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HUMAN RIGHTS WATCH COMMENTARY TO THE FOURTH PREPARATORY COMMISSION MEETING FOR THE INTERNATIONAL CRIMINAL COURT

INTRODUCTION

The March-April Preparatory Commission meeting is the penultimate negotiating session before the June 2000 deadline for the completion of the Elements and Rules of Procedure and Evidence. As delegates begin their work, they will do so aware of the limitations of time and the considerable task ahead of them. Human Rights Watch considers the completion of these documents and fulfillment of the mandate of the Preparatory Commission to be of critical importance.

However, it is at least as essential that the Elements and Rules elaborated do not deviate from the Statute, constitute a regressive step in the development of international law or put unnecessary obstacles in the way of speedy, fair and effective prosecutions.

This Commentary recognizes the challenges posed by the shortage of time and focuses very selectively on those aspects of the rolling texts of the Elements and Rules of Procedure and Evidence that are matters of particularly serious concern.

SECTION A: ELEMENTS OF CRIME

Unless otherwise specified, comments are based on the Coordinator's rolling text (PCNICC/1999/L.5/Rev.1/Add.2).

THE CHAPEAU

War Crimes: Knowledge of the Conflict

Recommendation: The Elements should not impose, directly or indirectly, any burden on the prosecutor to prove that *the accused knew* of the existence of an armed conflict or of its character as international or non-international. The part of the coordinator's text that implicitly incorporates such a requirement should be deleted.

Recommendation: The nexus requirement specifying that the conduct was "committed in the context of ... armed conflict" should be set out in the chapeau, not listed as an element of each crime as in the current rolling text.

Commentary:

The Coordinator's proposed text

A 'coordinator's text', which emerged from informal intercessional discussions,¹ proposes the insertion of the following text in the chapeau of the Elements document:

*"It is understood that the Elements for war crimes do not include any requirement that the accused make any legal evaluation as to the existence of an armed conflict or its classification as international or non-international."*²

This Statement merely reiterates the principle that an accused person is not required to make any 'legal' evaluation. It is a matter of concern, however, that it may imply that the accused does have to make some kind of non-legal, or factual, evaluation of either the existence of a conflict or its character as international or non-international.

The Nexus Requirement: An Objective Evaluation

There can be no doubt that, in order for the Statute to apply, there must be a close connection between the crime and an armed conflict. This requirement is reflected in the current rolling text, which provides that "the conduct took place in the context of and was associated with an international armed conflict". The jurisprudence of the international criminal tribunals for the former Yugoslavia³ and Rwanda⁴ (ICTY and ICTR) clearly sets

¹ The intercessional on Elements of crimes was held in Siracusa, Italy from 31 January to 6 February.

² This is the final matter dealt with in the coordinator's text, under the heading "6. The structure of the Elements of Crimes and contextual Elements."

³ The ICTY has held that "[f]or a crime to fall within the jurisdiction of the International Tribunal, a sufficient nexus must be established between the alleged offence and the armed conflict which gives rise to the applicability of international humanitarian law." *The Prosecutor v. Dusko Tadic*, International Criminal Tribunal for the former Yugoslavia, 36 I.L.M. 908 (1997).

⁴ The fact that "the acts perpetrated by the accused had to be ... acts committed in conjunction with the armed conflict" was mostly recently endorsed in the *Musema case*, ICTR-96-13-I (27 Jan 2000), citing *The*

out a parallel requirement, on which the applicability of the tribunal's Statute and hence the jurisdiction of the tribunal, depend. Whether sufficient nexus exists is a matter which the prosecutor must prove⁵, and which the Court must objectively evaluate, in the light of the facts and circumstances before it.

This objective nexus requirement must be carefully distinguished from a requirement that the accused must have made a subjective evaluation as to that nexus, and known that there was an armed conflict, or that that conflict was international or non-international in nature. As highlighted below, such a requirement is neither supported by the Statute nor international practice and would entail significant dangers.

As the nexus requirement specifying that the conduct was "committed in the context of ... armed conflict" is part of the backdrop to the commission of the crime, and not an element requiring *mens rea*, we suggest that it would appropriately be located in the chapeau, not listed as an element of each crime. Such an amendment to the current rolling text would also serve the interest of creating a more streamlined text.

• *The Statute*

First, it should be noted that there is nothing in the Statute itself to suggest that the accused must make any kind of evaluation as to the existence of a conflict or its nature. This stands in contrast to crimes against humanity, in relation to which the Statute specifically imposes the requirement that they be "committed as part of a widespread or systematic attack directed against any civilian population, *with knowledge of the attack*" (emphasis added).⁶

• *International Law and Practice*

The practice of international tribunals supports the view that knowledge of the conflict is not a necessary mental element for the commission of war crimes.

The ICTY and ICTR have treated the questions of the existence and nature of a conflict as relevant only to the applicability of the relevant law.⁷ In the *Tadic* case the tribunal indicated that "[t]he only question, to be determined in the circumstances of each individual case, is whether *the offences were closely related* to the armed conflict as a whole" (emphasis added).⁸

Prosecutor v. Jean-Paul Akayesu, International Criminal Tribunal for Rwanda, Case No. ICTR-96-4-T (2 Sept. 1998).

⁵ The *Musema case*, *ibid.*, endorsed the approach, that "the burden rests on the prosecutor to prove, beyond a reasonable doubt, that, on the basis of the facts, such a nexus exists between the crime committed and the armed conflict," citing the Tribunal in the *Rutaganda case*.

⁶ Article 7(1) of the Statute.

⁷ Note that in the case of *Prosecutor v. Delalic et al. (the Celebici case)* Case No. IT 96-21-T, 16 Nov 1998, paras. 314 and 317 the ICTY found that "Situations of internal disturbance are not covered by international humanitarian law....The distinction pertaining to situations of conflicts of a non-international character emanates from the differing intensity of conflicts...It should be stressed that the ascertainment of the intensity of a non-international conflict *does not depend on the subjective judgment of the parties* to the conflict (emphasis added)." Still less should it depend on the subjective judgment of the accused.

⁸ *The Tadic case*, *ibid.*

In no case before either the ICTY or the ICTR, has knowledge of the accused as to the existence of a conflict or its character been presented by the Prosecutor or raised by the Tribunal as a relevant matter that had to be proved. This reflects the practice of the Nuremberg tribunal.

Potential ramifications of a knowledge requirement

Evaluating when an armed conflict exists may involve subtle and complex distinctions. A factual evaluation of whether an accused had knowledge of the conflict and its nature would involve many of the same complex issues as an evaluation of law. The stage at which facts would point to the existence of an armed conflict of a non-international nature -- as opposed to an internal disturbance or series of civil riots, for example-- is unclear and would often be extremely difficult to establish.⁹ Requiring the prosecutor to prove such subjective knowledge on the part of the defendant would make it extremely difficult to successfully prosecute cases, such as a number of those within the practice of the ICTY, where egregious war crimes are committed outside the immediate context of armed hostilities.¹⁰ Similar objections pertain to requiring any individual perpetrator, with his or her limited geographic or temporal perspective, to be able to know whether the conflict is international or internal in character.

As a point of principle, there is no unfairness in treating the question of commission in the context of an armed conflict as a free standing jurisdictional element for the determination of the Court, any more than there would be in leaving to the Court the question of whether a murder was committed in one state or another. Most acts that are susceptible to prosecution as war crimes are, by their nature, illegal in any context. There can be no principled basis for excluding torturers and rapists who reasonably believed their deeds took place in the context of civil disturbance rather than armed conflict. While it may be that for certain crimes some degree of knowledge of the conflict is implicitly required to satisfy the *mens rea* requirement, this is not the general rule. Any such specific mental element prerequisite can be addressed on a crime by crime basis.

The indirect imposition of a knowledge requirement as to either the existence or the nature of a conflict is a matter of very serious concern. Delegates are urged to ensure that they do not impose new and unnecessary obstacles to effective prosecution which are not

⁹ The fact that many conflicts are mischaracterized as internal disturbances, in an attempt to deny the applicability of the standards of international humanitarian law applicable to armed conflicts, further illustrates some of the likely difficulties in proving that the accused in fact knew that there was a conflict, in the face of clear indications from his or her state to the contrary.

¹⁰ In the *Tadic* case, involving crimes committed in a prison camp around which substantial clashes were not occurring at the time, the tribunal found that “[I]t is not...necessary to show that armed conflict was occurring at the exact time and place of the proscribed acts alleged to have occurred,...nor is it necessary that the crime alleged takes place during combat.” See also the *Celibici* case, para 184 and 185

justified on grounds of law or principle. Sound legal and policy reasons dictate that this matter should be left for determination by the Court.

Crimes Against Humanity: Requirement that a State or Organization Actively Encourage or Promote

The Statute defines the “attack against a civilian population” required for crimes against humanity as meaning “a course of conduct...pursuant to or in furtherance of a State or organizational policy to commit such attacks.”¹¹ The Elements rolling text provides: “[I]t is understood that a ‘policy to commit such attack’ requires that the State or organization actively promote or encourage such conduct as an attack against a civilian population.”

Recommendation: The requirement that a State or organization “actively promote or encourage...” should be deleted from the chapeau. Any elaboration on the meaning of ‘policy’ must be consistent with the Statute and international law. As such, it should cover policies of toleration, acquiescence, explicit or implicit approval or endorsement, direct or indirect encouragement or promotion.

Commentary:

Inconsistency with the Spirit and Letter of the Statute

The interpretation of “policy” in the rolling text represents a dangerous departure from the letter and spirit of the Statute. The mandate of the Elements exercise is, as has often been recalled, to assist the Court in the application of the Statute,¹² not to alter its substance. The guiding principle of the exercise has been the need to ensure consistency with the Statute. The current text falls foul of this principle and must be unequivocally rejected.

Delegates will recall that the ‘policy’ reference in the Statute is itself the result of a delicate compromise achieved at the Rome conference. The policy language was included at the final stages of the conference, on the understanding that it was a flexible concept which would provide additional assurance that isolated acts would not be treated as crimes against humanity.¹³ It was not intended, and cannot reasonably be construed, to

¹¹ Article 7(2) of the Statute.

¹² Article 9 of the Statute.

¹³ Since the Rome conference, one commentator who was instrumental in the drafting of this part of the Statute has noted that “...explicit recognition of this policy element was essential to the compromise on crimes against humanity. It is the existence of a policy that *unites otherwise unrelated inhumane acts, so that it may be said that in the aggregate they collectively form an “attack”*. Delegations supporting the compromise explained that *the policy element was intended as a flexible test...*(emphasis added.)” See Darryl Robinson, *Crimes within the Jurisdiction of the Court*, in *The International Criminal Court, The Making of the Rome Statute*, Roy S. Lee, ed. 1999, at 96, 97.

This rationale reflects the ICTY Statement in the *Tadic case, supra*, at para.. 944, that crimes against humanity “are not isolated, random acts of individuals but rather result from a deliberate attempt to target a civilian population. Traditionally this requirement was understood to mean that there must be some form of policy to commit these acts.”

impose a rigorous new jurisdictional threshold, as represented by the ‘actively encourage or promote’ language.¹⁴

To present the imposition of an unjustifiable new threshold as an ‘understanding’ of how the Statute should be interpreted is disingenuous. Delegates are urged in the strongest terms to insist on deleting this gloss or formulating an alternative that encompasses State or organizational policies that are inactive or tacit.

“...actively promote or encourage....”

The attempt to restrict the Court’s jurisdiction over crimes against humanity to situations where the prosecutor can prove that a State or organization “actively encouraged or promoted” the attack would seriously curtail the ability to prosecute the most serious international crimes. History attests to many such situations where crimes against humanity have been committed with the toleration, acquiescence, endorsement, or indirect or implicit encouragement or promotion of State authorities.¹⁵ It should be borne in mind that in these situations national justice systems are often themselves manifestations of the policy of acquiescence or turning a blind eye, and therefore unable or unwilling to prosecute.¹⁶ If impunity is to be avoided and crimes deterred, it is precisely in these sorts of situations that the ability of the ICC to act will be critical.

Delegates should also bear in mind the onerous evidentiary burden that may be involved in proving a State or organizational policy of ‘active’ encouragement to commit atrocities. This is especially true in the not infrequent situation where the policy was covert and the State or organization continues to control access to relevant evidence. If the policy requirement is not to pose an insurmountable obstacle, it must be possible to

¹⁴ See Rodney Dixon, *Crimes against Humanity*-para. (2)a, in *Commentary to the Rome Statute*, Triffterer, ed. 1999, where the author observes that “the policy element only requires that the acts of individuals alone, which are isolated, uncoordinated, and haphazard, be excluded.”

¹⁵ For example, in a series of cases the State of Honduras was found responsible for the practice of enforced disappearances, which was recognized to involve groups or individuals “...acting with the authorization, support, or acquiescence of the State,” as defined in the Inter-American Convention on Forced Disappearance of Persons, Art. #2, or “acting...on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government,” as defined in the General Assembly Declaration on the Protection of All Persons from Enforced Disappearance. See, for example, the *Velásquez Rodríguez Case*, Inter-Am. Ct. H.R., Ser. C., No. 4, para. 131 (1988), reprinted in 9 HUMAN RIGHTS L.J. 212 (1988).

The widespread practice of disappearances is but one well-recognized example of how crimes against humanity have been carried out with State acquiescence.

Note also the *Akayesu case* the Tribunal found that “...by his presence, his attitude and his utterances, Akayesu encouraged such acts, one particular witness testifying that Akayesu, addressed the Interahamwe who were committing the rapes and said that ‘never ask me again what a Tutsi woman tastes like.’ In the opinion of the Chamber, this constitutes tacit encouragement to the rapes that were being committed.”

The present rolling text would exclude situations of ‘tacit’ encouragement. *Supra*, para. 706.

¹⁶ The Inter-American Court has noted, in the *Velásquez Rodríguez case*, *supra*, p.22, that:

[w]hen queried . . . the authorities systematically denied any knowledge of the detentions or the whereabouts or fate of the victims...Executive and Judicial Branches either denied the disappearances or were incapable of preventing or investigating them, punishing those responsible, or helping those interested discover the whereabouts and fate of the victims or the location of their remains.

infer the policy from the nature of the attack.¹⁷ In many situations, it would be virtually impossible for the Court to draw an inference of ‘active’ as opposed to ‘tacit’ encouragement.¹⁸

The Appropriate International Standard: Legal Authorities

International legal authorities have long interpreted crimes against humanity to encompass crimes committed pursuant to a State or organizational policy of toleration or acquiescence, not only active promotion. The Nuremberg Tribunals required only that there be proof of “conscious participation in systematic government organized *or approved* procedures.”¹⁹ Similarly, the 1954 International Law Commission’s ‘Draft Code of Offences Against the Peace and Security of Mankind’ defined the precursor of crimes against humanity as those “inhuman acts...committed...by the authorities of a State or by private individuals acting at the instigation *or with toleration* of such authorities (emphasis added).”²⁰

The jurisprudence of the *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda also points to a standard considerably more flexible than that in the draft chapeau. The criminal tribunals in both the *Akayesu* and *Tadic* cases, for example, have emphasized that for conduct to rise to the level of crimes against humanity, it must have a connection to a policy that is “preconceived” or “consciously pursued” by a State or organization. Neither, however, has required that this policy be ‘actively’ pursued, and a conscious policy of acquiescence or turning a blind eye would appear to be covered.

In seeking the appropriate alternative standard, delegates should be guided in particular by the most recent judgment of the ICTY in this respect. In the *Kupreskic* judgment of 14 January 2000, the tribunal Stated that “[t]he need for crimes against humanity to have been *at least tolerated* by a State, Government or entity is stressed in national and international case-law (emphasis added).”²¹ The judgment goes on to State that “[t]he available case-law seems to indicate that some sort of *explicit or implicit approval or endorsement* by State or governmental authorities is required (emphasis added).”²²

Recommendation 2: In the final sentence of the Chapeau, the phrase “such conduct as an attack” should be deleted and replaced with “such attack,” in order not to appear to limit the Court to situations where there was a policy to carry out the particular acts in question.

¹⁷The ICTY has Stated that “such a policy need not be formalized and can be deduced from the way in which the acts occur.” The *Tadic case*, supra, para. 944.

¹⁸The *Akayesu case*, para. 704 to 706, supra.

¹⁹Theodor Meron, *War Crims Law Comes of Age*, 92 A.J.I.L. 462,467 (19898) (citing 3 TRIAL OF WAR CRIMINALS BEFORE THE NURENBURG TRIBUNALS 982 (1951))

²⁰International Law Commission, *Draft Code of Offences Against the Peace and Security of Mankind*, Art. 11, U.N. GAOR, 9th Session, Supp. No. 9, at 11, U.N. Doc. A/2693 (1954).

²¹Prosecutor v. Kupreskic et al, Judgement of 14 January 2000, IT-95-16-T, para. 552.

²²*Ibid.*

Commentary: The final phrase of the *chapeau* should be revised to ensure that the Elements are consistent with the Statute and do not purport to limit the Court’s jurisdiction. The policy required by the Statute is a “policy to commit such attack” not a policy to carry out certain specific acts, as the current rolling text indicates. The fact that a State or organization may not have had a policy to commit the particular *type* of atrocity inflicted should not preclude the Court’s jurisdiction where there was a policy to attack the civilian population. Such specific policies may rarely exist and, where they do, would be extremely difficult to prove given that policies to commit explicit crimes are generally covert in nature.

Delegates will recall that the wording of the Statute is quite deliberate in this respect. An earlier draft of the provision, proposed by Canada during the diplomatic conference, referred to a “policy to commit such *acts*.” This phrasing met with considerable concern that Prosecutors would then have to show not merely that the State or organization had a policy to commit crimes against humanity but that it had a policy to commit those specific acts.²³ As a result of these concerns, the “policy to commit such attack” language was adopted.²⁴

These concerns remain as valid today, and delegates should ensure consistency with the Statute and prevent valuable gains achieved during the Rome diplomatic process being undermined in the Elements document.

ELEMENTS OF PARTICULAR CRIMES

Enslavement and Sexual Slavery

Article 7(1)(c): Crime Against Humanity of Enslavement

Article 8(2)(b)(xxii): War Crime of Sexual Slavery

Article 7(1)(g): Crime Against Humanity of Sexual Slavery

Nota Bene: *The rolling texts for each of these crimes include an element which provides that “[t]he accused exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.”*

Recommendation: **The illustrative lists of slavery-like practices in the rolling text should be deleted. If such lists are retained, they should be expanded to include modern day slavery-like practices.**

Commentary: The illustrative list works to limit the scope of the Statute. The statutory definition reflects a long established definition of slavery founded on the one provided in

²³ See Darryl Robinson, *Crimes within the Jurisdiction of the Court*, in Roy S. Lee, *supra*, at 96. The specific example given is that there must be no requirement of a policy to rape, where rape is carried out pursuant to a policy to attack the civilian population. See Darryl Robinson, *ibid* at 95, 96, footnote 47.

²⁴ See Darryl Robinson, *ibid* at 96.

international instruments.²⁵ Such a result is inconsistent with the objective of the Elements document and should be rejected.

Modern Slavery-like Practices

By restricting the examples of enslavement to traditional forms of slavery involving commercial transaction, and other ‘similar’ forms of deprivation of liberty, the text fails to embrace prevalent modern slavery-like practices such as debt bondage and forced labor. As commentators on the statutory provision have recently noted, “[g]iven the horrors of enslavement during the Second World War and the new forms of enslavement practiced in former Yugoslavia and Rwanda, it is difficult to believe that the drafters intended to restrict the Court’s jurisdiction to a merely symbolic one over the traditional forms of slavery where legislation provided that one human being had the right to own another human being as a mere chattel.”²⁶

‘The Illustrative Approach’

We recognize that the lists in the rolling text are illustrative and not exhaustive. However, the use of ‘such as’ language is generally construed as limiting the scope of the definition to conduct of a similar nature to that specified in the list. In the rolling text ‘deprivations of liberty’ are specifically restricted to deprivations of a ‘similar nature’ to those set out in the list. In this case the common element to all of the examples—which may be perceived as the essential common element—is the commercial exchange involved.

Delegates are urged to refrain from this illustrative approach. Examples are not Elements. They therefore do not belong in this document, as reflected in the fact that the Elements document does not generally provide examples of the sort of conduct encompassed in the statutory definition. Moreover, these examples seek to crystallize the definitions and limit the Court based on specific, and in this case very selective, experience.

The essence of slavery lies in the exercise of the power of ownership, as reflected in the Statute and international law. Slavery involves limitations on the individual’s autonomy, and in the case of sexual slavery, specifically on the power to decide matters relating to one’s own sexuality in a manner and to a degree that corresponds to the exercise of a power of ownership. If any further elaboration on the statutory definition is sought, it should be along these lines. There is no necessary link with ‘transactions’, still less with transactions of a commercial nature, and lists that appear to indicate otherwise should be deleted.

²⁵ See Convention to Suppress the Slave Trade and Slavery, Sept 25, 1926 60 L.N.T.S. 253 and Supplementary Convention on the Abolition of Slavery, the Slave Trade, article 1, and Institutions and Practices Similar to Slavery, 1956, 266 U.N.T.S. 3, Article 1. The I.L.C. Comment on the 1996 Draft Code of Crimes against the Peace and Security of Mankind, defines enslavement as “establishing or maintaining over persons a status of slavery, servitude or forced labor contrary to well-established and widely recognized standards of international law.” (Report of the International Law Commission on the Work of its Forty Eighth session, U.N. GAOR, 51 Sess., Supp.)

²⁶ Boot, Dixon and Hall, *Crimes Against Humanity* in Triffterer, ed., 1999, 134, where the authors go on to note that “...[h]ad the Court existed in 1945, under such a restrictive reading it would not have had jurisdiction over the persons who used slave labor in Nazi Germany.”

Article 7(1)(f): Torture

Recommendation: The Elements of torture should not include a reference to the purpose for which the torture is committed.

Commentary: The definition of torture in Article 7(2) of the Statute does not include any purpose requirement. This was one of two departures from the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.²⁷ Since the diplomatic conference, it has been noted by commentators closely involved in negotiations that the definition of torture in the Statute “is based on the Torture Convention, but it is not restricted to acts of public officials [and] [m]oreover, there is no requirement of any particular purpose...”²⁸ The current rolling text includes a requirement that “...the accused inflicted pain or suffering for the purpose of: obtaining information or a confession, punishment, intimidation or coercion, or obtaining any other similar purpose.”²⁹ We note the footnote reference to the fact that some delegations favor the deletion of such a purpose requirement, and support this approach. Delegates should respect the text of the Statute and refrain from adding additional requirements, however framed, to the Elements.³⁰

Article 7(1)(i): Enforced Disappearance of Persons

Nota Bene: The rolling text for this crime includes the following Elements:

3. *The accused arrested, detained or abducted one or more persons, whether lawfully or unlawfully;*
5. *The accused subsequently refused, or was aware of a refusal, to acknowledge the deprivation of freedom or to give information on the fate or whereabouts of such person or persons;*
6. *The accused intended to remove such person or persons from the protection of the law for a prolonged period of time.*

The definition and interpretation of enforced disappearance in international instruments³¹ is rooted in the understanding that the crime is most often committed by a network of collaborating people, generally pursuant to a State or policy. As these international instruments address State responsibility, to date there is little jurisprudence on individual

²⁷ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, G.A. Res. 39/46, U.N. GAOR 39 Sess., Supp. No. 51, U.N. Doc. A/39/51.

²⁸ Herman von Hebel & Daryl Robinson, “Crimes within the Jurisdiction of the Court, The International Criminal Court: The Making of the Rome Statute”, ed. Roy Lee, p.99.

²⁹ See Article 8(2)(c)1-4 and article 8(2)(e)(1)-4 of the Elements document.

³⁰ See footnote 40 to Article 8(2)(c)1-4, *ibid*.

³¹ Enforced disappearance has been recognized as a crime against humanity in a variety of recent international instruments, most notably the Declaration on the Protection of All Persons from Enforced Disappearance (U.N. GA Res. 47/133, U.N. GAOR, 47th Sess., Supp. No. 49, at 207, U.N. Doc. A/47/49 (1992)), the Inter-American Convention on the Forced Disappearance of Persons (OEA Doc. AG/RES. 1256 (XXIV-0/94), 9 June 1994), the ILC Draft Code of Crimes, and the proposed International Draft Convention on the Protection of All Persons from Forced Disappearance (U.N. Doc. E/CN.4/Sub.2/1998/WG.1/CRP.2 (14 Aug. 1998)).

responsibility for the crime of enforced disappearance.³² However, it is worthy of note that the decisions and judgments of the Inter-American Commission of Human Rights³³ and the Inter-American Court of Human Rights,³⁴ which recognize an affirmative duty on States to prosecute those responsible for enforced disappearances, do not distinguish between the criminal responsibility of organizers of enforced disappearance and of their agents. Each of them can be responsible for the crime by performing one or more of the requisite Elements, and delegates should ensure that the Elements adequately reflect this.

It is recognized that to a great extent Article 25 of the Statute is sufficient to address the question of differing degrees of individual criminal responsibility. An individual may be directly involved in the execution of some Elements of the crime and only indirectly involved in others, in accordance with the forms of criminal responsibility set out in article 25(3) of the Statute.³⁵ However, it is suggested that, given the inherently collective nature of this particular crime, and the notorious difficulty in proving its perpetration, some further clarification along the lines highlighted below is necessary to assist the Court in the application of Article 7(1)(i), and ensure that all those responsible for this crime against humanity can be brought to justice.

Recommendation 1: It should be clarified that "the accused...detained... one or more persons" in the third element of the rolling text encompasses not only responsibility for the initial act of detention but also for subsequent continuing detention.

In cases of enforced disappearances, the initial arrest, detention or abduction of the person may long precede the ongoing refusals to acknowledge the deprivation of liberty and may be perpetrated by persons other than those responsible for the ongoing detention. The Elements should ensure that someone responsible for the ongoing detention could be criminally liable (provided all other Elements are satisfied) even if that person did not initially detain the victim. In this situation, the person responsible for the ongoing detention is not an unwitting jailer—he or she must be shown to refuse to acknowledge the deprivation of liberty and intend to remove the person from the protection of the law

Recommendation 2: The fifth element of the rolling text should cover not only situations where the perpetrator refused to acknowledge the deprivation of liberty or was aware that there had been such a refusal, but also situations where the perpetrator was aware that such refusal would occur in the ordinary course of events.

³² Enforced disappearance was not included in the Nuremberg Charter, although an individual ordering disappearances was convicted of the crime as a war crime (see Commentary on the Rome Statute of the International Criminal Court, ed. Otto Triffterer, Article 7(1)(i), margin no. 73).

³³ See e.g., *Chumbivilcas v. Perú*, Case 10.559, Report No. 1/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.91 Doc. 7 at 136 (1996).

³⁴ See e.g., *Velásquez Rodríguez Case*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).

³⁵ For example, an individual who organizes enforced disappearances may be held directly responsible for Elements 1, 2, 4, 5 and 6 of the rolling text, and indirectly for element 3 through the acts of an intermediate agent, as specified in article 25(3)(a) or (b) of the Statute.

Commentary: The fifth element of this crime in the rolling text currently provides that “the accused subsequently refused, or was aware of a refusal, to acknowledge the deprivation of freedom or to give information on the fate or whereabouts of such person or persons.”

The difficulty with the formulation that “the accused ...was aware *of a refusal*” is the apparent requirement that the accused be aware of the fact that a “refusal” had already occurred. In reality, the accused may fall out of the picture immediately upon completion of the initial abduction, with the subsequent refusal falling perhaps to the relevant authorities or other link in the criminal chain. It should be sufficient that an individual responsible for the initial act of abduction, for example, carried out with the intention to remove the victim from the protection of the law,³⁶ be aware that a subsequent refusal to acknowledge the victims’ whereabouts would ensue in the ordinary course of events.³⁷

³⁶ This ‘intention’ requirement itself would be satisfied if the accused were aware that the denial of the protection of the law would result in the ordinary course of events, as per Article 30.

³⁷ This reflects Article 30 of the Statute which provides that for a ‘consequence’ element, the relevant *mens rea* requirement may be satisfied by awareness that the consequence would result in the ordinary course of events.

RULES OF EVIDENCE AND PROCEDURE

The Rules should provide only for those procedural and evidentiary matters necessary for the effective functioning of the Court. They do not represent an opportunity to renegotiate the Statute. Rather absolute consistency with the Statute must remain the guiding principle. Delegates are urged to ensure that the Rules do not add to the burdens of the Prosecutor, create additional procedural steps or further limit the Court's jurisdiction.

Unless otherwise indicated, the following comments relate to the rules set out in the rolling text (PCNICC/1999/L.5/Rev.1/Add.1).

PART TWO

Part Two of the Statute reflects a delicate compromise that the Rules must not undo. It provides for a complex system of checks on the Prosecutor's ability to initiate an investigation and on the Court's ability to assert jurisdiction over a particular case. This approach is consistent with the need to balance the underlying principles on which the Statute of the ICC is based: namely, complementarity with national criminal jurisdictions and the desire of the international community to ensure that the most serious crimes of international concern do not go unpunished.

The Rules should not upset this balance by adding additional layers to the already complicated procedure that must be followed before an investigation or prosecution can proceed.

Rule 2.13: Proceedings Concerning Article 18(2)

Recommendation: The Rules should not provide opportunities for State challenge beyond those anticipated in the Statute. As such, Rule 2.13 should clarify that the observations that should be put before the Pre-Trial Chamber are those which a State may have provided, under Article 18, up to the point at which authorization is sought. It must not introduce a new opportunity for State challenge, with concomitant delays.

Commentary: Rule 2.13 provides that “[t]he Pre-Trial Chamber shall examine the Prosecutor's application *and any observations submitted by the State*” (emphasis added).

Article 18 of the Statute does not anticipate the participation of States in the Pre-Trial Chamber procedure. Instead, it provides for the Prosecutor to seek authorization from the Chamber and, if granted, for the State to appeal to the Appeals Chamber. Such an appeal would be heard on an expedited basis. The legitimate interest of States in safeguarding complementarity, and any ‘procedural fairness’ concerns as to the opportunity for States

to challenge decisions that may impinge upon their interests, are more than adequately protected by existing procedures.³⁸

When the Prosecutor seeks authorization, any submissions that States may have made under Article 18 should, of course, be put before the Chamber. However, this procedure must not be construed as requiring States to be given notice and additional time to prepare ‘any observations’ they may wish to make. Given the potential impact of delay at this early stage, it would be helpful to clarify that the rule extends only to observations that may have been submitted by the State up to that point.

It should be recalled that Rule 2.13(a) allows the court to “take appropriate measures for the proper conduct of the proceedings,” which would include seeking additional observations from an interested State, in circumstances where the Pre-Trial Chamber considers it necessary or desirable to do so. However, the rules should not provide for the presentation of such observations as a matter of right.

Rule 2.18: Victims Representation under Article 19(3)

***Recommendation:* Consistent with Article 19, Rule 2.18 should not unduly limit the Court’s discretion with regard to the scope of the category of victims that are able to make representations to it, or the manner in which their observations are presented.**³⁹

Commentary: Rule 2.18(a) provides that the Registrar shall inform “victims who have already expressed their intention of participating in the proceedings,” or their legal representatives, when the Prosecutor seeks an Article 19(3) ruling from the Court. As the Prosecutor may use the Article 19(3) procedure at any stage, including immediately upon receipt of a referral under Article 13, Rule 2.18 effectively could exclude all victims: it may be that no victims will have had a chance to express their intention of participating in the proceedings by that stage. This rule provides an overly restrictive view of victim participation, which is not justified by Article 19(3), and should be redrafted to allow the Court greater flexibility.⁴⁰

Moreover, Rule 2.18(b) provides that victims informed of a request by the Prosecutor under Article 19(3) may submit their observations in writing, and only in any other form where “the circumstances of the case so require....” This sets a very high threshold for

³⁸ The right to challenge before the Pre-Trial Chamber is contained in Article 18(4). Moreover, it should be borne in mind that States might well also have additional opportunities to challenge and to appeal under Article 19, in the context of particular cases. Article 18(7) provides: “A State which has challenged a ruling of the Pre-Trial Chamber under this Article may challenge the admissibility of a case under Article 19 on the grounds of additional significant facts or significant change of circumstances.”

³⁹ Principles that we suggest should govern the comprehensive discussions on victim issues, and a recommendation as to the definition of victims, are set out toward the end of this Commentary under “Victims and the ICC.”

⁴⁰ Article 19(3) provides: “The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under Article 13, as well as victims, may also submit observations to the Court.”

intervention in any form other than in writing, as it is rare that circumstances will “require” oral intervention, even though the Court may consider it the more desirable way to proceed. Article 19(3) does not stipulate the manner in which victims may make their observations to the Court. While it may be that written representations will generally be the preferred manner of intervention, the Rules should not restrict the discretion of the Court to decide on the best way to conduct its proceedings in the particular case.

Proposed Rule: Prosecutorial Request for Periodic Information, Article 18(5)

Recommendation: A rule should be included providing that, in the event that the Prosecutor defers to a national investigation or prosecution and requests periodic information on such proceedings under Article 18(5), the State shall provide information that is sufficient to enable the Court to determine whether there has been “a significant change of circumstances based on the State’s unwillingness or inability genuinely to carry out the investigations.”⁴¹

Commentary: Under Article 18(3) the Prosecutor’s deferral is open to review six months after the deferral “or at any time when there has been a significant change of circumstances based on the State’s unwillingness or inability genuinely to carry out the investigations.” If this provision is to be meaningful, and the Prosecutor to be able to act pursuant to it where a State is ‘unable’ or ‘unwilling’, he or she must have access to the relevant information as to developments on the national level. This is one of the few situations in which we urge that a greater degree of specificity is in fact important to give effect to the essential complementarity procedures in the Statute.

PART FIVE: INVESTIGATION AND PROSECUTION

Rule 5.33: Automatic Review Mechanism For Disclosure

Recommendation: Rule 5.33 should be expanded to establish the principle of limited automatic supervision by the Pre-Trial Chamber of the decisions of the Prosecutor with regard to disclosure.

Commentary: The non-disclosure of information could have serious detrimental consequences for the rights of the accused, while disclosure could be seriously harmful to the essential interests of victims or witnesses.⁴² We agree with the statement in footnote 80 of the rolling text that “[c]onsideration should be given to setting forth procedures which protect the accused’s rights to disclosure of exculpatory evidence without compromising the existing obligations as to confidentiality, and the safety of persons and the investigations (see 5.32).…”

⁴¹ Under Article 18(3) the Prosecutor’s deferral is open to review six months after the deferral “or at any time when there has been a significant change of circumstances based on the State’s unwillingness or inability genuinely to carry out the investigations.”

⁴² Rule 6.4 establishes a rule outlining applicable privileges. This proposal would provide a mechanism that would have the benefit of providing a procedural framework to give effect to that rule.

The potentially competing human rights interests identified in the footnote would be better protected if decisions as to disclosure were not left entirely to the Prosecutor, but involved a limited supervisory role for the Pre-Trial Chamber. Clearly, a balance must be struck between the need for a check on the exercise of Prosecutorial judgment as to disclosure, and the risk of over burdening a Pre-Trial Chamber which will already be much utilized. The Chamber therefore should not be given the onerous duty of reviewing all material disclosed or withheld from disclosure. Rather, we believe that a routine review,⁴³ which requires the Prosecutor's office to provide a brief account as to the nature of material it intends to disclose or withhold, and an explanation thereof, strikes the appropriate balance.

As Draft Rule 5.33 recognizes, it is important that the Prosecutor approach the Court at any stage when a doubt arises as to whether material should be disclosed. However, we suggest that it is insufficient for the involvement of the Court to depend entirely on a doubt arising in the mind of the Prosecutor. Inevitably, on occasion even capable and experienced Prosecutors acting in good faith will have different views as to whether or not information within their possession ought to be disclosed, or even as to whether it raises any question deserving of judicial consideration. The experience of the ICTY testifies to this fact, and to the many problems that can result in practice from the absence of any mechanism such as that proposed.⁴⁴ An automatic review by the Court, while no guarantee that all problems will be detected, does provide some safeguard. In practice, it would oblige the Prosecutor to give careful consideration to what had and had not been disclosed, and may elicit questions on the part of the Pre-Trial Chamber as to the propriety of disclosure, on the basis of which appropriate orders can be issued.

Finally, victims or witnesses should be notified sufficiently in advance of disclosure where their interests may be adversely affected.⁴⁵ With the consent of the Court, this hearing would provide an opportunity to make representations as to non-disclosure, which have not been previously resolved with the Prosecutor's office. The interests of efficiency would be served by combining judicial consideration of all matters relevant to pre-trial disclosure in one *ex parte* hearing.

⁴³ In earlier Commentaries, Human Rights Watch suggested that this mechanism involve an *ex parte* hearing. At this stage, to ensure the most straightforward procedure and minimize changes to the draft rules, we suggest that the mechanism need not involve necessarily an oral procedure but generally could be handled by way of a routine written procedure. The Court, of course, should be able to call a hearing where it considers it desirable to do so.

⁴⁴ Problems arose at the ICTY in relation to the disclosure of a victim's counseling records. The records were not initially considered relevant by the Prosecutor and not disclosed, giving rise to serious concerns on the part of the tribunal about the right of the accused to disclosure. The scope of disclosure ultimately ordered by the Tribunal, in turn, caused great concern to victim assistance groups. The ICC should learn from the experience of the ICTY. See the decision of the Trial Chamber of the ICTY in the case of *The Prosecutor v. Anto Furundzija*, 16 July 1998, IT-95-17/1-T.

⁴⁵ Note the experience of the *Furundzija* case, *ibid*. We believe this matter should be addressed in the context of the comprehensive discussion of victim issues. Delegates should ensure, for example, that the role of the Victim and Witness Unit includes the responsibility to notify victims of key developments that affect their interests in a timely manner.

PART SIX: THE TRIAL

Human Rights Watch set out extensive recommendations on Part Six in our Commentaries to the second and third Preparatory Commissions. The only one of these issues which has not had its “first reading” by the Preparatory Commission is the issue of evidence in cases of sexual violence.

Rule 6.5: Evidence in Cases of Sexual Violence

• **Consent**

Recommendation: Before any evidence of consent in cases of sexual violence is admitted, the Trial Chamber must be satisfied, *in camera*, that the evidence is relevant and credible. In principle, any such evidence that is admitted should itself be heard *in camera*.

Commentary: Given the prospect for harassment and intimidation of witnesses that often arises when a defendant seeks to introduce evidence of consent, the highest possible threshold for determining admissibility should apply. In our previous Commentary, Human Rights Watch recommended that no corroboration of a victim’s testimony should be required in cases of sexual violence, due to the prejudicial attitudes that frequently lead to the testimony of a victim of sexual violence being treated as *per se* less reliable. On the understanding that this issue has been resolved, we do not repeat that aspect of our recommendation in this context. The Court must be satisfied that the evidence is both relevant and credible.⁴⁶

To safeguard witnesses, the Rules also should ensure that the Court make the prior determination of admissibility of such evidence *in camera*. Any details of the substance of the consent evidence that the defense provides in advance of that determination, should be considered *in camera*.⁴⁷ Also, to ensure greater protection, in the event that such evidence of consent is deemed admissible in the context of part of a case which the Court has ordered should be heard in open court,⁴⁸ the evidence of consent should be heard *in camera* unless the victim otherwise desires.

• **Other Sexual Conduct**

Recommendation: A rule should be included that deals with evidence relating to other sexual conduct of the victim. The rule should provide that such evidence is not admissible save in the most exceptional circumstances where the Trial Chamber, sitting *in camera*, so decides.

⁴⁶ This reflects the standard in Rule 96 of the ICTY Rules.

⁴⁷ Note footnote 81 of PCM ICC/1999/L.5/REV.1/Add 1 which proposes that the accused describe to the Court the substance of the evidence he or she intends to introduce. If this prevails, the presentation of such description in general should itself be heard *in camera*.

⁴⁸ Note that Article 68(2) provides that the Court “may conduct any part of the proceedings *in camera*In particular, such measures shall be implemented in the case of a victim of sexual violence...unless otherwise ordered by the Court.”

In no circumstances should evidence of other sexual conduct be admitted where it is presented for the purpose of attacking the character or credibility of the victim. Before admitting evidence, the Chamber should be satisfied that the evidence is highly relevant and credible, and is essential for a fair trial.⁴⁹

Commentary: It is essential to specify evidentiary rules for gender-based crimes to ensure that effective and fair adjudication of such crimes can occur. The Rules should categorically reject sexual stereotyping and the introduction of any sexual innuendo into the fact-finding process. They must avoid the discrimination often associated with the public disclosure of victims' sexual history and must safeguard the privacy of victims against undue invasion. The Rules must also protect proceedings from invidious notions that a woman's mode of dress or lifestyle implies consent to sexual relations or is relevant to the determination of her credibility. It is also essential that the ICC ensure that the accused's right to prepare a defense is unequivocally protected.

Only relevant evidence should be admissible and evidence of other sexual conduct will almost *never* be relevant to the defense case. Such evidence has often been used to intimidate and stigmatize victims of sexual violence. There should be, therefore, a general presumption that evidence as to sexual conduct is *inadmissible*. The Court, however, should have the power to admit such evidence in specific exceptional circumstances, where it is highly relevant, credible, essential to the accused's defense, and is not being submitted for the purpose of attacking the character of the victim.

The added safeguard that the defense must satisfy the Court *in camera* before any evidence is admitted provides protection for the victim from potential re-traumatization or emotional distress while safeguarding the accused's right to present an effective defense.

For example, the narrow circumstances where evidence of other sexual conduct may be potentially admissible include (i) specific instances of sexual conduct by the victim essential to prove that a person other than the accused was the source of semen, injury or other physical evidence, or (ii) where evidence of consent is relevant, specific instances of sexual conduct with the accused, closely related in time to the alleged offence, offered by the accused to support a defense of consent or mistake of fact as to consent.

With regard to (ii) above, it should be recalled that the existence of consensual relations on one occasion does not itself prove the existence of consent on others, nor does it justify the presumption by the accused as to consent by the victim on other occasions. However, where the Court considers that sexual relations between the victim and accused are an essential element of proof that, in light of all the facts of the particular case, is relevant to establishing consent or mistake of fact as to consent, it should have the power to admit the evidence on an exceptional basis. Evidence of sexual conduct with persons other than the accused is entirely irrelevant to the question of consent.

⁴⁹ The right of an accused person to a fair trial is enshrined in Article 67 of the Statute.

Finally, even in circumstances where such evidence is deemed admissible, the Court should hear the evidence *in camera* and order that the record of proceedings not be made public.⁵⁰

PART NINE: STATE COOPERATION

Rule 9.9 (b) and (c): Arrangements for Surrender

Recommendation: The Rule should clarify that a person shall be surrendered to the Court by the date and in the manner *determined by the Court, upon consultation between the authorities of the requested State and the Registrar.*

Commentary: The rule in the current rolling text provides: that “(b) [t]he person shall be surrendered to the Court by the date and in the manner *agreed upon* between the authorities of the requested State and the Registrar (emphasis added).” It goes on to provide that “(c) [i]f the circumstances prevent the surrender of the person by the date agreed, the authorities of the requested State and the Registrar shall agree upon a new date and manner....”

As currently drafted, this rule is inconsistent with the Statute, which clearly provides that States are obliged to cooperate with the court and comply with requests for arrest and surrender.⁵¹ In issuing its binding requests, the Court may consult with the State and will take into account all the circumstances, including any legitimate special difficulties that arise in the execution of the request. A consultation process for the resolution of any difficulties is specifically written into the Statute in article 97,⁵² as well as appearing elsewhere in part 9 in relation to particular issues involving surrender of persons.⁵³

Ultimately, however, the question is not one of consensus between the State and Court and it is critical that it is not presented as such. Rather, it is a matter of the Court’s authority and a State party’s obligation. At the end of the consultation process, even if the State party does not ‘agree’ to a particular deadline for surrender but would prefer several months more, if the Court determines otherwise, it is obliged to comply with the Court’s request. This fundamental tenet of the Statute must not be undermined in the Rules.

We believe that it was not the intention of delegations to undermine the obligations which are the linchpin of the cooperation regime, but rather to reflect the need for the Court and State to be engaged on the practical aspects of the fulfillment of those obligations. This is

⁵⁰ Article 68(2) provides, in relation to *in camera* proceedings, that “such measures shall be implemented in the case of a victim of sexual violence ... unless otherwise ordered by the Court, having regard to all the circumstances, in particular the views of the victim or witness.”

⁵¹ Article 89 provides that “State parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.”

⁵² See Article 97 headed “Consultations”.

⁵³ Article 89(2) provides for consultations where a *ne bis in idem* issue is raised and Article 91(4) provides that the State shall consult on special requirements of a State’s national law.

not, however, the net effect of this rule. The small suggested amendment would protect the important principle of State parties' obligations, consistent with the Statute, and better reflect what we understand to be the intention of the majority of delegations.

Rule 9.18: Application of Article 98 (Cooperation with Respect to Waiver of Immunity and Consent to Surrender).

Recommendation: If the Rules for Article 98 are reconsidered, they should establish a procedure that provides for the Court to determine the applicability of Article 98 in any particular case.

Commentary: Rule 9.18 of the rolling text provides: "When a requested State notifies the Court that a request for surrender or assistance raises a problem of execution in respect of article 98,⁵⁴ the requested State shall provide any information relevant to assist the Court in the application of article 98. Any concerned third State or sending State may provide additional information to assist the Court."

Human Rights Watch recognizes the delicate compromise that was reached on the wording of this rule at the December Preparatory Commission, and as such does not ask that the issue be reopened. If, however, there is any question of this Rule being reconsidered, we urge that the Rule clarify that if any potential conflict arises concerning the international obligations referred to in Article 98 and the obligations under the Statute, it falls to the Court to determine the matter. If Article 98 is not to constitute an escape clause that can be invoked unilaterally to avoid compliance, the Court must be the ultimate arbiter of whether such a conflict exists and whether the waiver or consent referred to in Article 98 is necessary in any particular case.

VICTIMS IN THE ICC

- **Governing Principles**

We understand that the participation of victims in proceedings before the Court and the protection of their interests will be the subject of a comprehensive discussion by the Preparatory Commission. In the course of this discussion, we urge delegates to consider the following general principles.

⁵⁴ Article 98 of the Statute provides that:

(1) the Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity;

(2) the Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

The interests of justice and the interests of victims are complementary. The overriding interest of victims is likely to be the interest in seeing that crimes are effectively investigated and that justice is done. Victims bring experience and perspective which can prove valuable to ascertaining the truth, and critical to the impact of the International Criminal Court (ICC) on the reestablishment of the rule of law and even peace and security.

Victims of human rights violations do not have “rights” within the ICC framework to the same extent as defendants. However, they do have **rights that may be implicated** in the context of proceedings of the ICC, such as the right to privacy and to security of the person, the right to truth, to access justice and to reparations. This underlies the recognition of victims’ interests in the Statute, which the Rules should protect and promote.⁵⁵

In establishing a framework wherein these interests can be addressed, the Rules should be governed by **international standards**.⁵⁶

While providing for the participation of victims and the protection of their rights and interests, the Rules must ensure that the **rights of the accused** are not in any way infringed. To fail to protect the accused would be inconsistent with the Statute and would undermine the credibility and authority of the Court. The Rules, like the Statute, will make an important contribution to international standard setting, being a potential point of reference for, and influence on, national standards of justice. This underscores the need for conformity of the Rules to the highest standards of international human rights law.

The Rules should also ensure that the **integrity and efficiency of investigations** are not jeopardized and that proceedings are conducted fairly and expeditiously.

Concerns that some delegates have about over burdening the Court can be addressed through a **broad and flexible procedural framework**, which allows the **discretion to balance competing factors** in a particular case. Neither the interests of victims nor those of the efficient administration of justice will be served by detailed and restrictive Rules. Procedures should be as straightforward as possible, and should not be unduly onerous for victims, or restrict the Court’s discretion to determine the best manner to conduct its proceedings. The need for restraint in drawing up the Rules is particularly pertinent given the degree of detail already enshrined in the Statute, unlike the relatively skeletal Statutes of the ICTY and the ICTR.

Critically, the Rules must be **consistent with the Statute** at all times.⁵⁷ The Statute enshrines these key principles: victim participation throughout the proceedings, the

⁵⁵ See for example, Article 68 of the Statute.

⁵⁶ See in particular the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power UNGA Resolution 40/34, U.N. GAOR 3d Comm., 40th Sess., Annex at 213-215, U.N. Doc. A/40/53, 1986 (“The Victims Declaration”).

⁵⁷ Article 51(4) States that “[t]he Rules of Evidence and Procedure shall be consistent with this Statute.”

protection of the broad interests of victims and the right to reparations. The Rules must not undermine or limit the statutory provisions.

- **Definition of Victim**

Recommendation: The definition of victim for the purposes of the ICC should accord with international standards. As such, it should cover all persons who have suffered harm, including physical or mental injury, emotional suffering, economic loss or impairment of their fundamental rights, as a result of crimes within the Court’s jurisdiction. A victim may include the family of the victim or a dependant of the victim as well as persons who have suffered harm as a result of intervening to assist victims.⁵⁸

Commentary: The ICC Statute endows the Court with an inherent control over its own proceedings and the flexibility to ensure that it can discharge its mandate efficiently. Concerns that the Court must not be overwhelmed, and that the efficiency and integrity of its proceedings must not be hampered by victim participation, are therefore addressed in the Statute, and can be further secured by a flexible mechanism for victim participation in the Rules. These concerns need not and should not result in a restrictive definition of ‘victim’.

Rather, the Rules should be consistent with international standards. The recommendation set out above is based on the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Violations of International Human Rights and Humanitarian Law,⁵⁹ and the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power.⁶⁰

⁵⁸ Human Rights Watch has set out detailed recommendations on the full range of ‘victim issues’ in previous Commentaries. We focus here on the outstanding issue that has not yet been considered: the definition of victim. See also the specific recommendation on Rule 2.18 in the section dealing with Part Two.

⁵⁹ Paragraph 7 of the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Violations of International Human Rights and Humanitarian Law in the “Report on U.N. Commission on Human Rights”, 53rd Sess., E/CN.4/1997/104 (16 Jan. 1997) provides: “States shall deem a person a ‘victim’ where ...such a person suffered harm, including physical or mental injury, emotional suffering, economic loss, or impairment of their fundamental legal rights. A ‘victim’ may also be a member of the immediate family or a dependant of the direct victim as well as a person who, in intervening to assist a victim or prevent the occurrence of further violations, has suffered physical, mental or economic harm.”

⁶⁰ Harm is defined in the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power UNGA Resolution 40/34, 1985 (The Victims’ Declaration), as including, “physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights.”