

INTERNATIONAL CRIMINAL COURT

MAKING THE INTERNATIONAL CRIMINAL COURT WORK A Handbook for Implementing the Rome Statute

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A. INTRODUCTION

On July 17, 1998, 120 states voted to adopt the Rome Statute of the International Criminal Court (Rome Statute).¹ Unlike the International Court of Justice (known as the World Court), the International Criminal Court (ICC) will not hear cases between nation states, but rather will try individuals who are accused of the most serious crimes under international law, namely genocide, crimes against humanity and war crimes.

The adoption of the Rome Statute was a historic event. The treaty creates the first-ever permanent international criminal court, independent and impartial, and able to hold individuals personally accountable for the commission of the most serious international crimes. The ICC will provide redress to victims and survivors of these crimes and may, over time, prove to be a powerful deterrent to the commission of these crimes. The ICC will extend the rule of law internationally, impelling national systems to investigate and prosecute these crimes themselves — thus strengthening those systems — while ensuring that where they fail, an international court is ready to act.

To be effective the ICC will depend not only on widespread ratification of the Rome Statute, but also on states parties complying fully with their treaty obligations. For almost every state this will require some change to national law. Of course the degree to which new law will be necessary to implement a state party's Rome Statute obligations will depend on its existing laws and legal system. Given the necessity for implementing law, there has been a concerted effort, at the national, sub-regional and regional levels to ensure that effective implementing law is made by all ratifying states.

This paper explains the principal obligations of states parties under the Rome Statute and discusses how they should be implemented into national law. It recommends that states incorporate all the ICC crimes into national law to ensure that they can prosecute the crimes in the Rome Statute in their own courts as both international and national crimes. It also recommends that states enact law to allow for the prosecution of the ICC crimes under universal jurisdiction so that their courts can prosecute them no matter where they are committed and regardless of the nationality of the perpetrator and victims.

The paper explains the main obligations of states parties to the Rome Statute. It recommends that states take the opportunity that implementing the Rome Statute provides to strengthen their own criminal justice systems so they can prosecute the ICC crimes themselves and, in this way, fully contribute to an effective international criminal justice system in which there are no safe havens for those who commit the worst international crimes. This paper is not intended to be a comprehensive guide to implementation of the Rome Statute.

There are two main sections and three appendices in the paper. Section B sets out the principal treaty obligation of states parties to the Rome Statute, namely the obligation to cooperate with the ICC. The matters discussed in this section must be implemented at the national level. Section C explains the importance to national criminal justice of domestic implementation of the ICC crimes and of providing for the highest standards of protection for the rights of accused persons in national law. It also calls on states to legislate for the exercise of universal jurisdiction over ICC crimes and other serious crimes under international law so that national courts can prosecute these crimes even if they are not committed on the territory of the state and even if the perpetrator and victims are not nationals of the state.

Appendix One explains some of the key provisions of the Rome Statute, Appendix Two summarises the approaches to implementing law that several countries have taken and Appendix Three describes some differences in definitions of the crimes in the Rome Statute and those found in other international conventions and under international customary law. Human Rights Watch recommends that states adopt the most progressive

¹ Rome Statute of the International Criminal Court, UN Doc. No. A/CONF. 183/9 (July 17, 1998), 37 I.L.M. 999; online at: <http://www.un.org/law/icc/statute/romefra.htm>. N.B. all references to article numbers are references to articles of the Rome Statute unless otherwise indicated.

formulations of these crimes to ensure that their national law is consistent with the current state of international law.

A brief outline of the Rome Statute

Before the ICC can be set up, the treaty establishing it, the Rome Statute, must enter into force. It will enter into force once sixty states have ratified it. As of 27 August 2001, 37 countries had done so. The ICC will have jurisdiction over natural persons over the age of eighteen years. Its jurisdiction is prospective only: it can only prosecute crimes committed after the Rome Statute enters into force. It will be able to investigate the crimes of genocide, war crimes and crimes against humanity. Once a definition for the crime of aggression has been developed and agreed to, the ICC will be able to try individuals for this crime also. Other crimes of international concern can be added to the jurisdiction of the ICC over time if states parties agree.² The crime of genocide, war crimes and crimes against humanity are defined in the Rome Statute for the purposes of the ICC only.³ The elements of each crime are further elaborated in the Elements of Crimes paper,⁴ adopted by the Preparatory Commission for an International Criminal Court on 30 June 2000.

Once the Rome Statute goes into effect, both states parties and the Security Council can refer to the Prosecutor of the ICC a situation in which one or more of the ICC crimes appear to have been committed.⁵ In addition, the Prosecutor can initiate an investigation into such crimes without a referral on the basis of credible information he or she receives. The ICC has jurisdiction over ICC crimes if there is an appropriate territorial connection with a state party or a non-state party that accepts the jurisdiction of the ICC, or the person charged is a national of such states.⁶ The ICC's jurisdiction is "complementary" to national courts.⁷ This means that it cannot exercise its jurisdiction if the state that has jurisdiction has itself investigated or prosecuted, is investigating or prosecuting, or has investigated and decided not to prosecute, the case on a genuine basis.

The procedure for trial and appeals before the ICC is a hybrid of common law and civil law. This reflects the fact that the Rome Statute was negotiated by states from every part of the world, each with their own legal traditions. Nonetheless, all states agreed that trial before the ICC should be conducted in accordance with the highest international standards for fair trials. Thus, the rights of accused persons are fully elaborated in the Rome Statute. In addition to the presumption of innocence,⁸ these rights include the right to legal representation and to be tried without undue delay.⁹ Under article 66(3), guilt must be proved beyond reasonable doubt. The Rome Statute also requires the protection of the rights of people who are questioned in an investigation by the ICC, whether as witnesses or suspects.¹⁰ States parties assisting the ICC must also guarantee all of these rights.

The ICC will have three divisions: the Pre-Trial, Trial and Appeals Chambers. There will be 18 judges, who will serve 9-year terms that are not renewable.¹¹ As a general rule, judges of the Appeals Division can only serve in that Division, they cannot serve in the Trial or Pre-Trial Divisions.¹² Nominations and elections are by states parties.¹³ States parties also nominate and elect the Prosecutor and Deputy Prosecutors.¹⁴ Prosecutors and Deputy

² Article 121.

³ Articles 6, 7 and 8 define the ICC crimes for the purposes of the Rome Statute. In addition, article 10 provides that "[N]othing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."

⁴ Elements of Crimes, adopted by the Preparatory Commission for the International Criminal Court, at its 23rd meeting on 30 June 2000, UN Doc. PCNICC/2000/1/Add.2, <http://www.un.org/law/icc/statute/elements/elemfra.htm>

⁵ Article 13, paragraphs (a) and (b) respectively.

⁶ Article 12.

⁷ Article 1.

⁸ Article 66(1).

⁹ Article 67.

¹⁰ Article 55.

¹¹ Article 36. The initial appointments will be staggered with 6 judges serving 3 years (and eligible for re-election for 9 years), 6 serving 6 years and 6 serving 9 years.

¹² Article 39(3).

¹³ Article 36(4).

¹⁴ Article 42(4).

Prosecutors must be of high moral character and be highly competent and experienced in the prosecution of criminal cases.¹⁵ Judges the Prosecutor and the Deputy Prosecutors can be disqualified or excused from a particular case for certain reasons¹⁶ and can also be removed from office by the states parties for misconduct.¹⁷ In recognition that the judges of the ICC will play a large role in determining whether the ICC is impartial, fair and competent, the Rome Statute prescribes that the ICC judges meet certain qualifications and characteristics. They must be of high moral character and be highly qualified in their own legal system, whether as judges, criminal prosecutors or advocates or as experts with practical and relevant experience in international humanitarian and human rights law.¹⁸ Given the nature of the crimes that the ICC will be prosecuting, it is essential that among the eighteen judges some have legal expertise in specific issues, in particular, relating to crimes of sexual violence against both males and females, and violence against women and children. States must take this into account when selecting the judges.¹⁹

In addition to these requirements, the judges, sitting on an international court established by the world community, must represent the diversity of that community. So, the Rome Statute also requires states parties, in their selection of judges, to take into account the need for the representation of the principal legal systems of the world, equitable geographical representation and a fair representation of female and male judges.²⁰ To meet the requirement for a balanced representation of women and men judges, states parties need to identify and nominate suitable women as candidates. For this purpose, national procedures for the selection of candidates for international judicial office should be open and include broad consultation within the legal community and civil society.

The ICC will be able to impose terms of imprisonment, including life sentence for the most grave crimes, and fines upon conviction.²¹ The ICC cannot impose the death penalty. The Rome Statute does not affect national penalties that may apply to these crimes when tried at the national level.²²

The Rome Statute also provides for the creation of a Victims and Witnesses Unit within the Registry²³ and requires the Prosecutor, Pre-trial Chamber and the Trial Chamber to take measures to respect and protect victims and witnesses throughout the investigation and prosecution process. The Prosecutor and the Chambers of the Court are also able to request assistance or cooperation from states parties in protecting victims and witnesses. Reparations can be made to victims and the Rome Statute establishes a Trust Fund for this purpose into which money and property collected through fines, forfeiture of assets and proceeds of crimes that are seized can be deposited.²⁴

The seat of the ICC will be in The Hague in The Netherlands, although it will be able to sit elsewhere as necessary.

Why states should implement the Rome Statute

Human Rights Watch considers the adoption of the Rome Statute to have been a watershed in the development of an effective international criminal justice system in which there are no safe havens for those who commit the worst international crimes. The drafters of the Rome Statute had high expectations that the ICC will

¹⁵ Article 42(3).

¹⁶ Article 41 (judges) and article 42 (prosecutors).

¹⁷ Article 46.

¹⁸ Article 36(3).

¹⁹ Article 36(8(b)).

²⁰ Article 36(8).

²¹ Article 77.

²² Article 80 provides that Part 7 of the Rome Statute which deals with penalties does not affect “the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in [Part 7]”.

²³ Article 43(6).

²⁴ Article 79. Note that the Preparatory Commission for the International Criminal Court is currently negotiating the rules and regulations that will govern the trust fund for victims. For more information see

<http://www.un.org/law/icc/index.html> .

“put an end to impunity for the perpetrators of [these crimes] and ... contribute to [their] prevention”.²⁵ Widespread ratification will be necessary if the ICC is to meet these expectations. However, Human Rights Watch believes that it is equally important that states parties make their ratification meaningful through effective national implementing law that enables them to meet their principal obligation under the Rome Statute, namely cooperating with and assisting the ICC. It is presumed that all states parties will need to modify their national law in some way to meet this obligation.

The full cooperation of states parties is needed for the ICC to function effectively. States parties will be relied on to assist the ICC at every stage of its investigations and prosecutions. The ICC will not have its own police force or prisons so states will be required, on behalf of the ICC, to arrest and surrender suspects, interview witnesses, provide information and evidence to the ICC, agree to take persons sentenced to prison for the term of their imprisonment and provide any other assistance sought by the ICC. For this reason it is crucial that states parties have national laws and procedures in place to ensure that they can fully and expeditiously meet requests for cooperation and assistance from the ICC.

The ICC is only one, albeit an important, component of an effective international criminal justice system. National criminal justice systems remain the primary component. The drafters of the Rome Statute intended the ICC to step in and prosecute international crimes of greatest concern to the international community when states are unable or unwilling to prosecute. The regime in the Rome Statute reflects this intention. Therefore, an international criminal justice system needs states to pursue those who commit genocide, war crimes and crimes against humanity in order to be effective. For this reason, states need to incorporate into national law those ICC crimes that are not already on their statute books. This will enable them to prosecute the international crimes themselves, strengthening their national criminal judicial systems and contributing to the establishment of an effective international criminal justice regime.

Domestic implementation by “monist” states

In many countries international treaties need to be incorporated into domestic law by specific implementing legislation (“dualist” countries). However, in other states, referred to as “monist”, the mere ratification of an international treaty is sufficient for the treaty to be part of the law of the land. Many civil law countries are monist, while those countries with a common law tradition tend to be dualist. Typically, the constitutions of monist states provide that international treaties that are binding on the state have constitutional status and take precedence over ordinary laws in the hierarchy of national norms. For this reason, it is often argued that these countries do not need to implement treaties as they are already part of national law. However, as the Rome Statute has the potential to impact on a wide range of national laws, including constitutional provisions and criminal substantive and procedural law, relying solely on automatic incorporation into national law may not be sufficient to meet the Rome Statute treaty obligations. Specific national laws, especially relating to substantive and procedural criminal law, should be enacted.

Because of the importance of the Rome Statute and the reliance of the ICC on the timely cooperation of states parties, Human Rights Watch urges “monist” states to make an exception for the Rome Statute. By implementing the Rome Statute into national law, they will ensure that the relevant authorities are able to cooperate fully with the ICC, that the offences against the administration of justice by the ICC are punishable under law in national courts and that the ICC crimes can be prosecuted in national courts.

²⁵ Preamble to the Rome Statute, para. 5.

B. THE DUTY TO COOPERATE WITH THE ICC

STEP 1: States Parties Must Comply With Requests From The ICC For Cooperation Or Assistance With Its Investigations And Prosecutions

States that ratify the Rome Statute accept the obligation to comply with requests from the ICC for cooperation and assistance with its investigations and prosecutions. Part 9 of the Rome Statute sets out the details of this obligation and the types of cooperation and assistance states may be asked to provide. These include arresting and surrendering suspects, enforcing the orders and judgments of the ICC, including seizing and forfeiting proceeds of crime, protecting victims and witnesses and allowing the Prosecutor of the ICC to conduct investigations on the territory of the state. States parties must ensure that their national laws and procedures enable them to cooperate with the ICC without difficulty or unnecessary delay.

This section discusses some of the types of cooperation requests the ICC may make of states. A more detailed explanation of the duty to cooperate can be found elsewhere, particularly in publications by Amnesty International²⁶ and the Canadian organizations Rights and Democracy and the International Centre for Criminal Law Reform and Criminal Justice Policy.²⁷

The General Obligation to cooperate – Article 86

Article 86 provides that “States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of the crimes within the jurisdiction of the Court.” Without its own police force, the ICC will be dependent on the cooperation of states parties at every stage of its investigations and prosecutions. For this reason, the Rome Statute provides that states parties must not refuse to comply with a request from the ICC for assistance or cooperation with very few and limited exceptions.²⁸ This is an important difference between the Rome Statute regime and most mutual legal assistance regimes that operate between states. Under article 87(7) of the Rome Statute, failure to comply with a request for cooperation authorizes the ICC to make a finding of non-compliance and to refer the matter to the Assembly of States Parties or to the Security Council if the Security Council had referred the situation being investigated or prosecuted to the Court.

To give effect to the general obligation to cooperate with the ICC, article 88 specifically requires states parties to “ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under [Part 9].”²⁹ For this reason, Human Rights Watch urges states to review, and where necessary amend, their national laws and procedures to ensure that there are no obstacles to its meeting requests for assistance or cooperation from the ICC.

National law should also allow the relevant authorities to execute a request in the manner required by the ICC. For example, the ICC may wish the information in the request to be handled in a way that protects the

²⁶ Amnesty International, *The International Criminal Court: Summary Checklist for Effective Implementation*, 1 August 2000, AI Index: IOR 40/15/00. Available on the Amnesty International website at <http://web.amnesty.org/802568F7005C4453/0/0E24B70C6ABF58128025692700721D37?Open>

Copies can also be obtained by email: ijp@amnesty.org or by sending a written request to:

International Justice Project, Amnesty International, International Secretariat, Peter Benenson House, One Easton Street, London WC1X 0DW. This publication is available in several languages.

²⁷ Rights and Democracy & the International Centre for Criminal Law Reform and Criminal Justice Policy (ICCLR), joint paper, *International Criminal Court - Manual for the Ratification and Implementation of the Rome Statute*, May 2000. Available on the websites of both organizations as follows: Rights and Democracy at <http://www.ichrdd.ca/111/english/contentsEnglish.html>, and ICCLR at <http://137.82.153.100/Reports/ICCMANUAL.pdf>. This publication is available in several languages.

²⁸ See Articles 72 (protection of national security), 90 (competing requests for surrender), and 93(1)(l) (prohibition under national law). These articles are discussed in detail below.

²⁹ Part 9 of the Rome Statute covers cooperation and judicial assistance with the ICC.

“safety, and physical or psychological well-being of any victims, potential witnesses and their families” (article 87(4)). States must comply with this kind of directive from the ICC as part of meeting the cooperation request.

STEP 2: States Parties Must Arrest And Surrender A Person When Requested By The ICC

Article 88 requires that states parties ensure that national procedures for the arrest and surrender of ICC suspects are available. The ICC will not have a police force of its own so it will depend on states parties to arrest suspects on their territory and surrender them to the ICC for trial. The importance of national law enabling relevant authorities to carry out arrests for, and surrenders to, the ICC, cannot be overstated. The experience of the International Tribunals for the former Yugoslavia and Rwanda is that the arrest and surrender of suspects on one’s territory can be a politically sensitive and difficult matter.³⁰ Comprehensive and unambiguous national laws allowing for the arrest and surrender of suspects to the ICC will minimize these difficulties and assist states parties to meet their Rome Statute obligation for timely and full cooperation with the ICC. There are no grounds for refusing a request for the arrest or surrender of a person.³¹

Arrest

According to article 59, a state party that has received a request for the arrest and surrender or provisional arrest of a person must take *immediate* steps to arrest that person following its national procedures and Part 9. Once the person has been arrested, the requested state must follow a series of steps, including bringing the arrested person promptly before the competent judicial authority to determine that the person arrested is the person named in the warrant (article 59(2)(a)), that the person has been arrested lawfully (article 59(2)(b)) and that the person’s rights have been respected (article 59(2)(c)). Article 59 gives the arrested person the right to apply for interim release or bail pending surrender to the ICC (article 59(3)) and sets out some factors the national judicial authority must take into account in making a decision on the application for bail. It requires the national authority to consult with the ICC before making any decision on the bail application.

Importantly, article 59(4) explicitly provides that no challenge can be made to the validity of the arrest warrant by the national judicial authority nor can the national judicial authority consider the validity of the arrest warrant as a factor in determining a bail application. The reason underlying this is that only the authority issuing the warrant, in this case the ICC, is competent to determine whether it is valid. If the person is granted interim release by the national judicial authority, the Pre-Trial Chamber of the ICC may request periodic reports on the status of that interim release. These reports must be provided to the ICC upon request.

Surrender

Surrender versus extradition

The Rome Statute requires a state party to *surrender* a person upon request. It does not require the person’s extradition. The Rome Statute makes a careful distinction between extradition of a person to a foreign jurisdiction and the surrender of a person to the ICC. Article 102 defines “‘surrender’ as the delivering up of a person by a State to the Court” under the Rome Statute, and “‘extradition’ as the delivering up of a person by one State to another as provided by treaty, convention or national legislation.”

This distinction reflects the important underlying principle that transfer to another equal sovereign state is fundamentally different from transfer to the ICC, an international body established under international law, with the involvement and consent of the state which is asked to surrender a person.

³⁰ The ad hoc Tribunals for the former Yugoslavia and Rwanda were established by Security Council resolutions 827 of 5/25/93 and 955 of 11/8/94 respectively. Their Statutes and Rule of Procedure and Evidence can be found online at their respective websites: <http://www.un.org/icty/index.html> and <http://www.ictj.org/>

³¹ There are limited circumstances under which a state may delay execution of a request for surrender. See discussion on [postponing the execution of a cooperation request](#) below.

Distinguishing extradition from surrender or transfer has become well established through the practice of the ad hoc Tribunals for the former Yugoslavia and Rwanda. The Security Council resolutions establishing these Tribunals and the Statutes and Rules of Procedure of both Tribunals refer to the surrender or transfer of persons to the Tribunals and not their extradition.³²

Article 89 requires a state party to comply with a request for the arrest or surrender of a person to the ICC in accordance with Part 9 of the Rome Statute and their national law. The reference in article 89(1) to “national law” is a reference to the national law governing the procedures for arrest and surrender, and is not a reference to the state’s substantive criminal law. In particular, it is a reference to those procedures implemented under article 88 of the Rome Statute which allow states parties to provide all the forms of cooperation specified in the Rome Statute.³³

Article 91(2)(c) states that national procedures for arrest and surrender to the ICC should be as streamlined as possible and should not be more onerous and, if possible, should be less onerous, than those governing extradition to another state. The reason for this is to ensure that the ICC can proceed with its investigations and prosecutions without the lengthy delays that are often associated with extradition proceedings between states. Many of these national procedures are designed to protect the rights of the person whose extradition is sought. However, as the Rome Statute contains comprehensive guarantees for the rights of accused persons, the procedures that normally apply to extradition proceedings are not necessary and should not be applied in the case of surrender to the ICC.

National authorities must respect the rights of the arrested person, as provided for in the Rome Statute, at every stage of the surrender process.

Competing requests for surrender of a person

Article 90 covers the situation of a state receiving requests for the surrender of a person from the ICC and his or her extradition from another state at the same time. It establishes a hierarchy for responding to competing requests so that the ICC takes precedence when the state requesting the extradition is also a state party to the Rome Statute. In addition, requests from the ICC will prevail if the state requesting the extradition is not a party to the Rome Statute and if the requested state does not have an international obligation to extradite to that country.³⁴

Transit of persons being surrendered to the ICC through a state’s territory

Article 89(3) obliges states parties to authorize transportation through their territory of a person being surrendered to the ICC by another state, including in the case of unscheduled landings on its territory.³⁵ The transit state must keep the person being surrendered in custody while he or she is on their territory.

STEP 3: States Parties Must Comply With Requests For Assistance And Cooperation With The ICC’s Investigations And Prosecutions

Under the Rome Statute, states parties and those non-states parties who have agreed to cooperate with the ICC under article 87(5) may be asked to comply with requests for cooperation and assistance on a variety of matters other than those relating to the arrest and surrender of suspects. These are listed in the Rome Statute and are described briefly below.

³² See Articles 19(2) and 29(2)(e) of the ICTY Statute and articles 18(2) and 28(2)(e) of the ICTR Statute and Rules 57 and 58 in the Rules of Procedure and Evidence of both Tribunals.

³³ K. Kress and K. Prost, authors in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court, Observers’ Notes*, (Baden-Baden: Nomos Verlagsgesellschaft 1999), pp. 1074-1075.

³⁴ Article 90, paragraphs (2) and (4) in particular. Details of the regime for competing requests established under article 90 can be found in the Rights and Democracy and ICCLR, *Implementation Manual*, p. 51.

³⁵ See article 89(3)(a). See also the Rights and Democracy and ICCLR, *Implementation Manual*, p. 63.

A state may be asked to take the action requested itself or it may be asked to allow the ICC Prosecutor to conduct the investigation on the state's territory. There are only limited circumstances in which a state may refuse to comply with a request for cooperation or assistance from the ICC and these are explained below.

The ICC can ask for cooperation and assistance with the following matters.

Information, Documentation, and Evidence

States may be asked to:

- Provide information to the Prosecutor to assist him or her to determine if there is sufficient evidence to commence an investigation under article 15 (*article 15(2)*).
- In the case of the Prosecutor deferring an investigation under article 18(2) on the ground that the state is investigating the same conduct, make periodic reports to the Prosecutor on progress with the state's investigation and any subsequent prosecutions (*article 18(5)*).
- Identify the location of items (e.g. pieces of evidence or property that are the subject of a seizure order) (*article 93(1)(a)*).
- Take evidence, including testimony under oath or the physical examination of a person, and produce evidence, including expert opinions and reports necessary to the ICC (*article 93(1)(b)*).
- Allow the ICC Prosecutor to collect and examine evidence, to obtain the presence of and question suspects, victims and witnesses (*article 54(3)(a), (b) & (c)*).
- Take measures to preserve evidence for the ICC's future use and take protective measures for the purpose of forfeiture of assets, in particular for the benefit of the victim (*article 93(1)(j)*; *see also articles 18(6), 19(8), 54(3)(f), & 57(3)(e)*).
- Provide all types of records and documents, including official records and documents (*article 93(1)(i)*).
- Examine places and sites on a state's territory, including exhuming and examining grave-sites (*Article 93(1)(g)*). Note that, in certain circumstances the Prosecutor may also examine places and sites on the state's territory (*Article 99(4)*).

Suspects, Victims and Witnesses

States may be asked to:

- Transfer persons who are in the custody of the requested state party to the ICC on a temporary basis (*articles 93(1)(f) & 93(7)*).
- Protect victims and witnesses (*article 93(1)(j)*; *see also article 54(3)(f)*). Such a request may require a state to incorporate protective measures into its national law if these do not already exist.
- Identify persons or to investigate their whereabouts (*article 93(1)(a)*).
- Question any person being investigated or prosecuted (*article 93(1)(c)*). Such questioning would follow the relevant procedures under national law or, if not prohibited under national law, according to a manner specified by the ICC in its request (*article 99(1)*). It is essential that in carrying out a request to question a person, the rights of that person are protected and enforced, according to article 55 of the Rome Statute.
- Facilitate the voluntary appearance of persons as witnesses or experts before the ICC (*article 93(1)(e)*). Examples of such facilitation might include removing onerous visa requirements for witnesses and experts and allowing their safe transit.

Warrants, Searches and Seizures

States may be asked to:

- Serve documents, including summonses and all forms of writs and judicial records (*article 93(1)(d)*). Note that the ICC may specify in the request the mode of transmission of the document to be used (*article 99(1)*).
- Execute searches and seizures (*article 93(1)(h)*). All states parties must have a procedure in place for search and seizure under an ICC request (*article 88*).
- Identify, trace and freeze or seize proceeds, property and assets and instrumentalities of crimes. Such a request would be made to ensure that this property is available if the ICC eventually orders their

forfeiture, without prejudice to the rights of bona fide third parties (*article 93(1)(k)*; *see also article 77(2)(b)*).

Enforcing orders and judgments of the ICC (article 109)

States may be asked to:

- Enforce fines or forfeitures ordered by the ICC as part of a sentence (*article 109*). The ICC can order fines or forfeiture of proceeds, property and assets derived directly or indirectly from the crime as part of a sentence (*article 77(2)(b)*).³⁶
- Enforce orders made by the ICC for reparations to be made to victims of crimes (*article 75*).

Other Types of Assistance

States may be asked to:

- Provide any other type of assistance that is not prohibited by the law of the requested state, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the ICC (*article 93(1)(l)*).

STEP 4: States Parties Must Allow The Prosecutor Of The ICC To Conduct Investigations On Their Territory

The Rome Statute allows the Prosecutor to conduct investigations in the territory of a state. This power will be critically important to the Prosecutor's ability to prepare cases for trial. The experience of the International Criminal Tribunal for the former Yugoslavia is that most witnesses do not travel to the seat of the Court to give their testimony, rather it is taken from them *in situ*. It is likely that this will be the case for investigations by the ICC Prosecutor. In addition to interviewing witnesses on the territory of states, the ICC Prosecutor must be able to collect physical evidence, inspect sites and conduct other types of investigations on states' territory without hindrance from national and local authorities.

Article 54(2) provides that the Prosecutor can conduct investigations on a state's territory pursuant to a request made under Part 9 or as authorized by the Pre-Trial Chamber under article 57(3)(d). Article 57(3)(d) allows the Pre-Trial Chamber to authorize the Prosecutor to take specific investigative steps within the territory of a state party without having first secured that state's cooperation under Part 9 in certain, very limited, circumstances. These circumstances are when the Pre-Trial Chamber determines that, having had regard to the views of the state concerned, the state is unable to execute a request for cooperation because there is no available authority or component of its judicial system competent to fill such a request. However, in most cases, it is expected that the Prosecutor will have the prior agreement and cooperation of the state concerned through the Part 9 process. States parties are obliged to cooperate with the ICC by allowing the Prosecutor to investigate on their territory when requested.

States should ensure that their national laws allow the Prosecutor to travel to their territory and to undertake there the full range of investigative activities provided for in the Rome Statute with appropriate assistance from local authorities.

³⁶ See Rule 147, which allows the submission of evidence to the Court by bona fide third parties with an interest in proceeds, property or assets that may be subject to forfeiture. Finalised draft text of the Rules of Procedure and Evidence, Adopted by the Preparatory Commission for the International Criminal Court at its 23rd meeting on 30 June 2000, UN Doc. PCNICC/2000/1/Add.1, <http://www.un.org/law/icc/statute/rules/rulefra.htm>

STEP 5: States Parties Can Only Refuse To Comply With A Cooperation Request In Limited Circumstances

Unlike most mutual legal assistance arrangements or cooperation agreements between states, the Rome Statute provides very few grounds for refusing to comply with a request for cooperation or assistance from the ICC. Furthermore, because the ICC will depend on the cooperation of states in order to function, those that are provided for are limited in scope and available only as a last resort. It is unlikely that states will need to implement them into national law. A brief description of these grounds follows.

Protection of national security – Articles 72 and 93(4)

Article 93(4) provides that “[i]n accordance with article 72, states may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security.”

Article 72 sets out the rules and procedures to govern the case of a state denying a request on the ground covered by article 93(4). Although a state may intervene where it considers that its national security interests will be prejudiced, it is also obliged to take all reasonable steps to cooperate with the ICC to find a way to provide the information without prejudicing its national security interests.

Article 72 also provides for a number of protective measures that can be taken to facilitate this. These measures include the ICC modifying or clarifying its request (article 72(5)(a)), having the ICC determine if the evidence sought is relevant or could be obtained from another source (article 72(5)(b)), or agreeing to conditions on the provision of the evidence such as providing summaries, redacting parts of the text, limiting its disclosure and using in camera and ex parte proceedings (article 72(5)(d)).

If no cooperative resolution is possible, article 72 sets out the next steps. These differ depending on whether the ICC or the state has control of the information. If the information is in the control of the ICC, it may order disclosure if it determines that the information is relevant and necessary. If the information is in the control of the state concerned and is requested by the ICC under a Part 9 cooperation request, the ICC cannot order its disclosure. Similarly, if an individual is asked to give evidence and invokes article 93(4) with the support of the state concerned, the ICC will not be able to order disclosure. In these two latter cases, the ICC can refer the matter to the Assembly of States Parties if it determines that the state is not acting in accordance with its treaty obligations under the Rome Statute. If the ICC cannot or chooses not to order disclosure it may “make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances.”³⁷

The principal obligation under the Rome Statute to cooperate and assist the ICC when requested to do so should guide states parties in all their interactions with the ICC. Thus, the national security exception to the cooperation rule should only be used as a last resort and only when all efforts to resolve the matter cooperatively under article 72 have failed.

Prohibited under national law – Article 93, paragraphs (1)(l) and (5)

Under article 93(5), a requested state may refuse a request for assistance of a kind not specified in the Rome Statute but referred to in article 93(1)(l), if providing the assistance requested is prohibited under national law. Article 93(1)(l) states:

States parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:

³⁷ Article 72(7).

...

(l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation or prosecution of crimes within the jurisdiction of the Court.

However, before denying a request on this ground, a requested state must try to provide the assistance requested in an alternative manner or subject to conditions, such as on a confidential basis for the sole purpose of generating new evidence (article 93(8)(b)).

In addition, articles 93(1)(l) and 93(5) must be read consistently with the obligations of states parties to cooperate with the ICC, ensure that national laws and procedures provide for cooperation with the ICC and to consult with the ICC if difficulties with a request arise.³⁸ Only after all efforts to resolve the matter cooperatively fail can a state deny the request under article 93(5). If the state denies the request under article 93(5), it must promptly inform the ICC or the Prosecutor of the reason for denial of assistance.³⁹ Denying a request for cooperation or assistance on the basis of article 93(1)(l) should only be a last resort.

Human Rights Watch urges states parties to ensure that they have complied fully with the obligation under article 88 to ensure that national procedures for cooperating with the ICC are in place and that there are procedures for consulting the ICC without delay should any difficulty in the execution of a cooperation request arise. By meeting these requirements, states parties will minimize the potential for conflict between their national laws and procedures and a cooperation request from the ICC, and will maximize their ability to meet fully their cooperation obligation under the Rome Statute.

STEP 6: States Parties Must Prosecute Offences Against The Administration Of Justice By The ICC

Article 70(4)(a) requires each “State Party to extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in [article 70], committed on its territory, or by one of its nationals.”

The offences referred to in article 70 are:

- Giving false testimony (article 70(1)(a));
- Knowingly presenting false or forged evidence (article 70 (1)(b));
- Corruptly influencing a witness (article 70 (1)(c));
- Obstructing or interfering with the attendance or testimony of a witness (article 70 (1)(c));
- Retaliating against a witness for giving testimony (article 70(1)(c));
- Destroying, tampering or interfering with the collection of evidence (article 70 (1)(c));
- Impeding, intimidating or corruptly influencing an ICC official for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties (article 70 (1)(d));
- Retaliating against an ICC official for performance of his or her duties (article 70 (1)(e)); and
- Soliciting or accepting a bribe as an ICC official in connection with official duties (article 70(1)(f)).

Upon conviction for any of these offenses, the ICC can impose a maximum term of imprisonment of 5 years or a fine.

States parties must criminalize each of these acts under their national law to meet the obligation in article 70. They should be punishable upon conviction if committed against the administration of justice by national courts or by the ICC. Penalties for these crimes under national law should be of similar scale to those found in the Rome Statute.

³⁸ Article 97 requires states parties to consult with the ICC without delay if any difficulties arise in executing a request for cooperation or assistance.

³⁹ Article 93(6).

C. COMPLEMENTARITY

STEP 7: States Should Exercise Their National Jurisdiction Over ICC Crimes

The “complementarity principle”

Nation states have the obligation to prosecute international crimes such as those covered by the Rome Statute. However, all too often they have failed to meet this obligation allowing those who commit genocide, war crimes and crimes against humanity to avoid justice altogether. The failure of states to prosecute these crimes was a driving force behind the establishment of the ICC. Accordingly, the Rome Statute gives the ICC jurisdiction over these crimes when states fail to act.

The Rome Statute balances the primary duty of states to prosecute these crimes with the need for an alternative judicial mechanism to ensure that those who commit serious international crimes face justice. It does this by making the jurisdiction of the ICC complementary to national jurisdictions. This means that the ICC can exercise its jurisdiction only after it is established that there is no state with jurisdiction that is able or willing to pursue a bona fide investigation or prosecution. This approach is the basis of the ICC’s jurisdiction and the regime for investigations and prosecutions in the Rome Statute. It is known as the ‘complementarity principle’.

The complementarity principle is referred to several times in the Preamble to the Rome Statute. For example, paragraph 4 of the Preamble states that the most serious crimes of concern to the international community must be prosecuted through measures taken at the national level and by enhancing international cooperation. Paragraph 6 refers to the “duty of every State to exercise its criminal jurisdiction over those responsible for international crimes” while paragraph 11 plainly states that the ICC shall be complementary to national criminal jurisdictions.

The complementarity principle preserves national criminal jurisdictions as primary while allowing the ICC to step in when states fail to act to prevent a person accused of having committed genocide, war crimes or crimes against humanity from escaping justice altogether.

Article 17: When can the ICC exercise its complementary jurisdiction?

The circumstances in which the ICC can proceed with an investigation or prosecution are set out in article 17, which provides that the ICC can act if the state that would ordinarily exercise jurisdiction over the case is genuinely unable to proceed or is “unwilling” to proceed. Bona fide efforts to investigate and to hold accountable those responsible for any acts of genocide, crimes against humanity or war crimes will bar the ICC from proceeding.

Article 17 provides that a case will be inadmissible before the ICC if it is already being investigated or prosecuted by a state that has jurisdiction over it, or if it has been investigated by a state and the state has decided not to prosecute the person concerned. However, the ICC can find the case admissible if the state that asserts its jurisdiction is unwilling or unable genuinely to carry out the investigation or prosecution or if the decision not to prosecute resulted from its unwillingness or inability to prosecute.

In addition, a case will be inadmissible if the person concerned has already been tried for the same conduct⁴⁰ or if the case is not of sufficient gravity to justify further action by the ICC.⁴¹

The test for unwillingness, set out in article 17(2), is whether the proceedings themselves, or a decision not to prosecute, are aimed at shielding the person concerned from justice. The factors which the ICC must consider in making its determination include whether the proceedings are being conducted independently or impartially, with full respect for the accused person’s due process rights and consistently with an intent to bring the accused to

⁴⁰ See article 20(3) which sets out the *ne bis in idem* principle under which a person cannot be tried for the same conduct twice.

⁴¹ Article 17(1)(d)

justice. States should be aware that certain procedural or evidentiary rules that effectively prevent the proper investigation and prosecution of some crimes, may lead the ICC to determine that the state is “unwilling” to take action. For example, some jurisdictions have onerous and discriminatory requirements relating to the prosecution of crimes of sexual violence, such as a legal requirement that there be several male eyewitnesses to a rape of a woman. When it is not possible to meet this prejudicial standard, the woman herself is sometimes subject to prosecution. This type of requirement may not be consistent with an intent to bring the perpetrator to justice.

Article 17, paragraph (3) sets out the test to determine “inability.” It provides that, in order to determine inability of a state to prosecute in a particular case, the ICC “shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”

Domestic implementation of the complementarity principle

Under the complementarity principle, states parties that have the proper legal basis for prosecuting ICC crimes will be able to exercise their national jurisdiction over their nationals rather than having to surrender them to the ICC. Implementation of the Rome Statute into domestic law provides an excellent opportunity for states parties to review and amend their national law to ensure that they are able to exercise their jurisdiction over these crimes. At a minimum, this will require that states parties incorporate the “ICC crimes” into their national law, remove any barriers to prosecution of these crimes and guarantee all accused persons a fair trial “according to the principles of due process recognised under international law.”⁴² Implementation in this way will also benefit the state by strengthening its national criminal justice system, bring national law into conformity with international obligations and up to date with important developments in international law.

STEP 8: States Should Incorporate The ICC Crimes Into National Law And Provide For Universal Jurisdiction

Why states should incorporate the ICC crimes

Articles 6, 7 and 8 of the Rome Statute define the crimes over which the ICC has jurisdiction; that is genocide, crimes against humanity, and war crimes. These definitions also contain the list of acts that can amount to the crimes of genocide, crimes against humanity or war crimes when the threshold test for each crime is met. For example, genocide may be committed by killing or by other measures taken with the intention to destroy a national, ethnical, racial or religious group. War crimes include crimes set out in the four Geneva Conventions of 1949, the Additional Protocols I and II to the Geneva Conventions and The Hague Regulations of 1907,⁴³ covering crimes committed in international armed conflict and during internal armed conflict. Crimes against humanity include torture, rape, enforced disappearance and enslavement.⁴⁴ Crimes against humanity are distinguished from ordinary crimes by the threshold test, which requires that they be committed as a part of a widespread or systematic attack against civilians and that the perpetrator had knowledge of the attack.⁴⁵

⁴² Article 17(2).

⁴³ The four Geneva Conventions of 12 August 1949: *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, *Convention (III) Relative to the Treatment of Prisoners of War*, *Convention (IV) relative to the Protection of Civilian Persons in Time of War*; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), adopted on 8 June 1977; The Hague Regulations, 18 October 1907.

⁴⁴ See article 7 for the complete list of crimes against humanity in the Rome Statute. Crimes against humanity for the purposes of the Rome Statute are also explained briefly in Appendix 1 to this paper.

⁴⁵ See article 7.

In some cases, states will already have some of the ICC crimes in their national legislation.⁴⁶ States that have fully implemented the 1949 Geneva Conventions and their Protocols may have most of the war crimes in the Rome Statute on their statute books already. War crimes law in these states may only require minor amendment. However, there are still good reasons for these states to implement comprehensively the ICC crimes into domestic law.

Firstly, few states have fully or adequately implemented the Geneva Conventions into national law and very few states have the full range of crimes against humanity on their statute books. Ratification of the Rome Statute provides the ideal opportunity to correct this and establish detailed national law on these crimes. In addition, being able to prosecute genocide and the other ICC crimes at the national level may enable states to fulfil international obligations under other treaties and under customary international law. For example, the 130 states parties to the *Convention on the Prevention and Punishment of the Crime of Genocide* (the Genocide Convention) are obligated, under article 5 of that Convention, to try those accused of genocide under article 5 of that Convention.⁴⁷ This obligation is also considered part of customary international law so that even those few states that are not parties to the Genocide Convention are obliged to prosecute acts of genocide.⁴⁸ Incorporating genocide into domestic law so that it can be prosecuted fairly at the national level will bring domestic law into conformity with these obligations while allowing the state to avoid ceding jurisdiction over a person accused of genocide to the ICC.

Furthermore, in the 50 year period between the adoption of the Geneva Conventions and the adoption of the Rome Statute, international humanitarian law has evolved and the definitions of war crimes have developed. This is also true in relation to some definitions of crimes against humanity. This means that even where states have implemented the Geneva Conventions and other treaties domestically, it is likely that at least some of the definitions they imported into their national law no longer reflect the current status of international law. Although not all the Rome Statute definitions reflect this evolution, its domestic implementation still provides an opportunity to update national law. This is discussed further in the next section.

How to implement the ICC crimes

Implement the most progressive definitions of crimes

The drafters of the Rome Statute believed that the definitions of crimes in the ICC should be consistent with customary international law. However, as the Rome Statute was adopted by 120 states on the basis of consensus it contains numerous compromises, including in the definitions of crimes. The result is that some of the Rome Statute definitions reflect the evolution of international humanitarian and criminal law in the years since the principal treaties governing these areas were adopted, while others are less progressive and do not meet recent standards adopted by the international community.

An example of a Rome Statute definition that falls short of current standards is the definition for the war crime of recruiting a person under the age of 15 years into the armed forces.⁴⁹ A stronger standard is established

⁴⁶ Note that existing national law criminalizing certain conduct is unlikely to be sufficient for the purpose of incorporating the ICC crimes of genocide, war crimes and crimes against humanity into national law. For example, the ordinary crime of murder is not the same as the crime of humanity or war crime of murder as it does not have the intent requirements and therefore does not meet the threshold tests for these international crimes. However, Human Rights Watch urges states to ensure that they can prosecute all the crimes in the Rome Statute as single acts and as war crimes, crimes against humanity and genocide as the case may be.

⁴⁷ *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 227. Other examples include, the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, U.N. Doc. A/39/51; the four Geneva Conventions of 12 August 1949.

⁴⁸ The International Court of Justice Advisory Opinion on the Genocide Convention is often cited as authority for the prohibition on genocide as a customary international norm, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*, [1951] ICJ Reports 16, p. 23; W. Schabas, *Genocide in International Law*, (Cambridge University Press, 2000) pp. 3-4.

⁴⁹ Sections 7 and 8 on crimes against humanity and war crimes respectively.

in the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, which establishes eighteen as the minimum age for participation in armed conflict and for compulsory recruitment or conscription, and raises the minimum age for voluntary recruitment by governments from the current age of fifteen.⁵⁰ The protocol also prohibits any form of recruitment of children under the age of eighteen by armed groups. States parties should adopt the standard in the Optional Protocol, not the Rome Statute, and prohibit any recruitment of those less than eighteen years of age, whether forced or voluntary.

By contrast, the definition of the crime of “torture” in the Rome Statute, as a war crime and a crime against humanity, better reflects the how and by whom torture is committed. Unlike the Convention Against Torture, the Rome Statute definition does not require that torture be committed for a particular purpose, such as to obtain a confession, or that it be committed officially. The Rome Statute definition clearly includes torture when committed by persons with no connection to the state. States parties implementing this crime into their law should follow the Rome Statute definition.

States parties should update and fill in the gaps in their implementation of international humanitarian and international criminal law. In all cases, they should adopt those definitions that reflect current standards in international law, whether found in the Rome Statute or elsewhere. To do this, states will need to refer to several international instruments, in addition to the Rome Statute (e.g. Geneva Conventions and their Additional Protocols, Genocide Convention, Torture Convention, International Covenant on Civil and Political Rights⁵¹) when preparing their implementing legislation. Examples of other differences in definitions of crimes are given in Appendix 3 to this paper.

Implement ‘national ICC crimes’

Human Rights Watch also urges all states to ensure that the acts listed in article 7, defining crimes against humanity, are criminalized and can be prosecuted at the national level even if they do not amount to a crime against humanity. It would be anomalous for national courts to be able to prosecute, for example, the crime against humanity of enforced disappearance but not to be able to prosecute a single act of enforced disappearance. Domestic implementation of the Rome Statute is a good opportunity for states to strengthen their national criminal laws to ensure that all these heinous crimes are punishable under national law whether committed against one person or against one hundred persons.

Universal Jurisdiction

The responsibility of states to try persons accused of the most grave crimes under international law is not limited to the crimes set out in the Rome Statute nor to the circumstances in which the ICC can exercise jurisdiction under the Rome Statute (namely when the state of nationality of the accused or the state on whose territory the crimes were allegedly committed, have joined the Rome Statute). Under the principle of universal jurisdiction, a state has jurisdiction to try persons for certain international crimes no matter where those crimes were committed and regardless of the nationality of the perpetrator or victims. This authority derives from the principle that every state has an interest in bringing to justice the perpetrators of particular crimes of international concern. In the case of crimes against humanity for instance, a state can, and has the duty to, exercise universal jurisdiction on the basis that the crime is committed against all humanity.⁵²

Piracy was the classic “universal” crime, later joined by slave trading. As these crimes occurred across borders or on the open seas no one state could establish the usual basis for jurisdiction, a link between their

⁵⁰ *Optional Protocol to the Convention of the Rights of the Child on the involvement of children in armed conflict*, A/RES/54/263 of 25 May 2000 (not yet in force) at <http://www.unhchr.ch/html/menu2/6/protocolchild.htm>

⁵¹ *International Covenant on Civil and Political Rights (ICCPR)*, G.A. Res. 2200 A (XXI), 16 December 1966.

⁵² See Human Rights Watch, “The Pinochet Precedent: How Victims Can Pursue Human Rights Criminals Abroad”, March 2000 pp. 47, available at <http://www.hrw.org/hrw/campaigns/chile98/precedent.htm> or contact Human Rights Watch at hrwnyc@hrw.org; Amnesty International, “The Pinochet Case - Universal Jurisdiction and the Absence of Immunity for Crimes Against Humanity”, 1 January 1999, AI Index EUR 45/01/99; See also, *The Case of the S.S. Lotus, France v. Turkey*, (1927) P.C.I.J. (ser. A) No.9; *The Nuremberg Principles*, esp. Principle II, U.N.Doc. A/64/Add.1(1946); *The Eichmann Trial, A-G Israel v. Eichmann*, (1968) 36 ILR 18 (District Court, Jerusalem).

territory and the crime. Universal jurisdiction allowed states to bring the perpetrators to justice without that territorial connection. This illustrates the principal pragmatic reason why international law provides for universal jurisdiction: to make sure that there is no safe haven for those responsible for the most serious crimes.

Since World War II, the list of crimes giving rise to universal jurisdiction has grown to include many atrocities committed within national borders, such as grave breaches of the 1949 Geneva Conventions, genocide, torture, “apartheid” and other crimes against humanity. In many cases states are now under either a conventional or customary international legal obligation to pursue prosecutions on the basis of universal jurisdiction.⁵³

Implementing the Rome Statute and universal jurisdiction legislation

Unfortunately, the fact that a country has ratified a treaty requiring it to prosecute alleged torturers or war criminals, or that customary international law calls for prosecution of the perpetrators of genocide or other crimes against humanity, is not always enough to ensure that the country pursues prosecutions on the basis of universal jurisdiction. In many states universal jurisdiction can only be exercised if it has been implemented domestically. In other states, such as those with a French-inspired civil law tradition, even though national law on universal jurisdiction may not be strictly necessary, national courts have been reluctant to exercise it in the absence of a clear legislative mandate. Thus, Human Rights Watch urges all states to ensure that their laws allow for prosecution of these crimes under universal jurisdiction. As some states have already recognised, the preparation of law implementing the Rome Statute is the logical time for making this law. For example, both Canada and New Zealand took the opportunity of their preparation of ICC implementing law to provide for the exercise of universal jurisdiction over the ICC crimes.⁵⁴ These laws are briefly explained in Appendix two.

Command responsibility

The Rome Statute, consistent with well-developed customary international norms, gives the ICC jurisdiction over military commanders and certain civilians who are in a position of superiority. Military commanders and civilian superiors can, in certain circumstances, be held individually liable for the crimes committed by their subordinates. Article 28 of the Rome Statute sets out the tests for determining if a commander will be criminally liable. Different tests are established for military commanders and civilian superiors.

In the case of a military commander or a person who is effectively acting as one, they will be criminally responsible for ICC crimes committed by forces or persons under their effective command and control or effective authority or control, if they knew or should have known that crimes were being committed or were about to be committed and failed to take reasonable measures to prevent or stop them from being committed. They may also be held responsible if they fail to report the matter for investigation to the appropriate authorities for investigation and prosecution.

By contrast, civilians superiors will be responsible for the crimes of their subordinates over whose activities they have authority or control, if they knew that the crimes were being committed or were about to be committed or if they *consciously disregarded* information that indicated the commission of crimes by subordinates. The civilian superior may also be responsible if he or she fails to prevent, repress or report the crimes to the appropriate authorities for investigation and prosecution.

Thus, article 28 sets a higher threshold for responsibility for civilians than for military commanders, requiring that where civilian superiors do not know about the commission of crimes, they “consciously disregard” information indicating the commission of crimes. Compare this with military commanders who will be criminally responsible if they did not know of the commission of the crimes, but they “should have known.”

⁵³ For example, *The Restatement (Third) of the Foreign Relations Law of the United States*, (1987) para. 404, reporters’ note 1 states “[U]niversal jurisdiction to punish genocide is widely accepted as a principle of customary law.”

⁵⁴ *Crimes Against Humanity and War Crimes Act 2000* [Canadian ICC Act], available online at: http://www.parl.gc.ca/36/2/parlbus/chambus/house/bills/government/C-19/C-19_4/C-19_cover-E.html; *International Crimes and International Criminal Court Act 2000* [New Zealand ICC Act], available online at: <http://rangi.knowledge-basket.co.nz/gpacts/public/text/2000/an/026.html>

The doctrine of command responsibility allows for those who often have the greatest responsibility for the commission of international crimes to be held individually liable, even if they do not commit those crimes themselves. For this reason command responsibility is an important part of the Rome Statute regime and states parties should ensure that their national laws allow for the prosecution of those who are ultimately responsible for many of the worst crimes committed, that is, military and civilian leaders. States should explicitly include reference in their national law to the criminal responsibility of civilian superiors as well as military commanders for ICC crimes.

STEP 9: States Should Guarantee The Highest International Standards For Fair Trials At The National Level

The Rome Statute guarantees the highest standards of protection for the rights of the accused for all trials conducted before the ICC. These same rights, listed in article 67 of the Rome Statute,⁵⁵ also should be guaranteed by all states in every trial conducted at the national level, including trials of international crimes.

The right to a fair trial and the other due process protections in the Rome Statute were derived from key international human rights instruments, principally the International Covenant on Civil and Political Rights but also from the Universal Declaration of Human Rights and the regional human rights conventions from Africa, the Americas and Europe.⁵⁶

In order to comply with obligations under the Rome Statute and international human rights law, states parties should ensure that the guarantees in the Rome Statute are incorporated into national law and that they are enforced. A state that guarantees these rights in trials at the national level will strengthen its domestic legal system and ensure its compliance with customary international norms on fair trials. Guaranteeing these rights will also be important in the determination of the admissibility of a case by the ICC, which must, under article 17, take into account the capacity of the state's domestic legal system to provide trials by an independent and impartial tribunal without undue delay, in accordance with due process principles recognized under international law.

The fair trial rights that state parties should provide in all national criminal trials include the right:

- to be informed promptly, in detail, and in a language one understands, of the nature and cause of the charge;
- during detention to be treated humanely and with respect for the inherent dignity of the human person;
- to a hearing without undue delay;
- to a public hearing;
- to a fair hearing by a competent, independent and impartial tribunal established by law;
- to be presumed innocent until proven guilty according to law;
- to be present at one's trial and to defend oneself and to have effective legal representation of one's own choosing, without payment if one does not have sufficient means to pay for it;
- to have adequate time and facilities for the preparation of a defense;
- to obtain the attendance and examination of witnesses;

⁵⁵ See also article 55, which guarantees the rights of suspects and article 64(2), which provides that the Trial Chamber of the ICC is under a duty to ensure that "a trial is fair and expeditious and is conducted with full respect for the rights of the accused". This provision is consistent with Principle 6 of the UN *Basic Principles on the Independence of the Judiciary* which provides: "the principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected." U.N. Doc. A/Conf.121/122/Rev.1, G.A. Res. 40/146 (1985).

⁵⁶Articles 14 and 15, *ICCPR*; Articles 10 and 11, *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), 10 December 1948; *African Charter on Human and People's Rights*, 26 June 1981; *European Convention on the Protection of Human Rights and Fundamental Freedoms* 4 November 1950 and *American Convention on Human Rights*, 22 November 1969.

- not to be compelled to testify or to confess guilt and to remain silent without such silence being a consideration in the determination of guilt or innocence;
- to appeal the judgment to a higher judicial tribunal; and
- not to be tried or punished again for an offense of which one has already been finally convicted or acquitted.

These rights apply to all individuals equally without distinction and all individuals have the right to be informed of their rights.

The standards guaranteeing a fair trial and a remedy should be reflected in the appropriate legal instruments and governments should ensure that they are applied in practice at all times, including during any states of emergency. Human Rights Watch calls on all states to ensure that judges, prosecutors, lawyers and police and other security personnel are trained in the standards, procedures, and practices necessary to protect the right to a fair trial.

General principles of criminal law

In addition to the rights of an accused person, the Rome Statute sets out some fundamental principles of criminal law that should be respected in all national prosecutions of ICC crimes. These include the principles of *nullem crimen sine lege* (a person cannot be tried for conduct that was not criminal under national or international law at the time it was committed) and *ne bis in idem* (no person can be tried more than once for the same offence).⁵⁷

STEP 10: States Should Remove Any Barriers To Prosecution Of ICC Crimes

Because of the seriousness of the ICC crimes, statutes of limitations, immunities and other barriers to prosecutions do not apply. The Rome Statute provides for this in articles 27 and 29. Thus, the kinds of barriers to prosecution that might apply in national law to ordinary crimes should not be applied to prosecutions of an ICC crime, whether at the national level or in relation to a prosecution by the ICC. Statutes of limitation, immunities and other special procedural rules which might attach to the official capacity of a person, cannot be invoked as a ground for refusing to comply with a request from the ICC for the arrest and surrender of a person.⁵⁸ In the case of national prosecutions, states parties should be aware that the application of these types of barriers to prosecution of ICC crimes at the national level may lead the ICC to determine, under article 17, that the state concerned was unwilling to investigate or prosecute the case itself.⁵⁹

Statute of limitations

Consistent with customary international law, article 29 of the Rome Statute states that the ICC crimes are not subject to any statute of limitations.⁶⁰ This means that statutes of limitation cannot be used as a ground for refusing to arrest and surrender a person at the request of the ICC. Nor should they apply to the prosecution of the ICC crimes at the national level. Human Rights Watch urges states to include a provision in national law that explicitly provides that statutes of limitations do not apply to any of the ICC crimes, whether committed as a national crime or as a crime against humanity, war crime or as genocide.

⁵⁷ Article 20. Article 20(3)(b) provides an exception to the rule of *ne bis in idem* in cases where the ICC determines that a trial at the national level for an ICC crime was not conducted independently or impartially in accordance with the norms of due process recognized by international law. See article 22 for the *nullem crimen* principle.

⁵⁸ There are no grounds for states parties to refuse to arrest and surrender a person to the ICC upon request.

⁵⁹ The ICC will have to determine if the application of a statute of limitation, immunities or other special rules that might attach to the official capacity indicate an intention, on the part of the state, to shield the person concerned with justice in accordance with article 17.

⁶⁰ Article 29 is consistent with the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, G.A. Res. 2391 (XXIII), annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968).

Immunities other special procedural rules attaching to the official capacity of a person

Under article 27, the Rome Statute gives the ICC jurisdiction over all persons regardless of any official capacity they may enjoy. Article 27 also provides that immunities from prosecution and other special procedural rules that might attach to the official capacity of a person (such as amnesties) will not bar the ICC from exercising this jurisdiction.

This means that national amnesties and immunities cannot be invoked as a reason to refuse to comply with a request for the arrest and surrender of a person to the ICC. In addition, states wishing to avoid ceding their jurisdiction to the ICC in a particular case will need to ensure that such barriers to prosecution do not apply for the purpose of national trials of ICC crimes.⁶¹ National law should provide for this explicitly.

STEP 11: States Should Protect Victims And Witnesses & Create A Trust Fund For Victims

Protection

The ICC is under an obligation to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses and it may request states parties' cooperation and assistance in meeting this duty.⁶² States parties should have procedures in place to meet these requests or to undertake the protection of victims and witnesses on their own initiative as necessary. In particular, measures should be available at the national level to protect victims and witnesses and their relatives, from being identified, harassed or intimidated, retaliated against or otherwise harmed before, during, or following a trial. Such measures might include outlawing the public disclosure of the identity of a victim or witness; specifically criminalizing the harassment or intimidation of ICC witnesses, victims of the crimes and their families;⁶³ and granting special protection visas to enable victims and witnesses who are under threat of retaliation to escape, together with their families, or allowing them to resettle in a safe third country. National procedures should also provide for victims and witnesses or their representatives to make representations to national courts that are considering an application for interim release by detained persons under article 59(3), and ensuring that the national courts take those representations into consideration in such decisions. Victims and witnesses should also be kept informed of the progress of the case and states parties should implement procedures for keeping witnesses so informed.

Trust fund for victims

States are also encouraged to establish a trust fund, governed by legislation, for victims of ICC crimes into which all money obtained through enforcement of orders of the ICC for reparation or forfeiture and fines and all proceeds of crime seized by the state under its national ICC law and any money received as a donation to the fund should be paid.

National law should also make provision for the making of payments out of the fund for the benefit of victims and their families. Trust fund moneys should be payable to the ICC, to the trust fund set up under article 79 of the Rome Statute or to victims and their families.

STEP 12: States Should Accept Convicted Persons

The ICC will not have its own prison. Persons sentenced to prison by the ICC will need to serve their terms in national prisons. Under article 103, after sentencing a person to prison, the ICC will choose the state in which the person will serve their prison term from a list of states that have declared themselves willing to accept sentenced persons from the ICC. Human Rights Watch encourages all states to make this declaration.

⁶¹ For a more extensive discussion of the issue of compatibility of article 27 of the Rome Statute with national law, particularly constitutional law, see, Human Rights Watch Non-Paper, *The Compatibility of the Rome Statute with Certain Constitutional Provisions Around the Globe*, available at: <http://www.hrw.org/campaigns/icc/index.htm> or from Human Rights Watch at hrwnyc@hrw.org.

⁶² Article 68 and 93(i)(j) respectively.

⁶³ This is required under article 70 in any case.

In order to give effect to such a declaration, national implementing legislation will need to allow the sentenced person to enter their territory and be incarcerated. Appropriate provisions should also be made for the transfer of sentenced persons during and upon completion of their sentence (articles 104 and 107), for communication with the ICC regarding enforcement of the sentence (article 105), supervision of enforcement and conditions of imprisonment (article 106), and review by the ICC concerning reduction of sentence (article 110). National law should also specify that the ICC is to retain ultimate authority over the person and allow officials of the ICC to have access to any information on conditions of imprisonment, including communicating or meeting personally with the sentenced person to hear his or her views without the presence of national authorities (Rule 211⁶⁴). National law should ensure that communications between the prisoner and the ICC are confidential and should allow competent authorities from the ICC to visit the place of detention, in accordance with Principle 29 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.⁶⁵

States parties must act in full accord with the Body of Principles when detaining or imprisoning any person, whether for the ICC at the pre-trial,⁶⁶ post-conviction or any other stage, or in national proceedings.

D. CONCLUSION

In paragraph 4 of the Preamble to the Rome Statute, the drafters of the Statute re-affirmed their conviction:

that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.

The ICC was established by the Rome Statute to enhance international cooperation in the prosecution of the most serious crimes of international concern. Effective domestic implementation of the Rome Statute, particularly the obligation to cooperate with and assist the ICC in all its functions, is vital to ensuring that such crimes no longer go unpunished. Of equal importance, is that states take measures at the national level to punish these most serious crimes. These measures include making the crimes in the Rome Statute part of national law, guaranteeing the rights of the accused, ensuring that laws enabling prosecutions for these crimes are applied equally to all persons regardless of official capacity or other status, and providing for individual criminal responsibility for military commanders and civilian superiors. Finally, enabling national courts to exercise universal jurisdiction is essential to ensuring that there is no safe haven for those who commit the most egregious violations of human rights and humanitarian law.

⁶⁴ Finalized draft text of the Rules of Procedure and Evidence, UN Doc. PCNICC/2000/1/Add.1

⁶⁵ Adopted by the General Assembly of the United Nations in 1988. G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988).

⁶⁶ See article 55 which sets out the minimum standards for the protection of suspects and witnesses detained on behalf of the ICC, and article 59 which requires state judicial authorities to ensure that those detained for the ICC have their rights respected.

APPENDIX 1: SOME KEY PROVISIONS OF THE ROME STATUTE

Establishment of the ICC

Article 1 establishes the ICC, and provides that its jurisdiction over the most serious international crimes is complementary to national criminal jurisdictions.

Definitions of the ICC crimes

Article 5 lists the crimes over which the ICC will have jurisdiction, namely genocide, war crimes and crimes against humanity. The ICC will also have jurisdiction over the crime of aggression once states parties have defined it.

Articles 6, 7, and 8 define the three article 5 crimes for the purposes of the ICC.

Genocide involves any of a number of acts, including killing, causing serious bodily or mental harm, imposing measures intended to prevent births, and forcible transfer of children to another group, “committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group” (article 6). The 130 states parties to the Genocide Convention already have the obligation to prosecute the crime of genocide.

Crimes against humanity are defined as certain acts “when committed as part of a widespread or systematic attack directed against any civilian population.” Article 7 defines the following acts as crimes against humanity: murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other grave forms of sexual violence, persecution, enforced disappearance, apartheid, and other inhumane acts.

War crimes for the purposes of the Rome Statute cover acts committed during international and non-international (internal) armed conflicts. The definition includes acts such as grave breaches of the 1949 Geneva Conventions, including willful killing or torture of protected persons or extensive destruction of protected property; other serious violations of the laws and customs applicable in international armed conflict; serious violations of common article 3 of the 1949 Geneva Conventions, including intentional attacks on or violence against civilians and other serious violations of the laws and customs applicable to non-international armed conflict (article 8).

Article 10 states that the definitions of these crimes and other provisions of Part 2 of the Rome Statute cannot be interpreted as limiting or prejudicing in any way existing or developing rules of international law.

ICC has prospective jurisdiction only

Article 11 limits the scope of the ICC’s jurisdiction to crimes committed *after* the Rome Statute enters into force.

Jurisdiction of the ICC

Article 12 says that a state that joins the Rome Statute automatically accepts the ICC’s jurisdiction over the article 5 crimes. It also provides that the ICC can exercise its jurisdiction when either the state on the territory where the crime was committed or the state of which the accused person is a national is a state party to the Rome Statute or has accepted its jurisdiction.

Trigger mechanism or how the ICC can be an investigation

Article 13 explains how the ICC can begin to exercise its jurisdiction. A state party or the Security Council can refer to the ICC a situation in which an ICC crime appears to have been committed. In addition, the Prosecutor can initiate an investigation into such a crime.

Admissibility before the ICC or “complementarity”

Article 17 describes those cases that are not admissible and cannot be investigated or prosecuted by the ICC. Because the ICC’s jurisdiction is complementary to national jurisdiction, a case will only be admissible before the ICC if the state that would ordinarily exercise jurisdiction is unable or unwilling to investigate or prosecute the person. *Article 17* defines what is meant by “unable” and “unwilling.” To determine “unwillingness” in a particular case, the ICC must consider whether the proceedings are or were designed to shield the person from justice, there is an unjustified delay in proceedings that is inconsistent with a genuine intent to bring the person to justice, or the proceedings are or were not conducted independently or impartially and are being or were conducted in a manner inconsistent with an intention to bring the person to justice. The ICC must also have regard to “the principles of due process recognised by international law”.

In determining “inability” in a particular case, the ICC must consider whether due to the total or substantial collapse or unavailability of the national judicial system in question, the state is unable to obtain the accused or the necessary evidence, or otherwise carry out the necessary proceedings.

General principles of criminal law

Article 20 applies the fundamental principle of *ne bis in idem*, that no person can be tried twice for the same conduct, to proceedings by the ICC. The only exception is where the earlier trial was for the purpose of shielding the person from justice or was not conducted independently and impartially.

Attempt, soliciting, ordering, etc. ICC crimes

Article 25 says that the ICC has jurisdiction over natural persons who commit, attempt, solicit, order or induce others to commit crimes within the jurisdiction of the ICC.

ICC cannot prosecute children

Article 26 limits the ICC’s jurisdiction to adults, that is, persons at least eighteen years of age at the time the crime was allegedly committed.

Immunities from prosecution

Article 27 provides that the ICC Statute applies equally to all persons, regardless of any official capacity they may have. In other words, there is no immunity from prosecution under the Statute for heads of state, government members, military officials and others who may have an official status.

Statutes of limitations

Article 29 says that there is no statute of limitations on the crimes covered in the Statute.

Rights of suspects and witnesses

Article 55 sets out the rights of persons who are questioned and suspects during an investigation by the Prosecutor or other ICC official or by a state party on behalf of the Court.

Rights of the accused

Article 67 states that the accused is entitled to a fair and impartial trial and lists other rights that the ICC must guarantee to all accused.

Rights and protection of victims and witnesses

Article 68 requires the Court to protect the safety, well-being and dignity of victims and witnesses.

Obligation to cooperate

Article 86 requires States parties to comply with cooperation requests from the Court.

Reservations

Article 120 states that no reservations may be made to the Statute.

APPENDIX 2: SOME EXAMPLES OF ICC IMPLEMENTING LAW

Some states have already adopted implementing legislation or are in the process of doing so. They have chosen different ways to implement and to incorporate the ICC crimes into national law and to provide for cooperation with the ICC. The following is a very brief description of some of the approaches taken.

Incorporating the ICC Crimes

The New Zealand ICC law,⁶⁷ after providing specifically that genocide, war crimes and crimes against humanity are criminal offenses under New Zealand law,⁶⁸ defines these acts by reference to the Rome Statute. For example, sub-section 9(2), provides that “[F]or the purposes of this section, genocide is an act referred to in article 6 of the [Rome] Statute.”⁶⁹

The United Kingdom legislation takes a similar approach,⁷⁰ while the Canadian legislation,⁷¹ in addition to providing that the ICC crimes are indictable offences under Canadian law, defines each crime in detail for the purposes of national prosecutions of the ICC crimes.⁷²

By contrast, Germany has decided to prepare a new and comprehensive law: a ‘German Code of Crimes against International Law’. This legislation will fully adapt German substantive criminal law to the definitions of crimes in the Rome Statute, as well as to those under general international humanitarian law.⁷³

Universal Jurisdiction

Both the Canadian and the New Zealand laws provide for the exercise of universal jurisdiction over the ICC crimes.

Section 8 of the New Zealand Act specifically allows the appropriate New Zealand authorities to prosecute a person regardless of whether the accused person is a New Zealand national, crimes were committed in New Zealand or the person is present in New Zealand when the decision to prosecute them is made. This last factor means that New Zealand can request the extradition of an accused person from another country in order to prosecute them in New Zealand under universal jurisdiction for genocide, war crimes or crimes against humanity.⁷⁴

Section 8(1)(c) states that New Zealand may bring proceedings for an offence under the Act (i.e. the ICC crimes) “regardless of:

- (i) the nationality or citizenship of the person accused;
- (ii) whether or not any act forming part of the offence occurred in New Zealand; or
- (iii) whether or not the person 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.”

⁶⁷New Zealand ICC Act: <http://rangi.knowledge-basket.co.nz/gpacts/public/text/2000/an/026.html>

⁶⁸New Zealand ICC Act, sections, 9, 10 and 11.

⁶⁹New Zealand ICC Act, subsection 9(2).

⁷⁰ See clause 50 of the *International Criminal Court Act 2001*. This act covers England, Wales and Northern Ireland. It is available online at: <http://www.legislation.hmsso.gov.uk/acts/acts2001/20010017.pdf>

A separate act for Scotland called the *International Criminal Court (Scotland) Bill 2001* is expected to be passed by the Scottish Parliament in 2001. It closely follows the Act for England, Wales and Northern Ireland. The draft bill under consideration by the Scottish Parliament is available online at: http://www.scottish.parliament.uk/parl_bus/bills/b27s1.pdf

⁷¹ Canadian ICC Act: http://www.parl.gc.ca/36/2/parlbus/chambus/house/bills/government/C-19/C-19_4/C-19_cover-E.html

⁷² Section 4, subsection (3), Canadian ICC Act.

⁷³ The German Draft Code on International Crimes ("Völkerstrafgesetzbuch") is available (only in German) online at: <http://www.bmj.bund.de/ggv/vstgbeg.pdf>, or from Human Rights Watch.

⁷⁴ However, it does not allow for trials in absentia.

Section 6 of the Canadian Act allows Canada to prosecute persons accused of these crimes even if they were committed outside of Canada. It provides:

“Every person who ... commits outside Canada

- (a) genocide;
- (b) a crime against humanity; or
- (c) a war crime;

is guilty of an indictable offence and may be prosecuted for that offence.”

Cooperation

The New Zealand and UK ICC laws are comprehensive on cooperation between the national authorities and the ICC. Cooperation issues are not covered in the Canadian Crimes Against Humanity and War Crimes Act but are provided for in other Acts covering extradition, mutual legal assistance, immigration, witness protection, criminal code, foreign missions and international organizations.

APPENDIX 3: A COMPARISON OF THE ROME STATUTE DEFINITIONS OF CRIMES WITH DEFINITIONS IN OTHER INTERNATIONAL CONVENTIONS

The drafters of the Rome Statute believed that the definitions of crimes over which the ICC would exercise jurisdiction should reflect existing international norms. For this reason, they looked to existing relevant treaties and customary international law when developing the definitions of crimes. The most relevant treaties were the four 1949 Geneva Conventions and their two Protocols, the Torture Convention, the Genocide Convention, the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda and other conventions dealing with specific crimes such as enslavement⁷⁵ and apartheid.⁷⁶ In some cases, the definitions of crimes adopted in the Rome Statute reflect a conservative interpretation of the law established by these conventions and forming part of customary international law. In other cases, they reflect a more expansive interpretation of international law in 1998 when the Rome Statute was negotiated. This Appendix describes some of the more significant differences in definitions of international crimes.

While the Rome Statute provides a good guide to the status of international law in relation to the definitions for genocide, war crimes and crimes against humanity, Human Rights Watch recommends that states look beyond it when incorporating the ICC crimes into national law. Human Rights Watch encourages states to incorporate the most progressive definitions of crimes under international law, whether they are found in the Rome Statute or elsewhere. In this way, states will ensure that their new laws are in compliance with international human rights and humanitarian law generally and that they will be in a position to prosecute all the crimes of greatest concern to the international community.

Crimes against humanity

Unlike the Nuremberg Charter,⁷⁷ no nexus to an armed conflict is required for crimes against humanity under the Rome Statute. This is an important and positive development in international law and domestic crimes against humanity laws should not include such a nexus. The approach taken in the Rome Statute reflects the fact that crimes against humanity are often committed against civilians in the absence of hostilities and that the seriousness of the crime is not affected by whether it is committed in peace or war time.

In another positive development, the Rome Statute definition, unlike the definition in the Nuremberg Charter and the Statute of the International Criminal Tribunal for Rwanda,⁷⁸ does not require that the perpetrator have a discriminatory intent when committing a crime against humanity. This means that the attack against civilians that is the crime against humanity need not be committed against a particular group sharing certain characteristics such as nationality or religion.

⁷⁵ *Slavery Convention*, 26 September 1926, amended by Protocol G.A. Res. 794 (VIII) of 23 October 1953. See also *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery*, 7 September 1956, all in *Human Rights: A Compilation of International Instruments* Vol.1/Part 1, pp. 201, 206 & 209.

⁷⁶ *International Convention on the Suppression and Punishment of the Crime of Apartheid*, G.A. Res. 3068 (XXVIII) of 30 November 1973, *Human Rights: A Compilation of International Instruments* Vol.1/Part 1, p. 80.

⁷⁷ Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis and Establishing the Charter of the International Military Tribunal (IMT), [The Nuremberg Charter was annexed to the agreement], Annex, (1951) 82 UNTS 279. Article 6(c) definition included “murder, extermination, enslavement, deportation and other inhumane acts...and persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal.” See also, William Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, 2001, p. 35.

⁷⁸ See article 3 of the Statute of the ICTR, which provides: “[T]he International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds ...”.

Torture

Under the Torture Convention, the definition of “torture” requires that the act of torture be committed for a purpose, for example obtaining a confession or as punishment. It also requires that the torture be committed “by or at the instigation of or with the consent or acquiescence of a public official or a person acting in an official capacity”.⁷⁹ The Rome Statute definitions of torture, whether as a crime against humanity or a war crime, does not require either of these conditions to be met. The Rome Statute clearly includes torture when committed by persons with no connection to the state. Furthermore, there is no requirement that torture be committed for a purpose. For example, article 7(2)(e), defining torture as a crime against humanity, covers acts that are purposeless or merely sadistic.⁸⁰

The Rome Statute definition better reflects the reality that torture is committed frequently by people who are not “officials” and who may have no purpose in torturing someone than to inflict severe pain and suffering. States parties implementing this crime into their law should follow the Rome Statute definition.

Enslavement

The definition of enslavement in the Rome Statute builds on the 1926 Slavery Convention definition.⁸¹ However, article 7(2)(c) of the Rome Statute adds an element not present in the Slavery Convention definition. The Rome Statute defines enslavement as “... the exercise of any or all of the powers attaching to the right of ownership over a person *and includes the exercise of such power in the course of trafficking in persons, in particular women and children*” (emphasis added). The explicit reference to trafficking in women and children reflects developments in international law since the Slavery Convention was adopted. In particular, it reflects the growing number of women and children who are trafficked and the international community’s attempts to stop this crime.⁸²

Persecution

Article 6(c) of the Nuremberg Charter included the crime of persecution, defining it by reference to certain grounds on which persons could be persecuted (i.e. political, racial or religious). Those grounds reflected the basis for persecution that occurred in the Second World War and which the Nuremberg trials were to address. The Rome Statute definition in article 7(1)(h) provides that persecution can be committed “against any identifiable group or collectivity on *political, racial, national, ethnic, cultural, religious, gender ... or other grounds universally recognised as impermissible under international law*” (emphasis added). This expanded list of grounds for persecution better reflects the pattern that persecution has taken since the end of the Second World War. It is appropriate that states that incorporate this crime against humanity into their domestic law include a non-exhaustive list of grounds for which persons may be persecuted. Human Rights Watch urges states to ensure that this list, at a minimum, includes all the grounds listed in article 7(1)(h) of the Rome Statute and that the list, unlike the list in the Rome Statute, is inclusive and not exhaustive.

Article 7(1)(h) also provides that, for the purposes of the ICC, persecution must occur in connection with *an act referred to in article 7(1) or any crime within the jurisdiction of the ICC*. Importantly, this language differs from the Nuremberg and Tokyo⁸³ Charters. Those Charters required that persecution be committed in connection with another crime within their respective Tribunals’ jurisdiction. The Rome Statute provides an alternative. Persecution must occur either in connection with another crime within the jurisdiction of the ICC or in connection with any *act* referred to in article 7(1). Article 7(1) sets out all the acts that could amount to a crime against

⁷⁹ Article 1, Torture Convention.

⁸⁰ Article 7(2)(e) provides: “Torture” means the intentional infliction of severe pain or suffering.

⁸¹ See Article 1.

⁸² See for example, *Convention on the Elimination of All Forms of Discrimination Against Women*, 1979, the *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, 1949, the *Convention on the Rights of the Child*, 1989, all in *Human Rights: A Compilation ... Vol.1/Part 1*, pp. 150, 233 & 174. See also *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, A/RES/54/263 of 25 May 2000 (not yet in force) at <http://www.unhchr.ch/html/menu2/dopchild.htm>

⁸³ Nuremberg Charter; International Military Tribunal for the Far East, Proclaimed at Tokyo, 19 January 1946, revised 26 April 1946 (IMTFE), Annex, Charter of the International Military Tribunal for the Far East.

humanity for the purposes of the ICC. This means that persecution in connection with a single act of, say, torture may fall within the Rome Statute definition even if the single act of torture would not itself amount to a crime against humanity.⁸⁴

Enforced disappearance

There are two major differences between the definition of enforced disappearance in article 7(2)(i) of the Rome Statute and those found in other international instruments.⁸⁵ The first is that the Rome Statute definition provides that, in addition to states, political organizations should be held responsible for the crime of enforced disappearance. Until the adoption of the Rome Statute, enforced disappearances could only be committed by states or with their approval or acquiescence. Secondly, the Rome Statute definition adds the concept of detention for a “prolonged” period of time to distinguish enforced disappearance from other unlawful deprivations of liberty.

Article 7(2)(i) defines the crime against humanity of enforced disappearance as:

“the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge the deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time” (emphasis added).

War Crimes

Article 8 of the Rome Statute gives the ICC jurisdiction over war crimes when committed during international conflicts (articles 8(2)(a) and 8(2)(b)) and when committed during non-international armed conflicts (articles 8(2)(c) through (f)).

Article 8(2)(a) of the Rome Statute, defines war crimes as “grave breaches of the Geneva Conventions of 12 August 1949, namely any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention.” Eight acts are listed.⁸⁶ These largely follow the provisions in the Geneva Conventions.

Article 8(2)(b) defines war crimes as “other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts.” Twenty-six acts are then enumerated.

In most respects, the definitions of war crimes committed in international armed conflict in the Rome Statute are consistent with existing international law, in particular with the definitions in the four 1949 Geneva Conventions, the two additional Protocols to the Geneva Conventions, and the Hague Regulations.

War crimes committed in non-international armed conflicts are addressed in articles 8(2)(c) through (f). The norms applied in these provisions can be largely found elsewhere in international law. Subparagraph 8(2)(c) follows common article 3 of the four Geneva Conventions. Subparagraph 8(2)(e) draws on The Hague Regulations, the Geneva Conventions, and Additional Protocol II. Subparagraphs 8(2)(d) and (f) limit the scope of the ICC’s jurisdiction over acts committed in non-international conflicts. They exclude internal disturbances and tensions, riots, isolated and sporadic acts of violence and other acts of a similar nature.

⁸⁴ See generally Lionel Yee, *Not Just a War Crimes Court: the Penal Regime Established by the Rome Statute of the International Criminal Court*, 10 S.Ac.L.J. 321, 324-331 (1998); Darryl Robinson, *Defining “Crimes Against Humanity” at the Rome Conference*, 93 A.J.I.L. 43 (1999), at 326.

⁸⁵ United Nations Declaration on the Protection of all Persons from Enforced Disappearance, A/RES/47/133, 18 December 1992; Inter-American Convention on Forced Disappearances of Persons, 10 June 1994.

⁸⁶ (i) Willful Killing; (ii) Torture or inhuman treatment; (iii) Willfully causing great suffering, or serious injury to body or health; (iv) Extensive destruction and appropriation of property; (v) Compelling a protected person to serve in the hostile forces; (vi) Willfully depriving a protected person of the rights of fair and regular trial; (vii) Unlawful deportation, transfer or confinement; (viii) Taking of hostages.

The following explains some of the more important differences in the war crimes definitions.

A showing of serious injury to body or health

Three of the crimes listed in article 8(2)(b) of the Rome Statute are found in article 85(3) of Protocol I: intentionally directing attacks against civilian objects ((b)(ii)); intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or widespread and severe damage to the national environment ((b)(iv)); and attacking or bombarding, by whatever means, town, villages etcetera ((b)(v)).

Article 85(3) of Protocol I states that “the following acts shall be regarded as grave breaches of this Protocol, when committed willfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health.” By contrast, the Rome Statute does not explicitly require “death, serious injury to body or health” in connection with these three crimes. States are urged to adopt the Rome Statute definition.

Widespread and severe damage to the natural environment

Article 8(2)(b)(iv) of the Rome Statute includes “widespread, long-term and severe damage to the natural environment” in the list of acts defining the war crime of intentionally launching an attack in the knowledge that such attack will cause incidental loss. This violation is not found in the Geneva Conventions or the Additional Protocols. Note however the article 8(2)(b) threshold that such damage must be “clearly excessive” in relation to the overall military advantage anticipated.

Indirect transfer of civilian populations.

Article 8(2)(b)(viii) defines the war crime of transferring civilian populations by an occupying power.⁸⁷ The Rome Statute definition of this crime refers both to the direct and *indirect* transfer of civilian population and includes the transfer of its own civilian population into territory it occupies as well as the deportation or transfer of all or parts of the civilian population of the occupied territory.

This crime is based on article 49 of the Fourth Geneva Convention, which is now recognised as a grave breach in article 85(4)(a) of Additional Protocol 1.⁸⁸ However, the Rome Statute expands this prohibition to cover transfers of the occupying power’s own civilian population into the territory it occupies. The additional prohibition against “indirect” transfers in article 8(2)(b)(viii) is intended to make explicit that this crime includes the situation of an occupying power failing to take measures to prevent its civilian population from transferring itself into the territory it occupies.⁸⁹

Attacks against United Nations peacekeepers

Article 8(2)(b)(iii) of the Rome Statute prohibits intentionally directing attacks against United Nations personnel involved in humanitarian or peacekeeping missions as long as they are entitled to protection given to civilians under the international law of armed conflict. The Rome Statute is the first international treaty to include, in a war crimes definition, explicit reference to intentional attacks against this particular group of people and their installations and property.

Crimes of Sexual Violence

Under article 8(2)(b)(xxii) of the Rome Statute, “committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2(f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions” is a war crime when committed in international armed conflict.

⁸⁷ Article 8(2)(b)(viii) states: “The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all of parties of the population of the occupied territory within or outside this territory”.

⁸⁸ See Roy Lee, *The International Criminal Court: The Making of the Rome Statute* (The Hague: Kluwer Law International, 1999) p. 112.

⁸⁹ *Ibid.*, p 113. See also Triffterer, *Commentary on the Rome Statute*, p. 214.

Although none of these acts are “new” crimes, the Rome Statute is the first treaty to contain such an extensive list of crimes of sexual violence. For example, article 4(e) of the Statute of the ICTR prohibits “rape, enforced prostitution, and any form of indecent assault.” Rape, forced prostitution, and indecent assault are prohibited under Geneva Convention IV article. 27, and Protocol I, article 76(1), but are not expressly listed as grave breaches. Article 32 of the IV Geneva Convention prohibits any “measure of brutality whether applied by civilian or military agents.” Protocol II, article 4(2)(e), prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution, and any form of indecent assault.” Article 4(2)(f) prohibits “slavery and the slave trade in all their forms.” Rape was prosecuted as a war crime by the International Military Tribunal for the Far East in the Tokyo trials.

The definition of war crimes of sexual violence committed in armed conflict not of an international nature is set out in article 8(2)(e)(vi). This provision contains the same list of acts as article 8(2)(b)(xxii), namely rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence.

This definition compares favorably with those found in other international conventions covering crimes of sexual violence committed in internal armed conflicts. For example, article 4(2)(e) of Additional Protocol II prohibits rape, enforced prostitution, and any form of indecent assault. Article 4(2)(f) prohibits “slavery and the slave trade in all their forms.” Article 4(e) of the Statute of the ICTR prohibits “rape, enforced prostitution, and any form of indecent assault.”⁹⁰ The list of acts is the same as in article 8(2)(b)(xxii) covering”. Human Rights Watch urges states parties to ensure that their national laws criminalize every act listed in articles 8(2)(b)(xxii) and 8(2)(e)(vi) both as war crimes and as national crimes.

Child soldiers

Under articles 8(2)(b)(xxvi) and 8(2)(e)(vii), it is a crime to conscript or enlist children under the age of 15 years into the national armed forces or to use them to participate actively in hostilities. This is consistent with Protocols I and II additional to the 1949 Geneva Conventions and the UN Convention on the Rights of the Child,⁹¹ which set 15 as the minimum age for military recruitment and participation.

However, a stronger standard is established in the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, which establishes eighteen as the minimum age for participation in armed conflict, for compulsory recruitment or conscription, and raises the minimum age for voluntary recruitment by governments from the current age of fifteen. The protocol also prohibits any form of recruitment of children under the age of eighteen by armed groups. States should adopt the standard in the Optional Protocol, not the Rome Statute, and prohibit any recruitment of those less than eighteen years, whether forced or voluntary.

⁹⁰ Compare the coverage of crimes of sexual violence committed in internal armed conflicts in other international conventions. For example, article 4(2)(e) of Additional Protocol II prohibits rape, enforced prostitution, and any form of indecent assault. Article 4(2)(f) prohibits “slavery and the slave trade in all their forms.” Article 4(e) of the Statute of the ICTR prohibits “rape, enforced prostitution, and any form of indecent assault.”

⁹¹*Convention on the Rights of the Child*, U.N. Doc. A/RES/44/25 (12 December 1989), available online at <http://www.hrweb.org/legal/child.html>

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