

New Zealand

1 A Short History of Domestic Prosecutions of International Crimes Prior to Implementing Legislation

1.1 Under customary international law

There have been no domestic prosecutions of international crimes under customary international law in New Zealand. Although the question has never been tested, it seems that a crime at customary international law could not be prosecuted in the domestic sphere without implementing legislation to incorporate the crime into domestic law.¹

1.2 Under conventional international law

Similarly, there have been no domestic prosecutions of international crimes under conventional international law in New Zealand. The New Zealand Court of Appeal confirmed in *New Zealand Airline Pilots' Association Inc v Attorney-General* that New Zealand holds a dualist approach to international treaties.² Citing Lord Aitken in *Attorney-General for Canada v Attorney-General for Ontario*³ Keith J said:⁴

“[W]hile the making of a treaty is an Executive act, the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. The stipulations of a treaty duly ratified by the Executive do not, by virtue of the treaty alone, have the force of law.”

On the basis of this dualist approach then, no domestic prosecution can proceed on the basis of an international treaty without domestic enactment. Thus, the New Zealand courts have no jurisdiction over the crimes created by the Rome Statute in the absence of the domestic implementing legislation.

1.3 Under other domestic or international legal provisions

Grave breaches of the four Geneva Conventions were criminalised in New Zealand by the Geneva Conventions Act 1958. Grave breaches of the First Additional Protocol to the Conventions have been criminalised in New Zealand since 1993 by virtue of the Geneva

1 Section 9, Crimes Act 1961 provides that “No one shall be convicted of any offence at common law...”.

2 [1997] 2 NZLR 269.

3 [1937] AC 326 at 347.

4 Above, note 2, at 280.

Conventions Amendment Act 1987. Torture became a crime in New Zealand by virtue of section 3 of the Crimes of Torture Act 1989.⁵

There are a number of other Acts that criminalise in New Zealand acts or omissions that might be considered international crimes: Anti-Personnel Mines Prohibition Act 1998; Crimes (Internationally Protected Persons, United Nations and Associated Personnel, and Hostages) Act 1980; Nuclear-Test-Ban Act 1999; and Terrorism Suppression Act 2002.⁶

There has been no domestic prosecution under any of these Statutes.

2 Implementing Legislation

2.1 Title

International Crimes and International Criminal Court Act 2000 (hereinafter referred to as 'the Act' or, where the context requires, 'the principal Act'). The Act is available on the Internet at <http://www.legislation.co.nz/>.

2.2 When in force

The main provisions of the Act fall into two general categories: those relating to co-operation with the International Criminal Court (ICC) and those creating crimes in New Zealand. The provisions in the first category came into force as from 1 July 2002.⁷ The remainder of the Act (including the incorporation of the core crimes into domestic law) came into force on 1 October 2000.⁸

2.3 Government departments

The Act is administered by the Ministry of Justice.⁹ The Ministry of Foreign Affairs and Trade is an authorised channel in terms of requests for assistance to New Zealand from the ICC.

2.4 Amendments to existing legislation

The New Zealand approach was to implement the Rome Statute in a stand-alone Act. However, in order to ensure consistency with other legislation, a handful of consequential amendments were necessary. These are listed in sections 181-187 of the principal Act and include:

5 The definition of torture in this Act is taken directly from the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984.

6 All of these Acts are available at <http://www.legislation.co.nz/>

7 Section 2(1) effected by Clause 2, International Crimes and International Criminal Court Act Commencement Order 2002 (SR 2002/131).

8 Section 2(2).

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2.4.1 Diplomatic Privileges and Immunities Act 1968

The purpose of the 1968 Act is to make provision for diplomatic privileges and immunities in New Zealand and for privileges and immunities of international organisations and related persons. Section 10D, inserted by section 183 of the principal Act, empowers the Governor-General of New Zealand to confer on the Judges, Prosecutor and staff of the ICC such privileges and immunities as may be required by Article 48 of the Statute.

In June 2002, the Diplomatic Privileges and Immunities Amendment Bill was introduced into Parliament. When enacted, it will repeal the existing provision in the 1968 Act, replacing it with more detailed provisions and allow New Zealand to ratify the Agreement on Privileges and Immunities.

2.4.2 Extradition Act 1999

Section 99 of the Extradition Act 1999 governs the priority that the Minister of Justice ought to give in a situation of competing requests for extradition. Section 184 of the principal Act inserts section 99(3) into the Extradition Act whereby competing requests from the ICC for surrender and one or more countries for extradition must be dealt with, not under the terms of the Extradition Act, but under the terms of the principal Act.

2.4.3 Geneva Conventions Act 1958

Section 3 of this Act criminalises in New Zealand law grave breaches of the four Geneva Conventions 1949 and the First Additional Protocol 1977. The section is amended by the principal Act to ensure consistency in the penalties established by both Acts.

2.4.4 Penal Institutions Act 1954

Section 21P of the Penal Institutions Act 1954 provides protection for certain telephone calls to or from prison inmates so that the calls are not monitored. This amendment adds to the list of protected calls those that take place between an inmate and a person acting in his or her official capacity on behalf of the ICC.

2.4.5 Proceeds of Crime Act 1991

The purpose of the 1991 Act is to provide authority to confiscate the proceeds of serious criminal offending. Various provisions of this Act are amended to ensure that New Zealand can co-operate with the ICC pursuant to Article 93(1)(k) of the Statute relating to the identification, tracing, freezing or seizure of proceeds, property or assets.

3 Co-operation with the ICC

A notable feature of the co-operation provisions in the Act is the clear concern to ensure that New Zealand will be able to co-operate fully with the Court. For example, section 27, dealing with the execution of requests, provides:

“(1) If the ICC makes a request for assistance, the request must be dealt with in accordance with the relevant procedure under the law of New Zealand (as provided in this Act).

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

While Parts 4 and 5 (sections 32-123) set out the detail of arrest, surrender and other forms of co-operation, Part 3 of the Act sets out some general provisions relating to requests for assistance. Requests must be made through an ‘authorised channel’; that is, usually through diplomatic channels via the Ministry of Foreign Affairs and Trade,¹⁰ although there is a provision for urgent requests.¹¹

Sections 15 to 21 of the Act create several ‘offences against the administration of justice’, which supplement the co-operation provisions. The offences are directed at Judges and other officials of the Court itself as well as creating offences of bribery, giving false evidence, interference with witnesses or officials or conspiring to obstruct, prevent, pervert or defeat the course of justice.

3.1 Arrest and surrender

Generally speaking, requests for arrest and surrender will be made through diplomatic channels to the Ministry of Foreign Affairs and Trade, which will then transmit them to the Minister of Justice.¹² Part 4 of the Act (sections 32-80) deals specifically with detailed procedures for arrest and surrender.

3.1.1 Arrest procedure

On receipt of a request for surrender, the Minister “may” notify a District Court Judge and request the Judge to issue a warrant for the arrest of the person whose surrender is sought.¹³ The Judge “must” issue the warrant if s/he is satisfied that the person is in New Zealand, suspected of being in New Zealand or may come to New Zealand *and* if there are reasonable grounds to believe the person is the person to whom the request relates.¹⁴

Following arrest, the person must be brought before a District Court Judge “as soon as possible”.¹⁵ Bail is not available as of right and the person may not be at large without bail.¹⁶ However, the Judge may remand the person on bail, imposing any conditions s/he thinks fit.¹⁷

10 Section 25.

11 Section 26.

12 There is an urgency exception in section 26.

13 Section 33.

14 Section 34.

15 Section 39(1).

16 Section 39(2).

17 Section 39(3).

3.1.2 *Surrender procedure*

Once a person is arrested, the next step is for him/her to be brought before the District Court so that a determination can be made as to his/her eligibility for surrender. A person is eligible for surrender if the ICC warrant or judgment of conviction has been produced to the District Court and that Court is satisfied that the person in question is the person to whom the warrant or judgment relates.¹⁸ There is also a requirement that the District Court is satisfied that the person has been arrested in accordance with the proper process as provided in Article 59(2)(b) of the ICC Statute and that the person's rights were respected as provided in Article 59(2)(c) of the Statute.

Section 43(5), read with section 55(1) of the Act, specifies the circumstances in which surrender must not proceed. In all cases, the ICC must have made a determination that the case is inadmissible or that it has advised that it does not intend to proceed with the request. In each case, the burden of proof lies on the person being sought for surrender.

The legislation is clear that these narrow grounds are the only ones available to decline surrender. The District Court is not entitled to hear evidence going to the substance of the charges against the person.¹⁹ Essentially, the role of the District Court in making a determination of eligibility of surrender is a procedural check only. Note that a person may consent to being surrendered to the ICC.²⁰

Once the determination is made that the person is eligible for surrender (or a person has consented to surrender under section 45), the District Court will issue a detention warrant, sending a copy to the Minister of Justice.²¹ The District Court must inform the person that unless they waive the right, surrender will not be effected until 15 days have expired; that they have a right to make an application for a writ of habeas corpus; that they have a right of appeal to the High Court on a question of law only; that the actual decision on surrender is made by the Minister of Justice; and that if they are not removed from New Zealand within two months of the surrender order being made, they are eligible to apply to be discharged.²² Bail may be granted.²³

The next step is for the Minister of Justice to make a decision to surrender. The Minister "must" make a surrender order once the Court has made a determination of eligibility.²⁴ However, there is a narrow list of grounds for refusal of surrender. The most significant of these relate to restrictions on surrender that are listed in section 55 and are divided into mandatory (essentially that the ICC has determined that a case is inadmissible or it will not be proceeding) and discretionary (relating to where there are competing requests between the Court and another State).

18 Section 43(3).

19 Section 45(6).

20 Section 45.

21 Section 46(2).

22 Section 46(2)(c)-(e).

23 Section 46(3).

24 Section 47.

Section 53 onwards of the Act specifies the procedures to be followed in terms of the execution and form of surrender order once the Minister has made such an order.

3.1.3 *Constitutional/human rights concerns*

In many respects the procedures for arrest and surrender mirror procedures in New Zealand for dealing with extradition requests. An important difference is that the Extradition Act 1999 provides much broader grounds on which extradition can be (or must be) refused.²⁵ The aim of those limitations is to protect against abusive extradition requests from States whose motives are political, discriminatory or otherwise abusive.

By contrast, as outlined above, the grounds for refusal of surrender are much narrower in the ICC legislation. Section 55(3) of the Act provides as follows:

“To avoid doubt,

- (a) the only grounds on which surrender to the ICC may be refused are those specified in this section and, if applicable, section 23(2) (which relate to offences involving the administration of justice); and
- (b) the restrictions on surrender specified in the Extradition Act 1999 do not apply in relation to a request for surrender from the ICC.”

New Zealand does not have a written constitution, but the usual human rights protections are found in the common law, in the New Zealand Bill of Rights Act 1990 and in the Human Rights Act 1993. It would seem that the clear language of section 55(3) excludes any protection that these avenues might offer. That being said, many of the relevant protections, such as due process and the right to counsel, are already provided for within the legislation and so resort to the Bill of Rights Act, for example, would not be necessary.

3.2 **Other forms of assistance to the Court**

Part 5 of the Act (sections 81 to 123) puts in place detailed domestic procedures for types of co-operation other than arrest and surrender.

3.2.1 *Article 93 of the Statute*

Sections 81, 82, 89, 91, 92, 95, 100, 101, 109, 110, 111 and 113 respectively address the obligations set out in the sub-paragraphs (a)-(l) of Article 93(1) of the ICC Statute. In each case, it is the Attorney-General who considers the request and gives authority for it to proceed. The legislation sets out detailed criteria and procedures for dealing with and carrying out a request, but generally speaking the Attorney-General must be satisfied that it relates to an ICC investigation or proceeding and that (where relevant) the person or thing that is the subject of the request is or may be in New Zealand.

As with the provisions on arrest and surrender, the grounds on which a request may be refused are narrow – notwithstanding the apparent discretion conferred on the Attorney-

General. Section 114(1) sets out the grounds on which the Attorney-General must refuse a request for assistance (cannot be lawfully provided and there is no alternative assistance possible; or the ICC has determined that the case is inadmissible; or that it does not intend to proceed with the investigation or proceeding). The Attorney-General has the discretion to refuse a request on the grounds set out in section 114(2), namely that it would prejudice New Zealand's national security interests or that there is a competing request being made to New Zealand by another State. As with the arrest and surrender provisions, the legislation is very clear that these are the only grounds on which assistance can be refused.

3.2.2 Outside of mutual assistance context

Part 9 of the Act allows for the ICC to sit in New Zealand²⁶ and for the Prosecutor to conduct investigations in New Zealand.²⁷ While the ICC is sitting in New Zealand, it will exercise its functions and powers as provided for under the Statute and its Rules.²⁸ No orders, judgments or determinations of the ICC sitting in New Zealand are subject to review by the domestic courts.²⁹

Sections 14 to 23 of the Act deal with offences against the administration of justice, such as corruption, bribery, giving false evidence, conspiring to defeat the course of justice and interfering with witnesses. Section 15 (corruption) is directed to Judges, Registrar and Deputy Registrar of the ICC and Section 17 (corruption and bribery) is directed to officials of the ICC.

Section 14 of the Act asserts extra-territorial jurisdiction in respect of this group of offences, but it does not go as far as the core crimes. Here, the extra-territoriality only applies in two situations: where the act or omission is alleged to have occurred in New Zealand or on board a ship or aircraft that is registered in New Zealand (so a standard territorial provision) or the person charged is a New Zealand citizen. As with the core crimes, a prosecution under these provisions may not be instituted in any New Zealand court without the consent of the Attorney-General, although this does not preclude an arrest taking place, a warrant being issued or a person being remanded in custody or on bail.³⁰

3.2.3 Enforcement of sentences

Part 7 of the legislation sets out the provisions dealing with persons in transit to the ICC or serving sentences imposed by the Court. Section 139 provides that New Zealand may act as a State of enforcement for the ICC.

26 Section 167.

27 Section 166.

28 Section 168.

29 Section 170.

30 Section 22.

4 Incorporating the Crimes

The fact that the Statute appears in a Schedule to the Act does not, by itself, incorporate the Statute into domestic law.³¹ Section 6 of the Act does specify a number of provisions of the Statute, mainly relating to co-operation and assistance with the Court, that are to have the force of law in New Zealand. Section 12 provides for a range of provisions from the Statute to be applied in domestic proceedings. As regards the ICC crimes, rather than incorporating the crimes directly, an approach was taken whereby the legislation creates offences of genocide, crimes against humanity and war crimes that are in turn defined by direct reference to the relevant articles in the ICC Statute. In this way, the definitions of the core crimes are identical in New Zealand law and in the ICC Statute. Further consolidating that approach, section 12(4) of the Act provides that a New Zealand court, exercising jurisdiction over one of the three core crimes, “may have regard to any elements of crimes adopted or amended in accordance with article 9 of the Statute”.

4.1 Measure and extent of incorporation

4.1.1 *Genocide*

Section 9(1)(a) of the Act creates the offence of genocide while section 9(1)(b) creates the offence of conspiring or agreeing with any person to commit genocide. Section 9(2) provides that for the purposes of the section, “genocide is an act referred to in article 6 of the Statute”.

It is notable that the Statute itself only asserts jurisdiction over the actual act of genocide. Thus, the legislation goes further than the Statute in providing for the conspiracy offence as well. However, this offence is found in the Genocide Convention 1948 to which New Zealand is a party.

4.1.2 *Crimes against humanity*

The same approach of directly legislating for the offence and drawing on the Statute for the definition of the crime is adopted as regards crimes against humanity in section 10 of the Act.

4.1.3 *War crimes*

Section 11 of the Act deals with war crimes. In line with the approach in the two preceding sections, sub-section (1) creates the offence of a war crime and sub-section (2) goes on to define it. Again, it does this by reference to the Statute itself, referring to Article 8(2).

Because the definition is limited to Article 8(2), it would seem that in a prosecution in New Zealand there is no threshold imposed such that applies in prosecutions in the Court itself. In other words, the threshold in Article 8(1) that the Court shall have jurisdiction “in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes” has not been incorporated into New Zealand domestic law.

³¹ For a full discussion of what is required in a Statute to incorporate an international treaty, see *New Zealand Airline Pilots’ Association Case*, above, note 2.

5 Jurisdiction of Domestic Courts and Principles of Liability

5.1 Grounds of jurisdiction

The legislation asserts jurisdiction over “every person” who “in New Zealand or elsewhere” commits the said offences.³² Section 8(1)(c) supplements and confirms this extra-territoriality by providing that proceedings may be brought under the Act regardless of the nationality or citizenship of the accused, or whether or not any act forming part of the offence occurred in New Zealand or whether or not the accused was in New Zealand at the time that the act constituting the offence occurred or at the time a decision was made to charge the person with an offence.

Extra-territorial jurisdiction is an increasing feature of New Zealand’s criminal legislation in the case of offences that are international by nature.³³ However, this legislation goes much further because jurisdiction in respect of the core crimes applies even where there is no jurisdictional nexus with New Zealand.

Section 13 puts in place a safeguard to balance this sweeping power. It provides that proceedings in respect of all three crimes may not be instituted in any New Zealand court without the consent of the Attorney-General.

5.2 Temporal jurisdiction

Retrospective jurisdiction is asserted in respect of genocide (section 9) and crimes against humanity (section 10). Section 11 (war crimes) is not retrospective – but war crimes have been a crime in New Zealand since the enactment of the Geneva Conventions Act 1958.³⁴

By virtue of section 8(1), genocide occurring on or after 28 March 1979 (the date on which New Zealand became a party to the Genocide Convention 1948) falls within the Act. Crimes against humanity that occurred on or after 1 January 1991 fall within the Act. This date is the date on which jurisdiction over crimes against humanity were vested in the International Criminal Tribunal for the former Yugoslavia (ICTY) and is seen as a definitive date by which crimes against humanity were international crimes.

At the time the legislation was being enacted, the New Zealand Court of Appeal had occasion to strongly criticise the use of retrospective legislation in two separate cases, both dealing with sentencing provisions.³⁵ However, the retrospective provisions in the principal Act do not attract the same criticisms for two reasons. First, because genocide and crimes against humanity were criminal under international law from the relevant dates, the provisions do not offend Article 15(1) of the International Covenant on Civil and Political Rights 1966, which provides:

32 Sections 9(1), 10(1) and 11(1).

33 See for example, section 144A Crimes Act 1961 and section 3 Crimes (Internationally Protected Persons and Hostages) Amendment Act 1998.

34 There are of course some differences in the two Acts. Note that s 11(4) provides that nothing in s 11 of the principal Act affects or limits the operation of section 3 of the Geneva Conventions Act 1958 (which makes a grave breach of the Geneva Conventions an offence under New Zealand law).

35 *R v Poumako* [2000] 2 NZLR 695 and *R v Pora* [2001] 2 NZLR 37.

“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. ...”

Further, the retrospectivity goes back to clearly defined dates that are linked to international law developments. The second reason why the retrospectivity might be seen to be justified is that the underlying components of both genocide and crimes against humanity were always criminal under New Zealand law: murder, grievous bodily harm, assault, kidnapping, rape and so on. Thus, although the name of the offence is different, the substance of the offence pre-exists the legislation.

5.3 Principles of liability

Section 12(1)(b) of the Act provides that the provisions of New Zealand law and the principles of criminal law applicable to the offence under New Zealand law apply to proceedings in New Zealand. Thus, all the usual principles of liability apply. However, Section 12(1)(a) of the Act lists a number of provisions of the Statute that apply to such proceedings and these are outlined below. In the event of any inconsistency between the Statute’s provisions and New Zealand law, the former prevails.³⁶

Section 12 (1)(a)(v) provides that Article 26 of the Statute (exclusion of jurisdiction over persons under 18) applies in New Zealand proceedings. Consequently, persons under the age of 18 will not fall within the jurisdiction of this legislation. This is in contrast to New Zealand criminal law, which generally applies only to persons over the age of 17.³⁷ Persons under the age of 10 years cannot be convicted for committing an offence³⁸ and persons between the ages of 10-14 years can only be convicted if they knew that the act or omission was wrong or contrary to law.³⁹

Section 12(1)(a)(iv) of the Act provides that Article 25 of the ICC Statute (individual criminal responsibility) applies in New Zealand proceedings. Thus, complicity jurisdiction is asserted for New Zealand prosecutions on the same basis as for the Court itself. There is already provision in the New Zealand Crimes Act for complicity,⁴⁰ but the incorporation of Article 25 in this way takes the law much further and provides greater detail.

Section 12(1)(a)(vi) of the Act provides that Article 28 of the Statute (responsibility of commanders and other superiors) applies in New Zealand proceedings. This marks a

36 Section 12(3).

37 Section 208 of the Children and Young Persons and Their Families Act 1989 provides that criminal proceedings ought not be instituted against young persons (defined as a person under the age of 17 and never married) if there is an alternative course of action, unless the public interest requires the prosecution.

38 Section 21, Crimes Act 1961.

39 Section 22(1), Crimes Act 1961.

40 Sections 68 (for murder) and 69 (crimes other than murder), Crimes Act 1961. Note that s 181 of the principal Act amends those sections to ensure that they do not “limit or effect” ss 9-11 of the principal Act (criminalising genocide, crimes against humanity and war crimes).

significant change as previously there was no provision for command responsibility in New Zealand statute law.⁴¹

Section 12(1)(a)(vii) of the Act incorporates Article 29 of the ICC Statute (non-applicability of statute of limitations) into New Zealand law. Thus, there is no time limit imposed on when proceedings could be commenced in New Zealand. This is consistent with the general criminal law for all indictable offences.

Section 12(1)(a)(viii) of the Act provides that Article 30 of the Statute (mental element) applies in New Zealand proceedings. This is broadly similar to the *mens rea* requirement in New Zealand criminal law for comparable indictable offences.⁴²

6 Rights of the Accused

By virtue of section 12(1)(b),⁴³ a person being prosecuted under the Act will enjoy all the same rights under New Zealand law that normally attach to an accused. This includes the application of the Bill of Rights Act 1990. In addition, a number of protections in the ICC Statute itself are directly incorporated into New Zealand law by section 12(1)(a), which is discussed below. As with the principles of liability discussed above, in the event of any inconsistency between the ICC Statute protections and any protections offered by New Zealand domestic law, the Statute will prevail.⁴⁴

Section 12(1)(a)(i) of the Act provides that Article 20 (*ne bis in idem*) applies in New Zealand proceedings. The principle would appear to have already been part of New Zealand law by virtue of sections 358 and 359 of the Crimes Act 1961 and section 26(2) of the Bill of Rights Act 1990. However, inclusion of this provision removes any possible ambiguity.

Section 12(1)(a)(ii) of the Act provides that Article 22(2) of the ICC Statute (*nullem crimen sine lege* in the context of strict construction) applies in New Zealand proceedings. Again, this principle would also appear to be part of the New Zealand common law.⁴⁵

Section 12(1)(a)(iii) of the Act provides that Article 24(2) of the Statute (non-retroactivity) applies in New Zealand proceedings. This provision of the Statute is concerned with a change in the law prior to a final judgment and provides that, in such an event, the law more favourable to the accused shall apply. There is a strong prohibition against retrospectivity in New Zealand law.⁴⁶ However, that is premised on a retrospective

41 The First Additional Protocol to the Geneva Conventions of 1949 is included in the Fourth Schedule to the Geneva Conventions Act 1958 (as amended), but this by itself did not introduce the concept of command responsibility as set out in Article 86(2) of the Protocol into New Zealand domestic law.

42 See, for example, the definition of murder in section 167 Crimes Act 1961.

43 It provides that for the purpose of proceedings in respect of any of the three core crimes, “the provisions of New Zealand law and the principles of criminal law applicable to the offence under New Zealand law apply”.

44 Section 12(3).

45 See *R v Poupouare* (Unreported), T157/86 per Wylie J at 5.

46 See the discussion in *Pora and Poumako*, above, note 35.

provision operating to the detriment of an accused. Because the Statute will over-ride the New Zealand domestic law, Article 24(2) would take precedence.

7 Available Defences

Section 12(1)(c) of the Act provides that a person charged with war crimes, genocide or crimes against humanity may rely on any “justification, excuse, or defence available under the laws of New Zealand or under international law”. Section 20 of the Crimes Act 1961 preserves all common law defences as part of the New Zealand criminal law. As with principles of liability and rights of the accused, defences available to an accused in respect of the core crimes are available from the ICC Statute by means of the direct incorporation of Article 12.

Therefore, there are three sources of defences to an accused under the Act: New Zealand statutory defences, New Zealand common law, and the defences available in the ICC Statute. However, in the light of Section 12(3) of the Act,⁴⁷ it will be Articles 31 (by virtue of section 12(1)(a)(ix) of the Act), 32 (section 12(1)(a)(x)) and 33 (section 12(1)(a)(xi)) that would be applied for the most part in a New Zealand proceeding.

8 Immunity

When the Bill was first presented to Parliament, it was drafted so that Article 27 of the ICC Statute (irrelevance of official capacity) would apply directly in New Zealand law.⁴⁸ Reporting to Parliament, the Foreign Affairs, Defence and Trade Select Committee proposed that existing New Zealand law would apply instead, whereby “prosecutions of current diplomats and others holding similar immunities can take place in the court of another State only if the State which has the immunity waives it”.⁴⁹ The Committee’s proposal was accepted so that the legislation as enacted does not incorporate Article 27. Accordingly, for prosecutions that proceed within New Zealand, the normal immunities will apply.

A second aspect of the legislation dealing with immunity is where there is a request for surrender or assistance by the Court with respect to its own prosecutions or investigations. The initial Bill dealt with this issue by giving the Minister of Justice or Attorney-General the discretion to refuse a request from the Court in the event that Article 98 of the Statute was invoked by another State.⁵⁰ The Select Committee recommended that the onus of resolving questions about the existence of any immunities be placed with the Court – a recommendation that was subsequently adopted. Accordingly, as the legislation now stands, section 31 provides that the existence of any immunity is not a ground for refusing or postponing a request for surrender or assistance subject to sections 66 and 120. Essentially, these sections place the onus on the ICC to resolve any questions relating to Article 98 and then advise whether or not it intends to proceed with the

47 That in the event of an inconsistency between the domestic law and Statute, the Statute will prevail.

48 By means of Clause 12 of the Bill (now section 12 of the Act).

49 Report of the Foreign Affairs, Defence and Trade Select Committee, p 10.

50 Clauses 66 and 120 of the Bill.

request. If it does wish to proceed, then the request must be executed; if not, then that is the end of the request.⁵¹

9 Trial Procedure and Punishment in Domestic Courts

The trial procedure and punishment for the three ICC core crimes is the same as for all indictable offences in New Zealand. They are governed by the Summary Proceedings Act 1957 (pre-trial) and the Crimes Act 1961 (trial). The provisions of the Bill of Rights Act 1990 will also apply. There is a right of appeal against conviction or sentence to the Court of Appeal.⁵²

10 Article 98 Agreements

10.1 Government response to American attempts to conclude Article 98 agreements

The New Zealand Government has acknowledged that it has been approached by the United States with a request to conclude an Article 98 Agreement. In a statement to the Sixth Committee of the United Nations General Assembly, New Zealand seems to have indicated that it does not favour concluding such an Agreement. The New Zealand representative said:⁵³

“In this formative period all States Parties have a particular responsibility to support the ICC they have helped to create and to protect and maintain the integrity of the Rome Statute and the principles it contains. In that regard, New Zealand takes this opportunity to reassert its commitment to both the letter and the spirit of the Statute...

In our view, the Rome Statute contains a comprehensive range of checks and balances to protect against abuse. While we understand the sincerity of those few States that have reservations about the ICC, we are confident that its operations will, in fact, assuage those concerns.

Accordingly, as the ICC moves into its operative phase, we hope that all States will cooperate with its work, and recognize the particular obligations assumed by States Parties to the Rome Statute.”

51 Report of the Foreign Affairs, Defence and Trade Select Committee, p 10.

52 Section 383, Crimes Act 1961.

53 Statement by New Zealand representative, Elana Geddis, to the United Nations General Assembly Fifty-Eighth Session, Sixth Committee, 20 October 2003, available from www.mft.govt.nz.

