically to all Commonwealth countries, but an extradition arrangement was necessary and, further, an Order by the Minister applying the Act to that country. Currently, both enactments were being examined with a view to incorporating the agreed amendments of 1983 and 1986.

THE DELEGATE FOR MALTA noted that their Extradition Act 1977 had substantially implemented the London Scheme, and it had remained largely unchanged since then. It did not apply to all Commonwealth countries automatically, requiring designation. The legislation had remained largely unchanged, and to some extent their 1977 legislation anticipated the certain of the amendments of 1983 and 1986. They still retained the "list" approach and they had not adopted the simplified approach. This was not a question of lack of interest but one of competing priorities.

THE DELEGATE FOR MAURITIUS referred the meeting to his country's Extradition Act 1970 which did not fully implement the London Scheme, but did so to a significant extent. Their legislation insisted on the existence of the treaty between the requested and the requesting state.

THE DELEGATE FOR NEW ZEALAND advised that her country had not yet implemented the London Scheme and its amendments. However the government hoped to introduce a Bill later in 1989 which would be comprehensive. It would implement the London Scheme and its amendments as well as dealing with extradition between New Zealand and foreign countries.

THE DELEGATE FOR NIGERIA recalled that legislation in 1966 had implemented the London scheme. This applied to all Commonwealth countries, on the basis of reciprocity. A decree in 1988 had implemented the amendment in Harare abolishing the enumeration of offences. His country entered into bilateral treaties with non-Commonwealth countries. His country had gone further by entering into separate treaties with countries who were members of the Commonwealth to allow for extradition in the drugs area.

THE DELEGATE FOR PAPUA NEW GUINEA explained that his country's legislation was based on reciprocity, and extended to all Commonwealth countries. His government was presently moving to amend the Act to provide for the universal application of the London scheme to all parts of the Commonwealth, without the need for reciprocity. They were also drafting a bill for consideration by Parliament later in the year and providing for the transfer of convicted offenders.

THE DELEGATE FOR SIERRA LEONE said that his country's extradition laws relied upon the usual, reciprocal basis.

THE DELEGATE FOR SINGAPORE explained that his country's 1968 Extradition Act implemented the London Scheme and also provided for extradition to and from non-Commonwealth states. Their legislation had been based on the Australian counterpart.

THE DELEGATE FOR SRI LANKA explained that to date his country had not been able to implement the amendments to the London Scheme as his country looked for reciprocity in extradition matters. He noted that arrangements had been made in his region relating to the terrorist exception, to ensure extradition of terrorists within the region.

THE DELEGATE FOR SWAZILAND said that the position in his country had not changed since the 1986 Meeting of Law Ministers in that his country still treated extradition on a bilateral basis. However, recently the Government had decided to authorise his Ministry to examine possible implementation of the London Scheme.

THE DELEGATE FOR TANZANIA noted that extradition was still dealt with under the Fugitive Offenders Act (UK). However his Government supported both the London Scheme and the Harare recommendations and the matter was under serious study to see if it could be incorporated either in their 1985 Criminal Procedure Act or consolidated into one single piece of legislation.

THE DELEGATE FOR TONGA reported that his country had implemented the London Scheme in its 1973 Extradition Act. In respect of the 1983 and 1986, amendments were currently under study.

THE DELEGATE FOR TRINIDAD & TOBAGO advised that his country had enacted the Extradition (Commonwealth and Foreign Territories) Act 1985, which repealed the relevant UK Acts and implemented the London Scheme and its 1983 amendments. The 1986 amendments to the Scheme were under study.

THE DELEGATE FOR ZAMBIA noted that her country's 1968 Act had implemented the London Scheme, and they were in the process of implementing the 1983 and 1986 amendments.

THE DELEGATE FOR ZIMBABWE reported that their 1982 Extradition Act had implemented the London Scheme. They were in the process of preparing the necessary amendments to implement the 1983 and 1986 changes to the Scheme.

THE CHAIRMAN invited the meeting to focus on the discussion paper prepared for the meeting by the Delegation of Canada. He recalled that in Harare in 1986 a proposal for the outright abolition of the prima facie case had been made, but no consensus was reached and the proposed amendments were not adopted. A compromise had been reached, following a proposal by the Canadian Delegation for the matter to be given further study and a paper produced for further consideration. This had been distributed as Extradition Working Paper 2. He invited the Canadian Delegation to open the discussion.

THE DELEGATE FOR CANADA said that his country favoured a rule which required a prior demonstration by the requesting country to the requested country of a sufficient evidentiary basis to establish a case for trial. This was in a fact a two fold process - a scrutiny of the request for rendition by the judiciary of the requested country and its being satisfied that there was sufficient foundation for the matter to be put to trial. It had been Canada's concern that extradition was too complex, too expensive and too time consuming to meet the modern day demands of law and reinforcement. The essential concern was that systems were not effective in dealing, particularly, with transnational crimes. However, the proposal presented by Canada retained the requirement for a prior demonstration that there was a case for trial but sought to redefine what was called "evidence for the purposes of extradition." At present this had to be put together in the form of numerous affidavits and depositions, excluding all hearsay and establishing all the essential ingredients of the offence. These must also show that statements were taken voluntarily and that such evidence was obtained in accordance with law. Judges were placed in a difficult position in having to determine for themselves whether the proper procedures in the requesting country had been followed. Canada had found that some countries, and particularly its European partners to treaties, had abandoned requests for extradition, to the detriment of international law enforcement.

To overcome this, the proposal suggests that a comprehensive "record of the case" be put together. The exclusionary rules under the law of the requested state would, in a fact, be suspended. The record of the case would be narrative in form, and would be accepted, although there would be reliability factor built in. A balance would be struck between the need to give the defendant the protection of law to which he was entitled and ensuring appropriate cooperation in international law enforcement. An independent judiciary would continue to make an assessment in the requested country.

The record of the case would be received by the court in the requested country as the evidence on which it would base its decision. The record of the case would contain essential information to identify the person concerned, a description of the conduct which was alleged to be the basis of the offence and the law that applied to the charges, the warrants for arrest issued by the judicial authority and an enumeration of the evidence (which would include as exhibits documents and other physical evidence which would assist the court in making its decision). This record would be received in the court of the requested country with a different kind of authentication than hitherto. It would have the affirmation of the person who had prepared the record (e.g. the senior investigating policeman in charge), who would provide an assurance as to the contents of the record. To give further integrity, a certificate of the Attorney-General of the requesting country would be necessary (he being an officer with judicial responsibilities). The Attorney-General would certify two things; that the evidence was sufficient for him to put case to trial in the court of his own country, and that the evidence set out existed and had been preserved for trial. This certificate, and the record of the case, would then be admitted without further proof of authentication or certification in the courts of the requested country. Evidence gathered anywhere in the world could be incorporated into the

record of the case, and this was especially important as increasingly transnational crimes involve evidence from a number of jurisdictions.

Such a document would enhance the preparation of a case and would overcome preliminary objections as to admissibility.

The next step in the recommendation was an assessment of the record of the case by a judge in the requested country. Under the prima facie test, the question the judge would ask was whether the evidence submitted by the requested part was admissible in the courts of the requested state, according to its law, and then whether it was sufficient to warrant a trial of the charges had the conduct occurred in the requested country.

The proposal suggested three options to back away from the prima facie case, and commended option B (2) to the meeting. Thus the suggestion was that not only should the Scheme be amended to provide for a "record of the case", but the judges in the requested country should be directed as to the test which was to be applied to that record. He noted that option B (1) was not far removed from the prima facie case requirement (as it retained an admissibility test). It also preserved the domestic standard of committal. Option B (2) was a further step away, as the authenticated evidence in the record of the case was required to be admitted, with the judge then enforcing a test of sufficiency for committal. The judge could not reject parts of that case, even if inadmissible in his own courts. There was an element of trust in that the requested country would trust the requesting country to afford a fair trial in accordance with it own laws and procedures.

Option B (3) went further still. The judge would be required to order rendition if satisfied that the record was complete and prepared in accordance with the requirements of the Scheme. Under this option the examination would be one of formal and not of substance. The judge would not be examining the question of sufficiency. It was suggested that Option B (3) would be taking too much away from the judges in the requested country, and indeed would cause difficulties for Canada under its constitutional arrangements. Canada's extradition laws applied to its own nationals, and it was thought that the constitutional position was that before such a step could be taken, the sufficiency of the evidence would have to be established to the satisfaction of a Canadian judge.

The thrust of the three options was the "record of the case".

The recommended Option B (2) would mean that the individual would go back to face trial in the requesting part only after having seen, and been tested for committal against, the evidence from the requested part. It was in effect a relaxation in the rules of admissibility of foreign evidence, and a relaxation of the traditional standards for extradition. But it did provide the fugitive with a measure of protection in that he was able to argue against the sufficiency of evidence in his own court, in his own language, and in front of his own judge, before a determination was made that there was a case for him to go to trial.

The paperwork at the end of the proposal demonstrated how the system could work. This related to evidence concerning an extradition from the USA for extradition of an American who had murdered a Canadian policeman and fled across the border into the USA. Thanks to mutual legal assistance, a brief incorporating evidence on both sides of the border had been put together. This included a summary affidavit, an affidavit of the autopsy report (which had not been available at the time that the summary affidavit was prepared, or its evidence could have been included in the summary affidavit) and a third affidavit concerning matters of law which the investigating officer was not competent to make. This exhibited the arrest warrants, the charges and the law. The three affidavits collectively were sufficient in Canada's extradition arrangements for the USA, with diplomatic officers authenticating the documents which were thereafter admissible in the USA court, who

applied the tests of "probable cause to believe" that the person had committed the offence as charged. Canada had been able to obtain rendition very quickly, despite challenges in the appeal courts; the person had been extradited, tried, convicted of first degree murder and the conviction was now under appeal.

The "record of the case" approach was commended as being more expeditious, as reducing the length of time of pre-trial custody for a person whose extradition was being sought, and so as a proposal which warranted serious consideration.

THE CHAIRMAN invited comment.

THE DELEGATE FOR BERMUDA congratulated the Canadian delegates in dealing with a difficult matter in such a thorough manner. He expressed agreement with the Canadian proposal, preferring Option B (2), which gave the necessary protection to the accused person whilst allowing the requested country a means of dealing with the matter expeditiously and without spending a lot of time and money on useless exercises. He had always been puzzled as to why evidence was examined in detail where an application for extradition was being made, and on all manner of technical points, whilst where a person had already been convicted in that country, of the same offence and on the same evidence, there was no problem at all in returning him.

THE CHAIRMAN suggested that option B (2) was likely to be the most attractive to the meeting.

THE DELEGATE FOR JAMAICA congratulated the Canadian delegation for a thought-provoking paper. He suggested that extradition involved the taking of an extraordinary measure in the state which was surrendering from its own jurisdiction someone for the purpose of being tried in another jurisdiction, on the basis that he had committed, or there was reasonable cause to believe that person had committed, a criminal offence. This carried with it a responsibility on the part of the requested country to be assured that certain minimum standards of fairness had been observed. This in turn could involve legal and foreign policy considerations, which was why the ultimate decision to surrender might be properly characterised as a political decision.

He recalled that this was not the first time that the question of the prima facie had been discussed, and recalled that they had not to date been able to arrive at a consensus on the issue, doubtless because of its sensitivity and the Commonwealth shared tradition of ensuring that manifest fairness prevailed.

On the question of differences between legal systems, while he appreciated difficulties with non-Commonwealth countries he was not aware of difficulties deriving from lack of familiarity arising within the Commonwealth. Certainly prima facie did exact a higher burden, but that did not arise as a result of unfamiliarity in a situation of shared legal tradition. It might be appropriate in bilateral arrangements to abandon the prima facie rule to overcome particular problems.

As to efficiency and experience, any departure from the prima facie rule, or any relaxation of the exclusionary rules of evidence, would indeed facilitate the effectiveness of extradition. The question as he saw it was to what extent and how far did one go in abandoning, in diluting, fundamental rules in relation to the need to establish a prima facie case? It could be difficult to put such a case together, but if everyone was required to surrender from one's jurisdiction someone within one's borders for the purpose of standing trial in another country, was it justifiable to depart from the rules that one would apply within one's own jurisdiction for the purposes of determining whether that person should stand trial within one's own jurisdiction? To him, that was the question. It was a delicate question, and one which did not admit of an easy

answer but he suggested that it was a question which required very careful thought. It was a difficult jurisprudential question and it was a difficult political question.

The proposal that one should submit a "record of the case" which might not comply with the formal requirements required for the prima facie rule was based on the premise that a certain degree of trust existed between Commonwealth countries to ensure a degree of reliability as to the contents of that record. However, in addition to that, the question arose of the sufficiency of the evidence necessary for the purpose of establishing whether it was right for a person to be sent abroad to stand trial. He suggested that it was somewhat difficult to separate out the question of the admissibility of evidence from the question of the reliability of the evidence itself; as in a sense they were intertwined.

He offered these observations merely to indicate that, although the proposals submitted in the Canadian paper deserved careful and exhaustive examination, and although they would assist as a matter of expedience in providing a more effective framework for dealing with extradition, it was necessary that the proposal receive the most careful and exhaustive examination. Particularly was this so bearing in mind that insofar as Commonwealth countries were concerned, it did not appear to him that the differences in legal systems (advanced as a basis for the justification for the departure) existed to any degree or extent.

If the case for change were made out, the question would then arise as to whether the change should be a mandatory rule or an option.

THE CHAIRMAN said that he was sure that all delegates would appreciate the seriousness of the problem and the ramifications of the proposal. He suggested that although there was no guarantee that standards of admissibility and quality of evidence would be uniform throughout the Commonwealth, there was a certain measure - he liked to think - of trust, which could be relied upon. If that were felt to be present, perhaps the way forward suggested in the discussion paper might commend itself to the meeting.

THE DELEGATE FOR THE BAHAMAS agreed that the Canadian paper was a thought-provoking one. The delegate for Jamaica had highlighted the seriousness of the proposal before the Meeting. His country was concerned about any proposal to move away from the prima facie rule. His country had had quite some experience. In the bulk of these cases the greater part of the evidence would be considered hearsay in the Bahamas. What was of even greater concern was that countries sought extradition of persons who had never been in their country. Requests were based upon the fact that the laws of the requesting country considered that the person sought was subject to their jurisdiction. The act complained of might have never been committed within territory of the requesting country and in some instances the act had never been committed with in the territory of the requested country. But even if the act had been committed within the Bahamas, and even if the laws of the Bahamas considered such activities to constitute an offence, they would still find it very difficult to proceed on the basis of the evidence being put forward by the requesting country, because of its hearsay nature. He suggested that the sufficiency of the evidence as well the nature of the evidence was important. It was a fact that many extradition requests were based on allegations which were wholly unreliable, and he suggested that these should be resisted.

The Bahamas was anxious to have a single law covering its extradition arrangements with both Commonwealth countries and with foreign countries, applicable across the board. If some Commonwealth countries were to do away with the prima facie case requirement and also with the hearsay exclusion, and some did not, those who did not were likely to be told in negotiations with other countries that they were out of line with other Commonwealth countries and so Commonwealth countries should align their laws accordingly.

He urged the meeting to treat the proposal as one of most considerable importance.

THE DELEGATE FOR SRI LANKA expressed certain concerns. In his country, a statement made to a police officer was not of itself admissible evidence. He also asked whether a certification by an executive arm of government would be accepted as being binding upon the judicial arm, as a constitutional matter, on the question of the presence of a sufficiency of evidence. The Attorney-General in making a certification would be acting in his executive capacity, and a court would wish to be satisfied that there was a counterpart judicial body which would certify as to the sufficiency of the evidence.

With regard to the options presented, he suggested that option B (1) could be looked at to see what could be worked to meet the requirements of delegates.

On an another matter, he asked whether moving to the "no list" approach assisted with dealing with the political offences prohibition. He asked too whether it might be possible to work into the Scheme a discretion not to return a person to a country where the court believed there was a likelihood that torture might be practised, along the lines of discretions conferred by some United Nations Conventions.

THE CHAIRMAN suggested that in the first instance the meeting should focus contributions on the specific proposal before the meeting dealing with prima facie.

THE DELEGATE FOR HONG KONG hoped that the authorities in his jurisdiction had a reputation for being both cooperative and successful in extradition matters. He was not aware of any problems which had arisen as a result of application of the prima facie rule, with all its ramifications, of a kind which would warrant a substantial inroad into an important point of principle. Hong Kong would prefer to retain the safeguards and the system with which its courts and community were familiar, both for that reason and because no particular difficulties had been experienced.

The paper presented by Canada was an interesting one, and he asked how a person faced with such evidence would test the evidence place before the courts of the requested jurisdiction, e.g. a case in which identification was a cardinal point in issue. In the Canadian example, the investigating officer had made an affidavit saying that he had been "informed" by a certain person that he had seen someone whom he believed to be the person sought doing something. That evidence would not be admissible in the courts of the requesting country, and he asked how it could be tested and challenged by an accused person. Second, he would be interested to know how real a problem the prima facie rule was creating within the Commonwealth. He suggested that before inroads of the kind contemplated should be considered, the parameters of the problem should be made plain.

THE CHAIRMAN said that he believed that the problem itself had been understated in the discussion at Harare.

THE DELEGATE FOR AUSTRALIA said that as the mover of the proposal discussed in Harare, he would like to make some observations. Australia had been prompted to put forward the proposal because whilst Commonwealth countries constituted one-third of the international population, the rest of the world had no prima facie rule. The problem was at its greatest as between Commonwealth and non-Commonwealth countries, where it had presented enormous difficulties. He believed it would be fair to say that European countries regarded common law countries as extremely difficult countries from which to obtain the surrender of fugitives. In the case of one European country, some 70 requests had been made of a certain common law country and these had been rejected on every single occasion with the result that the particular European country terminated its extradition treaty with that common law country.

Insofar as extradition as between common law (and in particular Commonwealth) countries was concerned, the prima facie rule had been used to great advantage by criminals with large resources at their disposal with which to resist extradition.

He recalled that when fugitive offenders legislation was being considered in the UK at the end of the 19th century, one of the parliamentary committees had recommended that prima facie be not included in the UK legislation. He was not sure that those who advocated that the prima facie rule was entrenched in history as a matter of common law principle were on solid ground, as the record suggested that prima facie only came in on the basis of a marginal decision.

Further because of its attendant technicality, often debate over the admissibility of evidence in the requested country disguised the nature of the process. The true nature of the process was not to determine whether a person should be placed on trial in a requested country. It was to determine whether a person should be returned to a requesting country, to stand trial in that country. To allow the process to be obscured and complicated by questions of admissibility of evidence in the requested country, he suggested, over-complicated the situation and actively prejudiced law enforcement.

He suggested that the world was getting smaller and smaller, and criminals were becoming increasingly mobile. He suggested that all countries find common denominators, whether they be common law countries or non-Commonwealth countries, on which to base effective extradition relationships. It was for these reasons that Australia had proposed at Harare in 1986 to relax the prima facie requirement. He felt Canada was to be congratulated for the discussion paper which they had placed before the meeting. Australia was very attracted to the middle ground in that paper (option B (2)) because this represented a substantial improvement on the present situation, whilst not going as far as the Australian proposal at Harare.

There were some matters of detail in the proposal which could be examined, but on the matter of principle, Australia was in favour.

THE DELEGATE FOR BERMUDA observed that the problem with the prima facie case arose primarily with non-Commonwealth countries. This would mean that Commonwealth countries increasingly would do away with the prima facie case to the point where they were treating non-Commonwealth countries in a different, and easier, way then they were Commonwealth countries. It would be more difficult to return a fugitive to a Commonwealth country than to a foreign country. A second observation was that under the present system an accused person could not test an affidavit by a person as to identification where the maker of the affidavit stated that he had first hand knowledge of identification. He asked what real difference it made whether that statement was made at first or second hand.

THE DELEGATE FOR BOTSWANA suggested that the proposal was not a very radical departure, and he supported Option B (3). In his country, statements were placed before a magistrate in extradition proceedings, and proceeded on that basis. Domestically, they had moved away from the preliminary examination to the point where the Attorney-General could direct the prosecution of a person based on a summary statement of the evidence against him. He saw no reason why the same form of summary by the requesting state should not be accepted, particularly where the Attorney-General, the person responsible for prosecuting a fugitive, entered a formal certification. He suggested that the proposal was definitely a step forward.

THE DELEGATE FOR NEW ZEALAND said that in her country's new Extradition Bill, New Zealand proposed to abandon the prima facie requirement. There had been two reasons for this. The first was a failure to secure the extradition of certain alleged offenders, particularly to the United States, which suggested that the law was simply not working. Second, New

Zealand wanted a uniform extradition law covering both Commonwealth and foreign countries. They saw no logic in applying different standards. Her country welcomed the proposal, particularly Option B (2) which it saw as a possible middle way through the divergence of views which had become apparent during the discussions in Harare in 1986. The question of fairness had been mentioned by delegates. However, she asked whether it would be unfair to send a person back for trial under rules which would apply had that person been arrested in the requesting state. Conversely, she posed the question whether it would be fair for a person to escape trial completely in the country which had jurisdiction to try the matter simply because of the operation of technical rules in the requested state. Were the compromise approach rejected, it would leave the Commonwealth in a very difficult position as regards the prima facie case. She would like to think that the Meeting could resolve the matter in a way acceptable to most countries.

THE DELEGATE FOR BRITAIN observed that the Meeting was dealing with issues which were both complex and sensitive. He suggested that a consensus covering the countries represented at the Meeting was not going to be easy. The position of the UK in this matter was, in a sense, an odd one. They had experienced, perhaps as much as any country, the difficulties which the prima facie rule posed to countries which did not have a common law system. Because the UK was geographically on the edge of Europe, and most extradition requests came from Europe, this had been a problem for the UK to the point where they would abandon the prima facie rule for most European countries. The prima facie rule would remain for non-European countries (including Commonwealth countries). The logic was that where one had a group of countries with the same legal traditions, the prima facie rule (though not without problems) was not the obstacle which it was between common law and non-common law countries. He suggested that it would be a little odd for the Commonwealth, with its shared legal traditions, to move away from the prima facie requirement. It would mean that change would be made where it was needed least rather than where it was needed most. He was not suggesting that there were no intellectual arguments in favour of relaxation and of having the same rules for everyone, but although this might be an ideal, in practice countries varied and when it came to legislating the proposition that all countries be treated exactly alike would encounter some difficulty. The political impetus for reform in this area within the Commonwealth was likely to run up against the argument that the primary need was for reform with arrangements outside the Commonwealth. If it came to a question of legislative priorities in dealing with major criminals, his impression was that his own ministers would wish to focus on arrangements for mutual assistance and the confiscation of the assets of convicted drug traffickers.

THE DELEGATE FOR INDIA noted that two divergent views had been expressed on the proposal. He suggested that a balancing of three divergent interests was required. First, the expedition of extradition. The laws should not be so cumbersome as to impede effective extradition. Second, the liberty of the subject should be protected in that arrangements should ensure that any person was only sent to a country where he would receive a fair trial. The third factor was that national laws could not be completely ignored, for example domestic laws on hearsay. He suggested that option B(3) provided a recently good balance between these three competing interests, and he would support it.

THE DELEGATE FOR ZIMBABWE said that the matter was a difficult one, but he considered that the argument in favour of change was a convincing one. Where smaller countries were the requesting party, he asked whether the burden required of them under prima facie was not too much. He asked whether it was fair that simply because a fugitive had left the country and was in another Commonwealth country, a whole new dimension should arise. Had the person been intercepted before he left the country, he would simply have been dealt with under the law of the requesting country, without the requested country having any role whatsoever. Basic principles had to develop in the light of experience and over time. He suggested that the time had now come for modification of the prima facie rule, although before his country's final position could be decided they would need to reflect on the

matter further. The Canadian paper was an excellent one and indicated ways forward, and perhaps because there were options in the paper it meant that the matter required further consideration. He suggested that the meeting might be minded to agree that some way of relaxing the rule should be found, and to recommend to ministers that some route along the lines of the proposals made by Canada be examined. He suggested that the meeting need not at this stage agree on any particular option.

THE CHAIRMAN said that there was certainly need for close consideration to be given to the discussion paper, and the suggestion of more time was, he thought, a proper one and one which he would commend to the meeting. The divergence of opinion had been such that he doubted whether the meeting, as things presently stood, would be able to come to a consensus one way or the other. He suggested that the meeting might at this stage wish to conclude discussion of the agenda item on the basis that the matter could be the subject of further study.

THE DELEGATE FOR AUSTRALIA suggested that one of the problems experienced in Harare had been the fact that the Australian proposal had been received very late. Now that delegates had the benefits of the present meeting, he asked whether the matter might not be further considered on the eve of the forthcoming Law Ministers Meeting in New Zealand in 1990.

THE DELEGATE FOR SINGAPORE suggested that the Canadian proposal should be seriously considered. There was a difficulty with Option B (2) which was that courts had to assess the sufficiency of the evidence based on records produced by the requesting country, which might in certain circumstances be insufficient for such a determination. Perhaps an additional provision might be included to permit the courts of the requested country to request further information where the documentation provided was inadequate for a proper assessment. The Chairman, after asking whether it was the wish of the meeting for the proposal to be the subject of further discussion prior to the next Law Ministers Meeting, adjourned consideration of the paper on that basis.

AGENDA ITEM 6

THE CHAIRMAN invited Mr Tom Sherman (to Australia) to assume the Chair for consideration of agenda item 6.

THE CHAIRMAN (Mr Tom Sherman) suggested that the meeting receive country reports before dealing with the substantive matters under the agenda item. He suggested that they consider the recent UN Convention separately. He invited brief country reports of developments to date so far as agenda item 6 (a) and (c).

THE DELEGATE FOR AUSTRALIA recalled that their 1987 Mutual Legal Assistance Act had come into force in August 1988. Their legislation did not apply automatically to all the Commonwealth countries, and had to date only been applied to one country, Switzerland. They were in the process of applying it to Japan and noted that a treaty on mutual legal assistance in relation to drugs had been concluded with the UK. This treaty would come into force once the necessary subordinate legislation had be made in both countries.

Their experience with the legislation had been interesting. As they negotiate treaties with both Commonwealth and non-Commonwealth countries, they were finding it necessary to amend their mutual assistance legislation. Indeed, they had been minor amendments made at every parliamentary sitting since their initial legislation had been enacted. Sometimes these related to very simple matters, for example whether one should be able to take evidence in Australia for Hong Kong to use in an extradition proceeding from Singapore. This had not been envisaged originally, but there had been a country with a need for

evidence relating to criminal matter, and the fact that the immediate proceedings for which the proceedings were necessary were not in their own country was something which, Australia had had decided, should not be allowed to obstruct the provision of such assistance. Thus, legislative amendment had been necessary. Other amendments related to experience with the forfeiture of the proceeds of crime, and the need for adequate protection for the rights of bona fide third parties now the holders of property which at some stage had been derived from crime. She suggested that Australia should continue to keep other Commonwealth countries abreast of their experience in this matter either bilaterally or through the Commonwealth Secretariat.

Their experience under the scheme had been in that 2½ years the case work in relation to mutual legal assistance (including the taking of evidence) had increased by a factor of 950 per cent. This needed the setting up of an efficient central office system, with attendant expenses. This would increase as schemes were accepted more widely. It was also essential that matters not be left entirely to lawyers. They had found it necessary to teach the police how to use the new systems, and to familiarise their prosecutors with the developing arrangements.

THE DELEGATE FOR THE BAHAMAS reported that his country had enacted a criminal Mutual Legal Assistance Act in 1988, substantially in accordance with the Canadian provisions. It only applied where there was a bilateral or mutilateral mutual legal assistance agreement which was then designated under the Act. The only problems to arise related to the disclosure of banking transactions, but notwithstanding his country had been able to discharge the requests it had received to date.

THE DELEGATE FOR BANGLADESH advised that his country had not as yet introduced legislation to implement the Harare Scheme. This was presently being discussed and considered. There were some specific provisions for mutual assistance scattered through his country's statute book, but these were the usual, traditional forms of assistance. They were also taking keen interest in developments in other Commonwealth countries in order to benefit from experience to date.

THE DELEGATE FOR BARBADOS said that his country was very interested in all areas of mutual legal assistance, especially in criminal matters, although no legislation had as yet reached their statute book.

THE DELEGATE FOR BERMUDA recalled that his jurisdiction was subject to Imperial legislation in matters of external relations. He expected that the UK legislation would be extended to Bermuda. Presently they were acting ad hoc by doing all they could in the absence of formal arrangements. They had a taxation information agreement with the USA (even though Bermuda had no income taxes!), but that was the only specific arrangement at present.

THE DELEGATE FOR BOTSWANA said that his country cooperated especially with its immediate neighbours, in matters of mutual legal assistance but presently did so on an informal basis. The informal arrangements had been working very well, but there were areas where legislation would be required. They did not yet have the Harare scheme in place.

THE DELEGATE FOR BRITAIN said that his country regarded the issue as an important one, where legislation was necessary. There were 3 key stages in dealing with criminals, the first of which was intelligence. Intelligence arrangements with Commonwealth police forces and others were excellent. The final stage was extradition, which had been discussed that morning. In between lay the stage of turning police intelligence into the evidence without which a trial was not possible. The UK's non-Commonwealth neighbours had suggested that arrangements in this area with the UK were not satisfactory. The UK was in the position of only providing evidence when a case was "pending", but they were only able to reach

that point with the evidence they required. He appreciated the frustration of civil law countries with that proposition. They had not experienced such complaints from fellow Commonwealth members, but legislation was needed. He hoped it would be introduced in the near future. The legislation would be in a form which would apply to requests from all countries. It would not require reciprocity or bilateral agreements (unless other countries particularly needed bilateral agreements). Without further ado the UK would be able to assist with reasonable requests to turn intelligence into evidence.

THE DELEGATE FOR BRUNEI indicated that his jurisdiction had yet to act on the matter.

THE DELEGATE FOR CANADA noted that legislation had been enacted to provide comprehensively for mutual criminal legal assistance, including the international enforcement of fines in appropriate cases. They were particularly pleased with their proceeds of crime legislation, which complemented mutual legal assistance in criminal matters and provided for the identification, location, seizure and confiscation of the proceeds of crime, no matter how those proceeds had been obtained. In negotiating bilateral arrangements for mutual assistance, Canada had concluded a treaty with the United Kingdom (so far limited to drug trafficking offences) and a mutual legal assistance treaty with Australia was awaiting signature. Canada intended to ratify both quickly. Canada was also working with The Bahamas to finalise arrangements. They had been working closely with the United States, and were working with France, the Netherlands and the Swiss to finalise further arrangements. They had therefore been very happy with the progress they had made in implementing the Harare Scheme and looked forward to working with countries in and beyond the Commonwealth to make appropriate arrangements with countries wishing to work with them.

THE DELEGATE FOR CYPRUS noted that his country had not yet implemented the Harare Scheme but relevant draft legislation was under study and he hoped that in the very near future such legislation would be enacted.

THE DELEGATE FOR DOMINICA observed that his country had not yet introduced comprehensive legislation but was working on background information for consideration by Cabinet for implementation of the Scheme. In the meantime they had enacted tax information exchange legislation, and they had an agreement with the United States on that. Dominica also had legislation for the taking of evidence for both criminal and civil proceedings in other jurisdictions and were considering bilateral agreements, in due course, with both Venezuela and Taiwan on mutual legal assistance and extradition. He hoped that by the end of the year comprehensive legislation would been acted to implement the Harare Scheme.

THE DELEGATE FOR GHANA reported that his country had not yet enacted comprehensive legislation to implement the Harare Scheme, but they did have legislation which enabled other countries to apply to its courts to take evidence which then would be transferred through diplomatic channels. Ghana was currently having discussions with other countries in the region to develop regional arrangements along the lines of the Harare Scheme.

THE DELEGATE FOR HONG KONG noted that his jurisdiction provided some of the forms of assistance provided for under the Harare Scheme, but had not provided comprehensive legislation for it. Applications for assistance were no longer confined to cases where criminal proceedings had actually been implemented, but could also be applied for in cases where criminal proceedings were likely to be instituted if the evidence sought in Hong Kong was made available. Hong Kong's needs in the area of mutual assistance were being considered against the background of the changes to its position in 1997, and they had in mind moving towards the situation whereby they would be able to provide mutual legal assistance by way of legislation and a network of agreements. They also now had a Bill proposing legislation for the tracing, freezing and forfeiture of the proceeds of drug trafficking. The Bill included provisions for the enforcement of forfeiture orders outside the country.

THE DELEGATE FOR INDIA reported that his country did not yet have a single enactment dealing with all the matters in the Harare Scheme, but these were some provisions in India's domestic law to provide for mutual legal assistance in criminal matters - but this was based upon the principles of double criminality and reciprocity. They were also in process of amending their legislation relating to the taking of evidence to provide for applications at the investigative stage.

On the question of dual criminality, difficulties were being established as some countries did not have exchange control laws and many of the offences his country would like to pursue involved exchange control violations.

THE DELEGATE FOR JAMAICA reported that his country had not yet implemented the Harare Scheme but was presently considering the format of such legislation and had been active in the area of negotiating bilateral legal assistance treaties and agreements, particularly with the United States (on general assistance) and with the United Kingdom (concerning drug trafficking and forfeiture of the proceeds of drug trafficking). Those agreements would necessitate the introduction of legislation, which would be enacted within the framework of the Harare Scheme.

THE DELEGATE FOR JERSEY observed that as a dependency of the Crown, it would be able in due course either to extend the United Kingdom's Act, which was currently being drafted, or for Jersey to enact its own legislation. As a "constitutional peculiar" of the Crown it had these two different means of legislating. Jersey's 1988 drug trafficking offences law was very similar to the UK Act, but included a new concept which was styled a "saise judiciaire", which combined the legal effects of restraint orders and charging orders, which they found more easily in their own jurisdiction. Since the law came into force they had been able to use orders under that law to provide assistance to compel banks to give information in a number of cases, and they could by regulation specify countries and territories whose legislation could be enforced in Jersey. The legislation for the taking of evidence in criminal matters for use in other jurisdictions had been working well and were much used. They had, however, struck difficulties with continental neighbours, particularly in determining whether a request emanated from a court or tribunal. They had had a recent case in which the request came from an examining magistrate and after analysis it had become quite clear that the request was made not in his capacity as an officer of the court but as an investigating officer. Accordingly the provisions of the Act did not apply.

THE DELEGATE FOR KENYA reported that a draft Bill had been prepared and was now the subject of discussions with relevant government departments, which would implement the Harare Scheme. It was hoped that this would be enacted by the end of this year.

THE DELEGATE FOR KIRIBATI said that his country had no legislation yet, but was very much interested in the topic.

THE DELEGATE FOR LESOTHO observed that the subject was close to their hearts in Lesotho, but as yet no legislation had been prepared.

THE DELEGATE FOR MALAWI reported that in the circumstances of his country there did not seem to be any real need for mutual legal assistance arrangements. His was a small jurisdiction, trapped in the middle of Central Africa and the existing laws had proved satisfactory. However, they were monitoring the position closely and at an opportune time they would certainly legislate to implement the Harare Scheme.

THE DELEGATE FOR MALAYSIA reported that her jurisdiction was currently studying the Harare Scheme was in view to early implementation. They had received a request from Australia which they had not been able to meet simply because they had not yet enacted legislation

to implement the scheme. However, with the conclusion of the recent UN Convention against Trafficking in Narcotic Drugs and Psychotropic Substances they had to evaluate whether they needed a broad mutual legal assistance act or one restricted to drug trafficking. She envisaged that the central authority, when established, would be the Attorney General's department.

THE DELEGATE FOR MALTA said that his jurisdiction had no comprehensive legislation dealing with mutual legal assistance matters, but had to date been able to accede to most requests which had made and no particular problems had arisen. The only difficulty experienced was that referred to by the delegate of Jersey, relating to whether a request had emanated from a judicial authority.

THE DELEGATE FOR MAURITIUS said that his country had not yet given legislative effect to the Harare Scheme, but in a limited way some of the provisions had been incorporated into its domestic legislation, in particular the provision relating to the gathering of evidence from witnesses in Mauritius. He was optimistic that at least some provisions in the Harare Scheme would find their way to his country's statute book, especially given the aspirations of Mauritius to become a leading financial centre in the region and the establishment of off-shore banking and a stock exchange. This necessitated a degree of co-operation being established between Mauritius and other states. He personally, in prosecuting cases, had frequently found that evidence on a foreign component would have been most helpful in particular cases.

THE DELEGATE FOR NEW ZEALAND reported that her country proposed to introduce mutual legal assistance legislation into its Parliament towards the end of the year. It had similar taking of evidence provisions similar to those mentioned by other delegates. In other respects there was heavy reliance on informal assistance being given when requests were made.

THE DELEGATE FOR PAPUA NEW GUINEA expressed his country's support for the scheme, and advised that they had been supplied, on request, by Australia with copies its legislation. This was currently under close study.

THE DELEGATE FOR SINGAPORE advised that his jurisdiction was currently studying the Harare Scheme and he expected the Scheme to find favour with his country's Parliament. His country recognised the necessity for such legislation.

THE DELEGATE FOR SRI LANKA observed that his country had no specific mutual legal assistance legislation over and above the provisions commonly found in Commonwealth countries for the taking of evidence. They had experienced difficulties with their own courts in getting orders for the taking evidence abroad, and so saw the Harare Scheme as means for getting over these problems.

THE DELEGATE FOR SWAZILAND reported that the Harare Scheme was still under consideration by his government. In the intervening period, his country had been co-operating administratively and that in common with other countries in the region was making maximum use of informal arrangements.

THE DELEGATE FOR TANZANIA said that the Economic and Organised Crime Control Act 1984 provided for the seizure of the proceeds of serious crime. This anticipated the provision in the Harare Scheme. He assured his neighbours of his country's continuing wish to co-operate to the maximum.

THE DELEGATE FOR TONGA reported that his government was considering the possibilities of legislating to cover most of the provisions in the Harare Scheme.

THE DELEGATE FOR TRINIDAD AND TOBAGO advised that legislation for mutual legal assistance in criminal matters was presently being prepared. The first draft was being examined and he hoped that legislation would be in place by the end of the year. They also had an information exchange agreement with the United States, similar to those of Bermuda and Dominica. Also before the Parliament was a comprehensive Drugs Bill, which was approved by the lower house and was now going to the Senate. That Act created the new offence of dealing with property derived from drugs trafficking as provided for in the UN Convention. There were also wide provisions for the seizure and forfeiture of the proceeds of drug trafficking. It would also confer upon the Director of Public Prosecutions the ability to seize property the subject of foreign orders.

THE DELEGATE FOR SIERRA LEONE advised that there was as yet no specific legislation in his country adopting the Scheme, but that their participation in the workshops and other meetings and in the preparation of the Scheme was an indication of his country's interest in the matter. Sierra Leone was seriously contemplating the adoption of the Harare Scheme by legislation even if in a modified form. However, to date they had not requested nor had they received any requests which were prejudiced by the absence of any such legislation.

THE DELEGATE FOR ZAMBIA reported that her country was considering the implementation of the Scheme. They had also entered into a mutual legal assistance agreement with Zaire and with the GDR. They had an enacted the Drugs (Forfeiture of Property) Act 1989 which dealt with money laundering, trafficking, etc. This provided for assistance to foreign countries for the service of process and for taking of evidence.

THE DELEGATE FOR ZIMBABWE advised that his country had established a special committee to examine methods of implementing the Harare Scheme. They had reached the stage where the committee had produced draft legislation for consideration by government. He hoped that it would not be long before these proposals were enacted.

THE CHAIRMAN commented that Commonwealth schemes did take some time to implement across the board. Legislative priorities varied from country to country, and these problems had already been adverted to. A few things needed to be borne in mind, he suggested. Traditional legal assistance had severe limitations as it did not provide an effective mechanism for dealing with matters that involved crime. Further, often legislation of this nature was by way of insurance. There may have been no demonstrated historical need for legislation, but when the need arose, its priority came to a head very quickly.

Agenda Item 6(b)

THE CHAIRMAN, in introducing Professor David McClean to the meeting, stressed his essential role and the high level of intellectual input he had made to the achievement of the Harare Scheme. He invited Professor McClean to speak on item 6(b).

PROFESSOR McCLEAN observed that a draft model bill prepared by Mr W J Menary was before the meeting which would provide some help to governments in the preparation of legislation to implement the Harare Scheme.

The UN Convention was certain to have high political priority in the coming years which would cause governments to look at the possibility of legislation. He drew attention to the fact that governments could either legislate specifically for the drug problem or they could place drug provisions in a more general piece of legislation, covering confiscation of the proceeds of crime and mutual assistance in criminal matters in general. He expressed the hope that the work that had already been done in Commonwealth meetings might encourage a commonwealth law ministry to take the opportunity represented by the UN Convention to adopt the second strategy - to get a comprehensive code of legislation

enacted all at one time. The alternative was a whole series of Acts as had been demonstrated by Britain's experience with proceeds of crime. First there had been drug trafficking legislation; then it had to be applied to other offences; then a third element was to apply the approach to terrorist offences.

Looking at the Convention, article 5 dealt with the confiscation of proceeds. This was on the agenda and would be reached later. It provided for parties to the UN Convention to have in their law provisions for the freezing of proceeds, the tracing of proceeds and also for their forfeiture, either by proceedings in their courts or in response to orders made overseas which could then be enforced.

Article 5(4)(c) of the UN text provided that actions to provide the assistance specified would be taken in accordance with and subject to the domestic law of the requested country or subject to any international arrangements to which it might be party. It was doubtful whether the Harare Scheme met this later stipulation, as the Harare Scheme was not strictly speaking "binding" but nevertheless the provisions did match up.

The key provision was article 7 as far as the Harare Scheme was concerned. This dealt specifically with mutual legal assistance in such matters as the taking of evidence, effecting service, executing search and seizure, inspecting sites, providing information, providing relevant documents, identifying and tracing the proceeds of crime and instrumentalities, and so on. This really was the heart and soul of the contents of the Harare Scheme. The article provided in paragraph 7 that treaties would take priority, and the Harare Scheme was, of course, not a treaty. However in almost all respects the Harare Scheme provisions and the UN Conventions provisions matched up totally, and the only particular differences he had detected were at such a minor level as the UN Convention referring to the provision of details of nationality when a request was made (a consideration irrelevant in the Commonwealth context) and the grounds on which assistance might be refused. These latter were rather more limited, at least at a first reading. In the UN Convention text, however, the final ground was that it would be contrary to the legal system of the requested party relating to mutual legal assistance for the request to be granted. He suggested that the general terms of this would enable contracting states to bring in many of the specific grounds for refusal which were contained, often only as options, within the Harare Scheme.

Finally he pointed to the concluding paragraph of article 7 of the UN Convention which referred to consideration of bilateral and multilateral arrangements to give practical effect to the objects of article 7. This, he suggested, was a very real encouragement towards the arrangements contained in the Harare Scheme being put into effect.

He was happy to say that he could see in these particular articles no major conflict between the obligations which the UN Convention would impose upon contracting states and the moral obligations of the Harare Scheme on Commonwealth members. He hoped that the two would cross-fertilize each other and that the political imperatives in play to implement the UN Convention could be taken advantage of to get more general provision on the statute book for Commonwealth countries.

THE CHAIRMAN invited comments on the Vienna Convention.

THE DELEGATE FOR AUSTRALIA said that her country had signed the Convention in February and hoped to have the Convention ratified by the middle of 1990. She suggested that clause 19 (3) (p) of the model legislation might need to be modified where extra-territorial jurisdiction was claimed on the basis of a multilateral convention, at least where both the requesting and the requested state were parties to that convention. She simply raised the matter to draw to the attention of delegates.

PROFESSOR McCLEAN agreed that there was no provision in the Harare Scheme which dealt with the extra-territoriality point, although it was in the suggested model legislation - largely because it had been in the Australian legislation. He recognised that there issues to explore, and arguably these would also relate the question of extradition.

THE CHAIRMAN asked whether there were any other delegates who wish to speak to the matter of extra-territoriality or to the Convention. He invited those working on the model law to give consideration to changes that might be needed arising out of the convention.

In response to an invitation by the Chairman, Australia, Britain, Canada, The Bahamas, Malaysia and Zambia indicated that their countries had already signed the UN Convention. Those who expected to be signing the Convention within the next six months were Botswana, Dominica, Ghana, Malawi, New Zealand and Trinidad and Tobago.

Agenda Item 6(d)

THE CHAIRMAN invited Professor McClean to open the discussion.

PROFESSOR McCLEAN referred to Criminal Working Paper No.1. This suggested certain adjustments to the text of the Harare Scheme. The only important suggested changes related to the seizure of the proceeds of crime provisions, which would be dealt with under a later agenda item. What was now for discussion were minor textual amendments which might not have been worthy of consideration were it not for the substantive discussions to come.

The first point was to correct a typographical error in paragraph 1 (3) (i). In the second paragraph of the scheme the definition of "country" was inserted in Harare to replace the ungainly expression "part of the Commonwealth" as used in the extradition arrangements; the working paper suggested a more felicitous wording.

THE DELEGATE FOR NEW ZEALAND commented that paragraph 2 posed a problem for New Zealand in the sense that the Cook Islands and Niue do not regard themselves as either fully sovereign or as dependent territories of New Zealand. They were self-governing states in a voluntary, free association with New Zealand. She asked that this point be taken into account.

THE CHAIRMAN referred the matter to the drafting committee.

PROFESSOR McCLEAN accepted that some amendment was needed.

Paragraph 3 of the Scheme raised two points. The first was addressed in the paper - the need to provide for states such as Malaysia which chose to use a civil form of proceedings for the forfeiture of proceeds or instrumentalities of crime in lieu of the more usual criminal proceedings. He suggested that mutual legal assistance should be available in that context and that the changes suggested would accomplish this. The second point was one raised by Australia, namely providing mutual assistance to a country which was itself seeking to extradite an offender from a third country. He thought the latter point would be covered by the Harare Scheme as it stood, as there would be reasonable cause to believe that proceedings could be commenced - not immediately, because the accused would not be present, but the presence of the accused would not be a condition precedent to the provision of assistance under the Harare Scheme.

THE DELEGATE FOR AUSTRALIA indicated that she was content with this explanation.

PROFESSOR McCLEAN said that in paragraph 15 there was no proposal for a change, but it related to discussions at the Bermuda workshop where there had been some certainty amongst delegates. Paragraph 15 provided that a request be accompanied by the documents to be

served, and where those documents related to attendance in the requesting country, such notice as the central authority of that country was reasonably able provide about outstanding warrants or judicial orders in criminal matters against the person to be served. What was intended was that a witness summons could be served under the Harare Scheme, and it was thought appropriate to put on notice any person who received such a summons if there warrants out for him in the requesting country. However, some countries, such as The Bahamas, were opposed to serving witness summons. This had featured in discussions between the USA and The Bahamas in relation to their mutual legal assistance treaty. There had been uncertainty in Bermuda as to what the international practice was in this matter. The working paper invited comment on emerging practice in this area. The draft model legislation defined "document" as excluding a witness summons, but this really was a departure from the Harare Scheme.

On the question of "authentication", paragraph 2 of the Harare Scheme had a straight forward provision, but a somewhat more elaborate provision was needed, allowing for the authentication of materials sent either in or out. The normal system of authentication by the witness himself, or an appropriate officer, should be incorporated into the text.

Tuesday 20 June 1989

THE CHAIRMAN (Mr Sherman) called the meeting to order and invited the delegate of Jamaica to open discussion of Professor McClean's paper.

THE DELEGATE FOR JAMAICA congratulated Professor McClean on his paper. He made the general observation that the Scheme had been subject of considerable deliberation. From the reports the Meeting had received the previous day, the overwhelming majority of states were in the process of examining a scheme with a view to introducing implementing legislation. In many cases they had already drafted legislation, and in others legislation was before their Parliaments. He raised a question of procedure. The meeting was contemplating amendments which could have the effect of prolonging or delaying the course of implementation, rather than enhancing it. He asked whether it was appropriate, at such a stage, for the Meeting to consider changes. It was appropriate to be looking at drafting matters, but insofar as matters of substance were concerned and which had received detailed examination in jurisdictions, he suggested there might be some difficulties. He asked whether it might not be appropriate to postpone consideration until the dust had settled. He was concerned that implementation of the scheme not be delayed.

THE CHAIRMAN suggested that the nature of the amendments proposed by Professor McClean were essentially of a drafting nature, or involved fine-tuning. The point made was one of substance, but he felt the Meeting should be alert to refinements which could enhance the Scheme. He suggested that on balance countries considering legislating would be able to take on board amendments such as these relatively easily.

PROFESSOR McCLEAN concurred with the remarks made. He recalled that a great deal of work had been done at the regional workshops, particularly on the Secretariat's suggested draft legislation. As they had put much effort into this work at these meetings, it was really a matter of matching up the Scheme and the draft legislation. There was also one area of the scheme in which everyone was learning very fast, and that had originally been held over to Harare - namely the confiscation of the proceeds of serious crime. These provisions had not been through the Marlborough House meeting and had not been as fully considered as other provisions in the Scheme. Indeed, the international experience at that stage had been very slight. This was a very important area and one which the UN Convention done at Vienna had covered.

THE DELEGATE FOR JAMAICA had no doubt that the exchange of views at the meeting would be of assistance to governments. His concern lay with the purpose of the meeting. As he understood it, the meeting would make recommendations to next year's Law Ministers Meeting. Therefore any proposal that emanated from the present meeting would require consideration and endorsement by the next Law Ministers Meeting before it could be effective. It was in that context that he expressed his concern. Although they might unilaterally take certain decisions in their own jurisdictions, as far as the procedures were concerned decisions by the meeting would be recommendations and have no greater, or lesser, force than that. He asked what administrations would be expected to do on the basis of these deliberations in advance of the Law Ministers Meeting. He did not think it would be useful for jurisdictions to suspend their internal discussions, awaiting the outcome of the deliberations of ministers. The Chairman said that the point was well taken and that the context in which the proposals were being considered had to be borne in mind.

THE DELEGATE FOR SRI LANKA said that his own questions had been directed towards facilitating implementation in his own country. He asked whether it would serve any useful purpose to raise matters which had been sticking points for further discussion at the meeting.

THE REPRESENTATIVE OF THE COMMONWEALTH SECRETARIAT wholly concurred in the comments of the Delegate for Jamaica. Certainly the Commonwealth Secretariat had no wish to do anything which would slow down implementation of the Scheme. But at the same time, although appreciating the weight of the argument that while draft legislation was being prepared, the ground should not be shifted under the draftsman's feet. There was also the argument that came later, namely that legislation once enacted was "too new" to allow parliamentary time to amend it. It was something of a "catch 22" situation, which was why the consultant had been careful to steer away from anything such as the matters mentioned by the delegate for Sri Lanka - matters of substance which had proved sticking points. There was no wish to re-open buried controversies, but rather to take advantage of the various points which had been made by delegates at the Regional Meetings which appeared, at least to the Secretariat, to be uncontroversial. He suggested for consideration by the Meeting that if delegates considered the proposed amendments uncontroversial, then they were unlikely to create any controversy in New Zealand. If the Senior Officials saw little problem, then perhaps Ministers were likely to share their view. With respect, he encouraged delegates to look at each of the proposals put forward by the consultant. If they saw any possible controversy, then perhaps the suggestions in question should be put to one side. However, to the extent that they were merely tidying up the draft, then perhaps they could be allowed to go through and regarded as de facto and adopted even if de jure they would have to await the Law Ministers Meeting in New Zealand.

THE DELEGATE FOR MALAYSIA expressed gratitude for the suggestions made by the consultant in his paper, particularly extending forfeiture to cover civil proceedings. There was in Malaysia the unusual position whereby the Public Prosecutor could issue an order whereby the dealings in named property were restrained. These were not "complete proceedings" as such, although such an order could lead to proceedings inter parties. She knew the situation was unique to Malaysia, but wondered whether the definition of "proceedings" could be expanded further to cover this.

She would also ask whether the words "property derived or obtained, or used in connection with" envisaged covering tainted property as opposed to property directly obtained as such.

PROFESSOR McCLEAN said that he understood the Malaysian system as operating in two stages: first, an order issued by the Public Prosecutor which had the effect of a freezing order, as an interim, after which there could be what would clearly be "proceedings". He asked whether at the first stage there would need to be assistance from the state, or whether that order by the Public Prosecutor was one purely of domestic effect - because if it was, it would only be when the second stage was reached that mutual assistance would become relevant. If that were the case, too, the suggested amendments would meet the need.

As far as the second point was concerned, the phrase seemed to be that which was winning approval by draftsman around the Commonwealth. Some added the words "directly or indirectly", which might make the matter even more clear. Certainly, the redraft was intended, as far as possible, to cover tracing of profits in this way and to attach tainted property. The words "directly or indirectly" were used in the draft model legislation. He suggested that the drafting committee could look at the matter.

THE DELEGATE FOR MALTA addressed the definition of "criminal matter". He understood this as intended to cover forfeiture proceedings whether of a criminal or civil nature. Although he supported the extension of the definition, he felt the drafting could be improved in certain respects. He suggested drafting points for consideration by the drafting committee.

THE DELEGATE FOR BERMUDA suggested that, as assets were very often not discovered until long after criminal proceedings had concluded, the provision ought also clearly to cover the situation where proceedings were being commenced for forfeiture quite separately from other criminal proceedings.

PROFESSOR McCLEAN suggested that in most Commonwealth countries, though not Bermuda, such proceedings would have a criminal character.

THE DELEGATE FOR SRI LANKA said that in his jurisdiction the expression "property" only covered corporeal property and not incorporeal property. It would be helpful to his country to ensure that the definition of "property" covered both types of property.

PROFESSOR McCLEAN said that the Scheme did not define "property", leaving this as a matter for implementing legislation. There was a suggestion in the draft model bill in the materials published by the Secretariat also set out a range of definitions enacted in Commonwealth jurisdictions. He cautioned against the meeting going too far with matters of definition in the Scheme.

THE CHAIRMAN commented that in most countries, where legislation had been enacted, a wide definition, covering both types of property, had been used.

THE DELEGATE FOR JAMAICA suggested that they might wish to reflect on the question of treating forfeiture as a civil rather than a criminal matter. The definition in the consultant's paper covered a very wide area. Some of these would not be known to some jurisdictions, and this made relevant article 7 of the Vienna Convention, that for the request to be granted would be contrary to the legal system of the requested country - which he considered was a little wider than the grounds for refusal contained in the Harare Scheme. This was another matter in which they could be constitutional questions of considerable importance. The effectiveness of the Scheme was greatly enhanced by effective forfeiture provisions, but they had to bear in mind not only constitutional matters but also policy determinations which had to be made as to just how far a particular country went in dealing with the forfeiture of assets not directly resulting from particular crimes, but which were obtained from their proceeds.

PROFESSOR McCLEAN agreed that it was necessary to have a wide definition of proceedings because emerging practice was so divergent. Insofar as grounds for refusal were relevant, paragraph 7(3) of the Harare Scheme was useful and explained in some way the approach suggested. The paragraph used the trigger phrase "criminal matters arising", and not "criminal proceedings". The distinction was material and helpful, he suggested.

THE DELEGATE FOR JAMAICA said that the provision in paragraph 7(3) was helpful, although his inclination would have been not to draw the distinction between the two sets of wording. He suggested that the history of the provision would not support such a definition.

THE CHAIRMAN suggested that if the extended definition was agreed by Law Ministers in New Zealand, it would have the effect of a substantial amendment and would therefore meet the objection raised.

THE DELEGATE FOR ZIMBABWE said that his was one of the countries which was experiencing difficulties on account of constitutional provisions which could make it difficult to implement the Harare Scheme as it stood. There would be difficulty under his country's constitution in confiscating property owned by persons within his jurisdiction, but he hoped that a way out of the straight-jacket would be found. A constitutional change was probably unavoidable.

THE CHAIRMAN noted that this point had been raised by a number of countries in the discussions at Harare, and noted that this was the point which had been widely recognised.

PROFESSOR McCLEAN noted that rights to property were immediately raised where property was in the hands of third parties. A provisional answer might lie in the creation, and careful definition, of money laundering offences which involved receiving and laundering (however defined) the proceeds of crime wherever committed. This could then be an offence under the law of requested country, which was therefore committed within that territory and recognisable by the criminal jurisdiction of that country. Penalties and forfeiture could be attached to the commission of that offence, rather than to conduct which had taken place outside the jurisdiction. Thus the desired result could be reached. Relevant material was contained in Volume 3 of the materials published by the Secretariat.

THE DELEGATE FOR SRI LANKA sought clarification on the definition of "criminal matter". He asked whether this was intended to include a statement taken by a police officer in the course of an investigation or whether it was limited to the judicial recording of a statement.

THE CHAIRMAN suggested that the Scheme had been carefully designed to avoid duplicating the Interpol arrangements such as the informal taking of a statement by a police officer. They were all very conscious of the informal arrangements, and these had by and large been left out of the Scheme.

THE REPRESENTATIVE OF THE COMMONWEALTH SECRETARIAT also stressed the need to keep informal arrangements out of the formal arrangements to avoid Central Authorities from being flooded with unnecessary requests for formal assistance. The Harare Scheme, by providing for formal assistance, complemented the informal arrangements. Informal arrangements needed to be used to the maximum in order to ensure that the formal channels were left free to handle formal requests.

THE DELEGATE FOR SRI LANKA asked why investigatory stages had been mentioned in the preamble to the Scheme.

THE CHAIRMAN recalled that the Scheme added to existing mechanisms. For example, search and seizure was a normal part of an investigation and the advantage of this Scheme was that it would give to the law enforcement authorities in the requesting country the facility to have a search and seizure conducted in the requested country. That was a facility not available under current Interpol arrangements. Thus the Scheme covered investigation where it supplemented and enhanced informal arrangements by providing formal and compulsory mechanisms which were already made available within the requested country to its own law enforcement agencies.

THE DELEGATE FOR SRI LANKA asked whether the Scheme should not specifically deal with statements made in the course of search and seizure to avoid the situation arising thereby there was a search and seizure under the Scheme, but statements made in the course of that search and seizure were not available.

THE CHAIRMAN pointed out that the Scheme covered investigations as well as judicial proceedings. The scheme was not exclusive. The statement would, in practice, be available under the arrangements in train in respect of the particular investigation.

THE DELEGATE FOR BERMUDA reverted to the constitutional problems which had been referred to. Some delegates were fortunate in not having to face the problems of a written constitution. In order to foreshadow a possible constitutional attack in his own jurisdiction, they had adopted the approach suggested by the consultant by making it unlawful to have been in possession of the proceeds of drug trafficking. Secondly, they had moved on to provide that a confiscation order "is not any kind of punishment or penalty for any criminal offence or conduct" and further, "proceedings taken under this act for the confiscation of anything are not criminal proceedings" ... They had tried to make it clear that Parliament did not intend that even the odour of criminal proceedings should attach to forfeiture proceedings. The problem had been identified from the outset they had tried to deal with it. It remained to be seen what the approach of the court would be.

THE CHAIRMAN observed that the drafting committee would take into account various points raised by delegates. There being no further comments on "criminal matters", he suggested they discuss the suggested amendment to the service of documents (para. 15). He suggested that it might be best for each country to determine for itself whether or not documents included suppoenas.

Paragraph 15

THE DELEGATE FOR MALTA asked whether the consultant had had regard to the European Convention on criminal matters in this context, as it had comprehensive provisions dealing with subpoena. The safeguards built into the European Convention might make countries more willing to consider the services of suppoenas.

PROFESSOR McCLEAN said that the Convention had indeed been consulted from the outset. The immunity provisions for persons giving evidence voluntarily were drawn from the European Convention. The Scheme envisaged that the subpoena would be served, but it did not require the requested country to use any measure of compulsion on the individual concerned. The document was no more than an invitation to him to attend.

THE DELEGATE FOR BRITAIN said that they had no objection in principle to the service of a subpoena, and if there was to be any amendment they asked that it provide for the option of service where a country was prepared to do so.

THE DELEGATE FOR BAHAMAS asked whether the delegates would expect subpoenas with sanctions attached to them to be served by a Commonwealth country on persons within their territory. This was a matter of regular concern with their immediate northern neighbour, a non-Commonwealth member.

THE DELEGATE FOR BRITAIN considered that what the UK would do was to make it quite plain at the time of service that they, as the requested country, would not seek to attach any penalty to any failure to appear but would invite the person being served to consider seeking expert legal advice about the possibility that he might be liable to penalties in the requesting country should he elect not to comply with the subpoena.

THE CHAIRMAN said that the issue was really whether subpoenas would be served at all. There was no question under the Scheme of some "international subpoena". It was very clear under the Scheme that any decision to attend in another country to give evidence under a request for assistance would be entirely voluntary. He recalled that his own Attorney-General (of Australia) had envisaged the Scheme giving rise at some future date to the international subpoena when he had been introducing the Scheme for adoption in Harare. However it was clear that the Scheme at the present stage did not contemplate such a system. The only international subpoena he was aware of was provided for in the treaty between the USA and Italy dealing with the Mafia.

THE DELEGATE FOR SRI LANKA suggested that calling the document a "subpoena" was a contradiction in terms if in fact it carried no penalty.

THE DELEGATE FOR BERMUDA suggested that it was a question of what the requesting country called it, rather than what the requested country referred to it as being. If, for example, the United State issued a subpoena, that is precisely what it was, and the question which arose was whether a requested Commonwealth country would be prepared to effect service of it, and if so upon what undertakings, if any. It might be that a Commonwealth country would refuse to serve it at all. Or it might be that the Commonwealth country would be prepared to serve it on the lines outlined by the delegate for Britain.

THE DELEGATE FOR THE BAHAMAS recalled that at the Bermuda Workshop they had drawn attention to the fact that all the flights out of their country (except the one he came on to Bermuda) went to the United States. It was a problem faced by many bank managers within their country who were being requested to divulge confidential information. Unfortunately the UK solution was of no real assistance, as at present those served would have to face the consequences. He asked whether a government administration should lend itself to the service, within its own jurisdiction, of a document which exposed a person to penalty should he or she travel abroad at any time. Some delegations would not have this problem, but The Bahamas wished to conform as much as possible to international practice.

THE DELEGATE FOR JAMAICA echoed the concerns of the delegate from the Bahamas. They had gone as far as to clearly state their reservation on this matter which they had entered to the Harare Scheme.

THE DELEGATE FOR BERMUDA said that his country was in the same geographic region as the last two speakers, but had not experienced the same problem to date. He suggested that the question might be academic, as if service of the subpoena was refused it could just as well be outstanding in the United States and the individual passing through the United States might very well be faced with the problem in any event.

THE DELEGATE FOR HONG KONG said that he would not object to any proposal which enabled countries to opt out of serving a subpoena. He further drew attention to the inconsistency between serving a subpoena on behalf of the requesting jurisdiction as opposed to a notice of hearing, and of telling the person served with the subpoena that a failure to observe its terms carried no sanction, when in fact by its very terms the document did so.

THE CHAIRMAN observed that the part of the problem was the fact that there was no settled international practice in those areas. He suggested that in practice the opting out provision was in the scheme as it stood.

THE DELEGATE FOR MALTA suggested the immunity provisions as presently drafted might not apply where a person made a voluntary appearance under a subpoena which had been served under the scheme.

PROFESSOR McCLEAN agreed that there was a flaw in the draft which needed attention from the Drafting Committee.

THE CHAIRMAN suggested that, in practice, where a person was a material witness his or her presence was likely to be sought formally through mutual legal assistance arrangements rather than simply by sending a subpoena for service. He suggested that the area was one of the considerable difficulty, and one which the meeting could not reasonably hope to conclude deliberations on. There was a shortage of international experience in the area, and countries would need to reflect upon their own individual views until such time as there was sufficient international experience which would enable possible amendments to the Scheme to be considered.

THE DELEGATE FOR JAMAICA said that his delegation was not clear as to the integrity of the Scheme in its several aspects. It was a matter which had been discussed in Harare as to whether there would be a Scheme which was generally binding, and the extent to which Commonwealth countries would be able to make variations from the Scheme. It has been decided there that it would be necessary within a period of three months to enter any reservations, and it was in that context that Jamaica had made its own reservations. They had been under the impression that only to the extent that reservations had been made were there any difficulties in relation to the Scheme. He was increasingly gaining the impression that he ought not to be guided only by the reservations which had been entered to the scheme as it stood, and that other reservations might exist. It had been their understanding that they had agreed in Harare that, subject to reservations, a witness who appeared in another jurisdiction in response to a request for mutual assistance would not be subject to prosecution and would be afforded a period of time in which to depart from the territory. Only thereafter there would be any ability on the part of the requesting state to take any appropriate action against the person.

THE CHAIRMAN said that he saw no difficulty with requests to make available persons to give evidence, and as the delegate of Malta had made clear, immunity would apply in those circumstances. The difficulty was where a subpoena was the document to be served. This was a difficulty which had not been foreseen in Harare but which was starting to emerge as a difficulty. He noted that the Scheme did not attempt to regulate the service of the subpoena under paragraph 15, and that there were options open to countries to decide for themselves what those consequences should be.

THE DELEGATE FOR ZAMBIA asked what the position regarding immunity would be where the offence was of a continuing nature.

PROFESSOR McCLEAN said that the point was left vague in the Scheme but had been clarified in the draft Bill. The model legislation deemed a continuing offence to have been committed when it was first completed, and not "re-committed" on a daily basis. Clearly there had to be a cut off date, as someone who committed a fresh offence could not be allowed to plead immunity.

While he had the floor, he wished to draw attention to the fact that the government of Canada also made a reservation in respect of immunity in the context of the Harare Scheme, although subsequent discussions had resolved much of those difficulties.

THE DELEGATE FOR SRI LANKA suggested that the scheme could provide that any requesting country which wished to have a subpoena served would have to use means other than personal service in order to effect service of it.

THE DELEGATE FOR THE BAHAMAS asked what would happen where a bank official voluntarily responded to a witness summons but was then faced with being required to answer questions which they could not answer under Bahamian law without risking prosecution for a breach of bank secrecy laws. Could such a person be prosecuted for contempt?

PROFESSOR McCLEAN suggested that the difficulty was real, but it was one which existed regardless of the Scheme. Any person who responded to an invitation to give an evidence was voluntarily submitting himself to the regime of the requesting country, and there was nothing in the Scheme which made matters any worse than they already were.

THE CHAIRMAN drew attention to the fact that the consultant was not recommending any change in this particular area. He suggested that the matter might be considered further and and a paper prepared in advance of the next Law Ministers Meeting. It was a complex problem and one which was not going to be settled at the meeting.

Paragraph 19 "authentication"

THE DELEGATE FOR SRI LANKA raised the question privilege. He asked how the question the law of evidence in the requesting country was to be dealt with.

PROFESSOR McCLEAN recalled that the provision had much debated in the drafting stages of the Scheme, with the result that paragraph 16(2)(e) went somewhere towards dealing with the point. The requesting country was under a duty to give information as to any rules of its own laws which appeared especially relevant to the matter in hand. This was not a binding or complete certification, but it was an attempt to respond to this area of concern.

THE DELEGATE FOR SRI LANKA wondered whether the matter might be met by an amendment to para. 19(b), and by reducing the room for legal argument in a foreign territory over laws of privilege by providing for a certificate to be conclusive.

THE CHAIRMAN noted that one of the difficulties was determining how far one should go in a scheme of this nature in filling up the detail. He suggested that it was really for each country when developing its own law to work out the most appropriate mechanism, but leave to the Scheme to point in particular general directions. His own country, Australia, dealt with this matter in detail in its own legislation.

THE DELEGATE FOR KENYA asked the drafting committee to consider whether it should be left open to challenge a signature or seal.

THE CHAIRMAN observed that the provision conveyed the notion that nothing more was required to be proved.

PROFESSOR McCLEAN confirmed the point made by the Chairman. Now that the intentions behind the drafting of paragraph 22 had been thought in the context of the draft model legislation the provision was more clearly seen as one relating to admissibility; this had triggered the previous comments.

THE DELEGATE FOR JAMAICA observed that paragraph 22 was dealing with authentication and ensuring that the documents emanated from a reliable source. He had been unaware that the question of admissibility was being addressed in the Scheme, and suggest that it might be illegitimate to pretend under the guise of authenticity to deal with admissibility. It was proper to make the change, but not under the guise of authentication.

THE DELEGATE FOR SIERRA LEONE drew attention to paragraph 4 and the provision for central authorities to be designated for the transmission and receipt of requests under the scheme. This was quite compatible with the provisions for authentication.

THE DELEGATE FOR AUSTRALIA suggested that it might be important on occasions for the request to be admissible in evidence. The scheme was designed to combat crime, and many criminals would seek to have the court stop the taking of any action under mutual legal assistance legislation. If the admissibility of the request into evidence could be facilitated, the scheme should so provide. In her country decisions to grant mutual legal assistance were reviewable by the courts, and there had been instances of the person whose conduct was to be investigated trying to stop those proceedings, and the request had to be proved to prove jurisdiction. Had they not had provisions such as those suggested in para. 22 of the scheme, they would have had difficulty in proving that the request had been properly made and properly received at law.

THE DELEGATE FOR JAMAICA said that issues of admissibility would from time to time arise. He suggested that it was for each country to ensure that requests whether transmitted or received would be admissible under its own law as the lex fori. He questioned whether this was a matter for the Scheme.

THE DELEGATE FOR GHANA asked whether authentication would necessarily introduce the question of admissibility. He understood authentication as merely providing that the request be certified for transmission. The question of admissibility of the evidence would be a question to be argued in forum of the requesting country.

PROFESSOR McCLEAN said that he had found the discussion a most interesting one. He referred to the commentary on the paragraph which signalled the point that the Scheme was at that point going into the lex fori. It had been at the workshops that the view had been expressed that authentication was related to the reliability of the document for ultimate use. Authentication was for the purpose of rendering the material acceptable.

THE CHAIRMAN suggested that the matter be left for the Drafting Committee to look further at the provision to see it could be made a little clearer.

He suggested that the meeting consider the suggestion from Interpol, suggesting inclusion of a clearer role for Interpol within the Harare scheme.

Role of Interpol within the Harare Scheme

THE DELEGATE FOR INTERPOL recalled that Interpol had been involved in mutual legal assistance since 1923. It was an inter-governmental organisation, not a private organisation. His organisation had liaised closely with the Commonwealth Secretariat from the formation of the Commercial Crime Unit, and his organisation had had the unique distinction of being invited to take part in the meeting to revise the London Extradition Scheme. Their participation had resulted in a formal reference to Interpol being included in the revised scheme.

In 1986, at the meeting which formulated the Harare Scheme, Interpol had suggested that the Commonwealth should follow the example of the European Convention on Mutual Assistance in Criminal Matters by recognising Interpol as one of the authorised channels for the transmission of requests for assistance. Although that suggestion had not been accepted, the Secretary General of Interpol had sent out a circular in January 1987 to all Commonwealth Interpol NCBs to draw attention to the need for them to seek positive involvement in the Scheme.

Interpol had submitted a paper containing suggestions for amendment of the Scheme which were intended to ensure a greater involvement of Interpol in the operation of the Scheme. Furthermore, the delegate for Interpol reminded the meeting that in December 1988 the United Nations Convention against the Illicit Traffic in Narcotic Drugs provided expressly in Article 7 that urgent requests for assistance under the Convention be transmitted, whenever the Parties agreed, through the Interpol channel. In view of these considerations, his Organisation would welcome any Commonwealth initiative to include a provision in the Scheme authorising recourse to the Interpol channel of communications.

THE CHAIRMAN pointed out that the preamble to the Scheme provided that the Harare Scheme in no way derogated from informal arrangements or the arrangements made in other fora. It had always been intended that there be no duplication between the Interpol arrangements, which were extremely effective, and the Harare Scheme. Mutual assistance under the scheme was directed towards measures of compulsion and it was not intended that the Scheme be used where Interpol arrangements were available and could be as or more effective. He hoped that his remarks would place the Interpol proposal in perspective.

THE DELEGATE FOR AUSTRALIA for the reasons explained by the Chairman, expressed difficulties with the proposal. The decision whether or not to grant mutual assistance envisaged, in many cases, that there was a political consideration to be taken into account and it certainly envisaged that the national interests of the requested country be taken into account. It further involved consideration of matters such as the scope of the laws of the requested country, possible costs involved in implementing requests and decisions which were not properly be left only to the police arm of the requested country. There was a role as well for lawyers, politicians and, in Australia at least, consultation between federal and state governments.

THE DELEGATE FOR BERMUDA agreed with the reasons advanced by the representative of Australia for not highlighting Interpol in the matter suggested. The requests were from state to state, requiring legal and quasi-judicial decisions to be made. It was not a police matter, even if in the end the police were frequently involved. There were other organisations as well with an interest in the subject, and if one were to be mentioned should not also others be? He saw the suggestion as essentially cosmetic, and one that would not enhance the Scheme.

THE DELEGATE FOR INTERPOL said that no substantive provision was being sought. He was simply suggesting that the Harare Scheme be in line with the UN Convention. The Interpol channel would simply be a vehicle for communication, and not affect matters of substance.

THE DELEGATE FOR SIERRA LEONE endorsed the views expressed by Australia and Bermuda.

THE DELEGATE FOR ZIMBABWE sought clarification from the Delegate of Interpol as to the problem which was being addressed by the proposed amendment. His own country enjoyed a great deal of support from Interpol and valued its links with the organisation.

THE DELEGATE FOR INTERPOL said that there would be no difficulties as such for his organisation by it not being referred to by name in the Harare Scheme. The argument was really based on logic, and on the reference to Interpol in the Commonwealth extradition arrangements. In earlier stages of the draft there had been references to Interpol, and mutual assistance and extradition were conceptually interlinked. It was also the case that the Interpol channel was specifically mentioned in the UN Convention. His organisation was merely inviting consideration for similar provision to be made in the Commonwealth arrangements.

THE DELEGATE FOR CANADA asked whether the Secretariat's consultant had examined the matter. He asked what the thrust of the proposal was. He noted that it was not that Interpol should actually be the central authority, but only to be one of the competent authorities.

PROFESSOR McCLEAN stressed that the omission of Interpol was not meant to derogate from the considerable value of Interpol, it was just that there was so many other possible candidates for inclusion.

The reference to "competent authorities" in the Scheme was to the authorities who dealt with the working out of requests, whereas the proposal was that the NCBx send and receive requests, a task which he felt belonged properly to the Central Authority, which had also to exercise discretion whether to send and whether to grant assistance.

The third proposal in the paper might actually work a disservice to Interpol as it seemed to suggest that informal channels should not be used directly, but Central Authorities would become involved in handling Interpol requests. He felt sure this was not intended. Certainly the case studies presented by the Australian delegates to the regional workshops had demonstrated the value of developing arrangements as between Central Authorities, who should endeavour to develop the same degree of trust and cooperation as existed as between Interpol NCBx. He urged the meeting not to confuse the separate complementary networks.

THE DELEGATE FOR BANGLADESH suggested that as the Central Authorities liaised directly, the matter not be confused by the involvement of other agencies. He felt that the Scheme should stand as it was.

THE REPRESENTATIVE OF THE COMMONWEALTH SECRETARIAT recorded the Secretariat's, and the Commonwealth's, indebtedness to Interpol. The Secretariat had worked closely with Interpol from the outset of the exercise, and even earlier. Before the Secretariat had established its Commercial Crime Unit they had had discussions with Interpol to ensure that they were not duplicating existing facilities. Before inviting Professor McClean to try his hand that what had become the Harare Scheme, again there had been consultations with the Secretary-General of Interpol to ascertain that this initiative would have his full support. The Secretariat was grateful for Interpol's encouragement and support, and he hoped that the Representative of Interpol would not take back to his headquarters any negative feelings. Indeed, Interpol's membership had always been seen as the prime beneficiaries - but not the only beneficiaries - of the arrangements. It was the fact that there were other beneficiaries which had, in the end, dictated that no specific reference to be made to Interpol in the final version of the Scheme. He suggested that the Drafting Committee might consider including a paragraph recording the role played by Interpol in helping to develop the arrangements, that the meeting considered that maximum use should be made of the informal arrangements in the interests of efficiency, and the additional points made by Professor McClean.

THE DELEGATE FOR INTERPOL emphasised that the NCBx were not "third parties" to the arrangements, but were agencies of their governments. The UN Convention of 1988 mentioned Interpol.

THE CHAIRMAN suggested that some small states might well wish to designate their NCBx as Central Authorities. As he read the feeling of the Meeting it was that relations with Interpol were harmonious and highly valued, but the delegates did not see any particular purpose being served by especially referring to the organisation in the Scheme.

THE DELEGATE FOR INDIA said that his delegation supported the views expressed by the Chairman. Certainly as far as his country's practice was concerned, maximum use was made of the Interpol channels and these were greatly valued. As the Scheme made it plain that

the arrangements were in addition to, and not in derogation of, existing channels, he could see no useful purpose being served by making any of the amendments suggested.

Co-operating to Combat Fraud in the Financial Markets

THE CHAIRMAN invited the Commonwealth Secretariat to introduce discussion of Criminal Working Paper 6.

THE REPRESENTATIVE OF THE COMMONWEALTH SECRETARIAT explained that the Commercial Crime Unit had been active in assisting Commonwealth agencies in combatting fraud in the financial markets. This had led the unit to the view that it would be useful to consider - and he emphasised that the proposal was to consider a proposal - to embark on two proposals for Law Ministers. They were raised in the paper both for the information of the Meeting and to enable delegates to comment on them.

The first was to prepare a draft memorandum of understanding regarding mutual assistance as between securities commissions and similar regulatory bodies. There was bilateral experience building up in the area, and there was a feeling that a draft memorandum of understanding was an avenue worth exploring. Hence a paper on the topic was suggested for consideration by Law Ministers in New Zealand. It would be a decision without resource ramifications.

The second proposal was for the Crime Unit to explore the possibility of creating a data base dealing with violators. The Unit had access to considerable information in the course of its daily work, and the proposal would examine the feasibility of drawing this information together into a data base to which the Unit and, most importantly, Commonwealth authorities would have direct, fast, efficient and effective access. Clearly there would be resource implications if that proposal were to be accepted, but at this stage the proposition was that the proposal be developed and the resource implications examined in the light of the study.

In the normal course of events, the Legal Division would simply have proceeded with its two proposals. However the paper recognised that a forum for enhancing Commonwealth cooperation in legal matters had now been established and it was one from which the Secretariat was happy to accept guidance, as indeed it was bound to accept guidance from Law Ministers.

THE DELEGATE FOR CANADA endorsed the proposals and offered assistance in developing them.

THE DELEGATE FOR DOMINICA described the proposals as most interesting, particularly the latter. They welcomed the initiative being taken and wanted to encourage the Secretariat to go ahead with it.

THE DELEGATE FOR BERMUDA recorded his own country's support. The proposals were eminently beneficial to them all and he hoped that Law Ministers would support whatever recommendations came out the studies.

THE DELEGATE FOR SINGAPORE added his country's support to the proposals which represented two very sound ideas.

THE DELEGATE FOR INDIA looked forward to benefiting from the experience of other countries in these matters. They had been late to be touched by such problems, but this had started to happen. Both proposals were likely to benefit his country considerably.

THE DELEGATE FOR AUSTRALIA expressed her country's full support.

THE CHAIRMAN noted that the proposals had more than the requisite degree of support.

AGENDA ITEM 7

THE CHAIRMAN suggested that the same procedure be followed as for Agenda Item 6(A).

THE DELEGATE FOR AUSTRALIA recalled that the Australian Proceeds of Crime Act had now been in operation for 2 years. At this stage it had not been used in relation to any international cases, no requests from foreign countries having been received in relation to overseas orders. In relation to domestic matters, they had a dual scheme as for constitutional reasons the federal legislation could only deal with those crimes which fell within the authority of federal government. Each of the Australian states needed to enact similar legislation for crimes within their jurisdiction. Four of their states and one of their territories had done so, and two states remained who had not at present enacted forfeiture legislation.

They had had interesting experiences. Quite frequently in the course of trial the Taxation Commissioner would become aware that there was some "dirty money" around on which tax had not been paid. It then became a race between Commissioner of Taxation and the prosecuting authorities to see who could be first to freeze the money and get their hands on it. It had been causing some tension between the respective authorities. The Taxation Office tended to take their slice first and leave very little for anyone else. The only figure she had related to federal legislation. In the 18 months to January 1989 there had been only ten confiscation orders, and the amount confiscated was quite small. They had 41 restraining orders in force in respect of uncompleted proceedings, and they were looking at about 12 million dollars should all the property frozen be forfeited.

THE DELEGATE FOR THE BAHAMAS reported that in 1986 his country had passed legislation modelled on the UK legislation for the forfeiture of the proceeds of drug trafficking. In addition they had created the offence of being in possession of property which was considered to be obtained through drug trafficking or providing assistance to drug traffickers. It had been argued against this provision that it was retroactive in nature, as it attached property that had been acquired prior to the enactment of the legislation. This argument had not found favour in the lower courts and was currently being tested on appeal. His country's legislation provided for the enforcement of foreign orders, and had concluded an agreement with the UK for the enforcement of forfeiture orders, although this had not yet come into force.

THE DELEGATES FOR BARBADOS reported no specific legislation as yet, although there were various specific pieces of legislation which provided for forfeiture in specific circumstances, e.g. customs, inland revenue, restitution of property following criminal conviction, etc.

THE DELEGATE FOR BERMUDA advised that the Drug Trafficking Suppression Act of 1988 had been enacted, based on the best of the Australian, Canadian, Hong Kong and UK provisions. He hoped that the resulting legislation would not only work but would meet constitutional challenges, the latter being their greatest problem. One difficulty was how one handled a person who had been charged after the Act had come into force in respective of a drug offence committed prior to this. Another was where a person was convicted after the Act came into force and of an offence committed after the Act came into force but who was in possession of assets acquired before the Act had come into force. Thirdly, what did one do with assets which were acquired prior to the Act coming into force, but which were sold subsequent to the Act coming into force and the proceeds used to acquire additional assets? There were serious problems which all of them would have over the next 4 or 5

years until time and experience caught up with them all. Under their Misuse of Drugs Act 1972 there were two provisions, modelled on Hong Kong, one of which might assist them in overcoming problems with their new legislation; this was a provision that any money or other property possessed as a result of an offence under the Act was forfeited to the Crown. They were hoping that their courts would consider that this Act would enable them to bridge the period, and they would be looking at the jurisprudence on this from Hong Kong, if any. Their legislation also contained provisions for the reciprocal enforcement of forfeiture orders, under a system of designation. His country was keen to designate countries who were able to offer reciprocity.

THE DELEGATE FOR BOTSWANA indicated that his country did not yet have legislation dealing with domestic forfeiture of drugs profits, although it was the intention of the Attorney General that, before the end of the year and in a wish to comply with the UN Convention recently concluded in Vienna, legislation would be enacted.

THE DELEGATE FOR BRITAIN drew attention to three pieces of legislation. They had started with drugs traffickers' assets and enacted the Drug Trafficking Offences Act 1986, which provided for the tracing, seizing and confiscation of assets. All three elements were essential for any system to function. Then these provisions had been extended to the assets of all serious crime in the Criminal Justice Act of 1988. Thirdly, they had adopted similar provisions in relation to assets connected to terrorism in the Prevention of Terrorism Act 1989. The reason for special provisions about terrorism, in addition to all forms of serious crime, was that for terrorism they were not only confiscating assets which were the profits of crime, but also assets which may have been legitimately obtained if there was a reason to believe that those assets might be used to promote a terrorist crime. The lesson they were drawing from their own experience was that, valuable though the criminal law was in deterring criminal conduct and punishing through prison sentences, the approach of forfeiting assets and money was an approach of increasing importance and one which needed to be extended and developed. They were developing the approach quickly. Under the first Act, some £11 million had been ordered to be confiscated, and some £22 million frozen. Those figures needed to be understood not as the product of three years activity (because it took some time for new legislation to actually operate effectively and work its way through the courts; most of these amounts had been seized in very recent times).

British domestic legislation empowered them to designate other countries or territories whose own confiscation orders would be enforced in the UK, on a reciprocal basis. They would shortly be designating Australia, The Bahamas, Canada, the Isle of Man, Guernsey and Bermuda under their legislation and they were engaged in discussions with a number of other Commonwealth countries in the hope of designating and co-operating even more widely. They had taken the view that it was sensible to proceed by way of bilateral arrangements because there was not yet a sufficiently common fund of experience and agreement to justify a multilateral convention which everyone could adhere to. But he did wonder whether, given the speed with which things were moving, the time for such convention might not be approaching. He was not at this stage making any firm proposal, but suggested that the Secretariat keep this possibility in mind and be prepared for a multilateral convention when the time was right.

In reply to a question from THE CHAIRMAN, the DELEGATE FOR BRITAIN stated that designation and enforcement were not confined to drugs alone.

THE REPRESENTATIVE FOR BRUNEI said that they had only the provisions of the Corruption Act 1981 which provided for the tracing and forfeiture of the proceeds of corruption offences after conviction. To date no recourse had been made to this provision. They currently had under consideration enactments of legislation to deal with the enforcement with the forfeiture of the proceeds of drug offences.

THE REPRESENTATIVE FOR CANADA reported that in 1988 they had amended their Criminal Code and a number of drugs Acts to provide a single regime for the forfeiture of assets in drugs trafficking cases. "Enterprise crime" offences were also covered, such as murder, extortion, corruption, fraud, arson and a number of other property-related offences, primarily connected with organised crime. The court also had the power to impose a pecuniary penalty in lieu of forfeiture, where forfeiture would not be appropriate - such as in cases where the property had devalued, or assets had co-mingled with legitimately-owned property. The pecuniary penalty could also be used where the assets were offshore but the accused was in the country. New offences were also created, such as laundering the proceeds of crime. In addition, income tax laws were amended to provide for limited access to income tax returns to assist in asset valuations and the location of assets. Confidential business relationships were also protected from civil or criminal liability where parties reported on persons who might be involved in enterprise crime activities, e.g. bank officers. Forfeiture was, of course, conditional upon conviction except that there were special in rem provisions where an accused absconded before trial, or died before trial. With certain safeguards it was possible to seek forfeiture in rem. Third party rights were also protected, and statutory rights were given to the accused to protect his family and reasonable living and legal expenses. The definition of proceeds was very broad.

Since the legislation came into force on the 1st January 1989, less than six months ago, some $40 million had been made the subject of restraint orders, and there had been a number of forfeiture orders of lesser amounts. One involved $13.5 million, and was the result of mutual legal assistance rendered to Canada by the United States. The legislation did not provide for the direct enforcement of foreign forfeiture orders, but procedures were open for normal Canadian orders to be made in such circumstances. Fines and pecuniary penalties, wherever imposed, could be readily enforced in Canada.

THE DELEGATE FOR CYPRUS said that they did not as yet have specific legislation for the confiscation of criminal profits but this was presently being drafted and they hoped to have it enacted shortly. They, too, had forfeiture provisions in a number of specific laws.

THE DELEGATE FOR GHANA noted that his jurisdiction had no specific legislation dealing with the forfeiture or criminal profits, but they, too, had forfeiture provisions in respect of custom offences, other revenue offences and corruption. Unfortunately these were purely territorial, and did not apply to orders made in other jurisdictions.

THE DELEGATE FOR GUYANA reported passage of a Narcotic Drugs Psychotropic Substances Control Act which provided for the tracing, seizing, restraining and forfeiture of assets derived from drug trafficking. There were a number of cases before the court in relation to challenges to restraining orders. These were being challenged not on constitutional grounds, but on claims that the procedures had not been properly followed. The legislation also provided for the reciprocal enforcement of forfeiture orders by means of treaties, and they were presently considering such an arrangement with the UK.

THE DELEGATE FOR HONG KONG reported that presently before their legislature was a Drug Trafficking (Recovery of Proceeds) Bill. It was substantially similar to the 1986 UK Act, and as with that legislation it covered only drugs-related matters. This would introduce new powers for tracing and seizing assets, and create new offences of assisting a person to retain or conceal the proceeds of drug trafficking, and of disclosing information likely to prejudice an investigation into drug trafficking. Their Prevention of Bribery Ordinance also provided for forfeiture of any advantage obtained, and various other statutes provided for forfeiture in specific situations. The Drug Trafficking (Recover of Proceeds) Bill provided for the enforcement of external orders made in designated countries.

THE DELEGATE FOR INDIA explained that his country has no exhaustive legislation as such providing for the forfeiture of property involved in a crime, but there were, as in other countries, forfeiture provisions in the revenue Acts, etc. Their 1985 Drugs and Psychotropic Substances legislation provided for forfeiture not only of the drugs involved and instrumentalities, but also the proceeds of sale of any drugs.

THE DELEGATE FOR JAMAICA said that under his country's Dangerous Drugs Act there was power to forfeit conveyances and modes of transport used in the commission of offences. Similarly, under the Customs and Excise legislation, goods could be forfeited in certain circumstances. He reported that his country had been preparing legislation providing for the confiscation of drugs-related assets. It was a matter which caused both difficulty and anxiety in his country. On the one hand there was intense eagerness for the legislation, this was matched by the sobering thought of the constitutional implications which arose from such legislation. Fundamental freedoms were guaranteed in the Constitution of Jamaica, and in particular there were guarantees against compulsory acquisition of property, so that the question was inevitably raised as to whether the legislation would be consistent with the Constitution. They also had to consider whether there were any circumstances apart from a conviction in which they could properly provide for the confiscation of drugs-related assets. A further constitutional issue was whether the legislation could provide for the authorities in Jamaica to deal with what amounted to a crime committed abroad, by enforcing orders made abroad. The Constitution specifically provided for extradition, so that precedent was of little assistance. He explained that these issues accounted for the time preparation of legislation was taking, but it was hoped that legislation would be enacted in the not too distant future.

The draft was based largely on the UK 1986 Act, but inspiration was also being gained from other sources. On the bilateral level, they had been involved in negotiating a treaty for the confiscation of drug-related assets so far with one country, and this was proceeding well. His delegation was interested in the fact that some countries were designating other Commonwealth countries on the bases of reciprocity, as the Harare Scheme paralleled the London Scheme and did not call for designation on the bases of reciprocity. Those who had been at the meeting in 1983 would know that the Jamaican delegation had argued then that reciprocity was desirable in such matters, and they noted with interest the movement into those direction. This had the effect of transforming the very informal schemes into something more closely resembling a treaty.

THE DELEGATE FOR KENYA said that they had not yet enacted specific legislation but a draft bill had been prepared and was awaiting approval by the National Assembly. This would make provisions in this area. The draft bill dealt mainly with profits arising out of drug trafficking, and related activities. It was based on the Australian, Bahamian and UK legislation. They, too, had provisions in their revenue and customs excise providing for forfeiture. He hoped that the new bill would be enacted by the end of the year.

THE DELEGATE FOR KIRIBATI said that, in common with other countries, they had specific references to forfeiture scattered across their statute book, but they had no specific legislation dealing with the forfeiture of the proceeds of drug trafficking, although this was under serious consideration.

THE DELEGATE FOR LESOTHO explained that his country was a very small one, without experience of serious crime resulting in huge criminal profits. Some cannabis was grown in the north of his country, but the growers were usually caught before they managed to sell it in South Africa. He anticipated that at some stage such legislation would become necessary.

THE DELEGATE FOR MALAWI said that, like Lesotho, they were a small jurisdiction which had not to date experienced the problems being discussed at present. Accordingly, they had not yet enacted any such legislation, but this might need to be provided for in the future.

THE DELEGATE FOR MALAYSIA reported that her country had enacted the Dangerous Drugs (Forfeiture of Property) Act 1988 relating to the forfeiture of criminal profits derived from drug offences. This also applied to the proceeds of drug offences committed abroad. They had detected a slight imbalance in the Act in the sense that, although they would be able to provide assistance to foreign countries they themselves were not able to request assistance. Accordingly, further study was being undertaken to improve the situation. They had also found that Articles 4, 5 and 17 of the UN Convention of 1988 would have to be given further scrutiny to see what effect these might have on their present legislation.

THE DELEGATE FOR MALTA advised that his country's Criminal Code provided for the forfeiture of the instrumentalities of crime. However these had tended to receive a rather restrictive interpretation and indeed the need been felt for special legislation which was more detailed and comprehensive. In 1986 amendments were introduced to the Dangerous Drugs Ordinance and other legislation, providing for the confiscation of proceeds and instrumentalities in respect of serious drugs offences. Unfortunately these provisions referred only to domestic offences, including the provision for restraining orders. His country in principle supported, with appropriate safeguards, the enforcement of overseas orders, but certain constitutional hurdles would have to be overcome before this course could be adopted. He was optimistic that a solution could be found.

THE DELEGATE FOR MAURITIUS said that they had not dealt with criminal profits in general, but made provision for the forfeiture of the proceeds of drugs trafficking following conviction. There was a three tier type of proceedings - an inquiry before a commission following conviction, after which the DPP commenced proceedings before the Supreme Court and evidence was heard on the forfeiture issue. It was up to the Supreme Court, in the light of evidence, to determine whether the proceeds were in fact the proceeds of dealing in drugs. The legislation had only come into force towards the end of 1986, and all those convicted so far had lodged appeals, which were still pending. The legislation made no provision for the enforcement of orders made abroad, although it could be that if the orders made abroad were treated as civil judgements it might be possible to enforce them under existing reciprocal enforcement of judgements legislation. They also had forfeiture provisions relating to exchange control, customs etc. which in a limited way provided for forfeiture in restricted circumstances.

THE DELEGATE FOR NEW ZEALAND said that her government proposed to introduce a Criminal Forfeiture Bill before the end of 1989 to implement relevant provisions in the mutual assistance scheme. They would also take the opportunity to implement any further matters required by the UN Convention of 1988.

THE DELEGATE FOR SIERRA LEONE reported that his country had no general legislation for the forfeiture of criminal proceeds, but rather the fragmented ad hoc provisions. Emergency economic regulations provided for the tracing and seizing of the profits of certain crimes; there were provisions for the forfeiture of fishing vessels; the forfeiture of bribes received by corrupt public officials, and the like. Under the Drugs Act there were provisions for the forfeiture of drugs and the proceeds of trafficking, if traced.

THE DELEGATE FOR SINGAPORE advised that they did not at present have legislation for the enforcement of forfeiture orders made abroad, but they did have specific legislation providing for the domestic forfeiture of criminal profits, namely the Corruption (Confiscation of Benefits) Act 1989. This gave new powers to trace and freeze the benefits of corruption, and for their confiscation. This struck at the unexplained assets

of corrupt officials. The Act itself was modelled on the UK Drug Trafficking Act of 1986, with reference also to Australian and Malaysian drugs legislation. The full impacts of implementation had not yet been felt, but because of the legislative history of the provisions the legislation was expected to be effective.

THE DELEGATE FOR SRI LANKA said that forfeiture of property in his country could fall under several heads. The first was where the item was banned or prohibited. Second, smuggled goods were liable to forfeiture. Third, property used in the commission of the crime. Further, there was the forfeiture of bail bonds. Most important was the recovery of "stolen property", which encompassed not merely property the subject of theft but any property which had been gained by misappropriation, criminal breach of trust or some other form of unlawful acquisition. It included not only the property itself but the form into which the property had been converted.

THE DELEGATE FOR SWAZILAND advised that his country had not yet enacted legislation providing for the forfeiture of criminal profits in this area. Consequently there were no provisions, as yet, for the forfeiture orders made abroad. They appreciated the need for special legislation in this area, and it was presently under consideration.

THE DELEGATE FOR TANZANIA likened his country's position to that of Ghana and Kenya. Happily, the former members of the East African Community still had the same customs legislation. In addition, his country had relevant legislation concerning wild life, the prevention of corruption, some provisions in the penal code, the regulation of prices and other ad hoc provisions in specific legislation. There was provision for restraining orders under the Prevention of Corruption Act, where orders could be made freezing bank accounts and preventing disposal of property. Such interim freezing orders were issued by the Attorney General and served on the banks.

THE DELEGATE FOR TONGA compared his country's position to that of other small jurisdictions represented at the meeting, in that they had very limited provisions in the area of the confiscation of criminal profits. Insofar as drug trafficking was concerned, this had not proved any problem to them to date and so no legislation had yet been needed. They were, however, interested in developments in these areas but they, too, had potential constitutional problems.

THE DELEGATE FOR TRINIDAD AND TOBAGO advised that a Bill was presently engaging the attention of his Parliament, which provided for the tracing, freezing and seizing ultimate forfeiture of the proceeds of drug trafficking. It is also provided for a new offence of dealing in drug related property. Its provisions were influenced by the UK Act of 1986 and the Malaysian Act of 1988. His country shared the same constitutional problems as those mentioned by the delegate for Jamaica, and some of the provisions under the legislation were inconsistent with their constitution, thus requiring passage of the Bill by a three-fifths majority in the House. The Bill had been passed by the House of Representatives the previous Friday, and it now awaited consideration by the Senate. He expected the necessary three-fifths majority to be obtained in the Senate within the next few weeks.

THE DELEGATE FOR ZAMBIA advised that her country had enacted the Dangerous Drug (Forfeiture of Property) Act 1989 which provided, among other things, for offences relating to property obtained through trafficking in dangerous drugs, as well as for the seizure and forfeiture of property connected with activity related to offences under their Dangerous Drugs Act or any foreign law making corresponding provisions. "Property" was very widely defined and included tangible or intangible property. The Act only applied to offences committed offer the commencement of the Act, and was not retrospective. The Act had not yet been tested in their courts but it was drafted carefully, with an eye to constitutional limitations. They, too, had legislation dealing with forfeiture in other areas such as exchange control, corruption etc.

THE DELEGATE FOR ZIMBABWE observed that, like some of their neighbours, they did have some problems in this area. They, too, did not have comprehensive legislation but had specific pieces of legislation in such areas as customs and excise, corruption, and their fines regime could also be used to effect de facto confiscation. They had also had a spate of recent cases relating to the sale, at above controlled prices, of commodities in short supply which were subject to price control. This had necessitated a review of the adequacy of their legislation, and consideration of the need for forfeiture of profits provisions. In the area of mutual assistance, they had a constitutional problem in that private property was protected within their jurisdiction and could not be forfeited without recourse being had to the courts. They had considered the possibility of proceeding by way of reciprocal enforcement of judgements based on the civil law model and would follow the discussion very closely. They were looking forward to the eventual implementation of the Harare Scheme, but until their Constitution had been appropriately amended they would not have the means fully to implement the Scheme so as to forfeit all proceeds unless the acts which had taken place constituted a crime within their own jurisdiction.

THE DELEGATE FOR BANGLADESH said that his country was in a similar position to most of those sitting around the table in that their legislation made provision only for the forfeiture of the proceed of crime in certain limited specific areas. In the area of drugs, provision had been made for the forfeiture of illicit drugs. They were thinking in terms of legislating to provide for the forfeiture of ill-gotten money, and money which could not be accounted for or was the proceeds of crime. They were anxious to make crime not only difficult, but unprofitable.

THE DELEGATE FOR DOMINICA said that his country, too, had no generalised system for the forfeiture of the proceeds of crime. In 1988, however, they had passed the Drugs (Prevention of Misuse) Act which made provision in the case of non-trafficking offences, for optional forfeiture orders, and in respect of trafficking offences, for mandatory forfeiture orders. The forfeiture was limited to the articles, money etc. relating to the offence but extended to any property acquired subsequently, with tracing provisions provided for. They also had the traditional smuggling, tax and other forms of forfeiture. He doubted whether legislative priority would be given for an across-the-board approach to the forfeiture of the proceeds of serious crime. Drugs apart, this was not a large problem in Dominica.

THE CHAIRMAN invited Professor McClean to introduce his paper proposing certain amendments to the provisions in the Harare Scheme relating to the forfeiture of the proceeds of crime.

PROFESSOR McCLEAN referred to Criminal Working Paper No.1, the Canadian proposal concerning the enforcement of foreign orders and volume 4 of the materials relating to mutual legal assistance in criminal matters within the Commonwealth. Criminal Working Paper 1 listed four matters requiring attention under this heading.

First, there was the whole question of the instrumentalities of crime. The discussion at Harare had been in terms of proceeds, but it had become obvious looking at legislative models which now existed that instrumentalities were as much part of the forfeiture exercise as were proceeds. Thus "property used in connection with the commission of an offence" had been incorporated in the amendments.

The second point was the use, in Australian legislation, of "pecuniary penalty orders" - which were not fines but were orders for the payment of a sum of money fixed by reference to the assessed value of the property the convicted person had derived from illegal activities. These types of orders had been extensively discussed in the workshops.

The third, and most complicated, matter related to the type of provision made for dealing with requests originating abroad. The present text dealt with the enforcement of forfeiture orders and the taking of fresh proceedings for interim freezure and the taking of fresh proceedings for the forfeiture of property. However there was no provision for the direct enforcement of an interim freezing or restraining order. He believed that such a provision was needed and that some adjustment in the text was required.

Finally, there was the question of the definition of "proceeds of crime". The Harare definition had not seemed to be as good as it should be. The concept of property acquired "directly or indirectly" was important.

The Canadian delegation had suggested a text which followed very closely the text of article 5 of the UN Convention of 1988, and particularly article 5.4, whereby a country on receiving a request for action could either submit a request with the view of getting a fresh order or submit a request in order to obtain direct enforcement of an existing overseas order. The UN Convention appeared to envisage a single request which invited the requested country to take such steps as it considered fruitful. However, subsequent provisions in the Convention related to different options and it was envisaged, he suggested, that the requesting country would either ask for the enforcement of its order directly, or for some other form of action by the requested country.

He believed that the addition to paragraph 27 of the proposed new amendment in Working Paper No.1 of a reference to "confiscation", would meet the point.

THE CHAIRMAN invited the Canadian delegation to introduce its proposal.

THE DELEGATE FOR CANADA said that their proposal in lieu of Professor McClean's proposed new para.27 arose from their concern that the proposal as presented in Working Paper No.1 only provided for the enforcement of a foreign order directly, and did not provide desirable flexibility for a requested party to determine what might be the most appropriate manner in which to render assistance to a requesting country. The possibility of applying for a fresh order, with the accompanying safeguards that may be applicable in domestic legislation - whether constitutional or under a common law or statutory law - should be provided for. The draft they had submitted was designed to incorporate this flexibility, which was also to be found in the UN Convention. The matter, he suggested was at the discretion of the requested country either to give effect to the foreign order or to take proceedings for a fresh order under its domestic law. They did not read the UN Convention as giving the option to the requesting country, but to the requested country. This had been a matter of some controversy in Vienna, as a requested country might strike a different balance between the rights of the individual and the rights of the state. Accordingly the Convention had been drafted to provide flexibility at the option of the requested country.

The other proposal for change was to eliminate the reference to restraint orders in para. 28. Since restraint orders were by nature an interim proceeding, and since the intention would be to finalise that interim order into a confiscation order, the provision ought more properly to be under para. 27, as an "interim" measure.

He would save his comments concerning "instrumentalities" for subsequent discussion.

THE CHAIRMAN cautioned the meeting against becoming involved in drafting matters. He invited delegates to focus on matters of principle and policy, leaving it to the Drafting Committee to produce a draft for detailed scrutiny by the meeting. He suggested that the four points raised by Professor McClean be dealt with in order, and then the Canadian proposal. As to the question of dealing with "instrumentalities" as a parts of "proceeds", he invited the views of the meeting.

THE DELEGATE FOR CANADA had no objection to the concept of the seizure of and forfeiture of instrumentalities in general, but stressed the need for some definition. The example given in the Working Paper was one easily agreed upon, i.e. the forfeiture of the vehicle in which drugs were being transported. He asked, however, how this might apply to other circumstances - to equipment used in the manufacture of drugs? That was an easy matter. But would it extend to the building in which the drugs were being manufactured? Or the dwelling house in which the accused trafficker stored the drugs in his or her basement before distributing them on the street? The farmland on which the marijuana was cultivated? Clearly in the drugs area itself there was ambiguity as to what was meant by the "instrumentalities used in the commission of the offence". Outside the drugs area the same questions arose - did organised prostitution carry with it liability for forfeiture of the real property on which the activities had been carried out? What about an office building used in a fraudulent stock scam? There was the question, too, of the extent of the "connection" required by the scheme. Was this to be incidental or a connection which was inherent in the commission of the offence?

The questions were (i) whether a broad definition should be left as it was, (ii) whether the meeting should attempt to restrict the definition to a "substantial connection test", (iii) should it be limited only to drugs, and (iv) should it exclude real property or simply leave it to each country to define the extent to which it was prepared to render assistance with respect to instrumentalities? Decisions of policy were required, and possibly the last approach might be the one for which a consensus might be achievable.

THE CHAIRMAN suggested that it was the principle that needed to be provided for in the Scheme, leaving it for each country to decide for itself precisely what the parameters would be. A lot of the issues which arose under the Scheme were for the individual country to determine. Some countries might be prepared to provide for forfeiture of all the items referred to by the Canadian delegate, but others might take a more restrictive approach. It was in the nature of the Scheme to deal with broad principle and leave fine-tuning to individual countries.

THE DELEGATE FOR INDIA recalled that the question of instrumentalities had been discussed at Sydney, and clearly public conveyances were outside the concept of instrumentalities. He asked that this be borne in mind by the drafting committee.

THE CHAIRMAN pointed out that the courts would also have a large say in how these provisions were interpreted.

THE DELEGATE FOR JAMAICA suggested that the meeting had to look at the overall effect of what was under discussion. They had under their own legislation relating to dangerous drugs the ability to forfeit, after conviction, the conveyance in which the particular drug was found. There was a right of appeal by a third party if he could show that it was done without his knowledge, etc. Their general legislation had not yet reached the stage where it would, in a generalised form, give the courts power to forfeit things used in the commission of all offences. The issue of the forfeiture of the proceeds of crime had reached priority on the agendas of most countries, largely because of the activity of drug traffickers. Forfeiture also played a part of some significance in other aspects of international crime, particularly money laundering offences, but he suggested that there had, as yet, been no general acceptance of the proposition that a crime ought to be visited with the forfeiture of the proceeds in all and every circumstance - proceeds obtained not necessarily directly but also indirectly, and not necessarily by the offender, but through the offender. Had that been the initial proposition of the outset, he doubted whether the progress made to date would have been achieved. The lesson from this, he suggested, was that one took a pragmatic approach, dealing with situations on a case by case basis so as not to undermine basic approaches to fundamental questions.

He made this observation because his government had been the victim of acts of forfeiture imposed upon its by other jurisdictions, in spite of the considerable steps which they had taken within their own jurisdiction, to ensure that drugs were not to be found on the aircraft the country owned. They took the view that measures such as those taken against themselves were unconstitutional. These forfeitures were also taking place without any criminal convictions being recorded, under the so-called civil process, and the lesson from that would, in his view, inspire the meeting to proceed warily and with caution. He suggested that the matter needed to be studied in considerable depth. He further suggested that this was why countries had, by and large, elected to follow a bilateral path and in respect of only particular matters.

The Scheme for Mutual Assistance as originally formulated in Harare enabled Commonwealth countries to forfeit the proceeds of criminal activity after conviction (and he would stress the words "after conviction") and enabled the law of the requested state to apply to decide whether forfeiture would apply. Those were the fundamental safeguards, and he expressed uneasiness as to the direction the discussions were taking. His uneasiness did not derive from doubts about the effectiveness of forfeiture in dealing with dangerous crimes, crimes characterised as crimes against humanity, but he would be more cautious about a generalised approach to the issue of forfeiture in respect of criminal activities at large. He urged the meeting to take total view and to keep a broad prospective.

THE DELEGATE FOR INDIA wish to supplement the remarks by the delegate for Jamaica. His country bordered the "Golden Triangle", and, if drugs were found aboard their aircraft in certain jurisdictions - despite the best efforts of the state airline to prevent carriage of drugs on the aircraft - there were threats of confiscation of his country's aircraft.

THE CHAIRMAN drew attention to clause 25(3) of the Harare Scheme, which made it clear that it was the law of the requested country that applied to the circumstances and manner in which an overseas forfeiture order could be recognised or enforced. So far as the Harare arrangements were concerned, the circumstances in which orders would apply to instrumentalities would be those provided for the law of the requested country. There was a gap in the Scheme as it stood, as it did not cover instrumentalities at all, and the question was whether they should recognise instrumentalities whilst leaving it for each country to determine how far such a provision would apply.

PROFESSOR McCLEAN wished to widen the Chairman's point. The whole thrust of the Harare Scheme was that what one did was to make available to the prosecution authorities in other Commonwealth countries the powers which a country conferred upon its own authorities. The real question was whether, once a jurisdiction had made provision for the seizure of instrumentalities in its domestic context, it would be prepared to make that same provision available, upon request, to the authorities of other Commonwealth countries. The question faded away if there was no such provision in the domestic law. The question was whether, having taken the policy decision to provide for the forfeiture of instrumentalities, whether a country might then go on to decide to make that provision available to other Commonwealth countries. The Scheme was not model legislation, and had it been all these points of detail would have had to be covered.

THE DELEGATE FOR ZAMBIA said that their approach had been to exclude lawfully-run aircraft and trains coming into Zambia, but they could proceed against the owner if they were "liable person" under the Act.

THE DELEGATE FOR SRI LANKA observed that if real property were being confiscated, it was one thing for this to be confiscated into the ownership of the requested country and quite another for it to pass into the ownership of another government. He suggested that the wording be left in very general terms.

THE DELEGATE FOR GHANA suggested that where the instrumentality was owned by the person who was under investigation, no problem would arise. The problem loomed where the person who owned the instrumentalities was not aware of the criminal purpose for which the instrumentalities were being used. In such a case, the approach could be to provide protection for the owner of the property who was not aware of the use to which the instrumentalities were going to be put.

THE CHAIRMAN suggested that, as a number of views had been expressed on the question, it might be the wish of the Meeting to leave it now to the Drafting Committee to address the various difficulties which had been highlighted. He invited any delegate who felt that they should be no mention at all of instrumentalities to speak.

THE DELEGATE FOR KIRIBATI asked that the Drafting Committee consider providing alternatives regarding instrumentalities, as it would be a matter for each country to determine the extent to which instrumentalities should be subject to seizure. The guidance of the Drafting Committee, by providing a general as well as a narrow definition, would be particularly appreciated by smaller jurisdictions.

THE CHAIRMAN suggested the meeting move to the second suggested amendment, the coverage of "pecuniary penalty orders". He asked whether there were delegates who had concern with the extension of the Scheme to orders of that kind. There being none, he suggested that the Meeting move to consider the third suggestion, namely to add to the three orders which could be enforced in a requested country, the enforcement of interim seizure orders. He asked whether there was any delegation which had concern in principle with that proposal.

THE DELEGATE FOR BOTSWANA asked whether the request to restrain someone dealing with certain property would concern property which had already been identified as property derived or obtained, as oppose to property "believed" to have been derived or obtained from a criminal offence. A request for interim restraint implied that the proceedings in the requesting country were not yet complete, and if so was it possible to describe the property definitely as being "derived" - as opposed to property which was "believed to be derived" from criminal activity.

PROFESSOR McCLEAN confirmed that the intention was to freeze the proceeds pending the determination of the proceedings, and as the stage was one of allegation rather than of concluded proof of guilt, the point would have to be looked at by the Drafting Committee.

In reply to a question from the delegate of Australia, Professor McClean said that the intention had been to make it clear that the Scheme provided for the possibility, where countries wished to do so, of allowing for an interim seizure order or restraining order in country A to be enforced in country B. Speed would be of the essence in such circumstances as assets would be being got out of the way. It had seemed to the workshops that there would be advantage in some situations, once an order had been made in one country, to be able to export it to another country without putting together the whole case for a fresh order for an restraining order in the second country. This took account of the fact that it was an interim measure only, and awaited the final outcome of further proceedings.

THE DELEGATE FOR GHANA asked for clarification on the question of interim seizure. If an aircraft were placed under interim seizure and it subsequently transpired that there was insufficient evidence to convict the person concerned, would there be compensation provided for the loss of revenue resulting from the interim seizure? Did the loss lie where it fell, or was the requesting country going to provide compensation for the interim seizure? He suggested that provision be made to cater for payment by the requesting country of any damages or compensation that might arise from the Seizure, where the proceedings pending in the requesting country had either been discontinued or terminated

in favour of the suspect/accused whose assets had been seized in the interim by the requested country.

PROFESSOR McCLEAN drew attention to the provisions in many countries' legislation providing either for undertakings to be given by applicants for interim restraining orders, or for ex post facto compensation. In legislation such as the Canadian legislation there was elaborate protection for third party interests even where the property was the subject of interim restraining measures. All these matters were, he thought, to be dealt with in domestic legislation and in this area, as in others, it would be for the local law of the requested jurisdiction to provide the answers to the questions which delegates were raising.

THE DELEGATE FOR JAMAICA noted the consultant's comments that the law of the requested country would determine whether an interim restraining order would be made. This would normally be the case in questions of private international law. However there was a drafting point. In para. 28 it was the law of the requested country which applied insofar as enforcement orders and confirmation orders were concerned. Further, there was the provision in para. 29 that it was the law of the requested country which determined whether or not property was to be released from the effects of seizure. However there was not such provision in relation to interim orders. He asked the question as to whether there might be a conflict of laws situation in which there was a renvoi situation. Obviously the lex situs would apply where real property was involved, but he felt that the lex fori should apply in any event and the drafting should make this plain.

THE CHAIRMAN accepted the point and referred it to the Drafting Committee. He invited the meeting to take the next point.

PROFESSOR McCLEAN referred to the original text of the forfeiture provisions, which had been put together quickly in the run up to the Harare meeting. The definition provided that the "proceeds of criminal activity" related to property held "by the person convicted of an offence". The definition, he suggested was defective in that benefits could be secured for other persons - a shell company, a spouse, etc. Further in para. 29 (b) the notion of a course of conduct had been addressed, to strike at the fact that very often specimen convictions might be obtained whereas in fact there was a whole history or pattern of drug trafficking enterprise which had led to the accumulation of profits. The definition sought to capture the accumulation. He suggested that experience had since shown that there were better ways of approaching this matter. Further, the Scheme had gone too far in trying to provide a definition, which properly belonged in the domestic law of the requested country. For these interlocking reasons a more neutral draft had been prepared and was before the Meeting.

THE CHAIRMAN asked whether any delegates had problems with the proposal, which seemed to him to be unobjectionable. (There were none).

PROFESSOR McCLEAN said that he fully accepted the need for some clarification of the matter raised by Canada. It seemed to him that the natural practical thing would be that the requesting country would endeavour to have its order, as it stood, enforced in the requested country, and there would be a greater need of documentation if the requested country was to make a new application in its court. Was the proposal that in every case a requesting country was to provide a complete set of documentation? He was sure the meeting would not wish to burden the requesting authority with an obligation to provide a full documentation in every case.

THE DELEGATE FOR CANADA said that if one only provided for direct enforcement, and the requested country was unwilling to enforce directly, then the requesting country was left with no remedy whatever. He suggested that such in circumstances it was no real burden to

give the requesting country a second chance to apply for enforcement by way of a fresh application for an original order in the requested country. He saw this position as being for the benefit of the requesting country, if its original request was precluded either by law or by circumstance.

PROFESSOR McCLEAN accepted that there was a need to provide for both types of procedure to be available, particularly as the UN Convention provided for this. The question he was asking was whether one provided for two separate procedures. It was simply, as he saw it, a question of technique.

THE DELEGATE FOR CANADA recalled that the delegate for Botswana had raised the issue with the respect to para. 27, on the standard of belief where property was "believed" to have been obtained from a crime, and which was the subject of an application for a restraining order. This was the reason why the two concepts could not be mixed.

THE CHAIRMAN invited the Drafting Committee to examine the point carefully. He suggested that the meeting focus now on the issue as to whether the additional flexibility should be brought into the scheme, as proposed by Canada, and invited comments from any delegate who felt uneasy about agreeing to this added flexibility, especially given the incorporation of such flexibility in the 1988 UN Convention. There being none, he noted the conclusion of discussion of Agenda Item 6B.

Questionnaire

THE CHAIRMAN invited Mr Anthony Webb, QC (Consultant to the Commonwealth Secretariat) to speak briefly to a summary of the responses to the questionnaire which had been circulated to governments.

Mr Webb explained how the tables had been put together and invited delegates to discuss any particular points with him outside the formal meeting.

Wednesday 21 June 1989

THE CHAIRMAN (The Hon Tan Book Teik) reported to the meeting that that the Drafting Committee had succeeded in meeting at 9 a.m. that morning, despite the London-wide transport strike. They had prepared a detailed report for consideration by the Meeting.

AGENDA ITEM 8

THE CHAIRMAN invited the leader of the Canadian delegation, Mr D C Prefontaine to assume the chair for this agenda item.

THE CHAIRMAN (Mr D C Prefontaine) noted that there was before the Meeting a note on implementation, to date, of the Scheme for the Transfer of Convicted Offenders. This showed that while no country had implemented the Scheme as such, the UK had enacted legislation in 1984 to give effect to the European Convention on the Transfer of Convicted Persons, which had been extended to Cayman Islands, Hong Kong and the Isle of Man. However the Scheme had not been adopted as such by the UK because of difficulties with the acceptance provision not meeting the requirements of it legislation. Kiribati, Malta and Nigeria had all enacted legislation but no reciprocal arrangements had yet been made. His own country had legislation and had arrangements with a number of countries. He invited further comments as to progress with implementation in the Commonwealth context.

THE DELEGATE FOR MALTA explained that occasional ad hoc arrangements had been made for the transfer of convicted offenders. In most instance these had not been with Commonwealth countries.

THE DELEGATE FOR CANADA wished to record the fact that the Canadian Transfer of Offenders Act had been enacted in 1978 which had enabled it to accede to the Council of Europe's Convention, to which 14 countries (including Canada) were now parties. They also had bilateral arrangements with 17 countries. Although they had not implemented the Scheme as such, their legislation was consistent with the Commonwealth Scheme and they were in a very strong position and able to negotiate arrangements expeditiously with any country which was interested. In the past nine years they had brought back to Canada some 225 prisoners and they had returned, or surrendered, principally to the United States, 96 prisoners.

The procedure for bilateral arrangements was expeditious and usually effected through diplomatic missions abroad. He encouraged countries who were interested in working out arrangements with Canada to consider going through diplomatic channels for the purposes of starting talks.

THE DELEGATE FOR NIGERIA noted that his country had enacted legislation to enable the Scheme to be implemented, and they thought they had done all that was required of them. They were of the view that all that remained was for other Commonwealth countries to promulgate similar legislation in which case the Scheme would come into force by way of reciprocity between those countries.

THE REPRESENTATIVE OF THE COMMONWEALTH SECRETARIAT apologised to the Delegate for Nigeria as it was, of course, wrong to say that no country had implemented the Scheme as such - Nigeria had done so, and it was the Scheme which had not entered into force because a move to do so by a second was still awaited.

THE DELEGATE FOR KIRIBATI indicated that his country was willing to enter into arrangements with countries, both Commonwealth countries and others. They had their legislation in place, and they were waiting, in particular, for their neighbours to catch up. He was hoping to conclude arrangements with Nauru, as they had a number of their citizens working in Nauru, and also with Tuvalu and the Marshall Islands.

THE DELEGATE FOR BRITAIN noted that, like Canada, they subscribed to the European Convention on the Transfer of Sentenced Persons. There had been some practical difficulties where the result of a transfer had led to a substantially reduced sentence, and this had caused some difficulty. The arrangements had started off very slowly, but they would wish to encourage both the European and the Commonwealth arrangements to be used more widely than to date.

THE CHAIRMAN then invited Britain to speak to the proposed amendment to the Commonwealth Scheme for the Transfer of Convicted Offenders.

THE DELEGATE FOR BRITAIN explained that they had had some difficulty. They wished to subscribe to the Commonwealth Scheme and their enabling legislation authorised them to arrange transfers where they were parties to international arrangements providing for transfers. They had had some difficulty over the acceptance provision in article 19. It was unclear as to how countries would know who belonged to the arrangement. They were therefore suggesting an amendment, if other countries were agreeable, so that there would be a requirement for formal notification to the Secretariat of acceptance of the Scheme and a deposit with the Secretariat of their enabling legislation. Such an amendment would enable Britain then to give effect to the scheme.

THE CHAIRMAN read the proposed amendment: "Any country wishing to adopt the Scheme shall formally notify the Commonwealth Secretary-General that the provisions of this Scheme shall govern the transfer of prisoners between that country and any other country that accepts the Scheme, and shall inform him of the proper channels for communication and deposit with him a copy of its primary legislation."

THE DELEGATE FOR BERMUDA asked what the word "formally" meant.

THE CHAIRMAN suggested that this involved a communication with the Secretary-General. He invited the Commonwealth Secretariat to explain its understanding of the position.

THE REPRESENTATIVE OF THE COMMONWEALTH SECRETARIAT explained that in the case of Nigeria the Ministry of Justice and Attorney General had written to the Secretary-General stating that he wished to advise that his government "had formally adopted the Commonwealth Scheme" and attached a copy of the legislation to his letter. It seemed that Nigeria had anticipated that such a notification was properly called for. He understood that the use of the word "formal" had some advantages insofar as the UK legislation was concerned.

THE DELEGATE FOR JAMAICA asked for clarification. He asked whether the meeting was coming close to something that was near and dear to his own delegation's hearts, namely a formal treaty. He asked why this notification procedure was built into the Scheme for the transfer of convicted offenders, but not into the others.

THE REPRESENTATIVE OF THE COMMONWEALTH SECRETARIAT recalled that the provision had been inserted in the Scheme because there was a feeling that there should be a central point which could be contacted to ascertain whether there were arrangements in place, and if so what the proper channels of communications were. The position had been asked for as a matter of practicality. He accepted that one could make the same argument in respect of the other Schemes, but perhaps the difference was that mutual legal assistance allowed for a variety of responses whereas the present scheme was really a single issue Scheme.

THE DELEGATE FOR JAMAICA suggested that the draft addressed looked at intention, and he was not clear why.

THE REPRESENTATIVE OF THE COMMONWEALTH SECRETARIAT said that a suggestion had been received that the opening of the paragraph be reworded.

THE DELEGATE FOR BERMUDA suggested that there were two positions. One was where a country enacted legislation which said that the Scheme would govern the transfer of convicted offenders; the other was where a country enacted its own legislation, which followed the Scheme but did not actually say that "the Scheme shall govern" transfers. What would be the position in the later case? What was needed was a formal words which would meet the British point was ensuring that countries who implemented the scheme notified the Commonwealth Secretary-General so that he could let everyone else know that the arrangements were in force.

THE CHAIRMAN noted that the scheme could be implemented in a number of ways. He asked the Commonwealth Secretariat to comment.

THE REPRESENTATIVE OF THE COMMONWEALTH SECRETARIAT suggested that the existing text be completely rewritten, and taking up the point made by the Delegate of Bermuda.

THE CHAIRMAN invited further comments.

THE DELEGATE FOR JAMAICA hesitated to take the floor again, but pointed out that they would be making the Commonwealth Secretary-General a depository whereas previously the the provision had been trying to make the "consensual link" between the participating countries, and creating the mutual obligations. Under the re-draft the Secretary-General would simply be a depository, and receive certain types of information. However if the intention was simply to have the Commonwealth Secretary-General act as a depository, then the suggested amendments achieve that.

THE DELEGATE FOR BERMUDA said that he had thought this to be the original intention. He noted that in the Mutual Legal Assistance Scheme there was a parallel in para. 32, which similarly provided for notification of central authorities to the Secretary-General so that countries could easily have access to this information. He was happy with the proposed amendment.

THE CHAIRMAN noted the Meeting's agreement to the concept and invited the Secretariat to fine tune the wording for subsequent consideration by the Meeting. As no other amendments had been proposed, he declared the agenda item completed.

AGENDA ITEM 9

THE CHAIRMAN (The Hon. Tan Boon Teik) said that he had resumed the chair only to invite Mrs Shirley Miller QC of Jamaica to assume it.

THE CHAIRMAN (Mrs Shirley Miller, QC) recalled that it had been in Winnipeg in 1977 that the idea was thrown up for arrangements for mutual assistance in criminal matters to be explored. Since then, interest in the matter had grown considerably and had resulted in the Commonwealth Scheme. But the involvement of Commonwealth countries had not ended there, as there were also the questions of bilateral and multilateral relations with non-Commonwealth countries in the area of mutual legal assistance. This could be either the United States, where there had been various developments, or with civil law countries. She suggested that the agenda item would enable the delegates to share experience in negotiating treaties with non-Commonwealth countries. Speaking for Jamaica, they had had limited experience in the field in negotiating with the USA. And those experiences would be shared in due course. In the meantime she invited other delegations to share the experience in this area.

THE DELEGATE FOR AUSTRALIA recalled that most delegates would be familiar with what Australia had been doing, from their attendance at the three regional workshops. There was a paper by Mr Herman Woltring in volume 4 of the materials published by the Commonwealth Secretariat which summarised the negotiating experience of Australia, the source of problems they had encountered in dealing with civil law jurisdictions and in general how these had been overcome. For more specific details on particular problems, the texts of four of their treaties was also reproduced in volume 4. They proposed to continue to provide copies of their mutual assistance treaties to the Commonwealth Secretariat so that these could be made available to any other countries who might be interested. They had signed a treaty with Canada the previous day, and would be signing with Spain and Portugal the following week. They had signed treaties with the Philippines and with the UK (limited to drugs). They had recently concluded their negotiations with France, and had found them very reluctant to put proceeds of crime clauses in their mutual legal assistance treaties notwithstanding their participation in the Commission on Narcotic Drugs meetings in Vienna. Since France were about to sign the UN Convention they would become obliged to provide for a forfeiture law. When anyone found that the French had overcome their present reluctance, Australia would be only too happy to know! Similar difficulties had been experienced with Finland on the question of forfeiture.

THE CHAIRMAN noted that all delegates had been benefiting greatly from the Australian experience and were grateful for the cooperation which Australia had been according and had indicated that they were prepared to continued to accord.

THE DELEGATE FOR CANADA said that they were awaiting the US Senate to ratify their treaty with the USA, which was expected towards the end of this year. They had also negotiated with France, the Netherlands and Switzerland and would hopeful to go to signature soon. They had encountered the same problem as Australia, but hoped they had achieved the best possible package achievable under present conditions.

THE CHAIRMAN noted that with the growth in negotiation, some of these barriers will start break down. Thus keeping in touch with each other was a crucial part to the process.

THE DELEGATE FOR JAMAICA had had some experience in negotiating with the United States of America. The negotiations started in 1983 and there was now a text which had been initialled by both countries for signature and ratification. Volume 4 page 190 set out some of the problems they had encountered and he would not deal with these in any detail. He wished to highlight the question of a material witness. One of the issues concerned US law which empowered the US to detain a person as a "material witness". It was thought that a witness who travelled voluntarily would be a cooperative witness, and that it would be unlikely that such a person would be detained. However the possibility existed, and they had considered inserting a provision in the treaty advising witnesses of that possibility. Eventually it had been ommitted on the basis that administratively the witness would be advised of the position before that witness travelled to the United States to give evidence.

A second issue was privilege. This had proved a problem and the only way in which the matter could be concluded was to have the treaty silent on the subject, leaving it each country to deal with the matter saw fit in its own domestic legislation. This was not an ideal situation that it was the type of action which was, from time to time, unavoidable.

A third issue was minimum criminality. Jamaica had insisted that the treaty not be used as an opportunity to embark on fishing expeditions and that there should be a minimum criminality element in relation to all requests. After some negotiation this had been agreed. Such an insistence was also consistent with the Commonwealth Scheme.

A further issue was the prosecution of persons on the grounds of race, colour, political opinions etc. His government attached much importance to this issue and it proved almost intractable, but they had succeeded in securing a provision to the effect that a request might be refused where compliance with it would facilitate the person's prosecution or punishment on account of race, religion, nationality or political opinions. Again, this was consistent with the Commonwealth Scheme.

THE DELEGATE FOR INDIA reported that his government had recently entered into a Memorandum of Understanding for mutual legal assistance in criminal matters with Switzerland. The main problem they had encountered had been the principle of dual criminality. They were many acts which were offences in India which were not offences in Switzerland, and in such cases Switzerland refused to provide mutual legal assistance. India had elaborate laws in the area of foreign exchange control, and Switzerland had refused access to bank accounts etc. in such cases. This had been overcome by providing that if money were deposited in a Swiss bank by means of fraud, assistance would be available.

THE DELEGATE FOR THE BAHAMAS recalled that they had a treaty with the United States which was also awaiting approval by the US Senate. The main issue which had confronted them related to bank secrecy. It was felt that The Bahamas should endeavour to go as far as possible to keep bank records confidential, but nonetheless ensure as far as possible that

criminals would not abuse the banking system. In their agreement with the US, they had agreed to allow the opening of bank accounts and the waiver of secrecy where it could be shown that the information sought related to someone alleged to have been involved in drug trafficking or certain other operations. In such cases, bank secrecy laws would even be waived in respect of income tax measures. Even though the treaty was not yet in force, The Bahamas had on two occasions in practice allowed this waiver where the US had been able to substantiate that the persons against whom the information was sought could not have been prosecuted other than by the Inland Revenue Service. The Bahamas had allowed these requests as being the lesser of two evils.

THE DELEGATE FOR NIGERIA reported on his country's experience in negotiations with the United States. They had signed an agreement on procedure for assistance in criminal matters. The executive agreement did not need to go to Congress for ratification but dealt mainly with procedure. Matters covered by it were listed in the Commonwealth Scheme.

They had also negotiated a treaty with the United States on mutual assistance in criminal matters. When the treaty had been signed and ratified it would replace the executive agreement. In the meantime, relations between the two countries were governed by the executive agreement. They now had some limited experience, and this accorded with the points which had been raised by other delegates. There were some additional issues, however. They had based their negotiations on the Commonwealth Scheme, but had found that different interpretations had been placed on the limitations on the use for which evidence could be put which had been obtained under mutual legal assistance arrangements. The US had a narrower construction of this terminology in that any evidence or information obtained under the treaty could only be used by the government, or central authority, and only for criminal matters and could not be used in civil cases or by private individuals. On the question of forfeiture, the US accepted in principle but sought a wider scope in attacking instrumentalities as well as proceeds, and including aircraft and other such conveyances. The United States had agreed with them on the question of assets-sharing where forfeiture was achieved as a consequence of mutual legal assistance contributing to the process.

THE DELEGATE FOR BRITAIN expressed the view that as far as general mutual legal assistance arrangements were concerned, they would be able to provide assistance to any country which approached them under legislation which was presently being drafted. They had not been persuaded that there was any particular advantage to the negotiation of bilateral arrangements with countries whether inside or outside the Commonwealth, not as a question of principle but as a perceived need. Obviously they were prepared to do so where a country had a particular need for such an approach. However, whilst there was a clear need for bilateral agreements in relation to confiscation because of the particular complexities of the subject, the only country with which they had so far found it necessary to negotiate a full mutual legal assistance agreement was the United States. Talks had already started with further talks scheduled for later in the year.

THE DELEGATE FOR LESOTHO recalled that his country was completely surrounded by South Africa, a country which had been in the Commonwealth until 1961. South Africa was their only neighbour. Cases did arise for mutual legal assistance and bilateral arrangements existed for these to be dealt with on an ad hoc basis. However he stressed that his government never touched anything that had a political flavour because of the system of apartheid practised in South Africa. It was unfortunate, but it was a geographical fact that they were surrounded by such a neighbour.

THE CHAIRMAN, in summarising the discussion, noted a growing store-house of experience to assist Commonwealth countries as they continued to enter into growing numbers of bilateral relationships with non-Commonwealth countries in the field of mutual legal assistance in criminal matters. The United States of America figured very largely in this process, and

they in Jamaica had found it particularly useful in their negotiations with the USA to look at other treaties which had been negotiated by other Commonwealth countries to see how various problems had been solved. It had been useful at times to point to a solution reached in these negotiations where they were trying to insist on a particular position in relation to the USA. India had mentioned the question of double criminality with Switzerland, which was another problem Jamaica had had to deal with in respect of the USA.

There was a technical problem which had not been mentioned, which was that of language. Jamaica had wisely chosen an English speaking country with which to negotiate!

The fact that the Commonwealth scheme was in the background had also proved very helpful as they tried to negotiate their bilateral arrangements in a manner which was consistent with the Commonwealth scheme even though it was strictly speaking irrelevant.

AGENDA ITEM 10

THE CHAIRMAN (The Hon. Tan Boon Teik) noted that this item afforded an opportunity for delegates to mention how administratively they had carried out the mutual legal assistance arrangements. He asked Australia to commence the discussion.

THE DELEGATE FOR AUSTRALIA said that they had found that the negotiation of treaties had generated a very substantial increase in the case work, such as the number of requests which they had received. Careful planning needed in relation to resources because the handling of requests - whether outgoing or incoming - did have resource complications. There was also a real need to train law enforcement authorities. The development of the arrangements tended to be undertaken by a law ministry, not by a law enforcement agency, and so there was some training required to bring others up-to-date and to ensure that they understand what was involved. It was only after about three years that the utilisation of forfeiture provisions would generate a useful fund of experience.

AGENDA ITEM 11

THE CHAIRMAN invited Mr Adair Dyer of The Hague Conference on Private International Law to make a presentation on mutual legal assistance in civil matters as provided for by the Hague Conventions.

MR DYER expressed his organisation's pleasure at being able to contribute to the proceedings.

For some 35 years the area of mutual assistance in civil matters had been one of increasing activity for The Hague Conference. He expressed particular appreciation for the close relationship which had developed between the Hague Conference and the Commonwealth Secretariat. He paid particular tribute to the contributions which Professor McClean had been able to make at The Hague.

He referred in turn to The Hague Convention on the Service of Process (now in force between 27 countries), The Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (now in force between 20 countries) and The Hague Convention Abolishing the Legislation of Foreign Documents (now in force between 36 countries).

He emphasised that it was open to countries who were not members of The Hague Conference to accede to the conventions, and that procedures existed for this. He stressed, too, that the various conventions developed by the Hague Conference had quite deliberately set out to bridge differences in legal systems and it was a fact that all the conventions which

had been concluded had been ratified by both civil and common law countries. It had been true in the early years of the Hague Conferences operations that the civil law countries had been dominant but since the United States, Canada and Australia had joined Britain as common law members of the Conference, the work of the conference had been greatly strengthened by wider participation on the part of common law jurisdictions.

He noted that the Hague Convention on international Child Abduction was next to be discussed by the meeting, and drew attention to the Australian experience as set out in the Child Abduction Working Paper.

One of the advantages of the various Hague Conventions was that they gave access through a single instrument to a substantial number of countries. Thus it was highly economical to join a multilateral convention which created appropriate types of cooperation in civil matters as opposed to negotiating these on a bilateral basis. This was particularly so when going beyond the Commonwealth grouping.

The Conference was also involved in having periodic meetings on the workings of the various conventions, both in practice and in content.

PROFESSOR McCLEAN made a plea that as many countries as possible accede to the Convention to minimise the misery caused to parents who were unlawfully denied custody of their children.

THE DELEGATE FOR BRITAIN said that the UK had introduced legislation to implement the convention in 1986. They had had two to three years' experience in operating the system. In the period since August 1986 they had received 42 applications from other states which operated the same system, and had made 32 orders that the child in question should be returned to the applicant. These orders had been made in the UK courts. In five of the remaining ten cases, the courts had found against the applicant and determined that the child should stay where it was. The other five cases had been disposed of in other ways. In the same period, the UK had made 82 applications to a variety of countries, most of them non-commonwealth. Of these, only 21 had been successful. They thought there were some reasons for the differing rates of success. The first problem with the convention was that too few countries had signed it, and a person abducting a child, who was knowledgeable on the topic, can choose to take the child to a state to which the convention did not apply. Secondly, it was not simply a question of just signing or even ratifying the convention - one member of the European Community had signed and ratified the convention but had not yet introduced any legislation to implement it, with the result that there were still no arrangements in force under the convention. Even when legislation had been enacted two further problems arose. The first was that of practical assistance to the woman (since it usually was a woman) who was trying to secure the return of the child, who was unlikely to be rich, unlikely to be knowledgeable as to the law in the country to which the child had been taken and therefore needed help. The UK had established a panel of solicitors to whom any application was referred, who were knowledgeable in the relevant UK law and well placed to assist the applicant. This meant that the applicant did not have to work her way through the legal system from scratch. Secondly, the UK tried to move reasonably quickly because in practice, if the case took a long period of time there was a risk of the child disappearing before it was concluded. Delay in such cases is the same as negation. They therefore tried to resolve these cases in a matter of days rather than a matter of months. Where an appeal was involved, they try to have the matter resolved at least within weeks. In their experience this procedure had been reasonably helpful to applicants. He assured delegates that the United Kingdom's Central Authority (which was in fact the Lord Chancellors Department) would do all it could to be helpful to requests received from Central Authorities whilst of course remaining impartial. He expressed his country's hope that as many countries as possible would consider becoming party to the Convention which was one capable of removing a good deal of misery from individual citizens and their children.

THE DELEGATE FOR AUSTRALIA echoed the comments of the British delegation. It had also been their experience that increasing number of children were being taken from Australia, and the statistics suggested that almost as many children were being brought to Australia after they had been abducted by the non-custodial parent.

Australia had become a party on 1 January 1987, and had subsequently received 28 applications for action to be taken in Australia and had made 30 applications to Convention countries requesting the return of children abducted from Australia. Increasingly they received calls from distraught politicians who were being pressured by constituents, and she had had difficulty explaining that extradition was of no help in such matters and further that the country to which the child had been taken was not a party to the convention. At least seven or eight Commonwealth countries had fallen into this category within the past several months. It was the view of Australia that both the parents and interests of the child could be enhanced by maximum cooperation being assured in this area.

THE REPRESENTATIVE OF THE COMMONWEALTH SECRETARIAT explained by way of background that The Hague Convention under discussion was regarded by Commonwealth Law Ministers as very much a fruit of Commonwealth endeavour. He paid tribute to the hard work and inspiration of Mr Adair which had brought about the Convention and recalled that Canada had been at the forefront in feeling the need for a Convention such as this. Because of concern over the topic the matter had been listed for the agenda for the 1980 Meeting of Commonwealth Law Ministers in Barbados. The day before the Meeting was due to open, the estranged wife of the Chairman of the Barbadian Bar had flown into Barbados on a United Nations passport, had gone to the school play-ground where the child was playing (the father having custody after a full hearing in Barbados) and had removed the child from the play-ground. By the time the alarm was raised, mother and child were on a flight to France, and that was the end of the matter. Such a sensation had given particular poignance to the deliberations of Law Ministers, as it brought home very forcefully the agony involved in such an abduction.

There was a further matter. Time and again applications were coming before courts brought by parents who were living out of the jurisdiction who wished to take a child, for the purpose of access, to the country where they were living. A mother might have custody in Britain with a father living in New Zealand. The father wished to have the child for holiday in New Zealand. The Secretariat had found that, with surprising frequency, they were receiving telephone calls from judges from their chambers, asking what would happen if he were to allow such access and the child was not returned. Too often, the Secretariat had to advise that there would be no redress. It was therefore the perception of the Secretariat that legitimate applications for access were being denied by courts simply because not enough countries were participating in the Convention. He suggested they bear in mind that access was a right of the child, not just of the parent. Bearing this in mind, and seeing that the UK, Canada and the United States had all ratified the Convention, its potential assistance in helping with other Commonwealth countries was very considerable. He suggested that the Meeting might wish to pick up the suggestions made by Australia and Canada to the effect countries who had not done so or to consider becoming parties to this convention.

MR DYER acknowledged the considerable contributions made by Commonwealth countries to the production of the Child Abduction Convention. It had been a proposal by the Canadian government in 1976 which had started them off on the process of undertaking the necessary research. A Scottish law professor had served as president of the Commission, and several Commonwealth countries were among the 13 who were now parties to the convention.

The convention depended for its ultimate effect on having a broad network of countries cooperating in the matter. There were a number of countries in the process of going forward with ratification and he expected the number to be 18 or 20 within the next two

years. Once again, the Commonwealth Secretariat had prepared explanatory documentation for Commonwealth jurisdictions wishing to accede to the Convention and the Permanent Bureau was always available to provide assistance and documentation.

Notes on the Servicing of the New Arrangements

THE CHAIRMAN noted the need for government lawyers to have ready access to up to date information on mutual legal assistance arrangements. This had been provided by the Commonwealth Secretariat to date, but it was a growing field making increasing demands on its slender resources. The proposal was that the Meeting invite the Secretariat to explore the proposal to establish an information system with major legal publishing houses so as to establish the cost-effectiveness of such a service to Commonwealth governments. If a major legal publishing house were prepared to have such a matter farmed out to it, it might result in considerable savings to governments and to the Secretariat.

THE DELEGATE FOR BERMUDA said that something had to be done and he asked what support there would be for an alternative proposal, namely a recommendation that the Legal Division of the Commonwealth Secretariat get more manpower. He asked how practical such a counter proposal might be. He knew how hard-pressed and short of manpower the Legal Division was. Delegates around the table who received assistance on regular basis, such as his own, were in a position to appreciate just how overstretched the Legal Division was.

THE CHAIRMAN asked the representative of the Commonwealth Secretariat to respond to the suggestion.

THE REPRESENTATIVE OF THE COMMONWEALTH SECRETARIAT expressed appreciation for the remarks by the delegate for Bermuda, but expressed the view that before such a course could be followed the Finance Committee under which the Secretariat operated would expect all other avenues to be exhausted. He cautioned as well that notwithstanding a strong plea, even from Law Ministers, it would not necessarily follow that additional staff would in fact be provided by the Finance Committee on which all Commonwealth governments were represented. The Secretariat was under pressure to keep its staff to a minimum, and in the order of priorities it might be that a new post was needed to coordinate the various Commonwealth activities in the drugs area, of which law was only one.

THE CHAIRMAN noted that the meeting appeared to agree with the proposal made by the Secretariat. He invited the Commonwealth Secretariat to speak briefly on the question of the costs of distribution of the Commonwealth Law Bulletin. This was a growing item on the Secretariat's budget, and delegates had been invited to suggest how distribution might be made more effective whilst reducing costs.

THE REPRESENTATIVE OF THE COMMONWEALTH SECRETARIAT suggested that the most fruitful approach might be for individual delegates who had ideas as to how savings might be achieved to mention these to the Secretariat, either during the Meeting or subsequently. Then appropriate bilateral arrangements could be made. Their postal costs were enormous, and the Legal Division accounted for a highly disproportionate amount of the Secretariat's postal vote. Concern had been expressed in Finance Committee, but not about production of the Commonwealth Law Bulletin, as that was not in issue. The concern was the cost of its distribution. If ideas there were any for the saving of costs in distribution, governments would be saving their own money and this would also be much appreciated by the Secretariat.

THE CHAIRMAN asked if distribution through High Commissions could be used.

THE REPRESENTATIVE OF THE COMMONWEALTH SECRETARIAT cautioned that, for reasons of cost to the High Commissions themselves, some High Commissions were loathe to play a role in this way. However the Secretariat would be happy to pursue the matter with individual High Commissions who were prepared to play such a role.

Consideration of report of the drafting committee

(Interventions to correct minor typographical and stylistic matters are not recorded here).

THE DELEGATE FOR JAMAICA recalled that in the course of the discussions he had asked whether in fact any countries had experienced difficulties with the prima facie rule. His question had remained unanswered and he asked whether, in that respect, the report from the Drafting Committee accurately reflected the discussion. It would, he suggested, be entirely appropriate for delegations, if they had expressed difficulties, to voice them at this stage.

THE DELEGATE FOR AUSTRALIA said it was a little difficult in a forum such as the Meeting to be articulating in public specific difficulties which were being experienced with fellow Commonwealth member countries. In a sense the point was well taken, but had been very conscious when he had been making his own remarks that his own country had been experiencing very real difficulties. He had spoken in generalities and not in specifics in order to avoid embarrassment.

THE CHAIRMAN noted that the draft as it stood now accurately recorded the discussion. (Suggestions for amendments were made by the delegations of: Australia, Bermuda, Botswana, Britain, Canada, Dominica, Hong Kong, Jamaica, Jersey, Lesotho, Malaysia, Malta, Sri Lanka, Tanzania, Zambia, Zimbabwe, CARICOM, Professor McClean and the Commonwealth Secretariat).

Next meeting

THE CHAIRMAN invited the Commonwealth Secretariat to introduce discussion on the next meeting of Senior Officials from Law Ministries.

THE REPRESENTATIVE OF THE COMMONWEALTH SECRETARIAT suggested that delegates might wish to reflect on the timing for their next meeting. In the normal course of events, Senior Officials would be meeting briefly on Sunday 22 April on the eve of the next Law Ministers Meeting. He suggested that experience in Zimbabwe, where the Harare Scheme and the Scheme for the Transfer of Convicted Offenders as well as amendments to Commonwealth Extradition Arrangements had all been agreed, suggested that it was extremely unsatisfactory for Senior Officials to be dealing with substantive matters at a time when their Law Ministers were meeting, or just about to meet. He recalled that the Meeting had decided to consider a recasting of the Canadian proposal in respect of the prima facie case. It was expected that the Canadian's revised paper should be in Commonwealth capitals well before the end of the year, giving Commonwealth Governments perhaps six months in which to consider policy aspects prior to Senior Officials coming together again. He suggested that it might be too optimistic to expect the matter to be concluded within the space of an afternoon on the eve of the Law Ministers Meeting.

The week before the Meeting of Commonwealth Law Ministers in Christchurch, the Commonwealth Law Conference would be held in Auckland, also in New Zealand. A good number of senior officials and Ministers would be attending the Commonwealth Law Conference in Auckland. With the meetings being held back-to-back it would make possible a single visit

covering both major Commonwealth legal events. Its also created the opportunity for Senior Officials from Law Ministries to meet late in the Commonwealth Law Conference week, on the afternoon of Thursday, 19 April. This was scheduled as a vacant half-day on the Conference programme. He suggested that delegates consider inviting the Secretary-General to consider reconvening the meeting at an appropriate time on the eve of next Law Ministers Meeting, and perhaps in Auckland on 19 April. This would mean that some hours could be spent on the Thursday without the guillotine of the start of the Law Ministers Meeting hanging over the heads of delegates. If the discussions had not concluded in Auckland, it would be possible for them to be resumed in Christchurch were this necessary. If agreement could not be reached, then clearly the matter would have to wait for another three years before Law Ministers next met. He suggested, however, that it would be a pity if agreement were achievable, for an effort not to be made to establish common ground and agree amendments in 1990 rather than 1993.

THE DELEGATE FOR BERMUDA asked to be the first to recommend that the meeting do indeed request the Secretary-General to reconvene the meeting in Auckland on 19 April.

THE CHAIRMAN recorded the meeting's agreement to this course.

THE DELEGATE FOR CANADA said that he thought that course was eminently sensible and they would endeavour to have the document ready, in close consultation with Australia and others, in accordance with the timetable which Mr Pope had indicated.

Appreciation

THE DELEGATE FOR DOMINICA expressed his own appreciation, and that of all the delegates present, for the quality of leadership and the guidance which the Chairman, and his deputies, had given the meeting. It had been run with a firm but gentle hand, and it was to the Chairman's credit that the business had been dealt with so efficiently. Lawyers had the reputation of being long-winded and for stretching out discussion, but a combination of excellent weather and the Chairman's guidance had combined to tame these temptations to linger. He expressed gratitude, too, to the distinguished delegates from Australia, Canada and Jamaica for the sessions which they had chaired. All delegates were greatly rewarded by the meeting. He was sure every delegate had benefited greatly and he was confident that the deliberations would assist them all at their national level as well as the forthcoming Law Ministers Meeting to wrap up and put in place the various Schemes. (Applause).

THE CHAIRMAN thanked the delegate for Dominica for his generous words. He thanked the meeting for the honour of electing him as its Chairman. He thanked the staff of the Legal Division of the Commonwealth Secretariat for the preparatory work which they had undertaken, not only for the meeting but also for himself as chairman. He recorded the indebtedness of the meeting in particular to their consultant, Professor McClean. He added his own appreciation of the parts played by delegates of Australia, Canada and Jamaica in relieving him of part of the burdens of office. He knew he spoke for them as well in saying that the meeting had been so successful because of the positive spirit in which Commonwealth Lawyers traditionally approached their common problems.

END

ANNEX 1

MEETING OF SENIOR OFFICIALS FROM LAW MINISTRIES

London, 19-21 June 1989

A G E N D A

1. Opening

2. Election of Chairman

3. Introductions of Delegations

4. Adoption of Agenda

5. The Scheme for the Rendition of Fugitive Offenders within the Commonwealth

   (a) country reports on implementation by legislation

   (b) practical experience under the Scheme

   (c) consideration of proposals for amendment

6. The Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth

   (a) country reports on implementation by legislation

   (b) the United Nations' Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (done at Vienna on 20 December 1988) and the relationship of its mutual assistance provisions to the Commonwealth Scheme

   (c) practical experience under the Scheme (excluding forfeiture of criminal profits)

   (d) consideration of any proposals for amendment (if any)

7. The forfeiture of criminal profits

   (a) country reports on legislation providing for domestic forfeiture and experience and practice under it

   (b) country reports on legislation for the enforcement of forfeiture orders made abroad and practice under it

   (c) consideration of proposals for amendment to the relevant provisions of the Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth

8. The Commonwealth Scheme for the Transfer of Convicted Offenders

   (a) country reports on implementation by legislation

   (b) practical experience

   (c) consideration of any proposed amendments (if any)

9. Bi-lateral Arrangements for Mutual Legal Assistance in Criminal Matters with non-Commonwealth Countries

   (a) country reports

   (b) practical experience

10. Administrative Arrangements for Handling Mutual Legal Criminal Assistance

11. Any Other Business

    Consideration of report to the 1990 Meeting of Commonwealth Law Ministers.

Close

19 February 1989

ANNEX 2

AMENDMENTS RECOMMENDED TO THE SCHEME FOR MUTUAL ASSISTANCE IN CRIMINAL MATTERS WITHIN THE COMMONWEALTH

1. Paragraph 1(3) (i)

   To read: (i) tracing, seizing and forfeiting the proceeds of criminal activities.

2. Paragraph 3(1)

   To read: For the purposes of this Scheme, a criminal matter arises in a country if the Central Authority of that country certifies that criminal or forfeiture proceedings have been instituted in a court exercising jurisdiction in that country or that there is reasonable cause to believe that an offence has been committed in respect of which such criminal proceedings could be so instituted has been committed.

   Insert a new paragraph 3(3):

   "Forfeiture proceedings" means proceedings, whether civil or criminal, for an order -

   (a) restraining dealings with any property in respect of which there is reasonable cause to believe that it has been -

      (i) derived or obtained, whether directly or indirectly, from; or

      (ii) used in, or in connection with,

   (b) confiscating any property derived or obtained as provided in paragraph (a) (i) or used as provided in paragraph (a) (ii); or

   (c) imposing a pecuniary penalty calculated by reference to the value of any property so derived or obtained or so used.

3. Transfer paragraph 22(1) to become paragraph 21(3), and omit paragraph 22(2).

4. Insert a revised text of paragraph 22:

   A document or other material transmitted for the purposes of or in response to a request under this Scheme shall be deemed to be duly authenticated if it:

   (a) purports to be signed or certified by a judge or magistrate, or to bear the stamp or seal of a Minister, government department or Central Authority; or

   (b) is verified by the oath of a witness or of a public officer of the Commonwealth country from which the document or material emanates.

5. Delete paragraphs 26 to 29 and substitute:

Tracing the proceeds or instrumentalities of crime

26. (1) A request under this Scheme may seek assistance in identifying, locating, and assessing the value of, property believed to have been derived or obtained, directly or indirectly, from, or to have been used in, or in connection with, the commission of an offence and believed to be within the requested country.

(2) The request shall contain such information as is available to the Central Authority of the requesting country as to the nature and location of the property and as to any person in whose possession or control the property is believed to be.

Seizing and confiscating the proceeds or instrumentalitites of crime

27. (1) A request under this Scheme may seek assistance in securing

(a) the making in the requested country of an order relating to the proceeds or instrumentalities of crime; or

(b) the recognition or enforcement in that country of such an order made in the requesting country.

(2) For the purpose of this paragraph, "an order relating to the proceeds or instrumentalities of crime" means

(a) an order restraining dealings with any property in respect of which there is reasonable cause to believe that it has been derived or obtained, directly or indirectly, from, or used in, or in connection with, the commission of an offence;

(b) an order confiscating property derived or obtained, directly or indirectly, from, or used in or in connection with, the commission of an offence; and

(c) an order imposing a pecuniary penalty calculated by reference to the value of any property so derived, obtained or used.

(3) Where the requested country cannot enforce an order made in the requesting country, the requesting country may request the making of any similar order available under the law of the requested country.

(4) The requested shall be accompanied by a copy of any order made in the requesting country and shall contain, so far as reasonably practicable, all information available to the Central Authority of the requesting country which may be required in connection with the procedures to be followed in the requested country.

(5) The law of the requested country shall apply to determine the circumstances and manner in which an order may be made, recognised or enforced in response to the request.

Disposal or release of property

28. (1) The law of the requested country shall apply to determine the disposal of any property

(a) forfeited; or

(b) obtained as a result of the enforcement of a pecuniary penalty order as a result of a request under this Scheme.

(2) The law of the requested country shall apply to determine the circumstances in which property made the subject of interim seizure as a result of a request under this Scheme may be released from the effects of such seizure.

6. The remaining paragraphs to be renumbered appropriately.

ANNEX 2

AMENDMENTS RECOMMENDED TO THE SCHEME FOR MUTUAL ASSISTANCE IN CRIMINAL MATTERS WITHIN THE COMMONWEALTH

1. Paragraph 1(3) (i)

   To read: (i) tracing, seizing and forfeiting the proceeds of criminal activities.

2. Paragraph 3(1)

   To read: For the purposes of this Scheme, a criminal matter arises in a country if the Central Authority of that country certifies that criminal or forfeiture proceedings have been instituted in a court exercising jurisdiction in that country or that there is reasonable cause to believe that an offence has been committed in respect of which such criminal proceedings could be so instituted has been committed.

   Insert a new paragraph 3(3):

   "Forfeiture proceedings" means proceedings, whether civil or criminal, for an order -

   (a) restraining dealings with any property in respect of which there is reasonable cause to believe that it has been -

      (i) derived or obtained, whether directly or indirectly, from; or

      (ii) used in, or in connection with,

   (b) confiscating any property derived or obtained as provided in paragraph (a) (i) or used as provided in paragraph (a) (ii); or

   (c) imposing a pecuniary penalty calculated by reference to the value of any property so derived or obtained or so used.

3. Transfer paragraph 22(1) to become paragraph 21(3), and omit paragraph 22(2).

4. Insert a revised text of paragraph 22:

   A document or other material transmitted for the purposes of or in response to a request under this Scheme shall be deemed to be duly authenticated if it:

   (a) purports to be signed or certified by a judge or magistrate, or to bear the stamp or seal of a Minister, government department or Central Authority; or

   (b) is verified by the oath of a witness or of a public officer of the Commonwealth country from which the document or material emanates.

5. Delete paragraphs 26 to 29 and substitute:

Tracing the proceeds or instrumentalities of crime

26. (1) A request under this Scheme may seek assistance in identifying, locating, and assessing the value of, property believed to have been derived or obtained, directly or indirectly, from, or to have been used in, or in connection with, the commission of an offence and believed to be within the requested country.

(2) The request shall contain such information as is available to the Central Authority of the requesting country as to the nature and location of the property and as to any person in whose possession or control the property is believed to be.

Seizing and confiscating the proceeds or instrumentalitites of crime

27. (1) A request under this Scheme may seek assistance in securing

(a) the making in the requested country of an order relating to the proceeds or instrumentalities of crime; or

(b) the recognition or enforcement in that country of such an order made in the requesting country.

(2) For the purpose of this paragraph, "an order relating to the proceeds or instrumentalities of crime" means

(a) an order restraining dealings with any property in respect of which there is reasonable cause to believe that it has been derived or obtained, directly or indirectly, from, or used in, or in connection with, the commission of an offence;

(b) an order confiscating property derived or obtained, directly or indirectly, from, or used in or in connection with, the commission of an offence; and

(c) an order imposing a pecuniary penalty calculated by reference to the value of any property so derived, obtained or used.

(3) Where the requested country cannot enforce an order made in the requesting country, the requesting country may request the making of any similar order available under the law of the requested country.

(4) The requested shall be accompanied by a copy of any order made in the requesting country and shall contain, so far as reasonably practicable, all information available to the Central Authority of the requesting country which may be required in connection with the procedures to be followed in the requested country.

(5) The law of the requested country shall apply to determine the circumstances and manner in which an order may be made, recognised or enforced in response to the request.

Disposal or release of property

28. (1) The law of the requested country shall apply to determine the disposal of any property

(a) forfeited; or

(b) obtained as a result of the enforcement of a pecuniary penalty order as a result of a request under this Scheme.

(2) The law of the requested country shall apply to determine the circumstances in which property made the subject of interim seizure as a result of a request under this Scheme may be released from the effects of such seizure.

6. The remaining paragraphs to be renumbered appropriately.

ANNEX 3

AMENDMENT RECOMMENDED TO SCHEME FOR THE TRANSFER OF CONVICTED OFFENDERS WITHIN THE COMMONWEALTH

Delete para. 19 and substitute:

19. Any country which enacts legislation to give effect to this Scheme shall notify the Commonwealth Secretary-General of that fact and shall inform him of the proper channel for communication and deposit with him a copy of the legislation.