

HUMAN RIGHTS WATCH

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DRAFT No.2 - Table 1: Implementing the Rome Statute

Implementation Strategies Adopted by: Australia, New Zealand, Canada, United Kingdom and South Africa¹

Comparative criteria	Country				
	Australia	New Zealand	Canada	United Kingdom	South Africa
Status of implementing legislation	<p>IN FORCE: 1.9.2002</p> <p>Implementing legislation - the International Criminal Court Act 2002 (“the Cooperation Bill”) and the International Criminal Court (Consequential Amendments) Act 2002 (“the ICC Crimes Bill”) – were passed by Parliament on 27 June 2002. They will enter into force on 1 September 2002. Australia ratified the Rome Statute on 1 July 2002.</p>	<p>IN FORCE: 7.9.2000</p> <p>The ICC crimes included in the <i>International Crimes and International Criminal Court Act 2000</i> entered into force on 1 October 2000. The provisions regulating New Zealand’s cooperation with the ICC are intended to commence on 1 July 2002.</p> <p>New Zealand ratified the Rome Statute on 7 September 2000.</p>	<p>IN FORCE: 23.10.2000</p> <p>The <i>Crimes Against Humanity and War Crimes Act 2000</i> entered into force on 23 October 2000.</p> <p>Canada ratified the Rome Statute on 7 July 2000.</p>	<p>IN FORCE: 4.10.2001</p> <p>The <i>International Criminal Court Act 2001</i> is in force.¹</p> <p>The UK ratified the Rome Statute on 4 October 2001.</p>	<p>IN FORCE</p> <p>The <i>International Criminal Court Bill</i> was passed by Parliament on 26 June 2002.</p> <p>The Bill is currently awaiting Presidential signature.</p> <p>South Africa ratified the Rome Statute on 27 November 2000.</p>
General	The two implementing Acts	The Act comprehensively	The Act comprehensively	The Act comprehensively	The Bill simply “picks up”

¹ This informative chart is taken from the actual or proposed implementing laws for each jurisdiction. Importantly, each entry has been settled in consultation with government representatives from each relevant country during and after the 9th Preparatory Commission meeting in April 2002. Updates since the 9th PrepCom have not been subject to consultation. Comments from government representatives are welcome.

¹ The United Kingdom includes England, Wales and Northern Ireland. Many of the cooperation provisions extend to Scotland but jurisdiction for the ICC crimes does not (see s.79 of the Act). The domestic implementation of the ICC crimes in Scotland is contained in the International Criminal Court (Scotland) Act 2001. This Act has not been examined for the purposes of this chart.

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Comparative criteria	Country				
	Australia	New Zealand	Canada	United Kingdom	South Africa
summary	comprehensively implement the key provisions of the Rome Statute and incorporate the ICC crimes.	implements the key provisions of the Rome Statute and incorporate the ICC crimes.	implements the key provisions of the Rome Statute and incorporate the ICC crimes.	implements the key provisions of the Rome Statute and incorporate the ICC crimes.	the Rome Statute in its entirety, stating that it “applies in the [RSA], subject to the provisions of this Act” (see s.2 of the Bill). The extra provisions in the Bill set out the obligations to cooperate with the ICC.
Were any constitutional amendments made?	No.	No.	No.	No.	No.
Incorporation of ICC crimes into domestic law	All of the ICC crimes are incorporated into Australian domestic law by the ICC Crimes Act.	All of the ICC crimes are incorporated into New Zealand domestic law under the Act.	All of the ICC crimes are incorporated into Canadian domestic law under the Act.	All of the ICC crimes are incorporated into United Kingdom domestic law under the Act.	All of the ICC crimes will be incorporated into RSA domestic law under the Bill.
Definition of ICC crimes (Articles 6,7,8 – genocide, crimes against humanity and war crimes - & 9 – Elements of Crimes)	The ICC Crimes Act defines each crime in exhaustive detail, closely following the Elements of Crimes.	The Act does not define each crime in detail. It merely refers to the crimes as defined in the Rome Statute and permits a New Zealand Court to have regard to the Elements of Crimes (see s.12 of the Act).	The Act provides separate definitions of the ICC crimes (see ss.4(3) and 6(3) of the Act). These definitions are largely consistent with the Rome Statute and cover conduct recognized as an international crime under customary international law at the relevant time. ³	The Act does not define each crime in detail. It merely refers to the crimes as defined in the Rome Statute and permits a UK court to have regard to the Elements of Crimes (see s.50 and Schedule 8 of the Act).	The Bill does not define each crime in detail. It merely refers to the crimes as defined in the Rome Statute and permits a RSA court to have regard to the Elements of Crimes (see s.4(1) of the Bill).

³ The Act prescribes a mandatory sentence of life imprisonment for the “intentional” commission of an ICC crime and a maximum sentence of life imprisonment in any other case (see ss.4(2) and 6(2) of the Act).

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Comparative criteria	Country				
	Australia	New Zealand	Canada	United Kingdom	South Africa
<p>Universal jurisdiction² (UJ)</p>	<p>Yes, subject to a consent requirement.³</p> <p><i>Characteristics of UJ:</i></p> <p>The Attorney-General’s written consent is required before a prosecution can proceed.⁴</p> <p>There is no presence requirement. Thus an investigation <i>in absentia</i> could commence.⁵</p>	<p>Yes, subject to a consent requirement.⁶</p> <p><i>Characteristics of UJ:</i></p> <p>The Attorney-General’s consent is required before a prosecution can proceed.⁶</p> <p>There is no presence requirement at all. Thus an investigation <i>in absentia</i> could commence.⁷</p>	<p>Yes, but subject to both a presence requirement and a consent requirement.⁷</p> <p><i>Characteristics of UJ:</i></p> <p>Under s. 9(2) of the Act an accused must be present at the trial. It is not clear what is strictly necessary to comply with the presence requirement in ss.8 and 9(2).⁸</p> <p>The Attorney-General’s written consent is required before a prosecution can proceed.⁹</p>	<p>No, given a <i>residence</i> requirement and the consent requirement.¹⁰</p> <p><i>Jurisdiction characteristics:</i></p> <p>Jurisdiction only extends beyond UK nationals, citizens, etc to persons “subsequently becoming resident in the UK”. Mere presence is not enough; “<i>residence</i>” is required.</p> <p>The Attorney-General’s consent is required before a prosecution can proceed.¹¹</p>	<p>Yes, but subject to both a presence requirement and a consent requirement.¹²</p> <p><i>Characteristics of UJ:</i></p> <p>This presence requirement does not seem to preclude <i>in absentia</i> investigations.</p> <p>The National Director’s consent is required before a prosecution can proceed.¹³</p>

² Many jurisdictions purport to apply UJ subject to a “presence requirement”. The term “presence requirement” is used here to refer to a requirement for the accused to be physically situated within a country’s territory before giving rise to the necessary jurisdiction to prosecute. In jurisdictions with a “presence requirement” the accused must generally be present only for the prosecution stage of proceedings. A country could open an investigation into an accused’s conduct *in absentia* but, before a prosecution could proceed, the accused would have to be successfully extradited to the country intending to prosecute.

³ Existing s.15.4 of the *Criminal Code* applies UJ to the ICC crimes - specifically via s.268.123(1) of the ICC Crimes Act.

⁴ A person can be arrested, charged, remanded in custody, or released on bail before consent is obtained (s.268.127 of the ICC Crimes Bill – Australia; s.13 of the Act – New Zealand).

⁵ Although it would be very unlikely that the Public Prosecutor would commence a prosecution *in absentia*.

⁶ Section 8 of the Act applies UJ to the ICC Crimes.

⁷ Section 8 of the Act applies UJ if “after the time the offence is alleged to have been committed, the person is present in Canada.”

⁸ For example, could Canadian authorities launch an investigation *in absentia*, then seek a person’s extradition in order to commence a prosecution in conformity with s.9(2)?

⁹ Section 9(3) of the Act.

¹⁰ Sections 51, 58 and 67 of the Act. Existing UJ for grave breaches of the Geneva Conventions and torture were preserved but UJ was not extended to the ICC crimes generally.

¹¹ Via ss.53(3) and 60(3) of the Act.

¹² Section 4(2) of the Bill applies UJ to the ICC Crimes if “that person, after the commission of the crime, is present in the territory of the Republic”.

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Comparative criteria	Country				
	Australia	New Zealand	Canada	United Kingdom	South Africa
Retrospectivity (Articles 11 & 24)	No.	Yes, partially. The genocide crimes are retrospective back to 28 March 1979. The crimes against humanity are retrospective back to 1 January 1991. The war crimes do not operate retrospectively. ¹⁴	Yes, partially. For ICC crimes committed <i>outside</i> Canada there is retrospective application, providing the crime was recognized under customary international law at the relevant time (see s.6 and 7(5) of the Act). ¹⁵	No.	No.
Immunities, etc (Article 27)	The draft Acts do not refer to immunities, etc. For example, the Acts do not expressly override the immunity of certain foreign officials from criminal prosecution conferred under the Vienna Conventions (see the <i>Foreign States Immunities Act 1985</i> and the <i>Diplomatic Privileges and Immunities Act 1967</i>).	The Act expressly stipulates that the official capacity of a person is no ground for New Zealand to refuse to cooperate with the ICC (see s.31 of the Act.) However, this does not appear to extend to a prosecution under the Act in a New Zealand Court.	The Act amends the <i>Criminal Code</i> so that no person, regardless of official capacity, can claim immunity from the ICC or other international tribunal (see s.48 of the Act). However, this does not appear to extend to a prosecution under the Act in a Canadian Court.	The Act expressly stipulates that the official capacity of a person is no ground for the UK to refuse to cooperate with the ICC (see s.23 of the Act.) However, this does not appear to extend to a prosecution under the Act in a UK Court.	Official capacity is irrelevant. Article 27 applies fully by virtue of s.2 of the Bill.
Statute of Limitations (Article 29)	There is no limitation period for the ICC crimes under Australian law.	There is no limitation period for the ICC crimes under New Zealand law. Art.29 of is also replicated in s.12 of the Act.	There is no limitation period for the ICC crimes under Canadian law.	There is no limitation period for the ICC crimes under UK law.	There is no limitation period for the ICC crimes under South African law. Art.29 also applies fully by virtue of s.2 of the Bill.

¹³ Section 4(3) of the Bill.

¹⁴ The 28 March 1979 is the date New Zealand became a party to the Genocide Convention; 1 January 1991 relates back to the Statute of the ICTY. In practice, it was not necessary to make war crimes retrospective because many war crimes already existed in New Zealand law pursuant to the *Geneva Conventions Act*.

¹⁵ There is no retrospective application for ICC crimes committed within Canada prior to the commencement of the Act (see s.4 of the Act).

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Comparative criteria	Country				
	Australia	New Zealand	Canada	United Kingdom	South Africa
Command responsibility (Article 28)	Yes. Art.28 of the Rome Statute is replicated (s.268.121 of the ICC Crimes Act).	Yes. Art.28 of the Rome Statute is replicated (s.12 of the Act).	Yes. Art.28 of the Rome Statute is replicated (ss.5 and 7 of the Act).	Yes. Art.28 of the Rome Statute is replicated (s.65 of the Act).	Yes. Art.28 of the Rome Statute applies fully by virtue of s.2 of the Bill.
Superior orders (Article 33)	Yes. The defense of superior orders, as defined in the Art.33, is replicated (s.268.122 of the ICC Crimes Act). ¹⁶	Yes. The defense of superior orders, as defined in the Art.33, is replicated (s.12 of the Act).	Yes. The defense of superior orders, as defined in the Art.33, is replicated (s.14 of the Act).	Perhaps not. The Act <i>does not</i> expressly refer to the defense of superior orders. ¹⁷	Yes. The defense of superior orders, as defined in Art.33, applies fully by virtue of s.2 of the Bill.
Cooperation with the ICC	The Cooperation Act contains comprehensive provisions implementing the obligations to cooperate in the Rome Statute.	The Act comprehensively implements the obligations to cooperate in the Rome Statute.	The Act <i>does not</i> replicate the obligation provisions of the Rome Statute. Canada is relying on amended provisions in the <i>Mutual Legal Assistance in Criminal Matters Act</i> to regulate cooperation with the ICC. ¹⁸	The Act comprehensively replicates the obligations to cooperate in the Rome Statute.	The cooperation provisions of the Rome Statute apply by virtue of the s.2 of the Bill. However, Parts 3 and 4 of the Bill add to the Rome Statute provisions.
(i) general obligation to cooperate	Yes. See Part 2 of the Cooperation Act.	Yes. See Part 3 of the Act.	See above general comment.	Yes. See s.27 of the Act.	Yes. By virtue of s.2 of the Bill.

¹⁶ Consistent with Article 33 of the Rome Statute, the defense of superior orders is expressly stated to be available only for war crimes and only if: the order was obligatory; the person did not know it was unlawful; the order was not manifestly unlawful.

¹⁷ It would be necessary to determine whether the defense of superior orders was prohibited at common law or under existing UK legislation.

¹⁸ Consequential amendments made to the *Mutual Legal Assistance in Criminal Matters Act* (MLACMA) seem to provide for Canadian cooperation with the ICC. According to the Canadian government, the amended MLACMA represents the full implementation of Canada's obligations under the Rome Statute in this area.

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(ii) provision to arrest and surrender upon ICC request	Yes. See Part 3 of the Cooperation Act.	Yes. See Part 4 of the Act.	See above general comment.	Yes. See Part 2 and Schedule 2 of the Act.	Yes. See Part 3 of the Bill.
(iii) additional requests for assistance contemplated	Yes. See Part 4 of the Cooperation Act.	Yes. See Part 5 of the Act.	See above general comment.	Yes. See Part 3 of the Act.	Yes. See s.14 of the Bill.
(iv) ICC prosecutor allowed to investigate on territory	Yes. See Part 5 of the Cooperation Act.	Yes. See Part 9 of the Act.	See above general comment.	This provision is not expressly stated in the Act, although could be covered under the general obligation to cooperate.	Yes. By virtue of s.2 of the Bill and see also s.15 of the Bill.
(v) incorporates administration of justice offences (Article 70)	Yes. See Subdivision J, Division 268 of the ICC Crimes Act.	Yes. See ss. 14 to 21 of the Act.	Yes. See ss.16 to 26 of the Act.	Yes. See Schedule 9 of the Act.	Yes. See s.38 of the Bill.
Fair trial standards (Article 67)	Not in implementing law. Australia's domestic laws and trial procedures already reflect the international standards picked up by the Rome Statute.	Not in implementing law. New Zld's domestic laws and trial procedures already reflect the international standards picked up by the Rome Statute.	Not in implementing law. Canada's domestic laws and trial procedures already reflect the international standards picked up by the Rome Statute.	Not in implementing law. The UK's domestic laws and trial procedures already reflect the international standards picked up by the Rome Statute. ¹⁹	Not in implementing law. RSA's domestic laws and trial procedures already reflect the international standards picked up by the Rome Statute.
Willingness to take ICC prisoners	Yes. See Part 12 of the Cooperation Act.	Yes. See Part 7 of the Act.	The Act does not contain an express authorization to accept ICC prisoners.	Yes. See Part 4 of the Act.	Yes. By virtue of s.2 of the Bill. See also s.31 of the Bill.

¹⁹ See also Schedules 3 and 4 of the Act, which list the rights of an accused during the investigative stage.

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Comparative criteria	Country				
	Australia	New Zealand	Canada	United Kingdom	South Africa
Protecting victims, witnesses and establishing a victims' trust fund	Yes. See Division 13, Part 4 and Part 10 of the Cooperation Act.	Yes. See s.85 of the Act.	Yes. See ss.30-2 of (trust fund) and ss.71-5 (consequential amendments to <i>Witness Protection Program Act</i>) of the Act.	Yes. See s.64 and Schedule 6 of the Act.	Yes. By virtue of s.2 of the Bill.