

# Implementing the Rome Statute of the International Criminal Court

Ratification, Implementation and Co-operation

## Case Matrix Network

The Case Matrix Network ('CMN') provides knowledge-transfer and capacity development services to national and international actors in the fields of international criminal and human rights law. We seek to empower those working to provide criminal accountability for violations of core international crimes and serious human rights violations, by providing access to legal information, legal expertise and knowledge tools. The CMN is a department of the Centre for International Law Research and Policy ('CILRAP'), which is an international non-profit organisation, registered in Belgium.

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# 1

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# 1. Introduction

## 1.1. The significance of implementing legislation

Adopted in 1998, the Rome Statute of the International Criminal Court<sup>1</sup> ('ICC') established the first permanent international criminal court with jurisdiction over core international crimes: genocide, crimes against humanity, war crimes and aggression. It also created an international criminal justice system, with the ICC at its centre.

A court of 'last resort', the ICC is governed by the principle of complementarity,<sup>2</sup> and can only intervene when national courts are deemed to be 'unwilling' or 'unable' genuinely to deal with a case.<sup>3</sup>

Consequently, for the system to function, State Parties need to incorporate elements of the ICC Statute into their respective national legal systems: a process known as 'implementation'. The dual purpose of enacting national implementing legislation is (1) to empower States to cooperate with the Court; and (2) to enable States to exercise primary jurisdiction over the core international crimes, thereby giving meaning to complementarity.

## 1.2. Purpose

At the time of writing, a little over half of the 124 State Parties have legislation covering core international crimes and less than half of these have legislation regulating cooperation with the ICC.

The Guidelines have been developed with the aim of providing guidance for national legislators and policy-makers, as well as criminal justice practitioners, researchers and academics, who wish to gain an in-depth understanding of the approaches that are available to States in the implementation process.

Using the ICC Statute as a starting point, the Guidelines discuss a number of approaches regarding its incorporation into national legislation and cover both substantive provisions and the ICC cooperation regime.

The purpose of this publication is to enable relevant stakeholders to:

- Make an informed choice on the method of incorporating core international crimes provisions into their national legislation;
- Identify the challenges of the implementation process;
- Understand the legal elements that need to be implemented;

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<sup>1</sup> ICC Statute.

<sup>2</sup> *Ibid.*, Art. 1.

<sup>3</sup> *Ibid.*, Art. 17.

- Identify national provisions and highlight the various approaches;
- Guide the national legislators through the implementation process;
- Facilitate the implementation process.

### 1.3. Methodology

The Guidelines follow a thematic approach; nevertheless, a decision had to be made as to the order in which the themes are presented. This order does not imply judgement by order of significance. A number of options were, therefore, available. Distinguishing either between important and less important concepts, or focusing on the chronological sequence that the issues arise before the ICC or before national courts were considered.

The Guidelines follow the order the provisions appear in the ICC Statute and do not prioritise certain issues over others. However unorthodox this approach might seem, it offers a distinct advantage. It allows the reader to identify which Statute articles have been widely implemented and which have not.

The approach taken is also dictated by the fact that there is no uniform method of implementation. Some laws follow the Statute, whereas others tackle the issues as they are likely to arise in practice or as they would have arisen, had this been a purely domestic law process. At the end of each section implementation notes have been added for guidance. A complete implementation checklist can also be found in the final section of the Guidelines.

The Guidelines present the elements of the ICC Statute that ought to be incorporated into national legal frameworks. Examples are drawn from States that have implemented it in a single act, by amendment, through the use of a model law, or through a combination of these approaches. Further, examples are drawn from States that adhere to common law, civil law, and mixed legal systems.

The examples used in the present Guidelines are indicative and no value judgement is intended. Moreover, they are not exhaustive; a selection is made among various approaches. The value of this method is to shed some light on what is expected to be incorporated by virtue of the Statute and the responses of a selection of States to these challenges. Ultimately, some guiding principles emerge and these will be summarised at the end.

The comparative examples that form the basis of the Guidelines, have been identified through the National Implementing Legislation Database (NILD)<sup>4</sup> and the Cooperation and Judicial Assistance Database (CJAD).<sup>5</sup>

National provisions are presented alongside selected international jurisprudence and relevant academic writings.

<sup>4</sup> 'National Implementing Legislation Database'.

<sup>5</sup> 'Cooperation and Judicial Assistance Database'.

## 1.4. Structure

**Section 1** discusses the purpose, methodology and structure of the Guidelines.

**Section 2** explores some challenges that may arise during the implementation process, such as the timing of implementation, the complexity of the task and difficulties inherent in the differing legal systems.

**Section 3** covers compatibility considerations at the national level, such as the necessity of having domestic provisions in place, potential time constraints regarding when States ought to review national legislation and the options available to them when doing so.

**Section 4** examines core international crimes provisions, focusing on the international norms and on examples from different jurisdictions.

**Section 5** analyses how the jurisdictional provisions of the ICC Statute have been implemented.

**Section 6** discusses general principles of criminal law, as found in the ICC Statute, and their national implementation.

**Section 7** examines the implementation of the penalties provision.

**Section 8** touches on the issue of victims' rights and reparations, with a particular focus on the Trust Fund for Victims.

**Section 9** examines the implementation of the provisions relating to the offences against the administration of justice.

**Section 10** covers the implementation of provisions regulating international cooperation and judicial assistance.

**Section 11** provides guidance on the implementation of the Agreement on Privileges and Immunities of the International Criminal Court.

**Section 12** presents the conclusions and includes a checklist on ICC Statute implementation.

**Section 13** contains a complete list of sources used, including national legislation, international jurisprudence and academic sources; where possible, materials have been included in the ICC Legal Tools Database, facilitating open access.

## 1.5. Glossary of key terms and acronyms

**CJAD:** Cooperation and Judicial Assistance Database.

**Complementarity:** principle found in the 10th preambular paragraph, Articles 1 and 17 of the ICC Statute.

**Cooperation:** part IX of the ICC Statute.

**De facto:** in fact, whether by right or not; actual.

**De jure:** according to law.

**Elements of Crimes:** document relating to genocide, crimes against humanity, war crimes and aggression, adopted by the Assembly of the States Parties to the Rome Statute to assist in the interpretation and application of Articles 6, 7 and 8.

**IAC:** international armed conflict.

**ICC:** International Criminal Court.

**ICTR:** International Criminal Tribunal for Rwanda.

**ICTY:** International Criminal Tribunal for the former Yugoslavia.

**Implementation:** adoption of legislation incorporating the ICC Statute provisions into domestic law.

**NIAC:** non-international armed conflict.

**NILD:** National Implementing Legislation Database.

**PTC:** Pre-Trial Chamber.

**Punishable acts:** list of acts or omissions criminalised in the ICC Statute provisions.

**TC:** Trial Chamber.



# 2

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## 2. Challenges of Implementing the ICC Statute

### 2.1. Obstacles

Implementation takes time. Reviewing the compatibility of national provisions with international standards is not an easy task. Drafting and passing implementing legislation on substantive international criminal law and procedure is a complex and often protracted process. It requires expert knowledge and resources, which many States lack. International criminal law implementation is an unfamiliar and challenging process for most drafters of domestic legislation. These challenges are further exacerbated in less well-resourced jurisdictions, including post-conflict or transitioning States, where a lack of political will, legal expertise, institutional capacity, and a shortage of actors within the criminal justice system coupled with a potentially overwhelming number of crimes falling within the jurisdiction of the ICC, may be present. Such States often have access to a limited number of qualified drafters, lack funding and have an institutional infrastructure destroyed or impaired as a consequence of armed conflict. Moreover, ICC implementation may not be prioritised over legislation regulating more pressing domestic issues.

Besides political will, the absence of which may be difficult to overcome, the most common hurdles to national implementation of the ICC Statute are (1) the type of legal system, (2) potential conflicts with constitutional guarantees and (3) the presence in pre-existing national legislation of: (a) statutes of limitations and (b) immunities. Such obstacles ought to be reviewed and removed in order to allow for the investigation and prosecution of core international crimes by national authorities.

### 2.2. Legal system

The type of legal system a State follows may influence the manner in which international criminal law is incorporated. In monist legal systems – where the domestic and international legal systems are viewed as a single, integrated whole – the self-executing provisions of international agreements ratified by that State would apply directly in national law and would prevail over any conflicting domestic provisions.<sup>6</sup> Conversely, in dualist legal systems – which view the international and domestic legal systems as separate entities – specific incorporating legislation is required to enable international treaty application at the domestic level. As most States are neither purely monist nor purely dualist, and given that implementation is required in order to give effect to elements of procedure, such as specifying the competent national authority to execute cooperation requests, enacting legislation is both common and preferable.<sup>7</sup>

6 Olympia Bekou and Sangeeta Shah, “Realising the Potential of the International Criminal Court: The African Experience”, in *Human Rights Law Review*, 2006, vol. 6, no. 3, p. 499, at p. 503.

7 For instance, the Netherlands follows the monist legal tradition but implemented the ICC Statute – crimes and cooperation regime – through three separate pieces of legislation.

### 2.3. National constitutions

Another consideration is the elevated status national constitutions occupy within domestic legal orders. Certain constitutional guarantees often conflict with international criminal law provisions and this can represent a major obstacle to legal reform.<sup>8</sup> These include the prohibition of extradition of a State's own nationals typically found in civil law countries,<sup>9</sup> the absence of life imprisonment in the constitutions of some States,<sup>10</sup> the absence of a jury at international courts or tribunals,<sup>11</sup> the role of amnesties or pardons.<sup>12</sup>

The most common obstacles in harmonising national laws with international criminal law provisions are statutes of limitations and immunities. Given that the ICC Statute departs from the approach traditionally taken in the national laws of many States, their implementation warrants further examination and will be discussed in more detail in Section 6.2.

8 Venice Commission, Report on Constitutional Issues raised by the Ratification of the Rome Statute of the International Criminal Court, 15 January 2001; Venice Commission, Second Report on Constitutional Issues raised by the Ratification of the Rome Statute of the International Criminal Court, Supplement to the CDL-INF (2001)001 Report, 4 November 2009.

9 Venice Commission Report (2001), *ibid.*, p. 6 et seq.

10 *Ibid.*, p. 8.

11 *Ibid.*, p. 10.

12 *Ibid.*, pp. 9-10.





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# 3. Review of Implementation Approaches

## 3.1. Implementing the ICC Statute – Why?

Genocide, crimes against humanity, war crimes and aggression carry a certain stigma that cannot be captured if treated as ordinary crimes.

Ordinary criminal law is not always suitable to prosecute conducts amounting to core international crimes. For example, some forms of persecution may not be covered by ordinary criminal law provisions; similarly, a number of war crimes provisions do not have a national law equivalent. States ought to incorporate such crimes into domestic law, regardless of ICC membership.

Moreover, if a State is under an international obligation to cooperate with the Court, the availability of procedures under national law – an obligation under the Statute – would enable it to cooperate with the Court.<sup>13</sup>

In light of complementarity, the ICC can only be seized of jurisdiction if the national courts of a State are ‘unwilling or unable’ genuinely to investigate or prosecute;<sup>14</sup> States continue to have the primary role in the fight against impunity.<sup>15</sup> Therefore, criminalising ICC crimes at the national level and enabling cooperation with the ICC is vital to the functioning of the international criminal justice system.

## 3.2. Implementing the ICC Statute – When?

The ICC Statute does not specify when – or indeed how – its provisions ought to be implemented. A margin of discretion is therefore afforded to this end. However, since the entry into force of the Statute on 1 July 2002, ICC State Parties are under an obligation to cooperate with the Court. As a result, should a State without legislation be requested by the ICC to execute a cooperation request – an arrest and surrender, for example – it risks violating the general obligation to cooperate with the Court found in Article 86 of the ICC Statute.

In practice, most States ratify the Statute before implementing the relevant provisions thereof. However, the **United Kingdom**,<sup>16</sup> the **Philippines**,<sup>17</sup> **Australia**,<sup>18</sup> **Canada**<sup>19</sup> and **Finland**<sup>20</sup> are examples of States that implemented the ICC Statute prior to ratifying it. The

<sup>13</sup> ICC Statute, Art. 88. Given that the ICC does not have its own police force to arrest suspected criminals or collect evidence, among other enforcement tasks, it depends solely on State authorities to function effectively.

<sup>14</sup> ICC Statute, Arts. 1 and 17.

<sup>15</sup> ASP, “Resolution ICC-ASP/8/Res.9”.

<sup>16</sup> The UK enacted the *International Criminal Court Act 2001* on 11 May 2001 and ratified the ICC Statute on 4 October 2001.

<sup>17</sup> The Philippines enacted the *Philippine Act on Crimes against International Humanitarian Law, Genocide, and Other Crimes against Humanity* on 11 December 2009 and ratified the ICC Statute on 30 August 2011.

<sup>18</sup> Australia enacted the *International Criminal Court Act 2002* on 28 June 2002 and ratified the ICC Statute on 1 July 2002.

<sup>19</sup> Canada enacted the *Crimes against Humanity and War Crimes Act* on 29 June 2000 and ratified the ICC Statute on 7 July 2000.

<sup>20</sup> Finland passed *Act No 1284/2000 on the implementation of the provisions of a legislative nature of the Rome Statute of the International Criminal Court and on the application of the Statute* on 28 December 2000 and ratified the ICC Statute the following day.

latter approach has some advantages. By implementing the ICC Statute first – and ratifying later – a State is able to execute any cooperation requests originating from the Court immediately upon ratification. Moreover, if crimes under the jurisdiction of the Court were to be committed, the first step towards applying complementarity has already been taken, bringing the primacy of national courts a step closer.

### 3.3. Implementing the ICC Statute – How?

The manner in which international norms are to be incorporated into domestic law is often prescribed in the international instrument whose incorporation is sought. It is generally also dictated by the approach the national system takes towards international law. Whilst substantive international criminal law provisions are complex, the ICC Statute does not prescribe a particular implementation approach, thereby affording States wide discretion when it comes to implementation.

The following section will explore differing approaches followed by States that have enacted national legislation incorporating (at least part of) the ICC Statute into their national legal frameworks.

#### 3.3.1. The single act approach

Drafting a single, comprehensive piece of legislation covering all relevant provisions to be implemented is the first option available. This approach presents certain advantages. A single, all-encompassing act addressing all relevant matters creates one point of reference for legal actors in search of information on matters of international criminal justice at the national level. Several States have followed this method, including *Uganda*,<sup>21</sup> *Samoa*<sup>22</sup> and *Ireland*.<sup>23</sup>

#### 3.3.2. The amendment approach

An alternative approach is to incorporate the relevant elements into pre-existing legal frameworks by amending criminal law and criminal procedure codes/acts. This method can be useful where national legislation already covers some elements – typically some of the core international crimes – and can therefore be amended to incorporate further aspects without the need for significant re-drafting. A number of States had already criminalised genocide and war crimes by incorporating the Genocide Convention<sup>24</sup> or the four Geneva Conventions.<sup>25</sup> *Norway*,<sup>26</sup> *Senegal*<sup>27</sup> and *Spain*<sup>28</sup> followed this approach, revising their respective

21 [International Criminal Court Act 2010](#), 25 June 2010.

22 [International Criminal Court Act 2007](#), 9 November 2007.

23 [International Criminal Court Act 2006](#), 31 October 2006.

24 [Convention on the Prevention and Punishment of the Crime of Genocide](#), adopted by Resolution 260 (III) A of the United Nations General Assembly, 9 December 1948.

25 [Geneva Convention \(I\) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces in the Field](#) (adopted 12 August 1949, entered into force 21 October 1951) 75 UNTS 31; [Geneva Convention \(II\) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea](#) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85; [Geneva Convention \(III\) relative to the Treatment of Prisoners of War](#) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135; [Geneva Convention \(IV\) relative to the Protection of Civilian Persons in Time of War](#) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287.

26 [Lov om straff \(Act on Punishment\)](#), 20 May 2005.

27 See, e.g., [Loi n° 2007-02 du 12 février 2007 modifiant le Code pénal](#), 12 February 2007.

28 See [Ley Orgánica 15/2003, de 25 noviembre, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre del Código Penal](#), 25 November 2003.

criminal legislation to incorporate additional elements including – but not limited to – crimes against humanity and the crime of aggression.

### 3.3.3. The model approach

The Commonwealth Secretariat,<sup>29</sup> the South African Development Community<sup>30</sup> and the League of Arab States,<sup>31</sup> among others, have attempted to prepare model laws to aid ICC implementation. They provide a template that States may use in drafting their own national implementing legislation. However, although such model laws may prove useful in highlighting particular issues, they inevitably need to be adjusted to a greater or lesser extent, as they cannot cover all aspects of a State's legal system. **Samoa** is one State that has chosen to utilise the model approach for its ICC legislation.<sup>32</sup>

### 3.3.4. The combination approach

The above-mentioned approaches are not mutually exclusive. Indeed, a combination of the said approaches can be followed by States when incorporating international criminal law norms. For example, **Canada** enacted both a new, specific piece of legislation to incorporate the core international crimes into Canadian law while also amending its existing extradition legislation to implement the ICC cooperation regime.<sup>33</sup>

## Implementation notes

- ▶ Identify implementation challenges within a specific legal context:
  - Review the current legal framework;
  - Identify particularities linked to the type of legal system;
  - Identify potential constitutional challenges.
- ▶ Choose the implementation approach or combination of approaches most suitable to the legal system.

<sup>29</sup> Commonwealth Secretariat, "International Criminal Court (ICC) Statute and implementation of the Geneva Conventions", *Commonwealth Law Bulletin*, 2011, vol. 37, no. 4, pp. 683-738.

<sup>30</sup> Reproduced in Sivu Maqungo, "The establishment of the International Criminal Court: SADC's participation in the negotiations", *African Security Review*, 2000, vol. 9, no. 1, pp. 51-53.

<sup>31</sup> Arab Justice Ministers Council, "Model Law Project on crimes within the jurisdiction of the ICC", for more information see OSF, "The League of Arab States: Human Rights Standards and Mechanisms", 2015. See Mohamed M. El Zeidy, "Egypt and Current Efforts to Criminalize International Crimes", in *International Criminal Law Review*, 2005, vol. 5, no. 2, p. 247, at p. 256 *et seq.*

<sup>32</sup> See *supra* note 22.

<sup>33</sup> See *supra* note 19.

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## 4. Core International Crimes

The decision to implement the crimes listed under Article 5 of the ICC Statute – genocide, crimes against humanity, war crimes, and aggression – remains at the discretion of the State. The same holds true with regard to defences and modes of responsibility, among other provisions. However, in order for a State to be able to investigate or prosecute crimes under its jurisdiction, it is highly advisable that States adequately incorporate core international crimes into their national legal systems.

During the implementation process, States can benefit from examples of the laws of other States. National legal systems often share common features such as Commonwealth States or States from the same geographic region. It may even be advisable for a State to consult legislation enacted by another State, as legislation that has been in force for a number of years is likely to have been subject to scrutiny and possibly even amended accordingly.<sup>34</sup>

Following the adoption of the Genocide Convention,<sup>35</sup> the four Geneva Conventions and Additional Protocols I and II,<sup>36</sup> a number of States had already incorporated genocide and war crimes – to a lesser or greater extent – into their respective national legal frameworks prior to ratifying the ICC Statute.<sup>37</sup> Owing to the absence of a crimes against humanity convention, crimes against humanity had not been widely criminalised at the domestic level prior to the entry into force of the ICC Statute.<sup>38</sup>

A definition for the crime of aggression was adopted at the Kampala Review Conference.<sup>39</sup> Given that the 30th ratification of the amendment was deposited in June 2016, the ICC will be able to exercise jurisdiction over this crime in the course of 2017.<sup>40</sup>

### 4.1. Methods of implementation in national practice

When implementing ICC crimes, most States have been inclined to follow one of two approaches: (1) replicating the wording of Articles 6, 7 and 8 of the ICC Statute *verbatim* or (2) making direct reference to the relevant provisions. Both approaches carry two important

34 See Olympia Bekou, “Regionalising ICC Implementing Legislation: A Viable Solution for the Asia-Pacific Region?”, in Neil Boister and Alberto Costi (eds.), *Regionalising International Criminal Law in the Pacific*, New Zealand Association for Comparative Law, Wellington, 2006, p. 137.

35 See *supra* note 24.

36 See *supra* note 25; Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3; Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609.

37 For example, Denmark criminalised genocide at the national level in its *Lov nr. 132 af 29.04.1955 om straf for folkedrab (Act No. 132 of 29 April 1955 concerning the punishment of genocide)* 29 April 1955. In a similar vein, Uganda incorporated the 1949 Geneva Conventions into its national law through the *Geneva Conventions Act 1964*, 3 October 1964.

38 See Leila N. Sadat (ed.), *Forging a Convention for Crimes against Humanity*, Cambridge University Press, 2014. See also *Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity*. At its 66<sup>th</sup> session, the International Law Commission (ILC) added the topic of crimes against humanity to its work programme, appointing Professor Sean D. Murphy as Special Rapporteur. See ILC, ‘Report on the Work of its sixty-sixth session (5 May to 6 June and 7 July to 8 August 2014)’ UN Doc A/69/10, p. 265. The Special Rapporteur’s second Report was published in January 2016. For more information see: Sean D. Murphy, *Second Report on Crimes against Humanity*, (A/CN.4/690), 21/01/2016.

39 See *Amendment to the Rome Statute of the International Criminal Court, Adoption of amendment of Article 8*, Kampala, 10 June 2010.

40 ‘State of Palestine becomes the thirtieth State to ratify the Kampala amendments on the crime of aggression’, 29 June 2016.

advantages. First, these methods demand relatively few resources and little expert knowledge of international criminal law. This is particularly useful for under-resourced jurisdictions. Second, by repeating the provisions of the ICC Statute – or making explicit reference thereto – the likelihood that the Court might exercise its jurisdiction because of an inaccurate implementation of the ICC crimes is considerably reduced, if not eliminated.<sup>41</sup> As the methods for implementation of the ICC crimes are not strictly prescribed, States can replicate the Statute in addition to making reference thereto.

#### 4.1.1. The replication method

The ‘replication method’ has been followed by a number of States, including **South Africa**, which repeats Articles 6, 7, and 8 of the ICC Statute *verbatim* in its implementing legislation.<sup>42</sup> The absence of a multilateral agreement on crimes against humanity similar to the Genocide Convention and Geneva Conventions has led a number of States to follow the replication method with regard to the crimes listed under Article 7 of the ICC Statute. An example of this is **Trinidad and Tobago**.<sup>43</sup>

Other States to broadly follow the replication method include **Kenya**,<sup>44</sup> **Mauritius**,<sup>45</sup> **Australia**,<sup>46</sup> **New Zealand**<sup>47</sup> and **Malta**,<sup>48</sup> all of which append the relevant provisions of the ICC Statute related to core international crimes to their implementing legislation as schedules thereto. **Belgium**<sup>49</sup> and **Georgia**<sup>50</sup> also follow the replication method.

#### 4.1.2. The reference method

Many other ICC State Parties utilise the ‘reference method’, directly referring to the relevant provisions of the ICC Statute when proscribing core international crimes in their national law. For example, the **United Kingdom** incorporates the ICC crimes of genocide, crimes against humanity and war crimes as follows:

Meaning of “genocide”, “crime against humanity” and “war crime”

(1) In this Part— “genocide” means an act of genocide as defined in Article 6, “crime against humanity” means a crime against humanity as defined in Article 7, and “war crime” means a war crime as defined in Article 8.2.

(2) In interpreting and applying the provisions of those Articles the court shall take into account— (a) any relevant Elements of Crimes [...].<sup>51</sup>

41 Bekou and Shah, 2006, see *supra* note 6, p. 509.

42 Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. The South African implementing legislation is an example of the single act approach, incorporating crimes and cooperation into national law by way of a single piece of legislation. See Max du Plessis, “South Africa’s Implementation of the ICC Statute: An African Example”, in *Journal of International Criminal Justice*, 2007, vol. 5, no. 2, p. 460.

43 International Criminal Court Act, 21 February 2006, section 10(2)(k).

44 International Crimes Act 2008, 24 December 2008.

45 International Criminal Court Act 2011, 26 July 2011.

46 See *supra* note 18.

47 International Crimes and International Criminal Court Act 2000, 6 September 2000.

48 International Criminal Court Act, 13 December 2003.

49 Act of 5 August 2003 on Serious Violations of International Humanitarian Law, Art. 136ter.

50 Criminal Code of Georgia, 1999.

51 See, *supra* note 16, ICC Act 2001 which gives effect to the ICC Statute in the law of England, Wales, and Northern Ireland, Art. 50. The International Criminal Court (Scotland) Act 2001, 24 September 2001, internalises the ICC Statute in Scotland, which operates according to a separate legal system.



By adding the second paragraph, making reference to the Elements of Crimes, which are designed to assist the ICC in the interpretation and application of Articles 6, 7, and 8 of the ICC Statute,<sup>52</sup> the United Kingdom ensures that these three crimes currently under the jurisdiction of the ICC are fully implemented in its national law.<sup>53</sup>

The **Republic of Korea** also adopts this approach, which empowers its domestic courts to have recourse to the ICC Elements of Crimes as follows:

Where necessary for the purposes of Articles 8 through 14, the elements of crimes adopted by the Assembly of States Parties to the Statute of the International Criminal Court on September 9, 2002, may be taken into consideration in accordance with Article 9 of the Statute of the International Criminal Court.<sup>54</sup>

Other States that follow the reference approach are: **Austria**,<sup>55</sup> **Ireland**,<sup>56</sup> **Samoa**<sup>57</sup> and **Uganda**.<sup>58</sup>

The reference method offers clarity and ensures comprehensive coverage.

## 4.2. Art. 6: Genocide

Of the core international crimes, genocide is the one that most States had already criminalised nationally, well before the coming into force of the ICC Statute. The genocide definition has not changed since the adoption of the Genocide Convention in 1948.<sup>59</sup> Calls to amend and update it when the *ad hoc* international criminal tribunals for the former Yugoslavia<sup>60</sup> and Rwanda<sup>61</sup> were created and later during the negotiations for the establishment of the ICC have gone unanswered, with the definition remaining intact.

Article 6 of the ICC Statute defines genocide in terms of five punishable acts, committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

### 4.2.1. Art. 6: Chapeau requirements

#### National approaches to genocide

Different trends can be identified when examining the level of adherence to the international definition of genocide. As a general trend, States follow the internationally accepted definition.

<sup>52</sup> The Elements of Crimes were adopted by the Assembly of States Parties in 2010 by a two-thirds majority, Art. 9.

<sup>53</sup> See Robert Cryer and Olympia Bekou, "International Crimes and ICC Cooperation in England and Wales", in *Journal of International Criminal Justice*, 2007, vol. 5, no. 2, p. 441; Robert Cryer, "Implementation of the International Criminal Court Statute in England and Wales", in *International and Comparative Law Quarterly*, 2002, vol. 51, no. 3, p. 733.

<sup>54</sup> *Act on the Punishment of Crimes within the Jurisdiction of the International Criminal Court*, 21 December 2007 (2011), Art. 18.

<sup>55</sup> *Federal Law no 135: Cooperation with the International Criminal Court*, 2002, Art. 3.

<sup>56</sup> See *supra* note 23.

<sup>57</sup> See *supra* note 22.

<sup>58</sup> See *supra* note 21.

<sup>59</sup> See *supra* note 24.

<sup>60</sup> *International Criminal Tribunal for the former Yugoslavia* (ICTY), UNSC Res 827, 25 May 1993, S/RES/827 (1993).

<sup>61</sup> *International Criminal Tribunal for Rwanda* (ICTR), UNSC Res 955, 8 November 1994, S/RES/955 (1994).

Examples include:

### **Belgium**

The crime of genocide, as defined below, whether committed in peacetime or wartime, constitutes a crime under international law and shall be punished in accordance with the Belgium Law on Serious Violations, 2003 provisions of this Title. In accordance with the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, and without prejudice to the provisions of criminal law applicable to offences of negligence, the crime of genocide shall mean any of the acts listed below, committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (1) killing members of the group;
- (2) causing serious bodily or mental harm to members of the group;
- (3) deliberately inflicting on the group conditions of life calculated to bring about its
- (4) physical destruction in whole or in part;
- (5) imposing measures intended to prevent births within the group;
- (6) forcibly transferring children of the group to another group.<sup>62</sup>

### **Cuba**

A sentence between ten and twenty years of imprisonment shall be imposed on anyone who, with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such:

- (a) inflicts on the group conditions of life which constitute a threat of extermination of the group or some of its members;
- (b) undertakes measures to prevent or hinder births within the group;
- (c) forcibly transfers children of the group to another group;
- (ch) causes the killing or seriously harms the physical or mental integrity of members of the group.<sup>63</sup>

### **Germany**

Whoever with the intent of destroying as such, in whole or in part, a national, racial, religious or ethnic group

1. kills a member of the group,
2. causes serious bodily harm or mental harm to a member of the group, especially of the kind referred to in section 226 of the Criminal Code,
3. inflicts on the group conditions of life calculated to bring about their physical destruction in whole or in part,
4. imposes measures intended to prevent births within the group,

<sup>62</sup> See *supra* note 49, Art. 6.

<sup>63</sup> *Ley No. 62 Código Penal 1987*, 1987 (1999), Art. 116.

5. forcibly transfers a child of the group to another group shall be punished with imprisonment for life.<sup>64</sup>

## Ghana

- (1) Whoever commits genocide shall on conviction be sentenced to death.
- (2) A person commits genocide where with intent to destroy, in whole or in part any national, ethnical, racial or religious group he—
- (a) kills members of the group;
  - (b) causes serious bodily or mental harm to members of the group;
  - (c) deliberately inflicts on the group conditions of life calculated to bring its physical destruction in whole or in part;
  - (d) imposes measures intended to prevent births within the group; or
  - (e) forcibly transfers children of the group to another group.<sup>65</sup>

Similarly, *Austria*,<sup>66</sup> *Ireland*,<sup>67</sup> *Liechtenstein*,<sup>68</sup> *Mali*,<sup>69</sup> *Malta*,<sup>70</sup> the *Netherlands*,<sup>71</sup> *New Zealand*,<sup>72</sup> *Portugal*,<sup>73</sup> *Rwanda*,<sup>74</sup> *Tajikistan*,<sup>75</sup> *Trinidad and Tobago*<sup>76</sup> and the *United Kingdom*<sup>77</sup> also follow the international definition.

However, some national provisions are either under or over-inclusive. This is because either fewer or additional protected groups are recognised compared to those provided for in Article 6 ICC Statute. Moreover, conditions may be attached to the commission of the genocidal acts contained in the genocide definition or additional genocidal acts are included.

## Protected groups

The genocide definition limits the protected groups to national, ethnical, racial and religious groups. Whereas most States include these groups in their domestic definitions, there are some notable aberrations, particularly in Latin America.<sup>78</sup>

64 *Act to Introduce the Code of Crimes against International Law of 26 June 2002*, 2002 (2016), Section 6.

65 *Criminal Code Act 1960 (2003)*, Section 49A.

66 *Criminal Code*, 1958 (2016).

67 See *supra* note 23.

68 *Criminal Code*, 1987 (2013).

69 *Code Pénal*, Loi No 01-079 du 20 aout 2001.

70 *Criminal Code*, 1854 (2014).

71 *International Criminal Court Implementation Act*, 20 June 2002.

72 See *supra* note 47.

73 *Law No. 31/2004 of 22 July, Seventeenth Amendment of the Criminal Code*, 2004.

74 *Law No 33/BIS/2003 Repressing the Crime of Genocide, Crimes against Humanity and War Crimes*, 2003.

75 *Criminal Code of the Republic of Tajikistan*, 1998 (note the rather unusual wording).

76 See *supra* note 43.

77 See *supra* note 16.

78 See, E. Santalla Vargas, 'An Overview of the Crime of Genocide in Latin American Jurisdictions', in *International Criminal Law Review*, 2010, pp. 441-452.

For instance, some countries omit racial groups:

### ***Bolivia***

Anyone who with the intent to destroy in whole or in part a **national, ethnical, or religious** group, kills or injures members of the group, or inflicts on them inhuman life conditions, or undertakes measures intended to prevent their reproduction, or violently transfers children or adults to other groups, shall be sentenced to between ten (10) and twenty (20) years of imprisonment.<sup>79</sup>

***El Salvador*** omits ethnical groups:

Anyone who, with the intent to destroy in whole or in part a human group, **by reason of nationality, race or religion**, kills or causes bodily or mental harm to members of the group or inflicts on them conditions that hinder their livelihood or undertakes measures intended to prevent their reproduction or forcibly transfer persons to other groups, shall be sentenced to between ten and twenty years of imprisonment.<sup>80</sup>

On the other hand, some States have expanded the protected groups in their national definitions of genocide. The most common such group is that of political groups, with social groups to follow.

### ***Colombia***

Anyone who with the intent to destroy in whole or in part a **national, ethnical, racial, religious, or political group**, kills members of the group because of their affiliation to the latter, shall be sentenced to between four hundred and eighty (480) to six hundred (600) months of imprisonment; to a penalty of between two thousand and six hundred sixty six point sixty-six (2.666,66) and fifteen thousand (15.000) times the legal minimum monthly salary and to the interdiction of rights and public functions between two hundred and forty (240) to three hundred and sixty (360) months.<sup>81</sup>

### ***Costa Rica***

A sentence between ten and twenty-five years of prison shall be imposed on anyone who takes part, with homicidal intent, in the destruction in whole or in part of a particular group of human beings, because of its **nationality, race, or religious or political beliefs**.<sup>82</sup>

### ***Ethiopia***

Whoever, in time of war or in time of peace, with intent to destroy, in whole or in part, a **nation, nationality, ethnical, racial, national, colour, religious or political group**, organizes, orders or engages in: (a) killing, bodily harm or serious injury to the physical or mental health of members of the group, in any way whatsoever or causing them to disappear; or (b) measures to prevent the propagation or continued survival of its members or their progeny; or (c) the compulsory movement or dispersion of peoples or children or their placing under living conditions calculated to result in their death or disappearance, is pun-

79 *Código Penal y Código de Procedimiento Penal*, 2010, Art. 138.

80 *Código Penal*, 1997 (2010), Art. 361.

81 *Ley 599 de 2000 (julio 24) por la cual se expide el Código Penal*, 2000, Art. 101.

82 *Código Penal Ley N° 4573-1970 (2013)*, Art. 375.

ishable with rigorous imprisonment from five years to twenty five years, or, in more serious cases, with life imprisonment or death.<sup>83</sup>

### ***Lithuania***

A person who, seeking to physically destroy, in whole or in part, the persons belonging to any **national, ethnic, racial, religious, social or political group**, organises, is in charge of or participates in their killing, torturing, causing bodily harm to them, hindering their mental development, their deportation or otherwise inflicting on them the conditions of life bringing about the death of all or a part of them, restricts the birth of the persons belonging to those groups or forcibly transfers their children to other groups shall be punished by imprisonment for a term of five up to twenty years or by life imprisonment.<sup>84</sup>

### ***Poland***

Whoever, acting with an intent to destroy in full or in part, **any ethnic, racial, political or religious group, or a group with a different perspective on life**, commits homicide or causes a serious detriment to the health of a person belonging to such a group, shall be subject to the penalty of the deprivation of liberty for a minimum term of 12 years, the penalty of deprivation of liberty for 25 years or the penalty of deprivation of liberty for life.<sup>85</sup>

### ***Switzerland***

The penalty is a custodial sentence of life or a custodial sentence of not less than ten years for any person who with the intent to destroy, in whole or in part, a group of persons characterised by their **nationality, race, religion or ethnic, social or political** affiliation [...].<sup>86</sup>

As seen above, there are States that include both political and social groups (see Lithuania and Switzerland). Other States include only social groups:

### ***Peru***

A sentence of no less than twenty years of imprisonment shall be imposed on anyone who, with the intent to destroy, in whole or in part, a **national, ethnic, social or religious group**, commits any of the following acts: [...].<sup>87</sup>

### ***Estonia***

Killing or torturing, with the intention of destroying, in whole or in part, of members of a **national, ethnic, racial or religious group, a group resisting occupation or any other social group**, causing of health damage to members of the group, imposing of coercive measures preventing childbirth within the group or forcibly transferring of children of the group, or subjecting of members of such group to living conditions which have caused the risk of total or partial physical destruction of the group, is punishable by eight to twenty years' imprisonment or life imprisonment.<sup>88</sup>

83 Proclamation No. 414/2004, Criminal Code of the Federal Republic of Ethiopia, 2005, Art. 269.

84 Criminal Code of the Republic of Lithuania, 2000 (2010), Art. 99.

85 Penal Code, 1997, Art. 118.

86 Loi fédérale portant modification de lois fédérales en vue de la mise en œuvre du Statut de Rome de la Cour pénale internationale, 2010, Art. 264.

87 Código Penal, 1991 (2010), Art. 129.

88 Penal Code, 2002 (2015), Art. 90.

**Poland** extends its protection to “groups with a different perspective on life”, which goes well beyond the Genocide Convention definition.<sup>89</sup>

Moreover, **France** in Article 211-1 of its Criminal Code covers also the destruction “of a group determined by any other arbitrary criterion”.<sup>90</sup> Consequently, if a person is targeted because of his/her membership of a defined group, such a group would be protected.

**Burkina Faso** adopts an identical approach to France, providing:

For the purposes of the present law, any of the following acts committed with the intent to destroy, in whole or in part and as such, a national, ethnic, racial or religious group, or a **group determined by any other arbitrary criterion**, constitute genocide.<sup>91</sup>

A similar approach was adopted in the *Akayesu* judgment of the International Criminal Tribunal for Rwanda (ICTR) where the Tribunal expanded the traditionally protected groups under the genocide definition, by accepting any “stable and permanent group”.<sup>92</sup> It was not however confirmed by the Appeals Chamber or in subsequent case law by this or other international tribunals.<sup>93</sup>

The **Canadian** legislation also provides:

“[G]enocide” means an act or omission committed with intent to destroy, in whole or in part, an identifiable group of persons, as such, that, at the time and in the place of its commission, constitutes genocide 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, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.<sup>94</sup>

### The contextual element

The Elements of Crimes document introduces a contextual element for the crime of genocide, which must take place “in the context of a manifest pattern of similar conduct” directed against a particular group. This introduces a quasi-threshold ensuring that ICC resources are directed towards the most serious crimes, rather than isolated or sporadic attacks.

The ICC Pre-Trial Chamber has acknowledged that the definition of the Article 6 of the ICC Statute “does not expressly require any contextual element”.<sup>95</sup> The jurisprudence of the *ad hoc* international criminal tribunals did not insist upon a plan or policy as an element of the crime of genocide either.<sup>96</sup>

89 See *supra* note 85, Art. 118.

90 Code pénal, 1994 (2013).

91 Décret No 2009-894 promulguant la loi no 052-2009/AN du 03 décembre 2009 portant détermination des compétences et de la procédure de mise en œuvre du statut de Rome relatif à la Cour pénale internationale par les juridictions burkinabè, 2009, Art. 16.

92 ICTR, *Prosecutor v. Akayesu*, TC I, Judgment, Case No. ICTR-96-4-T, Trial Chamber, 2 September 1998, para. 516.

93 William A. Schabas, “Article 6, Genocide” in Otto Triffterer & Kai Ambos (eds.), *The Rome Statute of the International Criminal Court, A commentary*, C.H. Beck, Hart & Nomos, 2016, p. 135.

94 See *supra* note 19, Art. 4 (3).

95 ICC, *Prosecutor v. Bashir*, PTC I, Decision on the Prosecution’s application for a warrant of Arrest against Oman Hassan Ahmad Al Bashir, Case No. 02/05-01/09, 4 March 2009, para. 117.

96 *Ibid.*, para. 119; for a more extensive discussion see: Schabas, *supra* note 93.

This contextual requirement of the Elements of Crimes is reflected in the national legislation of some States.

For example, *Albania* makes reference to a premeditated plan, providing:

The **execution of a premeditated plan** aiming at the total or partial destruction of a national, ethnic, racial or religious group directed towards its members, and combined with the following acts, such as: intentionally killing a group members, serious physical and psychological harm, placement in difficult living conditions which cause physical destruction, applying birth preventing measures, as well as the obligatory transfer of children from one group to another, is sentenced with no less than ten years of imprisonment, or with life imprisonment.<sup>97</sup>

*Cabo Verde* similarly provides:

A penalty of 15 to 25 years' imprisonment shall be imposed as punishment upon anyone who, **as part of the execution of a concerted plan**, and with the intention of destroying, in whole or in part, a national, ethnic, racial, religious or other group identified on the basis of some arbitrary criterion, carries out any of the following acts with respect to members of that group.<sup>98</sup>

*France*<sup>99</sup> requires a “concerted plan” and *Georgia* demands “an agreed plan”.<sup>100</sup>

*Belgium*,<sup>101</sup> *Bosnia and Herzegovina*,<sup>102</sup> *Canada*,<sup>103</sup> *Croatia*,<sup>104</sup> *Denmark*,<sup>105</sup> *Estonia*,<sup>106</sup> *Ethiopia*,<sup>107</sup> *Finland*,<sup>108</sup> *Germany*,<sup>109</sup> *Ghana*,<sup>110</sup> *Greece*,<sup>111</sup> *Grenada*<sup>112</sup> and others remain silent on the issue.

#### 4.2.2. Art. 6(a)-(e): Punishable acts

##### Attaching conditions to the punishable acts

Variation is also observed in the implementation of genocidal acts, with States either attaching conditions to the punishable acts or expanding the list of punishable acts under the definition of the crime of genocide.

97 *Criminal Code of the Republic of Albania*, 1995 (2013), Art. 73.

98 *Cabo Verde Legislative Decree 4/2003 of 18 November 2003 – Penal Code*, 2003, Art. 268.

99 See *supra* note 90.

100 See *supra* note 50.

101 See *supra* note 49.

102 *Criminal Code of Bosnia and Herzegovina*, 2003.

103 See *supra* note 19.

104 *Criminal Code*, 1998 (2015).

105 See *supra* note 37.

106 See *supra* note 88.

107 See *supra* note 83.

108 *Criminal Code of Finland*, 1989 (2012).

109 See *supra* note 64.

110 See *supra* note 65.

111 *Law No. 3948/2011 on the adaptation of internal law to the provisions of the ICC Statute*, adopted by Law 3003/2002 (A '75), Art. 7.

112 *Chapter 122 - Genocide Act*, 1972.



**Lithuania** interprets the “causing serious bodily or mental harm to members of the groups” clause as referring to torturing, mutilating and disturbing mental health:

A person who, seeking to physically destroy, in whole or in part, the persons belonging to any national, ethnic, racial, religious, social or political group, organises, is in charge of or participates in their killing, **torturing, causing bodily harm to them, hindering their mental development**, their deportation or otherwise inflicting on them the conditions of life bringing about the death of all or a part of them, restricts the birth of the persons belonging to those groups or forcibly transfers their children to other groups shall be punished by imprisonment for a term of five up to twenty years or by life imprisonment.<sup>113</sup>

**Mexico** refers to mass sterilisation as the only method of impeding reproduction of the group, providing:

The crime of genocide is perpetrated by anyone who with the intent to destroy, in whole or in part, one or more national, ethnic, racial or religious groups, commits by any mean, offenses against the life of the members of these groups, or **inflict massive sterilization intended to hamper the reproduction of the group**.<sup>114</sup>

Such requirements make it harder to assert that genocide has been committed, and may unduly restrict a determination that genocide has occurred. When this approach is taken by an ICC State Party, the coverage falls short of the ICC Statute provision, exposing the State to the risk of not meeting the threshold for effective national prosecutions owing to the narrow approach adopted in its legislation.

### Expanding the punishable acts

Another trend that can be observed in national genocide provisions is the inclusion of additional punishable acts, beyond those specified in the international definition of genocide.

Several States have expanded the list of punishable acts to include displacement or deportation.

For example, **Armenia** provides (note the different wording):

The actions aimed at the complete or partial extermination of national, ethnic, racial or religious groups by means of killing the members of this group, inflicting severe damage to their health, violently preventing them from childbearing, enforced hand-over of children, **violent re-population**, or physical elimination of the members of this group, are punished with imprisonment for the term of 13 to 15 years or with life sentence.<sup>115</sup>

Similarly, the Criminal Code of **Ethiopia** reads:

Whoever, in time of war or in time of peace, with intent to destroy, in whole or in part, a nation, nationality, ethnical, racial, national, colour, religious or political group, organizes, orders or engages in: (a) killing, bodily harm or serious injury to the physical or mental

<sup>113</sup> See *supra* note 84, Art. 99.

<sup>114</sup> Código Penal Federal, 1931 (2013), Art. 149bis.

<sup>115</sup> Criminal Code of the Republic of Armenia, 2003, Art. 393.



health of members of the group, in any way whatsoever or causing them to disappear; or (b) measures to prevent the propagation or continued survival of its members or their progeny; or (c) **the compulsory movement or dispersion of peoples** or children or their placing under living conditions calculated to result in their death or disappearance, is punishable with rigorous imprisonment from five years to twenty-five years, or, in more serious cases, with life imprisonment or death.<sup>116</sup>

Moreover, the **Russian** Criminal Code provides:

Actions aimed at the complete or partial extermination of a national, ethnic, racial or religious group as such by killing its members, inflicting grave injuries to their health, forcible prevention of childbirth, forcible transfer of children, **forcible resettlement**, or by any other method of creating living conditions meant for the physical destruction of the members of this group, shall be punishable by deprivation of liberty for a term of 12 to 20 years with restriction of liberty for a term of up to two years, or by deprivation of liberty for life, or by capital punishment.<sup>117</sup>

Other States that include displacement or deportation in the list of genocidal acts are: **Bolivia**,<sup>118</sup> **Italy**,<sup>119</sup> **Lithuania**<sup>120</sup> and **Spain**.<sup>121</sup>

**Colombia** expands the list of genocidal acts to include forced pregnancy.<sup>122</sup> **Finland** adds illness to the list of acts amounting to genocide and substitutes conditions of life with “in any other way impairs the survival of the group”.<sup>123</sup> **Italy** refers to the imposition of distinctive signs,<sup>124</sup> whereas **Spain** includes sexual attack, transfer of adults from one group to another, causing loss or uselessness of parts and body functions.<sup>125</sup>

The inclusion of additional acts is not against the spirit of the provision; it does, however, raise concerns over the effectiveness of national genocide prosecutions, as a broader list of punishable acts are brought under the definition, potentially diluting the essence of the crime of genocide.

### Intent to destroy

The ‘intent to destroy’ is the *dolus specialis* that distinguishes genocide from other core international crimes. It is regarded as the essence of the definition,<sup>126</sup> with the ICTY observing that “convictions for genocide can only be entered where that intent has been unequivocally established”.<sup>127</sup>

116 See *supra* note 83, Art. 269.

117 Criminal Code of the Russian Federation, No. 63-Fz of June 13, 1996 (2012), Art. 357.

118 See *supra* note 79.

119 Legge Italiana 9 ottobre 1967, n.962, Prevenzione e Repressione del Delitto di Genocidio, 1967.

120 See *supra* note 84.

121 See *supra* note 28.

122 See *supra* note 81.

123 See *supra* note 108.

124 See *supra* note 119.

125 See *supra* note 28.

126 Schabas, see *supra* note 93, p. 131.

127 ICTY, *Prosecutor v. Krstić*, AC, Judgment, Case No. IT-98-33-A, 19 April 2004, para. 134.

The jurisprudence of the *ad hoc* international criminal tribunals has affirmed that genocide is a crime of “specific intent”.<sup>128</sup> In its early jurisprudence, the ICTR found that “special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”.<sup>129</sup> The ICTY held that:

[A]n examination of theories of intent is unnecessary in construing the requirement of intent in Article 4 para. 2. What is needed is an empirical assessment of all evidence to ascertain whether the very specific intent required by Article 4 para. 2 is established, that is, the ‘intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such’.<sup>130</sup>

The ICC has also confirmed the significance of “a subjective element, normally referred to as ‘dolus specialis’ or specific intent, according to which any genocidal acts must be carried out with the ‘intent to destroy in whole or part’ the targeted group”.<sup>131</sup>

When examining national approaches to the crime of genocide, certain States, such as **France** have omitted the element of ‘special intent’ in their national legislation on genocide:

Genocide occurs where, in the enforcement of a concerted plan aimed at the partial or total destruction of a national, ethnic, racial or religious group, or of a group determined by any other arbitrary criterion, one of the following actions are committed or caused to be committed against members of that group:

- willful attack on life;
- serious attack on psychological or physical integrity;
- subjection to living conditions likely to entail the partial or total destruction of that group;
- measures aimed at preventing births;
- enforced child transfers.<sup>132</sup>

By lowering the intent required for genocide, more cases would fall within the genocide definition. However, this might dilute the exceptional circumstances for which genocide prosecutions are normally reserved.

### Ethnic cleansing as genocide

The United Nations Security Council’s Commission of Experts on violations of humanitarian law stated that “‘ethnic cleansing’ means rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area”.<sup>133</sup> Following this, the majority of academic scholars, legal practitioners and institutions consider ethnic cleansing

<sup>128</sup> ICTR, *Prosecutor v. Ntakirutimana et al.*, AC, Judgment, Case No. ICTR-96-10-A and ICTR-96-17-A, 13 December 2004.

<sup>129</sup> See *supra* note 92.

<sup>130</sup> ICTY, *Prosecutor v. Sikirica et al.*, TC, Judgment on Defence motions to acquit, Case No. IT-05-8-I, 3 September 2001, para. 59.

<sup>131</sup> See *supra* note 95, para. 139ii..

<sup>132</sup> See *supra* note 90, Art. 211-1.

<sup>133</sup> Letter Dated 9 February 1993 from the Secretary-General Addressed to the President of the Security Council, para. 55, Annex No. 1, U.N. Doc. S/25274 (9 February 1993).

to be “the forcible removal, displacement, deportation, and expulsion of an ethnic group from a given territory”.<sup>134</sup>

It is a crime distinct from genocide, as the latter requires a specific intent to “destroy, in whole or in part, a national, ethnical, racial or religious group, as such”.<sup>135</sup> Due to the specific intent required for genocide, displacing an ethnic group to achieve an ethnically homogenous territory is considered to be incompatible with the specific genocidal intent.<sup>136</sup>

#### 4.2.3. Art. 6: Use of customary international law

**Canada’s** approach to genocide is unique. Instead of listing the punishable acts, an act or omission “constitutes genocide 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”.<sup>137</sup>

Such an approach “enables the future jurisprudence to use the ICC Statute as a starting point for what constitutes customary international law, while at the same time allowing new developments in this area of international law to be taken into account”.<sup>138</sup>

Adopting a similar approach **Samoa** provides:

For the purposes of this section, “genocide” is an act specified in Article 6 of the Statute and includes any other act which, at the time and in the place of its commission, constitutes genocide according to customary international law or conventional international law or by virtue of it being criminal according to the general principles of law recognised by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.<sup>139</sup>

This method of expanding the *sources* available to national courts when prosecuting ICC crimes is a useful tool in fighting impunity. However, due care should be taken to avoid any inconsistencies with the ICC Statute.

<sup>134</sup> Micol Sirkin, Expanding the Crime of Genocide to Include Ethnic Cleansing: A Return to Established Principles in Light of Contemporary Interpretations in *Seattle University Law Review*, Vol. 33, Number 2, Winter 2010, p. 490.

<sup>135</sup> See also the discussion above on Protected Groups.

<sup>136</sup> ICTY, *Prosecutor v. Brdanin*, TC, Judgment, Case No. IT-99-36-T, 1 September 2004, paras. 977-8.

<sup>137</sup> See *supra* note 19.

<sup>138</sup> Joseph Rikhof ‘The Canadian Model’, in M. Bergsmo, M. Harlemm and N. Hayashi (eds.) *Importing Core International Crimes into National Law*, (TOAEP, 2010), p. 16.

<sup>139</sup> See *supra* note 22, Art. 5(2).

## Implementation notes

- Article 6 ICC Statute**
- ▶ Ensure that all protected groups are covered by the national provision for genocide and consider whether including additional groups is appropriate;
  - ▶ Ensure that all punishable acts are covered by the national provision for genocide;
  - ▶ Ensure that the specific intent required for genocide is reflected;
  - ▶ Consult the Elements of Crimes document;
  - ▶ If applicable, consult customary international law and consider other relevant treaty law.

### 4.3. Art. 7: Crimes against humanity

In the absence of a specialised treaty, the adoption of the ICC Statute acted as a ‘catalyst’ for States, previously largely unfamiliar with crimes against humanity, to incorporate crimes against humanity into domestic legislation.<sup>140</sup> Under Article 7 of the ICC Statute, crimes against humanity are defined as eleven punishable acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

#### 4.3.1. Art. 7: Use of customary international law and international treaties

##### Adopting a broader approach to crimes against humanity than the ICC Statute

A number of States have adopted a broader approach to crimes against humanity, criminalising not only the acts found in Article 7 of the ICC Statute, but also breaches of international customary law, binding international treaties or grave violations of human rights.

For example, **Canada** includes, in addition to the ICC Statute, acts that are criminalised under customary and conventional international law. More specifically:

“[C]rime against humanity” means murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes 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, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.**<sup>141</sup>

<sup>140</sup> Sadat, *supra* note 38.

<sup>141</sup> See *supra* note 19, Art. 4 (3).

Following the reference method but also a wider approach, *Kenya* provides:

“[C]rime against humanity” has the meaning ascribed to it in Article 7 of the ICC Statute and includes an act defined as crimes against humanity **in conventional international law or customary international law that is not otherwise dealt with in the ICC Statute or in the Act.**<sup>142</sup>

Adopting a similar approach, *Samoa* provides:

(1) Every person who, in Samoa or elsewhere, commits a crime against humanity shall be guilty of an offence and shall be liable, on conviction after trial on indictment, to the penalty specified in subsection (3).

(2) For the purposes of this section, “crime against humanity” is an act specified in Article 7 of the Statute and includes any other act which, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of it being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.<sup>143</sup>

Similarly, *Costa Rica* provides:

A prison term of between ten and twenty-five years shall be applied to anyone who, as part of a widespread or systematic attack directed against a civilian population, with knowledge of the attack, commits or orders the commission of acts **recognised as crimes against humanity by international treaties to which Costa Rica is party – where these treaties relate to the protection of human rights – or by virtue of the ICC Statute.**<sup>144</sup>

In the same spirit, *Ethiopia* provides:

Criminal liability of persons who commit crimes against humanity, **so defined by international agreements ratified by Ethiopia** and by other laws of Ethiopia, such as genocide, summary executions, forcible disappearances or torture shall not be barred by statute of limitation. Such offences may not be commuted by amnesty or pardon of the legislature or any other state organ.<sup>145</sup>

Adopting a similar approach, *Montenegro* provides:

Anyone who **by breaching the rules of international law**, within the limits of a wider or systematic attack against civilian population, orders any of the following: murders; placing the population or its part under such living conditions as to bring about their complete or partial extermination; enslavement; forced displacement; torture; rape; coercion to prostitution; coercion to pregnancy or sterilization with a view to changing the ethnic composition of the population; persecution or expulsion on political, religious, racial, national, ethnic, cultural, sexual or any other grounds; detention or abduction of persons without disclosing information thereon so as to deprive them of legal assistance; oppression of a racial group or establishment of domination of one such group over another; or any other similar inhuman

<sup>142</sup> See *supra* note 44, Section 6 (4).

<sup>143</sup> See *supra* note 22, Art. 6.

<sup>144</sup> *Penal Code of Costa Rica*, Art. 379, as amended by Criminal Prosecution to Punish War Crimes and Crimes against Humanity No. 8272 (2002).

<sup>145</sup> *Constitution of the Federal Democratic Republic of Ethiopia*, 1994, Art. 28.

acts intended to cause serious suffering or seriously harm health; or who commits any of the said offences shall be punished by a prison term not shorter than five years or by a forty year prison term.<sup>146</sup>

**Estonia** includes in its crimes against humanity provision the “systematic or large-scale deprivation or restriction of human rights and freedoms”, more specifically:

Systematic or large-scale deprivation or restriction of human rights and freedoms, instigated or directed by a state, organisation or group, or killing, torture, rape, causing health damage, forced displacement, expulsion, subjection to prostitution, unfounded deprivation of liberty, or other abuse of civilians, is punishable by 8 to 20 years’ imprisonment or life imprisonment.<sup>147</sup>

### Adopting a narrower approach to crimes against humanity compared to the ICC Statute

In some cases, States adopt a narrower approach to crimes against humanity than the provision contained in the ICC Statute.

For example, the German Code of Crimes against International Law restricts the definition of torture by referring only to severe physical or mental harm, while the ICC Elements of Crimes cover a wider range of conducts. A similar approach is observed in the definition of enforced disappearance of persons.

The **German** provision reads:

Whoever, as part of a widespread or systematic attack directed against any civilian population,

[...]

5. tortures a person in his or her custody or otherwise under his or her control by causing that person substantial physical or mental harm or suffering where such harm or suffering does not arise only from sanctions that are compatible with international law,<sup>148</sup>

[...]

7. causes a person’s enforced disappearance, with the intention of removing him or her from the protection of the law for a prolonged period of time,

(a) by abducting that person on behalf of or with the approval of a State or a political organisation, or by otherwise severely depriving such person of his or her physical liberty, followed by a failure immediately to give truthful information, upon inquiry, on that person’s fate and whereabouts, or

(b) by refusing, on behalf of a State or of a political organisation or in contravention of a legal duty, to give information immediately on the fate and whereabouts of the person deprived of

<sup>146</sup> Criminal Code of the Republic of Montenegro, 2003 (2012), Art. 427.

<sup>147</sup> See *supra* note 88, Art. 89.

<sup>148</sup> See *supra* note 64.

his or her physical liberty under the circumstances referred to under letter (a) above, or by giving false information thereon.<sup>149</sup>

**Georgia** also adopts a narrower definition of crimes against humanity, excluding a number of acts covered by the international definition:

Humanity crime, i.e. any action perpetrated within the frames of large-scale or systematic attack on civilians or persons and expressed in murders, mass killing, deportation of humans or any other inhumane action that inflicts serious damage to the physical or mental condition of a human being - shall be punishable by imprisonment extending from ten to twenty years in length or by life imprisonment.<sup>150</sup>

#### 4.3.2. Art. 7(1)(k): “Other inhumane acts”

Article 7(1)(k) of the ICC Statute includes a residual clause criminalising “other inhumane acts of similar character intentionally causing great suffering, or serious injury to body or to mental or physical harm”. This open-ended clause, while successful in bringing under the crimes against humanity the definition other acts of comparable gravity, may create problems in its implementation, owing to a potential conflict with the legality principle, which requires the strict definition of crimes.<sup>151</sup>

A number of States have implemented this provision, by reiterating the wording of Article 7(1)(k) ICC Statute, without attaching any conditions in its implementation. Such States are: **Belgium**,<sup>152</sup> **Georgia**,<sup>153</sup> **Malta**,<sup>154</sup> the **Netherlands**,<sup>155</sup> **New Zealand**,<sup>156</sup> **Norway**,<sup>157</sup> **Portugal**,<sup>158</sup> **South Africa**,<sup>159</sup> **Trinidad and Tobago**<sup>160</sup> and the **UK**.<sup>161</sup>

Expanding the coverage of the provision further, the Crimes Against Humanity and War Crimes Act (CAHWCA) 2000 bestows **Canadian** courts with jurisdiction over crimes against humanity that are not contained in the ICC Statute, but are instead found in customary international law, either at the time when the CAHWCA was passed or in the future, if new crimes against humanity crystallise.<sup>162</sup>

149 *Ibid.*, Section 7.

150 See *supra* note 50, Art. 408.

151 *Nullum crimen sine lege 'stricta'*.

152 See *supra* note 49. Notably, the Serious Violations of IHL Act incorporates the crimes listed in Art. 7(1) ICC Statute into domestic law, but does not make reference to the definitions of crimes against humanity outlined in Art. 7(2). However, the Serious Violations of IHL Act provides that the crimes must be interpreted ‘in accordance with the Statute of the International Criminal Court’, indicating that the crimes will be interpreted so as to be consistent with the definitions contained in Art. 7(2) ICC Statute.

153 See *supra* note 50.

154 See *supra* note 70.

155 Act of 19 June 2003 containing rules concerning serious violations of international humanitarian law (International Crimes Act), 2003.

156 See *supra* note 47.

157 Penal Code, 7 March 2008.

158 See *supra* note 73.

159 See *supra* note 42.

160 See *supra* note 43.

161 See *supra* note 16, Schedule 8, Art. 6. Sections 50 & 51 of the ICC Act 2001 incorporate crimes against humanity into national law by reference to the ICC Statute. Further, the ICC Act 2001 provides that the crime should be interpreted in accordance with the Elements of Crimes, propagated under ICC Statute, Art. 9, along with decisions of the ICC and other international tribunals.

162 See *supra* note 19.



As regards crimes against humanity, States have largely followed the wording of the Statute. The implementation examples discussed above shed some light on the different approaches and the challenges of implementation.

#### 4.3.3. Art. 7(2)(a): Inclusion of a policy element

When incorporating crimes against humanity, States must consider whether or not to include the policy element introduced in Article 7(2)(a) ICC Statute, which criminalises acts committed “pursuant to or in furtherance of State or organizational policy to commit such attack”.

Despite the disjunctive wording regarding the ‘widespread or systematic’ nature of the attack in the *chapeau* of Article 7, the introduction of a policy element in Article 7(2)(a) has divided international criminal lawyers ever since the adoption of the Statute.<sup>163</sup>

State reaction to this has been mixed: States that incorporate the Statute crimes by reference or by repeating the provision *verbatim* have adopted the policy requirement, while those that have created their own offences have not.

Examples of States incorporating the crimes against humanity definition of the ICC Statute – including the policy requirement – by reference are: **Malta**,<sup>164</sup> the **Netherlands**,<sup>165</sup> the **Republic of Korea**<sup>166</sup> and the **UK**.<sup>167</sup>

**South Africa** implements the policy element as well, as it repeats *verbatim* the crimes against humanity provision.<sup>168</sup>

On the other hand, there are States that make no reference to the policy element whatsoever. For example, **Belgium** provides:

Crimes against humanity, as defined below, whether committed in peacetime or wartime, constitute crimes under international law and shall be punished in accordance with the provisions of this Title. In accordance with the Statute of the International Criminal Court, crimes against humanity shall mean any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, and with knowledge of the attack [...].<sup>169</sup>

Similarly, the *chapeau* of **Germany’s** national provision on crimes against humanity reads:

Whoever, as part of a widespread or systematic attack directed against any civilian population.<sup>170</sup>

163 M. de Guzman, ‘The Road from ICC: The Developing Law of Crimes against Humanity’, in *Human Rights Quarterly* 22 (2000), 335; P. Hwang, ‘Defining Crimes against Humanity in the ICC Statute of the International Criminal Court’, in *Fordham International Law Journal* 22 (1998), 457; W.A. Schabas, ‘State Policy as an Element of International Crimes’, in *Journal of Criminal Law and Criminology* 98 (2008), 953.

164 See *supra* note 70.

165 See *supra* note 155.

166 See *supra* note 54.

167 See *supra* note 16.

168 See *supra* note 42.

169 See *supra* note 49, Art. 136ter.

170 See *supra* note 64, Section 7.



**Georgia** adopts a similar approach, providing:

Crime against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, expressed in murder, massive extermination, serious injury to body or health, deportation, forced confinement, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, persecution against any identifiable group on political, racial, national, ethnic, cultural, religious, gender or other grounds, the crime of apartheid, other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health,

Shall be punishable by imprisonment for the period from eight to twenty years or life imprisonment.<sup>171</sup>

### Implementation notes

- Article 7 ICC Statute**
- ▶ Ensure that all punishable acts are covered by the national provision for crimes against humanity and consider whether including additional acts is appropriate;
  - ▶ Consider incorporating “other inhumane acts” in the national provision for crimes against humanity;
  - ▶ Consider the incorporation of the “policy element” for crimes against humanity;
  - ▶ Consult the Elements of Crimes document;
  - ▶ If applicable, consult customary international law and consider other relevant treaty law.

#### 4.4. Art. 8: War crimes

War crimes are the oldest and most common category of core international crimes. Like genocide, war crimes were already established under international humanitarian law and regulated by a number of international instruments, prior to the adoption of the ICC Statute. The most relevant instruments are the 1949 Geneva Conventions and their 1977 Additional Protocols.<sup>172</sup>

Article 8, the lengthiest ICC Statute provision, contains a very detailed list of war crimes criminalised in the Statute, which, however, does not replicate all of the war crimes enshrined in other international humanitarian law instruments.

<sup>171</sup> See *supra* note 50, Art. 408.

<sup>172</sup> See *supra* note 36.

#### 4.4.1. Art. 8: Relationship between the ICC Statute and the Geneva Conventions and their Additional Protocols

The relationship between the ICC Statute and the Geneva Conventions and Additional Protocols is the first issue that needs to be addressed, when implementing war crimes.

The *Netherlands* in its International Crimes Act 2003 includes breaches of international law outlined in Additional Protocol I to the Geneva Conventions in its definition of grave breaches.<sup>173</sup> Section 5.1 refers to acts “committed against persons protected by the said Conventions”, namely the Geneva Conventions.

Article 8(2)(a) ICC Statute is worded differently, referring to persons or property “protected under the provisions of the relevant Geneva Convention”. The conduct listed in Articles 8(2)(a)(i)-(viii) ICC Statute covers all grave breaches of the Geneva Conventions, but not all the acts listed are grave breaches in each Geneva Convention. For example, unlawful confinement and taking of hostages are grave breaches only under the Geneva Convention IV. This means that unlawful confinement is a grave breach only if committed against civilians as defined in Geneva Convention IV, not if committed against the persons protected under the other Geneva Conventions I, II and III. The wording of the International Crimes Act 2003 is drafted somewhat more loosely insofar as it refers to persons protected by “the said Conventions”. The plural indicates that all protected persons under the four Geneva Conventions are considered protected persons for all forms of conduct.

Furthermore, Section 5(2)(a) of the *Dutch* International Crimes Act 2003 provides:

Anyone who commits, in the case of an international armed conflict, one of the grave breaches of the Additional Protocol (I), concluded in Bern on 12 December 1977, to the Geneva Conventions of 12 August 1949, relating to the protection of victims of international armed conflicts (Netherlands Treaty Series 1980, 87), namely:

(a) the acts referred to in subsection 1, if committed against a person protected by the Additional Protocol (I).<sup>174</sup>

The list of ‘protected persons’ under Protocol I is broader than those under the Geneva Conventions. For example, wounded and sick persons in need of medical care are protected persons under Additional Protocol I, whether they are military or civilian. To be protected under Geneva Convention I, the wounded and sick must belong to one of the specified categories, namely members of the armed forces, militias, etc. attached to the armed forces; members of other militias, volunteer corps, etc. participating in hostilities; persons who accompany the armed forces without being members thereof; members of crew; inhabitants of a non-occupied territory participating in a *levée en masse*. The persons protected under Additional Protocol I might be largely considered to be protected also under customary international law, although it is worth bearing in mind that the ICC Statute was meant to codify customary international law.

In practice, there might be little difference, but it is notable that the *Netherlands* have decided to extend the legal protection provided specifically to Additional Protocol I.

<sup>173</sup> See *supra* note 155.

<sup>174</sup> *Ibid.*, Section 5(2)(a).

Adopting a similar approach, **Costa Rica** expands the coverage of its war crimes provision by referencing the treaties to which it is a party. More specifically:

A prison term of between ten and twenty-five years shall be applied to anyone who, in the course of an armed conflict, commits or orders the commission of acts recognised as grave violations or war crimes **by international treaties to which Costa Rica is party** – where these treaties relate to participation in hostilities; the protection of the sick, wounded and shipwrecked; the treatment of prisoners of war; and the protection of civilians and cultural objects in cases of armed conflict – or by virtue of any other instruments of international humanitarian law.<sup>175</sup>

#### 4.4.2. Art. 8: Use of customary international law

As seen in the analysis for genocide and crimes against humanity, **Canada**, in addition to the definitions found in the ICC Statute, also criminalises any act or omission that is a crime under customary international law. This is also the case for war crimes.<sup>176</sup> Reference to customary international law can accommodate future developments in the law and allow Canadian courts to prosecute war crimes that are contained in treaties ratified after the coming into force of the ICC Statute, or war crimes based on newly crystallised norms of customary international law, offering flexibility in the future.

Similarly, **Samoa** also provides for:

any other act committed during an armed conflict which, at the time and in the place of its commission, constitutes a war crimes according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.<sup>177</sup>

Samoaan jurisdiction over war crimes will, thus, expand and is not constrained by the codification of war crimes in Article 8(2) ICC Statute. Unlike genocide and crimes against humanity, however, its legislation makes no mention to war crimes that exist “according to the general principles of law recognized by the community of nations”.<sup>178</sup>

#### 4.4.3. Art. 8: The jurisdictional clause and the national context

The *chapeau* of Article 8 of the ICC Statute, includes a ‘non-threshold threshold’; namely, that the Court shall have jurisdiction over war crimes “in particular when committed as part of a plan or policy or as part of large-scale commission of such crimes”. A question arises as to whether this should also be incorporated at the national level. This threshold is directed at the ICC and aims to ensure better allocation of the Court’s finite resources. Forgoing this distinction at the national level ought to be considered, as the onus of pursuing as many cases as possible lies with national systems.

<sup>175</sup> See *supra* note 144, Art. 378.

<sup>176</sup> See *supra* note 19.

<sup>177</sup> See *supra* note 22, Art. 7.

<sup>178</sup> *Ibid.*, Arts. 5 and 6.

Where war crimes are incorporated by replicating the Statute provisions verbatim, the threshold is also transposed to the national level. Such States include: *Ireland*,<sup>179</sup> *Malta*<sup>180</sup> and *South Africa*.<sup>181</sup>

*Spain* has incorporated this distinction in its penalty scheme, providing:

When any of the conduct referred to in this Chapter **forms part of a plan or a policy or is committed on a large scale**, the sentences imposed shall be in the upper half of the applicable range of sentence.<sup>182</sup>

Incorporating the threshold in the penalty scheme allows Spain to recognise in its implementation the most serious of the war crimes.

Similarly, the *Norwegian* legislation provides:

The penalty for a war crime against a person is imprisonment for a term not exceeding 15 years, but for a term not exceeding 30 years in such cases as are mentioned in the first paragraph (a) to (e) or otherwise if the crime is serious. In deciding whether the crime is serious, importance shall be attached to its potential for causing harm and its harmful effects, and to whether it was committed as part of a plan or policy for or as part of a large-scale commission of such crimes.<sup>183</sup>

#### **4.4.4. Art. 8: The distinction between international and non-international armed conflicts**

The distinction between international and non-international armed conflicts has been preserved in the war crimes provision of the ICC Statute. The question, therefore, arises as to whether such distinction ought to be retained when implementing the provision domestically.

Many States have maintained the distinction in their national legislation. These include: *Lesotho*,<sup>184</sup> *Lithuania*,<sup>185</sup> *Malta*,<sup>186</sup> *Mauritius*,<sup>187</sup> the *Netherlands*,<sup>188</sup> *Norway*,<sup>189</sup> the *Philippines*,<sup>190</sup> *Portugal*,<sup>191</sup> *Slovenia*,<sup>192</sup> *South Africa*,<sup>193</sup> *Timor Leste*,<sup>194</sup> *Trinidad and Tobago*,<sup>195</sup> *Uganda*<sup>196</sup> and the *UK*.<sup>197</sup>

179 See *supra* note 23.

180 See *supra* note 70.

181 See *supra* note 42.

182 See *supra* note 28, Art. 614bis.

183 See *supra* note 157, Section 103.

184 *Penal Code Act*, 2010.

185 See *supra* note 84.

186 See *supra* note 70.

187 See *supra* note 45.

188 See *supra* note 155.

189 See *supra* note 157.

190 See *supra* note 17.

191 See *supra* note 73.

192 *Criminal Code of the Republic of Slovenia*, 2008 (2016).

193 See *supra* note 42.

194 *Código Penal de Timor-Leste*, 2009.

195 See *supra* note 43.

196 See *supra* note 21.

197 See *supra* note 16.

There is, however, a notable trend towards affording war crimes the same coverage regardless of whether committed in non-international or international conflicts.

**Albania** provides:

Acts committed by different people in war time such as murder, maltreatment or deportation for slave labor, as well as any other inhuman exploitation to the detriment of civil population or in occupied territory, the killing or maltreatment of war prisoners, the killing of hostages, destruction of private or public property, destruction of towns, commons or villages, which are not ordained from military necessity, are sentenced with no less than fifteen years of imprisonment, or life imprisonment.<sup>198</sup>

Similarly, **Bangladesh** provides:

(2) The following acts or any of them are crimes within the jurisdiction of a Tribunal for which there shall be individual responsibility, namely:

[...]

(d) War Crimes: namely, violation of laws or customs of war which include but are not limited to murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population in the territory of Bangladesh; murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages and detainees, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(e) violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949.<sup>199</sup>

In **Belgium**, no distinction was made between war crimes committed in international and non-international armed conflict when they were first incorporated into Belgian law, by way of a free-standing Act in 1993.<sup>200</sup> The Serious Violations of IHL Act maintains this approach. The list of war crimes in Article 8 of the Serious Violations of IHL Act puts forward Article 136quater for inclusion in the Belgian Criminal Code.<sup>201</sup> It enumerates crimes that apply when committed in international armed conflicts (as defined in Common Article 2 of the Geneva Conventions and Article 1 of Additional Protocol I) or non-international armed conflicts (as defined in Article 1 of Additional Protocol II and Article 8(2)(f) ICC Statute). The reference to non-international armed conflicts as defined in Article 8 (2)(f) as an alternative to Additional Protocol II is significant in so far as Article 8(2)(f) only requires the existence of a protracted armed conflict. Additional Protocol II contains a narrower definition of non-international armed conflict.<sup>202</sup> The absence of a distinction between crimes committed in international armed conflict and non-international conflict renders the Serious Violations of IHL Act broader than Article 8 of the ICC Statute, which does distinguish between the types of conduct criminalised in the two different contexts.

198 See *supra* note 97, Art. 75.

199 *The International Crimes (Tribunals) Act*, 1973, Art. 3.

200 D. Vandermeersch, 'The ICC Statute and Belgian Law', in *Journal of International Criminal Justice*, 2004 (2) 133, at 134.

201 See *supra* note 49.

202 According to Art. 1, APII such conflicts are: 'conflicts which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement the Protocol', see *supra* note 36.

**Bosnia and Herzegovina** makes reference to violation of “rules of international law in time of war, armed conflict or occupation”.<sup>203</sup> Similar wording is adopted by **Croatia**,<sup>204</sup> **Montenegro**,<sup>205</sup> **Serbia**<sup>206</sup> and **the Former Yugoslav Republic of Macedonia**.<sup>207</sup>

**Bulgaria** refers to “violation of the rules of international law for waging war”.<sup>208</sup> Similarly, **Cabo Verde’s** national legislation refers to actions “in violation of the provisions of international law, in a situation of armed conflict”.<sup>209</sup>

**Canada** does not make a distinction between international and non-international armed conflicts either<sup>210</sup> and so does not the **Republic of Korea**.<sup>211</sup>

Similarly, **Ethiopia** makes reference to violations of “public international law and humanitarian conventions”.<sup>212</sup>

**Georgia** criminalises deliberate violations of the norms of international humanitarian law “amid inter-state or internal armed conflict”.<sup>213</sup>

Similarly, **Germany** removes the distinction between international and non-international armed conflicts,<sup>214</sup> while it also includes grave breaches of Additional Protocol I to the Geneva Convention, containing a broader list of crimes than the one contained in the ICC Statute. The main innovation of Germany’s war crimes legislation is the structural reorganisation of war crimes. War crimes are listed according to the protected legal interest, i.e. against persons, against property and other rights, against humanitarian operations and emblems, the use of prohibited methods of warfare. In doing this, the German legislation maintains the distinction between Geneva Law (protected persons) and The Hague Law (prohibited means and methods of warfare). A similar approach is adopted by **Greece**.<sup>215</sup>

203 See *supra* note 102.

204 See *supra* note 104.

205 See *supra* note 146.

206 *Criminal Code*, 2006.

207 *Criminal Code*, 1996.

208 *Criminal Code*, 1968 (2010).

209 See *supra* note 98.

210 Rikhof, *supra* note 138, p. 14.

211 See *supra* note 54; See also, T.H. Choi and S. Kim, ‘Nationalized International Criminal Law: Genocidal Intent, Command Responsibility, and an Overview of the South Korean Implementing Legislation of the ICC Statute’, in *Michigan Journal of International Law*, 2010 (19), p. 609.

212 See *supra* note 83.

213 See *supra* note 50.

214 See *supra* note 64.

215 See *supra* note 111.

## Implementation notes

- Article 8 ICC Statute**
- ▶ Ensure that all punishable acts are covered by the national provision for war crimes and consider whether including additional acts is appropriate;
  - ▶ Consider relationship with other international legal instruments (e.g. Geneva Conventions, Additional Protocols etc.);
  - ▶ If applicable, consult customary international law;
  - ▶ Consider whether the threshold of “in particular when committed as part of a plan or policy or as part of large-scale commission” ought to be retained for prosecutions before national courts;
  - ▶ Consult the Elements of Crimes document;
  - ▶ Consider whether the distinction between IAC and NIAC ought to be retained.

### 4.5. Art. 8bis: Aggression

The crime of aggression was debated at length during the ICC Statute negotiations, without, however, reaching agreement on its definition at the end of the Rome Conference.<sup>216</sup> A placeholder provision was included in the then Article 5 of the ICC Statute. Agreement on the definition was achieved in the course of the Kampala Review Conference, in 2010.<sup>217</sup> Article 8bis of the ICC Statute now contains the punishable acts of the crime of aggression.<sup>218</sup> At the time of writing, a handful of States have implemented the crime of aggression at the national level.<sup>219</sup>

**Luxembourg** incorporates Article 8bis ICC Statute *verbatim*, including the acts of aggression, but omits the reference to General Assembly resolution 3314 (XXIX) of 14 December 1974 mentioned in the Statute Article.<sup>220</sup> **Samoa** quotes the Kampala amendment in a schedule annexed to the act. It also adds customary international law, conventional international law and the general principles of law recognized by the community of nations as sources for the criminalisation of aggression “whether or not it constitutes a contravention of the law in force at the time and in the place of its commission”.<sup>221</sup>

**Austria**,<sup>222</sup> **Czech Republic**,<sup>223</sup> and **Ecuador**<sup>224</sup> and **Germany**<sup>225</sup> implement the first two paragraphs of Article 8bis of the ICC Statute, but do not include the list of *actus rei*. **Slovenia** covers only six of the seven material elements, but includes provisions on instigation, forms of complicity and association to commit aggression.<sup>226</sup> **Estonia** does not list the *actus rei* ei-

216 Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998, U.N. Doc. A/CONF.183/10.

217 See *supra* note 39.

218 ICC Statute, Art. 8bis.

219 See *Global Campaign for Ratification and Implementation of the Kampala Amendments on the Crime of Aggression, Status of Implementation and Ratification of the Kampala Amendments on the Crime of Aggression*, Update No. 27 (information as of 1 May 2017).

220 *Code Pénal*, 30 August 1879 (2016), art. 136*quiquies*.

221 *International Criminal Court Amendment Act 2014*, 28 October 2014, Art. 3.

222 See *supra* note 66, Art. 321k.

223 *Criminal Code*, 8 January 2009 (2017), 405a.

224 *Código Orgánico Integral Penal*, 10 February 2014, Art. 88.

225 See *supra* note 64, Art. 13.

226 See *supra* note 192, Arts. 103, 105, 297.

ther; it defines aggression as “the use of armed force by one state in conflict with international law against another state” and criminalises the “participation in the management, execution, preparation of an act of aggression controlling or directing the activities of the state or threatening with an act of aggression by a representative of the state”.<sup>227</sup> **Croatia** has updated its criminal code to include a definition of the crime of aggression that omits the word ‘manifest’. However, it includes its direct and public incitement, as well as a provision outlawing war of aggression.<sup>228</sup>

### Implementation notes

- Article 8bis ICC Statute** ▶ Ensure that all aspects of the crime of aggression, including the punishable acts, are covered by the national provision for aggression.
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<sup>227</sup> See *supra* note 88, Section 91.

<sup>228</sup> See *supra* note 104, Arts. 89, 157.





# 5

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# 5. Jurisdiction

## 5.1. National approaches

Besides incorporating the definitions of core international crimes, States ought to specify how the national legal orders will assert jurisdiction enabling local investigations and prosecutions.

As regards jurisdiction, a number of States adopt an assertive approach, emphasising the primacy of their domestic courts over crimes that fall under ICC jurisdiction.

The **Australian** legislation provides:

- (1) The principal object of this Act is to facilitate compliance with Australia's obligations under the Statute.
- (2) Accordingly, this Act does not affect the primacy of Australia's right to exercise its jurisdiction with respect to crimes within the jurisdiction of the ICC.<sup>229</sup>

Several commentators have suggested that the approach towards jurisdiction adopted by the Australian national implementing legislation can be better understood if read alongside a Declaration made thereby when ratifying the ICC Statute:

To enable Australia to exercise its jurisdiction effectively, and fully adhering to its obligations under the Statute of the Court, no person will be surrendered to the Court by Australia until it has had the full opportunity to investigate or prosecute any alleged crimes.<sup>230</sup>

This affirmation is perfectly compatible with the provisions of the ICC Statute. The wording of the Australian provision merely suggests that Australian courts will always be willing and able to investigate and prosecute any core international crimes committed within their jurisdiction.<sup>231</sup> Other States to embrace a similar approach include **Slovenia**<sup>232</sup> and **Germany**.<sup>233</sup> **Austria** and **Liechtenstein** also adopt explanatory provisions, which implicitly recognise the complementary nature of the ICC and national courts, albeit less forthrightly than the Australian and Slovenian provisions.<sup>234</sup>

<sup>229</sup> See *supra* note 18, Section 3.

<sup>230</sup> Gideon Boas, "An Overview of Implementation by Australia of the Statute of the International Criminal Court", in *Journal of International Criminal Justice*, 2004, vol. 2, no. 1, p. 185. See also Gillian Triggs, "Implementation of the Rome Statute for the International Criminal Court: A Quiet Revolution in Australian Law", in *Sydney Law Review*, 2003, vol. 25, no. 4, p. 507, at p. 514.

<sup>231</sup> Olympia Bekou, "In the hands of the State: Implementing legislation and complementarity", in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, Cambridge University Press, Cambridge, 2011, p. 830, at p. 843.

<sup>232</sup> *Cooperation between the Republic of Slovenia and the International Criminal Court Act*, 14 November 2002, Article 6 of which provides as follows: "[t]he State Prosecutor's Office and domestic courts shall have primary jurisdiction for the prosecution and trial of perpetrators of criminal offences within the jurisdiction of the Court as determined in Articles 5 to 8 of the Statute [...]". Note that Slovenia follows the reference method when incorporating ICC crimes into its national law.

<sup>233</sup> Article 1, *Law on Cooperation with the International Criminal Court*, 21 June 2002, part 1, §1 of which provides as follows: "The International Criminal Court supplements German criminal law jurisdiction". This wording is less assertive than the Australian legislation.

<sup>234</sup> Liechtenstein's *Law of 20 October 2004 on Cooperation with the International Criminal Court and other International Tribunals*, 20 October 2004; Austrian *Federal law n° 135 on Cooperation with the International Criminal Court*, 13 August 2002. The Liechtenstein and Austrian legislations provide, that the competence of their national courts is not precluded by the competence of the ICC and – in the case of Liechtenstein – other international tribunals.

Moreover, the drafters of the **South African** provision recognise the importance of domestic prosecutions of core international crimes by interpreting the principle of complementarity as a positive obligation for State authorities:<sup>235</sup>

The National Director must, when reaching a decision on whether to institute a prosecution contemplated in this section, give recognition to the obligation that the Republic, in the first instance and in line with the principle of complementarity as contemplated in Article 1 of the Statute, has jurisdiction and the responsibility to prosecute persons accused of having committed a crime.<sup>236</sup>

This positive obligation – although not compulsory under the ICC Statute system of justice – is welcome, giving South African national authorities a mandate to investigate and prosecute ICC crimes domestically.

**Belgium** affords the opportunity to national courts to defer jurisdiction to the ICC, where the two systems are examining the same facts. In other words, the Belgian legislation reverses the complementarity principle in respect of offences specified in Book II, Title I *bis* of the Criminal Code,<sup>237</sup> i.e. core international crimes.<sup>238</sup> The *Belgian* legislation provides:

[T]he Minister of Justice may acquaint the International Criminal Court with the facts relative to offences specified in Book II, Title I *bis* of the Criminal Code [that is, genocide, crimes against humanity, and war crimes] which have been referred to the judicial authorities, following a decision discussed by the Cabinet.

Once the Prosecutor has given the notification provided for in article 18, paragraph 1 of the Statute in respect to the facts brought to the attention of the Court by the Minister of Justice, the Court of Cassation, on application by the Principal Crown Prosecutor, shall pronounce the deferral of the Belgian court seized of the same facts.

Where the Court, at the request of the Minister of Justice, after the deferral of the Belgian court, states that the Prosecutor of the Court has decided not to produce an indictment or that the Court has not confirmed an indictment, or has deemed it does not have jurisdiction or that the case is inadmissible, the Belgian courts shall once again have jurisdiction.<sup>239</sup>

This procedure can be viewed as a way for national courts to declare unwillingness in cases where the ICC Prosecutor has initiated proceedings, thereby ensuring a balance between the respective workloads of the national and international legal systems.<sup>240</sup>

## 5.2. Art. 11: Jurisdiction *ratione temporis*

When discussing jurisdiction for international crimes, issues of temporal jurisdiction must be considered first. In order to protect the rights of accused persons, the *nullum crimen, nulla*

235 Bekou and Shah, 2006, see *supra* note 6, p. 509.

236 See *supra* note 42, Art. 5.

237 *Code Pénal*, 22 August 2008.

238 Damien Vandermeersch, “The ICC Statute and Belgian Law”, in *Journal of International Criminal Justice*, 2004, vol. 2, no. 1, p. 133, at p. 146; Damien Vandermeersch, “Prosecuting International Crimes in Belgium”, in *Journal of International Criminal Justice*, 2005, vol. 3, no. 2, p. 400.

239 *Loi relative aux violations graves du droit international humanitaire*, 5 August 2003, Art. 28.

240 Bekou, 2011, see *supra* note 231, p. 847.

*poena sine lege* principle needs to be taken into account.<sup>241</sup> Many States stipulate that the applicability of their respective national implementing legislation is prospective from the day of its entry into force.<sup>242</sup> However, a number of States have allowed for retrospective jurisdiction in their national legislation, to 1 July 2002 – the day the ICC came into existence –<sup>243</sup> and to 17 July 1998 – when the ICC Statute was first adopted. For instance, the **Canadian** implementing legislation provides:

For greater certainty, crimes described in Articles 6 and 7 and paragraph 2 of Article 8 of the ICC Statute are, as of July 17, 1998, crimes according to customary international law. This does not limit or prejudice in any way the application of existing or developing rules of international law.<sup>244</sup>

Article 11(2) of the ICC Statute provides that the jurisdiction of the ICC is limited to all “crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3”. This provision limits the temporal scope of the jurisdiction of the Court over core international crimes. In the same way that a declaration under Article 12(3) of the ICC Statute can fill the so-called ‘temporal gap’ at the international level, an extension of the temporal jurisdiction at the national level is to be welcomed, in order to fill the equivalent domestic lacuna.<sup>245</sup>

### 5.3. Art. 12: Jurisdictional principles

Most States enable their domestic courts to exercise jurisdiction over core international crimes according to jurisdictional principles recognised by international law. These include: (1) the territoriality principle; (2) the nationality principle; and (3) the passive personality principle. States that choose to incorporate substantive international criminal law provisions into their national legal frameworks by amending their criminal codes and codes of criminal procedure may have pre-existing provisions that provide for such jurisdiction. Other States may choose to restate these bases of jurisdiction for core international crimes. For example, the **Croatian** implementing legislation provides as follows:

Crimes committed in the Republic of Croatia, crimes committed by the Croatian nationals and the crimes the victims of which are the Croatian nationals shall be prosecuted in the Republic of Croatia and brought before a competent Croatian court.<sup>246</sup>

These jurisdictional bases – arguably the least controversial under international law – are sufficient to enable the domestic prosecution of international crimes. However, a number of States have adopted more expansive provisions, many of which pertain to the residence of

<sup>241</sup> Article 22 of the ICC Statute restates the *nullum crimen sine lege* principle, as follows: “A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court”. Article 23 of the ICC Statute reaffirms the *nulla poena sine lege* principle, as follows: “A person convicted by the Court may be punished only in accordance with this Statute”.

<sup>242</sup> For example, the majority of the Australian implementing legislation entered into force on the day after the Act received Royal Assent. See *supra* note 18, Section 2.

<sup>243</sup> New Zealand provides for limited retrospective application of certain provisions of its national implementing legislation. International Crimes and International Criminal Court Act 2000, see *supra* note 47. For a detailed analysis of the New Zealand legislation, see Juliet Hay, “Implementing the ICC Statute in New Zealand”, in *Journal of International Criminal Justice*, 2004, vol. 2, no. 1, p. 191. On retrospective application, see pp 195-196.

<sup>244</sup> See *supra* note 19, Art. 4(4).

<sup>245</sup> See generally, Robert Cryer *et al.* (eds.), *An Introduction to International Criminal Law and Procedure*, Third edition, Cambridge University Press, Cambridge, 2014, p. 169.

<sup>246</sup> *Law on the Implementation of the Statute of the International Criminal Court and the Prosecution of Crimes against International Law of War and Humanitarian Law*, 24 October 2003, Art. 10 (1).

the perpetrator, universal jurisdiction over core international crimes, and the relationship between the perpetrator and the State.

#### 5.4. Art. 12: More expansive provisions

Enabling national courts to exercise jurisdiction over international crimes committed by or against a person *ordinarily resident* in the State in question is one way to expand jurisdiction. This is wider than the nationality – or active personality – and passive personality principles, traditionally recognised under public international law. For example, the **South African** legislation provides:

In order to secure the jurisdiction of a South African court for purposes of this Chapter, any person who commits a crime [...] outside the territory of the Republic, is deemed to have committed that crime in the territory of the Republic if

[...]

(b) that person is not a South African citizen but is ordinarily resident in the Republic; or

[...]

(d) that person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic.<sup>247</sup>

Other States that enable the exercise of jurisdiction on the basis of residence include **Kenya**<sup>248</sup> and **Uganda**,<sup>249</sup> both of which also provide for jurisdiction over core international crimes committed by persons employed by the State. For instance, the **Ugandan** legislation provides as follows:

For the purpose of jurisdiction where an alleged offence [...] was committed outside the territory of Uganda, proceedings may be brought against a person, if –

[...]

(b) the person is employed by Uganda in a civilian or military capacity.<sup>250</sup>

The adoption of more expansive jurisdictional provisions is not required by the ICC Statute regime. The ICC was not granted universal jurisdiction, that is, jurisdiction over an international crime in the absence of any other recognised jurisdictional link to a State Party to the Statute.<sup>251</sup> Nevertheless, a number of States have adopted legislation allowing for the exercise of universal jurisdiction over core international crimes, which is, therefore, wider than the ICC Statute. The provision of universal jurisdiction over ICC crimes at the national level, when properly exercised by the domestic courts, can help to ensure that there are no safe havens for the perpetrators of serious crimes.<sup>252</sup>

<sup>247</sup> See *supra* note 42, Art. 4.

<sup>248</sup> See *supra* note 44.

<sup>249</sup> See *supra* note 21.

<sup>250</sup> *Ibid.*, Art. 18.

<sup>251</sup> See *supra* note 53, p. 49.

<sup>252</sup> Máximo Langer, “Universal Jurisdiction is Not Disappearing: The Shift from ‘Global Enforcer’ to ‘No Safe Haven’ Universal Jurisdiction”, in *Journal of International Criminal Justice*, 2015, vol. 13, no. 2, p. 245.

The wider, pure form of universal jurisdiction (or universal jurisdiction *in absentia*), whereby a State exercises jurisdiction over a crime without requiring the presence of the accused on its territory, is rarely practiced in modern public international law.<sup>253</sup>

Notwithstanding, a number of States have allowed for the narrower form of universal jurisdiction – that is, requiring the presence of the accused on their territory – in their legislation incorporating the ICC Statute into national law. For example, the **Netherlands** provides, as follows:

Without prejudice to the relevant provisions of the Criminal Code and the Code of Military Law, Dutch criminal law shall apply to: (a) anyone who commits any of the crimes defined in this Act outside the Netherlands, if the suspect is present in the Netherlands.<sup>254</sup>

The **Senegalese** legislation similarly reads:

Any foreigner that, outside of the territory of the Republic, has been accused of being the perpetrator or accomplice of one of the crimes enshrined in articles 431-1 to 431-5 of the criminal code [i.e., the crime of genocide, crimes against humanity, and war crimes] [...] may be prosecuted and tried in accordance with the provisions of Senegalese laws or the laws applicable in Senegal, if they are within the jurisdiction of Senegal.<sup>255</sup>

### Implementation notes

- ▶ Consider whether to expand national jurisdiction *ratione temporis*;
- ▶ Review applicable jurisdictional principles.

<sup>253</sup> Fannie Lafontaine, “Universal Jurisdiction – the Realistic Utopia”, in *Journal of International Criminal Justice*, 2012, vol. 10, no. 5, p. 1277. It is notable that New Zealand provides for the wider form of universal jurisdiction. See *supra* note 47.

<sup>254</sup> See *supra* note 155, Section 2. Göran Sluiter, “Implementation of the ICC Statute in the Dutch Legal Order”, in *Journal of International Criminal Justice*, 2004, vol. 2, no. 1, p. 158; Erwin van der Borght, “Prosecution of International Crimes in the Netherlands: An Analysis of Recent Case Law”, in *Criminal Law Forum*, 2007, vol. 18, no. 1, p. 87.

<sup>255</sup> *Loi n° 2007-05 du 12 février 2007 modifiant le Code de la Procédure pénale relative à la mise en œuvre du Traité de Rome instituant la Cour pénale internationale*, 12 February 2007, Art. 2. See also Penal Code 2007 *supra* note 27, Art. 9.

## 6

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# 6. General Principles of Criminal Law

General principles of criminal law, as were recognised by the States participating in the negotiations for the ICC Statute are included in Part III of the ICC Statute. While a full review of those principles is outside the scope of this publication, this section will highlight some important points, which require attention by the national legislators when implementing this part of the ICC Statute.

## 6.1. Art. 25: Individual criminal responsibility

The grounds of individual criminal responsibility – or modes of liability – under the ICC Statute are numerous and wide-ranging.<sup>256</sup> It provides for individual perpetration, joint perpetration, direct and indirect perpetration, as well as, *inter alia*, liability for attempt, ordering, soliciting, inciting, inducing, and aiding and abetting crimes under its jurisdiction. These modes of liability adopted by the drafters of the ICC Statute represent a compromise and are – at least in part – drawn from provisions of States’ domestic criminal procedure. Consequently, a number of States already provide for these grounds of individual criminal responsibility, to a lesser or greater extent; nonetheless, many States have adopted the modes of liability provided in the ICC Statute in addition to those already included in their national law.

For example, the *Kenyan* legislation lists the following modes of liability:

(1) A person who, in Kenya or elsewhere, commits—

(a) genocide;

(b) a crime against humanity; or

(c) a war crime,

is guilty of an offence.

(2) A person who, in Kenya or elsewhere, conspires or attempts to commit, or is an accessory after the fact in relation to, or who counsels in relation to, an offence mentioned in subsection (1) is guilty of an offence.<sup>257</sup>

However, the *Kenyan* legislation also provides for the grounds of individual criminal responsibility under the ICC Statute, as follows:

For the purposes of proceedings for an offence under section 6, the following provisions of the ICC Statute shall apply, with any necessary modifications

<sup>256</sup> Kai Ambos, “Article 25: Individual Criminal Responsibility”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, C.H. Beck, Hart & Nomos, Munich, 2016, pp. 979-1029. See also Albin Eser, “Individual Criminal Responsibility”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford, 2002, pp. 767-822.

<sup>257</sup> See *supra* note 44, Art.6.

[...]

(d) article 25 (which relates to principles of individual criminal responsibility);

[...]

(f) article 28 (which relates to the responsibility of commanders and other superiors);

[...]

(h) article 30 (which relates to the mental element of crimes).<sup>258</sup>

A similar approach is adopted by *Trinidad and Tobago*<sup>259</sup> and the *Philippines*.<sup>260</sup>

*Austria* recognises the competence of the ICC pursuant to Article 25 ICC Statute, providing:

The International Criminal Court, pursuant to the provisions of the Statute relative to the exercise of its jurisdiction, is competent for the prosecution and punishment of persons accused of crimes within the meaning of articles 5(1) (a) to (c), 6 to 8, and 25 of the Statute (genocide, crimes against humanity and war crimes) committed after the entry into force of the Statute (articles 10 to 13 of the Statute).<sup>261</sup>

Further, although the ICC Statute regime does not provide for conspiracy as a mode of liability and only criminalises public incitement to commit the crime of genocide, the *Norwegian* national legislation criminalises conspiracy and incitement to commit any of the core international crimes – not only genocide, as follows:

Any person who conspires with another person to commit a criminal offence mentioned in sections 101 to 107 [i.e., genocide, crimes against humanity, and war crimes] is liable to imprisonment [...]. The same applies to any person who directly and publicly incites another person to commit such an offence.<sup>262</sup>

This is wider than the ICC Statute and serves to strengthen the system by criminalising the commission of the three crimes presently under ICC jurisdiction to the broadest extent possible at the national level. A similar provision can be found in the legislation of *Bosnia and Herzegovina*,<sup>263</sup> *Fiji*<sup>264</sup> and *Slovenia*.<sup>265</sup>

Furthermore, the *Belgian* legislation provides for liability for ordering, regardless of whether or not the order is put into effect. Article 25(3)(b) of the ICC Statute punishes ordering in relation to crimes that ‘in fact’ occur, or those which are attempted and is therefore wider than the Statute:

Punishable with the penalty envisaged for the completed offence is: 1. the order, even if not carried out, to commit one of the offences envisaged in articles 136bis, 136ter and 136quater [genocide, crimes against humanity, and war crimes].<sup>266</sup>

<sup>258</sup> *Ibid.*, Art. 7.

<sup>259</sup> See *supra* note 43.

<sup>260</sup> *Revised Penal Code of the Philippines*, 1930 (2012).

<sup>261</sup> See *supra* note 55, Art.3.

<sup>262</sup> See *supra* note 26, Section 108.

<sup>263</sup> See *supra* note 102.

<sup>264</sup> *Crimes Decree 2009*, (decree No. 44 of 2009), 2009.

<sup>265</sup> See *supra* note 192.

<sup>266</sup> See *supra* note 49, Art. 136 septies.

Other States include additional grounds of individual criminal responsibility. For instance, the **Maltese** Criminal Code provides for the following mode of liability, which is not envisaged under Article 25 of the ICC Statute:

A person shall be deemed to be an accomplice in a crime if he

[...]

(b) instigates the commission of the crime by means of bribes, promises, threats, machinations, or culpable devices, or by abuse of authority or power, or gives instructions for the commission of the crime [...].<sup>267</sup>

Moreover, under the **French** Criminal Code, both recklessness and negligence incur criminal liability, albeit as less serious offences:

There is no felony or misdemeanour in the absence of an intent to commit it. However, the deliberate endangering of others is a misdemeanour where the law so provides. A misdemeanour also exists, where the law so provides, in cases of recklessness, negligence, or failure to observe an obligation of due care or precaution imposed by any statute or regulation, where it is established that the offender has failed to show normal diligence, taking into consideration where appropriate the nature of his role or functions, of his capacities and powers and of the means then available to him. In the case as referred to in the above paragraph, natural persons who have not directly contributed to causing the damage, but who have created or contributed to create the situation which allowed the damage to happen who failed to take steps enabling it to be avoided, are criminally liable where it is shown that they have broken a duty of care or precaution laid down by statute or regulation in a manifestly deliberate manner, or have committed a specified piece of misconduct which exposed another person to a particularly serious risk of which they must have been aware. There is no petty offence in the event of force majeure.<sup>268</sup>

Negligence constitutes a mode of liability in the legislation of a number of States such as **Bulgaria**,<sup>269</sup> **Cabo Verde**,<sup>270</sup> **Croatia**,<sup>271</sup> **Latvia**<sup>272</sup> and **Poland**.<sup>273</sup>

Finally, a number of States provide for liability for omission. The ICC Statute does not envisage criminal responsibility for omissions, except for military commanders or superiors. The **Polish** Penal Code provides that the omission to act in accordance with a legal duty incurs individual criminal responsibility:

Whoever, with an intent that another person should commit a prohibited act, facilitates by his behaviour the commission of the act, particularly by providing the instrument, means of transport, or giving counsel or information, shall be liable for aiding and abetting. Furthermore, whoever, acting against a particular legal duty of preventing the prohibited act, facilitates its commission by another person through his omission, shall also be liable for aiding and abetting.<sup>274</sup>

<sup>267</sup> See *supra* note 70, Art. 42.

<sup>268</sup> See *supra* note 90, Art. 121-3.

<sup>269</sup> See *supra* note 208.

<sup>270</sup> See *supra* note 98.

<sup>271</sup> See *supra* note 104.

<sup>272</sup> *The Criminal Law*, 1998 (2013).

<sup>273</sup> See *supra* note 85.

<sup>274</sup> *Ibid.*, Art. 18 para. 3.

The ***Finnish*** Criminal Code also punishes omissions:

An omission is punishable if this is specifically provided in the statutory definition of an offence.

(2) An omission is punishable also if the perpetrator has neglected to prevent the causing of a consequence that accords with the statutory definition, even though he or she had had a special legal duty to prevent the causing of the consequence.

Such a duty may be based on:

- (1) an office, function or position,
- (2) the relationship between the perpetrator and the victim,
- (3) the assumption of an assignment or a contract,
- (4) the action of the perpetrator in creating danger, or
- (5) another reason comparable to these.<sup>275</sup>

Omission is also punishable in the legislation of *inter alia* ***Afghanistan***,<sup>276</sup> ***Bosnia and Herzegovina***,<sup>277</sup> ***Croatia***<sup>278</sup> and ***Slovenia***.<sup>279</sup>

## 6.2. Art. 27: Irrelevance of official capacity

Article 27 of the ICC Statute excludes the application of immunities for State officials at the *international* level, i.e. in proceedings before the ICC. States are, therefore, advised to review the application of immunities for national officials in their domestic law. This may necessitate a re-examination of constitutional provisions, many of which afford wide-ranging immunities to State officials.<sup>280</sup>

Arguably, the commission of core international crimes does not qualify as official conduct for the purposes of functional immunities under international law, although this is not uncontested.<sup>281</sup> However, in respect of personal immunities, it is accepted that Article 98(1) ICC Statute must be respected by ICC State Parties. Article 98(1) prevents the Court from proceeding with a request for surrender or assistance that would force 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 is first able to secure the cooperation of the third State for the waiver of the immunity. This provision can serve to protect those officials afforded personal immunities by non-State Parties to the ICC Statute, unless (1) the immunity is waived; (2) the UN Security Council has demanded full

<sup>275</sup> See *supra* note 108, Section 3.

<sup>276</sup> *Penal Code*, 1976.

<sup>277</sup> See *supra* note 102.

<sup>278</sup> See *supra* note 104.

<sup>279</sup> See *supra* note 192.

<sup>280</sup> Helen Duffy, “National Constitutional Compatibility and the International Criminal Court”, in *Duke Journal of Comparative and International Law*, 2001, vol. 11, no 1, p. 5.

<sup>281</sup> Steffan Wirth, “Immunities, Related Problems, and Article 98 of the *Rome Statute*”, in *Criminal Law Forum*, 2002, vol. 12, no. 4, p. 429. See also Dapo Akande, “International Law Immunities and the International Criminal Court”, in *American Journal of International Law*, 2004, vol. 98, no. 3, p. 407; Dapo Akande and Sangeeta Shah, “Immunities of State Officials, International Crimes, and Foreign Domestic Courts”, in *European Journal of International Law*, 2010, vol. 21, no. 4, p. 815; Paola Gaeta, “Official Capacity and Immunities”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford, 2002, p. 975.

cooperation from the third State; or (3) the official in question no longer holds the position entitling him or her to personal immunity.<sup>282</sup> However, Article 98(1) does not provide any justification for a State Party to refuse the arrest and surrender of its own officials or those of another ICC State Party. As a result, the removal of functional immunities – and indeed personal immunities as far as possible – ought to be prioritised when implementing the ICC Statute.

The **United Kingdom's** approach to immunities for crimes under the jurisdiction of the Court distinguishes between State Parties and non-State Parties to the ICC Statute, reflecting Article 27 and Article 98(1) thereof, as follows:

(1) Any state or diplomatic immunity attaching to a person by reason of a connection with a state party to the ICC Statute does not prevent proceedings under this Part in relation to that person.

(2) Where— (a) state or diplomatic immunity attaches to a person by reason of a connection with a state other than a state party to the ICC Statute, and (b) waiver of that immunity is obtained by the ICC in relation to a request for that person's surrender, the waiver shall be treated as extending to proceedings under this Part in connection with that request.

(3) A certificate by the Secretary of State— (a) that a state is or is not a party to the ICC Statute, or (b) that there has been such a waiver as is mentioned in subsection (2), is conclusive evidence of that fact for the purposes of this Part.

(4) The Secretary of State may in any particular case, after consultation with the ICC and the state concerned, direct that proceedings (or further proceedings) under this Part which, but for subsection (1) or (2), would be prevented by state or diplomatic immunity attaching to a person shall not be taken against that person.

[...]

(6) In this section “state or diplomatic immunity” means any privilege or immunity attaching to a person, by reason of the status of that person or another as head of state, or as representative, official or agent of a state, under— (a) the Diplomatic Privileges Act 1964 (c. 81), the Consular Relations Act 1968 (c.18), the International Organisations Act 1968 (c.48) or the State Immunity Act 1978 (c.33), (b) any other legislative provision made for the purpose of implementing an international obligation, or (c) any rule of law derived from customary international law.<sup>283</sup>

By way of an alternate example, **South Africa's** legislation removes immunities for core international crimes at the domestic level as follows:

Despite any other law to the contrary, including customary and conventional international law, the fact that a person-

(a) is or was a head of State or government, a member of a government or parliament, an elected representative or a government official; or

(b) being a member of a security service or armed force, was under a legal obligation to obey a manifestly unlawful order of a government or superior, is neither- (i) a defence to a crime; nor (ii) a ground for any possible reduction of sentence once a person has been convicted of a crime.<sup>284</sup>

<sup>282</sup> Robert Cryer *et al.* (eds.), see *supra* note 245, pp. 558-559.

<sup>283</sup> See *supra* note 16; Cryer, 2002, see *supra* note 53, pp. 737-738.

<sup>284</sup> See *supra* note 42, Art. 4.

On the one hand, these provisions appear to prohibit the invocation of immunities – as a defence – by officials before South African courts. On the other, it is unclear whether the South African legislation precludes the surrender of State officials to the ICC on the basis of personal or functional immunities. For the purposes of fostering effective cooperation between State authorities and the ICC, it is advisable that State Parties to the ICC Statute address this issue during the implementation process.

### 6.3. Art. 28: Responsibility of commanders and other superiors

Command responsibility assigns criminal responsibility to *de jure* or *de facto* military commanders and other (non-military) commanders for failing to prevent, repress and/or punish the commission of core international crimes by their subordinates.<sup>285</sup>

These modes of liability are drawn partly from pre-existing national legislation. As such, similar provisions may be found in the national legal frameworks of States applicable to ordinary crimes. However, some variations may be observed in both the wording and the coverage of these provisions.

The ICC Statute defines command responsibility ‘in positive terms’,<sup>286</sup> as a ground of individual criminal responsibility for the crimes “within the jurisdiction of the Court”. Article 28 of the ICC Statute sets out a set of requirements: (1) the existence of a superior - subordinate relationship; (2) the element of effective control; and (3) a causation link between the superior’s acts/omission and the criminal conduct of their subordinates.<sup>287</sup>

A number of States incorporate command and superior responsibility into their criminal legislation by direct reference to the ICC Statute. For example, **Ireland** provides:

(1) The law (including common law) of the State shall, subject to subsection (2), apply in determining whether a person has committed an offence under this Part.

(2) Article 27 (application of Statute to all persons without any distinction based on official capacity) and paragraphs (a) and (b) of Article 28 (responsibility of commanders and other superiors for crimes within the jurisdiction of the International Criminal Court) shall apply, as appropriate and with any necessary modifications, in relation to any such determination.<sup>288</sup>

**Kenya**,<sup>289</sup> **New Zealand**,<sup>290</sup> **Trinidad and Tobago**<sup>291</sup> and **Uganda**<sup>292</sup> also follow this approach.

285 ICC Statute, Art. 28.

286 Elies van Sliedregt, *Individual Criminal Responsibility in International Law*, Oxford University Press, 2012, p. 197.

287 For a detailed analysis on command responsibility and a comparative overview of national and international legislation, see CMN, [Command Responsibility: International Criminal Law Guidelines](#) (2<sup>nd</sup> ed., November 2016).

288 See *supra* note 23, Art. 13.

289 See *supra* note 44.

290 See *supra* note 47.

291 See *supra* note 43.

292 See *supra* note 21.

Other States, such as *Australia*,<sup>293</sup> *Comoros*,<sup>294</sup> the *Democratic Republic of the Congo*,<sup>295</sup> *Malta*,<sup>296</sup> *Samoa*<sup>297</sup> and the *United Kingdom*<sup>298</sup> reproduce the ICC Statute in their national provisions.

*Canada* views the criminal liability of commanders and superiors as a “breach of responsibility”.<sup>299</sup>

*Montenegro* assigns criminal responsibility to commanders and superiors for their “omission to prevent criminal offences against humanity and other values protected under international law”.<sup>300</sup> Similar language is adopted by *Serbia*.<sup>301</sup>

In some instances, national provisions are narrower than the ICC Statute. For example, in the *Former Yugoslav Republic of Macedonia*, military commanders are accountable for crimes “committed during war or any type of armed conflict, international or domestic”.<sup>302</sup> The provision restricts the responsibility of the military commander only to times of war or conflict, a restriction that is not made within the ICC Statute.

#### 6.4. Art. 29: Non-applicability of statute of limitations

Article 29 of the ICC Statute reads: “[T]he crimes within the jurisdiction of the Court shall not be subject to any statute of limitations”. It has been convincingly argued that this provision is targeted at national authorities because the crimes under ICC jurisdiction are not subject to any period of prescription in the ICC Statute.<sup>303</sup> As a result, should a State Party be prevented from prosecuting core international crimes at the national level based on domestic statutory limitations, the jurisdiction of the ICC could be triggered according to the complementarity principle. Alternatively, failure to act on behalf of the State in question could be regarded as non-cooperation with the Court, which, depending on the trigger mechanism utilised, could lead to a referral by the ICC to the UN Security Council or the Assembly of States Parties, respectively.<sup>304</sup> It is consequently advisable to remove statutes of limitations in national legislation as far as possible.

293 See *supra* note 18.

294 *Décret No 12-022/PR, Loi n°11-022/au du 13 décembre 2011, portant de Mise en Œuvre du Statut de Rome*, 4 février 2002.

295 Laws implementing the Rome Statute of the ICC were adopted in January 2016: *Loi n°06/018 du 20 juillet 2006 modifiant et complétant le Décret du 30 janvier 1940 portant Code pénal congolais, Loi n° 06/019 du 20 juillet 2006 modifiant et complétant le Décret du 06 août 1959 portant Code de Procédure Pénale Congolais, Loi Modifiant et Complétant le Décret du 6 août 1959 portant Code de procédure pénale, Loi Modifiant et Complétant le Décret du 30 janvier 1940 portant Code pénal*. See PGA, ‘PGA welcomes the enactment of the implementing legislation of the Rome Statute of the ICC by the Democratic Republic of the Congo’.

296 See *supra* note 70.

297 See *supra* note 22.

298 See *supra* note 16.

299 See *supra* note 19.

300 See *supra* note 146.

301 See *supra* note 206.

302 See *supra* note 207.

303 See, e.g., William Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2nd ed., Oxford, 2016, p. 623.

304 *ICC Statute*, Art. 87(7).



The **Republic of the Congo** has eliminated all periods of prescription for genocide, crimes against humanity and war crimes, as follows:

Public action for the prosecution and punishment of the crimes envisaged in this law [i.e., genocide, crimes against humanity, and war crimes], as well as the penalties imposed shall not be subject to prescription.<sup>305</sup>

The **Ugandan** legislation also excludes all statutes of limitations for the crimes under ICC jurisdiction, by direct reference to Article 29 of the ICC Statute,<sup>306</sup> which makes this approach entirely compatible with the aims of the ICC Statute system of justice and most welcome.

Several States have made serious efforts to remove statutes of limitations from their national laws – or to reduce the effects thereof. For example, the **German** legislation has eliminated all periods of prescription for core international crimes, but for two offences not categorised as ‘serious criminal offences’ (“Verbrechen”) under German criminal law.<sup>307</sup> It provides:

The prosecution of serious criminal offences pursuant to this Act and the execution of sentences imposed on their account shall not be subject to any statute of limitations.<sup>308</sup>

It is notable that the legislation of the **Netherlands** adopts a broadly similar approach to its German counterpart as regards the removal of statutes of limitations.<sup>309</sup>

Because the **German** legislation does not remove the relevant period of prescription for *every* core international crime at the domestic level, it has been argued that the possibility that proceedings for (less serious) criminal offences (“Straftaten”) might take place before the ICC is less than satisfactory.<sup>310</sup> On the other hand, it has been suggested that this is unlikely to arise in practice because the ICC only has jurisdiction over “the most serious crimes of concern to the international community as a whole” and is unlikely to investigate and prosecute less serious offences, such as those for which periods of prescription remain applicable.<sup>311</sup>

Nonetheless, so as to encourage national investigations for core international crimes, it is advisable that States exclude statutes of limitations for core international crimes to the fullest available extent in their legislation.

305 Loi n°8-98 du 31 Octobre 1998 portant définition et répression du génocide, des crimes de guerre et des crimes contre l’Humanité, 31 October 1998, Art. 14.

306 See *supra* note 21.

307 The offences for which a statute of limitations remains applicable are “Violation of the duty of supervision” and “Omission to report a crime”, enumerated in sections 13 and 14 of the Act to Introduce the Code of Crimes against International Law of 26 June 2002, see *supra* note 64.

308 *Ibid.* An explanatory footnote to this section of the legislation provides, in relevant part, as follows: “In German law the term “serious criminal offence” (“Verbrechen”) is used to denote criminal offences (“Straftaten”) that are punishable with not less than one year of imprisonment. [...] As a result, all criminal offences in the present Draft Code are “serious criminal offences” (“Verbrechen”) with the sole exception of the criminal offences in sections 13 and 14 [i.e. violation of the duty of supervision and omission to report a crime].”

309 Periods of prescription continue to apply to certain violations of the laws and customs of war. See *supra* note 155.

310 Helmut Satzger, “German Criminal Law and the ICC Statute – A Critical Analysis of the New German Code of Crimes against International Law”, in *International Criminal Law Review*, 2002, vol. 2, no. 3, p. 272.

311 See, e.g., Ruth A. Kok, *Statutory Limitations in International Criminal Law*, T.M.C. Asser Press, The Hague, 2007, p. 122.



## 6.5. Art. 31: Grounds for excluding criminal responsibility

The ICC Statute provides a wide range of grounds for excluding criminal responsibility, including the existence of a mental disease or defect,<sup>312</sup> intoxication,<sup>313</sup> acting in self-defence, acting under duress,<sup>314</sup> mistake of fact,<sup>315</sup> and, under conditions, mistake of law.<sup>316</sup> The Statute also recognises superior orders as a ground for excluding criminal responsibility, albeit under strict conditions.<sup>317</sup>

Article 31 of the ICC Statute draws from national legal traditions; similar provisions can be found in most jurisdictions. By avoiding the use of the term ‘defences’, found in common law systems, the Statute follows the civil law tradition and treats these as grounds for excluding criminal responsibility.<sup>318</sup>

Article 31 is not exhaustive and paragraph 3 allows the invocation of further grounds for excluding criminal responsibility. It is favourable to the accused to have recourse to defences under both international law *and* domestic law.

Making the full range of international criminal law defences available at the national level, requires domestic courts to be in a position to address any conflicts that may arise *inter se*. National courts may also be required to identify which defences are generally available under general international law. For example, the **New Zealand** implementing legislation provides:

(1) For the purposes of proceedings for an offence against section 9 or section 10 or section 11 [i.e., genocide, crimes against humanity, and war crimes], –

(a) the following provisions of the Statute apply, with any necessary modifications:

[...]

(ix) Article 31 (which specifies grounds for excluding criminal responsibility):

(x) Article 32 (which relates to mistakes of fact or law):

(xi) Article 33 (which relates to superior orders and prescription of law)

[...]

(c) a person charged with the offence may rely on any justification, excuse, or defence available under the laws of New Zealand or under international law.<sup>319</sup>

**Comoros** on the other hand, repeat *verbatim* the provisions of the ICC Statute, which are applicable “in addition to the other grounds for excluding criminal responsibility envisaged by the law”.<sup>320</sup>

<sup>312</sup> ICC Statute, Art. 31(1)(a).

<sup>313</sup> ICC Statute, Art. 31(1)(b).

<sup>314</sup> ICC Statute, Art. 31(1)(d).

<sup>315</sup> ICC Statute, Art. 32(1).

<sup>316</sup> ICC Statute, Art. 32(2).

<sup>317</sup> ICC Statute, Art. 33.

<sup>318</sup> Albin Eser, “Article 31” in Otto Triffterer and Kai Ambos see *supra* note 93, pp. 1125–1160, p. 1135.

<sup>319</sup> See *supra* note 47, Art. 12.

<sup>320</sup> See *supra* note 294.

**Canada** offers recourse to a wide range of defences providing:

In proceedings for an offence under any of sections 4 to 7, the accused may, subject to sections 12 to 14 and to subsection 607(6) of the Criminal Code, rely on any justification, excuse or defence available under the laws of Canada or under international law at the time of the alleged offence or at the time of the proceedings.<sup>321</sup>

It also notes that:

Despite section 15 of the Criminal Code, it is not a justification, excuse or defence with respect to an offence under any of sections 4 to 7 that the offence was committed in obedience to or in conformity with the law in force at the time and in the place of its commission.<sup>322</sup>

A similar provision can be found under Article 31 in the *Trinidad and Tobago* ICC Act 2006.<sup>323</sup>

### **6.5.1. Art. 31(1)(a): Mental disease or defect**

A perpetrator is not criminally responsible if, owing to a mental disease or defect, they are not able to recognise the unlawfulness of their conduct and/or control it according to the requirements of law.

Exclusion of criminal liability due to mental disease or defect is generally recognised in most domestic legal systems.<sup>324</sup> The provision requires complete destruction of the perpetrator's capacity to appreciate the unlawfulness and/or the nature of the conduct and destruction of their capacity to control their conduct to conform to the requirements of law. Although a high standard, it is consistent with the approach of most domestic jurisdictions on the matter.<sup>325</sup> The provision is, thus, fairly uncontroversial.

### **6.5.2. Art. 31(1)(b): Intoxication**

A person who, due to intoxication, is unable to “appreciate the unlawfulness or nature of his or her conduct, or [...] control his or her conduct to conform to the requirements of law” when committing a criminal act will not be punished. However, criminal liability remains with the perpetrator if he or she became “voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court”.

Intoxication as a ground of excluding criminal responsibility is a much debated topic. National approaches differ greatly, not only as a matter of policy but also due to diverging cultural

<sup>321</sup> See *supra* note 19, Art. 11.

<sup>322</sup> *Ibid.*, Art. 13.

<sup>323</sup> See *supra* note 43.

<sup>324</sup> See for example, Canada, *Criminal Code*, 1985 (2013); France, *supra* note 90 and Japan, *Penal Code*, 1907 (2007).

<sup>325</sup> Cryer, *supra* note 245, p. 401.

attitudes towards alcohol.<sup>326</sup> However, given reports of core international crimes being committed under the influence, intoxication was included in the ICC Statute.<sup>327</sup>

The core of the provision focuses on the test of voluntary or non-voluntary intoxication. This is meant to prevent a *mala fide* use of intoxication to exclude criminal responsibility, in cases where the alleged perpetrator intentionally consumed alcohol and/or drugs in order to gain courage to commit a crime or knowingly disregarded the risk of committing a crime.<sup>328</sup>

### 6.5.3. Art. 31(1)(c): Self-defence, defence of other and of property

Self-defence, defence of other and of property “reflects provisions found in most national criminal codes, and may be regarded as constituting a rule of customary law”.<sup>329</sup>

There are three requirements for this provision to take effect: (1) an imminent and unlawful danger to a person or property, (2) a proportionate defence against it and (3) a person not merely involved in a defensive operation. These elements are common to most national legal frameworks and as such, largely uncontested.<sup>330</sup>

### 6.5.4. Art. 31(1)(d): Necessity and duress

A person acting under duress is someone who is compelled to commit a crime by a threat to their life or to that of another person.<sup>331</sup> A threat to other protected interests, such as freedom or property, cannot form the basis of this ground for excluding criminal responsibility.

Necessity, on the other hand, refers to threats to life and limb that are a result of objective circumstances, in particular forces of nature.<sup>332</sup>

When invoking necessity and/or duress, the alleged perpetrator must act ‘necessarily and reasonably’.<sup>333</sup> According to Werle and Jessberger “an action is necessary if it is the only possibility of immediately eliminating the threat. It is reasonable if it is generally appropriate to avert the danger and causes no disproportionate consequences”.<sup>334</sup>

### 6.5.5. Art. 32(1): Mistake of fact

The ICC Statute recognises that a mistake about facts relevant to the definition of the crime can be a ground for excluding criminal responsibility, if the mistaken perception affects the

<sup>326</sup> For example, Ghana in principle does not recognise intoxication as a defence to a criminal charge, see *supra* note 65. A similar attitude is adopted by the Russian Federation, see *supra* note 117. Other countries recognise it conditionally, see for e.g. Spain, *supra* note 28.

<sup>327</sup> See Eser, *supra* note 318, p. 1140; for an overview, see Elies van Sliedregt, *supra* note 286, p. 230 *et seq.*

<sup>328</sup> For a further analysis see Eser, *supra* note 318.

<sup>329</sup> ICTY, *Prosecutor v. Dario Kordić and Mario Čerkez*, TC, Judgment, Case No. IT-95-14/2-T, 26 February 2001, para. 451.

<sup>330</sup> See for example Finland, Criminal Code, *supra* note 108, Romania, Criminal Code, 2005; Nigeria, Criminal Code Act- Chapter 77, 1916 (1990).

<sup>331</sup> William A. Schabas, *An Introduction to the International Criminal Court*, Fourth edition, Cambridge University Press, 2011, p. 242. For examples of implementation see Germany, Criminal Code (Strafgesetzbuch, StGB), 1998 (2009); Canada, *supra* note 312; Botswana, Penal Code, 1964 (2005).

<sup>332</sup> Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, Third edition, Oxford University Press, 2014, p. 239. For examples of national provisions see Spain, *supra* note 28; Portugal, Penal Code, General Part (Articles 1-130), 1982 (2006).

<sup>333</sup> See Eser, see *supra* note 318, paras. 58 *et seq.*

<sup>334</sup> See Werle, *supra* note 332, p. 241.

material elements and, consequently, negates the subjective conditions for liability.<sup>335</sup>

Mistake of fact is not a controversial issue, however, in any case, the Court will have to assess the credibility of claims invoking mistake of fact on a case-by-case basis.<sup>336</sup>

#### 6.5.6. Art. 32(2): Mistake of law

In principle, the ICC Statute does not recognise mistake of law as a ground excluding criminal responsibility. It allows for a very narrow application of the defence, only when the mistake negates the mental element of the crime in question or, if under Article 33 of the ICC Statute, it concerns superior orders.

Mistake of law is a controversial provision and there is divergence in States' approach on the matter.

For example, **Portugal** recognises that mistake of law can potentially exclude intent, providing:

1. The mistake about fact or law elements of a type of crime or about prohibitions the knowledge of which is reasonably indispensable for the agent to become aware of the act unlawfulness excludes intent.
2. The rule established in the previous number applies to the mistake about a state of things that, if existing, would have excluded the unlawfulness of the fact or the agent's fault.
3. Punishability is safeguarded in negligence general terms.<sup>337</sup>

**Canada** fully prohibits the use of ignorance of law as a ground for excluding criminal responsibility:

Ignorance of the law by a person who commits an offence is not an excuse for committing that offence.<sup>338</sup>

A mistake of law does not apply when the alleged perpetrator is ignoring the law or he or she is mistakenly assuming that his or her act does not fall under the jurisdiction of the Court. It is relevant only when it concerns "normative elements of a crime under international law".<sup>339</sup>

### 6.6. Art. 33: Superior orders and prescription of law

Core international crimes, by nature, are often committed pursuant to the orders of a superior. Perpetrators "are frequently integrated into a hierarchically structured collective, such as an army or police force".<sup>340</sup> A hierarchy is also present in non-State and paramilitary groups.

<sup>335</sup> See e.g. Bulgaria, Criminal Code, *supra* note 208; Ghana, Criminal Code, *supra* note 65.

<sup>336</sup> Schabas, see *supra* note 303, p. 656.

<sup>337</sup> See *supra* note 73, Art. 16.

<sup>338</sup> See *supra* note 324, Art. 19.

<sup>339</sup> Werle and Jessberger, *supra* note 332, p. 248.

<sup>340</sup> *Ibid.*, p. 248.

In such situations, a duty of obedience exists, where subordinates are expected to follow their superior's orders.

In principle, the ICC Statute recognises that the existence of an order does not absolve the perpetrator of criminal responsibility. The provision highlights the concept of individual criminal responsibility, underlining that subordinates can no longer hide behind the responsibility of their superiors or their States.<sup>341</sup> The provision expressly includes orders of both military and civilian superiors.

An order can provide a ground for excluding criminal responsibility only if three cumulative requirements are met: (1) a legal obligation to obey the given order; (2) the person did not know that order was unlawful and (3) the order was not manifestly unlawful.<sup>342</sup> The Statute further provides that orders to commit genocide or crimes against humanity are manifestly unlawful.<sup>343</sup>

The ICC Statute provision, the result of lengthy and complex negotiations, presumes that the illegality of such orders is “obvious to the average observer”,<sup>344</sup> and leaves room for exclusion of criminal responsibility only in cases of war crimes, due to their varied forms and varying degrees of severity.<sup>345</sup>

States that follow closely the ICC Statute approach include *Canada*,<sup>346</sup> the *United Kingdom*<sup>347</sup> and *Kenya*.<sup>348</sup>

### Implementation notes

- ▶ Article 25 ICC Statute: Recognise all modes of liability found in the Rome Statute;
- ▶ Article 25 ICC Statute: Consider extending the crime of incitement to cover all core international crimes;
- ▶ Article 27 ICC Statute: Recognise that the official capacity of the alleged perpetrator of a core international crime is irrelevant to the investigation and prosecution of such crimes;
- ▶ Article 28 ICC Statute: Provide for the responsibility of commanders and other superiors at the national level;
- ▶ Article 29 ICC Statute: Remove statutes of limitation for core international crimes;
- ▶ Articles 31-32 ICC Statute: Review applicable grounds for excluding criminal responsibility under both international and national law;
- ▶ Article 33 ICC Statute: Accept superior orders as a ground for excluding criminal responsibility only when the three conditions of Article 33 ICC Statute are fulfilled.

<sup>341</sup> Otto Triffterer and Stefanie Bock, “Article 33: Superior orders and prescription of law”, in Triffterer and Ambos (eds.) *supra* note 93, p. 1187

<sup>342</sup> *ICC Statute*, Art. 33(1).

<sup>343</sup> *Ibid.*, Art. 33(2).

<sup>344</sup> Werle and Jessberger, *supra* note 332, p. 252.

<sup>345</sup> *Ibid.*

<sup>346</sup> See *supra* note 19.

<sup>347</sup> See *supra* note 16.

<sup>348</sup> See *supra* note 44.

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## **7. Offences Against the Administration of Justice 68**

### **7.1. National approaches 69**

# 7. Offences Against the Administration of Justice

## 7.1. National approaches

Article 70 of the ICC Statute lists a number of offences against the administration of justice applicable in proceedings before the ICC. It includes six punishable acts that can be divided into three categories: 1. offences involving perjury or false testimony; 2. obstruction of the activities of the Court; and 3. solicitation of bribes. States have incorporated most or all of these crimes into their respective national legal orders by reference or replication.

For instance, the *Irish* legislation proscribes the crimes against the administration of justice listed in the ICC Statute by reference, as follows:

(1) It shall be an offence for a person to do intentionally any of the acts mentioned in paragraph 1 of Article 70 (offences against the administration of justice) in relation to proceedings—

(a) before the International Criminal Court, or

(b) before a court for an ICC offence, and for the purposes of the proceedings mentioned in paragraph (b) references to the International Criminal Court in paragraph 1 and the first sentence of paragraph 2 of that Article shall be construed as references to a court.

(2) (a) A person convicted of an offence under subsection (1)(b) is liable [...].<sup>349</sup>

Other States incorporating offences against the administration of justice by reference are: *Australia*,<sup>350</sup> *Austria*,<sup>351</sup> *Belgium*,<sup>352</sup> *Malta*,<sup>353</sup> *Samoa*<sup>354</sup> and the *United Kingdom*.<sup>355</sup>

In contrast, *Mauritius* incorporates the offences against the administration of justice provided in the ICC Statute into its national legal order by replication:

(1) Any person who, in relation to any proceedings before the International Criminal Court –

(a) gives false testimony when under an obligation, pursuant to Article 69, paragraph 1 of the Statute, to tell the truth;

(b) presents evidence that he knows is false or forged;

(c) corruptly influences a witness, obstructs or interferes with the attendance or testimony of a witness, retaliates against a witness for giving testimony or destroys, tampers with or interferes with the collection of evidence;

349 See *supra* note 23, Art. 11.

350 See *supra* note 18.

351 See *supra* note 55.

352 *Act of 29 March 2004 on Cooperation with the International Criminal Court and the International Criminal Tribunals*, 2004.

353 See *supra* note 70.

354 See *supra* note 22.

355 See *supra* note 16.

(d) impedes or intimidates an official of the International Criminal Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his duties;

(e) retaliates against an official of the International Criminal Court on account of duties performed by that or another official, shall commit an offence.<sup>356</sup>

A similar approach is adopted by a number of countries that either repeat the ICC Statute language *verbatim* or adapt it to their national legal frameworks. Such countries include: **Canada**,<sup>357</sup> **Japan**,<sup>358</sup> **Republic of Korea**,<sup>359</sup> **Lithuania**,<sup>360</sup> **New Zealand**,<sup>361</sup> **South Africa**,<sup>362</sup> **Spain**,<sup>363</sup> **Trinidad and Tobago**<sup>364</sup> and **Uganda**.<sup>365</sup>

Other States choose to extend the application of relevant pre-existing national legislation to offences against the Court and its officials. For example, **Denmark** provides:

The provisions in Chapter 14 of the Criminal Code with respect to crimes committed against official authorities and in chapter 17 in case of perjury or false accusation is likewise applicable in cases related to the International Criminal Court.<sup>366</sup>

**Finland** adopts a similar approach,<sup>367</sup> while **Norway** applies the pre-existing penalty system to the offences against the Court.<sup>368</sup> **Germany** on the other hand provides:

Sections 153 to 161 shall apply mutatis mutandis to false statements made before an international court established under a legal instrument binding on the Federal Republic of Germany.<sup>369</sup>

In order to preserve the integrity of national proceedings for core international crimes, States are advised to implement the offences against the administration of justice over which the ICC has jurisdiction, pursuant to Article 70 of the ICC Statute, into their respective national legal orders. In that case, States are afforded the opportunity to hold to account those suspected of obstructing the administration of justice for ICC crimes, without recourse to the Court.

## Implementation notes

- Article 70 ICC Statute** ▶ Review existing national legislation and extend criminal laws to cover ICC offences against the administration of justice.

<sup>356</sup> See *supra* note 45, Art. 7.

<sup>357</sup> See *supra* note 19.

<sup>358</sup> *Act on Cooperation with the International Criminal Court*, Act No. 37 of May 11, 2007.

<sup>359</sup> See *supra* note 54.

<sup>360</sup> See *supra* note 84.

<sup>361</sup> See *supra* note 47.

<sup>362</sup> See *supra* note 42.

<sup>363</sup> See *supra* note 28.

<sup>364</sup> See *supra* note 43.

<sup>365</sup> See *supra* note 21.

<sup>366</sup> *Act No 342/2001 on the International Criminal Court*, 2001, Art. 5.

<sup>367</sup> See *supra* note 20.

<sup>368</sup> See *Act No. 65 of 15 June 2001 relating to the implementation of the Statute of the International Criminal Court of 17 July 1998 (the Rome Statute) in Norwegian law, 15 June 2001*.

<sup>369</sup> See *supra* note 331, Section 162.





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**8. Penalties**

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8.1. National approaches

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# 8. Penalties

## 8.1. National approaches

Part VII of the ICC Statute regulates the applicable penalties for crimes under the jurisdiction of the Court. To this end, Article 77 of the ICC Statute envisaged imprisonment up to 30 years and only exceptionally, life imprisonment. Additionally, the Court may impose a fine or a forfeiture of proceeds, property, and assets derived from the crime for which the accused has been convicted. Article 78 of the ICC Statute provides guidance to the ICC with regard to sentencing. It is not one of those provisions whose implementation is required nationally.

Article 80 of the ICC Statute notably stipulates that: “Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.” In light thereof, State Parties to the ICC are not obliged to follow the sentencing guidance provided in the Statute. Notwithstanding, given the fact that neither the ICC Statute, nor the respective Statutes of the *ad hoc* International criminal tribunals, provide for recourse to the death penalty, it has been argued that even the most serious crimes of concern to the international community as a whole do not merit capital punishment.<sup>370</sup>

The approach adopted by ICC State Parties regarding penalties for core international crimes in their national legislation varies greatly. However, some trends can be observed.

Genocide is traditionally punished with the lengthiest penalty, often with life imprisonment.<sup>371</sup> An exception can be found in **Albania’s** legislation, where the minimum penalty for war crimes and crimes against humanity (15 years) is more severe than the minimum penalty for genocide (10 years).<sup>372</sup>

**Australia** provides for different penalties for each of the crimes. Genocide is punished by life imprisonment, crimes against humanity by imprisonment of a minimum 17 years and maximum 25 years and war crimes carry a range of punishment from 10 to 25 years. Attacks against the person, including sexual and gender-based crimes attract heavier penalties.<sup>373</sup> A similar approach is adopted by **Fiji**.<sup>374</sup>

**Greece** also adopts such a graded approach, which outlines in detail the aggravating circumstances and their effect on the severity of the penalties imposed.<sup>375</sup> Similarly, the **Spanish** legislation provides detailed guidance regarding penalties and sentencing.<sup>376</sup>

370 Bekou and Shah, 2006, see *supra* note 6, p. 519. See also, generally, William A. Schabas, *The Abolition of the Death Penalty in International Law*, Third edition, Cambridge University Press, 2002.

371 For example, life imprisonment is provided in the legislation of (among others): Albania, Australia, Canada, Fiji, Germany, Samoa and Slovenia.

372 See *supra* note 97.

373 See *supra* note 18.

374 See *supra* note 264.

375 See *supra* note 111.

376 See *supra* note 28.

**New Zealand's** legislation provides:

9. (3) The penalty for genocide, or conspiring with, or agreeing with any person to commit genocide is,—

(a) if the offence involves the wilful killing of a person, the same as the penalty for murder:

(b) in any other case, imprisonment for life or a lesser term.

10. (3) The penalty for a crime against humanity is,—

(a) if the offence involves the wilful killing of a person, the same as the penalty for murder:

(b) in any other case, imprisonment for life or a lesser term.

11. (3) The penalty for a war crime is,—

(a) if the offence involves the wilful killing of a person, the same as the penalty for murder:

(b) in any other case, imprisonment for life or a lesser term.<sup>377</sup>

This approach has been followed also by **Kenya**<sup>378</sup> and **Trinidad and Tobago**.<sup>379</sup>

The **Philippines** outline the penalties applicable to core international crimes in a single provision:

Any person found guilty of committing any of the acts provided under Sections 4, 5 and 6 of this Act shall suffer the penalty of reclusion temporal in its medium to maximum period and a fine ranging from One hundred thousand pesos (Php 100,000.00) to Five hundred thousand pesos (Php 500,000.00).

When justified by the extreme gravity of the crime, especially where the commission of any of the crimes specified herein results in death or serious physical injury, or constitutes rape, and considering the individual circumstances of the accused, the penalty of reclusion perpetua and a fine ranging from Five hundred thousand pesos (Php 500,000.00) to One million pesos (Php 1,000,000.00) shall be imposed.

Any person found guilty of inciting others to commit genocide referred to in Section 5(b) of this Act shall suffer the penalty of prision mayor in its minimum period and a fine ranging from Ten thousand pesos (Php 10,000.00) to Twenty thousand pesos (Php 20,000.00).

In addition, the court shall order the forfeiture of proceeds, property and assets derived, directly or indirectly, from that crime, without prejudice to the rights of bona fide third (3rd) parties. The court shall also impose the corresponding accessory penalties under the Revised Penal Code, especially where the offender is a public officer.<sup>380</sup>

Among the States that maintain the death penalty for core international crimes are: **Bangladesh**,<sup>381</sup> **Ghana**,<sup>382</sup> **Republic of Korea**,<sup>383</sup> **Mongolia**<sup>384</sup> and **Tajikistan**.<sup>385</sup>

<sup>377</sup> See *supra* note 47, Arts. 9-11.

<sup>378</sup> See *supra* note 44.

<sup>379</sup> See *supra* note 43.

<sup>380</sup> See *supra* note 17, Section 7.

<sup>381</sup> See *supra* note 199.

<sup>382</sup> See *supra* note 65.

<sup>383</sup> See *supra* note 54.

<sup>384</sup> Mongolia, *Criminal Code of Mongolia*, 2002.

<sup>385</sup> See *supra* note 75.

### Implementation notes

- ▶ Consider international treaty standards and customary international law whilst acknowledging that no prejudice to national application of penalties and national laws is imposed by the ICC Statute;
  - ▶ Consider the gravity of the crimes in deciding the applicable penalty scheme.
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# 9

## **9. Victim's Rights and Reparations** **76**

### 9.1. Art. 79: Trust Fund **77**

## 9. Victim's Rights and Reparations

The ICC places great emphasis on victims and, for the first time at the international level, it has allowed for their participation in trials. This is one of the key defining features of the ICC Statute. State Parties are not expected to reform their criminal procedures to allow for the participation of victims before national courts. They are, however, advised to enforce reparation orders at the national level.

### 9.1. Art. 79: Trust Fund

Part X of the ICC Statute obligates State Parties to enforce orders made by the ICC as regards – among other things – sentences, fines, forfeiture orders, and reparations to victims. Moreover, the funds generated through enforcement measures should be transferred to the Court, with any expenses incurred by the State deducted, of course. Under Article 79(2) of the ICC Statute, funds recovered through the enforcement of victim reparation orders may be transferred directly to the ICC Victims' Trust Fund.

**France** implements this aspect as follows:

Article 627-16. Where the International Criminal Court so requests, the enforcement of fines and seizures or decisions relating to compensation pronounced by that court is authorised by the correctional court of Paris, which is seised of the case by the district prosecutor. The procedure followed in the correctional court follows the rules contained in the present Code.

The court is bound by the International Criminal Court's decision, including orders affecting the rights of third parties. However, in cases where a confiscation order is carried out, it may order any measures designed to ensure recovery of the value of the product, assets or holding that the court has ordered to be confiscated, where it appears that the confiscation order cannot be carried out. The court hears the convicted person as well as any other person who has rights over these assets, if necessary by letters rogatory. These persons may be represented by an advocate.

Where the court finds that the enforcement of a confiscation or compensation order could harm a bona fide third party who cannot appeal against the order, it informs the district prosecutor for the purpose of sending the matter back to the International Criminal Court, which takes the necessary action.

Article 627-17. The authorisation for execution which the correctional court orders under the previous article involves, in accordance with the decision of the International Criminal Court, the transfer of the value of the fines and the confiscated assets or the proceeds of their sale to the court or to a fund for victims. These assets or sums may also be awarded to the victims, if the court so decides and has so designated them.

Any challenge concerning the allocation of the proceeds of the fines, assets or the proceeds of their sale is sent to the International Criminal Court, which takes the necessary action.<sup>386</sup>

**Canada** utilises procedures which currently exist under national law to implement any forfeiture orders issued by the ICC. These allow the imposition of a monetary payment instead of forfeiture when the rights of third parties mean that property cannot be forfeited. This power ensures that the goal of reparation to victims cannot be thwarted by third party interests, while also taking into account those third parties with legitimate interests in the property. The *Canadian* legislation provides as follows:

The Minister of Public Works and Government Services shall pay into the Crimes Against Humanity Fund

(a) the net amount received from the disposition of any property referred to in subsections 4(1) to (3) of the Seized Property Management Act that is

(i) proceeds of crime within the meaning of subsection 462.3(1) of the Criminal Code, obtained or derived directly or indirectly as a result of the commission of an offence under this Act, and

(ii) forfeited to Her Majesty and disposed of by that Minister; and

(b) any amount paid or recovered as a fine imposed under subsection 462.37(3) of the Criminal Code in substitution for the property referred to in paragraph (a).<sup>387</sup>

**Norway** enforces reparations orders as if they were fines or forfeitures:

Payment of fines ordered by the Court may be enforced in Norway. The same applies to forfeitures and reparations to aggrieved persons that have been ordered by the Court. In so far as they are appropriate, sections 456 and 457 of the Criminal Procedure Act apply correspondingly to the enforcement of pecuniary claims.<sup>388</sup>

**Liechtenstein** establishes a national Victims' Trust Fund whose purpose is similar to that of the ICC Victims' Trust Fund, created under Article 79 of the ICC Statute. Assets from the national Trust Fund may be transferred to the ICC Trust Fund as voluntary contributions, at the discretion of the Government of Liechtenstein. It is provided:

(1) A trust fund shall be established, and be administered by the Government.

(2) Shall be transferred to the trust fund:

(a) proceeds from the enforcement of fines and forfeiture measures imposed by the International Criminal Court or an International Tribunal, where the Court or Tribunal forgoes the transfer thereof and files no claims pursuant to Article 43(9) above;

(b) proceeds from the enforcement of fines and forfeiture measures imposed by a domestic court, where these are on account of a conviction for genocide, crimes against humanity or war crimes;

(c) voluntary contributions.

<sup>386</sup> Code de procédure pénale, 2 March 1959, Art. 627.

<sup>387</sup> See *supra* note 19, Art. 31.

<sup>388</sup> See *supra* note 368, Art. 11.



(3) Assets from the trust fund may be used at the Government's discretion:

(a) for the benefit of victims of genocide, crimes against humanity or war crimes and for the benefit of their family members;

(b) to cover the cost for the judiciary of a trial relative to any of the crimes referred to in paragraph a above; or

(c) as a voluntary contribution to the Trust Fund of the International Criminal Court.<sup>389</sup>

It is encouraging to see that additional effort has been made to meet the needs of the many victims of core international crimes. If used properly, this approach might pave the way for other States to follow this example.

### Implementation notes

- ▶ Provide for the enforcement of reparation orders at the national level.

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<sup>389</sup> See *supra* note 234, Art. 47.

## 10

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# 10. International Cooperation and Judicial Assistance

Ensuring effective State cooperation is one of the key challenges for the ICC. Given that the Court does not have its own enforcement mechanism, it is entirely dependent on States to perform activities that are essential to its operation.

State Parties to the ICC Statute are under an obligation to cooperate fully with the Court. This is evidenced in Article 86 of the Statute, which contains the unequivocal obligation to cooperate. The ICC Statute sets out a detailed cooperation regime, the application of which requires the availability of procedures under national law.

The following sections discuss the main points of interest as set out in Part IX of the ICC Statute.

## 10.1. Art. 86: General obligation to cooperate

Article 86 of the ICC Statute outlines the basic obligation of State Parties: to cooperate fully with the ICC in its investigations and prosecutions. This provision does not contain any specific steps States need to take in order to incorporate it. Rather, it sets the benchmark for implementing legislation, as it constitutes a rule of general application. The key element is ‘full’ cooperation by a State. In order for a State to cooperate ‘fully’, it must have implementing legislation that meets the requisite standards.

Some States, like *Australia*, include this as an objective of their legislation, providing in relevant part:

The principal object of this Act is to facilitate compliance with Australia’s obligations under the Statute.<sup>390</sup>

## 10.2. Art. 87 (1)-(2): The practicalities of cooperation

Article 87 comprises the general provisions with regard to requests for cooperation made by the ICC. It is clear from the first paragraph that each State should designate the authority to receive these requests by the Court. As this has to be determined by the State Party at the implementation stage – upon ratification, acceptance, approval or accession – it would suffice to provide the requisite procedures upon receipt of the request by the designated channel. States regularly appoint Ministers of Justice and Ministers of Foreign Affairs as competent authorities under this provision.

<sup>390</sup> See *supra* note 18; see also Boas *supra* note 230, p. 179; Triggs, *supra* note 230, p. 507.

For example, the **Belgian** legislation provides as follows:

The Minister of Justice shall be the central authority competent to receive requests from the Court and to transmit to the Court requests from the Belgian judicial authorities and shall ensure follow-up to them.<sup>391</sup>

**Liechtenstein** states:

As a rule, communications with the International Criminal Court or International Tribunals shall take place via the Ministry of Foreign Affairs.<sup>392</sup>

In addition, the possibility that the ICC can use the International Criminal Police Organisation or any other regional organisation to transmit its request for cooperation is contained in Article 87(1)(b) of the ICC Statute.

Accordingly, **Australia** provides as follows:

- (1) Subject to section 9, a request for cooperation is to be made in writing:
  - (a) to the Attorney General through the diplomatic channel; or
  - (b) through the International Criminal Police Organisation or any other appropriate regional organisation.<sup>393</sup>

### 10.3. Art. 87 (3)-(4): Confidentiality and safety

Confidentiality of the proceedings is guaranteed through Article 87(3) of the Statute. The requested State is required to disclose any information only insofar it is necessary for the execution of the request. States are, therefore, required in their implementation to guarantee the confidentiality of the cooperation request and of any supporting documentation. In most States, such execution will habitually be dealt with in confidence. Moreover, with regard to Article 87(4) of the ICC Statute, the safety, physical and psychological well-being of victims, potential witnesses and their families should be taken into account when dealing with information provided by the requested State to the Court. This may already be covered in domestic procedure, so it might not be necessary to provide specifically for this paragraph in implementing legislation. Reinforcing the confidentiality aspect, however, would guarantee careful handling of sensitive information.

Both **Australia** and **New Zealand** devote an entire Section to confidentiality and implement Articles 87(3) and (4) by incorporating such an obligation in their domestic law and by turning the abstract obligation into a specific one for the person handling the Court's request.

**New Zealand** provides as follows:

- (1) A request for assistance and any documents supporting the request must be kept confidential by the New Zealand authorities who deal with the request, except to the extent that the disclosure is necessary for execution of the request.

<sup>391</sup> See *supra* note 352, Art. 5.

<sup>392</sup> See *supra* note 234, Art. 8.

<sup>393</sup> See *supra* note 18, Art. 8.

(2) If the ICC requests that particular information that is made available with a request for assistance be provided and handled in a manner that protects the safety and physical or psychological well-being of any victims, potential witnesses, and their families, the New Zealand authorities must use their best endeavours to give effect to that request.

(3) In this section, the New Zealand authorities are—

(a) the Attorney-General:

(b) the Minister:

(c) every Police employee:

(d) every prison officer:

(e) every employee of or contractor engaged by a New Zealand agency that is authorised to deal with the request.<sup>394</sup>

#### 10.4. Art. 87(5)-(7): Failure to cooperate

Paragraphs 5, 6 and 7 of Article 87 of the ICC Statute primarily concern the Court, rather than the requested State. These provisions will therefore not be explored in the present Guidelines. Article 87(7) of the ICC Statute deals with failure to cooperate with the Court; a State Party should, through its implementing legislation and subsequent application, strive to never have this provision invoked against it. Failure to cooperate due to poor legislation is not permitted under the Statute and every step should be taken to eliminate this possibility.

The above provision does not require implementation as it constitutes a measure the Court may have recourse to in order to respond to non-cooperation. However, *Australia*,<sup>395</sup> *Kenya*,<sup>396</sup> *New Zealand*<sup>397</sup> and *Uganda* reiterate Article 87(7) in their implementing legislation.

The *Ugandan* legislation provides as follows:

In determining what action to take in relation to a matter to which this Part applies, the Minister shall take into account the power of the ICC to refer a matter to the Assembly of State Parties or to the Security Council in accordance with article 87(7) of the Statute if the ICC considers that a requested State is not acting in accordance with its obligations under the Statute.<sup>398</sup>

Such provision acts both as a reminder of the consequences of non-cooperation and as an incentive to avoid referrals to the Assembly of State Parties or the UN Security Council. As such, it is facilitative and might assist in ensuring compliance with the Statute whilst highlighting the importance a State places on cooperating with the Court.

<sup>394</sup> See *supra* note 47, Art. 29. See also, generally, Hay, *supra* note 243, p. 191.

<sup>395</sup> See *supra* note 18.

<sup>396</sup> See *supra* note 44.

<sup>397</sup> See *supra* note 47.

<sup>398</sup> See *supra* note 21, Art. 87.

### 10.5. Art. 88: Availability of procedures under national law

Article 88 of the ICC Statute requires States “to ensure that there are procedures available under their national law for all of the forms of cooperation”.

State Parties are under a clear legal obligation to incorporate the ICC cooperation regime. However, Article 88 neither specifies the exact procedures to be put in place, nor does it contain any guidance on how these procedures are to be implemented.

### 10.6. Art. 89(1): Surrendering persons to the court

As there are no trials *in absentia* before the ICC, the Court is dependent on State authorities to arrest and surrender individuals subject to ICC proceedings. Article 89 of the ICC Statute outlines the procedure covering surrender of a person to the Court. States need to ensure that persons sought by the Court are arrested and transferred. Article 89(1) contains a reminder of the general obligation to cooperate with a request to arrest and surrender a person to the Court. The execution of the obligation is pursuant to their national law. This reference to national law acknowledges that States possess different procedures for arrest. The obligation under Article 89(1) of the ICC Statute is therefore binding regarding the outcome to be achieved. It would have been impractical for the ICC Statute to provide for and enforce a uniform approach common to all State Parties.

Allowing the practical application to be regulated by the relevant State offers greater flexibility for the execution of the Court’s requests, which, in turn, has the potential for greater compliance with such requests, at least in principle.

In accordance with the final sentence of Article 89(1) of the ICC Statute, in implementing this paragraph, a State should specifically provide for the arrest and surrender of a person to the Court in its domestic law, complying with the ICC cooperation regime. National law procedures are to be employed in that respect. Such procedures should also be applicable in the case of transit, as required by Article 89(3).

The **South African** legislation outlines a detailed procedure for the arrest and surrender of persons to the Court:

8(1) Any request received from the Court for the arrest and surrender of a person for whom a warrant of arrest has been issued by the Court must be referred to the Central Authority and accompanied by such documents as may be necessary to satisfy a competent court in the Republic that there are sufficient grounds for the surrender of that person to the Court.

(2) The Central Authority must immediately on receipt of that request, forward the request and accompanying documents to a magistrate, who must endorse the warrant of arrest for execution in any part of the Republic.

[...]

10(1) Any person who detains a person under a warrant of arrest or a warrant for his or her further detention must, within 48 hours after that person’s arrest or on the date specified in the warrant for his or her further detention, as the case may be, bring that person before a

magistrate in whose area of jurisdiction he or she has been arrested or detained, whereupon that magistrate must, with a view to the surrender of that person to the Court, hold an inquiry in order to establish whether-

- (a) the warrant applies to the person in question;
- (b) the person has been arrested in accordance with the procedures laid down by domestic law; and
- (c) the rights of the person, as contemplated in Chapter 2 of the Constitution, have been respected, if, and the extent to which, they are or may be applicable.

(2) The magistrate may at any time during the inquiry postpone that inquiry for purposes of consultation between the relevant authorities of the Republic and the Court where any problem is experienced with the execution of any request of the Court for cooperation or judicial assistance [...].<sup>399</sup>

It is notable that the South African legislation also allows for the postponement of proceedings for consultations with the Court. Consultations between States and the Court enable more effective cooperation procedures, thereby reducing the chances that a State will be referred for reasons of non-cooperation.

### 10.7. Art. 89(2): *Ne bis in idem* challenges

Article 89(2) of the ICC Statute operates as a bridge between national jurisdictions and the ICC with regard to admissibility issues. A person sought by the Court is likely to raise an inadmissibility claim before national courts first, regarding a previous acquittal or conviction, if applicable. Where this occurs, a consultation procedure has been put forward to address such issues and it is the procedure that needs to be provided for in national law. The national court before which the *ne bis in idem* claim is made would then liaise with the ICC to decide the course of action.

To implement Article 89(2), a State should allow for a consultation procedure in case of a *ne bis in idem* claim made before the national courts.

The **Netherlands** in its national provision covers a number of instances where consultation will be used:

- (1) If Our Minister considers that there are obstacles or impediments to granting a request of the ICC for cooperation or enforcement, he shall immediately consult with the ICC in order to remove these obstacles or impediments.
- (2) The following may in any event constitute obstacles or impediments as referred to in subsection 1:
  - (a) insufficient information for the request to be granted,
  - (b) the person to be arrested at the request of the ICC cannot be located in the Netherlands, despite best endeavours,
  - (c) the person arrested at the request of the ICC on the basis of an arrest warrant is not the person referred to in the warrant,

<sup>399</sup> See *supra* note 42, Arts. 8 and 10.

- (d) granting the request in its present form would result in a breach of a treaty obligation that existed prior to the request and is owed to another State,
  - (e) granting the request in its present form would result in a violation of the principle of *ne bis in idem* referred to in article 20 of the Statute,
  - (f) a prosecution of the person claimed for the same acts is either in progress or in preparation in the Netherlands,
  - (g) granting the request of the ICC immediately would obstruct an investigation or prosecution in a case other than that to which the request relates,
  - (h) granting the request would prejudice the national security interests of the Netherlands as referred to in article 72 of the Statute,
  - (i) the case referred to in section 25, subsection 1
- (3) If the public prosecutor responsible for executing a request of the ICC finds obstacles or impediments as referred to in this section, he shall notify Our Minister immediately.
- (4) Our Minister shall request the ICC to respond within a reasonable period to be determined in consultation. This period may be extended at the request of the ICC.
- (5) The processing of a request for the surrender of a person or for enforcement of a decision of the ICC shall be suspended for the duration of the period referred to in subsection 4. The processing of a request for any other form of cooperation may be suspended by Our Minister or, as the case may be, by the public prosecutor after consultation with Our Minister.
- (6) If Our Minister or the authorities designated by him consider that a request for the assistance of the host State cannot be granted, he shall immediately consult with the ICC in accordance with the headquarters agreement referred to in article 3, paragraph 2 of the Statute and the regulations and agreements based on it, in order to resolve the matter.<sup>400</sup>

Other States to provide for similar procedures include *Greece*,<sup>401</sup> *Ireland*<sup>402</sup> and *Liechtenstein*.<sup>403</sup>

## 10.8. Art. 89(4): Consultations for competing requests for a crime different than that of the ICC

A different situation altogether is envisaged in Article 89(4) of the ICC Statute, which relates to a competing request in case of the same person being proceeded against or serving sentence for a crime other than the one for which he/she is sought by the Court. This provision requires a consultation procedure to be in place after the requested State has made a decision to grant the request.

Instead of providing for a consultation process, *Germany* opts to ‘temporarily’ surrender the person to the ICC. In essence, priority is given to the Court and this Section contains the procedure to be followed upon return of the suspect.

<sup>400</sup> See *supra* note 71, Section 7.

<sup>401</sup> See *supra* note 111.

<sup>402</sup> See *supra* note 23.

<sup>403</sup> See *supra* note 234.



The *German* legislation reads as follows:

If the approved surrender is postponed because there is a domestic criminal proceeding against the suspect or incarceration or measures for the prevention of crime and the reformation of offenders (Maßregel der Besserung und Sicherung) are to be executed, the suspect may be temporarily surrendered when the Court guarantees to return him at a particular point in time [...].<sup>404</sup>

This approach recognises the significance of the surrender to the Court at the expense of domestic proceedings.

### 10.9. Art. 90: Competing requests

The obligation to arrest and surrender individuals under the ICC Statute exists alongside obligations under other international treaties and does not prevail over other existing international obligations. Article 90 of the ICC Statute addresses conflicts between the obligation to arrest and surrender to the ICC and the obligation to comply with extradition requests made by other States. The provision distinguishes between requests from State Parties and non-State Parties, as well as requests concerning the same or different conduct.

In situations where a request for surrender to the ICC conflicts with a request for extradition from another State Party with regard to the *same conduct*, priority is given to the ICC, provided that the case is admissible (Article 90(2) of the ICC Statute). If an admissibility decision has not been made, the ICC Statute provides that the State has discretion to proceed with the extradition request, but no extradition can take place until there has been a determination of inadmissibility (Article 90(3) of the ICC Statute).

In situations where a request for surrender conflicts with a request for extradition from a non-State Party with regard to the same conduct, the ICC Statute procedure differs, depending on whether or not there is an international obligation to extradite. Where there is *no* international obligation, priority is given to the ICC if the case is admissible (Article 90(4) of the ICC Statute). If an admissibility decision has not yet been made, the State has discretion to proceed to deal with the extradition request (Article 90(5) of the ICC Statute).

Where there *is* an international obligation to extradite, the requested State must choose between the two requests. The State should take into account the respective dates of the requests for extradition, the interests of the requesting State (such as the place of commission of the crime and the nationality of the person requested) and the possibility of subsequent surrender to the ICC (Article 90(6) of the ICC Statute).

In situations where a request for surrender conflicts with a request for extradition from any State in relation to *different conduct*, the response thereto again depends on whether or not there exists an international obligation to extradite. If there is *no* international obligation to extradite, priority is given to the Court. If there exists an international obligation to extradite, the requested State must choose between the two requests. Again, the requested State should take into account the respective dates of the requests, the interests of the requesting State,

<sup>404</sup> See *supra* note 233, Section 27. For further discussion of the German national implementing legislation, see Peter Wilkitzki, "The German law on co-operation with the ICC", in *International Criminal Law Review*, 2002, vol. 2, no. 2, p. 195.

and the possibility of subsequent surrender to the ICC (Article 90(7) of the ICC Statute). This applies even when a case is admissible before the ICC and the request comes from an ICC State Party.

Implementing competing requests involves a number of steps to be taken by a State depending on the nature of the request. Article 90 of the ICC Statute covers a range of different situations which need to be addressed in domestic law.

The responsibilities of the requested State could be summarised as follows: first, provision should be made to notify the Court of the competing requests. Second, the distinction between the different cases within Article 90 should be clear and consistent with the Statute. In particular, a distinction should be made between dealing with a request concerning the same and different conduct as well as between State Parties and non-State Parties, with reference also to the admissibility of the case. Finally, although not spelt out clearly in the ICC Statute, granting precedence to the request by the Court over a competing extradition request could validly be an underlying concept in the incorporation of this provision into domestic law. This is due to the particular significance of the crimes falling within the jurisdiction of the ICC.

States have largely incorporated the provision on competing requests by replication or by reference.

For example, on the one hand, *New Zealand* has implemented Article 90 of the ICC Statute as follows:

- (1) If section 61 applies and the requesting State is a party to the Statute, priority must be given to the request from the ICC if—
  - (a) the ICC has, under article 18 or article 19 of the Statute, made a determination that the case in respect of which surrender is sought is admissible and that determination takes into account the investigation or prosecution conducted by the requesting State in respect of its request for extradition; or
  - (b) the ICC makes such a determination after receiving notification of the competing request.
- (2) If the request is one to which subsection (1)(b) relates, then, pending the ICC's determination,—
  - (a) the steps required to be taken under the Extradition Act 1999 in relation to a request for extradition may continue to be taken; but
  - (b) No person may be surrendered under that Act unless and until the ICC makes its decision on admissibility and determines that the case is inadmissible.<sup>405</sup>

*Mauritius* incorporates competing requests by reference, as follows:

In case of competing requests between the International Criminal Court and another State, the matter shall be settled in accordance with Article 90 of the Statute.<sup>406</sup>

<sup>405</sup> See *supra* note 47, Art. 62.

<sup>406</sup> See *supra* note 45.

The *Netherlands* deals with Article 90 in a simple, yet effective, manner. In a two-line provision it is stated that competing requests will be dealt with by the Minister of Justice “having regard to article 90 of the Statute”.<sup>407</sup> Consequently, inconsistencies in the application are avoided.

### 10.10. Art. 91: Contents of request for arrest and surrender

Article 91 of the ICC Statute outlines the contents of a request for arrest and surrender. Paragraph 2(b) is unproblematic; it stipulates that a copy of the warrant of arrest should be transferred to the State in question.

In identifying the person sought as per Article 91(2)(a) of the ICC Statute, the issue that comes into play is not so much what information is needed in order to verify a person’s identity, but what should happen if, as a result of a mistaken identity, the wrong person is arrested. This issue is addressed in most pieces of implementing legislation. As it is in the ICC’s interest to have the right person before them, regulating this issue at the national level is desirable.

The *Canadian* legislation tackles this issue appropriately, by establishing a double requirement. First, the name of the person appearing before the court must be similar to the name included in the documents submitted by the ICC and the physical characteristics need to match. Physical characteristics are evidenced in “a photograph, fingerprint or other description of the person”.<sup>408</sup> The use of the term ‘similar’ and not ‘identical’ allows for greater flexibility in the identification process. The fact that the name for instance, has not been spelled correctly should not be a reason not to identify the accused. Provided that the elements in Canada’s Section 37 are akin to the ones found in the information given by the Court, the identification of the person is achieved.

States place considerable importance on identity verification. In accordance with Article 59(2) of the ICC Statute, the custodial State has to determine that the warrant applies to the right person. The Statute does not provide further guidance on that issue. It can be, therefore, presumed that in the case of mistaken identity, the person should be set free. Cooperating with the ICC on this is also important, as the Court would need to be informed of the outcome of the process.

The drafters of the ICC Statute aim to accommodate both common and civil law legal traditions in Article 91(2)(c). Many common law jurisdictions require requests for surrender and/or transfer to be accompanied by evidence supporting the allegations – whereas a number of civil law jurisdictions do not.

The *Australian* national implementing legislation provides, as follows:

If a request is made for arrest and surrender of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber under article 58 of the Statute, the request must contain or be supported by:

<sup>407</sup> See *supra* note 71, Art. 15.

<sup>408</sup> *Extradition Act 1999*, 17 June 1999.

- (a) information describing the person sought, being information sufficient to identify the person; and
- (b) information as to the person's probable location; and
- (c) a copy of the warrant of arrest, authenticated by the ICC; and
- (d) any other documents, statements or information required by or under the regulations.<sup>409</sup>

Conversely, the *Austrian* stipulates:

Should the International Criminal Court request a search for arrest or should the Austrian authorities otherwise learn of an order for arrest from the Court, the Federal Ministry of the Interior shall seek the arrest of the person for the purpose of surrender to the International Criminal Court if the request or order for arrest contains the necessary details about the person sought and the alleged offence [...].<sup>410</sup>

The Austrian legislation – which operates according to a civil law legal tradition – requires fewer accompanying materials when in receipt of a request for arrest and surrender.

Article 91(3) of the ICC Statute covers request for arrest and surrender of a person already convicted by the ICC for a crime falling under the Court's jurisdiction. The necessary documentation is similar to that which is required for the arrest or surrender of a person to be tried by the Court. However, the fact that a person is already convicted ought to be taken into account.

Article 91(3) of the ICC Statute is straightforward as regards its implementation. *Australia* repeats the wording of this paragraph in its legislation:

If a request is made for arrest and surrender of a person who has already been convicted, the request must contain or be supported by:

- (a) a copy of any warrant of arrest for the person, authenticated by the ICC; and
- (b) a copy of the judgment of conviction, authenticated by the ICC; and
- (c) information to demonstrate that the person sought is the person referred to in the judgment of conviction; and
- (d) if the person sought has been sentenced:
  - (i) a copy of the sentence imposed, authenticated by the ICC; and
  - (ii) in the case of a sentence of imprisonment—a statement of any period already served and the period remaining to be served.<sup>411</sup>

### 10.11. Art. 92: Provisional arrest

Requests for provisional arrest pursuant to Article 92 of the ICC Statute can be issued in “urgent cases”, where a request for arrest and surrender would be “frustrated or jeopardized” by a waiting for such request and for the accompanying documentation. Article 92(3) of the ICC Statute provides that a person can be released if the State in receipt of a request for arrest

<sup>409</sup> See *supra* note 18, Art. 17.

<sup>410</sup> See *supra* note 55, Art. 22.

<sup>411</sup> See *supra* note 18, Art. 18.

has not received the request and the requisite documentation within the set time-frame of 60 days, as evidenced from Rule 188 of the ICC Rules of Procedure and Evidence.

Some States provide for broader time limits in their respective national legislation. For example, the relevant **Canadian** national law provides to this end:

- (1) A person who has been provisionally arrested, whether detained or released on judicial interim release, must be discharged
  - (a) when the Minister notifies the court that an authority to proceed will not be issued under section 15;
  - (b) if the provisional arrest was made pursuant to a request made under an extradition agreement that contains a period within which a request for extradition must be made and the supporting documents provided,
    - (i) when the period has expired and the extradition partner has not made the request or provided the documents, or
    - (ii) when the request for extradition has been made and the documents provided within the period but the Minister has not issued an authority to proceed before the expiry of 30 days after the expiry of that period; or
  - (c) if the provisional arrest was not made pursuant to a request made under an extradition agreement or was made pursuant to an extradition agreement that does not contain a period within which a request for extradition must be made and the supporting documents provided,
    - (i) when 60 days have expired after the provisional arrest and the extradition partner has not made the request or provided the documents, or
    - (ii) when the request for extradition has been made and the documents provided within 60 days but the Minister has not issued an authority to proceed before the expiry of **30 additional days**.<sup>412</sup>

Other States adhere more closely to the time limit in the ICC Rules of Procedure and Evidence. For instance, **Samoa** provides for a 60-day time limit, as follows:

- (1) Where a person has been provisionally arrested under section 42, the Judge shall not proceed under section 45 until –
  - (a) the Judge has received a notice from the Minister that the request for surrender and supporting documents required under article 92 of the Statute have been received by the Minister; and
  - (b) the relevant documents have been transmitted to the Judge by the Minister under section 42(5).
- (2) Pending the receipt of the notice and documents under subsection (1), the Judge may adjourn the proceedings from time to time.
- (3) **If the Judge has not received the notice specified in subsection (1)(a) within 60 days of the date of the provisional arrest of the person, the Judge shall release the person from custody or on bail unless satisfied that the period for submission of the notice should be extended in the interests of justice.**

<sup>412</sup> See *supra* note 408, Art. 14 [Emphasis added].

(4) Notwithstanding subsection (4), a person who is provisionally arrested may consent to surrender before the expiration of 60 days, in which case, the Minister shall proceed to surrender the person to the Court as soon as possible.

(5) The release of a person under subsection (3) shall be without prejudice to any subsequent proceedings that may be brought for the arrest and surrender of the person to the ICC whether for the same facts and offence or not.<sup>413</sup>

Individuals sought by the Court can consent to their surrender before the expiration of the 60-day time limit, provided that this is permitted by the law of the requested State. The reference to domestic law in Article 92 of the ICC Statute is important, as it allows States some leeway to examine their own provisions and decide whether to incorporate this possibility or not. Unless prohibited by domestic law, it would be advisable to include consensual surrender, as it facilitates transfer of the person sought to the ICC.

Nothing precludes the arrest, at a later date, once the surrender documents are delivered, of a person previously released pursuant to Article 92(3) of the ICC Statute. This provision implies that the State cannot use the person's release to refuse surrender once the necessary documents are presented. The significance placed on following correct procedure is emphasised. Article 92(4) does not need to be incorporated into domestic law.

## 10.12. Art. 93: Other forms of cooperation

Besides arrest and surrender, State Parties are required to perform a number of cooperation acts to assist the ICC with its investigations or prosecutions. All of the acts listed in Article 93(1) of the ICC Statute must be provided for at the domestic level. The list appears exhaustive at first but, upon closer scrutiny, and in light of Article 93(1)(l) of the ICC Statute, it is not. The latter provision requires a State to provide "any other type of assistance" not prohibited by its law in order to facilitate the Court's investigation or prosecution. Implementing Article 93(1) is crucial to the effectiveness of the Court.

The legislation of the *Netherlands* fully implements this provision as follows:

1. Requests of the ICC for any form of cooperation as referred to in article 93 of the Statute shall, to the extent possible, be executed in the desired manner, having regard to the provisions of this chapter.
2. Requests of the ICC for cooperation as referred to in article 93, paragraph 1 (l) of the Statute shall be executed as quickly as possible and in the desired manner, unless this is prohibited by Dutch law.<sup>414</sup>

### 10.12.1. Art. 93(3)-(6): Refusal to cooperate

Article 93(2) of the ICC Statute does not require implementation, as it provides guidance to the ICC regarding the way witnesses or experts should be treated. However, the same is not true

<sup>413</sup> See *supra* note 22, Art. 43 [Emphasis added].

<sup>414</sup> See *supra* note 71, Section 45.



for Articles 93(3), (4), (5) and (6) of the ICC Statute which cover the possibility of a State refusing cooperation.

A State may refuse the execution of a cooperation request if the said request conflicts with a fundamental principle of general application. Despite the difficulty in identifying such principles, in implementing Article 93(3), a consultation procedure to deal with such a conflicting request must be put in place first. Moreover, identifying which are the principles considered as having such an elevated status and which are likely to conflict with an ICC request is also important.

A similar approach should be taken with regard to Article 93(4) of the ICC Statute, without the obligation to hold consultations with the ICC. Article 93(4) of the ICC Statute makes reference to Article 72 and stipulates that a “State Party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security”.

The *New Zealand* legislation includes a comprehensive regime as regards national security:

158(1) If a request for assistance made under Part 9 of the Statute appears to concern the production of any documents or disclosure of evidence that would, in the opinion of the Attorney-General, prejudice New Zealand’s national security interests, that request must be dealt with in accordance with the process specified in sections 161 and 162.

(2) If, having followed the specified process the matter is not able to be resolved, the Attorney-General may refuse the request or decline to authorise the production of the documents or giving of the evidence, as the case may be.

Cf Statute, articles 72(1), 93(4), 99(5)

159(1) This section applies if a person who has been requested to give information or evidence—

(a) refuses to do so on the ground that disclosure would prejudice the national security interests of New Zealand; or

(b) refers the matter to the Attorney-General on the ground that disclosure would prejudice the national security interests of New Zealand.

(2) If this section applies, the Attorney-General must determine whether or not he or she is of the opinion that the giving of information or evidence would prejudice New Zealand’s national security interests.

(3) If the Attorney-General confirms that he or she is of the opinion that disclosure would prejudice New Zealand’s national security interests, the matter must be dealt with in accordance with the process specified in sections 161 and 162.

(4) If, having following the specified process, the matter has not been resolved, the Attorney-General may refuse the request or decline to authorise the provision of the information or giving of the evidence, as the case may be.

Cf Statute, articles 72(2), 93(4)

160(1) If, in any circumstances other than those specified in sections 158 and 159, the Attorney-General is of the opinion that the disclosure of information or documents to the ICC

would prejudice New Zealand's national security interests, the matter must be dealt with in accordance with the process specified in sections 161 and 162.

(2) Without limiting subsection (1), this section applies if the Attorney-General learns that information or documents are being, or are likely to be, disclosed at any stage of the proceedings, and intervenes in accordance with article 72(4) of the Statute.

(3) If, having followed the specified process, the matter has not been resolved and the ICC has not made an order for disclosure under article 72(7)(b)(i) of the Statute, the Attorney-General may refuse the request or decline to authorise the provision of the information or giving of the evidence, as the case may be.

Cf Statute, articles 72(4) and 72(7) (b) (i), 93(4).<sup>415</sup>

New Zealand's legislation makes reference to the ICC Statute provisions it seeks to implement at the end of each section. This makes the compatibility assessment of the provision easier.

Article 93(5) of the ICC Statute refers back to Article 93(1)(l) and obliges a State to consider whether any other type of assistance required under the latter can be provided subject to conditions or in another date or manner which should be first accepted by the Court or its Prosecutor. The requested State should therefore provide for such consideration in its implementing legislation.

Should all such efforts fail, and a State refuses to provide assistance to the Court, it ought to inform the ICC promptly to that effect. The domestic legislation must provide for such a possibility as well.

In implementing the limited right to refuse cooperation to the Court, a State should endeavour to limit the invocation of the relevant provisions to the absolute minimum, and should ensure that the overarching obligation to cooperate in accordance with Article 86 of the ICC Statute is not curtailed in any way.

### **10.12.2. Art. 93(7): Temporary transfer**

In case of a temporary transfer pursuant to Article 93(7) of the ICC Statute, apart from the consent of the person involved, the requested State must also agree to the transfer and may attach conditions to which both it and the ICC may agree.

**Germany** incorporates this provision in a manner consistent with the Statute, as follows:

A person in Germany who is in pretrial detention or imprisoned or is in detention based upon an order regarding measures for the prevention of crime and the reformation of offenders (Maßregel der Besserung und Sicherung) shall be, upon request of the Court, temporarily surrendered to the Court or the authorities of a state designated by the Court for a different investigation there, for the taking of evidence in a proceeding pending against another, or for another objective foreseen in Article 93 para. 7(a) sentence 1 of the ICC Statute when:

<sup>415</sup> See *supra* note 47, Arts. 158-160.



1. after instruction set forth on the court record by a judge of the District Court in whose district the institution where the person is in custody is located, he declares his agreement therewith,
2. there is no expectation that as a result of the surrender the objective of the criminal proceeding or the execution of the sentence will be impaired,
3. it is ensured that the affected party, during the time of his surrender, with the exception of measures based upon criminal acts under Articles 70 and 71 of the ICC Statute, shall not be punished, nor subjected to another penalty, nor pursued by measures that could not also have been taken in his absence, and that in case of his release, he may leave the guest state or the state designated by the Court, and
4. it is ensured that the affected party will be returned promptly after the taking of evidence, unless that has been waived.

Agreement (sentence 1 number 1) may not be retracted. The detention served due to the surrender shall be set-off against the detention to be served in Germany. Paragraph 4 of Section 27 applies *mutatis mutandis*. This does not apply to detentions based upon paragraph 3 of Article 70 of the ICC Statute that have been imposed by the Court and are to be enforced.<sup>416</sup>

Section 54(1) of the German legislation mentions that consent is necessary to effectuate this temporary transfer, whereas Sections 54(2)-(4) contain the various conditions attached by Germany in accordance with Article 93(a)(ii) of the ICC Statute. Assurances are sought that the temporary transfer will not impact on the sentence already served in Germany and that no additional punishment or penalty of any sort will be imposed save for some exceptions specifically mentioned in the provision. Moreover, in line with Article 93(7)(b) of the ICC Statute, Section 54(4) contains the obligation imposed on the ICC to return the person to the requested State. A prohibition on revoking the consent to the temporary transfer, as well as reference to Articles 70 and 71 of the Statute as exceptions to the conditions imposed by this Section, can also be found therein.

The approach taken by Germany is exemplary. Not only does it implement the Statute in this instance entirely appropriately, but thought has also been given to the possible interaction with other relevant provisions.

### 10.12.3. Art. 93(8): Confidentiality

Confidentiality is safeguarded in Article 93(8) of the ICC Statute. States may wish to transmit documents or information to the ICC on a confidential basis, which may potentially later be used by the Prosecutor to generate new evidence. These documents may be disclosed and used following Parts 5 and 6 of the Statute.

**Australia** incorporates Article 93(8) by authorising the Attorney-General to provide the necessary information or documents whilst undertaking to implement Article 93(8)(c) as well:

- (1) The Attorney-General must consult with the ICC, without delay, if, for any reason, there are or may be problems with the execution of a request for cooperation.

<sup>416</sup> See *supra* note 233, Section 54.

(2) Before refusing a request for assistance of a kind mentioned in paragraph 1(l) of article 93 of the Statute, the Attorney-General must consult with the ICC to ascertain whether the

assistance requested could be provided: (a) subject to conditions; or (b) at a later date or in an alternative manner.

(3) Without limiting the types of conditions under which assistance may be provided, the Attorney-General may agree to information or documents being sent to the Prosecutor on a confidential basis, on the condition that the Prosecutor will use them solely for the purpose of generating new evidence.

(4) If the Attorney-General sends information or documents subject to the condition specified in subsection (3), the Attorney-General may subsequently consent to the disclosure of the documents or information for use as evidence under the provisions of Parts 5 and 6 of the Statute and in accordance with the Rules.<sup>417</sup>

In Section 11(3), and also in Subsection (4), Australia attaches conditions to the provision of such assistance, without specifying the types of conditions. This is not provided for in Article 93(8) and thus the manner in which this provision will be applied in practice is important.

#### **10.12.4. Art. 93(9): Duty to consult with the ICC**

Article 93(9) of the ICC Statute covers competing requests, which do not involve surrender to the Court or extradition to a third State owing to an international obligation. It also establishes a duty for the requested State to resolve the situation, in consultation with the Court. In the event that such effort fails, the general principles of Article 90 of the ICC Statute apply, in accordance with Article 93(a)(ii).

The requested State should therefore include in its implementing legislation a duty to consult with the Court in the case of Article 93(9).

This, however, does not apply in the case of Article 93(9)(b) and the requested State is only required to inform the ICC of the situation at hand.

#### **10.12.5. Art. 93(10): Requesting ICC assistance**

Article 93(10) of the ICC Statute operates as a bridge between the international and the national systems. By empowering the ICC to assist with domestic proceedings upon request, States can invite the Court to provide its expertise in dealing with cases falling under its jurisdiction.

Despite being in the cooperation part of the Statute, Article 93(10) is not among the provisions that must necessarily be implemented into domestic law, as it would be for a State to decide whether or not it desires to request the Court's assistance. That said, however, States may wish to provide for such possibility.

<sup>417</sup> See *supra* note 18, Art. 11.

The *Netherlands* is an example:

- (1) At the request of any Dutch authorities responsible for dealing with a criminal case, Our Minister may, in accordance with article 93, paragraph 10, of the Statute, address a request to the ICC for the provision of assistance and cooperation.
- (2) Documents concerning official acts of investigation and prosecution which have been drawn up by the authorities of the ICC and have been transmitted by them in response to a request shall have the evidential value accorded to documents concerning similar acts performed by Dutch officials, subject to the proviso that their evidential value may not exceed that which they have for the ICC.<sup>418</sup>

Although this is a very interesting provision, it is not specified in the Dutch law whether such assistance may be requested for both investigation and trial. Neither are the crimes for which such a request may be made specified. From the general wording of Section 5 it should be assumed that Article 93(10) of the ICC Statute has been incorporated in its entirety. Of interest is Section 5(2), which defines the probative value of the documents received by the ICC in the course of their assistance to the Netherlands.

Despite its place in the cooperation part of the Statute and, more specifically, under “other forms of cooperation”, Article 93(10) of the ICC Statute is construed as a much wider provision. According to this Article, assistance may be provided with respect to both investigation and trial for crimes falling under the jurisdiction of the ICC, but interestingly, also with regard to “serious crimes under the national law of the requesting State”. This provision should not be seen as broadening the ambit of the Court’s jurisdiction, but merely as a provision which facilitates assistance even when the crimes are not defined at the national level in terms identical to the ICC Statute.

### 10.13. Art. 94: Postponement of execution of a request in respect of ongoing investigation or prosecution

Should a request by the ICC interfere with an ongoing investigation or prosecution of conduct different from that to which the request relates, then the requested State may postpone the execution of the Court’s request for a mutually agreed period, in accordance with Article 94 of the ICC Statute.

In implementing Article 94, a State has to provide for a procedure to consult with the ICC for the postponement of the execution of the request. Bearing in mind that postponement is not refusal to cooperate, the procedure in place must reflect this and must further allow for greater flexibility in ensuring cooperation with the Court.

In the *United Kingdom*, Part 1 of Schedule 2 deals with this issue, as follows:

- 2(1) Where—
  - (a) the Secretary of State receives a request from the ICC for the arrest and surrender, or provisional arrest, of a person, and

<sup>418</sup> See *supra* note 71, Section 5.

(b) criminal proceedings against that person are pending or in progress before a court in England and Wales or Northern Ireland, the Secretary of State shall inform the court of the request.

(2) The court shall (if necessary) adjourn the proceedings before it, for such period or periods as it thinks fit, so as to enable proceedings to be taken to determine whether a delivery order should be made.

(3) If a delivery order is made and the criminal proceedings are still pending or in progress, the Secretary of State—

(a) shall consult the ICC before giving directions for the execution of the order, and

(b) may direct that the criminal proceedings shall be discontinued.

(4) Where the Secretary of State directs that criminal proceedings shall be discontinued, the court before which the proceedings are pending or in progress shall—

(a) order their discontinuance, and

(b) make any other order necessary to enable the delivery order to be executed (including any necessary order as to the custody of the person concerned).

(5) The discontinuance under this paragraph of criminal proceedings in respect of an offence does not prevent the institution of fresh proceedings in respect of the offence.

3 (1) Where—

(a) the Secretary of State receives a request from the ICC for the arrest and surrender, or provisional arrest, of a person, and

(b) criminal proceedings against that person are pending or in progress before a court in Scotland, the Secretary of State shall inform the Scottish Ministers of the request and they shall inform the court.

(2) The court shall (if necessary) adjourn the proceedings before it, for such period or periods as it thinks fit, so as to enable proceedings to be taken to determine whether a delivery order should be made.

(3) If a delivery order is made and the criminal proceedings are still pending or in progress, the Secretary of State shall consult the ICC before giving directions for the execution of the order.<sup>419</sup>

Sections 2 and 3 are very accommodating of the surrender request and implement Article 94 appropriately. The guiding principle is cooperation with the ICC and consultation wherever necessary. The procedure put forward by the United Kingdom is elaborate and attempts to foresee every possible scenario. Article 94 of the ICC Statute refers to postponement of execution of a request in respect of an ongoing investigation or prosecution of a “case different from that to which the request relates”. Section 2 does not make such a distinction and relates to any possible conflicting request. However, this goes beyond the Statute in the sense that discontinuation of proceedings is also envisaged, as opposed to postponement only. On the whole, postponement of an execution request ought to follow the Statute and need not be problematic when it comes to implementation.

<sup>419</sup> See *supra* note 16, Arts. 2-3.

### 10.14. Art. 95: Postponement of execution of a request in respect of an admissibility challenge

When, in accordance with Articles 18 and 19 of the ICC Statute, the Court considers an in-admissibility challenge, there is the option for the requested State to postpone the execution of a cooperation request until the ICC has determined the admissibility of the case before it. Article 95 ICC Statute provides for this possibility, which should, in turn, be reflected in domestic implementing legislation, by providing for postponement of cooperation pending an admissibility challenge before the ICC.

**Australia** implements Article 95 in two different Sections of its Act:

35 (1) This section applies if:

- (a) a request for surrender of a person is made; and
- (b) the request relates to conduct that would constitute an offence under Australian law; and
- (c) either: (i) the conduct is being investigated or prosecuted in Australia; or (ii) the conduct has been investigated in Australia, and a decision was made not to prosecute the person sought; and
- (d) a challenge to the admissibility of the case is being or has been made to the ICC under paragraph 2(b) of article 19 of the Statute.

(2) The Attorney-General may postpone the execution of the request for surrender until the ICC has made its determination on admissibility.

(3) If the ICC determines that the case is inadmissible, surrender must be refused.

(4) If the ICC determines that the case is admissible and there is no other ground for refusing or postponing the request, the request must continue to be dealt with under this Part.

36 (1) This section applies if the ICC is considering an admissibility challenge under article 18 or 19 of the Statute, other than a challenge of the kind referred to in section 33 or 35.

(2) The Attorney-General may, pending a determination by the ICC on the admissibility challenge, postpone the execution of a request under this Part in respect of the crime within the jurisdiction of the ICC to which the challenge relates.

(3) If the ICC determines that the case to which the request relates is inadmissible, surrender must be refused.

(4) If the ICC determines that the case to which the request relates is admissible, and there is no other ground for refusing or postponing the request, the request must continue to be dealt with under this Part.<sup>420</sup>

Sections 35 and 36 adopt the same approach: the Attorney-General may postpone the execution of the cooperation request pending determination of the admissibility by the Court and, depending on the outcome, he/she may either refuse the surrender, or, if the case is deemed admissible, proceed with it provided that there is no other reason to postpone or refuse the execution of the request.

<sup>420</sup> See *supra* note 18, Arts. 35-36.

**Canada** deals with this issue in a different way:

40 (5) If the person has made submissions to the Minister under section 43 and the Minister is of the opinion that further time is needed to act on those submissions, the Minister may extend the period referred to in subsection (1) as follows:

- (a) if the person is the subject of a request for surrender by the International Criminal Court, and an issue has been raised as to the admissibility of the case or the jurisdiction of that Court, for a period ending not more than 45 days after the Court's ruling on the issue; or
- (b) in any other case, for one additional period that does not exceed 60 days.

43 (1) The person may, at any time before the expiry of 30 days after the date of the committal, make submissions to the Minister in respect of any ground that would be relevant to the Minister in making a decision in respect of the surrender of the person.

(2) The Minister may accept submissions even after the expiry of those 30 days in circumstances that the Minister considers appropriate.<sup>421</sup>

Section 40(5) allows for a time extension to be given to the Minister regarding the decision concerning surrender, provided that submissions have been made to the Minister in accordance with Section 43. Section 40(5)(a) stipulates that if these submissions relate to the admissibility of the case or the jurisdiction of the Court, then the extension described above may be extended “for a period ending not more than 45 days after the Court’s ruling on the issue”. Although no mention is made of postponing the execution of a request, the extension envisaged in this Section has exactly the same effect because in essence, the 45-day extension applies after the Court’s ruling, which means that until then the person may not be surrendered to the ICC.

### **10.15. Art. 96: Contents of request for other forms of assistance**

Article 96 of the ICC Statute contains the form which a request for assistance other than arrest and surrender should take, and as such, does not need to be implemented by a State. However, when such a request touches upon specific requirements under national law, the requested State shall consult with the ICC on these issues.

A State should therefore provide for consultation with the Court relating to specific requirements under national law for the execution of requests under Article 93 of the ICC Statute.

### **10.16. Art. 97: Consultations**

Article 97 of the ICC Statute requires that in case of a problem regarding a request made by the ICC, the requested State should consult the Court to identify ways of resolving it. Consultation procedures must therefore be put in place to allow for such interaction between the ICC and the State to which the cooperation request is addressed. Article 97 also contains an indicative list of issues with regard to which the need for consultation might arise.

<sup>421</sup> See *supra* note 408, Arts. 40, 43.



**Greece** fully implements this provision by adopting a broad approach; it provides a non-exhaustive list of situations in which consultations must take place, while also offering scope for consultations to take place depending on the particular circumstances of the case:

The Secretary of State for Justice, Transparency and Human Rights, in cooperation with the Foreign Secretary, shall consult with the ICC in all circumstances specified by the ICC Statute or warranted by the particular circumstances of the case such as:

- (a) When the production of any documents or disclosure of evidence at any stage of the proceedings before the ICC or during the course of judicial cooperation may jeopardize national security, according to Article 72 and 93 par. 4 of the ICC Statute, ratified by Law 3003/2002,
- (b) When the execution of a certain measure of assistance requested by the ICC contravenes a fundamental, generally applicable legal principle of Greek public order, as stipulated in Article 93 par. 3 of the ICC Statute,
- (c) When the request for surrender of a person or for the provision of judicial assistance is inconsistent with the obligations of the Hellenic Republic with respect to the State or diplomatic immunity of a person or property of a third State, according to the provisions of Article 89 par. 2 of the ICC Statute,
- (d) When the person sought for surrender brings a challenge before a national court on the basis of the principle of *ne bis in idem*, as provided in article 89 par. 2 of the ICC Statute,
- (e) If the person sought is being proceeded against or is serving a sentence in the requested State for a crime different from that for which surrender to the Court is sought, as provided in article 89 par. 4 of the ICC Statute.<sup>422</sup>

In implementing Article 97 of the ICC Statute, States should not refuse to execute an ICC request and should instead enter into consultations with the Court without delay. It is therefore imperative to provide for such a possibility in domestic legislation.

### **10.17. Art. 98: Cooperation with respect to waiver of immunity and consent to surrender**

Although Article 98 has been at the centre of many States' criticism of the ICC, not much is required in terms of its implementation. In accordance with Article 27 of the Statute, State Parties should provide in their implementing legislation that official capacity is irrelevant where crimes falling under the jurisdiction of the Court are involved, thereby at least enabling the prosecution of such crimes at the international level. Immunities have been addressed by most States in their substantive criminal law, rather than their procedural laws dealing with cooperation and they have been discussed previously, in Section 6.2, Article 27: Irrelevance of Official Capacity.

### **10.18. Art. 99: Execution of requests under Articles 93 and 96**

Article 99 of the ICC Statute stipulates that, for the execution of requests for assistance, use shall be made of national procedures. This, in turn, implies that the relevant procedures to facilitate such requests must be in place. There is no extra burden placed on the requested State, as evidenced from Article 99(3) of the ICC Statute, where it is stated that States do not

<sup>422</sup> See *supra* note 111, Art. 26.

have an obligation to translate the documents into the two working languages of the Court, but shall submit the documents in the original form. The spirit of this provision is to facilitate execution of the requests, without imposing unnecessarily burdensome provisions that delay the process, whilst not affording greater protection for either the individual concerned, or improving the quality of the evidence.

Article 99(4) of the ICC Statute envisages the execution of the Court's requests directly on the territory of the State party, without the presence of State authorities. The provision is important for the effectiveness of the Court as such, and it should be implemented. This Article also provides for the possibility of execution of requests following consultations with the requested State Party.

Few States have opted to implement this provision. **Germany** incorporates Article 99(4) of the ICC Statute in a generous manner allowing ample access for members of the Court and their authorised representatives as follows:

Upon special request and upon agreement with the responsible German authorities, members of the Court and authorized representatives thereof shall be permitted to independently conduct questioning, inspections, and similar evidence gathering in Germany. Mutual assistance may be approved under the conditions within the meaning of Article 99 para. 4(b) of the ICC Statute. The ordering and implementation of compulsory measures are in all cases reserved for the responsible German authorities and shall be carried out in accordance with German law.<sup>423</sup>

Germany, therefore, takes a clear and facilitative approach to allow the Prosecutor and its staff to conduct on-site investigations in accordance with the Statute. The emphasis is on Article 99(4)(b) of the ICC Statute without, however, imposing specific conditions. Moreover, the permissibility of on-site investigations is stressed, provided that this is done without compulsory measures.

### 10.19. Art. 101: Rule of speciality

In domestic extradition proceedings, the transfer of individuals is commonly agreed upon on condition that proceedings will not be carried out in relation to that person for any conduct committed prior to surrender other than the one which formed the basis of the extradition request. This rule is referred to as the rule of speciality.

The rule of speciality has been incorporated into the ICC Statute regime, through Article 101(1) of the ICC Statute.

Article 101(2) of the ICC Statute allows the Court to request a waiver of the rule of speciality from the requested State. There is, however, no obligation for the State to provide a waiver; some States have nonetheless followed this positive course of action.

<sup>423</sup> See *supra* note 233, Section 62.



**Ireland** provides for discretionary waiver of the rule of speciality as follows:

(1) Subject to subsection (2) and in accordance with Article 101, a person surrendered to the International Criminal Court shall not be proceeded against, punished or detained, whether by the Court or an enforcement state, for any offence committed before his or her surrender other than that for which the surrender was requested.

(2) The Minister may, if so requested by the Court and having received such information or assurances from it as he or she considers necessary, waive the requirements of subsection (1) in a particular case.<sup>424</sup>

### 10.20. Art. 102: Use of terms

It is not necessary to incorporate the use of terms found in Article 102 of the ICC Statute into domestic law as long as the distinction between surrender and extradition is made clear and these terms cannot be confused. Similarly, there is no need to put extradition laws aside when cooperating with the ICC.

There are examples of both approaches available. The **Netherlands**, in Section 11(2) of its legislation, explicitly provides that its Extradition Act is not applicable when surrendering a person to the ICC:

(1) At the request of the ICC and subject to the provisions of this chapter, persons shall be surrendered to the ICC

(a) for prosecution and trial in respect of criminal offences over which the ICC has jurisdiction under the Statute,

(b) for enforcement of a sentence of imprisonment imposed by the ICC.

(2) The Extradition Act (Uitleveringswet) is not applicable.<sup>425</sup>

This is an interesting example of Article 102 being directly implemented in domestic law. However, compliance with Article 102 does not necessarily imply non-applicability of extradition law. **Canada**, for example, has successfully amended its Extradition Act to comply with a request for surrender of a person to the Court. No distinction is made between the use of terms of extradition and surrender in the Canadian case.<sup>426</sup> As is shown by this examination of the various pieces of implementing legislation, what matters is the substance of the relevant piece and not the form it might take.

<sup>424</sup> See *supra* note 23, Section 36.

<sup>425</sup> See *supra* note 71, Art. 11.

<sup>426</sup> See *supra* note 324.

## Implementation notes

- ▶ Article 86 ICC Statute: Ensure full cooperation with the ICC;
- ▶ Article 87 (1) ICC Statute: Designate preferred channel of communication and specify the authority responsible for receiving cooperation requests by the ICC;
- ▶ Article 87 (3)-(4) ICC Statute: Ensure the confidentiality of the cooperation request and the safety and physical and psychosocial well-being of victims, potential witnesses and their families;
- ▶ Article 88 ICC Statute: Ensure the availability of national provisions for all forms of cooperation specified in the Rome Statute;
- ▶ Article 89 ICC Statute: Provide for the arrest and surrender of a person to the ICC and outline the procedure applicable under national law, including for transit;
- ▶ Article 89(2) ICC Statute: Allow for consultation procedures in case of a ne bis in idem claim made before national courts;
- ▶ Article 89(4) ICC Statute: Enable consultations with the ICC after granting a request relating to a person being proceeded against or serving a sentence for a crime different from that for which surrender to the Court is sought;
- ▶ Article 90 ICC Statute: Facilitate the notification of the Court in case of competing requests, taking into consideration whether the request comes from a State or non-State party, and whether it concerns the same or different conduct than that sought for by the ICC;
- ▶ Article 91 ICC Statute: Recognise the contents of an ICC arrest and surrender request and facilitate consultation as appropriate;
- ▶ Article 92 ICC Statute: In case of provisional arrest, allow the person to consent to be transferred to the ICC;
- ▶ Article 93 ICC Statute: Ensure that the full range of other forms of cooperation in Article 93 are provided for in national law;
- ▶ Article 93 (1)(l) ICC Statute: Consider incorporating “any other type of assistance”;
- ▶ Article 93(3) ICC Statute: In case of refusal of an ICC cooperation request, provide for consultations and clearly define the principles which have an elevated status and could potentially in conflict with an ICC request. Give consideration to whether the assistance can be rendered in another manner or subject to conditions. Ensure that the right to refuse cooperation with the Court is not abused and its invocation is reserved to the absolute minimum;
- ▶ Article 93(5) ICC Statute: Prior to denying a request for assistance consider whether assistance can be provided subject to conditions, at a later date or in an alternative manner;
- ▶ Article 93(6) ICC Statute: In case of denial of a request for assistance, promptly inform the Court or the Prosecutor of the reasons for such denial;
- ▶ Article 93(7) ICC Statute: Agree to the temporary transfer of a person in custody for identification purposes, for obtaining testimony or other assistance;
- ▶ Article 93(8) ICC Statute: Ensure confidentiality of documents or information transmitted to the Court following a request for cooperation;
- ▶ Article 93(9) ICC Statute: Include a duty to consult with the Court in the case of 93(9);
- ▶ Article 93(10) ICC Statute: Allow for the possibility to request ICC assistance, in accordance with Art. 93(10);
- ▶ Article 94 ICC Statute: Provide for postponement of execution of a request in respect of ongoing investigation or prosecution, noting that postponement is not refusal to cooperate;
- ▶ Article 95 ICC Statute: Provide for postponement of execution of a request pending an admissibility challenge before the ICC;

- ▶ Article 96 ICC Statute: Recognise the contents of a request for “other forms of assistance” and facilitate consultation as appropriate;
  - ▶ Article 97 ICC Statute: Provide for consultation procedures, focusing on finding solutions to potential problems;
  - ▶ Article 99 ICC Statute: Consider allowing on site execution of requests without compulsory measures, as outlined in Art. 99(4);
  - ▶ Article 101 ICC Statute: Consider granting a rule of speciality waiver relating to ICC cooperation requests;
  - ▶ Article 102 ICC Statute: Maintain a clear distinction between extradition on other States and requests relating to ICC cooperation.
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# 11

## **11. Agreement on Privileges and Immunities of the ICC** **106**

### 11.1. National practice **107**

# 11. Agreement on Privileges and Immunities of the ICC

## 11.1. National practice

The Agreement on the Privileges and Immunities of the International Criminal Court ('APIC') is a multilateral agreement that entered into force on 22 July 2004.<sup>427</sup>

The APIC grants privileges and immunities to the Court, its officials, personnel, counsel, witnesses, victims, experts, State representatives participating in ICC proceedings or the ASP, as well as other persons whose presence is required at the seat of the Court. Among the privileges and immunities afforded to the Court and its officials in the APIC are the capacity to contract, acquire and dispose of immovable and movable property, participate in legal proceedings, the exemption from taxes customs and import duties, the inviolability of premises, archives, documents and communications, and the exercise of the functions of the Court outside its headquarters, where necessary.

The APIC therefore affords wide-ranging privileges and immunities to Court officials and staff operating on the territory of State Parties. As a result of the obligations incurred upon the ratification, acceptance – or approval of – or accession to – the APIC, a number of States have incorporated its provisions into their domestic legal frameworks.

For example, **Samoa** incorporates the APIC alongside both core international crimes and cooperation, as follows:

- (1) The ICC shall have legal personality in Samoa with such legal capacity as may be necessary for the performance of its functions and the fulfillment of its purposes.
- (2) Without prejudice to the generality of subsection (1), the ICC shall have the capacity to contract, to acquire and dispose of immovable and movable property and to institute in legal proceedings, in Samoa.
- (3) The Judges, the Attorney General, the Assistant Attorneys General, the Prosecutor, the Deputy Prosecutors, the Registrar, the Deputy Registrar, staff of the Office of the Attorney General and the Office of the Prosecutor and of the Registry, counsel, experts, witnesses, and other persons required to be in Samoa for the performance of official functions or for participation in proceedings before the ICC shall have the privileges and immunities set out in article 48 of the Statute and the Agreement on the Privileges and Immunities of the ICC.
- (4) Article 48 of the Statute and articles 2 to 11, 13 to 22, 25 to 27, 29 and 30 of the Agreement on the Privileges and Immunities of the ICC shall have the force of law in Samoa, and references in those articles to the State Party shall, for this purpose, be construed as references to Samoa.<sup>428</sup>

The **Canadian** legislation, similarly to its Samoan counterpart, makes explicit reference to the APIC. Notably, however, Canada does not incorporate the relevant provisions of the APIC

<sup>427</sup> [Agreement on the Privileges and Immunities of the International Criminal Court](#), 9 September 2002.

<sup>428</sup> See *supra* note 22, Art. 108.

into its national legal order by way of a single piece of legislation; rather, privileges and immunities are afforded to ICC staff and officials in Canada through a separate legal instrument, the International Criminal Court Privileges and Immunities Order, which provides, in relevant part, as follows:

(1) The International Criminal Court shall have in Canada the legal capacities of a body corporate and, to the extent specified in the Agreement, the privileges and immunities set out in Articles II and III of the Convention.

Subject to subsection (4), representatives of a foreign state that is a member of or that participates in the Assembly shall have in Canada, to the extent specified in the Agreement, the privileges and immunities set out in Article IV of the Convention.

Subject to subsection (4), judges, officials and staff of the International Criminal Court and counsel, experts, witnesses and other persons required to be present at the seat of that Court shall have the privileges and immunities set out in Article 48 of the ICC Statute and in the Agreement.

[...]

(4) This Order does not exempt permanent residents of Canada and Canadian citizens from liability for taxes or duties imposed by any law in Canada.<sup>429</sup>

**Mauritius** follows a similar approach in its implementing legislation, without making explicit reference to the APIC:

9. (1) The International Criminal Court may sit in Mauritius, in such place as may be appointed by the President, at the request of the International Criminal Court, by Proclamation.

(2) The International Criminal Court shall be a body corporate.

10. (1) The Judges, the Prosecutor, the Deputy Prosecutors and the Registrar of the International Criminal Court, when performing their functions in Mauritius, shall be immune from the criminal and civil jurisdiction of the courts of Mauritius and shall enjoy such immunities and privileges as are accorded a representative of another State or government under the Diplomatic Relations Act and as may be prescribed.

(2) The Deputy Registrar, and the staff of the International Criminal Court, counsels, experts, witnesses and other persons involved in proceedings before the International Criminal Court shall enjoy such privileges and facilities necessary for the performance of their functions in Mauritius as may be prescribed.

(3) Any person – (a) required to be present at the seat of the International Criminal Court; or (b) attending meetings of the Assembly of State Parties to the Statute, including the its subsidiary organs, shall enjoy such privileges and facilities necessary for the performance of his functions in Mauritius as may be prescribed.<sup>430</sup>

The **United Kingdom** implements elements of the APIC in a comparable manner:

(1) Her Majesty may by Order in Council confer on the ICC the legal capacities of a body corporate.

(2) Her Majesty may by Order in Council provide that—

(a) the ICC,

<sup>429</sup> [International Criminal Court Privileges and Immunities Order](#), 21 June 2004, Art. 2.

<sup>430</sup> See *supra* note 45, Arts. 9–10.

(b) the judges, the Prosecutor, the Deputy Prosecutors and the Registrar and members of their families who form part of their households,

(c) the Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry,

(d) counsel, experts, witnesses and other persons involved in proceedings of the ICC, and

(e) persons attending meetings of the Assembly (including persons attending such meetings as observers and persons invited to such meetings),

shall have such privileges and immunities as, in the opinion of Her Majesty, are or will be required for giving effect to the ICC Statute or any related agreement to which the United Kingdom, or Her Majesty's government in the United Kingdom, is or will be a party.

(3) In sub-paragraph (2)(e) "the Assembly" means the Assembly of States Parties to the ICC statute (and includes the subsidiary organs of that Assembly).<sup>431</sup>

Finally to this end, both **Serbia** and **Slovenia** incorporate elements of the APIC into their national legal orders alongside provisions enabling State cooperation with the Court.

The **Serbian** implementing legislation provides as follows with regard to APIC:

Judges, the Prosecutor, Deputy Prosecutors, the Secretary, Deputy Secretaries, the Prosecutor's Office staff and the International Criminal Court Secretary staff, when carrying out tasks in the interest of the International Criminal Court in the territory of the Republic of Serbia, enjoy the immunities in accordance with the agreement on the immunities and the privileges concluded between the Republic of Serbia and the International Criminal Court.<sup>432</sup>

The **Slovenian** national implementing legislation provides similarly, as follows:

Judges, the Prosecutor, Deputy Prosecutor, Secretary, Deputy Secretary, staff of the prosecutor's office and secretary's office of the Court who are co-operating in the work of the Court or in connection with its work and are located on the territory of the Republic of Slovenia or work in it under the provisions of this Act, shall enjoy privileges, immunities and advantages necessary for performing their tasks, as determined in the Agreement on privileges and immunities of the International Criminal Court.<sup>433</sup>

The State Parties to the ICC Statute that have not already ratified the APIC are not only encouraged to proceed as soon as possible with this course of action, but are equally advised to incorporate its provisions into their respective domestic legal frameworks. Implementing the APIC at the national level – in a similar vein to incorporating the ICC cooperation regime – will assist in enabling the effective functioning of the Court on State territory.

## Implementation notes

- Ratify the APIC and implement its provisions into the national legal framework, in a similar way to incorporating the ICC cooperation regime.

<sup>431</sup> See *supra* note 16, Art. 1.

<sup>432</sup> *Law on Cooperation with the International Criminal Court*, 8 September 2009, Art. 34.

<sup>433</sup> See *supra* note 232, Art. 22.

# 12

## **12. Guiding Principles on Implementation** **110**

### 12.1. Implementation checklist **112**



## 12. Guiding Principles on Implementation

Having examined State implementation efforts with regard to the substantive provisions of the ICC Statute, as well as regarding those dealing with cooperation and the APIC, it is clear that each State has its individual concerns and priorities and affords different treatment to each of the issues involved.

The points of reference in the preceding analysis have been the ICC Statute and the APIC. Mindful of the positions taken by States when implementing international law in general and international criminal law in particular, in order to identify some guiding principles common to the various pieces of implementing legislation, the basis has to be the ICC Statute.

The guiding principles presented here are by no means unique, nor are they exhaustive. The approach taken is dependent on the perspective on implementation; the approach would differ, had different parameters been examined. For instance, had the emphasis been on State interests, the approach would, perhaps, have been quite different. Given that States have signed up to the Statute, they have therefore committed to undertaking the obligations enshrined therein, and to abiding by it and its standards. From the preceding article-by-article analysis, States should:

### GUIDING PRINCIPLES ON IMPLEMENTATION

- ▶ Enact implementing legislation that closely follows the ICC Statute;
- ▶ Provide for full cooperation under the Statute. This, in essence, means respect for the ICC Statute and facilitation of its cooperation regime;
- ▶ Strive for promptness and expediency when dealing with a cooperation request;
- ▶ Ensure that ICC implementing legislation is not more burdensome than other pieces of legislation, particularly extradition procedures. Where possible, the ICC should be treated more favourably;
- ▶ Interpret ambivalent provisions in favour of the ICC Statute, as far as possible. When in doubt regarding the implementation of core international crimes provisions, consult the Elements of Crimes;
- ▶ Minimise the possibility of refusing cooperation;
- ▶ Where problems arise, engage promptly in consultations with the ICC;
- ▶ Facilitate consultation with the Court, in accordance with the Statute, either through a general clause empowering the State to enter consultations with the ICC, or through a specific reference to consultation whilst implementing various ICC Statute articles;
- ▶ Consult customary international law and general treaty law in order to provide the widest protection possible to victims of mass atrocity.

## 12.1. Implementation checklist

### Implementation Approaches

1. Identify implementation challenges within a specific legal context:
  - Review the current legal framework;
  - Identify particularities linked to the type of legal system;
  - Identify potential constitutional challenges.
2. Choose the implementation approach or combination of approaches most suitable to the legal system.

### Core International Crimes

#### Article 6 Genocide

3. Ensure that all protected groups are covered by the national provision for genocide and consider whether including additional groups is appropriate;
4. Ensure that all punishable acts are covered by the national provision for genocide;
5. Ensure that the specific intent required for genocide is reflected;
6. Consult the Elements of Crimes document;
7. If applicable, consult customary international law and consider other relevant treaty law;

#### Article 7 Crimes against Humanity

8. Ensure that all punishable acts are covered by the national provision for crimes against humanity and consider whether including additional acts is appropriate.
9. Consider incorporating “other inhumane acts” in the national provision for crimes against humanity;
10. Consider the incorporation of the “policy element” for crimes against humanity;
11. Consult the Elements of Crimes document;
12. If applicable, consult customary international law and consider other relevant treaty law.

#### Article 8 War Crimes

13. Ensure that all punishable acts are covered by the national provision for war crimes and consider whether including additional acts is appropriate;
14. Consider relationship with other international legal instruments (e.g. Geneva Conventions, Additional Protocols etc.);
15. If applicable, consult customary international law;
16. Consider whether the threshold of “in particular when committed as part of a plan or policy or as part of large-scale commission” ought to be retained for prosecutions before national courts;
17. Consult the Elements of Crimes document.;
18. Consider whether the distinction between IAC and NIAC ought to be retained.

- Article 8bis Aggression**      **19.** Ensure that all aspects of the crime of aggression, including the punishable acts, are covered by the national provision for aggression.

### Jurisdiction, admissibility and applicable law

- Articles 11-13 Jurisdiction**      **20.** Consider whether to expand national jurisdiction *ratione temporis*;  
**21.** Review applicable jurisdictional principles.

### General principles of criminal law

- Article 25 Individual criminal responsibility**      **22.** Recognise all modes of liability found in the Rome Statute;  
**23.** Consider extending the crime of incitement to cover all core international crimes.

- Article 27 Irrelevance of official capacity**      **24.** Recognise that the official capacity of the alleged perpetrator of a core international crime is irrelevant to the investigation and prosecution of such crimes.

- Article 28 Responsibility of commanders and other superiors**      **25.** Provide for the responsibility of commanders and other superiors at the national level.

- Article 29 Non-applicability of statute of limitations**      **26.** Remove statutes of limitation for core international crimes.

- Article 31 Grounds for excluding criminal responsibility/ Article 32 Mistake of fact or mistake of law**      **27.** Review applicable grounds for excluding criminal responsibility under both international and national law.

- Article 33 Superior orders and prescription of law**      **28.** Accept superior orders as a ground for excluding criminal responsibility only when the three conditions of Article 33 ICC Statute are fulfilled.

### Trial

- Article 70 Offences against the administration of justice**      **29.** Review existing national legislation and extend criminal laws to cover ICC offences against the administration of justice.

### Penalties

- Article 78 Determination of the sentence/ Article 80 Non-prejudice to national application of penalties and national laws**      **30.** Consider international treaty standards and customary international law whilst acknowledging that no prejudice to national application of penalties and national laws is imposed by the ICC Statute;  
**31.** Consider the gravity of the crimes in deciding the applicable penalty scheme.

## Victims' Rights and Reparations

- Article 79 Trust Fund **32.** Provide for the enforcement of reparation orders at the national level.

## International Cooperation and Judicial Assistance

- Article 86 General obligation to cooperate **33.** Ensure full cooperation with the ICC.
- 
- Article 87 Requests for cooperation: general provisions **34.** Designate preferred channel of communication and specify the authority responsible for receiving cooperation requests by the ICC;  
**35.** Ensure the confidentiality of the cooperation request and the safety and physical and psychosocial well-being of victims, potential witnesses and their families.
- 
- Article 88 Availability of procedures under national law **36.** Ensure the availability of national provisions for all forms of cooperation specified in the ICC Statute.
- 
- Article 89 Surrender of persons to the Court **37.** Provide for the arrest and surrender of a person to the ICC and outline the procedure applicable under national law, including for transit;  
**38.** Allow for consultation procedures in case of a *ne bis in idem* claim made before national courts;  
**39.** Enable consultations with the ICC after granting a request relating to a person being proceeded against or serving a sentence for a crime different from that for which surrender to the Court is sought.
- 
- Article 90 Competing requests **40.** Facilitate the notification of the Court in case of competing requests, taking into consideration whether the request comes from a State or non-State party, and whether it concerns the same or different conduct than that sought for by the ICC.
- 
- Article 91 Contents of request for arrest and surrender **41.** Recognise the contents of an ICC arrest and surrender request and facilitate consultation as appropriate.
- 
- Article 92 Provisional arrest **42.** In case of provisional arrest, allow the person to consent to be transferred to the ICC.
- 
- Article 93 Other forms of cooperation **43.** Ensure that the full range of other forms of cooperation in Article 93 are provided for in national law;  
**44.** Consider incorporating “any other type of assistance”;  
**45.** In case of refusal of an ICC cooperation request, provide for consultations and clearly define the principles which have an elevated status and could potentially conflict with an ICC request. Give consideration to whether the assistance can be rendered in another manner or subject to conditions. Ensure that the right to refuse cooperation with the Court is not abused and its invocation is reserved to the absolute minimum.

- 46. Prior to denying a request for assistance consider whether assistance can be provided subject to conditions, at a later date or in an alternative manner;
- 47. In case of denial of a request for assistance, promptly inform the Court or the Prosecutor of the reasons for such denial;
- 48. Agree to the temporary transfer of a person in custody for identification purposes, for obtaining testimony or other assistance.
- 49. Ensure confidentiality of documents or information transmitted to the Court following a request for cooperation;
- 50. Include a duty to consult with the Court in the case of 93(9);
- 51. Allow for the possibility to request ICC assistance, in accordance with Art. 93(10).

**Article 94 Postponement of execution of a request in respect of ongoing investigation or prosecution**

- 52. Provide for postponement of execution of a request in respect of ongoing investigation or prosecution, noting that postponement is not refusal to cooperate.

**Article 95 Postponement of execution of a request in respect of an admissibility Challenge**

- 53. Provide for postponement of execution of a request pending an admissibility challenge before the ICC.

**Article 96 Contents of request for other forms of assistance under article 93**

- 54. Recognise the contents of a request for “other forms of assistance” and facilitate consultation as appropriate.

**Article 97 Consultations**

- 55. Provide for consultation procedures, focusing on finding solutions to potential problems.

**Article 99 Execution of request under articles 93 and 96**

- 56. Consider allowing on site execution of requests without compulsory measures, as outlined in Art. 99(4).

**Article 101 Rule of speciality**

- 57. Consider granting a rule of speciality waiver relating to ICC cooperation requests.

**Article 102 Use of terms**

- 58. Maintain a clear distinction between extradition to other States and requests relating to ICC cooperation.

## Agreement on the Privileges and Immunities of the ICC

**APIC**

- 59. Ratify the APIC and implement its provisions into the national legal framework, in a similar way to incorporating the ICC cooperation regime.

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Database on Open  
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Core International  
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**CJAD**

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**CLICC**

Commentary on the  
Law of the International  
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