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Ireland

Comments and recommendations on the International Criminal Court Bill 2003

I. Introduction

Amnesty International welcomes Ireland's ratification of the Rome Statute of the International Criminal Court (Rome Statute) on 11 April 2002 and the publication of the International Criminal Court Bill 2003 (Bill) to implement its obligations under the Rome Statute into national law. This paper examines the Bill and makes comments and recommendations for amendments to ensure that Irish courts can investigate and prosecute individuals accused of crimes under international law consistently with international law and practice and to ensure full cooperation with the International Criminal Court (ICC).

Amnesty International notes the many positive elements contained in the Bill, including the incorporation of all crimes under the Rome Statute (genocide, crimes against humanity and war crimes), the extension of universal jurisdiction to war crimes, the exclusion of state or diplomatic immunities for the crimes, the detailed provisions on arrest and surrender to the Court, the inclusion of offences against the administration of justice and the provision for the enforcement of ICC orders for fines, forfeiture and reparations for victims. In some cases, these provisions could be strengthened further, as outlined below.

Amnesty International, however, has a number of concerns with the Bill described below and in some cases the organization makes recommendations on how to best address these issues. These comments are based on the Rome Statute, supplementary instruments adopted by the Assembly of States Parties and the following Amnesty International documents: *International Criminal Court: Checklist for Effective Implementation* (IOR 40/11/1999), *International Criminal Court: Making the Right Choices, Parts One to Five*, (IOR 40/01/97, 40/11/97, 40/13/97, 40/04/98, 40/10/98) and *International Criminal Court: Checklist to ensure the nomination of the highest qualified candidates for judges* (IOR 40/023/2002). These documents are available on Amnesty International's ICC webpages: <http://www.amnesty.org/icc>

II. Ensuring full consultation with civil society

Amnesty International is disappointed that the government failed to adopt a transparent process, including consultation with civil society, when drafting the Bill. Other states, such as Brazil, the Democratic Republic of Congo, Senegal and the United Kingdom, have adopted such an approach. There are many organizations and individuals, including victims' organizations, women's organizations, professional legal bodies, academics, as well as Amnesty International, that could have been invited to make submissions regarding the content of the Bill before it was submitted to Parliament. Our organization hopes that Parliament will provide adequate time and fora to ensure that such submissions are considered fully prior to enactment of the Bill.

III. Complementarity

A. Definitions of crimes covered by the Act

The Bill should cover the most serious crimes under international law. Amnesty International welcomes the criminalization of genocide, crimes against humanity and war crimes in accordance with the Rome Statute in Sections 6 and 7 of the Bill. In doing so, the drafters have incorporated the definitions in the Rome Statute. Measures should however be taken to strengthen this section by:

(i) Addressing those crimes in the Rome Statute that are not consistent with international law.

Some crimes listed under Article 8 of the Rome Statute are much weaker than prohibitions in other international humanitarian law instruments. By incorporating all crimes as defined in the Rome Statute, Ireland would find that its laws are inconsistent with its obligations to implement other treaties it has ratified, in particular, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), as well as national laws implementing them, including the Geneva Conventions (Amendment) Act 1998.

In particular, Article 57 (2) (a) (iii) of Protocol I prohibits "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the

concrete and direct military advantage". The definition of this crime in Article 8 (2) (b) (iv) of the Rome Statute is much weaker because, at the urging of the United States of America (USA), it replaces the narrow term "concrete and direct military advantage" with the expansive term, "concrete and direct *overall* military advantage". The definition in Protocol I should therefore be used.

(ii) Incorporate Article 8(2)(b)(xx) into national law.

Article 8 (2) (b) (xx) of the Rome Statute includes the war crime of employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict. However, such weapons, projectiles and material and methods of warfare must be the subject of a comprehensive prohibition and be included in an annex to the Rome Statute, by an amendment to the Rome Statute. There are a number of such prohibited weapons, projectiles and materials and methods of warfare that could be included in an amendment to the Rome Statute.

Section 6 of the Bill expressly excludes this crime from the jurisdiction of Irish courts and the explanatory note states "Article 8.2(b)(xx) is excluded from this definition as the provision will not come into force until the Statute is reviewed by the State Parties, seven years after coming into operation." Instead of excluding the crime at this stage, which may demand future amendment to the Bill, Amnesty International recommends Ireland adopt the approach taken by Brazil in its draft legislation and provides that this war crime covers any such weapons, projectiles and materials or methods of warfare that are the subject of a prohibition in a treaty ratified by Ireland.

(iii) Incorporate other war crimes

The implementation process should be seen as an opportunity to include other war crimes not included in the Rome Statute, including those contained in Protocol I and Protocol II, if they are not covered by other national legislation, including the Geneva Conventions (Amendment) Act 1998. Both treaties were ratified by Ireland on 19 May 1999.

In particular, the Rome Statute does not criminalize unjustified delays in repatriating or freeing prisoners of war or interned civilians once active hostilities

have ceased. This conduct has been defined as a "grave breach" and, thus, a war crime under the provisions of Article 85 (4) (b) of Protocol I. Similarly, the prohibition of an attack on demilitarized zones, is not expressly defined as a crime in the Rome Statute, but such conduct is prohibited in Article 85 (3) (d) of Protocol I.

(iv) Increase the prohibited age of conscripting or enlisting children into armed forces or groups to under 18.

Articles 8(b)(xxvi) and 8(e)(vii) provide that it is a war crime to conscript or enlist children under the age of fifteen years into armed forces or groups or to use them to participate actively in hostilities. The age limit was set in accordance with the Convention on the Rights of the Child and Protocol I to the Geneva Conventions. The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict which Ireland ratified on 18 November 2002 establishes a higher standard of protection for children. The Protocol requires States Parties to set a minimum age of 18 for compulsory recruitment and participation in hostilities and to raise the minimum age for voluntary recruitment from that set out in article 38, paragraph 3, of the Convention on the Rights of the Child and to take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities. Amnesty International believes that voluntary or compulsory recruitment by governments or armed groups can jeopardize the mental and physical integrity of anyone below the age of 18 years. For this reason the organization opposes all forms of recruitment of persons below 18 years of age. Amnesty International is therefore disappointed that in its declaration under Article 3 of the Optional Protocol, Ireland specified that the minimum age of voluntary recruitment is 17. Only by raising the minimum age to 18 years can Ireland guarantee that children will not participate in hostilities and ensure that they will not be defined as combatants under International Humanitarian Law. We therefore urge Ireland in this legislation to criminalise both the conscription and enlistment of persons under 18 and to amend its own practices and withdraw its declaration to the Optional Protocol.

(v) Include other crimes under international law not contained in the Rome Statute

Crimes under international law include not only genocide, crimes against humanity and the war crimes listed in the Statute, but also include war crimes not listed in the Statute (such as certain grave breaches and other serious violations of Protocol I and certain violations of international humanitarian law in non-international armed conflict) and torture, extrajudicial executions and enforced disappearances which are

not committed on a widespread or systematic basis. To ensure that the international system of justice is fully effective, states should ensure that their legislation makes each of these crimes under international law also crimes under national law.

Although the Criminal Justice (United Nations Convention against Torture) Act 2000 and the Geneva Conventions (Amendment Act) 1998 appear to criminalize torture and other war crimes not listed in the Rome Statute, it does not seem that extrajudicial executions and enforced disappearances are criminalized in Irish law. Both crimes should, therefore, be incorporated into the Bill in accordance with their definitions under international law as set out in the 1989 UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions and the 1992 UN Declaration on the Protection of All Persons from Enforced Disappearance (see Appendix).

B. Scope of the jurisdiction of Irish courts

The Bill should provide for universal jurisdiction for all grave crimes under international law. Amnesty International welcomes the provision in Section 12 of the Bill to the extent that it provides for universal jurisdiction over war crimes defined in the Rome Statute and Grave Breaches of the Geneva Conventions and Additional Protocol I. However, the organization believes that the Bill should also provide universal jurisdiction for the crimes of genocide, crimes against humanity and other crimes under international law over which all states have a responsibility to exercise universal jurisdiction.

When the Rome Statute was adopted on 17 July 1998, the international community, including Ireland which voted in favour of the Statute, reaffirmed the fundamental obligations of every state to bring to justice at the national level those responsible for crimes against humanity, genocide and war crimes and to exercise its jurisdiction over those responsible for these crimes. In the Preamble of the Rome Statute, the states parties affirm “that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”, determined “to put an end to impunity for the perpetrators of these crimes” and recalled “that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”.

Nothing in the Preamble limits the scope of the obligation to exercise jurisdiction to the exercise of territorial jurisdiction. These solemn declarations in the Preamble of the Rome Statute are simply the latest in a series of affirmations by states that they have a duty to cooperate in bringing to justice persons responsible for genocide, crimes against humanity, war crimes and other crimes under international law. They mark a shift from focussing on a duty to extradite suspects to territorial states as the method for ensuring that they were brought to justice to a duty to ensure that such persons are brought to justice with extradition as one technique. Universal jurisdiction is a fundamental tool that can ensure states accomplish this goal.

Article 29 (8) of the Irish Constitution provides that “[t]he State may exercise extraterritorial jurisdiction in accordance with the generally recognized principles of international law.” This constitutional provision permits Irish courts to exercise universal jurisdiction over crimes under international law, but, apparently, only to the extent that they were expressly authorized to do so by legislation. Sections 2 and 3 of the Criminal Justice (United Nations Convention against Torture) Act, 2000 provide for universal jurisdiction over the crime of Torture. Irish law should also provide for universal jurisdiction over genocide, crimes against humanity, extrajudicial executions and disappearances as crimes under international law for which universal jurisdiction is clearly permitted¹ and which are *jus cogens* prohibitions, which is a duty all states owe to the international community as a whole to ensure justice is respected.²

In fact, as explained in the Appendix, which summarizes conclusions of Amnesty International’s legal memorandum *Universal Jurisdiction: The duty of states to enact and implement legislation* (AI Index: IOR 53/002/-018/2001), there are strong arguments that there is an international duty to bring those accused of the crimes to justice by exercising universal jurisdiction for each of the crimes.

¹ See Appendix and Amnesty International’s *Universal Jurisdiction: The duty of states to enact and implement legislation*, Chapters 5 Crimes against humanity: The legal basis for universal jurisdiction (AI Index: IOR 53/008/2001); Chapter 7 Genocide: The legal basis for universal jurisdiction (AI Index: IOR 53/010/2001); Chapter 9 Torture: The legal basis for universal jurisdiction (AI Index: IOR 53/012/2001); Chapter 11 Extrajudicial executions (AI Index: IOR 53/014/2001) and; Chapter 12 “Disappearances” (AI Index: IOR 53/015/2001).

² *Restatement (Third) of the Foreign Relations Law of the United States* § 702 comment o (violations of certain rights falling within the concept of crimes against humanity (slavery and slave trade, murder as state policy, torture, prolonged arbitrary detention, systematic racial discrimination, systematic religious discrimination and gender discrimination) “are violations of obligations to all other states”).

Irish courts should not be precluded from exercising jurisdiction over past crimes. Amnesty International is concerned that Section 9(4) of the Bill prohibits, with the exception of acts of genocide covered by the Genocide Act 1973, investigations and prosecutions of crimes against humanity and war crimes which occurred before the enactment of the Bill. Firstly, the provision should exempt past war crimes, most of which have been criminalised in Ireland under the Geneva Conventions Act 1962. Secondly, crimes against humanity and war crimes were considered crimes under international law under general principles of law recognized by the international community before the adoption of the Rome Statute and it would not violate the principle of *nullum crimen sine lege* to permit retrospective national criminal legislation with respect to crimes under international law. As Article 15(2) of the International Covenant on Civil and Political Rights (ICCPR) makes clear such legislation is fully consistent with the *nullum crimen sine lege* principle. That provision states that nothing in the article prohibiting retroactive punishment “shall prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognized by the community of nations.” Therefore the Bill should ensure that Irish courts have extraterritorial criminal jurisdiction over the crimes no matter when they were committed.

C. Principles of criminal responsibility

The principle of command and superior responsibility should be in accordance with international law. Section 13 of the Bill copies the two-tiered standard of a relatively strict command responsibility for military commanders and a much weaker standard of superior responsibility for civilian superiors as set out in Article 28 of the Rome Statute solely to govern trials in the Court. Due to a political compromise made at the Rome Diplomatic Conference, as a result of pressure by the United States of America and a few other states, Article 28 is not in accordance with customary international law. The lower standard of responsibility for civilian superiors compared to military commanders is contrary to customary international law, as reflected in Article 86 (2) of Protocol I of 1977 to the Geneva Conventions, Article 6 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind, Article 7(3) of the 1993 Statute of the International Criminal Tribunal for the former Yugoslavia, Article 6(3) of the 1994 Statute of the International Criminal Tribunal for Rwanda and Article 6(3) of the Statute of the Special Court for Sierra Leone. Each of these standards hold civilian superiors to the same strict standards as military commanders.

Ireland, as a state party to Protocol I, is required to implement it in national law. Therefore, Amnesty International recommends that the legislation be amended to be consistent with international law by including the same standards for civilian superiors as are included for military commanders. Nothing in the Statute or international law prevents a state from adopting stricter standards of command or superior responsibility than provided in the Statute.

The strongest possible standard would contain the following elements:

- equal application to military commanders and civilian superiors;
- the commander or superior knew or should have known that the subordinate was committing or was about to commit a crime;
- failure to take all feasible measures (stronger than all reasonable measures) within the power of the commander or superior; and
- failure to prevent or punish the subordinate.

Grounds for excluding criminal responsibility in accordance with international law should be included in the Bill. Amnesty International is concerned that the grounds for excluding criminal responsibility in accordance with international law are not included in the Bill, resulting in defences for ordinary offences being applied to the crimes. Of course, if the national law in a state party is stricter and does not include all of the grounds identified in the Statute, this would pose a problem only when the omission would deny fundamental principles of criminal law, such as omitting a defence of insanity. However, if during the consideration of the Bill it is discovered that any defences are less restrictive, the legislation should redress the gap.

The principle of superior orders should be included in accordance with international law. Amnesty International welcomes the non-inclusion of the defence of superior orders as set out in Article 33 of the Rome Statute, unless of course other legislation upholding the defence is applicable to the crimes. Article 33 is not consistent with customary international law, as reflected in Article 8 of the Nuremberg Charter, which provides: '[t]he fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment, if the Tribunal determines that justice so requires.' The Statutes of the International Criminal Tribunals for the Former Yugoslavia and Rwanda and the Special Court for Sierra Leone contain the same rule. Amnesty International recommends that instead of omitting the issue from the Bill, it should reflect the principle by expressly excluding it as a defence.

D. Rights of the accused

Rights of the persons during investigation should be consistent with the Rome Statute. Amnesty International welcomes the inclusion of the rights contained in Article 55 into the Bill in Sections 51(4), 51 (7) and 52(1) of the Bill. Section 51(4) however, only requires the judge to inform a person during the investigation of their rights under Article 55(1). Amnesty International recommends that Section 51(4) should be strengthened to expressly require that those rights are respected.

Rights of an accused during national proceedings under complementarity should be consistent with the Rome Statute. The Bill should ensure that all persons who will be prosecuted by Irish courts in accordance with the principle of complementarity should meet the highest standards of fair trial, including those that will be applied by the ICC itself listed in Article 67 of the Rome Statute. If any restrictions of these rights exist in Irish law, they should be addressed in the Bill.

E. Statutes of limitations and amnesties

Statute of limitations should be expressly excluded for crimes under international law. Article 29 of the Rome Statute provides that '[t]he crimes within the jurisdiction of the court shall not be subject to any statute of limitations'. Although this provision is self-executing, Amnesty International recommends that the Bill should expressly exclude statutes of limitations for all crimes within the Court's jurisdiction, as well as other crimes under international law, such as torture. This express provision has been included in the draft legislation of a number of states, including Bosnia Herzegovina, Brazil and Democratic Republic of Congo and the legislation enacted by Germany and other states parties.³

The legislation should also provide that Ireland will not recognise any amnesties, pardons or similar measures of impunity by any state. Such national measures that prevent judicial determinations of guilt or innocence in a criminal trial, the discovery of the truth or full reparations to victims are contrary to international law.⁴ They cannot bind the Court or the courts of other states.⁵ Explicit

³ To view other states' enacted and draft legislations implementing the Rome Statute, see Amnesty International's website: http://web.amnesty.org/pages/int_jus_icc_implementation

⁴ Amnesty International, *Universal Jurisdiction – the duty of states to enact and enforce legislation*, Chapter 14 (IOR 53/017/2001).

acknowledgment of this principle has been included in the draft legislation of Brazil and Democratic Republic of Congo.

IV: Cooperation

A. Agreement on Privileges and Immunities

The Bill should fully implement the Agreement on Privileges and Immunities of the International Criminal Court. The provisions in Section 59 of the Bill appear to recognize the privileges and immunities of the Court, its personnel, counsel, experts and other persons whose presence is required at the seat of the Court according to Article 48 of the Rome Statute. However, although Section 59 implements the Agreement on Privileges and Immunities of the Court (Agreement), which Ireland has signed, but not yet ratified, with respect to such persons, the draft does not expressly provide for implementation of all provisions of the Agreement, including those related to communications, records, premises, property and evidence. To avoid the need for further implementing legislation, one solution could be to include a provision in this article permitting the Minister of Foreign Affairs to extend the scope of the provisions on immunities to include all privileges and immunities included in the Agreement when it enters into force for Ireland.

B. Nomination of candidates to be judges or the Prosecutor

The Bill should establish the procedure for nominating candidates for judges or the Prosecutor of the ICC. Amnesty International is concerned that the Bill has no provisions regarding the nomination of judges pursuant to Article 36 of the Statute and the Prosecutor. Amnesty International in point 14 of its *Checklist for Effective Implementation*, recommends that all states parties ensure that when they nominate candidates to be judges or Prosecutor, they do so in an open process with the broadest possible consultation. Depending on the national legal system, such a procedure could be established by constitutional amendment (if necessary), legislation or administrative regulations.

⁵ “Whatever the effect of the amnesty granted in the Lome Agreement may have on a prosecution for such crimes as are contained in Articles 2 to 4 in the national courts of Sierra Leone, it is ineffective in removing the universal jurisdiction to prosecute persons accused of such crimes that other states have by reason of the nature of the crimes. It is also ineffective in depriving an international court such as the Special Court of jurisdiction.” Prosecutor against Morris Kallon and Brima Bazzy Kamara, Decision on Challenge to Jurisdiction: Lome Amnesty Accord, Appeals Chamber, Special Court for Sierra Leone (13 March 2004).

In its document, "*International Criminal Court: Checklist to ensure the nomination of the highest qualified candidates for judges*," (AI Index: IOR 40/023/2002) Amnesty International suggests, among other things, that there should be a public call for all possible nominations for the selection process; that the nomination of the greatest number of candidates should be encouraged; that civil society and other interested parties should have an opportunity to comment on the knowledge and experience of each of the candidates.

C. Cooperation with investigations and prosecutions

Basic obligation to cooperate with the ICC. The Bill does not contain any provision concerning the basic obligation of national authorities to cooperate with the Court. This basic obligation is contained in Article 86 of the Rome Statute: 'States Parties shall, in accordance with this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court'. Although the duty to cooperate is defined in a detailed way in certain matters, the Bill should incorporate this mandatory language to make it clear to all national authorities that they have a duty to cooperate with the Court in the investigation and prosecution of crimes within the jurisdiction of the Court.

The Bill should ensure confidentiality of requests for cooperation consistent with the Rome Statute. Article 87(3) of the Rome Statute expressly provides that "the requested state shall keep confidential a request for cooperation and any documents supporting the request, except to the extent that the disclosure is necessary for execution of the request." However, the Bill does not have such a provision which should be included.

The Bill should ensure the provision of national security information in accordance with Article 72. Section 4 of the Bill sets out a detailed procedure taking into account the provisions of Article 72, which require a state that has concerns over submitting information which it believes would prejudice national security to cooperate and consult with the Court in order to try and resolve the matter. Section 4 of the Bill, however, does not appear to incorporate fully Article 72 (7), which provides that if a state refuses to cooperate, then the ICC can make an order for disclosure or refer the matter to the Assembly of States Parties, or the Security Council in the case of a Security Council referral, to decide what steps should be taken to ensure that the state fulfils its legal obligations. Section 4 should be amended to provide that Ireland will implement the decision of the Court and comply with any

decision by the Assembly of States Parties or the Security Council under Article 87 if this situation arises.

The Bill should provide for national authorities to compel witnesses to give evidence to the ICC. Section 53(3) of the Bill sets out a procedure for informing witnesses that they have been summoned to appear before the ICC and Section 51(3)-(6) provides for compelling witnesses to provide information to a judge of the Irish District Court pursuant to an ICC request to take evidence under Article 93(1)(b). However, there is no provision for facilitating the voluntary appearance of persons as witnesses or experts before the ICC pursuant to Article 93(1)(e) or compelling witnesses to appear before the ICC which would fall clearly within the scope of Article 93(1)(l). Article 64(6)(b) of the Rome Statute expressly provides that the Trial Chamber may '[r]equire the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute'. Therefore, Ireland should ensure that witnesses whose presence has been requested by the Court – whether sought by the Prosecutor, the defence or by the Trial Chamber – must testify before the Court, subject to any privilege under Article 69(5) or international law or standards. In particular, the obligation to ensure that witnesses for the defence appear before the Court flows from the Trial Chamber's express duty under Article 64(2) to ensure a fair trial.

D. Arrest and surrender of accused persons

Amnesty International welcomes the detailed provisions in the Bill on complying with ICC requests to arrest and surrender persons to the ICC. The organization, however, has some concerns about these provisions.

National cases for ordinary crimes should not unduly interfere with the ICC's work. Amnesty International is concerned that the Bill allows the Minister on receipt of an ICC request for arrest (Section 18(2)(b)) or surrender (Section 30) to postpone action if the person is being investigated or proceeded against by national authorities for a non-ICC offence. Despite the requirement in Section 18(3) that the Minister in making a decision should take into account the seriousness of the offence, this provision presents an unnecessary obstacle to investigation and prosecution of the most serious crimes under international law. It is unlikely that any crime under ordinary law will be more serious than genocide, crimes against humanity and war crimes. The provision in the Bill, should at least comply with Article 94 of the Rome Statute, which requires that in such event the national authorities should comply

within a time agreed upon with the Court and postponement shall be no longer than is necessary to complete the relevant investigation or prosecution in the national state.

Any rule on specialty should not prevent the Prosecutor from amending an indictment. Amnesty International notes the inclusion of the rule of specialty in Section 35 which requires that a person surrendered to the ICC “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.” While the organization accepts the validity of the rule of specialty in extradition practice between states with regard to ordinary crimes as a safeguard against abuse, it does not believe that such a rule should be used in relation to surrendering a person to the ICC, acting on behalf of the entire international community. The very nature of the work of the ICC in investigating and prosecuting crimes under international law will mean that the ICC may need to take advantage of specific circumstances – for example, when an accused is temporarily present on the territory of another state while investigations are still in progress - and preliminary charges may need to be issued and amended at a later date in accordance with Rule 128 the Rules of Procedure and Evidence which require the authorization of the Pre-Trial Chamber. Section 35 should either contain a provision that the ICC may amend the charges in accordance with the Rome Statute and Rules of Procedure and Evidence or that the Minister will automatically waive the rule in relation to charges which fall within the crimes of the Rome Statute.

E. Justice and reparations for victims

Amnesty International welcomes the inclusion in Section 14 of the Bill requiring the protection of victims and witnesses in accordance with Article 68 of the Rome Statute. Furthermore, the organization welcomes the inclusion in Section 39 of the Bill of the obligation to enforce orders for reparations to victims made under Article 75 of the Rome Statute. The award of reparations for victims of genocide, crimes against humanity and war crimes is a central role of the ICC and the Bill should further provide that victims of ICC crimes prosecuted in Irish courts should be provided with full reparations to address their suffering. While recognizing that Section 10(3) of the Bill may amount to restitution for victims, the national system should be able to provide a range of reparative measures, including restitution, compensation and rehabilitation (as provided in Article 75(2) of the Rome Statute), as well as satisfaction and guarantees of non-repetition. To provide such reparation Ireland should consider establishing a national Trust Fund for victims of crimes under international law.

F. Identification, tracing, freezing and seizing Assets

Amnesty International welcomes the detailed provisions in the Bill which set out the procedure for freezing and seizing assets for fines, forfeiture and reparations orders of the Court. However the organization is concerned that while much attention is paid to freezing and seizing the assets, there is little provision for identifying and tracing assets. It is unclear whether identifying and tracing assets for the enforcement of ICC orders may be covered by Section 50 of the Bill (locating persons and identifying or locating property). Identifying and tracing assets should be expressly provided for in the Bill and the procedure for such cooperation set out, including requiring the cooperation of national institutions and agencies with expertise in such matters.

G. Public education and training of officials

Amnesty International recommends that states parties should develop and implement programs for the training of judges, prosecutors, defence lawyers, police, army and court officials and foreign affairs officials concerning their respective obligations under the Rome Statute. Ireland should also update its military manuals to incorporate appropriate references to the Rome Statute.

H. Consultation with the International Criminal Court

In reviewing and considering the comments in this document, it would be useful to consult the Presidency, Registry and Office of the Prosecutor of the Court for their expert advice.

Appendix:

Excerpts from Amnesty International's legal memorandum, *Universal Jurisdiction: The duty of states to enact and implement legislation* (AI Index: IOR 53/002-018/2001)

Genocide: In recent years, as evidenced by jurisprudence of the International Court of Justice, resolutions of the Security Council and the General Assembly and scholarly authority, for the principle that all states are not merely *permitted* to exercise universal jurisdiction over genocide, but also have *an international duty* not to shield persons found in their territory suspected of genocide, but instead *must* either exercise jurisdiction, extradite suspects to states able and willing to fulfil this obligation or surrender them to an international court. This interpretation takes into account the full scope of obligations undertaken by states parties to the Genocide Convention itself, as well as the duty not to grant asylum to persons responsible for crimes against humanity, which include genocide.

Although the drafters of the Genocide Convention declined to incorporate an express *aut dedere aut judicare* (extradite or prosecute) obligation in Article VI of that convention, in 1996, the International Court of Justice explained that there are no territorial limitations to the obligation of all states to prevent and punish genocide. After noting that half a century before it had recognized the universal nature of the crime, the Court declared that “[i]t follows that the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*. The Court noted that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention.”⁶

This conclusion of the International Court of Justice is reinforced by the Security Council call upon all states to prosecute persons found within their territory against whom there was sufficient evidence that they were responsible for genocide in Rwanda or to surrender them to the Rwanda Tribunal. In 1995, the Security Council in Resolution 978 urged all states - not just states parties to the Genocide Convention -

⁶ *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment of 11 July 1996, Int'l Ct. Justice, para. 31. As *Ad Hoc* Judge Elihu Lauterpacht explained in a separate opinion in the same case: “The duty to ‘prevent’ genocide is a duty that rests upon all parties and is a duty owed by each party to every other.” *Ibid.* (separate opinion), para. 86.

“to arrest and detain, in accordance with their national law and relevant standards of international law, pending prosecution by the International Tribunal for Rwanda or by the appropriate national authorities, persons found within their territory against whom there is sufficient evidence that they were responsible for acts [which include genocide] within the jurisdiction of the International Tribunal for Rwanda.”⁷

Trial Chamber 1 of the Rwanda Tribunal in 1999 called upon all states to exercise universal jurisdiction over genocide.⁸

The Security Council has also called upon all parties to the conflict in the Democratic Republic of the Congo, which has both international and non-international dimensions, to bring those responsible for genocide to justice.⁹

The General Assembly on several occasions has called upon all states to bring to justice those responsible for crimes under international law, including genocide, in Rwanda in 1994, citing, in particular, obligations of states parties under the Genocide Convention.¹⁰ There is not the slightest suggestion in these General Assembly

⁷ S.C. Res. 978 (1995) of 27 February 1995. Since the phrase “appropriate national authorities” is not limited to Rwandan authorities, it is clear that the Security Council envisaged prosecution by the courts of other states, which would necessarily have included prosecutions based on universal jurisdiction.

⁸ It stated in the context of approving a request to withdraw an indictment, that “the Tribunal wishes to emphasize, in line with the General Assembly and the Security Council of the United Nations, that it encourages all States, in application of the principle of universal jurisdiction, to prosecute and judge those responsible for serious crimes such as genocide, crimes against humanity and other grave violations of international humanitarian law”

Prosecutor v. Ntuyahaga, Decision on the Prosecutor’s Motion to Withdraw the Indictment, Case No. ICTR-98-40-T (Trial Chamber I, 18 March 1999). The Trial Chamber also noted that “the Tribunal does not have exclusive jurisdiction over crimes included in its mandate and that its criminal proceedings are complementary to those of national jurisdictions.”

⁹ On 24 February 2000, the Security Council in Resolution 1291 (2000) called on “all parties to the conflict in the Democratic Republic of the Congo . . . to refrain from or cease any support to, or association with, those suspected of genocide . . . , and to bring to justice those responsible, and facilitate measures in accordance with international law to ensure accountability for violations of international humanitarian law.”

Since the conflict includes a rebellion by certain of the parties against the government and since some of the other parties are foreign states, the Security Council necessarily was calling upon those foreign states to exercise universal jurisdiction over war crimes in a non-international armed conflict. *See also* S.C. Res. 1304 (2000) of 16 June 2000.

¹⁰ G.A. Res. 49/206 of 23 Dec. 1994, paras 4 (“Reaffirms that all persons who commit or authorize genocide . . . are individually responsible and accountable for those violations and that the international community will exert every effort to bring those responsible to justice in accordance with international

resolutions that the obligation to bring those responsible for genocide to justice is limited to the territorial state, Rwanda, or that it is limiting its appeal to states to the obligation to extradite persons suspected of genocide.

The International Law Commission has incorporated an *aut dedere aut judicare* obligation with respect to genocide in Article 9 of the 1996 Draft Code of Crimes. It explained, "It would be contrary to the interests of the international community as a whole to permit a State to confer immunity on an individual who was responsible for a crime under international law such as genocide."¹¹ It also reasoned that "a more effective jurisdictional regime" than in the Genocide Convention "was necessary to give meaning to the prohibition of genocide as one of the most serious crimes under international law which had such tragic consequences for humanity and endangered international peace and security."¹²

Crimes against humanity: It is also recognized that the prohibition of crimes against humanity is an obligation *erga omnes* of all states, which is a duty all states owe to the international community as a whole to ensure justice is respected.¹³

principles of due process[.]") and 6 ("Requests States that have given refuge to persons involved in . . . acts of genocide to take the necessary steps, in cooperation with the International Tribunal for Rwanda, to ensure that they do not escape justice[.]"); GA. Res. 50/2000, of 22 Dec. 1995, Preamble, para. 6 ("Recalling the obligations of all States to punish all persons who commit or authorize genocide . . . and, pursuant to Security Council resolution 978 (1995) of 27 February 1995, to exert every effort, without delay, to bring those responsible to justice in accordance with international due principles of due process, and to honour their obligations under international law in this regard, particularly under the Convention on the Prevention and Punishment of the Crime of Genocide[.]") and paras 6 ("Reaffirms that all persons who commit or authorize genocide . . . are individually responsible and accountable for those violations[.]") and 7 ("Urges all States, pursuant to Security Council resolution 978 (1995), to exert, without delay, every effort, including arrest and detention, in order to bring those responsible to justice in accordance with international principles of due process, and also urges States to honour their obligations under international law in this regard, particularly under the Convention on the Prevention and Punishment of the Crime of Genocide[.]"); G.A. Res. 51/114 of 12 Dec. 1996, para. 4 ("Reaffirms that all persons who committed or authorized acts of genocide . . . are individually responsible and accountable for those violations, and that the international community must exert every effort, in cooperation with national and international tribunals, to bring those responsible to justice, in accordance with international principles of due process[.]"); G.A. Res. 54/188 of 29 February 2000, para. 3 ("Reaffirms that all persons who committed or authorized acts of genocide . . . are individually responsible and accountable for those violations[.]").

¹¹ 1996 Draft Code of Crimes, Commentary to Article 9, para. 4.

¹² 1996 Draft Code of Crimes, Commentary to Article 8, para. 8.

¹³ *Restatement (Third) of the Foreign Relations Law of the United States* § 702 comment o (violations of certain rights falling within the concept of crimes against humanity (slavery and slave trade, murder as state policy, torture, prolonged arbitrary detention, systematic racial discrimination, systematic religious discrimination and gender discrimination) "are violations of obligations to all other states").

There is some evidence that states not only are *permitted* to exercise universal jurisdiction over persons suspected of crimes against humanity, but also that they are *under an obligation* to exercise universal jurisdiction over persons found in their territory or to extradite persons suspected of committing crimes against humanity under the principle of *aut dedere aut judicare*.

Given that the prohibition of crimes against humanity is *jus cogens* and is an obligation *erga omnes*, it follows that states have limited choices if a person suspected of such crimes is found in their territory. It is logical to assume that if a person are found in the territory or jurisdiction of a state who are suspected of crimes against humanity, the state must either investigate and, if there is sufficient admissible evidence, prosecute the suspect or to cooperate in the detection, arrest, extradition and punishment of persons responsible for these crimes, wherever they have occurred, just as they must with regard to war crimes. Sheltering them from justice by failing to initiate criminal investigations or failing to extradite them to a state able and willing to exercise jurisdiction would be inconsistent with the *erga omnes* obligation.

The UN General Assembly declared that “crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment”.¹⁴ It stated that all states have extensive obligations to cooperate with each other to ensure that those responsible for crimes against humanity wherever these crimes occurred are brought to justice and must not take any measures which would be prejudicial to these obligations.

¹⁴ UN Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity (1973 UN Principles of International Co-operation), adopted by the General Assembly in Resolution 3074 (XXVIII) of 3 December 1973, para. 1. In 1971, the General Assembly had urged all states “to take measures in accordance with international law to put an end to and prevent war crimes and crimes against humanity and to ensure the punishment of all persons guilty of such crimes, including their extradition to those countries where they have committed such crimes.” G.A. Res. 2840 (XXVI) of 31 October 1971. The General Assembly also affirmed that “refusal by States to co-operate in the arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity is contrary to the purposes and principles of the Charter of the United Nations and to generally recognized norms of international law.” *Ibid.* Although the focus of this resolution was on extradition of persons taking refuge in other countries, the wording clearly suggests that extradition to territorial states was only one option for bringing persons to justice for such crimes.

The resolution that states have the obligation to trace persons suspected of crimes against humanity “wherever they are committed” and the suspects shall be subject to trial . . . as a general rule in the countries where they have committed those crimes”. However, it is clear from the wording that the resolution leaves open the possibility of trying them on the basis of extraterritorial jurisdiction elsewhere.

In addition, the International Law Commission has incorporated the principle of *aut dedere aut judicare* in Article 9 of the 1996 Draft Code of Crimes. That article states: “Without prejudice to the jurisdiction of an international criminal court, the State Party in territory of which an individual alleged to have committed a crime set out in [Article 18 on crimes against humanity] is found shall extradite or prosecute that individual.”¹⁵ The International Law Commission explained that Article 9 established “the general principle that any State in whose territory an individual alleged to have committed [crime against humanity] is present is bound to extradite or prosecute the alleged offender”.¹⁶ It added that the “fundamental purpose” of the *aut dedere aut judicare* principle reflected in Article 9 “is to ensure that individuals who are responsible for particularly serious crimes are brought to justice by providing for the effective prosecution and punishment of such individuals by a competent jurisdiction.”¹⁷

Extrajudicial executions: The international community has declared that every state should bring to justice those responsible for extrajudicial executions. Principle 18 of the 1989 UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions provides:

“Governments shall ensure that persons identified by the investigation as having participated in extra-legal, arbitrary or summary executions in any territory under their jurisdiction are brought to justice. Governments shall either bring such persons to justice or cooperate to extradite any such persons to other countries wishing to exercise jurisdiction. This principle shall apply

¹⁵ International Law Commission, Report of the International Law Commission on the Work of its Forty-Eighth Session (1996 ILC Report) , 51 U.N. G.O.A.R. Supp(No. 10) at 9, U.N. Doc. A/51/50 (1996), 1996 Draft Code of Crimes, Art. 9.

¹⁶ 1996 Draft Code of Crimes, Art. 9, Commentary, para. 2.

¹⁷ *Ibid.*

irrespective of who and where the perpetrators or the victims are, their nationalities or where the offence was committed.”¹⁸

This mandatory language is strong evidence that states believe that they are obliged to prosecute or extradite any person suspected of an extrajudicial execution even in cases where the killing does not amount to a war crime, crime against humanity or genocide.

Further support for such an obligation is found in the resolution adopted by the Inter-American Commission on Human Rights on 20 October 2000 recommending to the Member States of the OAS that they “refrain from granting asylum to any person alleged to be the material or intellectual author of international crimes”, including summary executions.¹⁹

The UN Commission on Human Rights has reiterated “the obligation of all Governments to conduct exhaustive and impartial investigations into all suspected cases of extrajudicial, summary or arbitrary executions, to identify and bring to justice those responsible, to grant adequate compensation to the victims or their families and to adopt all necessary measures to prevent the recurrence of such executions”, without limiting that obligation to bring to justice those responsible to those suspects in its jurisdiction who were alleged to have committed such executions in its territory.²⁰

“Disappearances:” The General Assembly has declared that all states have a duty to bring to justice those responsible for “disappearances” no matter where they occurred. Article 14 of the 1992 UN Declaration on the Protection of All Persons from Enforced Disappearance (UN Declaration against Disappearances) provides:

“Any person alleged to have perpetrated an act of enforced disappearance in a particular State shall, when the facts disclosed by an official investigation so warrant, be brought before the competent civil authorities of that State for the purpose of prosecution and trial unless he has been extradited to another State

¹⁸ UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, adopted by the UN Economic and Social Council (ECOSOC) in its Resolution 1989/65 of 24 May 1989, Principle 18 (emphasis supplied). The Principles were welcomed by the UN General Assembly in its Resolution 44/159 of 15 December 1989.

¹⁹ Inter-American Commission on Human Rights, *Asylum and International Crimes*, 20 October 2000, obtainable from <http://www.cidh.oas.org/asylum.htm>

²⁰ UN Commission on Human Rights, Res. 2000/31 of 20 April 2000, para. 4.

wishing to exercise jurisdiction in accordance with the relevant international agreements in force. *All States should take any lawful and appropriate action available to them to bring to justice all persons presumed responsible for an act of enforced disappearance, who are found to be in their jurisdiction or under their control.*" (emphasis supplied)²¹

Ten years later, the Inter-American Convention on Forced Disappearance of Persons recognized that enforced disappearances were subject to universal jurisdiction.²² As of 20 November 2003 ten of the 18 members of the OAS had ratified the Convention, without any reservations, and six others had signed it.

Similarly, Article 6 (1) of the draft International Convention on the Protection of All Persons from Forced Disappearance requires every state party to take the necessary measures to provide its courts with universal jurisdiction over enforced disappearances:

"1. Forced disappearance and the other acts referred to in article 2 of this Convention shall be considered as offences in every State Party. Consequently, each State Party shall take the necessary measures to establish jurisdiction in the following instances.

. . . .

(b) When the alleged perpetrator or the other alleged participants in the offence of forced disappearance or the other acts referred to in article 2 of this

²¹ UN Declaration on the Protection of All Persons from Enforced Disappearance, U.N. G.A. Res. 47/133, 18 December 1992, Art. 14.

²² Article IV provides:

"The acts constituting the forced disappearance of persons shall be considered offenses in every State Party. Consequently, each State Party shall take measures to establish its jurisdiction over such cases

in the following instances:

- a) When the forced disappearance of persons or any act constituting such offense was committed within its jurisdiction;
- b) When the accused is a national of that state;
- c) When the victim is a national of that state and that state sees fit to do so.

Every State Party shall, moreover, take the necessary measures to establish its jurisdiction over the crime described in this Convention when the alleged criminal is within its territory and it does not proceed to extradite him.

This convention does not authorize any State Party to undertake, in the territory of another State Party, the exercise of jurisdiction or the performance of functions that are placed within the exclusive purview of the authorities of the other Party by its domestic law."

Convention are in the territory of the State Party, irrespective of the nationality of the alleged perpetrator or the other alleged participants, or the nationality of the disappeared person, or of the place or territory where the offence took place unless the State extradites them or transfers them to an international criminal tribunal.”²³

Article 13 of the draft International Convention requires states parties to extradite persons suspected of forced disappearances or related crimes. It provides:

“When a State Party does not grant the extradition or is not requested to do so, it shall submit the case to its competent authorities as if the offence had been committed within its jurisdiction, for the purposes of investigation and, when appropriate, for criminal proceedings, in accordance with its national law. Any decision adopted by these authorities shall be communicated to the State requesting extradition.”

Further support for an *aut dedere aut judicare* obligation concerning enforced disappearances is found in the resolution adopted by the Inter-American Commission on Human Rights on 20 October 2000 recommending to the Member States of the OAS that they “refrain from granting asylum to any person alleged to be the material or intellectual author of international crimes”, including enforced disappearances.²⁴

The Human Rights Committee, in an authoritative interpretation of that treaty concluded that enforced disappearances inflict severe mental pain and suffering on the families of the victims in violation of Article 7, which prohibits torture and cruel,

²³ Report of the sessional working group on the administration of justice, U.N. Doc. E/CN.4/Sub.2/1998/19, Annex: Draft international convention on the protection of all persons from forced disappearances, Art. 6 (1). The other acts referred to in Article 2 include instigation, incitement or encouragement of the commission of the offence of forced disappearance; conspiracy or collusion to commit this offence; attempt to commit such an offence; concealment of such an offence; and the non-fulfilment of a legal duty to prevent a forced disappearance. The UN Sub-Commission on the Promotion and Protection of Human Rights transmitted this draft in its Resolution 1998/25 of 26 August 1998 to the UN Commission on Human Rights and urged it to give priority consideration to the draft and the Commission in Resolution 2000/37 of 20 April 2000 requested the Secretary-General to give the draft wide dissemination, asking states, intergovernmental organizations and non-governmental organizations to submit their views and comments, as a matter of high priority.

²⁴ Inter-American Commission on Human Rights, *Asylum and International Crimes*, 20 October 2000, obtainable from <http://www.cidh.oas.org/asylum.htm>

inhuman or degrading treatment or punishment.²⁵ The European Court of Human Rights reached the same conclusion, finding that the extreme pain and suffering an enforced disappearance inflicted on the mother of the “disappeared” person violated Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which prohibits torture and inhuman or degrading treatment.²⁶

²⁵ *Elena Quinteros Almeida v. Uruguay*, Communication No. 107/1981, views of the Human Rights Committee adopted on 21 July 1983, para. 14, *reprinted in* Selected Decisions of the Human Rights Committee under the Optional Protocol, 2 (1990)

²⁶ *Kurt v. Turkey*, Judgment, Eur. Ct. Hum. Rts, Case No. 15/1997/799/1002, 25 May 1998, para. 134.