

Comments on the Draft International Criminal Court Bill 2000

Introduction

Human Rights Watch wishes to thank the Government of the United Kingdom for the opportunity to comment on its draft International Criminal Court Bill 2000 (the 'draft Bill').

As you know, only two states have completed their Rome Statute implementation thus far, Canada and New Zealand. The UK draft Bill will join these two examples as the earliest efforts at comprehensive implementation of the Rome Statute and the UK Government is to be commended for its effort in moving quickly to ratify and implement the Rome Statute.

Furthermore, the Government's decision to provide an opportunity for public comment is particularly welcome given the potential impact the Bill may have on the implementing legislation of other states. As one of the first examples of implementing legislation, the UK Bill, like the Canadian and New Zealand Acts, will be the subject of careful examination by other states as they prepare their own implementation. This will be particularly so for countries which share the UK's common law tradition. For these nations, the draft Bill is likely to serve as a precedent rather than mere example. For this reason, Human Rights Watch believes that it is vital that the draft Bill fully implement the UK's Rome Statute obligations and, where the Bill goes beyond the strict requirements under the Rome Statute, that it is consistent with international law and with human rights values.

Human Rights Watch has been actively involved in the negotiations for an International Criminal Court (ICC) since 1995 and, since the adoption of the Rome Statute in June 1998 we have been campaigning worldwide for early entry into force of the Rome Statute. Human Rights Watch believes that the ability of the ICC to fulfil its mandate will depend on the extent to which states parties have implemented their Treaty obligations and are able to assist the ICC. For this reason, our campaign aims, not only for the 60 ratifications needed to bring the Statute into force, but also for its effective domestic implementation.

We are pleased to see that the draft Bill, in most respects, effectively implements the primary obligation under the Rome Statute that states parties cooperate with, and assist, the Court upon request. We also welcome those provisions in the Bill that go beyond the strict requirements in the Statute but which we believe are necessary for an effective international justice system; in particular ensuring that the UK can take prisoners from the ICC and that its courts can prosecute those accused of genocide, crimes against humanity and war crimes.

This approach also serves the interests of the United Kingdom as it will limit the chances of its having to cede its jurisdiction to the ICC. As you know, the ICC was only ever supposed to fill the gap left when States that would ordinarily exercise jurisdiction over a crime failed to act. For this reason the ICC's jurisdiction is complementary to national criminal jurisdiction and the ICC will only ever be able to act if the state concerned is unable or unwilling to do so. To minimize the chances that the ICC would find a state party "unable" to exercise its criminal jurisdiction in a particular case, and consequently

the case admissible before the ICC, it is necessary that the state concerned, at the very least, be able to investigate and prosecute the ICC crimes itself under its national law.

While the draft Bill adequately incorporates the ICC crimes into UK law, it omits some very important principles that may be considered by the ICC pursuant to Article 17 in determining the ability and willingness of the United Kingdom to prosecute an ICC crime itself. It also fails to extend universal jurisdiction to all of the ICC crimes and in some respects does not fully address the cooperation responsibilities that the United Kingdom will undertake upon ratification. Each of these issues is addressed in detail below.

Non-applicability of immunities from prosecution– Article 27

Article 27 of the Rome Statute provides that the ICC has jurisdiction over all persons regardless of their official status and that any immunity or special procedural rules that they may enjoy because of this official status will not bar the ICC from exercising its jurisdiction over that person. This is one of the most important provisions in the Rome Statute and should be explicitly incorporated into the draft Bill.

The rationale behind this provision is simple. The objective of immunities from prosecution is to enable the beneficiary of the immunity to carry out his or her official functions unhindered. It is not to facilitate or to guarantee impunity for genocide, crimes against humanity or war crimes, crimes. The acts constituting these crimes are not part of a person's official functions and thus they fall outside the scope of the immunity.

Recognition for this principle dates back, at least, to the Treaty of Versailles which provided for the individual responsibility of Kaiser Wilhelm II.¹ The Charter establishing the Nuremberg Military Tribunal² (the Nuremberg Charter) codified this principle in Article 7 which provided that: “[T]he official position of defendants, whether as heads of state or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.” It has since been repeated in the Statutes of the International Criminal Tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY) and, of course, in the Rome Statute.

This principle was also recognized by the House of Lords in the ‘Pinochet case’ in which some of the rationale for holding that General Pinochet did not have immunity from prosecution as a former head of state was that the applicable UK law on state immunity extended only to the exercise of official functions, and as torture was not a sovereign function, there was no entitlement to immunity in respect of it. To avoid the possibility of re-litigating this question in respect of crimes other than torture, the draft Bill should make it clear that no immunity from legal process applies to the crimes in Clause 45.

Finally, whether a state has conferred an immunity, or recognizes an immunity conferred by another state on a person accused of an ICC crime, will be considered by the ICC in determining, under Article 17, the state's willingness and ability to prosecute the person

¹ See O. Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court*, at p. 502.

² The Charter of the International Military Tribunal Annexed to the London Agreement, 8 August 1945; U.N.T.S. 279; 59 Stat. 1544, 8AS No. 472. Reprinted in *American Journal of International Law*, vol. 39, (1945) p. 257.

concerned itself. Hence, it is in the interests of the UK to ensure that no immunity will be recognized by UK courts as a bar to prosecution under the draft Bill.

No defence of superior orders

The principle that there can be no defence of superior orders is well established under international law.³ This principle was incorporated into Article 8 of the Nuremberg Charter, which explicitly prohibited the application of superior orders as a defense. The specific exclusion of superior orders as a defense has been expressed in other, subsequent international instruments such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture),⁴ the Statutes for the International Criminal Tribunal for Rwanda and International Criminal Tribunal for the former Yugoslavia and the Rome Statute. The draft Bill should be amended to explicitly provide that the defence of superior orders is not available for the crimes set out in the Bill.

Universal jurisdiction

The failure of the UK Government to extend universal jurisdiction to all of the ICC crimes incorporated into UK law by Clause 45 is disappointing and creates the possibility of the UK becoming a 'safe haven' for some perpetrators of these crimes. It also limits the ability of the UK to meet its duty to prosecute those accused of the most serious crimes of international concern and to assist the work of the ICC by being able to exercise fully its complementary jurisdiction.

Not extending universal jurisdiction to all of the ICC crimes creates an anomalous situation whereby UK courts can exercise universal jurisdiction in respect of torture and grave breaches of the 1949 Geneva Conventions pursuant to legislation implementing obligations under the Convention Against Torture and the Geneva Conventions, but not in respect of other crimes against humanity or serious violations of the laws and customs of war even if they are committed at the same time or in the same context as acts of torture or grave breaches. The effect of this anomaly is two-fold and leaves open the possibility that the UK could become a 'safe haven' for those who commit these crimes.

It is quite possible that the ICC will focus its limited resources on those who order, or are otherwise directly responsible for, the commission by others of genocide, crimes against humanity or war crimes. Thus, the ICC may never indict many of the people who actually commit these crimes, for example low-level officials. If they are not UK nationals and if the crimes alleged were not committed on UK territory, these people could find refuge in the UK unless they had committed torture or grave breaches of the Geneva Conventions or unless they are extradited to another state.

³ For example, in the trial of Adolf Eichmann, the Israeli district court observed that the rejection of the superior orders defense in the prosecution of war criminals had been acknowledged in 1946 and had "now become general in all civilized nations." *A-G of the Government of Israel v. Eichmann*, (Dec. 12, 1961) 36 *International Review* 18, 20 (1968), at p. 257, affirmed *Text of Judgment of the Supreme Court* (May 29, 1962), p. 317-18. See also U.N.G.A. Resolution 95(1).

⁴ See Article 2(3) of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, G.A. Res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51. Entered into force 26 June 1987.

In addition, failure to extend universal jurisdiction to all the ICC crimes creates a potential disparity in the treatment of nationals of states parties to the Rome Statute and nationals of other states. If the crimes alleged were committed by a national of a non-state party on the territory of that state or another state not party to the Treaty, the ICC, pursuant to Article 12 of the Rome Statute, will not be able to exercise jurisdiction over that person. In order for the ICC to exercise jurisdiction, Article 12 requires that either the state of nationality of the perpetrator or the state on whose territory the crimes were allegedly committed are States parties or have otherwise accepted the jurisdiction of the ICC. Thus, unless the UK is able to prosecute on the basis of universal jurisdiction, such a person may avoid justice altogether.

Not extending universal jurisdiction to all the ICC crimes also limits the ability of the UK to participate fully in an international criminal justice system of which the ICC is but one important component. The ICC was only ever intended to fill the gap left by States' unwillingness and inability to prosecute serious international crimes themselves. For a truly effective international justice regime, in which there are no safe havens, it is vital that States are both able and willing to try those accused of the crimes within the jurisdiction of the ICC, no matter where those crimes were committed and regardless of the nationality of the perpetrator or victims. Foreign Secretary Cook, in his statement on the release of the draft Bill, said that one of the objectives of the United Kingdom's ratification and the draft Bill was to "send a clear signal to the perpetrators of the world's most heinous crimes that they will not go unpunished". To meet this objective the draft Bill should be amended to extend universal jurisdiction to all the ICC crimes.

On site investigations by the Prosecutor

While the draft Bill sets out some of the forms of assistance the UK authorities will need to give to the ICC, it does not address a request by the ICC for the Prosecutor, him or herself, to conduct investigations on UK territory.

The power of the Prosecutor to conduct investigations on the territory of a state under Article 54(2) is critically important to his or her ability to prepare cases for trial.⁵ The practice of the International Criminal Tribunal for the former Yugoslavia strongly suggests that most witnesses will not travel to the seat of the Court to give their testimony and most physical evidence will need to be collected and brought to the seat of the Court.

For this reason, it is important that the draft Bill explicitly allow the Prosecutor to conduct his or her investigations on the UK's territory when requested to do so and that relevant authorities are authorized and required to cooperate with and assist the Prosecutor in those investigations.

⁵ Article 54(2) allows the Prosecutor to conduct investigations in the territory of a state either under a request made under Part 9 of the Rome Statute or as authorized by the Pre-Trial Chamber under Article 57(3)(d). Part 9 of the Rome Statute, entitled "International Cooperation and Judicial Assistance" sets out the cooperation regime between state parties and the ICC. 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 secured that State's cooperation under Part 9 in certain, very limited, circumstances. These include a determination by the Pre-trial Chamber that the state concerned is unable to execute a request for cooperation because there is no available authority or component of its judicial system competent to execute such a request.

Privileges and Immunities for officials of the ICC

To enable the judges, prosecutor, deputy prosecutor and registrar effectively to carry out their official functions without being subject to attacks by way of criminal or other legal process, Article 48(2) of the Rome Statute provides that they are, when engaged on or with respect to the business of the Court, to enjoy the same privileges and immunities as are accorded to heads of diplomatic missions. Furthermore, they are to continue to be accorded such immunity from legal process of every kind after the expiry of their terms of office in relation to words written or spoken or acts performed by them in their official capacity. Naturally, the immunity from legal process they enjoy would not apply in relation to the commission of any of the Rome Statute crimes.

Sub-paragraph 2(2)(b) of the draft Bill provides that Her Majesty may, by Order in Council, provide that “the judges, prosecutor, deputy prosecutor and registrar are to have such privileges and immunities as, in the opinion of Her Majesty, *are or will be required for giving effect to the ICC Statute*” (emphasis added). Human Rights Watch recommends that the UK Government, in its explanation of the Clause to Parliament, state that the privileges and immunities “required for giving effect to the ICC Statute” are those set out in Article 48, paragraph (2).

Reparations Fund for victims of crimes

The importance of providing justice to the victims of the crimes of genocide, war crimes and crimes against humanity is recognized in a number of respects in the Rome Statute. In addition to participation rights, victims may also be entitled to reparations and the Court is empowered to make orders for reparations under Article 75. One major force behind the establishment of the ICC was the recognition that victims of the most serious international crimes should be able to get reparations for the harm they suffer. For this reason, Human Rights Watch urges the UK Government to consider establishing a Trust Fund, like the one provided for in the Canadian implementing legislation, for the purpose of paying reparations to victims of genocide, war crimes and crimes against humanity and their families.