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International Criminal Court: The failure of states to enact effective implementing legislation

INTRODUCTION

The International Criminal Court (Court) is the twentieth century's most important creation in the struggle against impunity for the worst crimes known to humanity. It presents an historic opportunity to bring to justice those accused of genocide, crimes against humanity and war crimes. However, as it begins its first two investigations,[1] the Court is facing three increasingly pressing problems that demand the urgent attention of the Assembly of States Parties to avoid undermining the effectiveness of the Court: states parties are failing to implement the Rome Statute of the International Criminal Court (Rome Statute), those states parties that are implementing the Rome Statute are enacting flawed legislation, and states are not ratifying and implementing the Agreement on Privileges and Immunities of the International Criminal Court (Agreement on Privileges and Immunities).

Failure to implement the Rome Statute

As of 23 August 2004, only 36 of the 94 states parties to the Rome Statute are known to have enacted legislation implementing *any* of their obligations under the Rome Statute and other relevant international law into national law. As far as Amnesty International is aware, the following 58 states parties have not enacted any legislation implementing the Rome Statute: Afghanistan, Albania, Andorra, Antigua and Barbuda, Argentina, Barbados, Belize, Benin, Bolivia, Botswana, Brazil, Burkina Faso, Cambodia, Central African Republic, Cyprus, Democratic Republic of Congo (DRC), Djibouti, Dominica, East Timor, Ecuador, Fiji, Gabon, Gambia, Ghana, Greece, Guinea, Honduras, Hungary, Ireland, Italy, Jordan, Lesotho, Liechtenstein, Luxembourg, Macedonia, Malawi, Marshall Islands, Mauritius, Mongolia, Namibia, Nauru, Nigeria, Panama, Paraguay, Republic of Korea, Romania, Saint Vincent & the Grenadines, Samoa, San Marino, Senegal, Sierra Leone, Tajikistan, Tanzania, Trinidad & Tobago, Uganda, Uruguay, Venezuela and Zambia.[2]

[1] The Office of the Prosecutor has recently announced the opening of the Court's first two investigations into the Democratic Republic of Congo (DRC) (announced 23 June 2004) and Uganda (announced 29 July 2004).

[2] Some of these states have drafted implementing legislation, or are reported to be in the process of doing so. However, such drafting efforts have generally been done in closed discussions, without broad consultation with civil society, although a small number of states have involved civil society from the start of the process (the DRC, Peru and the UK are particularly noteworthy in this regard).

Flawed implementing legislation

Only 19 states parties are known to have legislation that addresses their complementarity and cooperation obligations under the Rome Statute (Australia, Belgium, Bulgaria, Canada, Croatia, Denmark, Estonia, Finland, Georgia, Germany, Iceland, Lithuania, Malta, the Netherlands, New Zealand, Slovakia, South Africa, Spain and the United Kingdom (UK)). Nine states parties are known to have legislation that addresses only their complementarity obligations (Bosnia-Herzegovina, Colombia, Costa Rica, Latvia, Mali, Serbia and Montenegro[3], Niger, Portugal and the Republic of the Congo). Some of the legislation defining crimes under international law as crimes under national law was enacted before states ratified the Rome Statute or even before the Rome Diplomatic Conference, but these states parties are likely to cite such legislation as meeting their complementarity obligations. Eight states parties are known to have enacted legislation designed to implement only their cooperation obligations (Austria, France, Norway, Peru, Poland, Slovenia, Sweden and Switzerland). Of the remaining 58 states parties, Amnesty International is only aware of 13 that have published draft implementing legislation (Argentina, Benin, Brazil, the DRC, Ecuador, Ireland, Liechtenstein, Nigeria, Panama, Senegal, Uganda, Uruguay and Venezuela).

The most common problems that are emerging in draft legislation now being prepared or considered are:

- weak definitions of crimes;
- unsatisfactory principles of criminal responsibility and defences;
- failure to provide for universal jurisdiction to the full extent permitted by international law;
- political control over the initiation of prosecutions;
- failure to provide for the speediest and most efficient procedures for reparations to victims;
- inclusion of provisions that prevent or could potentially prevent cooperation with the Court;
- failure to provide for persons sentenced by the Court to serve sentences in national prisons; and
- failure to establish training programmes for national authorities on effective implementation of the Rome Statute.

Of course, many of the provisions in draft and enacted legislation do fulfil the obligations of states adequately and some go well beyond the express requirements of the Rome Statute; such provisions are noted below. However, the purpose of this paper is to

[3] Serbia and Montenegro has enacted legislation that partially addresses its complementarity obligations. Each republic is responsible for enacting its own crimes legislation; Montenegro has done so, Serbia has not.

express concerns about worrying trends in implementation that, if not halted, will gravely weaken the Court's ability to fulfil its role in the fight for international justice and the promotion of long-standing customary and conventional international law.

Failure to ratify and implement the Agreement on Privileges and Immunities

As of 23 August 2004, only 12 states had ratified the Agreement on Privileges and Immunities, although 62 states have signed it. Only three states are known to have included the Agreement on Privileges and Immunities in their draft implementing legislation (Ecuador, Ireland and Uganda). Amnesty International is not aware of any state that has so far implemented the Agreement in legislation.

Why is implementing legislation important?

Effective implementing legislation for the Rome Statute and the Agreement on Privileges and Immunities is essential to the Court's success. The problems outlined above provide particular cause for concern because:

- Under the principle of complementarity reflected in the Preamble, Article 1 and Article 17 of the Rome Statute, the Court will act only when states are unable or unwilling genuinely to investigate or prosecute genocide, crimes against humanity and war crimes. The implicit bargain reached on 17 July 1998 when the Rome Statute was adopted at the Diplomatic Conference was that each state party recognized that under international law it had the primary responsibility to bring to justice those responsible for such crimes, with the Court only stepping in when states failed to fulfil their obligations. Indeed, it was implicit in the adoption of the Rome Statute that states parties would do their utmost to carry out their responsibilities to investigate and prosecute cases, otherwise the Court would be so overwhelmed with cases it would not be able to function. States parties have a responsibility to ensure that the Court is able to operate effectively.
- The adoption of definitions of crimes, principles of criminal responsibility and defences in national legislation that fail to meet the strictest standards of international law will be cited – improperly – as evidence that new, weaker rules of customary international law are emerging that undermine existing customary and conventional international humanitarian and human rights law.
- By ratifying the Rome Statute, states undertake to cooperate in good faith with the Court in its own investigations and prosecutions so that it can carry out its duties effectively. Such cooperation is essential for the Court to carry out investigations, obtain the arrest and surrender of accused persons, enforce sentences and provide reparations to victims and their families.

- The Agreement on Privileges and Immunities supplements Article 48 of the Rome Statute concerning the privileges and immunities of the Court, personnel, and persons connected to Court proceedings, such as defence lawyers, victims and their representatives and witnesses. Without such privileges and immunities it will be difficult, or even impossible, for the Court to function effectively and independently. In particular, the ability of court staff, investigators and witnesses to travel and transport evidence across and within national borders will be compromised. Due to the nature of the Court's jurisdiction, its investigations will involve events, evidence and statements that are extremely sensitive both to individuals and states. Article 48 of the Rome Statute is not sufficient to protect the Court's activities from undue interference, and without the Agreement on Privileges and Immunities and effective implementing legislation the work of the Court could be obstructed and staff, victims, accused and counsel could be put at risk.

States parties to the Rome Statute and the Agreement, therefore, must enact effective legislation to implement both their complementarity obligations, so that they can investigate and prosecute crimes under international law, and their cooperation obligations, so that the Court will be able to investigate and prosecute cases. Amnesty International has published a *Checklist for Effective Implementation* (AI Index: IOR 40/011/2000, July 2000), which explains both what states parties are required to do to implement the Rome Statute and what they should do to fulfil these obligations. Amnesty International has also provided detailed commentaries on draft and enacted implementing legislation, many of which are available on the organization's website (http://www.amnesty.org/icc).

What issues does this paper address?

This paper is designed to highlight emerging problems in such legislation and draft legislation, with a view to helping states to avoid adopting weak provisions and to enact effective ones. All implementing legislation and draft implementing legislation publicly available to Amnesty International is on or will shortly be on the organization's website. A list of the draft and enacted legislation on which this paper is based can be found in the appendix, together with details of where this legislation can be found (where available on the internet). Citations are in the following form: country, section or article number, legislation or draft legislation (where there is more than one law or draft bill).

This paper is not intended to provide a comprehensive review of each provision in each law and bill, but simply to indicate some of the emerging problems and positive aspects, illustrated by selected examples from all regions. This paper will be supplemented by a series of detailed guidelines for implementation (the first paper in this series, *International Criminal Court: Guidelines for effective implementation of the Rome Statute – Introduction*, (IOR 40/013/2004, August 2004) is available on Amnesty International's website at www.amnesty.org/icc). Future papers, to be issued in 2005, will deal comprehensively with

implementation of the Rome Statute, including reparations by national courts and national security information. This paper will also be supplemented by an implementation database, currently being established by the International Justice Project of Amnesty International, which will contain all enacted national legislation, together with comments by Amnesty International and others. The International Justice Project welcomes comments and any corrections, which should be sent to: svanderp@amnesty.org or jodonohu@amnesty.org.

The organization hopes that this paper will encourage the Assembly of States Parties and the Court to turn their attention to the urgent need for states parties not only to enact implementing legislation for the Rome Statute and the Agreement on Privileges and Immunities, but also to ensure that such legislation is as effective as possible, going beyond the Rome Statute in certain respects so that it is consistent with other international law. One of the most effective ways to achieve this goal is for states to follow the example of states such as the DRC, Peru and the United Kingdom, which have involved civil society from the start in the process of drafting implementing legislation.

I. FAILURE TO IMPLEMENT COMPLEMENTARITY OBLIGATIONS

A. Definition of crimes

Most states parties that have enacted or are drafting implementing legislation for the Rome Statute are failing to fulfil their obligations under international law effectively. First, some states parties are not including all of the crimes in the Rome Statute or are defining them in a weaker form. Second, Amnesty International is concerned that many states parties are simply copying the definitions of the Rome Statute without change into their implementing legislation. When implementing the Rome Statute, states parties should also incorporate other crimes under customary and conventional international law, bearing in mind that the Rome Statute expressly states in Article 10 that nothing in Part 2 "shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute".

Although in some states the fact that they are finally taking steps to ensure that their courts can exercise jurisdiction over *some* crimes under international law is a dramatic step forward, it falls short of their obligations under international law. A few of the definitions of the crimes in the Rome Statute were in advance of conventional and customary international law, for example, in defining certain conduct previously considered as a war crime only when committed in international armed conflict as a war crime when committed in non-international armed conflict. However, in a number of respects, the definitions, principles of criminal responsibility and defences in the Rome Statute fall short of the customary and conventional obligations of states parties, for example, under the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). In the light of such flaws, states parties should not slavishly follow the Rome Statute definitions, principles of criminal responsibility and defences where they fall short of customary and conventional international law.

In addition, a few states have included the elements of crimes in the Elements of Crimes instrument in their definitions. However, in the light of the subsidiary role indicated for the Elements of Crimes in Article 9 of the Rome Statute, as well as the inconsistency of some of the elements of particular crimes in that instrument with the Rome Statute and other international law, it is important to ensure that states do not enact these flaws and that legislation expressly provides that the Elements of Crimes play a similarly subsidiary role in national legislation.[4]

[4] Article 9 (1) of the Rome Statute provides: "Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8." One example of the way that the Elements of Crimes is inconsistent with both the Rome Statute and other international law is the contextual element for genocide, which was designed to limit the number of cases heard by the Court, not to change the

1. Genocide

There are two types of flaws in national draft and enacted implementing legislation concerning genocide. First, some definitions of genocide are not consistent with the definition in Article II of the 1948 Convention for the Prevention and Punishment of the Crime of Genocide (Genocide Convention) and in Article 6 of the Rome Statute, either because definitions do not include all the elements of the crime or because they define the elements in a less comprehensive manner. Second, few states appear to have included all the principles of criminal responsibility as defined in Article III of the Genocide Convention, which also criminalizes complicity and conspiracy in committing genocide, attempted genocide and direct and public incitement to commit genocide. States should ensure that all principles of criminal responsibility in the Genocide Convention and in other international law are criminalized; Amnesty International is not aware of any state that has done so sufficiently. Offsetting these serious flaws, a number of states have incorporated the definition of genocide satisfactorily or defined genocide more broadly.

Flawed definitions of genocide. One failing in definitions of genocide is the omission of the prohibited conduct of causing serious mental harm to members of the group. States parties that have failed to implement this provision include Portugal. In some cases, particularly in the absence of legal memoranda accompanying the legislation, it is not always possible to determine whether the provision restricts or expands the scope of the definition. For example, the definition of genocide in the penal code of Estonia replaces "[c]ausing serious bodily or mental harm" with the phrase causing "health damage to members of the group", which appears to be somewhat narrower in scope and does not expressly state that it covers both bodily and mental health damage (Paragraph 90).

Another serious failing is that it appears that not a single state party has included all of the ancillary forms of genocide defined in Article III of the Genocide Convention in their draft or enacted implementing legislation, although it may be possible that some states have incorporated all of these forms of ancillary criminal responsibility in other legislation that would be applicable to genocide.

definition of the crime. A similar example involves the elements of the crime against humanity of rape. The Elements of Crimes mixed the two approaches of the ICTR Trial Chamber judgment in the *Akayesu* case, (*Prosecutor v. Akayesu*, Case No. ICTR-96-4, Judgment, Trial Chamber, 2 September 1998, para. 688) and the ICTY Trial Chamber judgment in the *Furundzija* case (*Prosecutor v. Furundzija* , Case No. IT-95-17/1, Judgment, Trial Chamber,10 December 1998, para. 185). This definition has since been partially supplanted by the broader definition adopted in the *Kunarać* judgment (*Prosecutor v. Kunarać et al.*, Case No. IT-96-23, Judgment, Appeals Chamber , 12 June 2002, paras. 127 and 128).

Definitions that are consistent with the Genocide Convention and the Rome Statute. Several states parties have incorporated definitions of genocide that are identical to the definition in Article II of the Genocide Convention and in Article 6 of the Rome Statute. For example, several states have incorporated the definition by reference in their draft or enacted implementing legislation, including Argentina (Article 2), Ireland (Section 6), New Zealand (Article 9 (2)), Uganda (Article 7 (2)), the United Kingdom (England, Wales and Northern Ireland Act, Section 50 (1); Scotland Act, Section 1 (4)) and Uruguay (Article 2). Other states have directly included the international law definition in their penal codes or implementing legislation, including Belgium (Article 6, law of 5 August 2003, containing Article 136 bis of the Penal Code), Canada (Sections 4 (3) and 6 (3)), Mali (Article 30), Malta (Article 54 (B) (1) of the Criminal Code, as modified by the International Criminal Court Act) and South Africa (Schedule 1, Part 1).

Definitions that are broader than in the Genocide Convention and the Rome Statute. In a positive development that may indicate the future emergence of a broader definition of genocide in customary international law, a number of states have adopted broader definitions than in Article II of the Genocide Convention. Several states parties have expanded the definition of genocide since 1998 by increasing the number of protected groups.[5] These include Ecuador (a group is defined on the basis of political condition, gender, sexual orientation, age, health or conscience (Article 19); Estonia (includes "a group resisting occupation or any other social group" (Paragraph 90)); Finland (includes "another comparable group" (Chapter 11, section 6 (1), Act No. 1285/2000)); Panama (includes political groups (Article 1 modifying Article 392 of the Criminal Code)); and the Republic of the Congo (the targeted group is not only defined on a national, ethnic, racial, religious basis, but on all other arbitrary criteria (Article 1)).

In addition, some states have increased the scope of prohibited conduct that is defined as genocide, including: Belgium (Belgian courts have jurisdiction not only over acts of genocide, but also over connected acts which are due to negligence (Article 6, law of 5 August 2003, containing new Article 136 bis of the Penal Code)); Colombia (forced pregnancy (Book 2 Title 1 Chapter 1 (2))); the DRC (the DRC draft qualifies the forced transfer of *any* member of a group (not just children) to another group as genocide (Article 17 containing proposed Article 221 of the Penal Code)); Estonia (which includes torturing members of the group as genocide (Paragraph 90)); Finland (which includes inflicting "illness" on members of the group (Chapter 11, Section 6 (1) (2), Act No. 1285/2000),

[5] Although this paper focuses on legislation adopted after the Rome Statute, in some cases it notes legislation adopted before 1998. The developments since the Rome Diplomatic Conference continue a trend begun earlier: prior to 1998, a number of states had expanded their definitions of protected groups to include political groups (Bangladesh, Costa Rica, Lithuania, Panama, Peru and Slovenia), social groups (Lithuania, Peru and Paraguay) and groups whose identification is based on arbitrary criteria (France), or had expanded the scope of prohibited acts, for example to include enforced disappearances (Ethiopia) or forced resettlement or displacement (Armenia and Spain).

conduct "in any other comparable manner [that] essentially impairs the survival of the group" (Chapter 11, Section 6 (1) (5)), and criminalizes preventing "procreation", which would necessarily include prevention of births (Chapter 11, Section 6 (1) (3))); Panama (includes as genocide inducement to commit suicide, abuses against sexual liberty and forced displacement (Article 1, modifying Article 392 of the Criminal Code)), Portugal (includes "cruel, degrading or inhuman treatment" in conditions of life calculated to bring about the destruction of a group, and excludes the provision that this destruction must be "physical" (Article 8 (1) (c)); includes imposing measures intended to prevent procreation or births in the group (Article 8 (1) (e))); and Spain (forced displacement (Article 607 of the Criminal Code, as modified by law 15/2003)). Other states, including Spain (Article 607 of the Criminal Code, as modified by law 15/2003), have facilitated prosecution by broadening the definition of the mental element of genocide. Germany has broadened the definition slightly by deleting the qualifier "as such" with regard to the intention to destroy a protected group (Section 6 (1), Code of Crimes).

2. Crimes against humanity

It is a matter of considerable concern that many states parties have either omitted certain crimes against humanity defined in Article 7 of the Rome Statute or defined them in a manner that is weaker than in that article or in other international law, particularly with regard to extermination and crimes of sexual violence. Some states, however, have either defined crimes against humanity in a manner that is consistent with Article 7 or have gone beyond that article by including a less restrictive threshold or by defining the crimes more broadly.

Omission of certain crimes against humanity. Several states parties have omitted certain crimes against humanity listed in Article 7 of the Rome Statute, including rape and other crimes of sexual violence, enslavement, persecution and the crime of apartheid. For example, Estonia has omitted the crimes of extermination, enslavement, enforced disappearance of persons and apartheid; Georgia has omitted the crimes of enslavement, imprisonment, enforced disappearances and the forcible transfer of population; Germany, Panama and Peru have omitted the crime of other inhumane acts; Spain has omitted the crime of extermination. Finland's unsatisfactory approach to crimes against humanity also risks the omission of some crimes listed in the Rome Statute.[6]

[6] According to the progress report submitted by Finland on 11 September 2001 on the implications for Council of Europe member states of the ratification of the Rome Statue, "the provisions in Chapter 11 of the Penal Code of Finland [criminalizing war crimes and offences against humanity] do not fully cover all those acts that are defined as crimes against humanity in Article 7 of the Statute. (…) however, (…) the differences do not mean that such crimes would go unpunished under the Finnish Penal Code. Crimes against humanity usually fulfil the elements of homicide and bodily injury, sexual offences and offences against personal liberty within the meaning of the Penal Code". This approach is unsatisfactory, not only because it does not treat crimes against humanity with the appropriate degree

The weak definitions of crimes of sexual violence as crimes against humanity are of particular concern. While most states parties have included rape as a crime against humanity in their penal codes or implementing legislation, several have failed to include the equally serious crimes of sexual slavery, enforced prostitution, forced pregnancy, or enforced sterilization. States that have failed to include some or all of these provisions and that should take immediate steps to address this omission include Estonia (omits sexual slavery, forced pregnancy, enforced sterilization (Paragraph 89)).

Amnesty International also is concerned that some states have not included the provision on "any other form of sexual violence of comparable gravity" in their criminalization of rape and sexual violence. It is essential that this provision, which is consistent with principles of legality, is included to ensure that all forms of sexual violence are criminalized as crimes against humanity. States that have failed to include this provision include Brazil, Estonia, Georgia and Germany.

Definitions that are weaker than those in Article 7 of the Rome Statute. It is of no less grave concern that certain crimes against humanity which are included in legislation are not being defined adequately in some instances. In particular, definitions adopted by states of rape and other crimes of sexual violence (Article 7 (1) (g) and (2) (f)) and extermination (Article 7 (1) (b)) are weaker than in the Rome Statute, although there are problems with the definitions of some of the other crimes as well.

a) *Article 7 (1) (g) and (2) (f) – Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity*

As noted above, some legislation omits rape or other crimes of sexual violence. However, it is a matter of concern that even when these crimes are included in implementing legislation, in some instances they are defined in a way that is inconsistent with evolving international law. The definition of rape in national law should reflect the most advanced international principles, including some of the better aspects of recent jurisprudence. In particular, the elements of the crime of rape should include: (i) a physical invasion of a sexual nature;[7] (ii) the lack of consent of the victim.[8] It is a matter of concern that some states have used a narrower definition of rape in their implementing legislation. For example, Bosnia-

of gravity, but also because it does not exclude any procedural or substantive bars to prosecution of ordinary crimes and it omits certain crimes against humanity.

[7] *See* ICTR, Trial Chamber, *Prosecutor v. Akayesu*, Case No. ICTR-96-4, Judgment, 2 September 1998, para. 688. Amnesty International believes that this approach is preferable to the more restrictive one, adopted by the ICTY jurisprudence and partially incorporated in the Elements of Crimes.

[8] *See Prosecutor v. Kunarać et al.*, Case No. IT-96-23, Judgment, Appeals Chamber , 12 June 2002, paras. 127 and 128. Amnesty International is concerned that the more restrictive approach adopted in this respect in the Elements of Crimes does not take into account the central factor of the victim's free and voluntary consent.

Herzegovina requires sexual violence to happen "by force or by threat of immediate attack upon his [the victim's] life or limb or the life or limb of a person close to him" (Article 172). Brazil defines sexual violence in its implementing legislation, but it does not expressly mention rape (Article 30). Although Brazil has included the crime of coercing someone to undertake obscene acts or to witness the practice of sexual violence or aggression, it does not appear to cover all the conduct covered by the definition in the Rome Statute. Portugal defines sexual aggression as a crime, but it does not specifically mention rape, although any case of rape would appear to fall within the scope of this crime (Article 9 (g) (i)).

b) *Article 7 (1) (b) - Extermination*

The crime of extermination, which covers situations in which a group of individuals who do not share any common characteristics are killed[9], is sometimes omitted as a separate crime in draft or enacted implementing legislation or in penal codes (e.g. Estonia). It is usually covered by the crime of murder, which does not reflect the enormity of the crime of extermination. All states should ensure that extermination should be defined and included specifically as a distinct crime against humanity. It should not be ignored just because it can be partially covered by other crimes, such as murder.

c) *Other crimes*

In addition, some legislation contains definitions of other crimes against humanity that are weaker than the definitions in Article 7 of the Rome Statute. Amnesty International is particularly concerned with the definitions of crimes against humanity in the implementing legislation of the Republic of Congo. Article 6 (j) replaces the crime against humanity of apartheid with a different non-discrimination provision, the scope of which is not clear (crimes of discrimination on tribal, ethnical or religious grounds). Article 6 (k) includes a non-exhaustive list of acts constituting the crime against humanity of other inhumane acts, at least one of which could be read as more restrictive than the definition of crimes against humanity in Article 7 of the Rome Statute (the widespread and systematic practice of extrajudicial executions).

Definition of gender. It is unfortunate that few states have made clear that the definition of gender in their draft or enacted implementing legislation (with regard to both crimes against humanity and war crimes) must be consistent with the UN definition.[10] In some

[9] Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May – 26 July 1996, UN GAOR , 51st Sess., Supp. No. 10, 30, UN Doc A/51/10, at 96.

[10] The most authoritative statement of UN usage is:

> "Gender: refers to the social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys, as well as the relations between women and those between men. These attributes, opportunities and relationships are socially constructed and are learned through socialization processes. They are context/ time-specific and changeable. Gender determines what is expected, allowed and

cases (Brazil, Finland, Portugal) there is no definition, leaving national courts with little guidance and risking restrictive interpretations. In other cases, such as in Malta (Article 54 (C) (3) of the Criminal Code, as modified by the ICC Act) and South Africa (Schedule 1, Part 2 (3)), states have adopted the obscure definition in Article 7 (3) of the Rome Statute. Although the correct interpretation of this provision is the same as the UN definition, it would have been better for national legislation to state this expressly.

Incorporation of the Rome Statute definitions. At least 12 states have incorporated the definitions of crimes against humanity in Article 7 of the Rome Statute as crimes under national law in their draft or enacted implementing legislation, either by incorporating them by reference, such as Argentina (Article 2), Costa Rica (Article 379), Ireland (Section 6), New Zealand (Article 10 (2)), Uruguay (Article 2), Uganda (Article 8 (2)) and the United Kingdom (England, Wales and Northern Ireland Act, Section 50 (1); Scotland Act, Section 1 (4)), or defining them without change directly as crimes under national law, such as Malta (Articles 54 (C) (1) and (2) of the Criminal Code as modified by the ICC Act) and South Africa (Schedule 1, Part 2). Other states have directly included the international law definition in their penal codes or implementing legislation, including Canada (Sections 4 (3) and 6 (3)). However, Belgium (Article 7, law of 5 August 2003, containing new Article 136 *quater* of the Criminal Code) and Republic of the Congo (Article 6) omit definitions of certain crimes against humanity in Article 7 (2) of the Rome Statute, leaving it unclear whether these are incorporated into national law or not.

Adoption of a less restrictive threshold. One positive development has been the adoption of less restrictive thresholds for determining whether a court can exercise jurisdiction over crimes as crimes against humanity.[11] For example, Canada does not include

valued in a women or a man in a given context. In most societies there are differences and inequalities between women and men in responsibilities assigned, activities undertaken, access to and control over resources, as well as decision-making opportunities. Gender is part of the broader socio-cultural context. Other important criteria for socio-cultural analysis include class, race, poverty level, ethnic group and age." Website of the Office of the Special Adviser on Gender Issues and Advancement of Women (OSAGI), <http://www.un.org/womenwatch/osagi/conceptsandefinitions.htm>.

A leading commentary on the Rome Statute has concluded that the definition in Article 7 (3) is in accord with UN usage. *See* Machteld Boot, *Article 7 (3)*, in Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden-Baden: Nomos Verlagsgesellschaft 1999), at p. 172.

[11] The threshold in the chapeau of Article 7 (1), as explained in Article 7 (2) (a) of the Rome Statute is not a definitive component of crimes against humanity, since there is no agreed threshold in the definition of these crimes, but elements of that threshold are increasingly being considered as part of the definition, while others, such as the policy requirement, have been seriously criticized. *See* David Hunt, *The International Criminal Court – High Hopes, 'Creative Ambiguity' and an Unfortunate Mistrust in International Judges*, 2 J. Int'l Crim. Just. (2004), pp. 56, 64-66.There was no threshold required in the Nuremberg and Tokyo Charters and the thresholds in the Statutes of the International

the qualifier of widespread or systematic attacks, but rather criminalizes any acts that "… constitute a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations" (Articles 4 (3) and 6 (3)). Some states have omitted the requirement of a threshold altogether and simply identified the conduct that is prohibited as crimes against humanity. Ecuador and Panama criminalize acts constituting crimes against humanity even when not committed as part of a widespread and systematic attack (Ecuador (Articles 25, 30, 34, 38, 43, 44); Panama (Article 1 modifying article 393 of the Criminal Code)). Estonia has not included the requirement of the attack to be "directed against any civilian population, with knowledge of the attack" (Paragraph 89). Georgia has not included "with knowledge of the attack" (Article 408 of the Penal Code); nor has Portugal, which has also not included "pursuant to or in furtherance of a State or organizational policy to commit such attack"(Article 9).

Broader definitions of crimes against humanity. Several states have adopted broader definitions of the conduct that constitutes crimes against humanity. The DRC defines apartheid as institutionalized oppression and domination not just on racial grounds, but also on political, national, ethnic, cultural, religious, sexist and other grounds (Article 17 containing proposed Article 222 (9) of the Criminal Code). It also has a broader definition of the crime of sexual violence since it mentions sexual abuse and harassment (Article 17 containing proposed Article 222 (6) of the Criminal Code). Estonia (Paragraph 89) includes as crimes against humanity "causing health damage" and "other abuse of civilians" (the latter crime is broader than the prohibition of other inhumane acts in Article 7 (1) (k) of the Rome Statute, but it could be considered so broad that it might be held to be inconsistent with the principle of legality). The Republic of the Congo includes pillaging, collective punishment, the taking of hostages and acts of political, racial or religious terrorism as crimes against humanity (Articles 7 and 8). At least three states have expanded the scope of the crime of forced pregnancy by omitting the requirement that the detention of the woman must be illegal (DRC (Article 17 containing proposed Article 222 (6) of the Criminal Code), Brazil (Article 35) and Portugal (Article 9 (g) (iv))). Brazil also includes violence, serious threat or any other form of coercion not only against the victim, but also against a third party, in the crime of forced pregnancy (Article 35). In addition, Brazil (Article 39) and Panama (Article 393 (10)) have both added "racial segregation" to the list of crimes against humanity.

Criminal Tribunals for the former Yugoslavia and Rwanda are radically different from each other and from the threshold in Article 7 of the Rome Statute.

3. War crimes

The way in which states are defining war crimes in national implementing legislation is of the greatest concern to Amnesty International. War crimes are defined as criminal acts by a large body of conventional international law, including the 1907 Hague Regulations, the four Geneva Conventions of 1949 and their 1977 Protocols. Much of this treaty law is now considered to be part of customary international law and many war crimes are increasingly recognized as contrary to *jus cogens* prohibitions. Article 8 of the Rome Statute draws on this existing body of law, but defines some war crimes more narrowly than in these instruments and, indeed, omits certain war crimes.

Although some states are adopting broader definitions of war crimes, there are serious flaws with the current trend in definitions of war crimes in national implementing legislation and penal codes:

- *Restrictive definitions.* Many states are adopting the definitions in some of the provisions in Article 8 that are more restrictive than in international humanitarian law. For example, these more restrictive definitions include the war crimes of intentionally launching an attack with the knowledge that it will cause injury to civilians (Article 8 (2) (b) (iv)) and the conscription or enlistment of children into armed forces or groups and their use actively in hostilities (Article 8 (2) (b) (xxvi) and (2) (e) (vii)).
- *Omission of war crimes.* States are limiting the war crimes that they define as crimes under national law by including only the limited number of war crimes in the Rome Statute and omitting certain war crimes that are codified under international law. For example, many states are following the Rome Statute by omitting the war crime of intentionally using starvation of civilians as a method of warfare in non-international armed conflict, although this war crime is expressly prohibited in Article 14 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to Non-international Armed Conflict (Protocol II) and is within the jurisdiction of the International Criminal Tribunal for Rwanda. Although some states have included certain war crimes omitted from the Rome Statute, Amnesty International is aware of only a few states that appear to have attempted to include all war crimes under international law.
- *Distinction between war crimes in international and non-international armed conflicts.* States parties are adopting the unfortunate and increasingly outdated distinction in Article 8 between acts defined as war crimes during international armed conflict and those defined as war crimes during non-international armed conflict. They should rather ensure that all conduct that is a war crime when committed in an international armed conflict is also a war crime when committed during a non-international armed conflict, subject to any modifications necessary to take into account certain unique aspects of non-international armed conflict.

More restrictive definitions of war crimes. Article 8 of the Rome Statute provides a far more detailed enumeration of war crimes than previously existed under international law. However, in some cases, this serves to narrow the traditional definition of war crimes. When drafting national implementing legislation or revising national penal codes, Amnesty International urges all states to use the wider definitions of war crimes in customary international law or in Protocols I and II and other international instruments, whether or not states have ratified these instruments.

Particular concerns with specific definitions. Amnesty International is particularly concerned with provisions in legislation and draft legislation relating to the following crimes:

a) *Article 8 (2) (b) (iv) – Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.*

Amnesty International is concerned about the way this provision is defined; in particular**,** that an attack must be excessive in relation to the "concrete and direct **overall** military advantage anticipated". This definition is more restrictive in scope than Article 57 (2) (a) (iii) of Protocol I, which specifies that such an attack is prohibited if it is excessive in relation to the "concrete and direct military advantage". It is essential that states use the Protocol I definition in order to ensure that they provide the maximum protection for civilians and civilian objects against intentional attacks. Some states claim "overall military advantage" means "overall military advantage in a theatre of military operations, such as the Pacific Theatre during the Second World War", while others contend that it is even broader and means "overall military advantage in an armed conflict". Either interpretation would render the prohibition essentially meaningless.

It is a matter of serious concern with regard to respect for international humanitarian law that many states parties have failed to use the Protocol I definition in their draft or enacted implementing legislation or penal codes, including the DRC (Article 17 containing proposed Article 224 (2) (d) of the Criminal Code), Ecuador (Article 96), Germany (Section 11 (1) (3)), Ireland (Section 6), Mali (Article 31 (i) (4)), Malta (Article 54 (D) (b) (iv) of the Criminal Code, as modified by the ICC Act), South Africa (Schedule 1, Part 3 (b) (iv)), Uganda (Section 9 (2)) and the UK (England, Wales and Northern Ireland Act, Section 50 (1); Scotland Act, Section 1). Each of these states is a party to Protocol I, so the incorporation of the weaker standard puts them in breach of their obligation under Articles 1, 80, 83, 85 and 86 of that treaty.

In a positive development, however, a small number of states parties have used the Protocol I definition either expressly, including Australia (Article 268.38, International Criminal Court (Consequential Amendments) Act 2002), Belgium (Article 8, law of 5 August 2003, containing Article 136 *quater* (1) (22) of the Penal Code) and Brazil (Article 62), or

under a general clause, including Finland (Chapter 11, Section 1 (1) (3), Act No. 1285/2000) and the Netherlands (Article 7 (1), International Crimes Act). Portugal has implemented Article 8 (2) (b) (iv) of the Rome Statute in two separate articles: "Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects" has been implemented in Article 11 (d), referring to "excessive" but not indicating what would the excessive effects of such an attack would be, which largely follows the Protocol I definition. "(W)idespread, long-term and severe damage to the natural environment" has been implemented in Article 11 (i), following the Rome Statute definition. At least one state appears to have defined this war crime even more broadly than Protocol I: Estonia appears to have covered all of the conduct prohibited in Article 8 (2) (b) (iv) in Paragraphs 96 and 104 of its penal code by not referring to the requirement of "military advantage".

b) *Article 8 (2) (b) (xxvi) – Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities; Article 8 (2) (e) (vii) – Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.*

These provisions of the Rome Statute are of great concern in that they adopt the more restrictive definition of a child soldier as someone under 15 years of age. The Convention on the Rights of the Child (CRC) defines a child as every human being below the age of 18 years. Its Optional Protocol on the involvement of children in armed conflict obliges states parties to prohibit and criminalize the recruitment and use in hostilities of persons under the age of 18 years (Article 4). Amnesty International urges that in national implementing legislation, all states prohibit the recruitment of children under 18 into armed forces and groups and the use of such children in hostilities.

It is regrettable that at least a dozen states have simply followed the Rome Statute in their draft or enacted legislation. States that have done so include states that have signed or ratified the Optional Protocol, including Australia (Articles 268.68 and 268.88 of the International Criminal Court (Consequential Amendments) Act 2002), Belgium (Article 8, containing Article 136 *quater* (1) (7) of the Penal Code), Canada (Sections 4 and 6), Germany (Section 8 (1) (5), Code of Crimes), Ireland (Section 6), Mali (Article 31 (i) (26)), Malta (Article 54 (D) (b) (xxvi) and (e) (vii) of the Criminal Code, as modified by the ICC Act), the Netherlands (Section 5 (5) (r), International Crimes Act), New Zealand (Section 11 (2)), South Africa (Schedule 1, Part 3, (b) (xxvi) and (e) (vii)), Uganda (Section 9 (2)) and Uruguay (Article 2). By doing so, these states undermine their obligation to implement the Optional Protocol in good faith.

However, at least half a dozen states have followed Amnesty International's recommendation by defining the recruitment and use of children under the age of 18 in hostilities as a war crime in their draft or enacted legislation including Argentina (Article 10), Brazil (Article 85), the DRC (Article 17, which contains proposed Article 224 (2) (z) and (5)

(g) of the Penal Code), Ecuador (Articles 96 and 102), Panama (Article 1 modifying Article 400 of the Criminal Code) and Portugal (Articles 10 (1) (h) and 2 (g)).

Omission of war crimes codified under international law. Amnesty International is aware of only a few states that appear to have attempted to incorporate all war crimes under international law into national legislation. Any grave breaches of the Geneva Conventions and of Protocol I or serious violations of Protocols I and II should be defined as crimes under national law if they are not already covered by existing legislation, even if the state has not ratified the Protocols. All conduct that amounts to war crimes under customary international law should be defined as crimes under national law. In addition, states should seek to address the gaps in current conventional and customary international law by defining all conduct that would be war crimes in international armed conflict as war crimes in non-international armed conflict.

States that appear to have attempted to include all current war crimes under international law in both international and non-international armed conflict in their draft or enacted legislation include Bosnia-Herzegovina (Article 179, Penal Code: "Whoever in time of war or armed conflict orders the violation of laws and practices of warfare, or whoever violates them . . ."); Canada (Article 4 (3) and (4): "…"war crime" means an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts …"), the Netherlands (Section 7 (1): providing jurisdiction over "anyone who, in the case of an international or non-international armed conflict, commits a violation of the laws and customs of war other than as referred to in sections 5 or 6"), and the Republic of the Congo (Article 4: prohibiting all serious violations of the laws and customs applicable to international and non-international armed conflicts, "as provided by international law"). Other states have included all war crimes in treaties ratified by the state, including Costa Rica (Article 378), Panama (Article 1 modifying Article 406) and Spain (Article 614 of the Criminal Code, as modified by law 15/2003). Although Finland has a very broad provision punishing violations of "the provisions of an international agreement on warfare binding on Finland or the generally acknowledged and established rules and customs of war under public international law" (Chapter 11, Section (1) (3), Act No. 1285/2000), it appears that this provision applies only to international armed conflict since it refers to "war" and elsewhere the Penal Code refers to "war, armed conflict and occupation" as separate events.

Amnesty International is particularly concerned that states parties are not incorporating specific war crimes that are omitted from the Rome Statute in their draft or enacted implementing legislation, including:

a) *The increasingly common war crime of intentionally using starvation of civilians as a method of warfare in non-international armed conflict.* This war crime is expressly prohibited in Protocol II and is within the jurisdiction of the International Criminal Tribunal

for Rwanda; it should be included in national implementing legislation as a war crime in non-international armed conflict, as well as in international armed conflict. Certain states have done so, including Argentina (Article 10), Belgium (Article 8, law of 5 August 2003, containing Article 136 *quater* (1) (10) of the Penal Code), Brazil (Article 84), Bosnia-Herzegovina (Article 173 (1) (f)), Germany (Section 11 (1) (5), Code of Crimes), Panama (Article 1 modifying Article 401 of the Criminal Code) and Portugal (Article 11 (f)). Most states, however, have not done so.

b) *The war crime of unjustified delay in repatriating or freeing prisoners of war or interned civilians once hostilities have ceased.* This is a grave breach of Protocol I, Article 85 (4) (b), and should be included in all national implementing legislation. Certain states parties have included this war crime in their legislation or draft legislation, including Australia (Article 268.99 of the International Criminal Court (Consequential Amendments) Act 2002), Belgium (Article 8, law of 5 August 2003, containing Article 136 *quater* (1) (32) of the Penal Code), Estonia (Paragraph 99), Georgia (Article 411 (1) (h) of the Penal Code), Germany (Section 8 (3) (1), Code of Crimes), the Netherlands (Section 5 (2) (d) (ii)), Panama (Article 1 modifying Article 398 of the Criminal Code) and Spain (Article 611 of the Criminal Code, as modified by law 15/2003). Some states have included this war crime in part (Bosnia-Herzegovina (Article 182), Brazil (Article 86) and Portugal (Article 10 (2) (c))). Most states, however, have not included any aspect of this war crime. When a state is a party to Protocol I, the incorporation of the weaker standard puts that state in breach of its obligation under Articles 1, 80, 83, 85 and 86 of that treaty.

c) *The war crime of attacking demilitarized zones.* This war crime is defined as a grave breach in Article 85 (3) (d) of Protocol I, and should be included in all national implementing legislation. A number of states parties have included this crime in their draft or enacted implementing legislation, including Australia (Article 268.98 of the International Criminal Court (Consequential Amendments) Act 2002), Belgium (Article 8, law of 5 August 2003, containing Article 136 *quater* (1) (24) of the Penal Code), Bosnia-Herzegovina (Article 173 (2) (b)), Estonia (Paragraph 106), Georgia (Article 411 (1) (d) of the Penal Code), Germany (Section 11 (1) (2), Code of Crimes), the Netherlands (Section 5 (2) (c) (iv)), Panama (Article 1 modifying Article 399 of the Criminal Code) and Spain (Article 612 of the Criminal Code, as modified by law 15/2003). Most states parties, however, have not. When a state is a party to Protocol I, the incorporation of the weaker standard puts that state in breach of its obligation under Articles 1, 80, 83, 85 and 86 of that treaty.

Distinction between war crimes in international armed conflict and non-international armed conflict. It is indefensible that the Rome Statute defines certain acts as war crimes when committed in an international armed conflict but not when committed in a non-international armed conflict. All war crimes should be defined as such whether they are committed in international or non-international armed conflict. In instances where conduct is defined in terms generally applicable to international armed conflict, such as "prisoners of war" or "occupied territory", equivalent conduct in non-international armed conflict, with any

necessary modifications to take into account unique aspects of non-international armed conflict, should be defined as a war crime. It is unfortunate that most states parties have simply copied the distinction in the Rome Statute. However, some states parties have included a single conflict standard for all war crimes, including Bosnia-Herzegovina, Costa Rica, Georgia, Panama and Spain. In addition, some states have included a single-conflict standard with regard to selected war crimes under Article 8, including Argentina (Article 19 (1) (e) and (f)), Brazil (Article 87, in general terms) and Portugal (Articles 10 (1), 11, 12, 13, 14, 15 and 16).

Broader definitions of war crimes. Belgium has included several definitions of war crimes that are broader than those in the Rome Statute, including omitting the requirement in the Rome Statute that the crime of physical mutilation and medical and scientific experiments must cause death—they need only compromise health (Article 8, law of 5 August 2003, containing new Article 136 *quater* (1) (18) and (19)).

Similarly, in the DRC draft implementing legislation, the war crime of wilfully causing great suffering or serious injury to health refers not only to physical but also to mental integrity (Article 17, containing proposed Article 224 (1) (c) of the Penal Code). In addition, Article 17, containing draft Article 224 (5) (f) of the Penal Code, is broader than Article 8 (2) (e) (vi) of the Rome Statute, since it also mentions sexual harassment.

4. Other crimes under international law

Amnesty International is also concerned that national draft and enacted implementing legislation is replicating the limited scope of the Rome Statute in not adequately defining as crimes under national law other crimes under international law that do not amount to war crimes or crimes against humanity under the Rome Statute, such as individual cases of torture, extrajudicial execution and enforced disappearance. However, in a positive development, a number of states parties have included some of these crimes as crimes under national law in their implementing legislation or draft implementing legislation, including Bosnia-Herzegovina (torture and other cruel, inhumane or degrading treatment, Article 190), Ecuador (execution, Article 25; torture, Article 47; enforced disappearance, Article 79) and Mali (torture, Article 209).

B. General principles of criminal law

1. Weak principles of criminal responsibility

The principles of criminal responsibility applicable to crimes under international law in national legislation should be at least as strict as those in Part 3 of the Rome Statute (Articles 22-33). In particular, 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, to ensure that individuals who are indirectly involved in the commission of crimes under the Court's jurisdiction can be held criminally responsible.

However, certain principles of criminal responsibility in the Rome Statute are not in accordance either with customary or conventional international law or jurisprudence of international and internationalized courts: specifically, responsibility of commanders and other superiors (Article 28), superior orders (Article 33), and certain aspects of immunity based on official capacities (Article 98 (1)). It is of grave concern that states are incorporating these provisions of the Rome Statute by reference or copying them into national implementing legislation. Some other principles of criminal responsibility in the Rome Statute are susceptible of misinterpretation and should be interpreted in a manner that is consistent with other international law and the object and purpose of the Statute.

Command/superior responsibility. International law requires that all persons—commanders and superiors, whether military or civilian—in positions of responsibility are obliged to prevent their subordinates committing crimes under international law. Article 28 of the Rome Statute departs from customary international law, which imposes a single standard of criminal responsibility for both commanders and superiors by introducing different degrees of responsibility for military and civilian superiors in trials before the Court. Article 86 (2) of Protocol I, Article 6 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind, Article 7 (3) of the 1993 Statute of the International Criminal Tribunal for the former Yugoslavia, Article 6 (3) of the 1994 Statute of the International Criminal Tribunal for Rwanda and Article 6 (3) of the 2000 Statute of the Special Court for Sierra Leone all hold civilian superiors to the same strict standards as military commanders. Unfortunately, in a retrograde step, Article 28 of the Rome Statute distinguishes between command responsibility for military superiors, and superior responsibility for civilian superiors, excluding the provision that the latter "should have known" that subordinates were committing or were about to commit crimes.

Amnesty International is concerned that states are incorporating the distinction set out in Article 28 into draft or enacted implementing legislation, risking the creation of a two-tier system of criminal responsibility. States parties that have done so include Australia (Article 268.115 of the International Criminal Court (Consequential Amendments) Act 2002), Brazil

(Article 10 (III) (a)), Canada (Section 5), the DRC (Article 14), Ireland (Article 13), Malta (Article 54 (E) (2) and (3) of the Criminal Code, as modified by the ICC Act), New Zealand (Section 12 (1) (a) (vi)), Uganda (Section 19 (i) (iv)) and the UK (England, Wales and Northern Ireland Act, Section 65; Scotland Act, Section 5). Amnesty International recommends that instead of incorporating Article 28 into national implementing legislation, states should follow other international instruments and jurisprudence by requiring: i) that the same standards should apply equally to military and civilian superiors; ii) that the commander or superior knew, or should have known, that a subordinate was committing or was about to commit a crime; iii) that the commander or superior shall be held responsible for failing to take all feasible measures within his/her power; and iv) that the commander or superior shall be held responsible for failing to prevent or punish a subordinate from committing a crime.

In a positive development, several states parties (Bosnia-Herzegovina (Article 180), Ecuador (Article 17) and Panama (Article 1 modifying Article 405 of the Criminal Code)) have included the same standards for military and civilian superiors in their draft or enacted implementing legislation.

2. Impermissible defences and bars to prosecution

It is deeply troubling that some states are including impermissible defences, such as superior orders, or other bars to prosecution, such as immunities, in national implementing legislation. Defences should be no broader than those permitted in the Rome Statute and, in some cases, should be narrower to be consistent with international law. Official immunities should not be recognized for crimes under international law.

Superior orders or due obedience. Article 33 of the Rome Statute further departs from customary and conventional international law by providing for the first time in an international treaty that superior orders are a defence to war crimes in certain instances. Under customary international law, superior orders can be considered as a mitigating factor, but they are prohibited grounds for relieving criminal responsibility.[12] Article 8 of the Nuremberg Charter, which reflects customary international law, 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."

[12] Amnesty International, *The international criminal court: Making the right choices – Part I: Defining the crimes and permissible defences and initiating a prosecution*, AI Index: IOR 40/001/97, January 1997.

The prohibition of superior orders as a defence to crimes under international law has been incorporated in the Charter of the International Military Tribunal for the Far East, the Statute of the International Criminal Tribunal for the former Yugoslavia, the Statute of the International Criminal Tribunal for Rwanda and the Draft Code of Crimes against the Peace and Security of Mankind.

Amnesty International is concerned that in draft and enacted implementing legislation, states parties are adopting the impermissible defence of superior orders for war crimes that applies under the Rome Statute *only* to trials in the Court. Various states, including Australia (Article 268.116 of the International Criminal Court (Consequential Amendments) Act 2002), Brazil (Article 14), Canada (Section 14), New Zealand (Section 12 (1) (a) (xi)) and Uganda (Section 19) have included this impermissible defence (sometimes called the due obedience defence).

However, several states parties have acted consistently with customary and conventional international law and rejected the defence of superior orders for war crimes, including Belgium (Article 12, law of 5 August 2003, containing Article 136 *octies* (2) of the Penal Code), Bosnia-Herzegovina (Article 180), the DRC (Articles 12 and 13), Ecuador (Article 6) and the Republic of the Congo (Article 13). The penal code of Estonia includes a provision regarding offences committed "pursuant to the order of a representative of state powers or a military commander" for genocide, crimes against humanity and war crimes defined in its penal code, mentioning that punishment of the principal offender shall not be precluded, which necessarily entails criminal responsibility for subordinates (Paragraph 88 (2)). Malta has omitted this defence in the International Criminal Court Act 2002 and it does not appear in the Criminal Code. The UK has omitted this defence in its implementing legislation, but it is not entirely clear whether this defence is excluded in all other legislation or jurisprudence. Amnesty International is concerned, however, at the increasing number of states parties that have included this impermissible defence in their legislation or draft legislation.

Recognizing immunities for crimes under international law. The principles articulated in the Nuremberg Charter and Judgment, including the principles that heads of state may be held criminally responsible for crimes under international law and that official immunities do not apply to such crimes, have long been recognized as part of general international law. The fundamental rule of international law that heads of state and public officials do not enjoy immunity for genocide, crimes against humanity, war crimes and other crimes under international law has been consistently reaffirmed in international instruments for more than half a century.[13]

[13] See Amnesty International, *United Kingdom: The Pinochet case: Universal jurisdiction and the absence of immunity for crimes against humanity*, AI Index: EUR 45/001/99, January 1999; *Universal jurisdiction: Belgian court has jurisdiction in Sharon case to investigate 1982 Sabra and Chatila*

The principles of criminal responsibility of heads of state and other officials and the unavailability of official immunities for crimes under international law are included in *inter alia*: Article 6 of the Charter of the International Military Tribunal for the Far East (1946); UN General Assembly Resolution of 11 December 1946 (Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal); Article IV of the Convention for the Prevention and Punishment of the Crime of Genocide (1948); Principle III of the Principles of Law Recognized in the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal (1950); Article 3 of the UN Draft Code of Offences against the Peace and Security of Mankind (1954); Article III of the Convention on the Suppression and Punishment of the Crime of Apartheid; Article 13 of the 1991 Draft Code of Crimes against the Peace and Security of Mankind; Article 7 (2) of the 1993 Statute of the International Tribunal for the former Yugoslavia; Article 6 (2) of the 1994 Statute of the International Criminal Tribunal for Rwanda; Article 7 of the UN Draft Code of Crimes against the Peace and Security of Mankind adopted in 1996; and Article 27 of the Statute for the International Criminal Court.

These instruments articulate a customary international law rule and general principle of law applicable in any court—national, internationalized or international. Indeed, several of the international instruments adopted over the past half century were expressly intended to apply to national courts, including the 1945 Allied Control Council Law No. 10, the 1946 General Assembly resolution on the affirmation of the principles of international law recognized by the Charter of the Nuremberg Tribunal, the 1950 Nuremberg Principles prepared by the International Law Commission, the Draft Code of Offences against the Peace and Security of Mankind of 1954 and the 1991 and 1996 Draft Codes of Crimes against the Peace and Security of Mankind.

In addition, each of the international instruments establishing international criminal courts since the Second World War, including the Rome Statute, envisaged that the same rules of international law set out in those instruments applied equally to prosecutions by national courts.[14] As the Preamble, Article 1 and Article 17 of the Rome Statute make clear,

killings, AI Index: IOR 53/001/2002, May 2002; *Universal jurisdiction: Belgian prosecutors can investigate crimes under international law committed abroad*, IOR 53/001/2003, February 2003.

[14] Article 27 (Irrelevance of official capacity) of the Rome Statute incorporates this principle. It provides:

> "1. This Statute shall apply equally to all persons without any distinction based on official capacity. In 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, nor shall it, in and of itself, constitute a ground for reduction of sentence.

states have the primary responsibility to prosecute persons for crimes within the Court's jurisdiction in all cases, without exception. When states are unable or unwilling to do so, the Court can assert jurisdiction. The failure to investigate or prosecute a government official solely on the ground that the official enjoyed immunity in his or her own country would demonstrate an inability or unwillingness of the state to act.

It is, therefore, particularly troubling that many states are failing to fulfil their responsibilities and are instead recognizing official immunities as bars to prosecution in national courts for genocide, crimes against humanity and war crimes in their draft or enacted implementing legislation. In some instances, such legislation applies to officials from all states, including nationals of states parties. For example, Article 13 of the Belgian law of 5 August 2003, containing Article 1 *bis* of the Criminal Procedure Code, excludes the prosecution of foreign heads of state and government and ministers for foreign affairs (while they are in office) and other persons whose immunity is provided for in international law. Other draft or enacted legislation is silent on the question of recognition of official immunities, leaving it unclear whether such purported immunities could bar prosecutions in national courts (for example, Uganda (Section 19 (1) (a) (ix)) simply provides that any official immunities do not bar surrender to the Court). In other instances, immunities are recognized for these grave crimes only with respect to officials from non-states parties. However, a few states have acted consistently with their obligations under international law in their draft or enacted implementing legislation. Article 8 of the DRC draft law, in marked contrast to the position the DRC took in the International Court of Justice, excludes all immunities in prosecutions in national courts, even for crimes other than genocide, crimes against humanity and war crimes; while Article 9 of the Brazil draft states that "The exercise of a position or of an official, civil or military, function, does not exempt the offender from criminal liability, nor may it be, as such, a reason for reducing the sentence".

In other damaging provisions, some states seek to prevent the Court from determining whether immunities bar surrender (see Part II.C.7 below).

3. Procedural guarantees, including the right to fair trial

Under states' complementarity obligations, it is essential that they include satisfactory procedural guarantees in national implementing legislation, penal codes or procedural penal codes, both to ensure that the rights of all persons connected with a criminal investigation or trial in a national court be fully respected, and to ensure that the Court does not determine that the absence of such guarantees demonstrates inability or unwillingness genuinely to

2. Immunities 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."

investigate or prosecute crimes under international law. The procedural guarantees in the Rome Statute reflect the highest standards of fair trial guarantees in international law and should be used as a model by all states.

In addition, it is essential that states cooperating with the Court during a preliminary examination or an investigation respect certain procedural guarantees, such as those incorporated in Article 55 of the Rome Statute, in order to ensure that the Court can carry out its responsibilities effectively. To do otherwise than explicitly include the highest standard of procedural guarantees in national law runs the risk that an accused could be acquitted on the easily-avoidable ground of failure to ensure that the procedural rights of the accused or a crucial witness were fully respected.

Amnesty International is concerned that states are not satisfactorily including all of these standards in national implementing legislation and penal codes. Flaws in the current pattern of implementation indicate that states are failing to define adequately all fair trial guarantees. Amnesty International is particularly concerned with the inclusion of the death penalty as a penalty in some national implementing legislation (see below, Section 5), and with unsatisfactory implementation of Article 55.

Unsatisfactory definitions of fair trial guarantees. It is of grave concern that states are not adequately including all fair trial guarantees in the Rome Statute in their draft or enacted implementing legislation with respect to investigations and prosecutions in national courts, independently of their obligation to incorporate guarantees with respect to cooperation in Court investigations and prosecutions. Such guarantees are essential to ensure that complementarity under the Rome Statute is protected. If cases of genocide, crimes against humanity and war crimes were to be conducted without satisfactory fair trial guarantees, the possibility exists that the Court would be able to exercise its jurisdiction to retry the accused on the ground that the case demonstrated that the national court was unable or unwilling genuinely to investigate or prosecute. If states wish to preserve their ability to exercise their primary responsibility to investigate and prosecute crimes under international law in their national courts, they must ensure that fair trial guarantees are included in national law. Most states have not satisfactorily included all fair trial guarantees in their draft or enacted implementing legislation with respect to investigations and prosecutions in national courts.

Failure to follow Article 55 in national investigations. Article 55 acts as a mini-human rights convention for the earliest stages of criminal proceedings and it should apply to any person (not just a suspect) under investigation and, in certain circumstances, even before a formal investigation has been opened. As discussed below, it is essential that states incorporate Article 55 satisfactorily into national law as part of their obligation to cooperate fully with the Prosecutor of the Court in the investigation and prosecution of crimes (see Part II.C.5 below). It is also essential that the guarantees contained in Article 55 be guaranteed at the national level for those persons that are questioned solely with respect to a national investigation. By failing to extend the guarantees in Article 55 to all persons, not just those

being investigated by the Court, states risk creating a two-tier system of rights, thus denying the right to equality before the law recognized in Article 14 (1) of the International Covenant on Civil and Political Rights. Most states parties have failed to require that Article 55 guarantees for all persons apply to national investigations. Only one state party, the DRC, appears to have used Article 55 as a model for national investigations, but it has not included all of the Article 55 guarantees (Article 23 containing proposed Article 11 (1) and (2) of the Criminal Procedure Code).

In addition to guaranteeing the rights of suspects under Article 55, states parties should ensure that their implementing legislation explicitly includes that the rights of any person under investigation are respected. It is not sufficient that the judge is simply required to inform a person of their rights. All states should ensure that this provision is explicitly stated.

4. Political control over the decision to prosecute

Amnesty International is particularly concerned that some states are including the requirement of consent to prosecute by the Attorney General, a political official, in their national implementing legislation. These states include Australia (Article 268.121 of the International Criminal Court (Consequential Amendments) Act 2002), Canada (Section 9 (3) and (4)), Malta (Article 54 (I) (2) of the Criminal Code, as amended by the ICC Act), New Zealand (Section 13), UK (England, Wales and Northern Ireland Act, Sections 53 (3), 54 (5), 60 (3) and 61 (5)) and Uganda (Section 17). Although these states have argued that such consent is given in the Attorney General's role as a professional prosecutor, rather than as a political official, and is in keeping with common law doctrine, Amnesty International is concerned that such a requirement risks creating the perception that prosecution decisions in cases involving crimes under international law have been made for political reasons. Such a requirement should be excluded in all implementing legislation. Several states, including South Africa (Section 5) provide that the decision whether to prosecute a person for genocide, crimes against humanity or war crimes is to be made by a professional prosecutor.

5. Inclusion of the death penalty

Amnesty International is gravely concerned that a few states parties have included the death penalty as an applicable penalty for genocide, crimes against humanity and war crimes in their draft implementing legislation. Amnesty International considers 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. No state party should include the death penalty for genocide, crimes against humanity or war crimes in its implementing legislation.

Articles 77 and 78 of the Rome Statute set out applicable penalties and determination of sentence once the accused has been found guilty; these exclude the death penalty as a punishment. Article 77 provides that the maximum penalty the Court may impose is life imprisonment; it is inappropriate that national courts should impose a more severe penalty for a crime under international law than the one chosen by the international community itself. The Security Council excluded the death penalty for such crimes from the Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia, and it has been excluded for such crimes by internationalized courts.

Introducing the death penalty in implementing legislation for crimes under the Court's jurisdiction goes against the steady trend to abolish this punishment. More than half the countries in the world (118) have abolished the death penalty in law or practice[15] It is of serious concern that the DRC (Article 17, containing proposed Articles 221 and 222 of the Criminal Code), Mali (Article 32), the Republic of the Congo (Articles 2, 3, 5, 7, 8, 9 and 10) and Uganda (Sections 7 (3) (a), 8 (3) (a) and 9 (3) (a)) have all introduced the death penalty in their draft or enacted legislation.

6. Failure to include effective universal jurisdiction provisions

As demonstrated in the Amnesty International study of state practice at the international and national level in 125 countries,[16] all states may exercise universal jurisdiction over crimes under international law. In some cases, such as genocide, grave breaches of the Geneva Conventions and Protocol I and torture, they must do so if a person suspected of these crimes is present in the state, or they must extradite the suspect to a state able and willing to do so in a fair trial without the death penalty or surrender the suspect to an international court. Moreover, all states may act as agents of the international community to investigate crimes under international law and seek the extradition of persons suspected of such crimes against the international community to stand trial, even when the suspect is not present in the state.

Therefore, although many states parties are providing for universal jurisdiction in their implementing legislation or draft implementing legislation, it is a matter of great regret that only a few states appear to have attempted to provide for the broadest jurisdiction

[15] Amnesty International, *Abolitionist and retentionist countries* (available at: http://www.amnesty.org/pages/deathpenalty-countries-eng).
[16] *Universal jurisdiction: the duty of states to enact and implement legislation* (AI Index: IOR 53/002-018/2001), September 2001.

permitted under international law, including Germany, Finland and New Zealand. It is also a matter of serious concern that some states parties have failed to provide any universal jurisdiction over genocide, crimes against humanity and war crimes, and others, such as Ireland and the United Kingdom have omitted universal jurisdiction over certain crimes under international law or limited it to certain classes of persons, such as residents, thus providing safe havens for persons responsible for such crimes.

II. FAILURE TO IMPLEMENT COOPERATION OBLIGATIONS

The principle of complementarity set out in the Rome Statute can only be effective if all states that ratify the Statute fulfil their obligations to cooperate fully with the Court. These obligations are set out in the broad framework of cooperation contained within the Rome Statute, and are equally as important as the Statute's definitions of crimes, principles of criminal responsibility and defences and procedures. Satisfactory legislation that fully implements the obligation of each state party to cooperate with the Court is essential to ensure that when a state is unwilling or unable to pursue its primary responsibility to try an accused in national courts, or witnesses, evidence or assets of the accused are present in the state, the Court is able to fulfil its historic function with full cooperation by the particular state party.

It is of serious concern, therefore, that much draft and enacted implementing legislation deals unsatisfactorily, and in some cases not at all, with the question of cooperation. This trend risks undermining both the ability of the Court to function effectively, and the principle of complementarity on which it is based. Amnesty International is particularly concerned with three flaws in the current pattern of implementing legislation.

- *Failure to ratify and implement the Agreement on Privileges and Immunities of the International Criminal Court.* The Agreement on Privileges and Immunities entered into force on 22 July 2004. As of 23 August 2004, the Agreement has only 12 ratifications and 64 signatures.
- *Failure to provide for cooperation with the Court.* Amnesty International is concerned that some states parties are not including even the basic obligation to cooperate with the Court into their implementing legislation. In addition to the 58 states parties that are not known to have enacted any implementing legislation (see p. 1), nine states parties do not have any legislation on cooperation with the Court.[17] Fulfilling this obligation in national legislation is essential to ensure that national courts and authorities cooperate fully with Court orders and requests.
- *Failure to include effective cooperation provisions.* Amnesty International is concerned that where states parties have included the basic obligation to cooperate, they have often failed to include all of the specific obligations to cooperate in Articles 86 to 102 of the Rome Statute in an effective manner. Most states parties have also failed to include in their cooperation legislation provisions expressly requiring their authorities to cooperate with the Prosecutor under Article 18 (5) and (6) and Article 19 (8). It is essential for legislation to require national authorities to provide for the fullest possible cooperation with the Prosecutor, the Registry and the Pre-Trial and

[17] Bosnia-Herzegovina, Colombia, Costa Rica, Latvia, Mali, Serbia and Montenegro, Niger, Portugal and the Republic of the Congo.

Trial Chambers. States parties should not simply provide the minimum amount of cooperation during investigations and prosecutions required under Article 86, but should require national authorities to provide cooperation at all stages of the proceedings and in any manner requested by the Court. States parties should also seek to eliminate any procedural or substantial obstacles to the work of the Court. Failure to take these steps could result in an ineffective Court and impunity for the worst crimes known to humanity.

A. Agreement on Privileges and Immunities of the International Criminal Court

The limited number of states parties to the Rome Statute that have ratified the Agreement on Privileges and Immunities and the failure of other states to ratify it is of considerable concern. Under Article 48 of the Rome Statute, the Court shall "enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfilment of its purposes". The Agreement provides for appropriate protections and assurances in general, and specifically provides for the protection of Court staff, defence counsel, victims and witnesses during investigations. It is necessary because the Court is not covered by the 1946 Convention on the Privileges and Immunities of the United Nations and it has unique requirements in terms of protection for its premises, property, activities and persons connected to it.

As of 23 August 2004 only 12 states have ratified the Agreement on Privileges and Immunities (these are Norway, Trinidad & Tobago, Iceland, Austria, Namibia, France, New Zealand, Serbia and Montenegro, Slovakia, Canada, Mali and Panama). All states parties to the Rome Statute, as well as other states, should proceed with ratification of the Agreement as soon as possible, and should ensure all of its provisions are implemented, including with regard to communications, records, premises, property and evidence. As far as Amnesty International is aware, no states so far have implemented the Agreement on Privileges and Immunities in their legislation, although three states parties, Ecuador (Articles 113-114), Ireland (Section 59) and Uganda (Article 101 (3)), provide for the implementation of the Agreement in their draft implementing legislation.

B. Basic obligation to cooperate

Article 86 of the Rome Statute sets out states parties' general obligation to cooperate "fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court". This express general obligation 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 86 is mandatory language and as such should

be expressly included in all implementing legislation. It is of concern that several states parties have not expressly included this language in their draft or enacted legislation, including Denmark, Georgia, Ireland, Malta and Switzerland.

In addition, each state party should ensure that legislation requires its national authorities to cooperate fully and immediately 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 states parties have to fulfil and could lead to a finding of non-cooperation pursuant to Article 87 (7). At least one state has included a general provision suggesting that full cooperation is required, but it also has a number of provisions that do not go far enough (Article 4 of Belgian law of 29 March 2004 implicitly provides that in case of a conflict between the Rome Statute and national law, the former prevails). National authorities should be required to respond to requests from the Court fully and immediately. States parties that have included general obligations to cooperate in their draft or enacted implementing legislation include Ecuador (Article 133). Finland has provided that the provisions of the Rome Statute, "insofar as they are of a legislative nature, shall be in force as applicable law in accordance with the commitments of Finland" (Section 1 of Act No. 1284/2000), but this approach does not clearly indicate which provisions are of a legislative nature and it is not certain that Finland will ensure full cooperation in all instances.

The number of states parties that have not provided for national authorities to respond to requests from the Court fully and immediately in their draft or enacted cooperation legislation is a matter of serious concern. Although Article 94 of the Rome Statute permits states to postpone execution of a request for cooperation in cases of genocide, crimes against humanity or war crimes if it would interfere with a current national investigation prosecution, it requires that the delay be no longer than necessary to complete the investigation or prosecution. It is disappointing that a number of states have provided for such postponements in their legislation or draft legislation, even when the crimes are ordinary crimes. For example, Switzerland has provided in Article 43 (2) that the Central Service can delay the execution of a request for cooperation if its immediate execution could obstruct an investigation or a criminal prosecution in a different case, even if that case was not as serious as the one that was the subject of the request. In addition, federal states should ensure that states, provinces and other political divisions provide for full cooperation with the Court.

C. Specific obligations to cooperate

In addition to these broad concerns with the implementation of cooperation obligations, particular attention should be drawn to the following obligations.

1. International assistance under Articles 88 and 93

Article 93 of the Rome Statute spells out certain specific obligations on states parties in cooperating with the Court during investigations and prosecutions. However, states parties have other express and implicit obligations under the Rome Statute to cooperate, including their obligations under Article 64 (6) (b). In national implementing legislation, cooperation should be spelled out in these terms; it is of serious concern that several states have not satisfactorily implemented Article 93. No state appears to have expressly implemented its obligations under Article 64 (6) (b). Furthermore, Article 88 requires that state parties ensure that there are procedures under their national law for all forms of cooperation specified in the Rome Statute.

It is also a concern that almost every state party has taken a minimalist approach to cooperation with the Court and few have included provisions that go beyond the express requirements of the Rome Statute. If every state party were to take a minimalist approach to implementing its cooperation obligations, the effectiveness of the Court would be greatly reduced, leading in some cases to impunity. For example, states parties are not interpreting the basic obligation under Article 88 to "ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under . . . Part [9]" as requiring them to eliminate any "existing fundamental legal principle of general application" that might otherwise prohibit cooperation with the Court pursuant to Article 93 (3). This provision could pose a problem in states that prohibit the involuntary transfer (as opposed to the more limited procedure of extradition) of nationals outside the national territory if those states were to declare that this prohibition was an "existing fundamental legal principle of general application".

States parties are also failing to fulfil their obligation under Article 93 (1) (g) and (h) to facilitate investigations by the Prosecutor. States parties that have failed to implement this provision satisfactorily include Austria, Brazil (Articles 98 (III) (b) and 117 (b)), Denmark and Finland (Act No. 4/1994 Section 1 (2)).

2. Permitting the Court to sit in the state

The obligation to permit the Court to sit in the territory of states parties is contained in Article 3 (3) and Article 62. States parties that have failed to implement this provision expressly include Brazil, Canada, the DRC, Denmark, France, Georgia, Malta and Uruguay. Although Belgium has failed to implement this provision in its legislation, Conseil d'Etat has ruled that Article 3 (3) of the Rome Statute is self-executing.

3. On-site investigations

States parties should ensure that the Office of the Prosecutor and defence counsel are allowed to conduct investigations on the spot without being subject to delay or refusal by national authorities (Articles 54 (3), 54 (2), 57 (3) (d) and 99 (4)). States parties that have failed to implement this provision satisfactorily include Belgium (Article 32 of law of 29 March 2004), Brazil (Article 122), the DRC, Denmark, Spain, South Africa (Article 15) and Switzerland (Article 38).

4. Provision of national security information

States parties are obliged to provide information to the Court, even if it involves national security information, subject to the procedure outlined in Article 72. This leaves it up to the Court to make a final judicial determination whether the state party is complying with its obligations under that article and to the Assembly of States Parties (or, in the case of a Security Council referral, to the Security Council) to make a determination on what steps should be taken if the Court determines that the state has breached its obligations under the Rome Statute. Most states have not taken appropriate steps to ensure that determinations by the Court on this question will be enforced. The obligations of states under this article will be addressed in a different publication.

5. Rights during an investigation, including under Article 55

The Rome Statute guarantees all persons, including suspects and witnesses, extensive rights with respect to national authorities aiding the Court during an investigation. Article 55, in particular, acts as a mini-human rights convention. Unfortunately, a number of states parties have failed to incorporate Article 55 and other relevant guarantees in full in their draft or enacted legislation, including the DRC (see discussion above in Part I). The UK provides that a person being investigated or prosecuted pursuant to a request by the Court should not be questioned pursuant to that request unless he or she has been informed of his or her rights under Article 55 (England, Wales and Northern Ireland Act, Section 28 (2); Scotland Act, Section 12), but does not impose this requirement when the person is not a suspect.

6. Compulsion of witness to testify

States are obliged to assist the Trial Chamber when it has required the attendance and testimony of a witness pursuant to Article 64 (6) (b) prior to or during the trial, and to provide documents and other evidence. This obligation to assist the Court in compelling the attendance of witnesses and their testimony is supplemented by separate obligations in Article 93 (1) (b) (to assist in the taking and production of evidence), (c) (to assist in the questioning of persons being investigated or prosecuted) and (e) (to facilitate, independently of the Article 64 (6) (b) obligation, the voluntary appearance of persons as witnesses or experts before the Court), although it is subject to the exceptional rule in Article 93 (7) governing the specific case of temporary transfer of persons in custody to the Court. However, Article 93 (7) simply requires consent to transfer to the Court, it does not permit a witness in custody to avoid appearance before a national court assisting the Court or providing testimony by video conference.

It appears that only Finland (Sections 5 and 6, Act No. 1284/2000) has properly implemented Article 64 (6) (b). The UK provides that its courts have the same powers to request the attendance of witnesses whose testimony is requested by the Court as they have for the purpose of other proceedings before them (England, Wales and Northern Ireland Act, Section 29 (3) (a); Scotland Act, Section 13), but does not expressly state that the witness can be transferred to the seat of the Court. Ireland (Section 51 (3) to (6)) and South Africa (Sections 15 to 19) have somewhat similar provisions. The UK and South Africa permit witnesses to assert privileges under national law without expressly excluding national privileges not recognized by the Rome Statute or the Rules of Procedure and Evidence (UK, England, Wales and Northern Ireland Act, Section 29 (3) (a); Scotland Act, Section 13; New Zealand, Sections 82 to 88; South Africa, Section 17).

7. Immunities

States parties should ensure that officials have no discretion to refuse cooperation on the supposed ground that a suspect or an accused is immune. The Court itself should take decisions to determine whether any immunities for genocide, crimes against humanity or war crimes may exist (Article 27 and Article 98). As demonstrated above in Part I, no such immunity for heads of state, heads of government or foreign ministers exists for such crimes, either in national or international courts.

Therefore, it is a matter of deep concern that there are a number of provisions in some legislation in which certain states parties seek to prevent the Court from determining whether immunities bar surrender (Malta, Article 26S of the Extradition Act, as amended by the ICC Act: giving the Minister of Justice discretion to prevent proceedings for surrender against a

person with state or diplomatic immunity, after consultation with the state concerned and with the Court; UK, England, Wales and Northern Ireland Act, Section 23: permitting the Secretary of State, after consultation with the Court and the state concerned, to direct that surrender proceedings which would be prevented by state or diplomatic immunity attaching to the person not be taken). In some legislation, the executive authorities appear to have the discretion to refuse a request for surrender on the ground of purported immunities (Austria, Article 9 (1) (3) and (3): obliging the authorities to consult with the Court if a request would violate state or diplomatic immunity and leaving it to the discretion of the authorities to deny the request if the request is not satisfactorily altered; Switzerland, Article 6: Federal Council decides questions of immunities arising while a request is being executed; Uruguay, Article (1) (l): Executive Power is competent to decide questions of immunities arising when a request is being executed). One type of provision would permit a requested state party to delay surrender to the Court pending the outcome of a challenge under Article 98 (1) instead of requiring surrender pending the final determination of the challenge in the Court, thus possibly leading to prolonged delays (New Zealand, Section 66).

These provisions are based on a misunderstanding of the scope of Article 98 (1) of the Rome Statute. That paragraph, a political compromise designed to achieve agreement between a minority of states that pressed for the Rome Statute to recognize immunities for genocide, crimes against humanity and war crimes and the majority of states that rejected such immunities, expressly applies only to the Court itself, not to states, and leaves the determination of whether any immunities for genocide, crimes against humanity or war crimes exist solely to the Court. It provides only that

> "[t]he Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity".

The term "third State" is limited to states that are not parties to the Rome Statute and which have not made a declaration under Article 12 (3). This paragraph does not answer the question of whether there are any state or diplomatic immunities applicable to genocide, crimes against humanity, war crimes or other crimes under international law, but, as demonstrated above, in each instance when this issue was addressed in an international instrument prior to the adoption of the Rome Statute, immunities were expressly rejected in all cases. It is, therefore, difficult to believe that the drafters of the Rome Statute intended to reject half a century of practice.

8. Tracing, freezing, seizing and forfeiting assets of accused persons

Amnesty International is particularly concerned with the failure of several states parties to include effective provisions covering assistance in tracing, freezing, seizing and forfeiting the assets of accused persons. Such assistance is essential if the Court is to fulfil its obligations to victims, including the obligation to provide reparations through the Victims Trust Fund, and to increase the deterrent effect of convictions by combining imprisonment with the forfeiture of assets. The inadequacy of such provisions mirrors the flawed system of mutual legal assistance between states, which is one of the major weaknesses in the international system of cooperation in the investigation and prosecution of crimes under international law.[18]

Article 93 (1) (k) requires states parties to provide assistance in connection with an investigation and prosecution in the "identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture". Article 57 (3) (e) further authorizes the Court, once an arrest warrant 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". Article 93 (1) (k) makes clear that the Court has the authority to make requests for identification, tracing, freezing and seizure at any point in the investigation; Articles 75 (5) and 109 provide for such steps to be taken after a conviction. Article 77 (2) (b) states that the Court may order the forfeiture of proceeds, property and assets derived directly or indirectly from a crime as a penalty for that crime; Article 79 (2) authorizes the Court to order money and other property collected through fines or forfeiture to be transferred to the Victims Trust Fund.

States parties should ensure that national implementing legislation fully incorporates all of these provisions and is fully effective to permit national authorities to act immediately in response to requests by the Court to prevent electronic transfers and address the most recent developments in money-laundering and asset concealment. Such legislation should be supplemented by effective inter-state cooperation arrangements to prevent and trace cross-border transfers.

A number of states parties appear to have enacted or drafted comprehensive legislation with regard to assets. While it is a positive development that these states have done so, it is a matter of concern that much of the draft or enacted legislation has significant flaws. For example, some states, such as Malta (Article 12), Norway (Section 3) and the UK

[18] For a review of the serious problems in this system, which are still present despite recent developments at the regional level, such as the European Arrest Warrant, and the 2000 UN Convention against Transnational Organized Crime, see Amnesty International, *The International Criminal Court: Making the right choices – Part III – Ensuring effective cooperation*, AI Index: IOR 40/013/97, November 1997.

(England, Wales and Northern Ireland Act; Sections 37 and 38), give national authorities broad discretion to decide whether to comply with Court requests. Some states parties, such as Australia (Section 81 International Criminal Court Act 2002), Brazil (Article 117 (j)) and Georgia (Article 42) appear to limit their cooperation to assets that are the proceeds of crime, which would preclude states from securing other assets of an accused person for enforcing reparations orders. Other states parties, such as Uganda (Section 59 (6)), provide that the national courts will consider discharging or varying an order freezing or seizing assets; a decision which should be taken by the Court without interference from the state party.

In particular, states parties should ensure that full provision is made for assisting in identifying and tracing assets; a number of states parties have only provided for assisting in the freezing and seizing of assets, which does not fully meet the obligation of assistance under the Rome Statute. These states include Finland (Section 8, Act No. 1284/2000), Ireland (Part IV) and Malta (Article 4 (j)).

9. Sentences of imprisonment

Article 103 (3) (a) of the Rome Statute recognizes the principle that "States Parties should share the responsibility for enforcing sentences of imprisonment". However, the Rome Statute relies on the voluntary cooperation of states to enforce sentences of imprisonment. Amnesty International is concerned, firstly, that much national draft and enacted implementing legislation fails to make any provision for sentences to be served on the territory of states parties, thus leaving the host state, the Netherlands, the prospect of accepting most persons serving sentences imposed by the Court (Article 103 (4) of the Rome Statute). Secondly, where such provisions have been included, they often lack effective safeguards to ensure that these sentences are served in accordance with the highest standards of international law.

Failure to provide for enforcement of sentences by the Court. The Rome Statute does not provide for an international prison. Instead, Article 103 (1) (a) provides that sentences of imprisonment are to be served in states designated by the Court from a list of those states that have indicated their willingness to accept sentenced persons (which can include states that are not yet parties to the Rome Statute); Article 103 (1) (b) permits states to attach conditions to their acceptance provided that the conditions are in accordance with Part 10 of the Rome Statute and agreed to by the Court. Amnesty International urges all states to share the responsibility set out in Article 103 (3) (a) both by indicating to the Court that they are willing to enforce sentences, and by ensuring that national implementing legislation and procedures provide for the serving of sentences.

It is regrettable that so far, apart from the host state, only 11 states are known to have indicated their willingness to the Court to accept sentenced prisoners. At least 12 states parties have incorporated some provisions in their draft or enacted legislation concerning the

acceptance of sentenced prisoners, including Belgium (Article 35 of the law of 29 March 2004), Brazil (Chapter V), Croatia (Article 43), the DRC (Article 27, containing proposed Articles 121-1 and 121-2 of the Criminal Procedure Code), Denmark (Section 3), Finland (Section 7, Act No. 1284/2000,), France (Article 627-18 to 627-20 of the Criminal Code, as modified by law no. 2002-268), Malta (Sections 9 to 11), Netherlands (Part 3 of the International Criminal Court Implementation Act), New Zealand (Sections 139-149), South Africa (Sections 31 and 32), Spain (Article 22, law 18/2003), Switzerland (Article 53), UK (England, Wales and Northern Ireland Act, Sections 42 to 48; Scotland Act, Sections 23 to 26) and Uruguay (Article 22). However, much of this legislation is flawed in certain respects, as explained below. All states parties, should ensure that they share this responsibility and use implementing legislation to amend national laws in order to provide for the serving of sentences.

Failure to include effective safeguards regarding the enforcement of sentences. Articles 105 to 111 set out the conditions to which states must agree in enforcing sentences. These conditions reflect the highest standards of international law with regard to imprisonment; it is essential that all states incorporate these safeguards into national legislation to ensure that all persons convicted by the Court serve their sentences according to the same, internationally-recognized standards, regardless of which state enforces their sentences. These conditions also assert the primacy of the Court in matters of sentencing. Amnesty International is particularly concerned that states are not satisfactorily meeting the following obligations in their draft or enacted implementing legislation:

a) *Enforcement of sentence.* Article 105 sets out safeguards for states enforcing sentences and provides that "the sentence of imprisonment shall be binding on State Parties, who shall in no case modify it" and that the state of enforcement shall not "impede the making of [an] application [for appeal and revision] by a sentenced person." It is essential that all states include this safeguard in order to preserve the primacy of the Court in decisions of sentencing; it is of grave concern that several states, including Croatia, the DRC and Uruguay have failed to do so.

b) *Conditions of detention must fully satisfy the requirements of the Rome Statute and other international standards.* States should ensure that they fully implement Article 106, which provides for supervision of enforcement and conditions of imprisonment. In particular, Article 106 (1) and (2) requires that the enforcement of sentences and the conditions of imprisonment "shall be consistent with widely accepted treaty standards governing treatment of prisoners". In addition, independently of Article 106, states should ensure that all places of detention meet both treaty standards and the full range of other international standards concerning detention. States that have failed to implement some or all of the provisions of Article 106 include Brazil, Croatia, Georgia and Uruguay. In Belgium (Article 35 (3) of law of 29 March 2004), the conditions of detention are determined by Belgian law, but it is not specified that they have to be consistent with international standards, although this might be implicit. States should also ensure 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. States that have failed to include these provisions in their draft or enacted implementing legislation include Belgium, Croatia, Estonia, France, Malta and Uruguay.

c) *Legislation should provide for the transfer of persons on completion of sentence.* Article 107 sets out the conditions for transfer of a person after completion of a sentence in a state of which he or she is not a national, and outlines that the cost of transfer may be borne by the Court and that the state of enforcement may extradite or surrender the person. All states should include these provisions in their implementing legislation; they should also ensure that national legislation provides the person to be transferred with the opportunity to express his or her wishes, and provides for assisting the Court by bearing the expenses of transfer. It is a matter of concern that several states have not satisfactorily included this provision in their draft or enacted implementing legislation, including Belgium, Brazil, Croatia, the DRC, Denmark, France, Malta, Spain, South Africa, Switzerland and Uruguay.

d) *Legislation should provide for the right of the sentenced person to apply to the Court to be transferred from the state of enforcement.* This right is guaranteed by Article 104. It is essential that all states include this provision in their national implementing legislation; regrettably, a number of states, including Croatia, the DRC, Denmark, France, Georgia, South Africa, Spain, Switzerland and Uruguay, have not done so.

e) *Legislation should provide that there be no punishment, prosecution or extradition of a person in the custody of the state of enforcement for any conduct engaged in prior to delivery to that state, without the consent of Court.* This important limitation is set out in Article 108, which also states that the Court shall decide the matter after hearing the views of the sentenced person. All states should include this provision in their implementing legislation; it is of concern that several states, including Brazil, Croatia, the DRC, Denmark, France, Georgia, South Africa, Switzerland and Uruguay have not included this limitation.

f) *Legislation should provide for an effective national system of supervision of the conditions of imprisonment and agreement with the Court to supplement Court supervision.* Although there is no express requirement to establish any particular national system of supervision of conditions of imprisonment, states should establish an effective national system of supervision to supplement Court supervision. The Court will not be in a position to have day-to-day supervision, so an effective national supervision system must be in place to assist it. This should include national judicial scrutiny over prisoners serving Court sentences (and for those awaiting surrender).

10. Other measures

In addition to the above express obligations under the Rome Statute to cooperate and other cooperation steps mentioned above that states should take, it is disappointing that many states parties have failed to adopt other measures that are either implied obligations under the Statute or imperative if the Court is to be effective and fair. These other measures include:

a) Advising the Court in advance of specific requirements of its national law related to forms of assistance listed in Article 93 so that the Court can plan ahead with respect to the formulation of requests for assistance and can recommend reform of national law and practice that might prevent or impede full cooperation before a problem arises requiring consultation under Article 96 (3).

b) Expressly requiring their authorities to cooperate with the Prosecutor when he or she takes measures pursuant to Article 18 (5) and (6) and Article 19 (8).

c) Establishing a transparent process for the nomination of judges and the Prosecutor, involving broad consultation with civil society. One state party, Croatia, has included such a provision in its implementing legislation, requiring a public announcement calling for nominations and the government to "conduct the procedure in a manner which will ensure its transparency, the possibility for the governmental and non-governmental expert and humanitarian bodies to give statements, as well as for the application of highest expert and moral criteria" (Article 45). All other states parties should include similar provisions in their legislation.

11. Failure to include training programs

At the same time that states parties begin drafting implementing legislation, they should start to develop and implement effective programs of public education and training for officials on the implementation of the Rome Statute. The lack of effective national training programs has contributed to refusals to implement requests by the International Criminal Tribunals for Rwanda and the former Yugoslavia.

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

particular, as several states are now doing, all states should update their military manuals to incorporate appropriate references to the Rome Statute.

CONCLUSION

States parties are finally beginning to enact legislation with a view towards implementing their obligations under the Rome Statute, or to draft such legislation. However, more than six years after the Rome Diplomatic Conference, only 19 states parties have enacted legislation designed to fulfil both their complementarity obligations and their cooperation obligations; nine have done so with regard to their complementarity obligations and eight with regard to cooperation. Only 12 states have ratified the Agreement on Privileges and Immunities and none of these states has yet implemented it. This regrettable record means that the Court will be operating under a serious handicap as it begins its first two investigations since victims, witnesses, evidence, suspects and accused and assets will be located in states that have not provided the necessary legal framework for the Registry, Office of the Prosecutor and other organs of the Court to operate effectively. In addition, as indicated in this paper, much of the legislation is seriously flawed in a number of respects.

The lack of effective implementing legislation for the Rome Statute and the Agreement on Privileges and Immunities is becoming an increasingly pressing problem for the Court and international justice. Amnesty International urges the Assembly of States Parties to renew and strengthen its call to all states parties to the Rome Statute that have not yet done so to enact effective implementing legislation fulfilling both their complementarity and cooperation obligations, and to urge all states that have not yet done so to ratify and to implement effectively the Agreement on Privileges and Immunities. In addition, the Assembly of States Parties should urge states parties that have not yet enacted implementing legislation for the Rome Statute or the Agreement on Privileges and Immunities to draft such legislation in a transparent process involving broad consultation with civil society.

Amnesty International recommends that the Assembly provide adequate resources to its Secretariat to monitor the status of implementation in states parties and states in the process of ratification and to publish regular reports on the progress of legislation. Amnesty International also recommends that the Assembly provide adequate resources to the Secretariat to establish technical assistance projects using independent legal experts for states implementing the Rome Statute, and that the Assembly directly calls on states parties and states that are in the process of ratifying to adopt effective implementing legislation as soon as possible.

APPENDIX: DRAFT AND ENACTED IMPLEMENTING LEGISLATION, PENAL CODES AND PENAL PROCEDURE CODES CURRENTLY AVAILABLE

Argentina: Proyecto de Ley de implementación del Estatuto de Roma de la Corte Penal Internacional, 2004, <http://web.amnesty.org/web/web.nsf/pages/int_jus-legislation_argentina-eng/$FILE/int_jus-argentinadraft2004.pdf >

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