

THE INTERNATIONAL CRIMINAL COURT:

Checklist for Effective Implementation

On 17 July 1998, the international community took an enormous step forward in the fight against impunity of those responsible for genocide, crimes against humanity and war crimes. On that date, 120 states voted at a diplomatic conference to adopt the Rome Statute of the International Criminal Court (Rome Statute or Statute) providing for the establishment of a permanent International Criminal Court (Court) with jurisdiction over those crimes when states are unable or unwilling to investigate or prosecute them themselves. The Court will be able to try persons accused of such crimes in four situations: (1) if they have been committed in the territory of a state which has ratified the Statute; (2) or by a national of such a state; (3) the United Nations (UN) Security Council has referred a situation involving a breach of or threat to international peace and security to the Court or (4) a state which has not ratified the Statute accepts the Court's jurisdiction over a crime.

The Statute will enter into force when 60 states have ratified it. As of 21 July 2000, 98 states had taken the first step towards ratification by signing the Statute and 14 of them had ratified it. A state which ratifies the Statute will, in most cases, have to enact implementing legislation in order to fulfill its obligations under this treaty. In accordance with the principle of complementarity incorporated in the Statute, such implementing legislation offers states an excellent opportunity to enable their prosecutors and courts to fulfill their primary role in ensuring accountability for the worst crimes in the world and to demonstrate their support for international law. Effective implementing legislation will assist governments in promoting the rule of law and contribute to accountability, stability and public order.

The following *Checklist for Effective Implementation* indicates both what states parties are *required* to do under the Rome Statute and what Amnesty International recommends that they *should* do to ensure that the Court is an effective complement to national courts and that their authorities are legally prepared to cooperate fully with the Court. It is designed to assist states in determining quickly whether their courts and other authorities can implement particular statutory requirements or whether they need to draft new - or amend existing - legislation. The *Checklist* does not suggest particular solutions, as these will vary depending on each state's legal system. However, this *Checklist*, which is an updated and slightly revised version of one distributed to participants at more than a dozen international conferences from April to July 2000, is to be supplemented by a more detailed analysis by Amnesty International in a paper to be published in 2000, *The International Criminal Court: Handbook for governments*, which will include a discussion of some of the draft implementing legislation now being considered in national parliaments and a review of some of the ways these countries are addressing apparent national obstacles to ratification.

Amnesty International is also urging that states parties take advantage of the opportunity presented when drafting legislation implementing the Rome Statute to incorporate provisions requiring their authorities to cooperate with the International Criminal Tribunals for the former Yugoslavia and Rwanda. For further information on the similar requirements in such cooperation legislation, see Amnesty International, *International criminal tribunals: Handbook for government cooperation*, August 1996 (AI Index: IOR 40/07/96), and its three

supplements (AI Index: IOR 40/08/96, 40/09/96 and 40/10/96). A supplement to this publication is to be issued in the near future.

States which become parties to undertake two fundamental obligations:

1. Complementarity. In accordance with the principle of complementarity in the Preamble, Article 1 and Article 17 of the Rome Statute, states parties recognize that states, not the International Criminal Court (Court), have the primary responsibility for bringing those responsible for genocide, crimes against humanity and war crimes to justice. In the Preamble they affirm 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 international cooperation”, determine “to put an end to impunity for the perpetrators of these crimes” and recall that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”. In the tenth paragraph of the Preamble, States Parties emphasize that the Court “shall be complementary to national criminal jurisdictions”. Article 1 repeats this statement. Article 17, which expressly refers to the tenth paragraph of the Preamble and Article 1, provides that a case is inadmissible when it is being, or has been, investigated or prosecuted by state, unless that state is or was unwilling or unable genuinely to carry out the investigation or prosecution.

Not only do states have the primary duty to bring to justice those responsible for crimes under international law, but the Court will be able to act only when states are unable or unwilling to do so. Thus, if the Court is to be an effective complement to states in the international system of justice for such crimes and not overwhelmed by cases, states need to fulfill their responsibilities. They must enact, and then enforce, national legislation which provides that these crimes under international law are also crimes under national law wherever they have been committed, no matter who has committed them or who is the victim. A state which failed to do so would risk being considered unable and unwilling genuinely to investigate and prosecute crimes within the Court’s jurisdiction. However, effective implementing legislation will demonstrate that the state is aware of its primary responsibility under international law to ensure accountability for these crimes and will make certain that national courts, not the Court, will undertake these tasks.

2. Full cooperation. Once the Court has determined that it may exercise jurisdiction in accordance with the principle of complementarity, states parties agree under Article 86 to “cooperate fully with the Court in the investigation and prosecution of crimes within the jurisdiction of the Court”. This obligation means that they must ensure that the Prosecutor and the defence can conduct effective investigations in their jurisdictions, that their courts and other authorities provide full cooperation in obtaining documents, locating and seizing assets of the accused, conducting searches and seizures of evidence, locating and protecting witnesses and arresting and surrendering persons accused of crimes by the Court. In addition to these statutory obligations, states should also cooperate with the Court in enforcing sentences by making detention facilities available for convicted persons. For state cooperation with the Court to be truly effective, states should educate the public and train their judges, prosecutors, law enforcement officials and defence lawyers on the scope of state obligations under the Statute.

To ensure a fully integrated international system of justice in which national and international courts reinforce each other, states should not only provide for cooperation with the Court, but also with the International Criminal Tribunals for the former Yugoslavia and Rwanda; they should also provide for universal jurisdiction over crimes under international law and strengthen the existing system of interstate cooperation through extradition and mutual legal assistance by eliminating inappropriate grounds of refusal and having courts, not political officials, make decisions on whether to cooperate.

CHECKLIST FOR EFFECTIVE IMPLEMENTATION

To ensure that legislation implementing legislation is as effective as possible, all ministries charged with preparation of draft legislation for consideration by parliaments should follow the example of those states which have involved civil society in the drafting of such legislation at the earliest possible date. The involvement of lawyers groups and other non-governmental organizations concerned with criminal justice issues, women's issues, rights of children and victims, as well as members of the general public, will not only help to guarantee that all obligations are properly included in the legislation, but will help build public support for the state's commitment to international justice.

The first part of the checklist deals with complementarity: defining crimes, principles of criminal responsibility and defences; elimination of bars to prosecution and ensuring fair trials without the death penalty. The second part of the checklist addresses cooperation: the basic obligation to cooperate, the status of the Court in national law facilitating and assisting Court investigations, arrest and surrender; ensuring effective reparations to victims; trying cases of offences against the administration of justice; enforcement of sentences; nomination of Judges and the Prosecutor; and public education and training of officials.

Part 1. Complementarity:

The following sections identify the fundamental principles which should be included in national legislation to ensure that the Court is an effective complement to national courts. The Statute makes clear that the Court may investigate and prosecute cases when states are unable or unwilling to do so, and no state party will wish the Court to remove a case from its jurisdiction where it intended to conduct the investigation and prosecution itself. Therefore, all states should ensure that they can fulfill their responsibility under international law to bring those responsible for genocide, crimes against humanity and war crimes to justice. Moreover, since the Court will only have limited resources, it will only be able to try a small number of those suspected of such crimes.

National law must be consistent with international law. This principle will mean that, in certain circumstances, national implementing legislation should define the crimes and principles of criminal responsibility more broadly than in the Statute and the defences more narrowly. As a multilateral treaty designed to hold individuals criminally responsible for a set of core crimes under international law, but also to achieve the broadest possible acceptance by states in the long run, the Statute reflects compromises which means that it does not always cover the full range of obligations under customary or conventional international law.

I. DEFINING CRIMES, PRINCIPLES OF CRIMINAL RESPONSIBILITY AND DEFENCES

1. Legislation should provide that the crimes in the Rome Statute, including other crimes under international law, are crimes under national law.

The necessity for such legislation to provide for trials in national courts follows from the Preamble, Article 1 and Article 17 of the Statute. Crimes under international law include not only genocide, crimes against humanity and the war crimes listed in the Statute, but also include war crimes not listed in the Statute (such as certain grave breaches and other serious violations of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I) and certain violations of international humanitarian law in non-international armed conflict) and torture, extrajudicial executions and enforced disappearances which are not committed on a widespread or systematic basis. To ensure that the international system of justice is fully effective, states should ensure that their legislation makes each of these crimes under international law also crimes under national law. The definitions should be as broad as the definitions in the Statute, but whenever international treaties (such as Protocol I) or customary law contains stronger definitions than those in the Statute, these definitions should be incorporated into national law.

2. National courts should be able to exercise universal jurisdiction in all cases of crimes under international law.

The duty recognized in the Preamble of each state “to exercise its criminal jurisdiction over those responsible for international crimes” is not limited to territorial jurisdiction. Nearly 80% of the states at the Rome Diplomatic Conference favoured giving the Court the same universal jurisdiction over persons found in their territories suspected of crimes under international law which their own courts could exercise under international law. However, as a result of a political compromise designed to secure the widest possible acceptance of the Statute, they agreed to limit the jurisdiction of the Court to crimes committed on the territory of states parties or by nationals of states parties. The only exceptions are when the Security Council refers a situation threatening international peace and security or when a non-state party agrees to accept the jurisdiction of the Court over a particular crime.

Therefore, Amnesty International believes that if the international system of justice is to be fully effective, all states parties should fill this gap in the Court’s jurisdiction by ensuring that their own courts can exercise universal jurisdiction over such crimes wherever they are committed, without requiring any link to the state such as the nationality of the suspect or the victim. The requirements of such extraterritorial jurisdiction are explained in Amnesty International’s *14 Principles for the Effective Exercise of Universal Jurisdiction*, May 1999 (AI Index: IOR 53/01/99).

3. Principles of criminal responsibility in national legislation for crimes under international law should be consistent with customary international law.

The principles of criminal responsibility in national legislation should be at least as strict as in Part 3 of the Rome Statute. For example, all crimes of accessory criminal responsibility, such as

aiding, abetting and direct and public incitement as contained in Article 25 should be punishable under national law.

In at least some respects, the Rome Statute falls short of other international law. For example, principles of superior responsibility with regard to civilians in Article 28 (b) of the Statute are not as strict as required by customary international law, as well as conventional international law, such as Protocol I, which holds civilian superiors to the same standards as military commanders. To ensure that the international system of justice is as effective as possible, Amnesty International recommends that national legislation should incorporate principles of criminal responsibility as broad as in customary international law.

4. Defences in national law to crimes under international law should be consistent with customary international law.

The defences in national law should not be any broader than those permitted in the Rome Statute and, in some cases, should be narrower to be consistent with customary international law. For example, Article 33 of the Rome Statute permits a defence of superior orders in certain limited situations which are not permitted under customary international law, as reflected in Article 8 of the Nuremberg Charter, which provides: “The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment, if the Tribunal determines that justice so requires.” The Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda contain the same rule.

II. ELIMINATION OF BARS TO PROSECUTION

5. No statutes of limitations are permitted.

Article 29 of the Rome Statute, in keeping with customary international law, provides that “[t]he crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.”

States parties must ensure that their legislation is consistent with Article 29, which will help ensure that their courts, not the Court, try such crimes.

6. No amnesties, pardons or similar measures of impunity by any state should be recognized.

National amnesties, pardons or similar measures of impunity for crimes under international law, such as genocide, crimes against humanity, war crimes, torture, extrajudicial executions and “disappearances”, which prevent the discovery of the truth and prevent accountability in a criminal trial are contrary to international law. They cannot bind the Court or the courts of other states.

States parties should neither take such measures nor recognize them when they have been taken by other states.

7. Immunity of officials from prosecution for crimes under international law should be eliminated.

Article 27 (1) provides that the Statute “shall apply equally to all persons without any distinction based on official capacity” and that official capacity, whether as a head of state or any other capacity “shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence”. Article 27 (2) provides that “[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”

It will be essential for states wishing to avoid the Court asserting jurisdiction over cases they are investigating or prosecuting to ensure that any existing immunity under national law with respect to crimes under international law based on official capacity be eliminated. It should be possible to prosecute any official under national law for such crimes and, in accordance with the Statute, to surrender any official to the Court.

III. ENSURING FAIR TRIALS WITHOUT THE DEATH PENALTY

8. Trials must be fair.

Trials in national courts of persons suspected of crimes under international law must be consistent at all stages of the proceedings with international fair trial standards, such as Articles 9, 14 and 15 of the International Covenant on Civil and Political Rights and Articles 55 and 62 to 68 of the Rome Statute, which reflect general principles of law recognized by the international community. Indeed, Article 20 (3) (b) of the Statute provides that if trials in a national court of a person accused of genocide, crimes against humanity or war crimes “were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice”, the Court may conduct a new trial for those crimes. Article 17 (1) (a) and (b) and (2) set forth similar principles regarding investigations and prosecutions.

9. Trials should exclude the death penalty.

Article 77 in Part 7 of the Rome Statute provides that the maximum penalty which the Court may impose for genocide, crimes against humanity and war crimes is life imprisonment. Article 80 states that nothing in Part 7 “affects the application by States of penalties prescribed by their national law, nor the laws of States which do not provide for penalties prescribed in this Part”.

It would be inappropriate for national courts to impose a more severe penalty for a crime under international law than the one chosen by the international community itself. Indeed, the

Security Council excluded this penalty for such crimes from the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda. Moreover, Amnesty International believes that the death penalty violates the right to life recognized in Article 3 of the Universal Declaration of Human Rights (UDHR) and is the ultimate cruel, inhuman and degrading punishment, contrary to the prohibition in Article 5 of the UDHR.

Part 2. Cooperation:

The 120 states which voted for the Statute at the Rome Diplomatic Conference established a broad framework in the Statute of obligations to cooperate with the Court in reaching its determination under the principle of complementarity that it should exercise jurisdiction and after it has made such a determination. The Statute carefully sets out a series of obligations for states parties to cooperate with the Court, and includes provisions aimed at facilitating this process by providing opportunities for consultations between the Court and national authorities.

In a number of instances, this statutory framework of international cooperation will need to be enhanced by other national measures of cooperation to ensure that the Court will be as effective as possible in putting an end to impunity to the worst crimes in the world.

I. BASIC OBLIGATION TO COOPERATE

10. National courts and authorities must cooperate fully with Court orders and requests.

Article 86 provides that the “States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in the investigation and prosecution of crimes within the jurisdiction of the Court.” This express general obligation to cooperate fully with the Court, which is in addition to the fundamental requirement to fulfill obligations in any treaty in good faith (*pacta sunt servanda*), applies to all aspects and stages of investigations and prosecutions, including any appeal and review of a judgment. It also applies to all organs of the Court, including the Office of the Prosecutor, the Registry, the Presidency and the three Divisions: Pre-Trial, Trial and Appeals.

Article 87 (1) expressly authorizes the Court to make requests to states parties for cooperation through diplomatic channels or any other appropriate channel which they designate at the time of ratification or later. Article 87 (3) requires the requested state to “keep confidential a request for cooperation and any documents supporting the request, except to the extent that the disclosure is necessary for execution of the request”. Most importantly, Article 88 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 this Part [9]”.

If a state party identifies problems which may impede or prevent the execution of a request for assistance from the Court under Part 9, Article 97 requires that the state “shall consult with the Court without delay in order to resolve the matter”. Such problems may include (1) “[i]nsufficient information to execute the request”; (2) inability, “despite best efforts” to locate a person whose surrender is sought or the fact that the person is not the person named

in the warrant; or (3) “[t]he fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State”.

If immediate execution of a Court request would interfere with an ongoing investigation or prosecution of a crime different from the one which is the subject of the request, Article 94 (1) provides that a state must not postpone execution of the request beyond the period of time which is necessary to complete the investigation or prosecution, as agreed by the Court. During that period, it must cooperate with the Prosecutor in preserving evidence in accordance with Articles 91 (1) (j) and 94 (1). Article 95 provides that states may also not postpone execution of a request by the Court under Part 9 while an admissibility challenge under Article 18 or 19 is pending if Court has ordered that the Prosecutor may pursue the collection of evidence under one of those two articles.

Each state must ensure that its national legislation requires its courts and authorities to cooperate fully with the Court; any national legislation, procedures or practices which would delay or obstruct full cooperation with the Court would be inconsistent with the obligations the states parties had agreed to fulfill and could lead to a finding of non-cooperation pursuant to Article 87 (7). Federal states should ensure that states, provinces and other political divisions provide full cooperation with the Court. If it encounters problems in executing the request, it must consult with the Court on how to resolve the problems, not simply refuse to execute it.

II. STATUS OF THE COURT IN NATIONAL LAW

11. The Court must be authorized to sit in the state.

Article 3 (3) provides that, although the seat of the Court is at The Hague, The Netherlands, “[t]he Court may sit elsewhere, whenever it considers it desirable”. Article 62 complements this provision by stating that “[u]nless otherwise decided, the place of the trial shall be the seat of the Court.”

States must incorporate provisions in their law to facilitate the Court, particularly the Pre-Trial and Trial Chambers, sitting in their territory. They should also facilitate the use of audio and video links in their territory to permit testimony and examination of witnesses unable to travel to the seat of the Court.

12. The legal personality of the Court must be recognized.

Article 4 (1) of the Statute provides that “[t]he Court shall have international legal personality” and that “[i]t shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.” In addition, Article 4 (2) of the Statute states that “[t]he Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party”.

Each state party must ensure that the Court has the necessary legal capacity under national law so that the Court can exercise its functions and powers effectively on the territory of the state and that the Court can fulfill its purposes.

13. The privileges and immunities of the Court, its personnel, counsel, experts, witnesses and other persons whose presence is required at the seat of the Court must be fully respected.

The Court. Article 48 (1) of the Statute provides that “[t]he Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfilment of its purposes.” This provision provides the same protection for the Court as Article 105 (1) of the United Nations Charter does for the UN. Those privileges and immunities are spelled out in more detail in the Convention on the Privileges and Immunities of the United Nations. In addition to Article 48, the Agreement on Privileges and Immunities of the Court, which will be adopted by the Assembly of States Parties, will help define further the scope of the Court’s privileges and immunities.

To make Article 48 (1) fully effective, Amnesty International recommends that states parties ensure that they provide similar protection for the privileges and immunities of the Court as they now do for the UN. Such protection should include absolute immunity from national legal proceedings; inviolability of Court premises and property, whether owned or rented; inviolability of Court archives and documents; exemptions from taxation and customs duties; the right to use codes and send its correspondence and documents by courier or diplomatic bags; and freedom from censorship.

Judges, Prosecutor, Deputy Prosecutor and Registrar. Article 48 (2) provides that “[t]he judges, the Prosecutor, the Deputy Prosecutor and the Registrar shall, when engaged on or with respect to the business of the Court, enjoy the same privileges and immunities as are accorded to heads of diplomatic missions and shall, after the expiry of their terms of office, continue to be accorded immunity from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity.”

To ensure the independence and effectiveness of these senior Court officials, states parties should accord them the same protection as they do to senior UN officials under Article 105 (1) of the UN Charter and Article V (19) of the Convention on the Privileges and Immunities of the United Nations, which is now part of customary international law. In particular, states parties should ensure that such protection applies to these senior Court officials even if they are their own nationals.

Deputy Registrar and staff of the Office of the Prosecutor and Registry. Under Article 48 (3), “[t]he Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry shall enjoy the privileges and immunities and facilities necessary for the performance of their functions, in accordance with the agreement on the privileges and immunities of the Court”.

States parties should guarantee the independence and integrity of Court staff by according them the same protection which they accord UN staff under Articles V and VII of the Convention on the Privileges and Immunities of the United Nations, both of which are now part of customary international law. Such functional immunities include immunities from arrest and legal proceedings for acts performed in an official capacity. These immunities should apply to all staff, regardless of nationality, including locally recruited staff, to ensure that the Court's independence and effectiveness is not compromised.

Persons required to appear before the Court. Article 48 (4) provides that counsel, experts, witnesses and other persons who are required to be present at the seat of the Court "shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on the privileges and immunities of the Court". There is no reason for states parties not to accord the same protection to persons whose presence at the Court - regardless whether it is sitting in The Hague or in the territory of a state party - is essential to its effective functioning. Amnesty International believes that counsel, experts, witnesses and other persons who are required to appear before the Court when it sits in the territory of a state party, for example, through video conferencing facilities, should receive the same protection under national law as they would under Article 48 (4) if they appear in the host state at the seat of the Court in The Hague.

In addition, states parties should extend the same protection to such persons who are travelling through their territory to or from the seat of the Court so that the work of the Court is not delayed or impeded.

III. NOMINATION OF CANDIDATES TO BE JUDGES OR PROSECUTOR

14. States should ensure that they nominate candidates to be Judges and the Prosecutor in an open process with the broadest possible consultation.

Article 36 (4) (a) provides that any state party may nominate candidates to be Judges of the Court in one of two ways, either:

- “(i) By the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question; or
- (ii) By the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court.”

Article 36 (3) (a) describes the necessary qualifications of Judges and Article 36 (4) (b) permits each state party to nominate a candidate who is a national of another state party. Whichever approach states choose to take with respect to nominating Judges, Amnesty International continues to believe, as it said in July 1997, that “[i]t is essential to devise a method for selecting

judges which will ensure the selection of the best possible candidates”.¹ It urged that the Statute include a procedure which was “as open as possible” and

“involve the broadest possible public consultation at the national level in the relevant state before making the nomination. States could consider making nominations from lists of candidates submitted by a national judicial, rather than an executive, body. At a minimum, the statute should provide that in making such nominations and in selecting the judges, states should do so only after consultation in an open process with their highest courts, law faculties, bar associations and other non-governmental organizations concerned with criminal justice and human rights, including women’s rights.”²

Article 42 (3) spells out the qualifications of the Prosecutor and Article 42 (4) describes the manner of electing the Prosecutor, but it does not explain how states should select nominees. Amnesty International believes that the most effective way to select a suitable candidate, if a state party wishes to nominate its own candidate, would be to adopt an open process at the national level similar to that it recommended for selecting judicial nominees. Indeed, it made similar recommendations in 1997 concerning the selection of the Prosecutor.³ States should ensure that their national selection processes for candidates to be Judges and the Prosecutor are consistent with these principles.

IV. FACILITATING AND ASSISTING COURT INVESTIGATIONS

15. When the Prosecutor has deferred an investigation, states shall comply without delay to requests for information.

Article 18 (5) provides that when the Prosecutor has deferred an investigation at the request of a state pursuant to Article 18 (2) on the ground that it is investigating or has investigated its nationals or others within its jurisdiction with respect to crimes within the Court’s jurisdiction which the Prosecutor has informed states he or she is investigating, the state shall respond to requests by the Prosecutor to be informed “of the progress of its investigations and any subsequent prosecutions” and to do so “without undue delay”.

States should ensure that the relevant authorities respond to such requests fully and promptly.

16. States shall give effect to acts of the Prosecutor or warrants issued by the Court prior to an Article 19 challenge to jurisdiction or admissibility and to actions by the Prosecutor

¹ Amnesty International, *The international criminal court: Making the right choices - Part II: Organizing the court and guaranteeing a fair trial*, July 1997 (AI Index: IOR 40/11/97), Section II.C.2.

² *Ibid.*

³ *Ibid.*, Section II.B.1.

to preserve evidence or prevent an accused person absconding pursuant to Articles 18 (6) and 19 (8).

Although the Prosecutor is required to suspend a number of investigative steps when a state makes an admissibility challenge under Articles 18 or 19 or a challenge to jurisdiction pursuant to Article 19, these articles provide that other investigative steps may continue pending the outcome of such challenges. Article 18 (6) provides that pending a ruling by the Pre-Trial Chamber or when the Prosecutor has deferred an investigation under Article 18, “the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available”. Article 19 (8) provides that, pending a ruling by the Court on challenges to admissibility or jurisdiction pursuant to Article 19, the Prosecutor may seek authority from the Court for three types of activities. These are: “[t]o pursue investigative steps of the kind referred to in article 18, paragraph 6”; “[t]o take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge”; and “[i]n cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58”. Article 19 (9) makes clear that a state challenge “shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge”.

Therefore, states parties must ensure that their authorities give full effect to such steps pending the determination of state challenges to admissibility or jurisdiction. This requirement is necessary to ensure that evidence is not lost or destroyed, that witnesses are not threatened or harmed or that accused persons do not flee.

17. States should facilitate the ability of the Office of the Prosecutor and the defence to conduct investigations in the state without any hindrance.

Article 54 (3) permits the Prosecutor to collect and examine evidence; to request the presence of and question persons being investigated, victims and witnesses; to seek the cooperation of any state or intergovernmental organization or arrangement; to enter into arrangements or agreements which are necessary to facilitate cooperation of a state, intergovernmental organization or person; to keep information confidential; and to take necessary measures or to request that they be taken to ensure the confidentiality of information, the protection of persons or the preservation of evidence.

Article 54 (2) expressly permits the Prosecutor to conduct investigations on the territory of a state in accordance with Part 9 (Articles 86 to 102) or as authorized by the Pre-Trial Chamber under Article 57 (3) (d). Part 9 identifies a broad range of investigative measures (discussed below) which the Prosecutor may take in the territory of a state party with that state’s consent. In addition, Article 99 (4) expressly authorizes the Prosecutor to take certain non-compulsory investigative measures in the territory of a state party, after consultation with the state concerned, even if the state fails to consent. If the state is not one in which the crime

is alleged to have taken place, the Prosecutor may execute the request subject to any reasonable conditions or concerns raised by the state, but the requested state must, “without delay, consult with the Court to resolve the matter”. Permitted non-compulsory investigative measures include interviewing or taking evidence from a person on a voluntary basis, including doing so without the presence of the requested state party, if it is essential for the request to be executed, and the examination without modification of a public site or other public place. Under Article 57 (3) (d), the Pre-Trial Chamber may authorize the Prosecutor to take specific investigative steps within the territory of a state party without having secured that state’s consent, whenever possible having regard to the views of the state concerned, if the Pre-Trial Chamber has determined that the state is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request.

Amnesty International believes that states should permit the Office of the Prosecutor and defence to conduct on-site investigations without hindrance in all cases. They should ensure that legislation requires national authorities to provide whatever security is needed and requested, in an unobtrusive fashion, to protect the Prosecutor and defence, including their investigators, whether locally or internationally recruited, to conduct investigations. There should be no legal obstacles to recruitment in the state of personnel, such as forensic experts, by the Prosecutor and defence.

18. National legislation should not contain grounds for refusal of requests for assistance by the Court in connection with investigations and prosecutions.

Many states now provide mutual legal assistance (sometimes called judicial assistance) to other states conducting their own criminal investigations and prosecutions, so they will be familiar with such assistance and have legislation, procedures or practices which may require only minimal modification to permit full cooperation with the Court. In most such cases, the main change which will be required to cooperate with the Court, an international judicial body established by the states parties themselves, will be the elimination of grounds for refusal of assistance which are appropriate only to state-to-state cooperation. These grounds include: the crime under investigation or prosecution is a political offence or a purely military disciplinary offence (genocide, crimes against humanity and war crimes are not political or purely military disciplinary offences), danger of unfair trial (the Statute has stronger guarantees of the right to a fair trial than many states), danger of the death penalty (this penalty is excluded from the Statute), the crime is not a crime in the requested state (double criminality) (genocide, crimes against humanity and war crimes are crimes which all states are obliged to punish), the person has been already been acquitted or convicted of the conduct under investigation or prosecution (*ne bis in idem*) (it is for the Court to decide whether this principle applies under the Statute), statutes of limitation (Article 29 provides that the crimes within the jurisdiction of the Court are not subject to any statute of limitations) and amnesties, pardons and similar measures of impunity designed to prevent a trial and the truth (such measures are contrary to international law).

19. National authorities should provide a broad range of assistance to the Court, as outlined below.

As described below, such assistance falls into three main groups: assistance related to documents, records and physical evidence; assistance related to witnesses, including victims; and assistance related to searches and seizures. In addition, states parties agree to provide any other form of assistance not prohibited by the law of the requested state. Article 100 provides that the ordinary costs of executing requests in the territory of a requested state are to be borne by that state, but a large number of expenses are to be borne by the Court, including costs associated with travel and security of witnesses and experts, including witnesses in custody; translation, interpretation and transcription; travel and subsistence costs of Court personnel; expert opinions or reports sought by the Court; transfers of persons being surrendered; and, following consultations, any extraordinary costs.

Article 96 (3) requires a state party, upon a request by the Court, to consult with it, “either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under [Article 96 (2) (e), which concerns forms of assistance other than arrest and surrender]” and, during such consultations, to “advise the Court of the specific requirements of its national law”. To improve the preparedness, speed and effectiveness of the Court, states parties should not wait for a request concerning requirements of their national law related to such forms of cooperation with the Court, but should provide comprehensive information on current requirements and update them as they change. They should also pay for the ordinary costs associated with Court requests.

A. Assistance related to documents and records, information and physical evidence

a. Locating and providing documents and records, information and physical evidence requested or ordered by the Court.

Article 93 (1) (a) requires states parties to assist in “the location of items”. Article 93 (1) (i) requires states parties to comply with requests for assistance in “[t]he provision of records and documents, including official records and documents”.

States must require their judicial and other officials to assist the Court in identifying, locating and providing such documents and records, information and physical evidence.

Confidential information. Article 68 (6) authorizes a state to “make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information”. Article 73 requires a state party which is “requested by the Court to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a State, intergovernmental organization or international organization . . . [to] seek the consent of the originator to disclose that document or information”. If the originator is a state party, it is required either to “consent to disclosure of the information or document or undertake to resolve the issue of disclosure with the Court subject to the provisions of article 72 [concerning national security]”. If the originator is not a state party and it does not consent to disclosure, “the requested State shall inform the Court that it is unable to provide the document or information because of a pre-existing obligation of confidentiality to the originator”.

To ensure effective investigation and prosecution of cases before the Court, states parties should provide in agreements with other states parties involving the exchange of information which involves the national security of any one of them that such information will be provided to the Court on its request, under the strict safeguards ordered by the Court in accordance with Article 72. States parties should enter into similar agreements with non-state parties.

Provision of national security information under safeguards. Article 72 provides a comprehensive and detailed system of safeguards for the protection of information sought by the Court which in the opinion of the state concerned, if disclosed, might prejudice its national security. Paragraph (4) provides that a state may intervene as of right in such situations to resolve the matter and paragraph (5) requires the state to take “all reasonable steps”, in cooperation with the Prosecutor, the defence or the Pre-Trial or Trial Chamber, “to seek to resolve the matter by cooperative means”. The latter paragraph identifies a number of possible steps which could be taken, including modifying or clarifying the request; a determination whether the evidence is relevant; obtaining the information from other sources or in a different form; agreement on methods to provide the information by other means, such as by *in camera* or *ex parte* means. Paragraph (6) provides that if “all reasonable steps have been taken to resolve the matter through cooperative means” and the state still thinks that there are no conditions under which it could provide the information it shall so inform the Prosecutor or the Court. However, if the Court then determines that the evidence is relevant and necessary for the establishment of guilt or innocence of the accused”, paragraph (7) provides that it may take further steps to seek a resolution of the matter or, if it concludes that the state “is not acting in accordance with its obligations under the Statute”, it may refer the matter pursuant to Article 87 (7) to the Assembly of States Parties or, if the Security Council referred the situation, to the Security Council. In all other circumstances, paragraph (8) authorizes the Court to order disclosure or, to the extent that it does not do so, “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”.

Given the carefully crafted safeguards in Article 72, states should feel confident that they can supply any information or evidence which is requested by the Court and which is relevant and necessary to determine if an accused is innocent or guilty of a crime. States should endeavour to provide any information or evidence which the Court requests after it determines that it is essential to the case, under any necessary safeguards provided by the Court.

b. Preserving such evidence from loss, tampering or destruction.

Article 93 (1) (j) provides that states parties must comply with requests for “the preservation of evidence”.

Therefore, states parties must require their judicial and other officials to assist the Court in identifying, locating, preserving and providing such records, documents and items.

c. Serving any documents requested by the Court.

Article 93 (1) (d) requires states parties to provide for “[t]he service of documents, including judicial documents” when requested by the Court.

States must require their judicial and other officials to serve any documents, whether Court documents or documents of the state, on request by the Court.

B. Assistance related to victims and witnesses

d. Assisting the Court in locating witnesses.

Article 93 (1) (a) requires states parties to assist in “[t]he identification and whereabouts of persons”.

States parties need to ensure that their authorities assist the Court in identifying and locating persons.

e. Provide victims and witnesses with any necessary protection.

Article 93 (1) (j) provides that states parties must provide for “[t]he protection of victims and witnesses”. Other articles related to the Court’s own responsibilities in this area will help states prepare to provide effective cooperation. Article 42 (9) requires the Prosecutor to “appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children”. Article 43 (6) provides for the establishment of a Victims and Witnesses Unit which will have the duty to “provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses.” In addition, this provision requires that “[t]he Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.” Article 68 (1) obligates the Court to “take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender . . . and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children.” It also requires the Prosecutor to take such measures.

States parties should ensure that their authorities assist the Court in protecting victims and witnesses, including victims of sexual violence or violence against children. Such assistance to the Court will necessarily involve helping it to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of witnesses. Like the Court, they will need to have regard to all the relevant factors when helping it to implement such measures,

including age, gender, health, the nature of the crime, in particular, where the crime involves sexual or gender violence or violence against children. To ensure that they can provide such assistance effectively, they should, like the Prosecutor, appoint persons with the responsibility of assisting the Court with legal expertise on relevant issues, including sexual violence and violence against children, as well as, like the Victims and Witnesses Unit, staff with expertise in trauma, including trauma related to crimes of sexual violence. Of course, states should also provide any necessary protection for Court officials and for persons suspected or accused of crimes within the jurisdiction of the Court.

f. Fully respecting the rights of persons questioned in connection with investigations of crimes within the Court's jurisdiction.

Article 93 (1) (c) provides that states parties shall comply with requests to provide assistance in “[t]he questioning of any person being investigated or prosecuted”, which includes both questioning by state officials and by the Prosecutor, and Article 93 (1) (b) provides that states parties should comply with requests for “[t]he taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court”.

Each of these provisions must be read together with Article 55, which recognizes a number of important rights which apply to any person during an investigation, which necessarily must be respected both by the Prosecutor and by national authorities assisting the Court in an investigation. The first paragraph guarantees that during an investigation a person:

may not be compelled to incriminate himself or herself or to confess guilt;

may not be subjected to any form of coercion, duress or threat or to any form of torture or ill-treatment;

must have the free assistance of a competent interpreter and necessary translations;
and

may not be subjected to arbitrary arrest or detention or deprived of liberty in a manner not permitted under the Statute.

The second paragraph provides that when a person suspected of having committed a crime within the Court's jurisdiction is about to be questioned by the Prosecutor or national authorities pursuant to a request of the Court, that person has the right to be informed before being questioned

that he or she is suspected of the crime;

of the right to remain silent, without that silence being a consideration in the determination of guilt or innocence;

of the right to have legal assistance of that person's choice; if the person does not have legal assistance, to have assigned counsel in any case where justice requires and without payment if the person cannot afford it; and

of the right to be questioned in the presence of counsel, unless that person has voluntarily waived this right.

Not all countries have incorporated these and other internationally recognized human rights guarantees into their criminal procedure codes. Those which have not done so will need to amend their legislation, police regulations and practices to ensure that these rights are scrupulously respected. Failure to do so could mean that a person who has committed such crimes could have the charges dismissed pursuant to Article 69 (7) (b) on the ground that his or her statement to the national authorities was taken without having been informed of his or her rights. That provision states that "[e]vidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if: . . . (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings." Indeed, the International Criminal Tribunal for the former Yugoslavia has excluded statements obtained by national authorities which were obtained from an accused in the absence of his counsel, contrary to Rule 42 (B) of the Rules of Procedure and Evidence, based on Rule 5, which provides that an act in violation of the Rules will be declared null if it "was inconsistent with the fundamental principles of fairness and has occasioned a miscarriage of justice".⁴

g. Assisting the Court by compelling witnesses to testify, subject to any lawful privilege, at the seat of the Court or in the state.

States parties affirm in the Preamble that "the effective prosecution" of crimes within the Court's jurisdiction "must be assured by taking effective measures at the national level and by enhancing international cooperation". Amnesty International believes that this affirmation necessarily requires states parties to provide effective measures to compel witnesses on their territories or under their jurisdiction to testify either at the seat of the Court or, if this is not possible, in their territories. If the Court is to succeed, states will need to ensure in their national legislation that witnesses whose presence has been requested by the Court - whether sought by the Prosecutor, the defence or by the Trial Chamber itself - must testify before the Court, subject to any privilege under Article 69 (5) or international law or standards, either at its seat at The Hague or, pursuant to Article 69 (2), through a video-link in the state. In particular, the obligation to ensure that witnesses for the defence appear before the Court flows from the Trial Chamber's express duty under Article 64 (2) to ensure a fair trial and the right of the accused guaranteed in Article 67 (1) (e) "to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her". This right would be

⁴ *Prosecutor v. Delalić*, Decision on Zdravko Mucić's Motion for the Exclusion of Evidence, Case No. IT-96-21-T (Trial Chamber 2 September 1997) (excluding statements obtained by Austrian authorities from accused in the absence of counsel, although Austrian law prohibited the presence of counsel during questioning).

meaningless unless the Court could compel attendance of witnesses on behalf of both the Prosecutor and the defence either at The Hague or in the territory of a state party.

In addition, there are two express provisions in the Statute concerning state assistance in obtaining witness testimony. First, Article 93 (1) (e) requires states to comply with requests to facilitate “the voluntary appearance of persons as witnesses or experts before the Court”. Second, Article 93 (1) (f) and (7) deal with the specific circumstances of persons in national custody. Paragraph (f) provides that states parties shall assist in “[t]he temporary transfer of persons as provided in paragraph 7” That paragraph states that “[t]he Court may request the temporary transfer of a person in custody for purposes of identification or of obtaining testimony or other assistance”, provided that the person consents to the transfer and the requested state agrees. Nevertheless, these provisions - which are similar to provisions current state-to-state mutual legal assistance treaties and other instruments - do not preclude a state party from providing the Court with more effective forms of cooperation with respect to witness testimony. In addition, as explained below, in addition to the illustrative list of types of assistance which the Court may request in Article 93 (1) (a) - (k), Article 93 (1) (l) expressly provides that states parties shall comply with requests to provide “[a]ny other type of assistance which 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 Court”.

Therefore, states parties not only must provide for the voluntary appearance of witnesses at the seat of the Court, but they also should provide for compulsory attendance, if necessary, before the Court, either at The Hague or in its territory.

C. Assistance related to searches and seizures

h. Facilitating searches and seizures of evidence by the Court, including the exhumation of graves, and the preservation of evidence.

Article 93 (1) (h) requires states parties to comply with requests by the Court to provide assistance in “[t]he execution of searches and seizures”. More specifically, Article 93 (1) (g) requires states parties to provide assistance in “[t]he examination of places or sites, including the exhumation and examination of grave sites”.

Therefore, states parties must require their authorities to facilitate searches and seizures of evidence, for example, by providing for courts to issue search warrants based on a request by the Court for a search. Amnesty International believes that to ensure that such searches are as effective as possible, Court investigators should be permitted to be present and, where necessary, to conduct the searches themselves. In particular, states should authorize the Court to conduct exhumations of graves, even without the consent of the property owner, without hindrance, and should require state authorities to provide security for grave sites as necessary on request of the Court. States should also require state authorities to provide whatever assistance is needed to preserve evidence, such as refrigeration for exhumed bodies or storage of items used in committing the crimes.

i. Assisting in tracing, freezing, seizing and forfeiting assets of accused persons.

Article 93 (1) (k) requires states parties to provide assistance in connection with an investigation and prosecution in “[t]he identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties”. In addition, Article 57 (3) (e) expressly authorizes the Court, once a warrant of arrest or summons has been issued, to “seek the cooperation of States pursuant to article 93 (1) (k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims”. The wording of Article 93 (1) (l) makes clear that the Court has the authority to make requests for identification, tracing, freezing and seizure at any point in the investigation. As described below, Articles 75 (5) and 109 provide for such steps to be taken after a conviction.

These provisions of the Statute mean that states parties should ensure that they have legislation in place that permits the identification, tracing, freezing and seizure of proceeds, property and assets and instrumentalities of crimes under international law at the request of the Court. In addition, Amnesty International recommends that they should extend these provisions to include requests by other states.

j. Providing any other assistance requested or ordered by the Court.

In addition, Article 93 (1) (l) provides that states parties shall provide “[a]ny other type of assistance which 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 Court”.

In keeping with the spirit of this provision and the purpose of the Statute, states parties should ensure that their courts and other authorities are able to provide any other form of assistance requested by the Court in connection with the investigation and prosecution of crimes within its jurisdiction. They should review existing legislation with the aim of eliminating any provisions which might be considered as prohibiting other forms of assistance to the Court so that it can conduct an effective investigation and prosecution of genocide, crimes against humanity and war crimes. They should undertake a similar review with respect to requests for assistance by other states in connection with investigation and prosecution of such crimes, with a view to reducing the grounds for refusal to the minimum necessary and consistent with international law.

V. ARREST AND SURRENDER OF ACCUSED PERSONS

20. States parties should ensure that there are no obstacles to arrest and surrender.

In contrast to extradition between states, there are no substantive grounds permitted under the Statute for refusal to surrender a person to the Court, such as: the person sought is a national of the state party; the person sought is entitled to immunity under national law as head of state,

diplomat or government official; the crime under investigation or prosecution is a political offence or a purely military disciplinary offence (genocide, crimes against humanity and war crimes are not political or purely military disciplinary offences); danger of unfair trial (the Statute has stronger guarantees of the right to a fair trial than many states); danger of the death penalty (this penalty is excluded from the Statute); the crime is not a crime in the requested state (double criminality) (genocide, crimes against humanity and war crimes are crimes which all states are obliged to punish); the person has been already been acquitted or convicted of the conduct under investigation or prosecution (*ne bis in idem*) (it is for the Court to decide whether this principle applies under the Statute); that the person is serving a sentence for a different crime (Article 89 (4) expressly requires the state party to grant the request and then to consult with the Court concerning the surrender); statutes of limitation (Article 29 provides that the crimes within the jurisdiction of the Court are not subject to any statute of limitations); and amnesties, pardons and similar measures of impunity designed to prevent a trial and the truth (such measures are contrary to international law).

In addition, the Statute calls on states parties to establish a procedure for surrender of persons to the Court which is less burdensome than that used for extradition to other states. Article 91 (2) (c) provides that the requirements for the process of surrendering persons to the Court “should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court”. Article 91 (4) requires a state party, upon a request by the Court, to consult with it, “either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under [Article 91 (2) (c), concerning arrest and surrender]” and, during such consultations, to “advise the Court of the specific requirements of its national law”.

States should ensure that there are no substantive grounds for courts to refuse to surrender persons to the Court and that they have a simple and speedy procedure for surrendering persons to the Court which is less burdensome than exists for extradition. To improve the preparedness, speed and effectiveness of the Court, states parties should not wait for a request concerning requirements of their national law related to surrender, but should provide comprehensive information on current requirements and update them as they change.

Article 98. Article 98 (1) provides that “[t]he Court may not proceed with a request for surrender 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.” Paragraph (2) of that article provides that “[t]he 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.”

Under international law, at least since the adoption of the Nuremberg Charter more than half a century ago, it is settled that the official position of an accused, even if a head of state,

does not absolve him or her from criminal responsibility for war crimes or crimes against humanity, including genocide. This rule of law has been included in numerous international instruments, including Allied Control Council Law No. 10, the Charter of the International Military Tribunal for the Far East, the Nuremberg Principles, the Draft Code of Offences against the Peace and Security of Mankind of 1954, the Draft Code of Crimes against the Peace and Security of Mankind of 1996, the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda and, of course, the Rome Statute. Indeed, Article 27 (1) of the Statute provides that the Statute “shall apply to equally to all persons without any distinction based on official capacity” and, “[i]n particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute . . .” Paragraph (2) of that article makes clear that “[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.” Therefore, it would not be inconsistent with a state’s obligations *under international law* for a state party to surrender an accused, regardless of that person’s official position, whether that person is a national of a state party or not.

Although Article 98 (2) provides that the Court cannot proceed with a request for surrender of an accused, where this would require the requested state to act inconsistently with its obligations under existing international agreements, it does not expressly prohibit the requested state from giving priority to the Court’s request or the Court from accepting surrender of an accused. It is clear that Article 98 (2) was designed to address the concerns of one state which voted against adoption of the Statute at the Rome Diplomatic Conference about existing bilateral and multilateral agreements between states to which it was a party concerning the status of its forces then stationed abroad. In any event, such agreements are inconsistent with the object and purpose of the Statute, which is to ensure that the Court may bring those responsible to justice when it has determined, by making a request, that states are unable or unwilling to do so. Therefore, any existing international agreements between states under this limited exception to the statutory duty to surrender accused persons to the Court must be strictly construed to avoid undermining the Statute. It follows that states which have signed or ratified the Statute should not enter into such agreements and Amnesty International is calling upon any states which are parties to existing agreements to renegotiate them to permit surrender of national of non-states parties to the Court. If the Court is precluded by such an interstate agreement from proceeding with the request, then the requested state should exercise jurisdiction over the case or extradite the person to another state able and willing to do so in fair proceedings without the possibility of the death penalty.

21. National courts and authorities must arrest accused persons as soon as possible after a request by the Court.

Article 89 (1) requires that states parties “shall, in accordance with the provisions of [Part 9 (Articles 86 to 102)] and the procedure under their national law, comply with requests for arrest and surrender”. Article 92 provides for provisional arrest in urgent cases, pending presentation of the request for surrender and supporting documents. States parties must make arrests

immediately. Article 59 (1) provides that a state party “which has received a request for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9”.

Therefore, states parties must ensure that their legislation provides for the arrest of accused persons as soon as possible after receiving a request by the Court.

22. National courts and authorities must fully respect the rights of those arrested at the request or order of the Court.

As stated above, Article 55 requires that the rights of persons be respected during the course of an investigation and that persons suspected of being responsible for crimes within the Court’s jurisdiction should be informed of those rights before being questioned. The rights identified in that article necessarily apply with equal force after a person has been charged.

Article 67 (1) (a) requires that an accused “be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks”. Article 59 (2) requires that a person who has been arrested by a state party on request of the Court “shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that: (a) The warrant applies to that person; (b) The person has been arrested in accordance with the proper process; and (c) The person’s rights have been respected”.

If the arrested person exercises the right under Article 59 (3) “to apply to the competent authority in the custodial State for interim release pending surrender”, the competent authority must consider the criteria for deciding the application listed in Article 59 (4), but it may not “consider whether the warrant of arrest was properly issued”. Article 59 (5) provides that the Pre-Trial Chamber must “be notified of any request for interim release and shall make recommendations to the competent authority in the custodial State”, which “shall give full consideration to such recommendations, including any recommendations on measures to prevent the escape of the person, before reaching its decision”. If interim release is granted, Article 59 (6) authorizes the Pre-Trial Chamber to “request periodic reports on the status of interim release”.

If the person sought for surrender brings a challenge in a national court on the basis of *ne bis in idem* (double jeopardy) under Article 20, Article 89 (2) provides that the requested state “shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility”. If the Court has determined that the case is admissible, then “the requested State shall proceed with the execution of the request”. If the Court is still considering the question of admissibility, then “the requested State may postpone the execution of the request for surrender of the person until the Court makes a ruling on admissibility”.

States parties must ensure that each of these requirements is incorporated into their legislation.

23. National courts and authorities must surrender arrested persons promptly to the Court.

Article 59 (7) provides that “[o]nce ordered to be surrendered by the custodial State, the person shall be delivered to the Court as soon as possible”. If a person who has been provisionally arrested consents to surrender before the expiration of the time limits specified in the Rules of Procedure and Evidence for the arrival of the request for surrender and supporting documents, Article 92 (3) requires that the requested state “shall proceed to surrender the person to the Court as soon as possible”. Article 101 (1) provides that the Court will not proceed against, punish or detain a surrendered person for conduct committed prior to surrender, other than that which forms the basis of the request, but paragraph (2) of that article authorizes states parties to provide a waiver and states that they “should endeavour to do so”.

States must ensure, by legislation or in practice, that once the person has been ordered to be surrendered - or consents to surrender - that the person is delivered to the Court as soon as possible. Of course, the proceedings from the moment of arrest to the issuance of the order of surrender should be as speedy as possible, consistent with the rights of the person concerned. As stated in Article 101 (2), states parties should endeavour to waive restrictions at the time of surrender on prosecution by the Court for conduct other than that which forms the basis of the request. Such waivers will enable the Prosecutor to seek leave to amend the charges without delaying the trial to obtain such waivers should subsequently discovered evidence reveal other crimes within the Court’s jurisdiction.

24. States should give priority to requests for surrender by the Court over competing requests by other states.

Article 90 spells out the obligations of states parties when they receive competing requests for surrender. These obligations vary depending on whether the competing request is for conduct which constitutes the crime for which the Court is seeking surrender or for separate conduct and depending on whether the request is by another state party or by a non-state party.

When a state party receives a competing request from another state for extradition of the same person for the *same conduct* as in the Court’s request, Article 90 (1) provides that it must notify both the Court and the requesting state. According to Article 90 (2), if the competing request is from a *state party*, the requested state shall give priority to the Court’s request if the Court has determined under Articles 18 or 19 that the case is admissible (taking into account the requesting state’s own investigation or prosecution) or made this determination after notice provided under Article 90 (1). If the Court has not made such a determination of admissibility, Article 90 (3) permits the requested state to proceed with the competing request, but “shall not extradite the person until the Court has determined that the case is inadmissible”.

If the requesting state is a *non-state party*, Article 90 (4) provides that the requested state, “if it *is not under an international obligation* to extradite the person to the requesting State, shall give priority to the request for surrender from the Court, if the Court has determined that the case is admissible” (emphasis supplied). If, however, the Court has not determined that

the case is admissible, then Article 90 (5) provides that the requested state “may, at its discretion, proceed to deal with the request for extradition from the requesting State”.

If the requesting state is a *non-state party*, and the requested state *is under an existing obligation* to extradite the person to the requesting state, Article 90 (6) authorizes the requested state to surrender the person to the Court or to extradite the person. In making that determination, the requested state shall consider all the relevant factors, including the dates of the requests, the interests of the requesting state and the possibility of subsequent surrender to the Court by the requesting state.

When a state party receives a competing request from another state for extradition of the same person for the *different conduct* from that in the Court’s request, Article 90 (7) (a) provides that it “shall, if it *is not under an existing international obligation* to extradite the person to the requesting State, give priority to the request from the Court” (emphasis supplied). If it *is under such an obligation*, Article 90 (7) (b) provides that it shall “determine whether to surrender the person to the Court or extradite the person to the requesting State”, taking into account all the relevant factors, including those mentioned in Article 90 (6), but “shall give special consideration to the relative nature and gravity of the conduct in question”.

When the Court has determined pursuant to a notification under Article 90 that a case is inadmissible, and the requesting state subsequently refuses extradition, Article 90 (8) requires the requested state to inform the Court so that it may reconsider the question of admissibility.

Article 90 reflects the principle of complementarity that it is the primary duty of states to bring persons suspected of genocide, crimes against humanity and war crimes to justice, but when they are unwilling or unable to do so, then the Court should be able to exercise jurisdiction. States parties should ensure that to the maximum extent possible, they give priority to requests from the Court over competing requests from states, particularly when it has made a determination that the case is admissible because no state is willing and able genuinely to carry out an investigation or prosecution. Article 90 ensures that such a finding would take into account the situation in the requesting state. Such a state might persist in its request for a variety of reasons, For example, it might intend to undertake an investigation or prosecution with the intent to shield the person from criminal responsibility or might not be able to ensure that the accused was tried independently and impartially. States parties should also seek to avoid lengthy delays in determining whether to give priority to a request by the Court over a competing request. One way to do this would be to provide in all bilateral and multilateral extradition agreements and arrangements - both with states parties and non-states parties - that Court requests should have priority over state requests.

25. States must permit transfers of accused persons through their territory to the seat of the Court.

Article 89 (3) (a) requires each state party to “authorize, in accordance with its national procedural law, transportation through its territory of a person being surrendered to the Court by another State, except when transit through that State would impede or delay the surrender”

and paragraph (c) requires that “[a] person shall be detained in custody during the period of transit”. Paragraph (d) states that no authorization is required for transfer through by air across the territory of the state party if no landing is scheduled. Paragraph (e) provides that in the case of an unscheduled landing in a state party, that state “shall detain the person being transported until the request for transit is received and the transit is effected” for a maximum period of 96 hours, unless a request for extension is received before that time.

Since many states will not have legislation permitting the detention of a person being transported through their territory to an international criminal court, they will need to ensure that there is a basis in law for such detention. Otherwise, the person may be able to challenge successfully the lawfulness of the detention in transit.

26. States must not retry persons acquitted or convicted by the Court for the same conduct.

Article 20 (2) provides that “[n]o person shall be tried by another court for a crime referred to in article 5 [genocide, crimes against humanity, war crimes, and when it has been satisfactorily defined in an amendment to the Statute, aggression] for which that person has already been convicted or acquitted by the Court”.

Since the principle of *ne bis in idem* normally applies only within a single jurisdiction, it will be necessary for many states to include safeguards against retrials of persons convicted or acquitted by the Court for the same conduct.

VI. ENSURING EFFECTIVE REPARATIONS TO VICTIMS

27. National courts and authorities must enforce judgments and decisions of the Court concerning reparations for victims and should provide for reparations in national law for all victims of crimes under international law in accordance with international standards, including the general principles established by the Court relating to reparations.

Article 75 (1) provides that the Court shall “establish principles relating to reparations to, or in respect of, victims” and, based on these principles, the Court may “determine the scope and extent of any damage, loss and injury to, or in respect of, victims” and paragraph (2) authorizes the Court either to “make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation” or, where appropriate, to “order that the award for reparations be made through the Trust Fund provided for in article 79”. It is anticipated that states will be able to make voluntary contributions to the Trust Fund under criteria established by the Assembly of States Parties pursuant to Article 116 and the trustees of the Trust Fund. Paragraph (3) permits the Court to invite interested states to make representations before it makes an order under Article 75. Paragraph (4) authorizes the Court in exercising its power under Article 75 to “determine whether, in order to give effect to an order which it may make under this article, it is necessary

to seek measures under article 93, paragraph 1 [concerning state cooperation]”. Paragraph (5) requires a state party to “give effect to a decision under this article as if the provisions of article 109 [concerning enforcement of fines and forfeiture measures ordered as part of the Court’s powers to order such relief as part of a sentence under Article 77 (2) - discussed below] were applicable to this article”. Paragraph (6) expressly provides that nothing in Article 75 “shall be interpreted as prejudicing the rights of victims under national or international law”.

To assist the Court in providing reparations to victims, states parties should provide all relevant information to the Court concerning implementation of orders of reparations in their jurisdictions, both with regard to national procedures and the particular case, without waiting for an invitation pursuant to Article 75 (3). They should also make sure that national procedures are available which will enable them to provide prompt and effective measures of cooperation specified in Article 93 (1) and Article 109 in implementing an order under Article 75. Of course, they should ensure that national law and procedures permit victims to exercise all their rights under national and international law. States should not only contribute to the Trust Fund established pursuant to Article 79, but should also establish similar trust funds at the national level.

VII. TRYING CASES OF OFFENCES AGAINST THE ADMINISTRATION OF JUSTICE

28. Legislation must provide for punishment of offences against the administration of justice by the Court.

Article 70 (1) provides that the Court has jurisdiction over the following offences against the administration of justice when committed intentionally: false testimony; presenting false or forged evidence; corruptly influencing, obstructing the attendance of or retaliating against a witness; impeding, intimidating or corruptly influencing a Court official or retaliating against such an official; and soliciting or accepting a bribe as a Court official. Article 70 (2) states that the Rules of Procedure and Evidence, to be adopted by the Assembly of States Parties, will govern the Court’s exercise of jurisdiction over such offences and Article 70 (3) provides for imprisonment of up to five years or a fine or both, in accordance with the Rules of Procedure and Evidence.

Conditions for providing international cooperation to the Court concerning such offences are, according to Article 70 (2), to be governed by the law of the requested state. Each state party is required under Article 70 (4) (a) 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 this article, committed on its territory, or by one of its nationals”. In addition, under Article 70 (4) (b), “[u]pon request by the Court, whenever it deems it proper, the State Party shall submit the case to its competent authorities for the purpose of prosecution.

Those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively”.

States, therefore, must amend existing legislation concerning offences against its criminal justice system to include each of the offences identified in Article 70 (1) and ensure that the national law definitions cover the full extent of the conduct prohibited in that paragraph. Amnesty International recommends that they should ensure, at a minimum, that the legislation covers offences committed in its territory and by its own nationals, but they also should consider extending its scope to include offences committed within its jurisdiction (such as occupied territory or in an area under the effective control of its peace-keeping forces) and by non-nationals resident in its territory or within its jurisdiction. Indeed, since these offences are defined under international law, there would appear to be no bar to states exercising universal jurisdiction over persons suspected of committing them. National legislation should provide for full cooperation with the Court - and other states - in investigations and prosecutions of offences against the administration of justice, including international assistance, extradition of persons suspected or accused of such offences to other states or surrender of suspects to the Court, if it so requests.

VIII. ENFORCEMENT OF JUDGMENTS AND SENTENCES

29. Legislation must provide for enforcement of fines and forfeiture measures.

Article 77 (2) authorizes the Court to order fines and forfeitures as part of a sentence. Article 109 (1) requires states parties to “give effect to fines or forfeitures ordered by the Court under Part 7 [Articles 77 to 80], without prejudice to the rights of bona fide third parties, and in accordance with the procedure of their national law”. Paragraph (2) of this article provides that “[i]f a State Party is unable to give effect to an order for forfeiture, it shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of third parties.” Paragraph (3) provides that “[p]roperty, or the proceeds of the sale of real property or, where appropriate, the sale of other property, which is obtained by a State Party as the result of a judgement of the Court shall be transferred to the Court.”

States should review their existing laws and procedures for mutual legal assistance to other states concerning enforcement of judgments - if they have such laws and procedures - to determine if they would permit full and prompt cooperation with the Court in enforcing fines and forfeiture measures. If they do not have laws and procedures which would do so, they must enact the necessary laws and adopt such procedures.

30. Legislation should provide for the enforcement of sentences by the Court, in accordance with the requirements set forth below.

Article 103 (3) (a) recognizes “[t]he principle that States Parties should share the responsibility for enforcing sentences of imprisonment”. However, like the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda, the Statute relies on the voluntary cooperation of states to enforce sentences of imprisonment. As of 18 July 2000, a number of states had entered into formal agreements with the International Criminal Tribunal for the former Yugoslavia to enforce sentences of imprisonment and several are reported to have done so with respect to the International Criminal Tribunal for Rwanda.

Article 103 (1) (a) provides that sentences of imprisonment are to be served in states designated by the Court from a list of states which have indicated their willingness to accept sentenced persons. Article 103 (1) (b) permits states to attach conditions to their acceptance in accordance with Part 10 (Articles 103 to 111) and Article 103 (1) (c) requires that states designated in particular cases shall promptly inform the Court whether they accept its designation.

The designated state (state of enforcement) must “notify the Court of any circumstances, including the exercise of any conditions under paragraph 1 [of Article 103], which could materially affect the terms or extent of the imprisonment”. It must give the Court at least 45 days’ notice “of any such known or foreseeable circumstances” and take no action during this period that “might prejudice its obligations under article 110 [providing that the state of enforcement may not reduce a Court sentence]”. In designating a state of enforcement, one of the factors the Court will consider under Article 103 (3) is “[t]he application of widely accepted treaty standards governing the treatment of prisoners”.

A state of enforcement will need to provide for transfer to another state on request of the Court pursuant to Article 104 (2). Article 105 (1) provides that, subject to any conditions accepted by the Court under Article 103, “the sentence of imprisonment shall be binding on the States Parties, which shall in no case modify it”. Article 105 (2) provides that the state of enforcement “shall not impede the making of [an] application [for appeal and revision] by a sentenced person”.

Amnesty International urges states to share the responsibility for enforcing sentences by indicating to the Court that they are willing to enforce sentences. They should make sure that their law and procedure provides for the serving of Court sentences, that their courts and other authorities cannot modify such sentences and that convicted persons can make applications for appeal or revision without any hindrance.

a. Conditions of detention must fully satisfy the requirements of the Statute and other international standards.

Article 106 (1) provides that “[t]he enforcement of a sentence of imprisonment shall be subject to the supervision of the Court and shall be consistent with widely accepted treaty standards governing treatment of prisoners”. Paragraph (2) of that article states that “[t]he conditions of imprisonment shall be governed by the law of the State of enforcement and shall be consistent with widely accepted international treaty standards governing treatment of prisoners; in no case

shall such conditions be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.” Paragraph (3) requires that “[c]ommunications between a sentenced person and the Court shall be unimpeded and confidential.”

States should make sure that their legislation permits the Court access to places where persons are serving Court sentences and that communications between sentenced persons and the Court are unimpeded and confidential at all times, including during visits by the Court to the places where sentenced persons are detained. In addition - and independently of the requirements in Article 106 - states should ensure that places where sentenced persons meet international standards for places of detention. Although Article 106 refers expressly only to international treaty standards governing treatment of prisoners, states should ensure that all places of detention - not just where persons sentenced by the Court are detained - satisfy the full range of international standards governing the treatment of prisoners. There are a broad range of international standards governing the treatment of prisoners other than those expressly incorporated in treaties which states should apply. These include: the UN Standard Minimum Rules for the Treatment of Prisoners, the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the UN Code of Conduct for Law Enforcement Officials, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and the UN Basic Principles on the Role of Lawyers. These instruments are used by treaty monitoring bodies to inform their interpretation of the rights in international treaties such as the International Covenant on Civil and Political Rights.

b. Legislation should provide for release of the convicted person on completion of sentence or on order of the Court.

Article 110 (1) provides that the state of enforcement “shall not release the person before the expiry of the sentence pronounced by the Court” and paragraph (2) of that article states that only the Court has the right to decide on any reduction of the sentence.

States should ensure that sentenced persons are not released before the expiration of their sentence unless otherwise ordered by the Court.

c. Legislation should provide for the transfer of persons on completion of sentence.

Article 107 (1) states that a person who is not a national of the state of enforcement after having served the sentence “may, in accordance with the law of the State of enforcement, be transferred to a State which is obliged to receive him or her, or to another State which agrees to receive him or her, taking into account any wishes of the person to be transferred to that State, unless the State of enforcement authorizes the person to remain in its territory”. If no state bears the cost of such a transfer, it will be borne by the Court, according to Article 107 (2). Paragraph (3) of this article states that, “[s]ubject to the provisions of article 8 [limiting the opportunities for prosecution or punishment for offences before arrival in the state of enforcement], the State of enforcement may also, in accordance with its national law, extradite or otherwise surrender the person to a State which has requested the extradition or surrender of the person for purposes of trial or enforcement of a sentence.”

States will need to provide opportunities for transfers of persons who have completed their sentences and who are not nationals, after giving them an opportunity to express their wishes, and should assist the Court by bearing the expenses of transfer. They should ensure, however, that in exercising their discretion concerning transfers that such persons are not extradited or otherwise surrendered to another state where the person faces the risk of serious violations of human rights, such as torture, unfair trial or the death penalty.

d. Legislation should limit prosecutions and punishment for other offences.

Article 108 (1) states that “[a] sentenced person in the custody of the State of enforcement shall not be subject to prosecution or punishment or to extradition to a third State for any conduct engaged in prior to that person’s delivery to the State of enforcement, unless such prosecution, punishment or extradition has been approved by the Court at the request of the State of enforcement”. Paragraph (2) of that article provides that the Court shall hear the views of the sentenced person before ruling on the matter and paragraph (3) states that paragraph (1) ceases to apply if the person does not leave within 30 days or returns after leaving the state.

States should ensure that no prosecution, punishment or extradition of a sentenced person in their custody proceeds in the absence of Court approval.

e. Legislation should address the question of escape.

Article 111 authorizes a state of enforcement, after consultation with the Court, to request the surrender of a sentenced person who has escaped from the state where the person is located pursuant to existing arrangements between states or ask the Court to seek the person’s surrender pursuant to Part 9 (Articles 86 to 102). It may ask that the person be returned to the state of enforcement or to another state designated by the Court.

States should ensure that their legislation permits them to implement Article 111.

IX. PUBLIC EDUCATION AND TRAINING OF OFFICIALS

31. States parties should develop and implement effective programs of public education and training for officials on the implementation of the Statute.

The experience of the International Criminal Tribunals for the former Yugoslavia and Rwanda with prosecutions by national courts of persons accused of crimes within the jurisdiction of the two Tribunals and with cooperation of national authorities demonstrates the need for public education and training of officials on the scope of crimes under international law and on the work of international criminal courts. For example, the lack of familiarity of a United States District Court in Texas with the obligations of the United States to cooperate with the International Criminal Tribunal for Rwanda may have led to its refusal to implement the request by the Tribunal for the surrender of a Rwandan national. Similarly, the lack of an adequate training program for officials may have been responsible for the protracted negotiations between

the International Criminal Tribunal for the former Yugoslavia and the French government before it would permit testimony by high-ranking military officers at the seat of the Tribunal.

States can help make sure that their authorities fully cooperate with the Court, as required by Article 86, if they commit themselves at the time of signing the Statute to a program of public education to generate support for investigating and prosecuting persons in national courts and for cooperation with the new international institution. Amnesty International recommends that at the same time, they begin an intensive training program for judges, prosecutors, defence lawyers, police and military, justice and foreign affairs officials on their obligations under the Statute. In particular, they should, as several states are now doing, update their military manuals to incorporate appropriate references to the Rome Statute.

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